



# Making the Case for Mediation in Estates Disputes

Capability Webinar to Meritas Members

May 30<sup>th</sup>, 2012

**1-866-640-4044 (Toll – Free - US & Canada)**

**+1 (678) 302-3554 (International Dial-in (Toll))**

**Participant Code: 969427**

Howard S. Black

Partner and Chair, Wills and  
Estates Group

# Housekeeping Items

- All phones are muted
- Dial \*0 at any time for technical support
- Questions may be submitted to the presenter via the Chat feature on the right-hand side of your screen
- Questions will be answered at the end of the presentation





# Introduction

- DEAR ANN:
- My mother passed away 10 years ago. At that time, my three siblings and I inherited her house, which was completely paid for. Mom's death was hard on us, and we couldn't bring ourselves to sell her home, even though we all had our own apartments.
- After Mom died, my younger sister divorced and desperately needed a place to live with her two children. She moved into my mother's empty house and has been there ever since. "Denise" is taking good care of the place, but she has always struggled financially and we never asked her to pay rent or buy the house from the rest of us.
- Here's the problem. My husband and I would like to buy our own house this year and we could really use some extra money. I think it's time to sell Mom's house and split the profits. My other siblings are against this. They say Denise doesn't have the money to buy the house, nor can she afford to pay rent somewhere else. They don't want to throw her out on the street.
- Denise has had everything handed to her since she was a child and everyone treats her as if she were some kind of princess. My husband and I have worked hard to make a life for ourselves. We have never asked for a handout and I don't see why we should be deprived so that life is easier for Denise.
- My siblings say if I insist on selling the house, it will cause irreparable damage among the family members, and they don't want to do it. I certainly don't wish to cause a rift, but I think Denise is taking advantage of all of us, and I resent it. What should I do?
- SIGNED - BEING PATIENT

- DEAR PATIENT:
- If you sell the house, it means Denise will have to move out - and she and her two children will be in a very tough spot. My advice is DON'T DO IT. You would incur the animosity of your entire family and the wounds might never heal.
- I know you are tempted to give your spoiled sister what she deserves, but the satisfaction would not be worth the damage that would surely result. Take the high road and pass up the financial advantage. In the long run, you will be glad you did.

- The “Headlock Theory”
- The root cause of most estate disputes is an unresolved interpersonal issue that may have arisen years earlier
- Most common disputes are among siblings and between stepparents and stepchildren

- Simply being a good “technician” is not sufficient
- Need to address the “non-legal” issues, as well
- These are the issues that will likely give rise to litigation

# Mediation vs. The Judicial Process

- Lawyers have historically been educated and trained in the adversarial process
- By definition, this implies that there is a legal “battle” at stake – goal is to “win” for one’s client
- Legal process may take on a life of its own – parties and lawyers become entrenched; even lawyers begin losing objectivity; generating income for the lawyer
- Is this in the best interests of the client?

# What is Mediation?

- Mediation (one form of alternative dispute resolution) is process in which a neutral third party assists two or more disputants in reaching a voluntary, negotiated settlement of their differences
- Voluntary process (minimum mandatory mediation in Ontario)
- Mediator does not have power to impose an outcome on the parties



# Benefits of Mediation

- Win-win as opposed to win-lose
- Private
- No obligation of full disclosure
- Availability for creative solutions
- Less costly and more efficient dispute resolution process
- Preserves relationships among parties
- Emotionally and psychologically satisfying
- Better meets desires of testator
- Finality at an earlier stage if resolution

# Styles of Mediators

- Facilitative
  - focus on negotiation process
  - do not focus on substantive issues
  - leave decisions to parties
  - maintain role of referee
  - more effective where parties are represented by counsel and there is no power imbalance

- Evaluative
  - express opinions on substantive legal issues
  - steer the decisions
  - allows for intervention
  - introduce concerns for parties to negotiate
  - more “facilitated negotiation” than “mediation”



# Issues to Consider When Mediating

- Timing of mediation within the process
- Time constraints on mediation itself
- Choice of mediator
- Tri-party approach: parties, lawyers, mediator – all have to be “swimming in the same direction”

# Disadvantages of Mediation

- If no settlement, a waste of time and money BUT: what is the definition of “no settlement”?
- Naïve to think that years of unresolved interpersonal conflict is going to be resolved within one or two mediation sessions
- The “unworthy litigant” at mediation – payment of ransom money?
- Evolution of our legal system over the long-term



# Benefits of the Judicial Process

- Finality
- Greater respect for the judge BUT: does this only apply to the “winner”?
- More familiar process to the parties
- Possible availability of judicial appeal

# Disadvantages of the Judicial Process

- Unpredictable result
- Usually more costly to reach an unpredictable result – is this a wise “investment”?
- One party likely dissatisfied with result
- No necessary absence of bias
- No necessary knowledge of the specific legal issues in dispute
- Takes a long time to get to trial
- Possibility of appeal

## “Med-Arb”

- Combination of mediation and arbitration
- Challenges in retaining a third party mediator/arbitrator
- Process not mandated in any jurisdiction – therefore, must be consensual
- Preserves autonomy of parties to reach resolution but, if not, brings finality to the process



# The Family and the Estate Planning Process

- A mother wants her son to assume control of the family business, to the exclusion of the other children and without interference from them while, at the same time, she wishes to provide an equivalent value of her other assets to the other children
- A husband on his deathbed is trying in vain to strike the appropriate balance between providing appropriately in his Will in favour of his wife while fulfilling his parental obligations to his children in their twenties from a prior marriage who are still dependent on his financial support
- Three children and their respective spouses and families struggle over sharing in the occupation of the family cottage that was previously owned by their parents and which was left to the three of them.

- All of the above examples involve interpersonal family relationships, some of which existed since birth while others came into existence at a later point in life
- Need to examine why conflicts become converted into disputes



# The Uniqueness of the Family Structure

- Is blood really thicker than water?
- Most family relationships are “involuntary”
- The family is an entity that generates from its members particularly highly-charged emotions and feelings, whether caused by genetics, environment, or both



# Increasing Varieties of Family Structures

- No longer just the “traditional” family
- Almost 1 out of every 2 individuals is no longer married to his or her original spouse
- Children from a prior marriage are brought into new spousal relationships
- Common law spouses with children
- Single parent families
- Adopted offspring

- “When both adults bring children into the present marriage, there can be a quantum leap as far as complexity is concerned: more children, more grandparents, more opportunities for jealousies and varying alliances.”

Visher, John S. and Visher, Emily B., “Stepfamilies and Stepparenting. In Walsh, Forma (ed.) *Normal Family Processes*. New York. The Guilford Press, 1982, p. 332.

## Effects of Grief and Mourning and the Consequences of Loss

- Feelings of guilt and remorse
- Efforts should be made to try and minimize potential disputes while at least one parent is still living
- Surviving parent, however, may be reluctant to “get in the middle” – vulnerability, etc.

# Fact Situations Giving Rise to Potential Conflict

- Following list is not exhaustive:
  - Mentally or physically challenged child
  - Economic disparity among heirs
  - Divorce and multiple marriages
  - Inherited or other separate property
  - The one “caregiver” child
  - Testator who is either very indecisive or dogmatic
  - Existence of a family business



# Predictors of Potential Disputes

- Unequal division of assets among children
- Continued operation of business where only one child involved
- Disposition of the family cottage
- Non-disclosure of information to family members
- Appointment of estate trustees – e.g. naming eldest child as estate trustee simply because he/she is the eldest



# The Power of the Will

- “ruling from the grave”
- “...the Will can be a weapon as well as an embodiment of love.” (Schneiderman, Gerald. “The Will, the Testator, and the Family, in *Successful Estate Planning Ideas*. Prentice Hall, Inc. 1988, p. 12,431.)
- has potential to reinforce either the positive or negative relationships that were formed during lifetime
- The “ethical Will”

# Concluding Question

- Is settlement preferable to a judicial determination?
- Most lawyers practising in the estates field would answer the question with a definitive “YES”



# Contact

## Howard S. Black

Partner and Chair, Will and Estates Group

T: (416) 369-4332

E: [hblack@mindengross.com](mailto:hblack@mindengross.com)

