Hull & Hull LLP

ENCOURAGING MEDIATION THROUGH CREATIVE WILL DRAFTING

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Clients who wish to discourage estate litigation may be able to use their wills to encourage the mediation of estate disputes. Arguably, the most direct way of achieving this goal would be to include a traditional mediation clause in the client's will. Mediation clauses, typically found in agreements or commercial instruments, require disputes to go through mediation before resort can be made to litigation. While this strategy may be the most direct way to encourage estate mediation, it may not actually be effective – estate mediation is not mandatory everywhere in Ontario,[1] and there is no case law addressing whether a mediation clause can actually be used to compel parties to mediate estate disputes.

Luckily, there are other creative ways to encourage mediation through a will. Inspired by Brian Schnurr and Barry Corbin's discussion of mediation clauses in *Estate Litigation*,[2] this month's Solicitor's Tip considers two types of clauses on point that could be included in a will.

Clause 1: Encouraging Mediation

Simply including a will clause that endorses mediation may be suitable for clients who do not expect their estates to be contested after they are gone. However, those clients ought to be made aware that including a precatory statement in their will, indicating the testator's preference for mediation over litigation, likely would be ineffective to actually prevent litigation. In *Decore v. Decore*, for example, the testator's family engaged in estate litigation for years despite the inclusion of a precatory mediation clause in the testator's will.[3] Precatory words only create a moral obligation typically, and "'do not in most circumstances create binding trusts."[4]

Clause 2: Penalizing a Failure to Mediate Through an *In Terrorem* Clause

For a client who anticipates estate litigation, their will could include an *in terrorem* clause, which would disinherit any beneficiary who:

- chooses to commence litigation over an estate dispute rather than try mediation first;

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[1] In certain jurisdictions in Ontario, it appears that such a will clause would be effective, since mediation is mandatory for estate disputes in Toronto, Ottawa and the County of Essex under Rule 75.1.02(a) of the *Rules of Civil Procedure*, RRO 1990, Reg 194.

[2] Brian A. Schnurr & Barry S. Corbin, "§ 20.4 – Mediation Clauses in Wills" in Brian A. Schnurr, *Estate Litigation*, 2nd ed (Toronto: Thomson Reuters, 1994) (loose-leaf).

[3] 2016 ABQB 246. See para. 1, where the mediation clause in the testator's will is quoted:

> I know that it will be difficult for my children to work together to resolve the distribution of my estate. … I encourage my children to treat each other in a respectful, reasonable, and courteous manner, to try to resolve matters by discussion and to submit any serious disputes to mediation … I cannot impose mediation on my children, because it only works if it is voluntary.

[4] See *Armstrong v. Kotanko*, 2023 BCSC 989 at para 36.

- does not respond to a mediation notice; or
- fails to attend mediation.

If an *in terrorem* clause is included in a client's will, however, counsel must also ensure that all legal requirements applicable to *in terrorem* clauses are satisfied so that the clause is enforceable.[5] Accordingly, the clause ought to include a gift-over, confirming how a beneficiary's gift will be distributed if they do not comply with the *in terrorem* clause, and also must not contravene public policy. If the *in terrorem* clause is unenforceable, beneficiaries will receive their testamentary gift regardless of whether or not they comply with the clause.

Aside from ensuring that an *in terrorem* clause is enforceable, a client may also want the clause to have some flexibility, to ensure that its application is reasonable. For example, the client may not want the clause to apply if a beneficiary has a *bona fide* reason for not responding to a mediation notice, or not attending mediation. If a will is drafted so that there are exceptions to the application of the *in terrorem* clause, the will drafter ought to take care to ensure that those exceptions are not overly vague or uncertain. Not only may a vague will clause warrant an application to the court for directions, potentially defeating the client's intention to mediate estate disputes, but it also is unclear whether conditions placed on the application of an *in terrorem* clause could be void if they are vague or uncertain.[6] Following through with the example noted above, if a client wants to ensure that a beneficiary who has a *bona fide* reason for not responding to a mediation notice or missing mediation is not disinherited, it will be essential for counsel and the client to discuss what criteria, if any, ought to be used to determine whether the beneficiary's reason is legitimate, and who ought to evaluate the legitimacy of that reason.[7] The testator's will also ought to provide direction as to the process for determining whether or not the beneficiary is disinherited; this is another issue that could be addressed through mediation.

A further factor to consider before preparing a will which would disinherit beneficiaries who do not participate in mediation is the power dynamics amongst the beneficiaries of the estate. If there is a history of violence or abuse in the client's family, or a power imbalance amongst the client's beneficiaries, requiring the mediation of estate disputes may not be appropriate.[8]

Conclusion

There are a number of ways that clients may discourage litigation by encouraging mediation through their wills. Suggesting mediation or including an *in terrorem* clause are only two possible options – undoubtedly, there are countless other ways to encourage mediation that also merit exploration.

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[5] To learn more about *in terrorem* clauses, see our Solicitor's Tip from February 2022, "Addressing Estate Litigation Through Will Drafting Part 1: No-Contest Clauses," online: Hull & Hull LLP Knowledge <https://hullandhull.com/app/uploads/2022/02/February-2022-Solicitor_s-Tip.pdf>.

[6] Traditionally, conditions on testamentary gifts that are vague or uncertain are void. See Ian M. Hull & Suzana Popovic-Montag, *Feeney's Canadian Law of Wills*, 4th ed. (Toronto, Ontario: LexisNexis, 2000) (loose-leaf) at § 16.3.

[7] This power could be entrusted to the estate trustee.

[8] See, for example, Kimberly A. Whaley, "§ RA:38. The Essential Guide to Estate Dispute Mediations: Unique Challenges and Creative Solutions for Lawyers" in Anne Armstrong, *Estate Administration: A Solicitor's Reference Manual* (Toronto, Ontario: Thomson Reuters, 1984) (loose-leaf) at 3.2.