OBA

Ethical Challenges (and Solutions) in Mediation, Arbitration and Collaborative Processes for ADR Practitioners and Counsel

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WHY ESTATE MEDIATION WORKS

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Why Estate Mediation Works

Estate disputes are some of the most emotionally fraught disputes before our courts. Litigating parties, or persons who find themselves in a dispute at the pre-litigation stage, are often grieving the loss of a loved one and opposing parties are often people that are closely related, either through blood or marriage. Unlike corporate/commercial disputes, where there is more likely to be little or no personal connection, estate disputes are often impacted by emotion and hence lack of objectivity in decision making ability. Long, often life-time-held family resentments, feelings of inequality, inadequacy, competition among siblings prove to be a certain recipe for intractable disputes. The “real” cause or root of the disagreement may not be clear on the surface, or even related to what is plead in the court documents.

Most notably, the person at the heart of the dispute, the testator, is no longer available for clarification or guidance. Many times the disputing parties are only connected through the deceased person and would not otherwise wish to have anything to do with the other.

For these reasons, estate disputes often benefit from mediation, a form of Alternative Dispute Resolution. Mediation is a highly effective, successful, and often less costly (though in itself expensive), alternative or addition to the adversarial litigation process. Estate mediation is “interest-based” as it explores solutions that meet the needs and interests of the parties, rather than “rights-based” litigation which focuses solely on the parties’ rights, or, rules and the law. That mediation is in the overview a better solution is easily apparent. Mediation in the estates context is often based on two potential approaches including facilitative and/or evaluative. Guidance on how best to prepare for mediating your estate dispute can be instructive to ensure that your clients are ready for mediation. Finally, as part of the process, consideration ought to be given to why your clients might benefit from choosing a mediator who is a specialist practitioner in estates, trusts and related areas.

Why should I Mediate my Estate Dispute?

First, if the estate claim or application is commenced in Toronto, Ottawa or the County of Wessex in Ontario mediation is mandatory pursuant to Rule 75.1 of the *Rules of Civil Procedure*. Rule 75.1.02 provides that mandatory mediation applies to the following:

- contested applications of passing of accounts;
- formal proof of testamentary instruments;
- objections to issuing a certificate of appointment;
- claims against an estate;
- proceedings under Part V of the *Succession Law Reform Act*;
- proceedings under the *Substitute Decisions Act*;
- proceedings under the *Absentees Act*, the *Charities Accounting Act*, the *Estates Act*, the *Trustee Act* or the *Variation of Trusts Act*;
- applications under Rule 14.05(3) whether the matters at issue relate to an estate or trust; and
- proceedings under s.5(2) of the *Family Law Act*.
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According to a Practice Direction of the Ontario Superior Court of Justice, which came into force on July 1, 2014, on passing of accounts applications parties should be prepared to deal with the issues of directions for mandatory mediation on the initial return date specified in the notice of application. In all other matters, motions for directions for the conduct of a mandatory mediation normally should from part of, or be combined with, a motion for directions under Rule 75.06. An order giving directions for mediation should, where appropriate, also deal with any information the parties require in advance of the mediation in order to ensure a productive mediation session.

Additionally, Rule 24.1 of the *Rules of Civil Procedure* directs mandatory mediation for specific actions commenced in the same jurisdictions of Toronto, Ottawa and the County of Essex. However, mediations under Rule 24.1 seldom occur in estate related disputes as the Rule does not apply to

any action to which Rule 75.01 applies. It is important to understand under which rule your claim may be subject to mandatory mediation, if at all.

Even if the dispute is commenced outside of the jurisdictions with mandatory mediation, mediation is always a viable option for parties to agree to in an estate dispute at any stage. As with most litigation, but ever more so in estate litigation, the "real" dispute may have nothing to do with the legal issues involved. Litigation may, but not always, result in a clear winner and a loser; however, it may not fix or even address any underlying problems. Often estate disputes arise from a misunderstanding of intent of the opposing party, conflicting expectations, or resistance to change. There is a high success rate in general with mediation in estate disputes as the parties must focus on the real issues involved and are encouraged to find a practical outcome.

Some of the benefits of mediating an estate dispute are:

- Mediation is strictly confidential and subject to settlement privilege;
- Privacy in a digital era where court decisions are more public than ever given the web, internet and social media;
- As there is no clear winner and loser, everyone involved in a mediated settlement can control the mediation process and take ownership of the outcome, and therefore there is a greater likelihood of compliance;
- Both sides can tell their story and hear the details of the opposing view, which may be therapeutic for all involved;
- A mediation is time limited, as opposed to litigation which can be time consuming and can take years to determine given the intents of the parties adverse in interest and the court scheduling and back-log;
- A mediation will occur in a neutral space with less pressure than a formal courtroom;
- Mediation is less expensive and faster than going to court; and
- Mediation can facilitate communication, listening and understanding.

There is little downside to mediation if you approach it with the right attitude and preparedness. Mediation gives parties a chance to 'hit the pause

button' and step outside of the litigation which can be traumatic for individuals who may still be bereaving the loss of a loved one.

Furthermore, a Court may order a mediation even if the claim is commenced outside of the enumerated mandatory mediation jurisdictions.

The Ontario Superior Court of Justice has a broad and inherent jurisdiction to control its own process, which is only limited if specifically restricted by statute.[1] Rule 1.04 states that the *Rules* "shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." A court ordered mediation may be the most expeditious, just, and least expensive way to resolve a civil proceeding. Moreover, the Court has a broad *parens patriae* jurisdiction to protect vulnerable and incapable persons.[2] Ordering a mediation in cases where capacity or vulnerability is an issue may facilitate a resolution more quickly and less expensively than litigation and be in the best interests of the vulnerable individual.

Facilitative vs. Evaluative Mediation: Which one is the best for estate disputes? A combination of both?

The two main styles of mediation are *facilitative* and *evaluative*.

A ***facilitative*** mediator is a neutral person who assists the parties in taking ownership of the issues and solving the dispute amongst themselves. The role of the facilitative mediator is to be in charge of and manage the process and guide the parties to a mutually agreeable resolution by facilitating discussions, asking open questions, communicating settlement offers, and digging into the real issues below the surface. Both parties are involved in the mediation's outcome, unlike a judicial outcome where the decision is ultimately in the hands of a third party decision maker. In mediation, the clients should have the major influence on the decisions made, rather than the parties' lawyers.

[1] See *Cook v. Ip* (1985) 52 OR (2d) 289 (CA), *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd. et al*, [1972] OR 280 (SCJ) and *Perino v. Perino* [2009] 99 OR (3d) 575 (SCJ).
[2] See *Perino v. Perino* [2009] 99 OR (3d) 575 (SCJ).

One of the benefits of a facilitative mediation is that it empowers parties and helps parties to take responsibility for their own disputes and resolution. Occasionally however, such an approach may not work and more so, where there is a clear power imbalance between the parties. Facilitative mediations may be more time consuming as they are dedicated to getting to the underlying issues.

An ***evaluative*** mediator will give an evaluation of the strengths of the parties' cases. This type of mediation however will be concerned more with the legal rights of the parties rather than their underlying interests and may not solve the real issues. The mediator will evaluate the parties' legal rights and positions, may push and/or urge the sides to a settlement, develop and/or propose the basis for settlement, predict an outcome in court and educate each party on their strengths and weaknesses. For an evaluative mediation to work, the mediator should have substantive expertise in the subject matter. It is in this way that consideration of a mediator with particular experience will benefit disputing parties in this area. In evaluative mediations careful managing such that there is not an appearance of winner and a loser is important to the process, especially where the mediator concludes that one party has the stronger case. This approach demands clients be prepared for possible negative feedback on their legal position.

In many situations there is room for both approaches. For example, parties could have the mediator start out as facilitative but at the end of the day, or when the parties request, provide an opinion on, or evaluate, the legal rights of the parties and the process.

What Should I do to Prepare for Mediation?

Mediation will work when all parties are prepared and understand the goal of mediation. A settlement should be reached on full knowledge, and transparency ensuring the best forum for understanding the issues involved, rather than having one party left in the dark about an aspect of the dispute. Lawyers should prepare their clients for the process, underscore the importance of confidentiality, explaining that this is a

chance to step away from the adversarial process. Clients should be prepared to be respectful of the process, to disengage the anger and entrenched views, depart from using blaming language and adopt neutral language, all with a view to compromise and brokering a deal that can be managed. No person will leave with everything they want, nor will any party be completely satisfied with the process.

Documentary preparation is also important and the mediator should be provided with helpful mediation briefs and all relevant materials including the drafting solicitor's records, medical records etc. depending on the issues involved. Counsel should have a full understanding of the assets of the estate, or related dispute and the legal issues. Settlement agreements are to be prepared by the parties or their counsel and should not be prepared by, or witnessed by the mediator.

The mediator will remain neutral, is not an advisor and cannot become a witness.

Who should be the Mediator?

While some believe that anyone can mediate an estate dispute regardless of whether they have mediation training, it is important to consider the complexity of estate litigation. Estate litigation is a unique area of the law with unique concerns.

The types of issues mediated in the area of estates include: will, estate and trust challenges; dependant support claims; family law act elections, passing of account applications by fiduciaries including attorney, guardian, trustee and estate trustee; power of attorney litigation; trust variations/interpretations, rectification applications, guardianships for property or for personal care; elder law issues and elder abuse; capacity proceedings; end-of-life disputes, trustee and fiduciary litigation; and the tax considerations and consequences arising in the estate. Also complex estate disputes often involve family businesses, corporate documents, shareholder agreements, complicated valuations etc.. Often the estate dispute will touch on more than one of the above issues. Therefore, it is important to choose a mediator who understands and is knowledgeable

about this area of law. This is ever more important if you choose an evaluative mediation or even a combination of the facilitative and evaluative approaches. Choosing a mediator who is a specialist in estates and trust litigation will aid in getting the parties to a mutually agreeable resolution of all of the issues.

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