

Gertie's Law: Episode 10 "The Iceberg"

This episode of Gertie's Law contains references to suicide.

Greg Muller

We've talked a lot about crime throughout Gertie's Law. When you think of the Supreme Court, it's natural for your mind to go straight to murders and terrorism.

If crime is the tip, this episode is about the rest of the iceberg, the 90 per cent which is not so readily seen. Indeed, crime is the smallest list here.

Thousands of people come here every year disputing wills.

Joanne Boyd

Probate is one of my actual favourite lists. We've been doing them since the earliest days of the court. So from the 1840s onwards.

Greg Muller

There are hearings in the Practice court which can happen in a moment's notice when a quick resolution is necessary.

Justice Richards

So, I heard one of those matters on a Tuesday. The election was due to happen on the Saturday.

Greg Muller

There's commercial matters ranging from large corporate battles

Justice Riordan

Of course the big corporates, the leviathans come to our court because our jurisdiction is unlimited. All the way down to small family company disputes.

Greg Muller

There's a section here which actively manages billions of dollars of people's personal funds.

Associate Justice Efthim

We buy houses if a house is needed. They've got to live somewhere. Yes, we'll pay it. Cars, we get cars for beneficiaries.

Greg Muller

And a lot of work goes into avoiding court cases altogether.

Associate Justice Wood

Traditionally lawyers are comfortable being in gladiator mode as to we're going to win and this is why we're going to win and it's an adversarial process. We rely a lot on the profession to switch modes in mediation and become problem solvers.

Greg Muller

I'm Greg Muller and this is Gertie's Law. This episode is about the areas of this court which rarely - if ever - appear on the TV news. But the stories are no less fascinating.

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By far the busiest section is Probate, which includes the probate registry and the Probate list for more complicated issues.

So let's start here.

When someone dies they usually leave property, assets or even debts behind, and determining where they should go is not always straightforward - even if there is a valid will.

Justice McMillan

That registry is the highest volume division of the Supreme Court. In the calendar year, that is 2018 the registry dealt with 21,758 applications for grants. That's an average of 420 applications each week.

Greg Muller

Justice McMillan is judge in the Common Law Division and also heads up the Probate list.

Justice McMillan

Its primary function is to make grants of probate or grants of representation. A grant of probate is made where there is a valid will and grants of representation are made where there is either an intestacy or some issues with the will where, for example no executor has been appointed.

Greg Muller

What do you mean by intestacy?

Justice McMillan

An intestacy is where a person dies without leaving a valid will.

It's a very busy list. Last year 353 proceedings were issued in the list. That's about one a day.

Greg Muller

And when you say a list, they're the ones which come over to you?

Justice McMillan

Yes, the bulk of the work is done by the Probate Registry. Anything contentious would come to the probate list.

Greg Muller

The list hears a remarkable breadth of applications. These include the contested applications for grants of representation.

Justice McMillan

Someone can come along saying they object to the grant of representation and then the file is sent over and then it's managed and a judge hears the case.

Greg Muller

The list also hears applications for grants of informal wills.

Justice McMillan

Where the registrar of probates does not have power to do that himself. He has power to do that if everybody agrees.

Greg Muller

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Under the Wills Act there are applications for certification of wills and also applications for court authorised wills.

Justice McMillan

They're applications where someone has lost testamentary capacity so they may be injured for example in an accident and they are unable to make a will so the court will make the will on their behalf on all of the evidence. The court's role is to establish what the likely intention of the testator will be had he or she had capacity.

Greg Muller

And then there's construction of wills - where certain clauses are ambiguous or meaningless. The court also approves settlement of proceedings where minors or people with a disability are concerned.

Determining what should happen to someone's assets often gets complicated. First, you have to establish that the person is in fact dead.

Justice McMillan

Someone can apply for a declaration for the presumption of death of someone who hasn't been found. The usual presumption is after seven years but one case for example was the deceased went on a sailing trip with his mate, Just before the boat crashed on a reef the deceased had telephoned his spouse and said, 'we're in trouble' and then there was this crashing and banging and no body was ever discovered but it seemed on the evidence that truly both of them had died in the accident so in that circumstance the court was able to make a declaration that he was presumed dead.

Greg Muller

And for some families, the time immediately after a death is when skeletons in the closet finally come out.

Justice McMillan

There are questions sometimes about the paternity of people which can be delicate because sometimes the person has no idea of the issues as in it might be something that arose out of cleaning out the house and finding some documents that suggest someone may have an ex-nuptial child.

Other areas that are difficult are where two or more people die in circumstances where you can't work out the order of death.

Greg Muller

Why is the order of death important?

Justice McMillan

The order of death's important because the presumption is the youngest person dies last. So if they are a husband and wife and the husband was older than the wife and there if there is an intestacy, the assets and there is no children the assets would pass to the wife and then they would pass to the wife's intestacy's beneficiaries. In the ordinary course, the wife would inherit.

There may be, as often happens today, children of a first marriage or a second marriage so the order of death's important of the devolution of the property and assets of the estate.

That's a question that the court must decide. There's a statutory presumption as to the order of death the younger person dies last, but that presumption only applies where the court determines that preliminary question as to whether or not the order of death is uncertain.

Now, you would think in most cases it would be certain but for example were you get car crashes or suicide, a suicide pact or a murder-suicide the court has to look at the forensic evidence and the coroner's report to understand who's died first.

Generally someone found guilty of murder cannot inherit, it's the forfeiture rule. So, you'll have a separate trial in relation to the murder charge and then once that's determined then the executor of the estate would come along and get an order from the court as to whether or not that person can inherit. There's some flexibility in some circumstances but generally when it's a murder the murderer can't inherit.

Greg Muller

Informal wills can also raise complications.

Justice McMillan

I've had one video will on a telephone. I've had another one where someone changed a will for a person who was very ill and on strong medicine and on the affidavit material there were statements about how the testator understood what was happening. The new will made substantial changes, but luckily enough from the court's perspective the person who made the will videoed reading of the will to the very ill person and it was clear from the video that the person had absolutely no comprehension of what was happening and that application was refused.

Joanne Boyd

Probate is one of my favourite lists.

Greg Muller

Court archivist, Joanne Boyd

Joanne Boyd

It's one of our oldest running types of things. So probate matters - we've been doing them since the earliest days of the court from the 1840s onwards. We've got a complete run of probate records here in the state of Victoria. So you can go back and look at a gold rush one. Redmond Barry's is there.

So what happens with the wills is the wills make up part of the probate file so that's how we have the wills, so that's how I can go and look at Redmond Barry's which is written in the hand of his associate and it says who he left his property to his de facto wife Louisa. There's a property in Sydnal and a property out in the country. So the wills form part of the probate file.

Greg Muller

Common Law judge, Justice McMillan.

Justice McMillan

Recently, we had one where the testator left the sum of \$200,000 for the purpose of building a family crypt in another country, enough to fit 20 bodies in it. And of course everyone mostly was living here from his immediate family and the more distant family in the country overseas were not interested in being put into the crypt, and the question was whether that was a valid gift. It certainly wasn't charitable and what to do with the \$200,000. It was determined it was not a charitable gift and the gift failed so then it went into the residue of the estate to be divided amongst the residual beneficiaries.

Greg Muller

You must see the worst and best of families?

Justice McMillan

Indeed I do. Often disputes within families arise only after death that you can see people are either angry or upset and then there's a challenge to the will. It's a process I think. The difficulty I think from the court's point of view is people are remembering for their purpose so sometimes the oral evidence is not that convincing and so what the court must, do as best as it can, is try and find contemporaneous evidence. So if someone comes along and says, 'my parents said to me I could have this farms if i worked here for no or little money 30 years ago', that causes grave difficulties in terms of the family dynamics. There are very sad cases but once I think that everyone gets together they can often solve them but sometimes it's a process depending on how willing they are to solve it.

Greg Muller

What would your advice be to someone who is about to prepare their will?

Justice McMillan

I think most important to have a will and perhaps to sit down with the family members and discuss it while they're alive rather than when the fighting starts afterwards. That might not resolve it but it does help to have a discussion so that people aren't caught by surprise. You often hear people say, 'oh the deceased said this or that', and someone else says something different but if someone's being pestered about how their estate should be left then sometimes people will say, 'yes I've done that,' when they haven't just to get the person off their back. But this is a hard conversation to have within your family if you've got a lot of dysfunction.

Greg Muller

Another section here managers money which comes into court. This could be money from other courts, compensation payouts, money from wills and so on.

Sometimes, people are assessed as not having the capacity to manage money which they have been awarded. This could be because of a mental injury or the person is under 18 years of age. That's where the Funds in Court steps in. This means the court has an ongoing role in looking after some of the most vulnerable people in society.

Associate Judge, John Efthim

My name's John Efthim. I'm an Associate Judge with the Supreme Court of Victoria and I'm also the Senior Master of Funds in Court.

Greg Muller

So what do we call you?

Associate Judge, John Efthim

John. Whenever somebody asks me, "What do we call you, Your Honour?" I say, "John". But in court's it's 'Your Honour' and in Funds in Court it's 'Senior Master'.

Yes, funds do come into court. They come into court for people that are under a disability or infants, that can't manage their own affairs and need their affairs to be looked after and we exercise what's known as a parens patriae jurisdiction. And it's been a part of this court since its establishment.

If a person has money paid into a court, what happens then this is, for example, they might need to purchase something, which will help the rehabilitation or purchase something for their needs like, maybe even a television set, they might be homeless and need rent. If we have their money, we'll apply it to that.

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If it's something like, "I want to go to Antarctica and live there" – and we know the person can't – of course, we won't make that order. We try to keep their money go as long as we can to make sure they're okay.

Greg Muller

Funds in Court dates back to 1867. Although it was then called something completely different. Joanne Boyd again.

Joanne Boyd

The Funds in court started off with the rather unfortunate name, Master in Lunacy. And that was from the lunacy Act of 1867.

Greg Muller

How did the Supreme Court end up taking responsibility?

Joanne Boyd

I think partly because it was about money. It was about equity and things like that and in one sense the Supreme Court also had feelers right through the colony so it was important to think about how we can look after people.

Greg Muller

And this is still the primary consideration of Funds in Court, providing sound investments at low cost. But it goes further than just looking after money. John Efthim.

Associate Judge, John Efthim

A lot of these people have an acquired brain injury and they're easy targets. They might have a million dollars and somebody might get hold of their money and waste it.

We have our trust officers. They have a great relationship with these people. Our trust officers stay there for years. They get to know these people by first name basis. They look after them. They need help. And it's a supportive decision making. We don't dominate these people, we want to know what they want. They get a right to be heard.

Greg Muller

Roughly how many people's money would you be managing at the moment?

Associate Judge, John Efthim

About 6000.

Greg Muller

And do you have any idea of how much money that is?

Associate Judge, John Efthim

Well, the assets we have are about 2 Billion dollars. Not million, billion.

Greg Muller

What sort of situation would you envisage where someone was awarded a large sum of money?

Associate Judge, John Efthim

Most seem to be medical negligence cases. For example, there's a baby about to be born and the doctor does the wrong thing, and the baby gets a lack of oxygen to the brain and then in a wheelchair for the rest of their life. PEG feed, can't talk properly. You get millions, five, six, seven million.

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We've seen up to about \$10 million awards for those sorts of cases. There are other cases where people are hit by a truck when they're crossing the road or something. They might get a million or two.

We have a lot of large awards, but we have a lot of small awards. For example, we've got about one or two thousand people, maybe even more, from Victims of Crime. They don't get large awards, but the important thing that Funds in Court does, it doesn't matter if you got \$10 million or about three or four thousand at the minimum. You'll still be looked at; 'do you need the money? What's it going to go to? Tell us what you want,' and we'll deal with each case by case.

Greg Muller

Just from a financial perspective, what's the benefit of having your money managed by you and not a private investment firm?

Associate Judge, John Efthim

Just recently, I asked one of our investment advisors, a company that we actually pay some money to advise us. They looked at 98 organisations. Guess who had the cheapest administration cost? It was us. Didn't surprise me. It's about 0.56 of a per cent. No one can compete to that. That's the first issue.

The second issue: the orders are made by a court. They're made for the benefit of those people, and because of the *parens patriae* jurisdiction, we have to act in their interests. We try to make sure they don't get ripped off by all sorts of people.

We buy houses if a house is needed. The beneficiary might have had a medical negligence case. 'Can we have a house for the beneficiary? They've got to live somewhere.' Yes, we'll pay it.

We get the house, we make sure that there are proper items in the house, like support so the person – the beneficiary won't fall over, ramps when they need it, if they need ramps, so we do all that sort of thing as well. Cars, we get cars for beneficiaries, particularly if they need modifications. We try to look after them. We see what their needs are.

Greg Muller

But once someone has hold of their money - after all it's their money - how does the court protect these funds.

Associate Judge, John Efthim

Well, you take it into account, because if a person says, 'can you give me \$300, I want to buy some clothing?' And we know they've got a gambling addiction, well, you want the receipts. Yeah, get the clothing. Get the receipts. Send them in. If you know they've got the gambling addiction and you believe the money will go to gambling, you've got to be very careful. Everything is on a case-by-case basis, including drugs.

That's a real worry. We sometimes send client liaison officers to have a look at people who might be on drugs and we try to call the health departments and all those departments to go in and have a look at them and see if they can help them. We're the custodian of their money, but when we see things wrong, we advise people. We try to get people care and those sorts of things to help them.

Joanne Boyd

There's a wonderful letter from the turn of the century - the 19th into the 20th century and this lady writing, "Can I please have some money for my son's new coat. We're going to

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come down to Melbourne to visit, “ and because she was a widow and her estate was being managed by the Fund in Court.

Greg Muller

Did she get the coat?

Joanne Boyd

Yes they did get the coat -it's a gorgeous letter - yes.

Greg Muller

Cases at the Supreme Court can be hugely complicated and require thorough, methodical consideration. This can mean a trial can go on for months. But there's one place here where things move fast. Because they have to. It's called the Practice Court.

Justice Richards

The Practice Court is a court where a judge who's on duty hears urgent applications. It's usually held in court 10.

Greg Muller

Justice Richards, a judge in the Common Law Division.

Justice Richards

Most days in this job, you come into work with a pretty fair idea of what's going to happen in your day but, when you're sitting in the Practice Court, you can have no idea what you'll be doing at the end of the day or how the day's going to work out.

It can be anything from an appeal from the Children's Court involving a decision that court made about the protection of a child to an injunction application in an industrial dispute about a picket line to an application for a freezing order made by an employer who's discovered an employee has been helping themselves to the employers assets, or an application for a restraining order made by the police to freeze what are thought to be proceeds of crime. So it's a hugely diverse jurisdiction and always very interesting.

Greg Muller

The Practice Court operates all year, around the clock with anything from 2 to 15 matters every week.

Laura Warren

My name's Laura and I'm the Practice Court coordinator for the common law division.

The practice court is designed to deal with anything urgent or injunctive that may occur in new cases or cases already before the court. It's a very reactive court so it's when matters occur quite urgently that need to be dealt with often to do with the preserving a party's rights to do something during a trial process.

There is a judge which is available 24-7. There is the *urgents* number should something be required outside the normal court hours. The matters that do arise outside of court hours are quite sensitive in nature - something to do with medical treatment or the non-provision of medical treatment. Also, any appeals regarding the family division of the children's court where custody of minors might come into question and there's concerns about safety or care.

We also have injunctions against house auctions, for example that are scheduled for a Saturday morning where perhaps a lender has repossessed a house due to a breach and

there's been a refinance agreement that then can sweep in and stop the auction from happening.

Medical cases can cover the provision of medical treatment where an individual has decided, due to religious or other reasons, to not undergo certain medical treatment and the hospital thinks that that would be detrimental or where the hospital thinks that would be detrimental.

Another example of where medical determination or court determination will be required for medical procedure will be where there is a soon to be deceased individual - usually male - on life support and his partner would like to extract his sperm for the potential use later down the track for an IVF proceeding. The hospitals will often require a court order allowing them to make such an extraction through medical procedures. Importantly that does not necessarily allow the individual to automatically use the product and that would be the subject of a later court dispute.

Greg Muller

Have you had many of those?

Laura Warren

There's on average one every three to six months or so, so I've seen about four or five in the last 18 months.

Greg Muller

Justice Richards heard a high-profile case towards the end of last year. One which needed a resolution before the weekend.

Justice Richards

So, I was the judge in the Practice Court in the week before the state election in 2018, and the week before that, a Liberal candidate had been quite suddenly dis-endorsed over some video material that appeared on social media, and there were then questions about what should happen to the ballot papers that had her name printed on them because pre-polling had already started and what should happen to how-to-vote cards that had her name printed on them in a way that could suggest that she was endorsed Liberal candidate.

So, those two applications came in to the Practice Court very quickly. One was an application to review a decision of the Electoral Commissioner to keep the ballot paper as it was printed and the other was an appeal from VCAT where VCAT had held that some of the how-to-vote cards that the Liberal Party had registered were misleading and deceptive, so they couldn't be used.

So, I think I heard one of those matters on a Tuesday and another on a Wednesday afternoon. One after the other. The election was due to happen on the Saturday, so clearly an answer was needed very quickly and I was able to decide each matter overnight.

The decision in the end was that the ballot papers had to stay the same because that was the effect of the provisions in the Electoral Act that once nominations have closed, the content of the ballot paper is fixed, but that the how-to-vote cards that indicated that this candidate was still the endorsed Liberal candidate were misleading and deceptive and that VCAT was correct to make that finding and that they could not be used. And after I delivered that decision, the Liberal Party appealed it to the Court of Appeal and they had a decision that same day.

Greg Muller

In the Practice Court, the least complicated decisions can sometimes be the toughest.

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Justice Richards

I have found the hardest decisions to make are ones where a person or, sometimes a family is about to be evicted from the place where they're living, either because they've defaulted on their mortgage and the mortgagee is about to execute a warrant for possession, and they've got the order that that person should be removed from the property and, again, the sheriff's about to go and execute it.

Usually it's pretty clear that, you know, the bank is entitled to possess the property, that the mortgagor's unable to service their loan, that really you'd just be delaying the inevitable, but when you're faced with someone who says, 'Well, look, I don't have anywhere to go and if you just give me two more weeks, I'll be able to turn this all around,' it's a very difficult decision to make.

So in some ways, they're the simplest decisions because the law's not very complicated but they're very hard judgement calls to make and you need to make them quickly.

Greg Muller

The other jurisdiction here which has a lion's share of the workload but receives little attention is the Commercial Court.

Principle Judge, Justice Riordan.

Justice Riordan

Members of the public see the Supreme Court and think that's it's all about crime and the criminal division and obviously that is the area where most people are interested but in fact it's the smallest division of the trial courts.

The largest division is the Commercial Court which just shades out the common law division.

Justice Riordan

A lot of our cases tend to be what I would call partnership disputes really, they're people who run businesses and disputes within the business have led to the parties falling out.

That's just parties who can no longer get on. But families, particularly wealthy families. There are families who have got business interests and they fall out and so they bring proceedings and those proceedings can be very bitter. The familial relationship gives a whole different dimension to it and they can go back over many years - 30 years - of issues between the family that we can have being litigated in this court.

One that's not long gone involved a couple, a reasonably elderly couple, who got lucky and their farmland all of a sudden found itself in the middle of a development area and so it became worth 10 million dollars. They ended up litigating in this court such that the last I heard I think, that at the end of the litigation they were bankrupted.

Greg Muller

That must be frustrating for you to watch?

Justice Riordan

It's excruciating to watch and in that particular instance I said things very directly from the bench about the ludicrous nature of real people who couldn't afford litigation giving up a once in a lifetime opportunity but it would appear that the parties were completely unable to understand there were risks that things may not go well for them.

Greg Muller

And then there's disputes from the big end of town.

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Justice Riordan

Of course the big corporates, the leviathans do come to our court because our jurisdiction is unlimited and it's those sorts of institutions that can afford to run litigation for a long time. We have to be very mindful of (these) for two reasons it's a bad idea for them to run long disputes in the court. The first is it takes up the resources of our court. We can have a judge not available for any other case for 12 months while they run a large trial and the second reason is that whilst they're running their litigation they're not getting on with commerce. And the business community is much better off by us getting the litigation resolved quickly and getting them back to doing what they're doing, which is running their businesses.

Greg Muller

What happens in the commercial court reflects the type of commerce happening in the community.

Justice Riordan

There's a lot of construction in Victoria and construction inevitably involved disputation. At the moment there's a lot of litigation arising from the fact that the cladding is being determined to be too dangerous and therefore there're large claims brought by the owners of buildings - large buildings that had to be re-clad because of the recent concerns about flammability of cladding.

Greg Muller

One issue which is coming to the Commercial court in increasing numbers is Phoenix companies.

Justice Riordan

Classically the creditors are complaining that what happened was they were owed large amounts of money by a corporation and all of a sudden the corporation came to an end and precisely the same business is now being run by a new company who surprisingly enough appears to be owned by the same people who owned the old company - usually with all the assets of the old company. And that's what called a phoenix company - the new company rising out of the ashes of the old company. That's a frequent problem or frequent complaint and it's the source of a lot of litigation because the creditors are not very pleased with that.

Greg Muller

How do you manage a case when both parties are not willing to give any ground?

Justice Riordan

Often that's the responsibility of the mediator and we have mediators within the court who will accept a referral from a judge and attempt to resolve between those parties who aren't prepared to give any ground. The key of course is to get the parties themselves in the room and often to bypass the lawyers.

And that's the way we try and get the parties to think about not only what would a successful result in the court look be like but what an unsuccessful result in the court will look like.

Greg Muller

This brings us to mediation where a lot of effort is put into not going to trial. This also happens within the Supreme Court. When a judge refers a case for mediation it lands on the desk of someone like Judicial Registrar Daniel Caporale or Associate Justice Jamie Wood.

Referrals for mediation come from all divisions of the court.

JR Daniel Caporale

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So, that includes common law division, commercial court, court of appeal; matter can be referred to mediation. On average we would do about 50 a month. We're pretty busy.

Ass Justice Wood

The traditional view of a court was its function was to decide cases in accordance with law but the reality is that most cases don't go to judgement. So if 90 per cent of cases settle prior to that, there's a responsibility to try and manage those cases so they settle earlier. It saves the parties money and it saves the court resources.

JR Daniel Caporale

A typical mediation session, well the people arrive and the judicial mediators of this court will put the parties in separate rooms initially and speak to them and go through with them a few of the rules that attach themselves to mediations and what the process might look like. Usually then, the parties will get in the same room together and we'll have a joint session and each party will put their case and anything else they want to talk about and then we usually split after that back into private sessions where parties go back into their rooms and take on board the things they've learnt perhaps for the first time in the joint session. And then you really start talking about how the matter can resolve.

Ass Justice Wood

It's actually quite a creative process. The role of a judge in hearing a case is quite narrow, they get to hear the evidence, they get addressed on the law and they make a decision. Usually somebody wins and somebody loses.

In mediation we try and identify people's underlying interests and their legal position might be, 'I want \$100,000 and I'm going to win and this is why.' The reality is that, particularly in family disputes about wills or family matters dressed up as company disputes. If you win it may not be in your interests to win because it will destroy the relationship forever, even losing you'll go bankrupt but even winning it may not be in your interest to win that particular case that time.

At the end of the process you end up with a terms of settlement which you wouldn't get from an outcome from a judge. There's a timeframe in there, there's an apology, there's instalment payments. It's confidential so there's no judgement on the internet forever for relatives to read. There's a whole range of interests which can be achieved through a mediated settlement which you wouldn't get from a judge.

JR Daniel Caporale

One I did recently between a bank and the customer of the bank which was really over money but which turned out into a mediation about the ongoing relationship between the bank and the customer. That was really typical with most mediation where it starts off really just an argument or a dispute over an amount of money but then turns into a discussion - a negotiation about a relationship and if we settle the dispute can we still have an ongoing relationship?

Greg Muller

A mediation session will usually run all day, often late into the night. About 70 per cent of mediations are resolved in the first day. Many also resolve after mediation but before the trial.

But for mediation to work, the legal profession has to switch modes.

Ass Justice Wood

Traditionally lawyers are comfortable being in gladiator mode as to we're going to win and this is why we're going to win and it's an adversarial process. We rely a lot on the profession to switch modes in mediation and become problem solvers, generating options for

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settlement, thrashing around ideas and being very aware of their clients real interests-
underlying interests, not their strict legal position.

Greg Muller

Do you get the impression that people are more satisfied after going through mediation
rather than having a win?

JR Daniel Caporale

Many people leave mediations not happy even if the matter settles but I think if they're not
immediately satisfied with a settlement at mediation I think they become satisfied very
quickly soon after because they get rid of the litigation.

Ass Justice Wood

Everybody's got to be a little bit unhappy because they're compromising and in reality if they
have a hand in fashioning the result they're much more likely to comply with it.

Greg Muller

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