EXECUTORS/TRUSTEES AND MANDATORY MEDIATIONS[1]

25 NOVEMBER 2009

The Honourable Justice P A Bergin
Chief Judge in Equity

1 The burdens of the office of executors and trustees are not decreasing. Apart from protecting the interests of, and acting fairly towards the beneficiaries as a whole;[2] keeping them informed of their expected entitlement[3] and investing wisely;[4] if an executor/trustee has the misfortune to be involved in litigation on behalf of an estate those burdens will increase. Depending upon the nature of the legal proceedings the executor's duties may include: seeking to uphold the will;[5] contesting any particular claim made on the estate; ascertaining the position of the beneficiaries in respect of the issues in the litigation;[6] assisting the Court to make a decision in "all the circumstances" of the case;[7] keeping the beneficiaries informed about the legal proceedings and any proposals to settle those proceedings; conducting informal settlement proceedings; and/or participating in a mediation, consensually or otherwise.

2 As a litigant in mediation the executor's duties include participating in the mediation in good faith;[8] clarifying the real issues in dispute;[9] and assisting the mediator to complete the mediation within the court-ordered time frame.

3 When the statutory power for mandatory mediations was enacted[10] it was described on the one hand as "a useful addition to the armory of the court to achieve its objectives"[11] and on the other as "radical" and "most

undesirable as a matter of principle".[12] There was concern in the ranks of the Bar that, the pressure on courts to "up their productivity" may result in the overuse (or abuse) of this power. As I have said previously, that concern has been proved to be without foundation.[13] There was no evidence of the exercise of discretion going awry, nor was there any evidence of the power being exercised for purposes other than to assist the litigants to resolve their disputes. There can certainly been no suggestion that the power[14] has been exercised to impress the Productivity Commission.

4 On 1 March 2009 the *Family Provision Act* 1982 (NSW) was repealed by the amendments to the *Succession Act* 2006 (NSW) in the *Succession Amendment (Family Provision) Act* 2008 (NSW). The *Family Provision Act* continues to apply to the estates of testators who demised prior to 1 March 2009 and Chapter 3 of the *Succession Act* applies to the estates of testators who demise after 1 March 2009 (Family Provisions claims). Under the new legislation, unless special reasons dictate otherwise, mediations in Family Provision claims are mandatory: s 98(2). Similarly for estates governed by the *Family Provision Act*, Practice Note SC Eq 7 of the Supreme Court of New South Wales, which commenced operation on 1 June 2009, provides that unless ordered otherwise, all proceedings involving Family Provision claims must be mediated.

5 These recent reforms are far more "radical", to use the epithet that was applied to the earlier grant of power, and yet they appear to have been welcomed by the profession and by institutional executors and trustees. The original enactment was for the exercise of the power in individual cases. These new provisions in the *Succession Act* apply to a category of cases, Family Provision claims, in which there must be mediation. The only discretion given to the Court is to allow a case to go to trial without

mediation if "special reasons" are established. In cases in which the *Family Provision Act* applies, the mandatory scheme is under the Practice Note, which does not limit the exercise of the discretion to "special reasons".

6 The policy behind the reforms and the introduction of mandatory mediation has been driven by the Court's concern in relation to excessive legal costs that have been out of proportion to the size of the estate. In *Tobin v Ezekiel-Ezekiel Estate* [2008] NSWSC 1108, the estate was worth $1.7 million and the legal proceedings would consume costs of at least $645,000. In *Mannix and Nudd v Mannix* [2008] NSWSC 1228, the total costs of the parties in two related proceedings heard together were approximately $192,000 whilst the value of the estate was $415,182. In *Fricano v Lagana* [2009] NSWSC 840 the value of the estate was $265,000 with costs of approximately $154,000.

7 Over the years judges have described such costs as "appalling", "extraordinary" and "grossly disproportionate to the size of the estate".[15] Section 60 of the *Civil Procedure Act* 2005 (NSW) provides:

> **60 Proportionality of costs**
>
> In any proceedings, the practice and procedure of the court should be implemented with the object of resolving the issues between the parties in such a way that the cost to the parties is proportionate to the importance and complexity of the subject-matter in dispute.

8 The subject matter in dispute in Family Provision claims is of course, not the value of the estate, but the applicant's entitlement to provision out of the estate in all the circumstances. The value of the estate is however a pivotal matter to be taken into account in respect of deciding whether the costs are proportionate to the importance of the matter in dispute. The

history of complaints by judicial offices in respect of legal costs being out of proportion to the size of the estate spans well back into the last Century.

9 Is the response to this concern appropriate? Will mandatory mediations remove the cause for judicial complaint in respect of a lack of proportionality in respect of costs in Family Provision claims? Will executors in understanding that the process has been implemented to assist the parties to reduce the costs burden on the estate with the consequence that the beneficiaries (rather than lawyers) will receive the bulk of the estate feel pressured to settle with an otherwise unmeritorious claimant to avoid the costs burden on the estate?

10 As to the first question whether the response is appropriate: the preservation of an asset, meant for family members and/or friends of the deceased is a reasonable goal. If mediation is more likely to preserve the asset for the beneficiaries, then the response is appropriate. What evidence is there to suggest that mediations do provide that outcome?

11 In the United States, many commentators have championed the use of mediation, arbitration or "mediated-arbitration" in settling Will contests, rather than recourse to traditional litigation. They argue that traditional civil litigation inevitably involves greater costs; increased delay; and, most importantly, risks permanently destroying family relationships.[16] Indeed, it has been said in the United States that "there is no form of civil litigation more acrimonious and more conducive to the public display of soiled linen and the uncloseting of family skeletons than is the will contest".[17]

12 Mediation statistics are difficult to obtain, but results that can be found, are encouraging. For instance, the Court of Fulton County, Georgia has required mandatory mediations for all contested wills since 1997. A sample conducted by staff in 1998 showed that 67% of contested Wills

cases (being 24 cases out of 36) referred to mediation achieved settlement. This procedure of requiring mandatory mediation for contested Wills has been propounded as a model practice by a number of commentators in both the United States,[18] and Canada.[19] Ottawa, Toronto and Essex County all require mandatory mediations for cases involving contested Wills.[20] Some interesting conclusions from a detailed survey in Ottowa and Toronto of over 3,000 cases in which mandatory mediations occurred included:

- For every case type, cases were resolved more promptly under the mandatory mediation program than the control group;[21]
- Cases that did not settle at or shortly after mediation nevertheless resolved earlier than the non-mediated control group cases;[22]
- Cases where the parties chose their own mediator were significantly more successful than when a mediator was assigned to them;[23]
- Mediations that lasted more than three hours had a much higher probability of success;[24]
- Very few mediations lasted more than a day (2-4%);[25]
- More experienced mediators had significantly better chances of success;[26]

13 In the United Kingdom the English Court of Appeal has observed that a power to order mandatory mediations might fly in the face of Art 6 of the *European Convention of Human Rights* (ECHR).[27] Article 6 is concerned with the right to a fair trial; and, it has been said, also implies a right of access to justice, which would be violated if parties were prevented from litigating their dispute, without first engaging in mediation.[28] This view has been heavily criticised by a number of commentators,[29] including the former Master of the Rolls, Sir Anthony Clarke, who, speaking extra-curially, said that it was "surely" not the case that mediation requires

parties to waive their rights to a fair trial.[30] That debate may certainly be worth watching.

14 Sir Anthony also observed that the Court already has power to order mandatory mediation[31] and said.

> We all know that a cast-iron case is a very rare bird indeed; so that for the most part only a madman is not want to settle. None of this is to say that parties must settle claims through mediation. It is simply to say that parties must assist the court in furthering the overriding objective by taking proper part in the mediation process.

15 Presently, little can be said with certainty, other than from the manipulation of statistics of the outcomes of the mediations that have occurred since the implementation of the reforms. Although I have always said that raw statistics, particularly in relation to the outcome of mediations, are of limited assistance, the statistics show that the overall settlement rate of Family Provision claims at mandatory mediations is 60%.[32] This is an increase on reported settlements in 2007 at 41%.[33]

16 If one starts from the premise that costs have been saved by settling the matter at mediation so that the beneficiaries have a share of the greater bulk of the estate than they would otherwise have had, then it is an appropriate response. There is of course the prospect that costs may be increased in cases that do not settle at mediation, however the anecdotal evidence is that although cases do not settle at mediation there is a certain percentage of cases (not yet identified with precision) that will settle soon after mediation. It must be recognized that in the class of case that does not settle, the mandatory mediation will be an additional cost, unless there has been a saving made by reason of refinement of issues or the abandonment of certain claims. Although it is very early days in this new regime I think it is fair to say that the scheme appears to be an appropriate

response to the concerns that have been expressed. The scheme will be closely monitored to facilitate any improvements and/or adjustments that are needed to ensure its effectiveness.

17 As to the second question whether mandatory mediations will remove the cause for judicial complaint in respect of a lack of proportionality in respect of costs in Family Provision claims: I am afraid that experience dictates that such judicial complaints will not be removed totally by these reforms, however I am confident that the statutory framework within which the Court now operates will greatly reduce such complaints and in time perhaps render the answer to the question in the affirmative.

18 As to the third question whether executors will feel pressured to settle with an otherwise unmeritorious claimant to avoid the costs burden on the estate: in some quarters of academe there is deep concern about the development of the practice of the "gaming" of executors.[34] As I understand what is suggested, it is that more and more claimants will bring Family Provision claims irrespective of the merits, on the basis that they are likely to receive some amount because executors will feel pressured to avoid the costs of litigation. This is perhaps not surprising having regard to the scathing judicial criticisms in relation to the costs in this type of litigation. The theory is that because the unmeritorious claim can be propounded in a confidential mediation session the taking of such punts is even more likely.

19 If the concept of "gaming" of executors is to be understood as the commencement of proceedings that have no proper foundation or no reasonable prospect of success then the academic prediction seems to ignore a very important aspect of the relationship between the profession and the courts. The "gaming" of executors would require the assistance of officers of the court, solicitors and/or barristers, to allow parties to

commence proceedings that have no proper foundation. The members of the legal profession are duty bound not to allow the commencement of such actions. Accordingly, if that is what is meant by the "gaming" of executors, I am confident it will not take hold in this State.

20 If on the other hand, the concept of the "gaming" of executors is to be understood as the commencement of proceedings with low, but reasonably arguable, prospects of success, then it would be unfair to suggest that the claimants are utilizing court procedures inappropriately. If that is what is meant, I do not believe that the introduction of these reforms will increase the number of such claims. There has always been the capacity for such claimants to utilize the court procedures, including mediation, and the introduction of mandatory mediation may indeed have the opposite effect of making such claimants think twice because there will scrutiny brought to bear on their claim at an early stage of the proceedings.

21 Let me explore these reforms and the changes they may make to the role of the executor/trustee in such claims. To understand the ambit of the executor's role in mandatory mediations in respect of Family Provision claims, it is appropriate to analyse the executor's role in Family Provision litigation.

22 On one view of the case law, a dormant controversy in relation to an executor's role in Family Provision litigation has recently been revived. It stems from a judgment of Kirby P in *Dijkhuijs (formerly Coney) v Barclay* (1988) 13 NSWLR 639. That case involved a claim under the *Family Provision Act* by the former wife of the deceased. The trial judge made an order permanently staying that application and the claimant appealed against that order. The appeal was allowed and the matter was returned to the Equity Division of the Court for trial. The learned President said

that it would be desirable when the matter was returned for trial that "the normal obligations of an executor should be observed": at 654. His Honour said:

> It is the duty of an executor to place all relevant evidence before the court. If there is evidence in the possession of the executor relevant, whether positively or negatively, to the "factors which warrant the making of the application" under the Act, I see nothing in the procedure envisaged by s 9(1) of the Act which will relieve the executor of the duty to provide that evidence to the court. The duty of the court to have regard to "all the circumstances" of the case signifies the potential width of the court's enquiry. … I believe that the terms of the subsection reinforced the duty of the executor to "place before the court … evidence which might have any bearing on any issues … raised by the applicant's evidence or which might arise at the hearing": (cf *Re S J Hall (Deceased)* (1958) 59 SR (NSW) 219 at 266; 76 WN (NSW) 288 at 293. The object of the Act can only be attained if the determination required by s 9(1), and any subsequent determination of an order in favour of an eligible person, is made upon relevant evidence. The executor, defending the will, will often be in the best position to provide that evidence. It has long been held to be his duty to do so.

23 Eight years later in *Warren v McKnight* (1996) 40 NSWLR 390, Hodgson J, as his Honour then was, dealt with an application for summary dismissal of an application under the *Family Provision Act* at a time when the applicant had filed all his evidence. One of the submissions in support of resisting the application was that the executor was obliged to put on "all relevant evidence", whether it supported the plaintiff's case or the defendant's case. In support of that submission counsel relied upon the abovementioned passage of the President's judgment in *Dijkhuijs*. Hodgson J accepted that the passage in the President's judgment supported the view that an executor is under such a duty but said (at 395) that the view was by no means necessary to the decision in the case and that its breadth was not supported by the cases relied upon by his Honour.

24 Hodgson J then analysed the cases relied upon by the President. The first case was *In the Will of Lanfear* (1940) 57 WN (NSW) 181. That case involved

applications under the *Testator's Family Maintenance and Guardianship of Infants Act,* 1916-1934, by the widow and only daughter of the testator for maintenance out of his estate. The testator had left a legacy to his housekeeper. The application for maintenance was served only on the executor. The housekeeper's solicitor wrote to the executor, The Public Trustee, seeking some form of assurance that the executor had placed the facts relating to the housekeeper before the court. The housekeeper's solicitor applied at the hearing and was granted leave to intervene and the court held that the legacy left to the housekeeper was intended by the testator to repay an indebtedness to her and that the claims by his widow and daughter should not affect the right of the housekeeper to take that legacy.

25 There then arose a question of costs, in particular, the costs of the solicitor for the housekeeper. Williams J said at 183:

> In an ordinary case, especially where the estate is a small one, it is the duty of the executors either to compromise the claim, or to contest it and seek to uphold the provisions of the will. For that purpose they should place all the relevant evidence before the Court relating, not only to the case generally, but to any particular circumstances which the Court should take into consideration relating to any particular gift in the will. In special cases where for instance the executors are themselves beneficiaries under the will, or where very substantial benefits are conferred upon beneficiaries, it can be proper for beneficiaries to intervene and be separately represented, but as a general rule such separate representation should not be necessary if the executors do their duty.

26 The next case was *Re Hall, Deceased*. That was an appeal against the order made by the trial judge under the *Testator's Family Maintenance and Guardianship of Infants Act,* 1916-1954 in respect of the maintenance of the widow of the deceased. It was not disputed at first instance nor on the appeal that the applicant was entitled to an order. The contest was as to the nature and extent of the provision that should be made for her maintenance. The deceased had made a disposition to Miss Blackman of a

property at Church Point. Miss Blackman owned the adjoining properties and there was no issue that she had done work on the property prior to the testator's death and probably since. The trial judge concluded that the testator should have left the whole of the estate to his widow. The Court of Appeal held that his Honour was justified in reaching that conclusion.

27 The question as to costs was controversial. The trial judge allowed the executors one half of their costs out of the estate and said that the executors had allied themselves with Miss Blackman and had "coolly" claimed that the applicant could go out to work and support herself. The executors were brothers-in-law of the deceased who took no beneficial interest under the will. The Court (Owen J, McLelland CJ in Eq and Walsh J) said at 226 "… it was the duty of the executors either to compromise the claim or to contest it and seek to uphold the provisions of the will." The Court referred to *Re Lanfear* and then said at 227:

> We are of the opinion that at that stage of the case it was the duty of the executors to present to the court any evidence made available to them by a beneficiary under the will, which she was anxious should be placed before the court, if that evidence might have any bearing on any issues which had been raised by the applicant's evidence or which might arise at the hearing. This was so whether or not the case was one in which the making of any order could be properly opposed. … This duty was, in our opinion, unaffected by opinions held by them as to whether [Miss Blackman's] evidence was true or whether it was an attack on the applicant or would be cruel to the applicant or would cause her pain. Different considerations might apply if it could be shown that the executors knew that the allegations were false, but that is not shown in this case. Short of that, it was not for them to form their own judgement as to the truth or falsity of the evidence or to refrain from putting it forward out of respect for the feelings of the applicant.

28 Their Honours adjusted the order at first instance so that the executors were entitled to their costs out of the estate.

29 The third case was *Vasiljev v Public Trustee*. That involved a claim by the daughter of a testator who was not a beneficiary under the will for an order under the *Testator's Family Maintenance and Guardianship of Infants Act* 1916 (NSW). Hutley JA, with whom Hardie and Reynolds JJA agreed, observed at 503 that:

> This statutory provision has been interpreted so as to discourage any person other than the executor from making himself responsible for defending the will, except in those special cases where this is impossible, e.g., where the executor is himself the applicant. Beneficiaries may be allowed to intervene on special grounds, but their intervention is unwelcome.

30 Hutley JA referred *Lanfear* and *Hall* and said at 504:

> A testator's family maintenance application cannot be properly heard where an executor comes before the Court without the means to enable him to put material as to the financial position and needs of a beneficiary before the Court. This case also emphasises the fact that though the executor is a party, he is there to do what the beneficiaries require him to do. In the case of an infant beneficiary, where the executor cannot get effective direction, it must be the responsibility of the executor to protect the interests of the infant to the full, and a Court should not put him in a position where he cannot do so.

31 After referring to these three cases in his judgment in *Warren v McKnight* Hodgson J then said at 395:

> The point at issue in those three cases was the obligation of the executor to present evidence on behalf of beneficiaries seeking to uphold the will, and the limited circumstances in which it is appropriate for beneficiaries to seek to become involved in such proceedings on their own account.
>
> In my opinion, underlying that principle is the notion that it is the executor who takes an adversary role against the plaintiff, so as to uphold the will and support the interests of beneficiaries. If it were thought that the executor had a duty to bring forward evidence supporting the plaintiff's case, then, in my opinion, the principle that normally beneficiaries should be excluded from taking an adversary role in the proceedings would be very seriously undermined. In my opinion, when one reads the passages relied upon by Kirby P in *Dijkhuijs (formerly Coney) v Barclay*, it is clear that the obligation of the executor to put forward

> all relevant evidence is qualified by the words which begin the sentence in question, namely "for that purpose", "that purpose" being to contest the claim and seek to uphold the provisions of the will; and thus it seems to me clear that those three cases all proceeded on the principle that the executor properly takes an adversary role in *Family Provision Act* proceedings.

32 Although reference has been made to both cases, without identifying the difference in approach,[35] it appears that this controversy has lain dormant for thirteen years until February this year when the Court of Appeal of the Supreme Court of Western Australia delivered judgment in *Lathwell v Lathwell* [2008] WASCA 256. That case involved a claim under the Western Australian equivalent of the *Family Provision Act*[36] in which the Master had made orders adjusting the provision to include the four daughters of the deceased who had previously been excluded from the benefit of the estate of the deceased. The Master divided the estate into five equal shares between the four daughters and the deceased's widow. The appeal was dismissed and in the Supplementary Decision on 23 February 2009 the Court dealt with the question of costs. After observing that it was not enough that trustees (or executors) honestly believe that they should engage in litigation but that they also must act reasonably, their Honours said at [9]:

> There is no doubt that in any first instance litigation which involves an attempt to alter the provisions of the will, the duty of the executor as the defender of the will, is to participate in those proceedings. The correct statement of the duty is that the executor should participate so as to place before the court evidence which will have any bearing on issues which arise during the proceedings. This duty would involve the disclosure of evidence, positive or negative, in relation to those issues. See ***Dijkhuijs (formerly Coney) v Barclay*** (1988) 13 NSWLR 639, 654 (Kirby P, Hope and Mahoney JJA agreeing).

33 It is not clear whether, by the use of the expression "disclosure of evidence", the Court intended to convey that the executor must "disclose" such evidence to the plaintiff; or rather call such evidence in the trial. However it appears more likely, having regard to the fact that the Court of

Appeal referred to *Dijkhuijs (formerly Coney) v Barclay* in support of its statement, that the Court was intending to convey that it is the executor's duty to call the evidence in support of the opponent's claim.

34 If evidence is "negative" to the executor's case, it may not necessarily mean that it is "positive" to the plaintiff's claim. However it is probable that the Court intended to refer to the circumstances in which the executor has "evidence" (not mere information) negative to the executor's claim and in support of, or positive to, the plaintiff's claim. It would appear that this imposes a duty on executors to analyse the material in their possession to work out whether it is "positive" to the opponent's case. If they are able to identify material that would be positive (even minutely so) to the opponent's case, there is apparently no discretion in the executor to withhold it, either from the opponent or from the Court. If this is what was intended then such a "duty" is akin to the role of a prosecutor. However it is a far more burdensome role because, even a prosecutor has a discretion not to call evidence in a criminal trial if a judgement is formed as to the veracity of a particular witness.[37]

35 The Court of Appeal in Western Australia appears to have been under the impression that in *Dijkhuijs (formerly Coney) v Barclay,* Hope and Mahoney JJA, had agreed with the *obiter* observations of the learned President. Although Hope and Mahoney JJA agreed with the orders (or outcome) proposed by Kirby P, there was no express endorsement of those observations. Indeed Hope JA expressly referred back to his own reasons in *Churton v Christian* (1988) 13 NSWLR 241, in which his Honour referred to the requirements on executors in Family Provision claims. His Honour referred to the duty as a requirement to "put on evidence" to enable the Court to have before it "all the circumstances to which it was required to have regard for the purposes of" the relevant sections of the Act. There was specifically no reference to evidence being "positive or negative".

36 In separate reasons Mahoney JA traced the history to the legislation and referred to the various types of cases that may be brought under the Act, including, those in which it would be unnecessary to examine the estate of the deceased. The Western Australian Court of Appeal was also at a disadvantage because it would appear it was not referred to Hodgson J's decision in *Warren v McKnight*.

37 An irony of this controversy is that in an unreported judgment in 1991, (*Shannon v Shannon*[38]) in a Family Provision claim, Kirby P referred to Hope JA's analysis of the executor's duty in *Churton v Christian* and said:

> I do not take Hope JA to be there extending the executor's obligation to one of establishing the case for those who challenged the will. On the contrary, unless otherwise required by law, the executor's duty is to uphold the will. An executor may in some circumstances have an obligation to disclose to the Court the assets and liabilities of the estate. But that obligation does not extend to proving that challenger's case for him or her. It is the challenger who must disturb the will and do so against the general presumption of the courts in favour of upholding the testator's intention expressed in the will, limiting departures from its terms to those strictly necessary to give effect to the requirements of the Act. He (or she) who asserts must ordinarily prove. A claim under the Act provides no exception from this general rule.

38 In *Shannon v Shannon*, Kirby P made no reference to his earlier observations in *Dijkhuijs (formerly Coney) v Barclay.* In *Warren v McKnight* Hodgson J was not referred to *Shannon v Shannon,* nor was the Court of Appeal of Western Australia referred to it in *Lathwell v Lathwell.* There have been a number of cases in which the observations of the former President in *Dijkhuijs* have been relied upon[39]. These observations should be seen in the light of his Honour's statements in *Shannon v Shannon* and Hodgson J's judgment in *Warren v McKinght.*

39 It can therefore be stated with certainty that the executor in Family Provision litigation is an adversary. An executor, like all parties, is bound

by the practice and procedure of the Court and is bound to proceed with the litigation under the rubric of "cards on the table"[40], but that does not mean that the executor must deal a winning hand to the plaintiff, and a losing hand to the beneficiaries. It means that the Court must be made aware of the real issues between the parties.

40 So what are the duties of the executor/litigant/adversary in the mandatory procedures of the Court in Family Provision claims?

41 Any Family Provision claim, whether under the *Family Provision Act* or the *Succession Act*, will also be governed by the provisions of the *Civil Procedure Act* 2005, in particular ss 56-61. The executor is under a duty to assist the court to "further the overriding purpose" to facilitate the "just, quick and cheap resolution of the real issues in the proceedings": s 56. The executor also has a "duty" to participate in the processes of the court which include mediation: s 56(3). Section 56 requires the court to achieve a just, quick and cheap resolution of the real issues in dispute consistently with the dictates of justice.

42 The *Civil Procedure Act* 2005 imposes a statutory obligation on the parties to participate "in good faith" in the mediation: s 27. The ubiquitous and amorphous concept of "good faith" has tantalized many academics and legal commentators over the years. The debate has caused some uncertainty, particularly, in respect of the application of this concept to commercial relationships. However in recent times the New South Wales Court of Appeal wrestled with the concept in a case involving commercial parties and the contractual obligation of good faith negotiations. President Allsop considered that one standard by which good faith could be measured is honesty[41] and said:

> A party would not be entitled to pretend to negotiate, having decided not to settle what is recognised to be a good claim, in order to drive the other party into an expensive [litigation] that it believes the other party cannot afford.[42]

43 Compromise is not a new concept for executors or trustees. The well-recognised role of the executor upholding the will is not incongruous with a decision to compromise a claim on the estate. The *Trustee Act* 1925, which applies equally to executors, provides that if the trustee "thinks fit" a claim on the estate may be compromised or otherwise settled: s 49(1)(d).

44 Campbell J (as his Honour then was) recently considered this section in *Ludwig v The Public Trustee* (2006) 68 NSWLR 69. In that case, an aggrieved beneficiary sued an executor in negligence for agreeing to compromise a claim brought by a car rental company. As is becoming far too commonplace in some of our cities, the car had been shot at, set alight, and written off (while the deceased was inside) and the rental company complained of a breach of the terms of bailment. The Public Trustee sought legal advice about the strength of the claim and was advised to compromise it and did so. Campbell J held that the Public Trustee embarked on an appropriate and reasonable course in seeking legal advice on the claim and said at [33]:

> That litigation brought against a deceased estate has been settled in accordance with legal advice is in many circumstances an adequate demonstration that the administrator has acted properly. It is not, however, always so. There can be circumstances where a matter is so important that it could be an appropriate exercise of discretion to seek a second opinion. There can be circumstances where the advice given is the sort of advice which, to an ordinarily prudent businessman conducting similar affairs of his own or (if the administrator is a professional administrator) to an ordinarily skilled and experienced professional administrator, ought seem suspect. In such situations seeking another opinion is required in the proper exercise of the administrator's discretion.

45 Seeking a second opinion may not be conducive to settling a matter at mediation. It may well be that any delay that is caused by an interruption

to the mediation to obtain a second opinion (or indeed judicial advice) may cause the settlement to go off. Notwithstanding that prospect, if the proper exercise of the executor's/trustee's discretion is to obtain a second opinion then such a risk should not deflect the taking of that second opinion. Although it may be a delicate matter, it would be very important for the executor to advise the then retained legal representative of the desire to obtain the second opinion so that every step can be taken: (a) to ensure that any risk to the settlement going off is minimized; and (b) to facilitate the urgent provision of the second opinion. That will enable either a short adjournment of the mediation during the course of that day or alternatively putting the mediation over part heard to another day.

46 A great deal has been said about confidentiality of communications in mediations. The statutory framework within which the mediation occurs is aimed at ensuring that parties feel free to negotiate without fear of having their statements within the confines of the mediation used against them in litigation. In *Unilever PLC v The Proctor & Gamble Co* [2002] 1 WLR 2436 (CA) the Court of Appeal refused to allow a party to a mediation to sue on litigious threats made in the mediation session. Walker LJ said:

> But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties.[43]

47 Walker LJ gave an indication of what "special reason" might be when he referred to the absence of any conduct that was "oppressive, or dishonest or dishonourable".[44] This is consistent with what Allsop P said about "good faith" negotiations. The executor has a duty therefore to act honestly and honourably at the mediation. The executor is not required to provide to the mediator material that would support the plaintiff's case. The executor is entitled as a negotiator to do what the executor "thinks fit"

in all the circumstances of the particular case in respect of which the claim is made on the estate. If there is a claimant that the executor regards as one who has slipped through the net and is attempting the practice of "gaming", the executor may have the dilemma of deciding whether it is cheaper for the whole of the estate for the gaming claimant to be paid a minimum amount to avoid the uncertainty of the incursion of costs that may ultimately come out of the estate.

48 I understand that is now usual that although the two parties to the litigation that is referred to mediation are the plaintiff and the executor/defendant, the other beneficiaries attend the mediation. It is also the case that the executor will from time to time telephone a beneficiary who is not present at the mediation but with whom the executor wishes to consult prior to settling the matter at the mediation. It is very important to maintain the position that makes it unnecessary for beneficiaries to be separately represented, to ensure that the costs of the litigation are kept to a minimum. It is very important that the plaintiff understands that the executor may well be consulting with the beneficiaries and that there is express consent to those communications. It is equally important that the beneficiaries understand and agree that they will be bound by the confidentiality governing the mediation and that they understand and agree that any communications between the plaintiff, the executor and a beneficiary will not be used against the plaintiff (or any other person).

49 One way to achieve certainty in relation to this matter is to prepare an agreement setting out the way in which the mediation will occur; the confidentiality of the communications; and the express agreement of the plaintiff, the executor and the beneficiaries that they understand and agree that communications in the mediation are confidential and statements made are not to be used against any other person.

50 So what is the executor to do, when a view is formed that the claim is unmeritorious and that it may not be "fit" to agree to a payment in the amount sought but there is a concern about the costs of the litigation. Each case will depend upon its own facts but any executor who knows that the claimant will continue the litigation, notwithstanding a view that there is a lack of merit in the claim, and is concerned about their own position is entitled to take judicial advice. The obtaining of judicial advice will resolve the doubt about whether it is proper to incur the costs and expenses of defending the claim. The resolution of those doubts means that the interests of the beneficiaries will not be subordinated to the executor's fear of personal liability for costs.[45] These cases will hopefully be rare, but the avenue for executors to take judicial advice is an important one.

51 The executor has a duty to co-operate with the mediator in trying to achieve a settlement but that does not mean that vigorous opposition to an unmeritorious claim in not an appropriate stance to adopt. However care needs to be taken to avoid the impression of obstructiveness. In a case in Western Australia in 1991[46] Ipp J said:

> In my view where, at a mediation conference, a party … adopts an obstructive or unco-operative attitude in regard to attempts to narrow the issues, and where it is subsequently shown that, but for such conduct, the issues would probably have been reduced, the extent to which the trial is in consequence unnecessarily extended is a relevant factor when deciding upon an appropriate award of costs.

52 This view was recently approved by the New South Wales Court of Appeal in *United Group Rail Services v Rail Corp*. [47]

53 It is important to remember that a compromise is not always the end of the matter. Depending upon the nature of the settlement, the Court may still have to be satisfied that the applicant is an eligible person and that the

quantum agreed upon is reasonable in the circumstances. In *Bartlett v Coomber*[48] Hodgson JA said:

> Agreements to compromise are possible, and indeed are to be encouraged. Such an agreement may be made by the parties to proceedings, and the court will generally give effect to it. However, the court will need to be satisfied that the precondition in s 9(2) of the Act is fulfilled, and that the order agreed on is one which ought to be made in terms of s 7 of the Act. Because of the agreement, the court will generally be satisfied of these things without the need for any significant investigation of the evidence.[49]

54 The role of the executor/trustee in mediation as in most other aspects of modern administration and management of estates, is not an easy one. However some comfort may be garnered from what Mason P said in *Bartlett v Coomber*:

> [57] But it must be borne in mind that litigation under the Act takes place in an adversary context in which the active parties to the particular litigation are usually expected to be the best judges of what is in their own interests. The policy of Australian law encourages the settlement of disputes (see eg *Baltic Shipping Co v Dillon* (1991) 22 NSWLR 1 at 9 per Gleeson CJ and Uniform Civil Procedure Rules 2005, Part 20). Our legal system would collapse were it not for the fact that most disputes are resolved by agreement.
>
> [58] One of the principles giving effect to this policy is the principle that a valid compromise gives effect to an agreement that effectively supersedes the antecedent rights of the parties. The possibility of greater success and the risk of greater failure is transposed into an arrangement that frees the litigants and witnesses of the risks, costs and toils of further disputation. This principle is not displaced in the context of proceedings under the Act, although for reasons already outlined, the court may decline to give effect to a settlement if doing so failed to effectuate the specific policies of the Act, amounted to an abuse of process or otherwise offended public policy in a demonstrable way

55 The mandatory mediation scheme for Family Provision claims recognizes the freedom of executors to compromise claims and is based on an expectation that parties will approach their negotiations and discussions with the best intention of reaching a compromise of the real issues in dispute. The mandatory mediation scheme also reflects an understanding that parties to the particular litigation are usually expected to be the best judges of what is in their own interests. Of course in the case of executors the burden is greater, having regard to the executor's obligations to protect the assets of the estate and the concurrent duty to be fair to the beneficiaries. That burden should be eased a little by the availability of the options referred to earlier such as the taking of a second opinion and/or judicial advice**.**

56 There are now three certainties - death, taxes and mandatory mediations in Family Provision cases in the Supreme Court of New South Wales.

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[1] Paper delivered at the proceedings of the Society of Trust and Estate Practitioners in the Banco Court of the Supreme Court of New South Wales. I would like to acknowledge the invaluable assistance of Charles Alexander, Researcher to the Judges of the Equity Division, in the preparation of this paper.
[2] *Commissioner of Stamp Duties (Q) v Livingston* (1964) 112 CLR 12 (PC) at 17; *In Re Charteris* [1917] 2 Ch 379 per Bankes LJ at 397; applied in *Re Hayes* [1971] 1 WLR 758 per Ungoed-Thomas J at 765-6; see also the discussion by Megarry VC in *In re Earl of Strafford, decd* [1980] 1 Ch 28 at 34 (affirmed on appeal).
[3] *Arnell v Thomas* [2004] QSC 123 per Douglas J; *Longworth v Allen* [2005] SASC 469 per Anderson J; *Skaftouros v Dimos* [2002] VSC 198 per Mandie J at [14]; see also Meyerowitz, D, *The Law and Practice of Administration of Estates* (5th Ed) (Juta & Co, Johannesburg, 1976), p 133.
[4] See ss 14A-14DB of the *Trustee Act* 1925 (NSW); s 4 of the *Trustee Regulation* 2005 (NSW); *Dalrymple v Melville* (1932) 32 SR (NSW) 596 per Long Innes J at 603; Heydon and Leeming (ed) *Jacob's Law of Trusts in Australia* (7th Ed) [1718], [1809]
[5] *Bovaird v Frost* [2009] NSWSC 917 per Brereton J at [19]; see also *Will of Lanfear* (1940) 57 WN (NSW) 181; *Re Hall* [1959] SR (NSW) 219 per Owen J, McLelland CJ in Eq and Walsh J at 226; *Vasiljev v Public Trustee* [1974] 2 NSWLR 497 per Hutley JA at 503-4, Hardie and Reynolds JJA agreeing.
[6] *Re Newell (Decd)* (1932) 49 WN (NSW) 181 per Long Innes J at 182; *Rowan v Roche* [2005] WASCA 6 per Murray J at [11], Steytler and Templemen JJ agreeing; *Vasiljev v Public Trustee* [1974] 2 NSWLR 497 per Hutley JA at 504D.
[7] see s 59(1)(b) of the *Succession Act* 2006 (NSW); previously, s 9(1) of the *Family Provision Act* 1982 (NSW); *Re Newell (Decd*) (1932) 49 WN (NSW) 181 per Long Innes J at 182.
[8] s 27 of the *Civil Procedure Act* 2005 (NSW).
[9] See *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 per Allsop P at [78] Ipp and Macfarlan JJA agreeing, citing *Baulderstone Hornibrook Engineering Pty Ltd*

v Gordian Runoff Limited [2008] NSWCA 243 per Allsop P at [160]-[165] and *Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd* [2008] NSWCA 228 per Spigelman CJ and Allsop P at [55]-[56]

[10] s 110K of the *Supreme Court Act* 1970 (NSW); now contained at s 26 of the *Civil Procedure Act* 2005 (NSW).

[11] The Hon Chief Justice JJ Spigelman, "Address to the LEADR Dinner – University and Schools' Club Sydney" (Speech delivered to the LEADR Dinner, Sydney, 9 November 2000, available http://infolink/lawlink/supreme_court/ll_sc.nsf/pages/SCO_speeches).

[12] B Walker SC and AS Bell "Justice According to Compulsory Mediation", *Bar News*, Spring 2000, 7

[13] The Hon Justice PA Bergin, "Mediation in Hong Kong: The Way Forward" (Speech delivered to the Hong Kong International Arbitration Centre, Hong Kong, 30 November 2007); contained at 82 ALJ 196, 202.

[14] Now found in s 26 of the *Civil Procedure Act* 2005 (NSW).

[15] *Bacon v Bacon* unreported, NSWSC, Bryson J (as his Honour then was) 11 February 1991; *Abrego v Simpson* [2008] NSWSC 215; *Tobin v Ezekiel – Ezekiel Estate* [2008] NSWCS 1108.

[16] See Vorys, Y (2006-2007) 22 *Ohio St. J. on Disp. Resol.* 871; Chester, R (1999) "Less Law, but more Justice?: Jury Trials and Mediation as a Means of Resolving Will Contests" 31 *Duquesne Law Review* 173; Whitman, R (2008) "Dealing Fairly with Estate and Trust Beneficiary Complaints, 22 *Quinnipiac Prob. L. J.* 46; Radford, M (1999-2000) "Introduction to the Uses of Mediation and other Forms of Dispute Resolution in Probate, Trust and Guardianship Matters", 34 Real Prop. Prob. & Tr. J. 601.

[17] Cavers, D "Ante Mortem Probate: An Essay in Preventative Law" 1 U. Chi L Rev, 440, 441 (1934)

[18] See Vorys, Y (2006-2007) 22 *Ohio St. J. on Disp. Resol.* 871, 872; Chester, R (1999) "Less Law, but more Justice?: Jury Trials and Mediation as a Means of Resolving Will Contests" 31 *Duquesne Law Review* 173, 183; Whitman, R (2008) "Dealing Fairly with Estate and Trust Beneficiary Complaints, 22 *Quinnipiac Prob. L. J.* 46; Radford, M (1999-2000) "Introduction to the Uses of Mediation and other Forms of Dispute Resolution in Probate, Trust and Guardianship Matters", 34 Real Prop. Prob. & Tr. J. 601.

[19] See Prince "Mandatory Mediation: the Ontario Experience" (2007) 26(Jan) *CJQ* 79; Keet, "The Evolution of Lawyers' Roles in Mandatory Mediation: A Condition of Systemic Transformation" (2005) 68 *Sask. L. Rev.* 313; Herlehy, F (2001) "Use Mediation as Estate Planning Pre-Emptive Strike", 21(26) *The Lawyers Weekly;* Hull, I (2000) "Settlement and ADR in Estate Litigation", 29 *ETR* (2d) 165.

[20] Rule 75.1 of *Ontario Rules of Civil Procedure* 1990 (this rule applied since September 1999 in the case of Toronto; January 1, 2001 in the case of Ottawa; and January 1, 2005 in the case of the County of Essex); for commentary regarding mandatory mediation in Ontario generally see Prince, "Mandatory Mediation: the Ontario Experience" (2007) 26(Jan) *CJQ* 79.

[21] Hann & Barr, *Evaluation of the Ontario Mandatory Mediation Program – Final Report*, p 38 (2001) available at http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/eval_man_med_final.pdf, last accessed 20 November 2009, hereinafter *Ontario Mandatory Mediation Report.*

[22] *Ontario Mandatory Mediation Report*, p 38.

[23] *Ontario Mandatory Mediation Report*, p 80.

[24] *Ontario Mandatory Mediation Report*, p 10.

[25] *Ontario Mandatory Mediation Report*, p 62.

[26] *Ontario Mandatory Mediation Report*, p 110.

[27] *Halsey v Milton Keynes General NHS Trust* (CA) [2004] 1 WLR 3002 per Ward, Laws and Dyson LJJ at [9]; citing the Judgment of the European Court of Human Rights in *Deweer v Belgium* (1980) 2 EHRR 439.

[28] See Yu, "Is Court-Annexed Mediation Desirable?" (2009) 28(4) *CJQ* 515, 521.

[29] See Yu, "Is Court-Annexed Mediation Desirable?" (2009) 28(4) *CJQ* 515; Genn et al, "Twisting Arms: Court Referred and Court Linked Mediation under Judicial Pressure" (May 2007), *Ministry of Justice Research Series 1/07*, available at http://www.justice.gov.uk/publications/docs/Twisting-arms-mediation-report-Genn-et-al.pdf at 15; Tronson, "Mediation Orders: Do The Arguments Against Them Make Sense?" (2006) 25(Jul) CJQ 412.

[30] Sir Anthony Clarke MR, "Address to the National Conference of the Civil Mediation Council", (Speech delivered to the Centre for Efficient Dispute Resolution, Birmingham, 8 May 2008) at [13]-[14]. Available at http://www.cedr.com/index.php?location=/news/archive/20080516_305.htm.

[31] This is said to be pursuant to the court's overriding objective in Part 1.4(2)(e) of the *Civil Procedure Rules* (UK); the parties' duty to the court in Part 1.3; and the case management powers in Part 3.1(2)(m).

[32] This is an adjusted figure which excludes aberrant cases in August when a series of cases were the subject of one mediation which was unsuccessful. If those figures are added back in the overall settlement rate is 50%.

[33] L Carty *"Law to cut costs in family disputes"* Sydney Morning Herald 27 January 2008.

[34] Professor M McGregor-Londes and F Hannah, "Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?" (2009) 17 *Australian Property Law Journal* 62.
[35] *Szlazko v Travini* [2004] NSWSC 610, Young CJ in Eq (as his Honour then was) at [9]-[11]
[36] *Inheritance (Family and Dependents Provision) Act* 1972 (WA)
[37] *R v Apostilides* (1984) 154 CLR 563.
[38] *Shannon v Shannon* [1991] NSWCA 245, unreported 7 May 1991, Kirby P, Samuels and Meagher JJA.
[39] *Kay v Archbold* [2008] NSWSC 254 per White J at [29]; and *Farr v Hardy* [2008] NSWSC 996 per White J at [53].
[40] *Glover v Australian Ultra Concrete Floors*, [2003] NSWCA 80 per Ipp JA at [60], Sheller and Hodgson JJA agreeing; *Nowlan v Marson Transport Pty Ltd*, per Heydon JA at [20]-[36], Mason P agreeing; per Young CJ in Eq at [40]-[46].
[41] *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWSC 177 per Allsop P at [65], Ipp and Macfarlan JJA agreeing, citing *Royal Brunei Airlines SDN Bhd v Tan* [1995] 2 AC 378; *Twinsectra Ltd v Yardley* [2002] 2 AC 164.
[42] *United Group Rail Services Limited v Rail Corporation New South Wales*, per Allsop P at [73].
[43] [2000] 1 WLR 2436 per Robert Walker LJ at 2448-2449, Brown LJ and Wilson J agreeing.
[44] *Unilever Plc v Procter & Gamble Co* [2000] 1 WLR 2436 (CA) per Robert Walker LJ at 2449, Brown LJ and Wilson J agreeing.
[45] *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar, The Diocesan Bishop of Macedonian Orthodox Diocese Australia and New Zealand* [2008] HCA 42; (2008) 237 CLR 66 at [71].
[46] *Capolingua v Phylum* (1991) 5 WAR 137 at 140.
[47] Per Allsop P at [79]
[48] [2008] NSWCA 100.
[49] per Hodgson JA at [72]; Mason P agreeing at [54]-[55]; Bryson AJA agreeing at [84].