

# CONFLICT OR CONTENTIOUS MATTERS

Geoff Sharp, Barrister & Mediator

Notes...

**Lindsay:** I'm pleased to introduce Geoff Sharp, a barrister and mediator. Geoff was the litigation partner of a significant New Zealand law firm before becoming a commercial mediator. While he's based in New Zealand, a lot of Geoff's mediation work is now international. I've used Geoff's services previously for training trustee advisors on how to best manage situations of conflict.

Geoff was Mediator of the Year in the 2012 New Zealand Law Awards so he's well placed to take us through what trustees need to be thinking about in managing conflict or contentious matters.

Geoff, being a trustee can be a burden at times when you consider the various relationships and interests a trustee needs to manage and balance. I've seen disputes arise between co-trustees, between trustees and beneficiaries and between trustees and settlors. Trusts go for long periods of time and trustees are often required to make some tough decisions, so it's no surprise conflict can arise. Where do you see problems arising for trustees?

**Geoff Sharp:** You're absolutely right and conflict can and does arise. I see it mainly in family trusts where one trustee may have been a trusted family friend or a longstanding legal adviser and it's generally a person who knows the family well, especially in a rural area.

Often I see those situations coming to mediation where there are different interests, and the trustee becomes caught in the middle. I think one of the risks for a non-professional trustee is that he or she is captured by one of the interests, to the disadvantage of the other.

An example would be a family trust with say, a farming family and a farm as an asset of the trust. Let's say it could be a situation where the son has taken over the farm and three sisters also have a community of interest in what's happening with the farm. The trustees and the son could effectively be on one side of the table, and the sisters on the other so it becomes a very difficult situation for everybody, especially for a trustee who gets characterised as being in one camp or the other.

That's a dangerous place for a trustee to be in and I often talk to trustees in that situation about how they got to be there and how they haven't been able to remain in the middle as a trusted advisor or family friend, as they set out to do.

**Lindsay:** It must be hard for trustees to remain neutral at times. What are some of the warning signs that trustees should look for?

**Geoff:** One warning sign for trustees to watch out for is when communication stops with one party, for example, one beneficiary to another. I think that's where the partisanship starts to set in and sides tend to be taken.

If we use the farming example I mentioned earlier, that situation may have arisen following the death of a father and the son has taken over the farm. The trustees in that situation should be very aware about keeping the lines of communication open with all beneficiaries, the three sisters, the widow and the son.

Trustees should continue talking to all the various interests so they are seen as neutral and not identified with one side or the other.

It's when trustees get themselves into situations where they're not seen as neutral and not trusted as neutral, that they then lose their ability to effectively be a wise counsel for a family who may be going through a difficult situation.

So, two important areas for trustees to watch for when conflict arises are firstly neutrality and secondly, communication. Maintain a neutral position and keep the lines of communication open.

**Lindsay:** So keep neutral and keep communicating. Geoff, I've often seen disputes arise in families around personal items or chattels, things which often have a high keepsake or sentimental value, rather than a high monetary value. It can get very emotional for those involved.

**Geoff:** Yes, I see that often. I often sit there as an outsider who's parachuted into the conflict. I often wonder why the "purple lamp shade", to use a silly example, is causing so much angst. When I start to scratch the surface, it becomes very clear that the purple lamp shade represents all sorts of years of layered frustration which has really come to the boil.

It often arises after the settlor has died and the next generation are looking at what they have got coming to them. The kinds of disputes I see where trustees are involved generally involve sentimental items, land or money. Those are the three sorts of problems that come over my desk from a family trust mediation point of view.

**Lindsay:** So if a trustee was in a situation where they recognised conflict was starting to emerge, say, from one of the beneficiaries, how would you recommend they deal with it?

**Geoff:** If I was able to talk to the trustees early enough (and often I'm not), I'd say to them to recognise the signs of unhappiness, if not conflict, and keep the lines of communication open. I would recommend that they take on a leadership role and convene their own

round table.

Confident trustees can do that and I've seen it work well in emerging disputes where there has been a family meeting that has been chaired by the trustee. While it won't always resolve things, it's a good process for the trustees to use to deal with issues in an informal way, often around the kitchen table. Sometimes it works, sometimes it doesn't, but it's still a very good process.

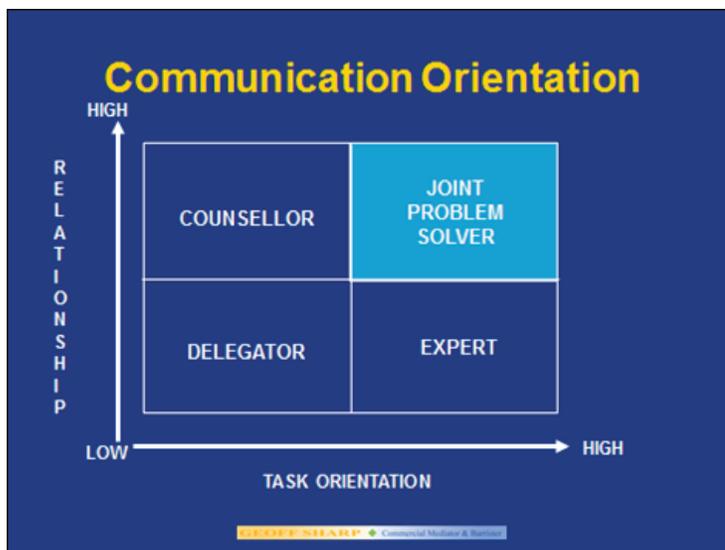
I often describe conflict as a bit like a bubble coming off the sea floor and it gets bigger as it gets towards the surface. The sooner you can grab that bubble while it's smaller, so much the better because it's often hard to deal with when it breaks to the surface.

So, if trustees can recognise the signs and they're confident enough in their own standing and their own processes to convene a family meeting, it can be a very good process to try and stem some of the complaints or issues.

**Lindsay:** Do you have any other strategies or suggestions that could help trustees to manage a challenging situation with conflict?

**Geoff:** I do think that trustees, especially ones with a professional background (for instance a legal or accounting background) do need to understand that often their role changes when they become a trustee, especially a trustee of a family trust. No longer are they simply an expert in their chosen field of law or accounting. Their role becomes significantly broader than that.

If we take a lawyer for example, he or she needs to move from being an expert in the law and providing legal advice (high on the task axis below) to being a joint problem solver which not only is high in "task" but also high in "relationship" ( as can be seen from the grid below).



To do this, many of the things I have mentioned earlier are necessary, good communication, a position of neutrality etc.

**Lindsay:** I like the “joint problem solver role” that you’ve described. It requires a trustee to start thinking about the outcomes that are needed. They may need to seek advice or guidance on tactics, options or process that may be available to help manage a challenging situation. If it can dampen down the high emotional or legal costs of a protracted dispute, it’s got to be a better outcome for the beneficiaries...

**Geoff:** Yes. We know that people don’t often factor in the hidden emotional cost. It can be huge and you see families who have effectively stopped moving, stopped developing or who have put their lives on hold for a couple of years while there’s been this family rift. It’s a huge cost.

You’re also right about the costs of litigation being high. That cost often comes out of the trust or the estate so if what’s being argued about is money for instance, it can be eroded away by the very argument. You see situations where a large part of the trust or estate has simply gone in process costs.

**Lindsay:** Geoff, can you take us through how mediation could be an option for trustees for managing conflict or a contentious matter?

**Geoff:** Mediation can come in as a next step option for trustees. If the informal processes around the kitchen table haven’t worked, then certainly wise trustees should be thinking about steps they can take before full blown litigation becomes the only option because that is just so expensive.

An option for trustees is to ask a mediator to get involved and mediation certainly has room for everybody including trustees, beneficiaries, settlors, widowers and professional advisers. It’s often a time when it’s sensible and helpful to have lawyers involved to ensure people know their legal rights and the consequences of an unresolved dispute having to go on to litigation.

So yes, mediation can fit all those different interests and we have had very good results where there are family relationships at stake. We have also had good results in terms of sorting out the trust issues and I would like to think that mediation in many cases will enable the family to start to heal the rifts and become whole again in time.

Often I see the last conversation of the mediation being between the trustee and the family with the trustee assuming the lead once more saying he wants to work with the family, get them back farming again or get them back round the Christmas table again, that kind of thing.

**Lindsay:** Geoff, what then would you then say are good practices for trustees to manage conflict and contentious matters?

**Geoff:** I've mentioned leadership, good communication and positions of neutrality earlier.

I'd like to expand on that and encourage any trustees, and in particular non-professional trustees, to take the time to know a little about how they can act as a "neutral". It's about how they can sit in the middle of a potential dispute and use skills, call them "mediation skills" but often they're just really "life skills", to try and resolve things at that kitchen table level.

I think that's a very valuable role that trustees can play but I'm also very aware that a lot of trustees don't realise the time and effort they may be taking on when they agree to be a trustee for a family they know well.

**Lindsay:** When we think of being a trustee, we don't often think of the role as a leadership role in the way you have described.

**Geoff:** It really is very much so, but I am conscious I do look at this topic through a limited lens of the mediation room. I will often encourage the trustees to sit with me as a mediator almost and partner me because of their leadership and authority within a family group. Sometimes they've lost that, as I've mentioned earlier, which is dangerous for a trustee.

If they've kept that neutrality, kept that authority, kept that mana, then I think it's a very valuable resource for the trustee as a leader in helping me in my job as a mediator.

**Lindsay:** Geoff, managing conflict is never easy. It's challenging and emotionally draining. There's a good chance at some stage a trustee will have to manage conflict or contentious issues. Clearly mediation, or just taking advice from a mediator, will be options for trustees as good leaders to consider as a way to resolve such a problem.

Geoff, your website is [www.geoffsharp.co.nz](http://www.geoffsharp.co.nz) and you've got some very good information there to guide and support people on mediation and where mediators can assist. Thank you for your time today.

Geoff: Thanks Lindsay, nice talking to you.