Growing pains

Legal Report: Wills, Trusts, & Estates

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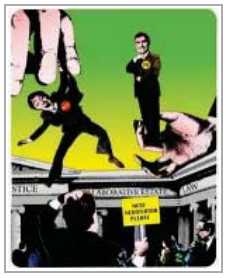
Issue Date: October 2010



The last 10 years have seen a phenomenon sweep through the family law community in the form of collaborative law. The hallmark of that movement has been that lawyers are only retained for the purpose of negotiating a settlement, and if that fails to eventuate, the parties have to find new counsel to litigate the matter. The collaborative approach turns away from aggressive, adversarial behaviour and favours interest-based negotiations. While collaborative family law is growing exponentially and has almost acquired mainstream status, it is very much in its infancy in estate law. Practitioners all over the country extol the concept as an excellent fit for estate matters. Why then are so few estate lawyers actually doing it?

The landscape of collaborative family law is strewn with international, provincial, and local associations, but collaborative estate law is evidenced by the odd case or willing individual here and there. The first formal attempt to promote the practice came in Alberta in 2003 when the Collaborative Estate and Trust Lawyers Society of Alberta (CETL) was incorporated. Bylaws were written, protocols were discussed, and a membership of about 40 lawyers was predicted. Seven years on, CETL is still not active although attempts are being made to kick-start it into life.

Anne de Villars, co-founder and president of CETL, says the movement “hit a hiatus” before the groundwork was complete. Renewed interest in the group stems from a new Wills Act expected in Alberta next spring that will require anyone making an application to the court in an estates dispute to be advised about alternative dispute resolution options. “This is a new requirement for estate lawyers,” says de Villars. “We are in the process of gearing the thing up again.”

The slow progress results from a lack of enthusiasm for collaborative law’s key concept, notes de Villars. “The thing halted itself because of the requirement that if it doesn’t work you have to get off the file.” She has done a couple of estate files in a collaborative way but not formally, and not with an agreement to lose the client if negotiations fail. So is it necessary to endorse the fundamental approach to get results? “In the collaborative law community, there is some discussion whether that clause is required. Maybe it’s not a hallmark in estate law.”

Collaborative Practice Toronto is grappling with the problem. It amended its bylaws in 2007 to permit all disciplines of law to join, but so far no one outside the family law bar has. Co-chairwoman Jill McLeod agrees the barrier may be the signing of the restrictive participation agreement. “There are firms who have represented some families for generations. The firm might lose the client if they start building a relationship with another firm. We’re not going to be rebellious and say we’re getting rid of the disclaimer but we could modify it so the individual lawyer is not profiting from the fact of a change. For instance, estate lawyers might be more comfortable if another lawyer in their firm takes over. Ultimately we want ADR to be one big happy family — that’s a philosophical goal — but the public needs the service so it can’t be all about doctrine. We have to be practical in how we create access to this.” Ian Hull of Hull & Hull LLP in Toronto agrees. “Personally I think the threat of being kicked off the file is

unnecessary. It's an excessive consequence of entering a collaborative agreement."

While the estate bar in Ontario has been talking about collaborative law for 10 years, it is only now emerging as a possible ADR route. On April 7, the newly formed Collaborative Estates Law Working Group held a session to introduce the executive and talk about the concept. A second meeting was planned for September. "Our approach will be community education," says Hull. "We hope to elevate the concept in the mind of the bar and the public so that it will get more traction. It's a completely novel concept and people don't understand it."

Organizer Clare Burns, of WeirFoulds LLP, describes the proposed model as a formal approach varied to suit the peculiarities of estate law. "There are far more parties than in family law matters, which presents challenges. We wouldn't want to see 19 lawyers signed up. That's not appropriate from a proportionality perspective. Also, the estate bar is quite small. There is a real issue as to whether the disqualification should apply to the entire firm as opposed to the individual. Further, where we are dealing with children or people without capacity, contracts can't bind anyone without court approval. In Ontario, the Children's Lawyer or the Public Guardian and Trustee only get authority when proceedings are commenced. We may need to start proceedings in order to get the appointment and then divert it. This is different from family law where the object is never to start proceedings."

The Alberta estate bar has also been troubled by the involvement of the Public Trustee. "The question is what do they do when negotiations fail?" muses de Villars. "They are all in the same firm, so to speak. We have discussed whether they would get an outside lawyer in and we have discussed a protocol to protect information revealed in negotiations if it breaks down."

In Saskatchewan, there is a different approach altogether. "What we're working on is a way to build some mediation or arbitration into the collaborative process for when you're close to settled," explains Brad Hunter, a past president of Collaborative Lawyers of Saskatchewan. "In a hybrid model, we could start with a collaborative type of negotiation. If there's one set of clients with one interest and another set of clients with another interest, we would be able to work with that. If we can at least focus the issues, we have more chances of getting a result without full-scale litigation." The Canadian Bar Association's revised Code of Professional Conduct issued in January 2010 is about to be adopted in Saskatchewan. It includes an ethical obligation for lawyers to consider ADR in every dispute, inform the client if appropriate, and pursue that course if instructed. Most law societies have policies modelled on this provision or have already adopted the code. At present, Hull says few estate lawyers are putting collaborative law on their list of ADR options and further education and training is required.

This has also been recognized in Quebec, where collaborative law fits neatly under the umbrella of the Barreau du Québec's participatory justice movement launched in 2005. Martha Shea, co-president of the Quebec Collaborative Law Group, believes the services a lawyer offers to a client should contain a whole spectrum of negotiation styles including mediation, arbitration, and collaborative law. "That has been adopted as a legal motif. We are trying to line up more training so all lawyers can offer it," says Shea.

Presently, most training is being taken by family lawyers, and it is fair to assume that if more family lawyers did estate law, we'd see more collaborative law. In some places, the estate bar is completely separate and there is very little interaction with family lawyers. Jacinta Gallant, chairwoman of Collaborative Law P.E.I., says in her province the two groups do not move in the same circles. "It may be that estate lawyers haven't lived through mediation and collaboration as family lawyers have."

Sheila Cameron, of Actus Law Droit in Moncton, N.B., says in her part of the country there is lots of cross-over in areas of law so the collaborative law training has affected all areas. "Since we started in 2004, the way we negotiate has changed. Instead of taking harsh positions from the start, we say: 'Let's be open and find the option that suits both parties.' We've transferred skills from collaborative law to all areas of negotiation and the court process, all for the better." Ann Soden, founder of the CBA elder law section, who is based in Quebec, says she does everything short of litigation in a collaborative way, mostly before the fact in the course of planning for the end of life. "It's an excellent way of ensuring that wishes are followed. Witnesses are there in a family meeting and can address the question of competence and work out any misunderstandings. Documents can be rigid and don't explain the subtleties, especially in a complicated estate or where beneficiaries are treated differently."

It appears estate law will evolve its own way of applying the model, probably on a case-by-case basis, and it may well be "practising collaboratively" not "collaborative law" that holds sway in the end, driven by the anticipated increase in estate disputes. "We are seeing more and more disputes, not just when mum or dad die, but when they are still alive and have lost capacity," says de Villars. "That will increase due to sheer demographics as the baby boomers finally start to give in. This is another reason we should try and head it off with alternatives."

Cameron agrees. "I think it will come in over the next 10 years as there are more estate disputes. The reality is that there are a lot of second marriages and people haven't done proper planning. It will be the same as when there was an increase in divorce litigation. Collaborative law will step in and meet the need."