TIPS AND TOOLS TO ENHANCE AN ESTATE MEDIATION

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1. INTRODUCTION

Estate litigation involves some of the most emotionally fraught disputes before our courts. Litigating parties, or persons who find themselves in a dispute at the pre-litigation stage, are often grieving the loss of a loved one, or perhaps trying to remedy an abuse by a fiduciary, and opposing parties are often people that are closely related, either through blood or marriage. Unlike corporate/commercial disputes, where there is more likely to be little or no personal connection, estate disputes are often impacted by emotion and, hence, lack of objectivity in decision making ability. Long, often life-time-held, family resentments, feelings of inequality, inadequacy, competition among siblings, prove to be a certain recipe for intractable disputes. The “real” cause or root of the disagreement may not be clear on the surface, or even related to what is plead in the court documents.

Most notably, the person at the heart of the dispute, the testator, is no longer available for clarification or guidance or perhaps may be incapable of meaningful participation. Many times, the disputing parties are only connected through the deceased person and would not otherwise wish to have anything to do with the other.

For these reasons, estate disputes often benefit from mediation, a form of alternative dispute resolution. Mediation is a highly effective, successful, and often less costly (though in itself not inexpensive), alternative or addition to the adversarial litigation process. Estate mediation is “interest-based” as it explores solutions that meet the needs and interests of the parties, rather than “rights-based” litigation which focuses solely on the parties’ rights, or, rules and the law.

There are also many benefits to conducting a mediation *before* the adversarial process begins, including that it is private (as opposed to the public court system), the parties may be able to preserve the relationships, there is a better chance of success in finding a mediated solution, and mediation is less costly. It is easily apparent that a mediated settlement is a better solution in most situations.

Some tips and steps that lawyers can consider to improve the chances of a successful mediation will be considered within.

2. TO MEDIATE OR NOT TO MEDIATE?

Whether or not to mediate is an easy question to answer if you practice in Toronto, Ottawa, or Essex County (Windsor area). Pursuant to Rule 75.1.02(1)(a) of the *Rules of Civil Procedure*, estates disputes are subject to **mandatory mediation** in those areas unless such requirement is waived by the Court. Mandatory mediations are governed by Rule 75.1 which sets out the procedure, attendance, confidentiality, remedy for non-compliance, etc.

Rule 75.1.02 (1)(b) provides that mandatory mediation applies to the following disputes:

- contested applications of passing of accounts;
- formal proof of testamentary instruments;
- objections to issuing a certificate of appointment;
- claims against an estate;
- proceedings under Part V of the *Succession Law Reform Act*;
- proceedings under the *Substitute Decisions Act*;
- proceedings under the *Absentees Act*, the *Charities Accounting Act*,
- the *Estates Act*, the *Trustee Act* or the *Variation of Trusts Act*;
- applications under Rule 14.05(3) whether the matters at issue relate to an estate or trust; and
- proceedings under s.5(2) of the *Family Law Act*.

Courts will only dispense with mandatory mediation where there is a clear reason. In the Toronto decision, *Sheard Estate* 2013 ONSC 7729, the court dismissed a motion for an order dispensing with mandatory mediation in a contested passing of accounts dispute. The beneficiaries of the estate (the grandchildren of the deceased) argued that as their primary complaint was over estate trustee compensation, the “quarrel was not really among family members, and thus is less amenable to mediation”. They also argued that mediation should be dispensed with as the amount in dispute was “small”. Justice Mesbur disagreed, noting that:

> Mediation is helpful in narrowing issues, focusing cases, and, where possible settling them. Mediation is useful in every kind of litigation before our courts. Its efficacy is not limited to "family relationship" disputes… I hardly view [$100,000.00] as a "small" amount.[1]

The grandchildren also argued that settlement had already been explored and failed. Justice Mesbur also rejected this argument:

> Often, parties need an independent, third party to help them see past their respective positions and arrive at a resolution that is in the interests of all, without expending further resources. The parties have not had the benefit of this kind of third party intervention. It is extremely beneficial. It could resolve this case.[2]

Justice Mesbur concluded that there was no reason for her to exercise her discretion to dispense with mediation.

Importantly, it should be noted that as of January 1, 2016, Rule 75.06(3.1) provides the Courts with the power to *order* parties to a mediation, on their own initiative, and without the consent of the parties, even in jurisdictions where the mandatory mediation rules do not apply. Court-ordered mediations are governed under Rule 75.2.

At the time of writing, there was only one reported decision, *Horbaczyyk v Horbacczyk* 2017 ONSC 6666, where a Court ordered mediation pursuant to section 75.06(3.1). In that case the challenger of a Will sought relief directing the parties to participate in mediation, however, he failed to request that relief in his motion for directions. Justice Emery made the following comment: "*Fortunately, Rule 75.06(3.1) provides that the Court may order that a mediation session take place under Rule 75.2, with power to give the necessary directions. Therefore, this Court makes an order that the parties attend a mediation*". The decision does not mention whether the propounder of the Will consented or objected to participating in a mediation.

When not subject to the mandatory mediation rules, or a mediation order, there are several reasons why counsel would choose to mediate. As with most litigation, but ever more so in estate litigation, the "real" dispute may have nothing to do with the legal issues involved. Litigation may, but not always, result in a clear winner and a loser; however, it

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[1] *Sheard Estate*, 2013 ONSC 7729 at paras 40-41.
[2] *Sheard Estate*, 2013 ONSC 7729 at para 43.

may not fix or even address any underlying problems. Often estate disputes arise from a misunderstanding of intent of the opposing party, conflicting expectations, or resistance to change. There is a high success rate in general with mediation in estate disputes as the parties must focus on the real issues involved and are encouraged to find a practical outcome.

Some of the benefits of mediating an estate dispute are:

- Mediation is strictly confidential and subject to settlement privilege;
- Privacy in a digital era where court decisions are more public than ever, given the accessibility of cases through CanLII and information that be posted on the internet and social media;
- As there is no clear winner and loser, everyone involved in a mediated settlement can control the mediation process and take ownership of the outcome, and therefore there is a greater likelihood of compliance;
- Both sides can tell their story and hear the details of the opposing view, which may be therapeutic for all involved;
- A mediation is time limited, as opposed to litigation which can be time consuming and can take years to determine given the intents of the parties adverse in interest and the court scheduling and back-log;
- A mediation will occur in a neutral space with less pressure than a formal courtroom;
- Mediation is less expensive and faster than going to court; and
- Mediation can facilitate communication, listening and understanding.

There is little downside to mediation if you approach it with the right attitude and preparedness. Mediation gives parties a chance to ‘hit the pause button’ and step outside of the litigation which can be traumatic for individuals who may still be bereaving the loss of a loved one.

While most estate disputes will benefit from a mediation, a mediation may not be appropriate in some situations. For example, where there is a history of documented physical violence between the parties, having the parties attend a mediation in person may not be appropriate. If this situation arises in a mandatory mediation jurisdiction, you will need to seek a court order excusing the parties from mediation under Rule 75.1.04.

3. CONSIDER THE TIMING OF THE MEDIATION

The timing of a mediation can be strategic. It is often not worthwhile to conduct a mediation unless and until all of the relevant documents are exchanged, reviewed, or otherwise ordered (by way of a court order for disclosure), and the documents circulated amongst the parties.

For example, Will challenges are heavily document and fact driven. After obtaining the relevant solicitor records, financial records, and medical records, a mediation session can be, and most often is, conducted without having to conduct expensive examinations-for-discovery, or cross-examination.

If it is your intention to proceed in this manner, it might be wise to seek an Order Giving Directions stating specifically that the mediation be conducted prior to examinations-for-discovery or cross-examinations. Insisting that examinations be conducted prior to attending a mediation session is in many circumstances cost prohibitive, and unnecessary, and often more appropriate to other civil litigation matters. Avoid the fight if possible and seek and clarify your Orders so expectations are set from the outset.

4. CHOOSE THE "RIGHT" MEDIATOR

For mandatory mediations, Rule 75.1.07(1) provides that a mediator must be chosen within thirty days of the court providing directions for the mandatory mediation session. The mediator may be chosen or assigned from the list for the county or chosen by consent if not listed (see Rule 75.1.06(1)(a-c).

Court ordered mediations are governed by Rule 75.2. Rule 75.2.04 requires a court-ordered mediation to be conducted by a "person agreed to by the designated parties". If

they have not chosen a mediator within 30 days after the order directing the mediation, the Court shall on motion assign a mediator (with the mediator's prior consent).

It is important to choose the right mediator for the job depending on the issues and personalities. While some believe that anyone can mediate an estate dispute regardless of whether they have mediation training, it is important to consider the complexity of the estate litigation matter and the type of assets and interests involved. Estate litigation is a unique area of the law with unique concerns. The types of issues mediated in the area of estates include: Will, estate and trust challenges; dependant support claims; family law act elections, passing of account applications by fiduciaries including attorney, guardian, trustee and estate trustee; power of attorney litigation; trust variations/interpretations, rectification/variation/interpretation applications, guardianships for property or for personal care; elder law issues and elder abuse; capacity proceedings; end-of-life disputes, trustee and fiduciary litigation; and the tax considerations and consequences arising in the estate. Complex estate disputes often involve family businesses, corporate documents, shareholder agreements, complicated valuations etc. Often the estate dispute will touch on more than one of the above issues. Therefore, it is important to choose a mediator who understands and is knowledgeable about the area of law which predominates the subject matter of the proceeding and reflects the dollar value attributed to the matter.

Choosing a mediator who is a specialist in estates and trust litigation will aid in getting the parties to a mutually agreeable resolution of all of the issues.

Counsel should also consider the "style" of the mediation that the proposed mediator will conduct. The two main styles of mediation are *facilitative* and *evaluative*.

A ***facilitative*** mediator is a neutral person who assists the parties in taking ownership of the issues and solving the dispute amongst themselves. The role of the facilitative mediator is to be in charge of and manage the process and guide the parties to a mutually agreeable resolution by facilitating discussions, asking open questions, communicating settlement offers, and digging into the real issues below the surface. Both parties are involved in the mediation's outcome, unlike a judicial outcome where the decision is

ultimately in the hands of a third party decision maker. In mediation, the clients should have the major influence on the decisions made, rather than the parties' lawyers.

One of the benefits of a facilitative mediation is that it empowers parties and helps parties to take responsibility for their own disputes and resolution. Occasionally however, such an approach may not work and more so, where there is a clear power imbalance between the parties. Facilitative mediations may be more time consuming as they are dedicated to getting to the underlying issues.

An ***evaluative*** mediator will give an evaluation of the strengths of the parties' cases. This type of mediation however will be concerned more with the legal rights of the parties rather than their underlying interests and may not solve the real issues. The mediator will evaluate the parties' legal rights and positions, may push and/or urge the sides to a settlement, develop and/or propose the basis for settlement, predict an outcome in court and educate each party on their strengths and weaknesses. For an evaluative mediation to work, the mediator should have substantive expertise in the subject matter. It is in this way that consideration of a mediator with particular experience will benefit disputing parties in this area. In evaluative mediations careful managing such that there is not an appearance of winner and a loser is important to the process, especially where the mediator concludes that one party has the stronger case. This approach demands clients be prepared for possible negative feedback on their legal position

In many situations there is room for both approaches. For example, parties could have the mediator start out as facilitative but at the end of the day, or when the parties request, provide an opinion on, or evaluate, the legal rights of the parties and the process.

Some examples of types of mediators include, lawyers, retired judges, social workers, elder law experts, etc.

5. SPEND TIME ON THE MEDIATION BRIEF

Use the mediation brief as a tool to assist in settling the matter. Tell your client's story in a compelling and persuasive way. This is your chance to convince the other side why they should settle. Spend time on the mediation brief, don't just cut and paste the

pleadings or notice of application. You want to get the mediator up to speed as much as possible and give them the information that they need to assist in settling the matter. However, there is no need for the mediation brief to be a lengthy document. Briefs can, and should be, clear and concise.

Rule 75.01.08 provides that a mediation brief (statement of issues) is required for all mandatory mediations and must be provided to all parties and the mediator at least seven days before the mediation. Form 75.1C outlines what should be included in a mediation brief (statement of issues) however, it can be modified. Form 75.1C sets out three sections: 1) Factual and Legal Issues in Dispute, 2) Party's Positions and Interests (what the party hopes to achieve) and 3) Attached Documents.

A well-written and fulsome brief will assist in achieving a successful mediation. You may consider adding a short "Overview" that talks about the theory of your case that highlights the main issue(s) that need to be settled, why your client has the better case, the status of the litigation and any outstanding offers to settle.

Consider also including a family tree, explaining the relationships and any estrangements or difficulties that might exist so the mediator will have an insight into the family dynamics.

Try to be careful of your tone. You are trying to settle this matter not ignite the emotions of the parties even more. You must show that your client has a good, strong, case but there is no need for inflammatory language.

For the "Facts" section consider including a chronology chart if several events have occurred and are important to the narrative.

It is important to include all of the relevant and key documents to the issues that need to be settled. See the next section, "Obtain Required Documents & Expert Reports" below for more information.

6. OBTAIN REQUIRED DOCUMENTS & EXPERT REPORTS

Have all documents you need to make informed decisions about the legal issues in dispute and that are required to reach a possible settlement. Consider including the following documents:

- The testamentary documents (wills, codicils)
- A chart or list of the estate assets and liabilities, including a list of jointly held assets and any assets that passed outside of the estate (s.72 assets). Include any account opening documents for joint accounts. Include insurance designations for any insurance policies.
- Relevant marriage contracts or separation agreements.
- In a will challenge scenario, consider including the drafting solicitor’s notes.
- If capacity is an issue, include any medical records, and/or consider obtaining an expert report.
- If there is a family business involved, it may help to have an organizational chart including the business structure, shareholder interests, etc.
- If it is a dispute over a passing of accounts application, obtain and understand the vouchers.
- Obtain real estate valuations in advance if real property at issue.
- If it is a dependant’s support claim, seek an expert report on life style analysis.

These are just some of the relevant documents you should consider including. The documents you choose will depend on the specific legal issues in dispute. Consider including only the “key” documents, there is no need to include the entire file.

7. PREPARE YOUR CLIENT

Mediation will work when all parties are prepared and understand the goal of mediation. A settlement should be reached on full knowledge, and transparency ensuring the best

forum for understanding the issues involved, rather than having one party left in the dark about an aspect of the dispute.

Lawyers should prepare their clients for the process, underscore the importance of confidentiality, explaining that this is a chance to step away from the adversarial process. Clients should be prepared to be respectful of the process, to disengage the anger and entrenched views, depart from using blaming language and adopt neutral language, all with a view to compromise and brokering a deal that can be managed. No person will leave with everything they want, nor will any party be completely satisfied with the process.

Your client should be as prepared for the day of mediation, as for a day of discovery. The day of mediation may be the first time that opposing counsel will meet your clients. A properly prepared and presented client may cause opposing counsel to re-evaluate their case, and sometimes re-evaluate what their clients have been saying about your client.

The client should be familiar with the process of a mediation: What will happen? Why will that happen? When will that happen? etc.

Explain the confidential nature of the mediation. Rule 75.1.11 and Rule 75.2.08 (for court-ordered mediations) state that "All communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions."

Often estate mediations will take a full day. The client should be prepared to spend significant time at the mediation.

Explain the mediation retainer to your client, the costs of the mediator, and how the mediator will be paid.

Sometimes in estate mediation there are non-parties who may have influence over whether a settlement will happen or not (other family members, spouses, etc.). Consider having them attend the mediation with your client. If they cannot attend and your client won't settle without conferring with them first, have them ready by phone, at least.

Explain the negotiation process. Prepare your client for the likelihood that an opening offer from the other side will not be close to what they are expecting. Manage client expectations and advise them up front on what they may realistically expect to achieve (even if they may not want to hear the answer).

Sometimes estate mediations fall apart over what seems to be inexpensive or insignificant items. Often it is the emotional connection to those items that stops the parties from letting go. Consider preparing a list, ahead of time, of the items the client really wants and have a conversation with the client about the realistic expectations of them receiving those items and an accurate value for those items (not what the client *thinks* they must be worth).

Counsel should also prepare themselves for mediation as though they were preparing for trial or for discovery. Since mediation usually occurs early in the litigation, sometimes counsel have not fully researched the nature and extent of the client's case, in the same way that they would have done by discovery or trial.

On the other hand, counsel should be aware of the risk that a mediation may be a 'fishing expedition' for the opposing party, and in that event, will likely not result in a settlement.

8. PREPARE DRAFT MINUTES AND RELEASES

Before the day of mediation, you should have a discussion with your client about the first offer they are prepared to make. Give your client a frank assessment of their case and its strengths and weaknesses. If possible, you should meet with your client in advance of the mediation to have this discussion and to review the mediation briefs.

Prepare ahead of time a shell or skeleton set of Minutes of Settlement and Releases. Having the style of cause, court file number, correct parties, recitals, etc. will save a substantial amount of time for the day of mediation. Since these mediations tend to go into the evening, a shell or skeleton of these documents will assist in making sure all protections are set out in your settlement agreement.

9. PREPARE FOR THE DAY OF MEDIATION

First and foremost, ensure all parties will be in attendance. A mediation will be less likely to succeed if the parties who can consent to settlement are not present.

Consider what non-parties should attend as well, either as support for the parties, or to "approve" the settlement if the actual party will be relying on the non-party's input, opinion, and advice.

Consider the utility of a social worker if it will help with any non-legal issues that need to be mediated as well.

If possible, agree to the format of the mediation ahead of time with other counsel and perhaps in consultation in advance with the mediator. Considerations:

- Should there be a plenary session?
- Should any of the non-parties be present in plenary or not?
- Will counsel be expected to give opening statements? Etc.

The format will often depend on the relationships between the parties, number of parties, and counsel or mediator preferences.

Contact any experts or accountants so they are available via phone if any questions may come up. Structuring a settlement may require tax advice. Do not forget that settlement may have tax consequences and clients need to understand the actual value they are receiving or paying. Having an accountant available to explain this to your clients is helpful. In other words, consider all the tools you need in advance to increase the likelihood of a successful mediation: real estate valuations, business valuations, etc.

If older adults are involved in the mediation and need accessible accommodation, make sure the venue provides what they need and ensure plenty of food and water are available.

10. SETTLEMENT CONSIDERATIONS

You will have prepared your draft or skeleton Minutes of Settlement and Releases. Have them available on your laptop, ready to edit and finalize.

When coming to a settlement, try to calculate the "real" value the client will be receiving or paying. This will include any tax consequences and should also consider any legal fees and expert fees that need to be paid. As counsel, you should be prepared with that information, including up to date dockets and any disbursements owing.

Settlement agreements must be prepared by the parties or their counsel and should not be prepared by, or witnessed by, the mediator. The mediator will remain neutral, is not an advisor and cannot become a witness.

Make note if any of the parties are "under disability" pursuant to Rule 7.01(1) of the *Rules of Civil Procedure* (includes a minor or an individual who is mentally incapable within the meaning of section 6 or 45 of the *Substitute Decisions Act, 1992*). All claims involving persons under a disability require judicial approval of any settlement.

11. POTENTIAL OUTCOME OF SETTLEMENT AND NEXT STEPS

If the Parties are successful in attaining a mediated settlement with Minutes of Settlement drafted and executed, the agreement is a legally binding contract.

Rule 75.1.12 (4) of the *Rules of Civil Procedure*, provides that if the settlement agreement resolves all the issues in dispute, the party with carriage of the mediation shall file a notice to that effect with the court, (a) in the case of an unconditional agreement, within 10 days after the agreement is signed; (b) in the case of a conditional agreement, within 10 days after the condition is satisfied, though in Estate Mediation practically speaking, often times no notice is ever filed.

The benefits of a legally binding contract include the ability to enforce the agreement before a court.

12. CONCLUSION

Obviously, there is no guarantee that an estate dispute will be settled at a mediation. However, if counsel and clients put in the effort and necessary preparation before and during a mediation session, the chances of a successfully mediated outcome increases substantially.

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

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