MED-ARB AS AN EFFECTIVE MECHANISM FOR RESOLVING WILLS AND ESTATES DISPUTES

By Marco Abruzzi

Will disputes are among the most emotionally charged legal conflicts. They often arise at a time of grief and loss, making them particularly challenging for families to navigate. In British Columbia, such disputes are governed by the *Wills, Estates and Succession Act* ("WESA"),[1] which allows interested parties, including disinherited spouses and children, to challenge the validity or fairness of a will. Traditional litigation, while a common avenue for resolving these disputes, is often costly, time-consuming and adversarial, further straining already fragile family relationships.

Given these challenges, alternative dispute resolution ("ADR") methods such as mediation and arbitration are increasingly being used to settle estate conflicts more efficiently and amicably. However, mediation alone does not always result in a resolution, and arbitration, though binding, can be too rigid and adversarial for emotionally sensitive family matters. Med-arb, a hybrid approach that integrates the best aspects of mediation and arbitration, provides a more comprehensive and effective solution. By first attempting to mediate a resolution and then, if necessary, proceeding to arbitration for a binding decision, med-arb ensures both flexibility and finality in estate disputes.

This article explores the application of med-arb to wills and estates disputes in British Columbia, examining how it can provide a structured, fair and efficient means of resolving inheritance conflicts. It also considers the advantages of med-arb over traditional litigation and standalone ADR methods, while addressing concerns that may arise in its application.

THE CHALLENGES OF WILL DISPUTES AND TRADITIONAL LITIGATION

Estate disputes frequently arise due to common factors such as allegations of undue influence, claims of lack of testamentary capacity, disagreements over ambiguous or improperly drafted wills and challenges based on unfair distribution under WESA's wills variation provisions. These conflicts are

particularly pronounced in blended families, where multiple spouses, stepchildren or estranged family members may contest a will's provisions.

Litigating such disputes can be highly problematic. First, the adversarial nature of court proceedings often exacerbates family divisions rather than resolving them. Second, litigation is expensive, with legal fees and court costs potentially reducing the value of the estate. Third, court cases can take months or even years to resolve, prolonging uncertainty and stress for beneficiaries. Additionally, litigation is a public process, exposing private family matters to public scrutiny, which many families wish to avoid.

Given these drawbacks, alternative approaches such as ADR offer significant advantages. However, mediation and arbitration each have inherent limitations when used separately, which is where med-arb becomes particularly effective.

MEDIATION AND ARBITRATION: STRENGTHS AND LIMITATIONS

Mediation in Estate Disputes

Mediation is a widely recognized ADR method in estate disputes, as it allows family members to engage in structured negotiations with the assistance of a neutral mediator. Mediation is particularly beneficial in estate disputes for the following reasons:

1. Preserves relationships: Unlike litigation, which often deepens family conflicts, mediation encourages cooperation and mutual understanding.
2. Confidential: Mediation ensures that sensitive family matters remain private rather than becoming part of the public court record.
3. Cost-effective and timely: Mediation is typically faster and less expensive than court litigation.
4. Provides flexible solutions: Mediation allows for creative agreements that courts may not be able to impose, such as redistributing assets or setting up trusts.

Despite these benefits, mediation has significant limitations. Because it is a voluntary process, there is no guarantee that parties will reach a resolution. If one or more parties refuse to compromise, mediation may fail, requiring parties to resort to litigation. Additionally, power imbalances can affect the fairness of the outcome, particularly if one party exerts undue pressure on another.

Arbitration in Estate Disputes

Arbitration is a binding dispute resolution process where a neutral arbitrator reviews evidence and arguments before rendering a final decision. It offers several advantages over litigation, including:

1. Finality: Unlike mediation, arbitration results in a binding decision, eliminating the possibility of prolonged disputes.
2. Efficiency: Arbitration is generally faster than court litigation, allowing for a more timely resolution of estate matters.
3. Confidentiality: Arbitration, like mediation, keeps family disputes private.

However, arbitration also has limitations. It can still be adversarial, as parties must present their arguments much like they would in court. The decision-making power rests entirely with the arbitrator, which removes the opportunity for negotiated settlements that mediation allows. These limitations suggest that neither mediation nor arbitration alone fully addresses the complexities of estate disputes. Med-arb, by combining these methods, offers a more effective approach.

THE MED-ARB PROCESS AND ITS APPLICATION TO WILL DISPUTES

Med-arb is a two-stage dispute resolution process that begins with mediation. If mediation is successful, the parties reach a mutually agreeable resolution. If mediation fails, the same neutral third-party transitions into the role of arbitrator and renders a binding decision.

How Med-Arb Works in Estate Disputes

1. Initial agreement to med-arb: The parties agree in advance to use med-arb, acknowledging that if mediation does not resolve the dispute, arbitration will follow. This provides clarity and ensures all parties understand the process.
2. Mediation phase: The neutral acts as a mediator, facilitating discussions between parties to help them reach a voluntary settlement. Solutions can include redistributing assets, modifying executorship or structuring inheritance in a way that satisfies all parties.
3. Transition to arbitration: If mediation does not result in an agreement, the same neutral shifts to the role of arbitrator, reviewing evidence and issuing a binding decision.
4. Final decision: The arbitrator's ruling is enforceable under the *Arbitration Act*[2] and provides closure for all parties involved.

Advantages of Med-Arb in Estate Disputes

1. Ensures a final resolution: Unlike mediation, which can break down without a binding result, med-arb guarantees that a resolution will be reached.

2. Encourages good faith negotiation: Because parties know arbitration follows if mediation fails, they are more likely to engage seriously in settlement discussions.
3. Reduces costs and time: Med-arb avoids the drawn-out nature of court litigation while combining two dispute resolution mechanisms into a single streamlined process.
4. Minimizes family conflict: The mediation phase allows open discussions, reducing emotional damage that adversarial litigation can cause.
5. Allows for customization: Parties can select an experienced med-arb neutral with estate law expertise, ensuring informed decision-making.

ADDRESSING CONCERNS ABOUT MED-ARB

Despite its effectiveness, med-arb has been subject to criticism, particularly regarding the neutral's dual role as mediator and arbitrator. Critics argue that the mediator, after hearing confidential discussions, may carry biases into the arbitration phase. However, skilled med-arb neutrals are trained to separate these roles and base arbitration decisions solely on presented evidence rather than informal mediation discussions.

Another concern is that parties may feel pressured to settle in mediation, knowing the same neutral will later act as an arbitrator. Procedural safeguards, such as ensuring parties explicitly consent to med-arb and understand its structure, can be implemented to maintain fairness and neutrality.

CONCLUSION

Med-arb presents a compelling solution for resolving will disputes in British Columbia, offering an effective balance between the flexibility of mediation and the finality of arbitration. By ensuring that disputes are resolved efficiently, privately and with minimal damage to family relationships, med-arb is an ideal method for estate conflict resolution.

As estate disputes continue to grow in complexity and cost, med-arb should be considered a primary alternative to litigation. Legal professionals should encourage the inclusion of med-arb clauses in wills and estate plans, ensuring that families have a structured, efficient and amicable method for resolving inheritance conflicts. With continued emphasis on ADR, med-arb is potentially poised to play an essential role in the future of estate dispute resolution in British Columbia.

ENDNOTES

1. SBC 2009, c 13.
2. SBC 2020, c 2.

CONTRIBUTORS

Marco Abbruzi is a full-time mediator and arbitrator and founder of Accordance Dispute Resolution LLP. He resolves business, family, estates and workplace disputes, from multimillion-dollar contested wills to who gets the good office chair (is there a good office chair?!). In addition to having a talent for bringing people together, he might just possibly like quoting arcane case law and is on the lookout for fellow Lord Denning fans.

His Majesty King Charles III is a sitting monarch and King of Canada currently residing in the United Kingdom. A frequent visitor to Canada, he was marshal of the 1977 Calgary Stampede parade, opened the Expo 86 world fair in Vancouver, and enjoyed a ski holiday in Whistler in 1998 with a future King of Canada. His Majesty is also an active farmer, having operated Home Farm from his 900-acre Gloucestershire retreat, Highgrove, since 1985. The King is also known to the bar as the "K" in "K.C."

King Charles III's (and formerly his mother's) counsel and a longtime partner at the Vancouver civil litigation firm Laxton Gibbens, **Robert D. Gibbens, K.C.**, was called to the B.C. bar in 1985. His varied areas of practice have included cases, often with household (well, if lawyers are in the household) names, regarding serious injury and abuse, pensions law and social worker liability.

Eric Kroshus is a senior associate practising employment and labour law at KPMG Law LLP. Making him particularly qualified to write about the subject matter of his short story, Eric has a bachelor's degree in neurobiology from Harvard.

Tom Posyniak is a partner in Fasken's commercial litigation group in Vancouver. He has an active appellate practice and is a co-author of the CLEBC *Civil Appeal Handbook*. One may, in fact … drum roll, please … defer to him on certain appellate-related topics.

Robert K. Smithson graduated from Dalhousie Law in 1994, then began his legal career in 1995 as in-house counsel for the Teamsters union, in Vancouver. He has since worked as a human resources/industrial relations executive in private industry, as an associate with (then) Schiller Coutts Weiler & Gibson in Vancouver, and as an associate and partner at Pushor Mitchell in Kelowna before opening Smithson Employment Law Corporation in 2011. But where does he now stand in relation to Great Big Sea?