

Estate mediation helps to prevent family warfare

THE LAWYERS WEEKLY
November 10, 2000
WILLS, ESTATES AND CHARITIES

By Eric Atkins
Toronto

Mediating a dispute over an inheritance can save more than time in a courtroom - it can save a family.

The less-confrontational process can often resolve estate matters without forever dividing the beneficiaries, said Malcolm Archibald, chairman of the subcommittee that drafted rule 75.1, which requires that all estates and trust matters in Toronto and Ottawa be mediated.

“Most people you talk to feel estates is an area where mediation is just a natural,” he said. “People have so many agendas and background and family fights that if you can address the issues in the non-interest-based way that mediation works, then you may help save a family from destroying itself. Mediation really is highly desirable in estate matters.”

The rule came into effect 13 months ago, several months after a similar rule, 24.1, was enacted to require all non-family civil suits go to mediation in Toronto and Ottawa.

“The procedures in estate matters are different in many cases from the procedures in many kinds of litigation,” he said.

Archibald said he hopes rule 75.1 will be extended past the scheduled ending date of the pilot project - July 2, 2001.

Timelines for estate mediations are more flexible than they are for other civil matters. For instance, the mediation can take place before or after examinations for discovery.

And the mediation is not triggered automatically. The parties who are

contesting the will must go to a judge for a mediation order.

But this had led to mediation being overlooked as an option in some cases, he said, even though it is mandatory.



Gaylanne Phelan

“There have been some motions for direction that just haven’t dealt with mediation,” he said. “That’s a question of education for the judges and education for the profession.”

“In other words, where we should be getting 100 per cent of these motions for directions dealing with mediation, it’s not happening. It’s up to the members of the profession who are bringing the application on and the judges to be aware that they must be dealing with the issue of mediation. It’s mandatory, but if the judges and the lawyers don’t know about it, and they don’t deal with it, it won’t happen.”

“If the judge isn’t on his or her toes to know that it has to be dealt with, the order for directions could be signed with the question of mediation being ignored,” Archibald said.

The decision to extend the rule will be made by the Ministry of the Attorney General and the rules committee, which is made up of members of the bench, bar and government.

The subcommittee is compiling reports filed by mediators to gauge the number and

success of the project. These will be used in determining if the rule should be extended, Archibald said.

But the province does not yet track the number of cases that go to mediation nor the number that are settled in such a manner.

Heather Daley, mediation co-ordinator for Toronto, said parties are not required to report back to her office on the result. Since there is no roster for estate mediators, they are not in contact with the office, she added.

Daley said she knows of a "small number" of cases that have gone to mediation, of which the majority were settled.

"There was a real need for this," said Gaylanne Phelan, a Toronto lawyer who works as a mediator at the Centre for Estate Mediation.

"My own personal feeling is that families are under terrible stress during a parent's terminal illness and around the time of the funeral, and they end up kind of snapping under the stress of it all - particularly because they find out the terms of the will very shortly after the parent has passed away," said Phelan.

As any divorce lawyer will attest, family disputes can be the most bitter. This compounds with the passage of time, during

which warring sides' lawyers typically exchange letters and the factions within the family exchange gossip that heightens the dispute, she said.

Instead, she said, it is far better for a group to sit down in front of a mediator and air their concerns.

"They get things off their chest in a controlled forum," she said.

The province sets the mediator's fees, which cover one hour of preparation time and a session of up to three hours. The bill can range from \$600 for a two-party mediation to \$825 for a session involving five people or more. Unlike in other civil mediations, there is no roster of mediators.

Phelan said most mediations she has worked on have lasted one day, with at least one going for three days. Most settle without going to court, she said.

The most common assets in dispute are a family business, a cottage and personal items - "All of the things that have emotion wrapped up in them."

"I feel very strongly that, our courts being as clogged as they are, we as a profession would be doing very well to come up with solutions for the public that are not adversarial processes," Phelan said.