

When to Call a Mentor

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INTRODUCTION

Although it may also be true for other practice areas, it is my experience that Wills and Estates litigation is increasingly undertaken by lawyers with limited experience in a day to day Wills and Estates practice. The result is sometimes unfortunate for the clients involved as a consequence of unnecessary protracted, costly and potentially unsuccessful litigation. The lesson is that there are risks in dabbling in unfamiliar practice areas. Therefore, in the event we find ourselves in that circumstance, it is prudent to seek the assistance and guidance of a mentor who is willing to share their knowledge and experience in the area. In the event Wills and Estates practitioners find it necessary to refer matters to litigation counsel, we should nevertheless continue our involvement in the file to provide our knowledge of the practice area. Regrettably, it is not unusual to see protracted litigation which would either not have arisen, or at least not expanded in scope, had the parties involved enjoyed a more practical working knowledge of the underlying principles of Wills and Estates. Such knowledge often allows counsel to bring perspective to their client's positions and to assist in a resolution of issues short of protracted and expensive litigation. It is the objective of this paper to provide some principles which may assist in minimizing the consequences of litigation which arises when reason, compromise and circumstance otherwise fail to resolve issues in dispute.

At the outset of a contested estate matter, and particularly when litigation becomes inevitable, early discussion among the parties and their counsel can assist in focusing on the real issues; separating them from issues which may have an emotional significance to the parties but ultimately distract from the real questions to be resolved. Counsel who provide a frank assessment to their own clients of their stated position, including the potential risks and expense involved in advancing that position in litigation, have a better opportunity to manage their clients' expectations and, by extension, mitigate those risks and expenses.

However, as most experienced practitioners can attest, not all clients are immediately receptive to candid appraisals of their position early on in a contested matter. Similarly, not all parties and their counsel in contested matters are open to engaging in discussions which serve to focus issues in the early stages of a dispute.

However, the new Alberta Rules of Court¹ (the "Rules") impose obligations regarding early issue identification, and early and ongoing discussion regarding alternatives to litigation.

Rule 1.2(1) states that the purpose of the Rules is to "provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.." Rule 1.2(2) states that:

1.2(2) In particular, these rules are intended to be used

- (a) to identify the real issues in dispute,
- (b) to facilitate the quickest means of resolving a claim at the least expense,
- (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,
- (d) to oblige the parties to communicate honestly, openly and in a timely way, and
- (e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

Rule 1.2(3) imposes obligations on litigants regarding the fulfilment of the purpose of the Rules:

1.2(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

- (a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,
- (b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court ...

CASE MANAGEMENT

One means of facilitating early and ongoing discussion among the parties in a contested matter is the management of an action through case management. The Rules regarding case management fall under Part 4 of the Rules dealing with managing litigation. Pursuant to Rules 4.11 to 4.13, a case management judge may be appointed for an

¹ Alta. Reg. 124/2010