

## **"Estate disputes ideal for mediation"**

By Deborah Lynn Zutter

Mediation is a natural for estate conflicts and misunderstandings that are often multi-generational and emotionally charged.

Whether a dispute arises from the intestate death of Uncle George; the unequal division of dad's controlling shares in the family corporation among Sylvie, Armand and Michel; or the dependant adult's application following Grandma Sabina's stroke by grandmother's neighbour, Mobina, mediation is a dispute resolution option many counsel are using.

"Even though estate disputes are caught by the mandatory mediation provisions in Saskatchewan's Queen's Bench Act, many estate mediations are done following counsel referrals," said Ken Acton, the Director of Mediation Services for Saskatchewan Justice.

Mediation of estate conflicts in the majority of Canadian jurisdictions remains voluntary.

Clients frequently resist initial suggestions by counsel to resolve their dispute at mediation. They may be invested in the litigation and concerned about directing (limited) resources towards less-familiar dispute resolution processes.

There may be fear over being in the same room with one or more of the other parties.

Patient review by counsel of the cost of time, delay and the risk of legal costs of participating in other dispute resolution options assists clients in weighing the benefits of mediation, particularly when they are assured that it is possible to leave the mediation if it turns out to not be productive.

Similarly, when clients understand that should they pursue litigation, they will encounter the person they are uncomfortable facing at discovery and at the trial, their resistance to mediation is reduced.

Even when the concept of mediation is not resisted, the reality of parties who live busy lives in wide-flung parts of the country creates challenges in achieving participation in a mediation by all the relevant parties. Fortunately, the flexibility of mediation allows for such variations as teleconferencing, creative scheduling of meetings, or separate meetings (caucuses) between the mediator and each party.

"The two most important aspects of a successful estate mediation are the preparation of the client and legal counsel's imaginative approach," commented Lynn Waterman, Vancouver estate litigator.

Client preparation includes describing both the mediation process and the room itself, assuring the client that neither the mediator nor counsel will permit abusive behaviors during the mediation, as well as stressing to the client that there is a continuing choice to leave the mediation room for a short break or permanently, or to continue the mediation on the basis of the parties remaining in separate rooms while the mediator moves between rooms.

In addition to procedural preparation, clients benefit from the substantive analysis of their dispute in advance of the mediation.

What are the risks at the mediation? What are the client's priorities? What can the client live with? What can the client live without? What are possible outcomes and how do these outcomes compare with the client's desires?

It is hard work to create imaginative resolutions. A thorough knowledge of the estate assets is necessary together with knowledge of other, related assets.

Bottom-line thinking must be supplanted by enthusiasm for crafting innovative solutions. Be open to opportunities to trade non-estate assets among the parties as part of the ultimate estate dispute resolution.

As the mediation moves towards resolution and proposals are put forward, said Vancouver estate litigation counsel Jim Carphin, "it is important not to make any decisions in the mediation session with the other parties. Always meet privately with your client."

There are some aspects of mediated resolutions to estate disputes that bear special mention.

"The difficult task of reaching agreement of who to trust with the management of the person and/or the estate of an anticipated or dependent adult is further complicated by the intermediate nature of the task.

"Mediated agreements in these disputes ought to include dispute resolution clauses so that situations that arise during the remaining lifetime if the incapacitated adult can be addressed collaboratively," suggested Edmonton estate mediator Tom Carter.

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