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20 — **Mediation** of Estate Disputes

20.4 — **Mediation** Clauses in Wills

Is there anything that practitioners can do in will drafting to oblige — or at least encourage — parties fighting over a will to turn to **mediation** as a dispute resolution technique? There are a number of approaches which warrant consideration. They range all the way from "motherhood" statements to strongly coercive provisions.

(a) — Precatory Statements

At one end of the range, one might consider personal statements by the testator as to his or her wish that any dispute be resolved through **mediation**. For example:

> It is my wish that, in the event of any dispute over my will, the parties to the dispute make good faith efforts to resolve the dispute through the use of a mediator, as it is my view that, among all forms of dispute resolution, **mediation** offers the greatest prospect for preserving my estate for the beneficiaries and for preserving good relations within my family or repairing those relationships which have been strained as a consequence of the dispute.

Of course, there is nothing more than moral suasion at work here. However, one ought not to discount the extent to which disputants will want to respect the wishes of the testator.

(b) — Forfeiture Clauses

Estates practitioners will be familiar with the clause which seeks to prevent litigation by imposing a penalty on the party who initiates it.[FN1] Are such clauses valid? Certainly, the courts will jealously guard their jurisdiction over legal issues pertaining to wills. Any attempt to deprive the courts entirely of their jurisdiction will be found to be void as against public policy.[FN2]

What about a condition that seeks only partially to restrain a person from resorting to the courts to establish his or her rights in relation to a will? While such a condition is apparently not void on public policy grounds, it may nonetheless be unenforceable if it is characterized as being in the nature of a threat — an "in terrorem" clause. In his book,[FN3] the late Professor Feeney makes two observations regarding "in terrorem" clauses; first, they apply only to bequests of personalty or of mixed realty and personalty; and second, they are normally saved by a gift over, "the presence of the gift over tending to show that the condition was inserted not simply to coerce the original donee but also to fix a possible benefit to another." Professor Feeney also suggests that the gift over may not save a clause from being found to be "in terrorem" if there is other admissible evidence to show that coercion was the main motive.[FN4] Consider the following clause:

> (a) A person (the "Applicant") who may be entitled to any benefit under my Will and who commences litigation in connection with my Will shall, not later than thirty (30) days after serving any document upon the Executors or upon any other person (the "Adverse Party") having an interest adverse to the Applicant, deliver a written notice (the "**Mediation** Notice") to each such person, indicating the Applicant's willingness to participate in **mediation** with a view to resolving the issue or issues in dispute. If the Applicant fails to comply with the foregoing condition and is ultimately denied the relief sought in the court proceedings after all avenues of appeal have been exhausted or after the time limits for instituting such appeals have expired, all benefits to which the Applicant would have been entitled shall be revoked and shall fall into, and form part of, the residue of my estate, to be distributed as if the Applicant had predeceased me without leaving surviving issue.
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> (b) A person (the "Respondent") who may be entitled to any benefit under my Will and who is served with a **Mediation** Notice shall, within thirty (30) days after receipt thereof, deliver to the Applicant a written notice (the "**Mediation** Reply Notice") indicating the Respondent's willingness to participate in the **mediation** proposed by the Applicant. If the Respondent fails to deliver to the Applicant the **Mediation** Reply Notice within the said time period, all benefits to which the Respondent would have been entitled shall be revoked and shall fall into, and form part of, the residue of my estate, to be distributed as if the Respondent had predeceased me without leaving surviving issue.
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> (c) Within sixty (60) days after the Applicant has delivered the last **Mediation** Notice, the Applicant and each person who has delivered a

Mediation Reply Notice shall select one or more persons to act as mediator(s) to the dispute. If there is no agreement on the choice of mediator(s) within that time period, my Executors shall choose the mediator, unless the Executor is an Adverse Party, in which case the Applicant or any Respondent who has delivered a **Mediation** Reply Notice may apply to a judge of the Superior Court of Justice who shall appoint the mediator(s).

(d) The Applicant and each Respondent who has delivered a **Mediation** Reply Notice shall attend a first **mediation** session convened by the mediator(s). If the Applicant fails to attend such **mediation** session, he shall be deemed not to have delivered the **Mediation** Notice as required by paragraph (a) hereof. If a Respondent fails to attend such **mediation** session, he shall be deemed not to have delivered a **Mediation** Reply Notice as required by paragraph (b) hereof.

(e) In respect of any particular issue in dispute, this clause shall not apply if, or shall cease to apply when, the Applicant and each of the Respondents consents in writing to its non-application or cessation of application, as the case may be, to such disputed issue.

This precedent is not without its shortcomings. Should a person who has delivered a **Mediation** Notice or a **Mediation** Reply Notice, as the case may be, but who fails, for a *bona fide* reason, to attend the **mediation** session convened by the mediator, forfeit his or her entitlement? If there is to be relief from forfeiture, who should determine whether that relief is to be granted? What if the persons with an adverse interest to the Applicant are persons represented by the Children's Lawyer?

Perhaps even more critical, this clause does not affect everyone with an interest in litigating over an estate. Consider, for example:

(a) a surviving spouse who is making a Family Law Act equalization claim against the estate (and is thereby forfeiting any entitlement under the will);

(b) a person who is not mentioned in the will at all; or

(c) a person whose challenge to the will is motivated by a wish to gain a greater share of the deceased person's estate by way of the intestate succession rules or by virtue of an earlier will.

(In the case of the person seeking to benefit under an earlier will, there would be no problem if a similar **mediation** clause had been included in the earlier will. Such a **mediation** clause would revoke a person's entitlement if he or she had litigated without first trying **mediation** in respect of any document purporting to be a will and signed on a later date.)

In the writer's view, the courts should have little reason to object, on public policy grounds, to a clause which obliges a party to try **mediation** before litigation, failing which the party would forfeit any entitlement under the will. Rather, one might reasonably expect to see a considerable degree of judicial deference toward such a clause, for two reasons. First, such a clause does not seek to prohibit a person from seeking a judicial remedy; it merely requires that he or she show a willingness to try **mediation** before pushing ahead with the litigation. Second, any process which has the potential for keeping the dispute out of the courts and therefore preserving the estate for the interested parties ought to be encouraged. In any event, would a lawyer be prepared to risk a client's interest in the will by advocating that the clause in question be ignored on the grounds it is unenforceable?

(c) — Damage Clauses

For the faint of heart, perhaps a more moderate approach would appeal: If any person who has a beneficial entitlement under my will institutes legal proceedings seeking relief in connection with my will and refuses to participate in **mediation**, despite being invited to do so by the adverse party or parties, and if such person is denied the relief sought in the court proceedings after all avenues of appeal have been exhausted or after the time limits for instituting such appeals have expired, such person's entitlement shall be reduced by the aggregate of any costs charged against my estate pursuant to a court order made as a result of the legal proceedings.

Or consider the following:

> If any person who has a beneficial entitlement under my will agrees to participate in **mediation** to resolve any dispute and if he or she fails to attend any scheduled **mediation**, such person's entitlement shall be reduced by the costs charged by the mediator as a consequence of the failure of the scheduled **mediation** session to proceed.

(d) — Engaging the Executor

An entirely different approach could be adopted vis-a-vis the executor. After all, an executor having no financial interest in the estate may be well placed

to promote **mediation** where a dispute arises. Why not impose a positive obligation on the executor to encourage the parties to a dispute to attempt **mediation**? For example, the executor could be directed to deliver an appropriate notice to each of the parties to a dispute, encouraging them to consider **mediation**. The notice might be accompanied by material designed to educate the disputants as to the benefits of **mediation**. Consider the following:

> In the event of a dispute arising over my will, I direct my Executors and Trustees (whether or not they themselves are, or may become, adverse parties in the dispute) to deliver to each of the parties to the dispute, within thirty (30) days after notice of the dispute first comes to the attention of my Executors and Trustees, an invitation to the parties to give serious consideration to using **mediation** to resolve the dispute. Such invitation shall be accompanied by a copy of the **mediation** information package which has been stored with my will.

Why should the executor be inclined to follow such a direction? The incentive may lie in the executor's compensation. Where there has been litigation over an estate and the executor has failed to comply with the direction to promote **mediation**, executor's compensation could be fixed at a low figure. In an extreme case, that compensation might be forfeited in its entirety. There is certainly a fair justification for tying this obligation to compensation. The executor's primary duty is owed to the beneficiaries. Why should that duty not extend to encouraging disputing parties to find alternatives to litigation so as not to have the estate wasted on legal fees?

For those who feel that the punishment may not necessarily fit the crime, a further alternative is offered. An executor who stands idly by while an expensive estate dispute ensues is, in the face of such a direction in the Will, guilty of a breach of trust. If the parties cannot agree on the amount of executor's compensation and a court is required to fix the amount, the will might request that, along with all other relevant factors, that breach of trust be taken into account. This would leave the court free to assess the extent, if any, to which that breach warranted a reduction in the executor's compensation from what it would have been, but for that breach of trust. Consider the following:

> I make the following declaration for the benefit of any Court of competent jurisdiction (the "Court") which is called upon to adjudicate the appropriate level of compensation for my Executors and Trustees. In my will, I have imposed upon my Executors and Trustees a positive obligation to encourage the parties to a dispute over my will to try to resolve their dispute by **mediation**. I hereby declare my intention

> that if, during the course of their administration, my Executors and Trustees have, in the judgment of the Court, breached this duty in respect of any particular dispute and if, as a consequence of that dispute, my estate has been reduced by any court order of costs awarded to any of the parties, it is my intention that this breach of duty and the consequent reduction in the size of my estate shall, along with all other factors which the Court considers to be relevant, be taken into account in determining the level of compensation to be awarded to my Executors and Trustees.

FN1. One might refer to it as a "Groucho Marx" clause, the late comedian's will being a notable example of a will containing such a clause. By way of example, here is a clause from *O'Brien's Encyclopedia of Forms* (11th ed.), Division V, Volume 1:

> If any person who may be entitled to any benefit under my Will, or the spouse of that person, commences any litigation in connection with any of the provisions of my Will, other than for any necessary judicial interpretation or for the discretion of the court in the course of administration, all benefits to which that person would have been entitled shall cease and I revoke all such benefits. I direct that these benefits so revoked shall fall into and form part of the residue of my estate to be distributed as if the person had predeceased me and had left no issue surviving me.

FN2. *Re Raven*, [1915] 1 Ch. 673; *Re Bronson*, [1958] O.R. 367 (H.C.J.).

FN3. Thomas G. Feeney and Jim MacKenzie, *The Canadian Law of Wills*, 4th ed. (Toronto: Butterworths, 2000) Vol. 2, pp. 255-256.

FN4. See also the article by Peter Lawson entitled, "The Rule Against 'In Terrorem' Conditions: What is it? Where did it come from? Do we really need it?", in (Dec. 2005) 25 Est. & Tr. J. 71.