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ADR in estates matters

Lawyers pushing for mandatory mediation

BY MICHAEL MCKIERNAN

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Mandatory mediation for estate and trusts matters should apply across Ontario, say some mediators who practise in the field.

The mandatory mediation program began in 1999 as a pilot in Toronto and Ottawa before expanding to Windsor, Ont., in 2002. But no further jurisdictions have come on board since then, and Toronto lawyer Kimberly Whaley, principal at Whaley Estate Litigation, says it's time for that to change.

"I'd love to see it expanded throughout Ontario," she says. "It's as if someone dropped the ball at some point and nobody's followed up to expand it."

Whaley accepts retainers from all over the province and says she often has trouble convincing judges to order mediation in areas not covered by the mandatory program.

Gaylanne Phelan of the Estate Mediation Group in Toronto says the failure to extend the program is "unfortunate." The matter has previously been part of a lobbying push from the Ontario Bar Association's alternative dispute resolution section to move mandatory mediation beyond the three pilot sites.

"We've made efforts over the years, but there doesn't appear to be the will at the government level to move forward with it," says Phelan.

Tracey Niekarz, a partner at Thunder Bay, Ont., firm Busset & Partners LLP, offers estate mediation as part of her practice but says demand for the service is limited. She believes clients could benefit from mediation in estates matters but has detected resistance in the local bar to making it mandatory.

"One of the primary concerns is that it would add a whole other layer to the cost for the client because you'll have lawyers participating in the mediation," she says.

"In places like Thunder Bay, where we have a relatively small bar compared to larger centres, a lot of lawyers would try to resolve things before court, so there's also a feeling that they pretty well do an informal type of mediation anyway."

Howard Black, who chairs the estates group at Minden Gross LLP in Toronto, would also like to see mandatory mediation outside the three cities. He says the emotional nature of many estates matters makes the area a good fit for a less conventional method of resolution.

"The disputes might raise some legal issues for

'Mediation stops the bleeding, so to speak,' says Kimberly Whaley



determination, but beneath the surface, the vast majority of them have at their core unresolved interpersonal issues," he says.

"Mediation allows the parties to that kind of dispute to do things and communicate in a way that they wouldn't be able to do in the court system."

One old case involving two siblings fighting over their parents' wills highlighted to Black how long-standing the real issues can be in estates disputes. Over the phone, one of the brothers told Black he felt as though his sibling was taking advantage of him just as he always had.

"He's been doing this ever since I was six years old when had me in a headlock and wouldn't let me go," says Black in quoting one of the brothers.

"In the judicial process, with the formal court culture, you're not going to get an opportunity to share that kind of experience," Black adds. "The judge is not interested being asked to listen to, be sensitive to, and can actually assist you in helping the parties resolve the dispute."

Phelan says mediation gives clients a chance to feel as though they had their day in court at an early stage of the proceedings without all of the hassle of getting a case to trial. She encourages parties to open the mediation by laying out their positions in a sometimes-volatile general session.

"It's an opportunity to sit down and express what is concerning them in an open and controlled forum where a therapist who has allegedly wronged them is there to face them," she says.

"I think they desperately need to tell their side of the

story in order to move on to the negotiation part."

According to Phelan, emotions inevitably run high at the outset of an estates dispute because the matter often begins with the death of a family member.

"People are often under terrible stress when a parent passes away," she says. "They're not well-equipped to deal with the stress of the moment. To start litigation on the heels of that throws the family into chaos and escalates the problems to a whole different level. Litigation is the most disastrous process to use in a family context because it can feel like a declaration of war when someone receives a statement of claim."

Phelan says she'd like to see Ontario follow British Columbia's example and introduce a new way to start court proceedings with a notice to mediate in order to minimize the explosive impact a statement of claim can have.

"It wouldn't have the same devastating impact on family members. As soon as you get a statement of claim with all the allegations in there, that's the end of the family dynamic for all practical purposes."

She notes the change could also make it easier for unrepresented parties to take advantage of mediation.

"It would be an opportunity for unrepresented family members to at least get the process started without retaining a lawyer," says Phelan.

"I get contacted frequently by unrepresented parties who would like to move their cases into mediation, but it seems to be difficult for individuals to get their other family members into the mediation room without lawyers who know exactly how to make it happen."

Richard Worsfold of Basman Smith LLP in Toronto says the high success rate of mediation in estates matters means clients can actually save a lot of money compared to taking a dispute all the way to trial.

"I'm a firm believer that everyone preparing and sitting for a day in mediation is a far better resolution than a week or more in court with all of the expense that brings, where you've got a third party you can't control — a judge — imposing a solution which maybe nobody is happy with," he says.

Whaley says the cost-control aspect of mediation is particularly important for will challenges in which there's a risk that litigation costs could ultimately come out of the estate depending on whether or not the matter arises from the fault of the testator.

"You may have many lawyers at the table representing many different beneficiaries, so it could deplete the estate quite quickly," she says. "Mediation stops the bleeding, so to speak. Everyone has a vested interest in the outcome."

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