Mandatory mediation is great for estates

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In his 1853 novel *Bleak House*, Charles Dickens told the tale of a family lawsuit in Chancery Court called *Jarndyce v. Jarndyce.* He described it thus:

> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated, that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of parties have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit… fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out… There are not three Jarndyces left upon the earth, perhaps… but Jarndyce and Jarndyce still drags its dreary length before the Court, perennially hopeless.

When the subject of estate litigation arises, I cannot help but remember *Bleak House* and reflect upon the many families in which a parent's estate has ended up in court. I catch myself wondering whether the justice system which has served us so long and so well in other areas is truly the best forum for dealing with disputes of this nature.

Fancy how delighted Dickens would be to learn of Ontario's recent steps to face this challenge. Effective Sept. 1, 1999, our Rules of Civil Procedure were amended to establish a pilot project in Toronto and Ottawa-Carleton for mandatory mediation of "estates" disputes. This pilot project will run until July 4, 2001.

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Rule 75.1 applies to proceedings commenced on or after Sept. 1 pertaining to virtually all disputes arising from wills, trusts, powers of attorney (both property and personal care), trustee accounting, statutory claims against estates, and other trust, estate and fiduciary matters.

Once a proceeding starts, the applicant brings a motion for directions regarding the conduct of the mediation, and the court sets the "ground rules" at a hearing.

Directions will cover such matters as issues to be mediated, parties to attend the mediation, apportionment of mediation costs, and service and timing.

Presently no separate roster exists for "estates" mediators. The parties may jointly select their own mediator (*e.g.*, a professional with an estates and trusts background), or the mediation co-ordinator for the county will assign a mediator from the general roster.

The person so assigned may have no knowledge of the unique problems of succession-related disputes. Perhaps, with time, an "estates-specific" roster will be developed, though this is not in the cards at the moment.

After selection of the mediator and notification of the mediation date, each party prepares a statement of the factual and legal issues, and sets out his/her position and interests. These are circulated, along with any key documents (such as the will).

The mandatory session is three hours, though the parties may agree to extend it.

It is noteworthy (and essential to the concept of mediation) that all communications at the mediation, and the mediator's notes and records, are deemed to be "without prejudice" settlement discussions.

If the mediation leads to a solution, a settlement agreement is prepared. Otherwise, the litigation proceeds.

Will mediation potentially spell an end to the "Jarndyce and Jarndyce" risk? What makes families "fall apart" in estate situations, and can mediation contain the damage?

Consider the stress a family experiences during a parent's terminal illness - the differences of opinion that may arise regarding health care, living arrangements, medical treatment and the like. Relationships disintegrate without the "common denominator" of the parental influence.

Then, when the grim reaper arrives, before the individuals can come to terms with all the upheaval, let alone their grief, the will is read and the financial details of the estate disclosed.

If this is the first time someone learns this information, surely it is one of the worst times in his/her life to have to assimilate it. It matters little the assets involved or the "fairness" of the will.

If it does not meet long-held expectations (or fantasies), people "snap". Family members lash out at each other; harsh words are spoken; lawyers are retained; and direct communication evaporates.

Information is now filtered through third parties.

Like the "telephone game", it seldom reaches the recipient in the language or with the intent of the sender. Financial "reality" is exacerbated by legal bills, and the full-blown adversarial process kicks into high gear!

If the legal process drags on, statements made under extreme stress are allowed to fester indefinitely. Any hope of salvaging the family relationships dwindles with time.

A great benefit of mediation is that it occurs early in the process. A neutral facilitator helps the parties work out their own solution rather than having one imposed upon them. People get frustrations "off their chest" in an open (but controlled) forum, or in a private "caucus" with the mediator. (In the latter situation, the mediator may not disclose what is said without the party's express permission.)

Mediation can be "rights-based", where legal positions play a key role in the negotiations, and the mediator is an experienced jurist; "interest-based", where the process seeks to get beneath a party's stated position to the underlying values and concerns that are driving it; or a combination of the two.

In many estate situations, deep-rooted feelings have simmered on the back burner for years and may present a major challenge to the mediator. However, this also expands options for creative solutions not available through conventional legal channels. It is not the mediator's role to give legal advice; thus, counsel's involvement is vital to the process.

Will mandatory mediation of estates disputes leave "Jarndyce and Jarndyce" a

creature of the waning millennium? That remains to be seen.

I should like to think, however, that Dickens would agree with me that we are clearly headed in the right direction.

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