

MEDIATION -- THE BETTER WAY IN ESTATE DISPUTES

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Why Mediation

In the estates area mediation is an attractive alternative to litigation for many reasons. Mediation is less costly, and faster. Estates not only have legal issues that need to be resolved but also emotional issues that need to be addressed. Estate matters are fraught with loss, sibling rivalry, feelings of anger, jealousy and greed.

Where parties are often family members, mediation can provide the first step in improving the lines of communication between the disputants. Litigation is more likely to increase the acrimony between the parties.

While litigation is a public process, mediation allows the parties to keep sensitive disputes private.

In litigation judges impose decisions upon the parties. Mediation provides a forum in which parties actively participate in finding a creative solution.

Mediation Process

Right Based vs Interest Based

Although mediation can take many forms, there are basically two styles. One, is evaluative, sometimes referred as “right-based” mediation, which generally focuses on the disputants’ legal rights. The other is facilitative mediation, sometimes referred to as “interest-based” mediation, which focuses on the disputants’ underlying interests and goals.

Evaluative mediators rely on their expertise and experience to assess situations and reach conclusions about the relative merits of the arguments that are being presented to them. These mediators are often retired judges, politicians, senior lawyers, or accountants, who have a lot of experience in a particular field.

Facilitative mediators attempt to determine why the parties take the positions that they do and encourage the parties to generate options that satisfy their interests. The mediator’s perception of what is right and what is fair will not play a major part in the process; rather the mediator focuses the parties on objective criteria and assists them in choosing from among possible options for resolution. Substantive expertise is not a must for a facilitative mediator but it can be of assistance in generating creative options to resolve disputes.

In estate mediation, either evaluative or facilitative mediation can be used. Counsel will have to determine the level of expertise required to help resolve the matter as well as clearly evaluate what their client wants to resolve. A technical estate dispute such as the interpretation of a trust or will provision may require the expertise of a retired judge, or an estates litigator to engage in right-based mediation. A highly emotional estate dispute such as guardianship or support claims may require a more interest-based mediation to resolve the dispute. However, having a facilitative mediator with substantive expertise in the area of estate disputes is of assistance in the event that the process needs to evolve from a facilitative mediation to an evaluative mediation to deal with specific legal issues.

Mandatory Mediation

In Ontario, there is mandatory mediation for estates matters in Toronto, Ottawa and the County of Essex, under Rule 75.1 of the *Rules of Civil Procedure*.

Under Rule 75.1, proceedings relating to estates, trusts and substitute decisions are directed to mediation in the absence of a court ordered exemption. Within 30 days after the last day for serving a notice of appearance, applicants must bring a motion for directions with respect to the particulars of the mediation, including who is to attend, how the costs of mediation will be allocated and what the issues are to be mediated. Thirty days after that, the parties must select a mediator. At least 7 days before mediation, parties must provide the mediator with a statement of issues.

In jurisdictions where it is not mandatory, mediation can be requested through an Application to Court for an Order giving Directions. The Court will often grant such an Order where the estate is not large and a quick and cost-efficient means to settle the dispute is required.

Types of Estate Issues Mediated

The types of issues mediated in the area of estates are the following: will and estate challenges; dependant support claims; contested passings of account; power of attorney litigation; trust disputes, guardianships for property or for personal care; elder law issues and elder abuse; capacity proceedings; trustee and fiduciary litigation; and the tax considerations and consequences arising in the estate. All of these issues benefit from a mediated resolution.

What can Counsel do?

Prepare the Client

One of the most important aspects of successful estate mediation is the preparation of the client. This includes procedural preparation, such as, describing the mediation process and assuring the client that neither the mediator nor counsel will permit abusive behavior during the mediation.

In addition to procedural preparation, clients benefit from a substantive analysis of their disputes in advance of the mediation. This helps the client understand what legal issues need to be resolved. Sometimes clients are so caught up in the emotional disputes that they lose sight of the legal issues. Therefore, it is important that counsel knows how to manage client expectations. Counsel in most estate disputes will need to emphasize the need for patience and understanding.

Be Prepared

It is important that counsel be prepared. This includes having a thorough knowledge of the estate assets, and the law. It also includes participating in the development of creative resolutions. Knowing what your client wants and trying to come up with creative ways to achieve it is more likely to result in a successful mediation. In some cases, clients are looking for something as simple as an apology.

Prepare the Mediator

It is up to counsel to ensure that the mediator is also well prepared before the mediation. This includes the right type of disclosure. For example, in a will challenge, counsel should produce the solicitor's records. If the issue is a guardianship application, medical records of the incapacitated individual need to be ready for disclosure. In other words, you need meaningful disclosure for meaningful mediation.

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The authors wish to acknowledge and thank the contribution of Jag Gandhi in writing this article.