Collaborative practice:
A new advocacy in the face of a perfect storm

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Australia is at the beginning of an intergenerational wealth transfer tsunami, with an estimated AUD3.5 trillion to be transferred from baby boomers to younger Australians in the next 20 years.

Recent surveys[1] indicate that a majority of Australians still do not have a will in place, and over half who are parents have not discussed their succession plan with their children.

Reading these statistics together with court data, showing a significant increase in contested estate matters over the past decade, makes it clear that estates professionals and courts alike are facing a perfect storm.

SOUND THE TSUNAMI WARNING

Courts and registries around the country are already innovating and adapting, particularly for disputes involving further provision claims. Solutions range from compulsory mediations before trial dates are set (or before affidavit materials are filed) to dedicated wills and estates lists and judicial settlement conferences. All are crucial in the quest to settle matters.

But the stories behind the 85 per cent success rate settlement statistics, more often than not, speak of forever-broken family relationships and family business casualties when 'commercial settlements' are made under the pressure of mounting legal costs. These settlements do not bring resolution, they just stop court processes.

Estate planning professionals work hard crafting plans to distribute their clients' wealth in accordance with their wishes, while balancing lofty goals like 'fairness', 'asset protection' and 'tax effectiveness'. Some recommend that the plan be explained to the family after completion, but only the brave consider actively involving those who might benefit (let alone those who might not) in a pre-death family succession facilitation. The thought of holding such discussions strikes fear into the heart of clients, let alone their lawyers who feel ill-equipped to manage these difficult (yet important) conversations.

Post-death, the almost universal response in contested matters is to file proceedings, sometimes with the hope that early settlement or mediation will resolve the matter to avoid a trial. But sometimes, 'principles' and the quest for a 'win' mean a court must decide. But the win always comes at a cost both human and financial. And if the matter attracts unwanted media attention, clients learn the hard way that their private family war is not private at all.

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Twenty years ago, mediation was considered a 'novel' approach, but now it is a normal part of the litigation process. Many of these mediations are, however, late-stage mediations held only after an acrimonious exchange of positioned affidavits and correspondence. By the time they are held, the damage to the family relationships has been done. Mediators 'shuttle' between rooms of parties no longer communicating to resolve the dispute on a commercial basis. After a long day, parties are exhausted by the 'horse trading' and bewildered by the process. Many experience settlement remorse when reflecting on the compromises they have made.

Lawyers are trained to put their blinkers on to see only the legal issues and the evidence, but this necessarily means that the impacts of grief on family members are treated as 'irrelevant'. Yet clients present angry, in denial, depressed and sad – often incapable of making good, rational decisions for themselves and their futures.

Assets are valued only for their monetary worth. Their intrinsic value (to provide continuity or financial stability) or sentimental value is not recognised. Family values, unique family structures and cultural nuances are not discussed, because the focus is on likely percentage outcomes based on the case precedent lens lawyers are trained to look through.

BROADENING THE HORIZON

Consider the anecdote about the 18th camel.

When their father passed away owning only 17 camels, three sons read his will. The will had been made according to the custom of the land and stated that the eldest son should get half, the middle son one-third and the youngest son one-ninth. Because it was not possible to divide 17 by two, three or nine, the sons started to argue. So, they decided to visit a wise old woman.

The wise woman listened patiently and, after giving the matter thought, she gave them her only camel and told them to distribute the 18 camels according to their father's will. With 18 camels, the eldest son ►

entitled to half took his nine camels, the middle son entitled to one-third took his six camels and the youngest son entitled to one-ninth took his two camels. But this totalled only 17, so the extra camel was returned to the wise old woman!

A NEW MODEL FOR WILLS AND ESTATES ADVOCACY?

It is time we looked for ways to add the 18th camel to the negotiation, to broaden out the discussion to include the things that actually matter to the humans involved in the conflict.

Collaborative practice does just this, in a way that has the potential to preserve family relationships when used to resolve disputes post-death, and to prevent disputes over inheritance arising in the first place when applied in the planning context pre-death.

HOW?

By offering families a bespoke alternative to litigation, where they control the process, reaching confidential resolutions that address both legal and non-legal issues. By scaffolding families early with a team of collaboratively trained professionals – lawyers for each party, a mutual financial neutral and a communications coach (skilled in social sciences/mediation) – who work together rather than in opposition to support the parties in the process.

The collaborative team and their clients contract together by signing a participation agreement to work in a respectful, dignified, problem-solving manner to negotiate in good faith on all issues that concern all clients.

The parties disclose all relevant information (about the estate and each other's circumstances) transparently. The mutual financial neutral then helps synthesise that data so that parties make fully informed decisions about the impact the inheritance might have on their futures. Clients and professionals brainstorm together to find solutions that advantage all or disadvantage none – the proverbial 'win/win'. The value brought and time saved by the convergence of problem-solving intellect is undeniable.

The process can be will maker-funded (pre-death) or agreed to be jointly funded or estate-funded so that financial stressors often in play in litigation are eliminated. Although not 'cheap', it costs less than litigation.

This model is much more than working collaboratively or collegiately with opposing lawyers to reach a lawyer-assisted settlement within the litigation framework. It is a procedurally non-adversarial model based in interest-based negotiation theory (rather than adversarial bargaining).

The central participation agreement is a contract not to litigate. It fundamentally changes the way in which the professional team operates, particularly in the post-death setting. Not in a 'without prejudice' tactical way, with one eye on the court door, but with the sole purpose to help the parties reach resolution without a court contest. If they do not, the professional team must withdraw.

'This is not a new or novel model, rather an established one newly applied in the (slightly more complex) succession law arena'

Unlike a lawyer-negotiated settlement, the control lies with the clients to reach settlement within the parameters of the law but on their terms. Unlike mediation, the pressure to reach settlement does not lie with the mediator over one day, but with a trained team of professionals over a series of meetings timetabled to suit the family's needs – not deadlines set by courts and statutes.

Those who have seen it operate attest to the power of the model.

That said, the process is not for every family and not for every dispute. The process requires not only the commitment, skills and emotional intelligence of the professional team but also of each family member. It requires trust, transparency, constructive communication and an ability to see things from another person's perspective.

The team must possess not only a high level of professional skills but also advanced skills in dispute analysis, negotiation preparation and strategising; high-level people skills; and an understanding of both conflict dynamics and conflict management.

It is a new form of advocacy – designed to bring climate change.

ESTABLISHED MODEL, NEW CONTEXT

With all 'new' ideas, there is inevitably resistance. However, this is not a new or novel model, rather an established one newly applied in the (slightly more complex) succession law arena.

Stuart Webb developed collaborative law as an out-of-court dispute resolution model for family law matters in the US in 1999. The enactment of the *Uniform Collaborative Law Act* in 2010 normalised collaborative law as accepted legal practice in the US.

Its acceptance in Australia since 2005 was solidified with the Law Council of Australia releasing ethical guidelines for its practice in the family law context in 2011 and several law societies around the country doing the same.

Its application in the wills and estates context began with practice groups in the US developing the model in pre-death and post-death contexts in 2017. Australian models developed in 2018 are now applied in Queensland, New South Wales, Western Australia and Victoria, with 60 professionals (lawyers, financial professionals and communications coaches) now trained in the models for wills and estates.

GETTING TO HIGHER GROUND

Professionals working in the succession law arena know that litigation is 'too costly, too painful, too destructive, and too inefficient for a truly civilized people'.[2] The climate is changing. The demand for out-of-court resolution options like those offered in collaborative practice has never been higher. The tsunami siren is ringing. It is time to look for ways to get to higher ground. ■

1 Perpetual's Client Insight and Analytics annual *What do you care about: The personal edition*, surveying over 3,000 Australians annually. **2** Former Chief Justice of the US Supreme Court Warren E. Burger.