A 40-Year Battle Over a Forest Hill Estate: Would Med-Arb Have Been Better?

Howard S. Black

T: (416) 369-4332
E: hblack@mindengross.com

In a March 2013 decision of the Ontario Superior Court of Justice, a judge has put an end (or has he?) to over 40 years of litigation in which more than 30 legal proceedings were commenced. The case involved the estate of the late Edward Assaf who died in 1971. In a nutshell, the bulk of the substantial estate (comprising, among other things, a valuable home in Forest Hill) was left to a daughter and grandson of the deceased, with only small amounts being left to the son and widow. The son was not pleased!

According to one judge, the son's many battles have been "motivated by a belief that a terrible injustice had been done by his father to his mother, who he felt had been abused in life and cruelly treated in the will."

Excerpts from only some of the 30-plus judicial rulings made over the years included the following:

> "…[t]he Assaf estate has been the subject of more litigation than perhaps any other in Ontario history."
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> "The relief sought by William Assaf in this branch of the litigation over his father's assets was described by Garrett J. as 'entirely without merit, completely without merit and absolutely without merit'."
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> "…egregious conduct of the worst kind…"
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> "…figures in a classical tragedy, bent upon destroying that which surrounds them and especially their monetary inheritance."

In this latest judicial saga, the judge dismissed the action. In addition, an Order was made declaring the son to be a "vexatious litigant", requiring the son to first obtain a judge's approval prior to commencing any further claims in the future.

Subject to the possibility of a successful appeal, this particular legal drama will have come to an end. But did it need to progress as far as it did?

While mediation (one of the most familiar and commonly-utilized forms of alternative dispute resolution [ADR]) is mandated in various jurisdictions within Ontario in which estates proceedings are commenced, it does not always (although very often it does) result in an end to the dispute. The mediator, who is a neutral, independent third party who helps the litigants facilitate a resolution of their dispute, does not decide anything and, therefore, in the end, it is up to the litigants as to whether they will arrive at a settlement. And in the case of a "vexatious litigant", that result is probably unlikely.

Arbitration, another form of ADR, is a process in which a neutral, independent third party, much like a mediator, is asked to make a final ruling concerning the dispute, which may either be binding or non-binding on the parties, depending upon their joint wishes at the outset.

In studying for my Masters of Laws degree in ADR, we learned about a concept called “Med-Arb”, which means nothing more than mediation possibly leading to arbitration. To the best of my knowledge, med-arb had never been used in estates disputes of which I was aware until I had occasion to propose the concept to opposing counsel in a matter in which my client and her siblings (some of whom were unrepresented) were suing a professional estate trustee who had been administering their mother’s estate.

Due to the self-representation of some of the parties, a history of tense relationships among some of the siblings, prior judicial proceedings involving the estate, changes of legal counsel along the way, and other reasons, counsel representing the professional estate trustee and I were very pessimistic about the possibility of mediation resulting in a resolution of the dispute. And yet, we knew that, without bringing some finality to the matter, the litigation would continue indefinitely.

We therefore agreed on proposing med-arb, and brought a motion to the Court, on notice to all parties, seeking an Order of the Court that would provide for med-arb to be scheduled, with any arbitration order to be final and binding on all parties. The Order was granted. We were fortunate in retaining one individual who agreed to serve as both mediator and, if necessary, as arbitrator to make a final and binding decision.

We scheduled the “proceeding” for two days, with mediation to take place on Day One, allowing the parties to come to a consensual agreement among them realizing that, if they did not, they would return on Day Two for the arbitration “hearing”.

As anticipated, the mediation did not result in a resolution of the dispute and, so, the parties returned on Day Two. Submissions were made, the arbitrator reserved his decision, and ultimately, the decision of the arbitrator was released which, in my view, represented a very fair and balanced decision on the merits of the case. More important than anything, the litigation was over!

If med-arb had been considered in the Assaf Estate case, perhaps more than 40 years, more than 30 judicial proceedings, and enormous legal costs might have been avoided.