guest

YUN LI-REILLY

A Call for Collaborative Law

In estate disputes

Collaborative law is a method of alternative dispute resolution whereby the parties enter into a contract to engage in earnest, interest-based negotiations instead of commencing litigation. The process is accompanied by voluntary disclosure, consent to disqualify counsel if negotiations are unsuccessful, and quite often, third party professionals such as financial experts. This cousin to mediation was conceived in the early 1990s, and is now widely used in North America, Europe, Australia and New Zealand in the context of matrimonial disputes.

WHY COLLABORATIVE LAW WORKS IN MATRIMONIAL DISPUTES

Collaborative law works for divorces for three main reasons. One, quite often the parties are working with one pool of family assets, and are thus collectively incentivised to minimize its depletion through prolonged litigation. Two, the parties are likely to have ongoing ties such as children after the divorce, and are therefore interested in reducing emotional distress and preserving an ongoing relationship. Three, collaborative law allows the discrete resolution of these very private disputes – often encompassing a family's deepest and darkest secrets.

SIMILARITIES BETWEEN FAMILY DISPUTES AND ESTATES DISPUTES

The BC Courts heard a number of disputes regarding wills and estates in 2015. One such dispute was *Bull Estate v. Bull*, 2015 BCSC 136, involving a mother who anticipated that her son would challenge her will, and as such prepared a very private letter – to be opened only if her son contested the will – which included embarrassing details about her son's flirtations with drugs and crime. More often than not, estate litigation involves the same stripes that make collaborative law so appropriate for matrimonial disputes. Preservation of one pool of estate assets. Feuding family (or blended family) members with high emotions. Family secrets and indiscretions.

So why don't we have an active collaborative law practice community for estate disputes in BC? One explanation is that in estate disputes, there is often an existing will to indicate how the deceased wanted to distribute his or her estate. Family members may feel strongly about ensuring that their loved one's testamentary wishes are carried out post-mortem. "I do not want to make a deal with my step-brother because it is not what my mother wanted in her will." However, considering the various layers of potential litigation under *WESA* and the amended *Supreme Court Civil Rules*, a full-blown trial only makes sense financially where estate assets are substantial. Many estate litigants would agree that at the end of the day, an expensive and public trial is not what the deceased wanted. Participation in a collaborative process is always optional, and when used in the appropriate cases, may shift the approach away from positional bargaining and personal attacks, toward interest-based discussions in the best interests of the estate, the beneficiaries and the family. Future will-makers may even indicate a preference for this alternative to litigation in their wills.

Of course, there are kinks that would have to be straightened out. For example, in estate matters where the Public Guardian and Trustee is involved, it is unclear what its participation would look like in a collaborative process. Further, only time will tell whether there is enough demand for collaborative law in the estate context to sustain a group of like-minded practitioners certified to act as collaborative counsel. Nevertheless, it is time for estate lawyers in BC to seriously consider this as an option to offer to clients, especially those interested in preserving estate assets, as well as the relationships and confidences of those involved.

Yun Li-Reilly is a litigation associate at Farris, Vaughan, Wills & Murphy LLP, currently pursuing an LL.M. at Harvard Law School.