Estates mediation pilot project extended

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For Law Times

Lawyers in Ontario's estates bar are heaving a collective sigh of relief since the provincial government decided to extend the two-year pilot project in mandatory mediation for estates matters for another three years.

"We are really excited by it," says Mary MacGregor, of Toronto's Dickson MacGregor Appell & Burton. "That may sound a little fatuous but it's true. We are excited because mediation usually gives such a great result in estate cases involving multiparty family disputes."

The pilot project was to end last December.

MacGregor, who works exclusively in the estates area, is also a founding partner of Toronto's Centre for Estate Mediation. She says a dispute over a will can involve as many parties as there are siblings.

"If there are five siblings, there can be five parties with five separate lawyers, which means the case can be pretty complicated. And, of course, litigation can be extremely expensive. If the case goes to trial, the costs just zoom upwards, and there's nothing left to divide up anyway."

Some 80 per cent of estates cases are resolved completely through mediation, and many more are partially resolved.

Gaylanne Phelan, of Toronto's Allen and Phelan, who is also a partner at the centre, says estate mediation has always been outside the regular mandatory mediation programs because estates law is subject to special rules, "and they proceed through the courts in a slightly different fashion."

Gaylanne Phelan

"Mandatory mediation has come into general litigation matters as part of the standard procedures," she says. "I think it is very likely that at the end of this pilot project, estates mediation will also become part of the permanent judicial landscape."

MacGregor says most estate matters start of way of an application rather than a statement claim, "although either way doesn't make a lot of difference.

"But as soon as all the parties have put in all their initial documents, everyone has been served and anyone who is going to reply has put in their responding materials - or once the time for filing responses has passed - then it is up to the applicant or the claimant to get an order for directions for mediation from the courts."

She says the order for directions will: set out the issues to be tried in the mediation; state who will pay for the mediation; appoint the mediator; and often also direct for the production or discovery of documents.

"Sometimes the direction will even order the discovery of an individual who is not a party to the proceedings," adds Phelan.

It is also possible for a party to bring a motion to waive mandatory mediation, "though this is not granted as a matter of course," she says.

Phelan and MacGregor, who each do between 40 and 50 estate mediations a year, are not on the court roster of mediators because there is not a separate roster for estate mediators.

"And so if we were on the list, we could well get selected to mediate another kind of case, and we really are very specialized in what we do," says Phelan.

The most critical, and probably easiest, job for estates mediators, they say, is getting crucial information into all parties' hands.

"Often the people are coming to this type of mediation taking very hard stands on certain legal positions," says MacGregor. "But often the parties don't even know how much they are dealing with, or each party may have very different views on what the estate is worth."

Things do calm down, she says, once everyone knows how large the estate is, what the estate liabilities are, and how much the estate has to pay in taxes.

"The most important thing that we can do as mediators in the first instance is to get everybody to agree on what is the size of this estate, both gross and net," says MacGregor.

"The idea is to go from very, very broad positions and arguments to focusing on what is available, on how large is the pie. Issues start to fall into place a little more quickly once we get that size determined."

Phelan adds that knowing the final tally does not necessarily make all the parties agreeable, "but at least everybody is now singing from the same song sheet."

Among the most contentious issues surrounding estates matters is whether or not the deceased was competent before death to make the will. "Or there may be competing wills, and the allegation that some evil family member unduly influenced the making of the last will," says MacGregor.

Sometimes, adds Phelan, "there are problems when a family member has been acting as attorney under a power of attorney for a lengthy period of time before the parent died. That family member knows how much was in the estate, but sometimes the record keeping has not been great.

"So then there are allegations that the attorney has benefited personally from the parent's estate during the time that they were managing it before the parent died."

Of course, everything is much more complicated when the deceased left behind several families.

Interestingly, under 1841's *Saunders v. Vautier,* "which is still good law, the beneficiaries can do whatever they want with the property being distributed in the will, no matter what the will says, provided they are adults, or the minors are represented by guardians or trustees, and they all agree," she says.

The mediators are most pleased when a family reunites after reaching an agreement. "It doesn't happen too often," says MacGregor. But is has in one or two cases. The parties came in not speaking to one another, and by the end they were actually shaking hands and discussing getting together."