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Adult Guardianship & Trusteeship Fundamentals

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Alternative Dispute Resolution for Guardianship and Trusteeship Matters

Adult Guardianship & Trusteeship Fundamentals

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ALTERNATIVE DISPUTE RESOLUTION FOR GUARDIANSHIP AND TRUSTEESHIP MATTERS

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INTRODUCTION

Interest based negotiation for Guardianship and Trusteeship matters are a viable tool for resolving disputes. This area of law often has parties whose interests align, but for a variety of reasons, cannot agree on how to best address the interest of the Represented Adult (“Adult”) without attending court. By going to court, clients lose the opportunity to develop their own home grown options in resolution of their collective issues in light of their shared interests for the Adult through interest based negotiations.

My paper is intended to assist the practitioner in thinking about the application of finding creative ways to deal with conflict as between the parties, how to respectfully consider the wishes, values and beliefs of the Adult, and considerations to keep in mind when drafting resolution documents. A case review of *D’Silva (Re)*¹ and *KC (Re)*² is intended to highlight the parties lost opportunities in finding a creative solution.

Keep in mind the words of Justice Tillman in *Dank (Re)*:

“...[W]hile courts dislike needless family litigation, it is ultimately up to the courts to ensure the protection of adults whose ability to oversee and protect their own interests including financial interests, is impaired. Such adults are vulnerable and the courts will become involved where necessary (*Re Roy Estate*, 2004 ABQB 624). Apart from that, I cannot see how litigation that divides a family is in the adult’s best interests.”³

And keep in mind the positive duty on counsel as set out in Rule 1.2(3)(a) of the Alberta Rules of Court⁴:and as reiterated by Associate Chief Justice J.D. Rooke in *Meads v. Meads*⁵:

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,

¹ 2018 ABQB 603 (CanLII)

² 2016 ABQB 202 (CanLII)

³ *Dank (Re)*, 2013 ABQB 112

⁴ Alberta Rules of Court, Alta Reg 124/2010

⁵ *Meads v. Meads*, 2012 ABQB 571 at para. 646

A ... duty of lawyers in OPCA litigation is that captured in *Rule 1.2(3)(a)*, that a litigant has an obligation "... to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense ...".

INTEREST BASED MEDIATION AS A TOOL TO FINDING SOLUTIONS

Guardianship and Trusteeship matters usually involve some issues which are based on the parties' thoughts on what is in the best interest of the Adult. IN this area of litigation there are often a collection of "interested based" and "rights based" issues the parties are disputing. The rights based issues focus on some alleged breach of the legislation, order or common law. Though right based issues are important and need to be addressed, the treatment of the legal issues are often mired and further complicated due to the interest based issues the parties have with each other. Their interests, issues and how they feel about the other party often directs the litigation. Interested based negotiation tries to get to a place where parties can communicate. It encourages the parties to find options which focus on the collective and shared interests the parties share which can, in turn, solve some if not all of the rights based issues.

Do No Harm

Mediation is a non-binding process run by a third party mediator who facilitates the meeting but has no decision making authority. The parties are in control of the results and for this reason often the parties will find a creative way to address the parties concerns without the cost, time and commitment of litigation. Mediator are to "do no harm" so there is no issues with respect to prejudicing positions. What mediation helps parties to do is focus on their alternatives and whether their alternatives to a mediated settlement outweigh a creative solution. Mediation is creative and allows for the parties to investigate their common interests and seek durable options that will address their issues. Courts are arbiters of rights whose role is to apply the law. Often courts cannot be creative due to the constraints of time, the parties' positions, and interpretation of the law. Mediation does not abrogate the law; rather it allows the parties to find a solution which works for everyone.

Preparing for the Mediation

Mediators will have the parties sign a commitment letter which sets out time, place and costs. Often the mediator will want to better understand the positions parties are taking so there will be a sharing of filed pleadings with the mediator. Often the mediator will connect with the lawyers prior to the mediation in order to conduct a further interview and to help set the stage for the mediation. Keep