

## ALTERNATIVE DISPUTE RESOLUTION

# How to handle estate and elderly mediation

“My divorce mediation clients are committed to getting the details of their separation settled so they can get on with their lives. This is not true of the clients in the mediation I am doing between elderly parents and their adult children,” complained a colleague over lunch recently. “For one of the adult children, there seemed to be no incentive to mediate. I had to persuade him to mediate and the progress towards settlement is really slow. This is harder than divorce mediation!”

The clients were an 80-year-old couple, their 50-year-old son and his two siblings. The 50-year-old son had purchased the home with his parents and lived in the basement. The title was in tenancy-in-common between the son and the parents. As between themselves, the parents were joint tenants. The home was the parents’ only significant asset.

The son wanted the parents to transfer the house to him right away, as this would fulfill his dream of owning a home in that community. The father was willing to do so; the mother was not. In her initial contact with the mediator, the mother complained of feeling overwhelmed and disempowered. The other two adult children wanted their share of their parents’ home, either right away or later.

This dispute is about a fundamental need — housing. It involves a sense of entitlement on the part of adult children. There was a power imbalance



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between the adult children and their senior parents. Significant relationships were in conflict.

What dispute resolution tools and processes are available?

## Preliminary conferences

Meeting with each disputant first, and separately, is essential. This would bring out different perspectives as well as power imbalances and safety issues. It would allow the mediator to review procedural changes with disputants. It would also help the mediator to untangle the dispute of who was in dispute with whom, over what issues. This would in turn suggest who to involve in various joint meetings.

## Coaches

One of the exciting benefits for me as a mediator and a collaborative law professional has been access to the mental health coaches and other professionals that are part of the multi-disciplinary collaborative law process. Coaches help people cope with the emotions they experience when a relationship ends.

Coaches are also excellent at assisting people who feel disempowered to find and use strategies that help them cope. I routinely introduce coaches to

## Real-life scenario

What’s striking about this story is its similarity to another real life scenario by the victim services group connected to the local police. The facts were:

*“A middle-age couple phoned for police assistance because their 25-year-old son refused to move out, and the parents were afraid for their safety.”*



Mediation strategies to deal with this situation include holding a preliminary conference, involving coaches, and providing financial and legal advice, as well as using procedural techniques and screening for abuse.

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mediation clients. The 80-year-old mother would likely benefit from a coach.

## Financial advice

Financial specialists in the collaborative process are neutrals. They take a possible settlement scenario and project it into the future, thereby providing an educated guess about the consequences of decisions. They are also knowledgeable about programs that can benefit clients.

Parents typically want to help adult children, who in this market can find it very challenging to become independent. A financial specialist could help

the parents and their son to find a creative solution.

## Legal advice

People often make decisions based on a misapprehension of the law. Encouraging disputants to seek out answers to specific legal questions can go a long way to creating an incentive to settle.

For example, each of the three adult children could ask their lawyers: “What rights do I have now regarding my parents’ home? What rights would I have if my parents’ home was transferred to only one of us now and my parents both passed away?”

How much would it cost to engage in an estate dispute like that? How long would it take? Who would pay the legal costs?”

## Procedural techniques

While speaking louder and more slowly will not be appreciated by elderly clients, they do prefer shorter meetings with longer periods between meetings. Co-mediators who mirror the age mix of the disputants may also help to bridge perceptions that arise from generational differences.

## Screening tools

There are several extensive screening tools for lawyers and mediators to use to screen for spousal abuse and power imbalance. These need to be modified for disputes between adult children and aging parents, as elder abuse exists in many forms. If abuse exists, the next question is “What is the best process at this time?” It may be that collaborative law provides better checks and balances than mediation.

Estate and elder mediation is challenging and requires specialized tools and processes. ■

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# Decision confirms trend to endorse ADR mechanisms

## Franchise

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## Lower court

Justice Helen MacLeod refused to stay the action in favour of arbitration, and granted the plaintiff summary judgment (rescinding the franchise agreement as the franchisee asked). According to Justice MacLeod, the franchisor could not rely on the arbitration clause because the Franchise Act requires that alternative dispute resolution mechanisms be described in detail in the disclosure document. Since the franchisor provided no disclosure document at all, it could not enforce a mandatory arbitration provision.

The defendant franchisor appealed to the Ontario Court of Appeal.

## Appeal court

As the appeal court noted, the issue raised by the appeal is a classic one: does an arbitration

clause become inoperative when the agreement containing that clause is rescinded or terminated? Prior to this case, no Ontario court had considered this issue in the franchising context.



**The court found that the arbitration clause was not invalid simply because the franchise agreement might ultimately be rescinded for want of proper disclosure.**

The Ontario Court of Appeal analyzed the relevant provisions of both the Ontario *Arbitration Act, 1991* (the “Arbitration Act”) and the Franchise Act, as well as the arbitration clause in the franchise agreement itself, in addressing this question. The court ultimately disagreed with Justice MacLeod.

The court noted that s. 7 of the

Arbitration Act requires it to stay all actions in favour of arbitration, subject only to certain exceptions (subs. 7(2) permits the court to refuse a stay in certain circumstances, such as where the

arbitration agreement is “invalid”). The court also noted that s. 17 of the Arbitration Act gives arbitrators the authority to rule on their own jurisdiction and whether an arbitration clause survives termination of the main agreement in which it is found.

The court then made the following observations:

■ The franchisee was not

alleging fraud or that the franchise agreement was void from the very beginning, and therefore the franchise agreement was not “invalid”;

■ The Franchise Act rescission remedy would not, if granted, make the franchise agreement “invalid” from the very beginning;

■ Nothing in the Franchise Act suggested that an arbitration clause in a franchise agreement could not survive rescission of the rest of the agreement; and,

■ The Franchise Act does not limit or restrict the right of parties to agree to resolve disputes by arbitration (instead of in court).

Accordingly, the court concluded that Justice MacLeod erred in law by failing to stay the action.

The court found that the arbitration clause was not invalid simply because the franchise agreement might ultimately be rescinded for want of proper dis-

closure. The court therefore stayed the action in favour of arbitration. According to the appeal court, arbitration is the proper forum for determining both the limits of the arbitrator’s jurisdiction and the merits of the franchisee’s claim for rescission.

MDG stands for the proposition that the normal rules regarding arbitration clauses apply, even in disputes between parties under the Franchise Act. The decision also confirms a continuing judicial trend to endorse the use of alternate dispute resolution mechanisms. ■

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