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Charting Troubled Water

Mediation settlement agreements are versatile, ranging from one-page term sheets to long-form agreements. But could a shorthand “chart” prepared during the mediation qualify as an admissible settlement agreement? The answer is yes, according to *Estate of Thottam* (2008) 165 Cal.App.4th 1331. In *Thottam*, three siblings fought over their deceased mother’s assets in probate court. At the start of a mediation, the siblings signed a “confidentiality agreement,” providing that all matters discussed at mediation would remain confidential, “except as may be necessary to enforce any agreements resulting from the Meeting.”

During the mediation the parties prepared a document in chart form to denote the assets to be disbursed to each sibling. The chart had a column for each sibling, identified by each sibling’s first initial at the top of their column. They each signed and dated the top of the chart above their column, and initialed each asset entry in that column. Weeks later, one sibling followed up with detailed distribution agreements which incorporated the signed chart. The other two siblings refused to sign the formal agreements, so the third sibling filed an action for breach of contract and specific performance. Attached to the complaint were copies of the signed chart and the unsigned formal agreements.

In ruling on a motion to compel a sibling’s deposition regarding the chart, a judge ruled that the chart was admissible under Evidence Code section 1123, because it satisfied the statute’s mediation privilege exception: The chart was signed by the parties, and the separate disclosure agreement allowed disclosure of the chart for enforcement purposes. Trial ensued before another judge who deemed the chart inadmissible, finding that the mediation privilege exception was not satisfied because the disclosure agreement was executed before the parties had reached a settlement. The chart that followed contained no disclosure language.

The court of appeal reversed. The chart was admissible at trial because it was signed by the settling parties, and the separate confidentiality agreement allowed disclosure of any resulting agreement (the chart), which satisfied Evidence Code section 1123, subdivision (c). The trial court erred by imposing a timing requirement. There is no requirement that the language permitting disclosure be contained in the settlement agreement, or that the agreement regarding disclosure be made at or after the time of the settlement.

Applying contract law, the court found that the chart was a “written settlement agreement” under section 1123. “The chart, signed and initialed by each of the parties, was allegedly the written memorialization of their agreement. Although lacking in details, the chart set out basic terms which, with the addition of parole evidence, were capable of being made certain.”

The takeaway:

1. Even a one-page chart lacking details and written in shorthand qualifies as a settlement agreement if it sufficiently indicates the basic terms agreed upon by the parties.
2. To be admissible, the agreement must be signed by the parties, with language in the agreement (or in a separate writing) stating that the agreement is admissible or subject to disclosure, or words to that effect.
3. The agreement regarding disclosure may be made before, at, or after the time of the settlement.