

MY VIEW ON ESTATE MEDIATION

Philip J. Renaud, Q.C. - Estate Mediator

Seek first to understand and then to be understood. Understanding is the key to the process. My role as mediator is to help the parties express their underlying interests in an effective manner, so that all parties understand each other's approach to the issues.

I have acted as a mediator and as a lawyer in estate mediations since the 1990's. My training as a mediator includes completing Levels I and II of mediation training with the Alberta Arbitration and Mediation Society (now the ADR Institute of Alberta). In June 2015, I updated and enhanced my mediation training by completing the Mediating Disputes course at the Program on Negotiation at Harvard Law School Executive Education.

WHAT TYPE OF MEDIATOR IS RIGHT FOR THE PARTIES?

There are many different kinds of mediation. I use the "understanding model" of mediation taught by Harvard Law School. Within this model I can take one of two approaches: Facilitative or Evaluative Mediation. In a facilitative mediation, my role is to smooth the lines of communication between the parties, make sure each side is listening to the other, and generally ensure that the conversation is a productive one. In an evaluative mediation, my role is not only to facilitate the discussion but also to evaluate each side's position. This is where it is important to choose a mediator experienced in estate law, as he or she may be called upon to predict what decision a court might make, and what the rights and costs might be in pursuing the matter through the courts.

THE ROLE OF THE LAW IN MEDIATION

I have been practicing wills and estates law for over 35 years. I bring to the mediation table an extensive knowledge of estate law and the taxation of estates and trusts. I have been assisting clients for many years by creating unique and innovative estate planning solutions which can often be achieved post mortem.

A mediator does not give legal or tax advice, but a mediator is an advocate for clarity. My role is to ensure the parties understand the law and facts. Therefore, lawyers play an important role in the mediation, by explaining the law to all the parties and how they view its impact on the case. As a mediator I am neutral, but I am not neutral about getting the law, the issues and the facts on the table. I encourage the lawyers to talk about the law with each other in the presence of the parties and I work to ensure that all the parties understand how the law impacts both sides of the issue.

THE CAUCUS METHOD OF MEDIATION

I do not use the caucus method of mediation. The typical caucus method begins with a joint session in which all parties and their lawyers participate. The mediator explains the process, hears briefly about the nature of the conflict from each party and their lawyers, and then separates the parties into different rooms and begins a process of shuttling back and forth between them until the mediation is completed. In my opinion, the caucus method is not suitable for estate disputes because the parties are not given the opportunity to listen and better understand the other parties' interests. Everything is translated through the mediator shuffling from room to room.

The understanding model of mediation uses caucusing sparingly. A caucus can be a very useful tool in the right circumstances, for example when it is necessary to help the parties through a difficult issue in the mediation. Here the goal might be to help the parties communicate their underlying interests more effectively, or to help the parties and their lawyer evaluate a settlement offer. All the parties then return to the mediation room and work together towards a solution.

DEVELOPING UNIQUE SOLUTIONS

The final step in the mediation is brainstorming solutions. I believe that better settlements are achieved when all the parties remain at the table and are able to participate in understanding each other's underlying interests. We start with the parties putting solutions on the table, with no evaluation or attribution of the ideas. The lawyers join in, working with the parties to develop solutions. This is where my experience can add unique estate planning solutions. We then work as a team towards reaching an agreement that satisfies the interests of all the parties.

I would be pleased to have a discussion with you about my approach to mediation, and I invite you to review my credentials on our website at www.dcllp.com.