WILLS, TESTATOR-BENEFICIARY AGREEMENTS, and ADR

The exponential growth in the value of deceased estates over several decades has seen a significant increase in the volume and value of estate litigation. Not surprisingly, lawyers who speciality is wills and estates have begun to change their practice model from one that is centuries' old. And that model treated testators' wills as strictly confidential, leaving beneficiaries to discover how their parents had provided for them only after they had passed away.

With the growth of ADR and the practice of collaborative law over the past few decades, lawyers are increasingly moving away from that age old model by encouraging parents and children to meet and openly discuss the proposed contents of last wills. Lawyers are placing their hopes on open discussion including review of the reasons for differential treatment that might otherwise cause resentment. That resentment, especially in families with a history of strained relationships, is often the spark that ignites litigation once parents die. In many cases, the roots of sibling rivalry is differential treatment by parents. It is doubtful that an open family discussion can ever make peace between family members who have been at war. The point is that such discussions however well intended could be a minefield.

Lawyers who practise in this field will be in the best position to get to know their clients and to probe any issues of intra-family conflict so as to advise parents before taking final instructions. Unfortunately, best efforts do not eliminate litigation. Although it may seem counterintuitive, there is no need for a *bright line* between will making and the use of testator-family agreements.

If we take the contemporary testator-family discussion model as the starting point, it makes sense that at the same time that parents finalize their wills, both they and their children meet to finalize a written agreement that acknowledges the provisions of the wills, and their promise that any conflicts among them must be resolved by means of med/arb or pure arbitration, using a single mediator/arbitrator. Med/arb is a hybrid process that encourages the parties in conflict to resolve any disagreements by negotiation, with the assistance of a mediator. And failing agreement, that mediator

shifts roles and proceeds to arbitrate the conflict and to decide it, providing an award at the end that determines the issues on a win/lose basis, imposes costs, and awards pre and post judgment interest.

In order for this model to work, wills would require a strongly worded condition that would disentitle the beneficiaries from receiving their interests in the estate if they failed to comply, leaving their interest in the estate to other named beneficiaries. Such a condition would contain a declaration of the absolute importance to the testators of family harmony, and of the need to avoid litigation.

At common law, conditions such as that proposed are called *conditions subsequent.* In plain English they are exit conditions meaning that the children could lose their entitlements should they fail to comply. And they are enforceable provided that they meet two criteria. The first is that they are clearly written, meaning that the language chosen leaves no uncertainty. The second criterion is that there is no public policy reason for courts to refuse enforcement. There is a line of court decisions that holds that a provision in a will forbidding litigation under statute is against public policy. One of the leading Canadian cases is *Bellinger v Nuyten estate 50 E.T.R. (2nd) 1* in which Mr. Justice Hood held that an attempt to prohibit a claim made under a provincial statute is void against public policy. Since so much of our law is governed by statute, it would be difficult to avoid trampling over a related statute were parents to decide on language in their wills forbidding litigation.

Bearing this in mind, the language of such a condition would have to be carefully chosen so as not to deprive the courts of jurisdiction. Instead, the condition would obligate the children to proceed to med/arb or to pure arbitration. Assuming that parents and children make such an agreement, it will be considered an 'arbitration agreement' under provincial law. Section 7 of the Ontario Arbitration Act gives precedence to arbitration over litigation by staying litigation on a motion made by any of the parties involved.

Viewed from a broad, public policy perspective, the use of med/arb or pure arbitration would provide the parties a quicker and less costly means of ending the

dispute resolution process which benefits both the family, and our courts that are overburdened and under resourced.

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