

80 per cent of estates cases solved with mediation

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For lawyers practising in the estates field, almost nothing is more satisfying than seeing their grieving clients satisfied when the cases end. But when estate matters end up in litigation, this rarely happens.

Even more than in family law, says estates lawyer Gaylanne Phelan of Toronto's Allen and Phelan - who is also a founding partner of the Centre for Estate Mediation - completely ruined family relationships are the all-too-frequent result of estates litigation.

That is why she is a big proponent of estates mediation, a process she has dared to call "almost miraculous." The greatest bonus after mediation is watching family members who have been at each other's throats "hug and make up," she says. "This, of course, doesn't always happen, but it is our biggest fantasy."

Some places in Ontario, including Toronto, are currently finishing up a two-year mandatory mediation pilot project in the estates area, but the government has decided to extend the project for another three years - a big relief for the estates bar.

In the pilot, mediation becomes mandatory as soon as an estates application or an action is commenced.

"It has worked really well," says Phelan, who practises exclusively in the estates field. "And the judges are incredibly helpful in promoting this kind of mediation."

According to the Rules of Civil Procedure, as soon as an application is brought on an estates matter, the lawyer is

required to bring an application for directions. When the second application reaches a judge, a direction for mediation is almost immediately ordered.

"What happens more often than not", explains Phelan, "is that the lawyers will say, 'Well it has to go to mandatory mediation anyway, so let's not bother bringing the application in the first place, and just go right into mediation.'"

Skipping the judge stage can cause delays, though. "For example, sometimes the judge will order the production of certain documentary information," says Phelan, "which is extremely helpful."

Indeed, productive estates mediation meetings can only occur when at least some basic information is included. "You want to have a reasonably good idea of the facts that you're dealing with," says Phelan.

"The only mediation that I recall that hasn't been successful, in at least bringing the parties closer together, is those sessions where there has been a lack of information."

In estates litigation, says Phelan, "we see some pretty nasty stuff. Often, it is brother against sister, and sometimes it is parent against child, or parent against children. Very often, if there is a second marriage, you'll have the first family and the second family fighting."



Gaylanne Phelan

One reason estates litigation is so devastating is because the grieving often begins even before the person dies, and it involves unconscious emotions that have been festering for decades.

“Particularly in the brother/sister context, what happens is, the siblings are under a lot of stress when their parents are terminally ill,” Phelan explains. “But this stress may really originate when they were very, very young, for instance because one sister always got the hand-me-downs. For years, though, the sibling rivalry has been controlled by the parent.”

Then, she continues, when the parent becomes ill, the differences of opinion on how the parent is to be treated or where he or she should live are exacerbated, and the tension explodes into all kinds of exaggerated acrimony.

“After the parent dies,” she says, “there are usually more differences of opinion about the funeral. Then, before any disputes have been forgotten, the family gathers about a week later to, for the first time, hear what the will says.”

And too often, the will has been a big secret, and becomes a major disappointment.

“Maybe the siblings had fantasies about what they were going to receive or whether they were going to be the executor,” says Phelan.

“These ideas frequently turn out to be complete misapprehensions about the size of the estate or how it was to be handled. When they find out, they are even more stressed out, and then one of them snaps, and off they go to their separate lawyers. You start sending letters back and forth, which can really escalate the dispute. Formerly close relatives stop talking directly to one another.”

In estates litigation the parties are usually able to get in front of a judge fairly quickly compared to other types of legal

cases, but, inevitably, some issues drag on, even for years.

Mediation, says Phelan, can be arranged quickly, help cut the procedural processes, and get right to the heart of the issues, which are often emotional at their root.

“Mediation has been almost miraculous in how well it works in this area of law,” comments Phelan, who started doing estates mediation about five years ago.

“I would say that probably about 80 per cent of our cases at the centre have settled completely, and probably another five or 10 per cent have probably settled substantially, or the parties have gotten a lot more information than they otherwise could have, and which has allowed them to pursue settlement discussions themselves.”

In fact, she adds, “I can’t really think of more than one or two mediation cases where I would’ve had to say the mediation process really didn’t achieve anything.”

Phelan cites statistics to show that mediation is in almost everyone’s best interest: “About 95 per cent of all cases in general litigation settle, but many of them settle at the 11th hour, when the parties hit the courtroom door right before trial the next day, when you can’t put off settling any longer.”

By this time, the parties have been through discoveries and rounds of negotiations, and so they have nearly perfect information. “But there is a big cost to that,” says Phelan, “years of contentious litigation and hundreds of thousands of dollars.”

Though mediation doesn’t always produce perfect information to start with, the process takes less time and money to reach the same point. “Mediation causes the issues to rise to the top of the agendas of everybody involved - the parties, the lawyers, and even the mediators - at an early point in the proceedings,” she says. “This gives everyone an opportunity to settle.”

Phelan would hate to see estates return to pure litigation.

“Before the pilot project, if there were disputes, the lawyers litigated,” she explains. “We would try to sort things out through negotiations, and certainly the estates bar in Toronto has by and large always been sensitive of the fact that we are dealing with family situations, and has tried very hard to sort things out without going to court.”

But mediation is much more effective than all negotiation efforts put together.

“It’s the getting all the parties and all the lawyers sitting around a table together,” says Phelan, “and knowing that, as is clearly specified in the rules, anything said is confidential and without prejudice.

“People who get a chance to face each other and discuss their problems in a controlled, structured yet open forum can do wonders.”