

2015

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Recommended Citation

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Osgoode Legal Studies Research Paper Series. 106.
<http://digitalcommons.osgoode.yorku.ca/olsrps/106>

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Osgoode Legal Studies Research Paper No. 25
Vol. 11/ Issue. 05/ (2015)

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Western Journal of Legal Studies, Vol. 4(1), 2014.

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Abstract:

In 1789, Benjamin Franklin famously wrote that nothing in this world is certain “except death and taxes.” Yet, as the baby boomer generation increasingly comprises our senior population, a third near-certainty has emerged: family disputes regarding the estate of a deceased family member. This article reviews the Canadian legislative response to these estate disputes thus far through the introduction of Rule 75.1 of the Ontario Rules of Civil Procedure. It is argued that the introduction of mandatory mediation provides the Estates Bar with an opportunity to review emerging demands on lawyers as well as mediation and bereavement literature in order to discern best practices for estate mediation. This article then compares current professional approaches to bereaved parties with modern bereavement literature. Finally, this article sets out a preliminary framework of best practices for estate mediation, arguing that the “new estates lawyer” must proactively incorporate knowledge of the psychological dynamics of grief into preparation for and participation in estate mediation.

Keywords:

Estate Mediation, Rule 75.1, Ontario Rules of Civil Procedure, Bereavement Theory, Stress, Family, Mediation, Ontario, Canada

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BEYOND THE FIVE STAGES OF GRIEF: BEST PRACTICES FOR ESTATE MEDIATION AND ADVISING THE BEREAVED CLIENT

LOUISE MIMNAGH*

In 1789, Benjamin Franklin famously wrote that nothing in this world is certain “except death and taxes.”¹ Yet, as the baby boomer generation increasingly comprises our senior population, a third near-certainty has emerged: family disputes regarding the estate of a deceased family member. In response to this projected increase in estate disputes, this article argues that in conjunction with the implementation of mandatory estate mediations, the “new estates lawyer”² must proactively incorporate knowledge of the psychological dynamics of grief into their preparation for and participation in estate mediation.

This article will begin with a brief discussion of Canadian demographic trends, wealth transfers, and a review of Ontario’s struggling civil justice system, which cumulatively suggest that we can anticipate an increase in estate disputes in the coming decades. It will then review the legislative response to these estate disputes thus far through the introduction of Rule 75.1 of the Ontario *Rules of Civil Procedure*. This article will argue that the introduction of mandatory mediation provides the Estates Bar with an opportunity to review emerging demands on lawyers as well as mediation and bereavement literature in order to discern best practices for estate mediation. Due to the prevalence of outdated bereavement-based literature circulating within the legal profession, this article will proceed with a comparison between current professional approaches to bereaved parties and modern bereavement literature. Finally, this article will set out a preliminary framework of best practices for estate mediation.

SECTION I: DEMOGRAPHIC AND JUDICIAL CONTEXT

Upon a review of Canadian demographic trends, the nature of testamentary wealth transfers, and Ontario’s struggling civil justice system, current trends suggest an increase in estate disputes in the coming decades. According to the Ontario Ministry of Finance, all member of the baby boomer generation will be sixty-five years of age or

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¹ Justin Kaplan, ed, *Bartlett's Familiar Quotations*, 17th ed (New York: Hachette Book Group, 2002) at 321.

² In reference to the concept of the “New Lawyer” in Julie Macfarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law* (Vancouver: UBC Press, 2008) [Macfarlane, *The New Lawyer*].

older by the year 2031.³ As a result, the ministry projects that the death rate in Ontario will begin to rapidly increase. From 2011 to 2012, the number of deaths per year in Ontario was approximately 96,200.⁴ The ministry anticipates that the annual number of deaths will increase gradually until 2021; however, over the years between 2021 and 2036, annual deaths will reach over 137,000.⁵

Similarly, in terms of anticipated wealth transfers in Canada, although approximately half of adult Canadians do not have a valid will,⁶ 91 per cent of those over the age of 64 have a valid testamentary document.⁷ In the coming years, the testamentary documents of baby boomers will assist in a projected wealth transfer of almost one trillion dollars.⁸ In addition, the children of the baby boomers are openly awaiting this transfer of wealth: according to a 2012 Investors Group survey, 53 per cent of Canadians are expecting an inheritance—and of those who believe they know how much they are getting, 57 per cent anticipate receiving an inheritance in the six-figure range.⁹

Such demographic trends and expectations of an inheritance are just two factors that suggest an increase in estate disputes in the coming decades. Members of the Estate Bar across Canada are already describing an increase in estate disputes.¹⁰ Any increase in estate disputes is incredibly problematic for the Ontario judicial system, which is already struggling to hear and resolve the number of civil actions coming before it. In a speech to the Empire Club of Canada, Chief Justice Beverley McLachlin directly highlighted the delays within the civil justice system by stating that “[parties] cannot wait for years for an answer.”¹¹ In addition, access to justice is severely threatened by the high costs of proceeding to trial: in 2007, a civil trial lasting three days was estimated to cost around \$60,000, a particularly alarming figure considering that the median family income in Canada is approximately \$58,000.¹²

³ Ontario Ministry of Finance, “Ontario Population Projections Update” (19 July 2013), online: Ministry of Finance <<http://www.fin.gov.on.ca>>.

⁴ *Ibid.*

⁵ *Ibid.*

⁶ Canadian Press and Leger Marketing, “Canadians and Death” (2002), online: DocStoc <<http://www.docstoc.com>> at 2.

⁷ *Ibid.* at 4.

⁸ Rob Carrick, “Why you shouldn’t count on an inheritance to bail you out” *The Globe and Mail* (3 October 2012), online: Globe Media <<http://www.theglobeandmail.com>>.

⁹ *Ibid.*

¹⁰ Judy van Rhijn, “Growing Pains” *Canadian Lawyer Magazine* (October 2010), online: Canadian Lawyer Magazine <www.canadianlawyermag.com>.

¹¹ Beverley McLachlin, “The Challenges We Face” (Speech delivered at the Empire Club of Canada, 8 March 2007), online: <www.scc-csc.gc.ca>.

¹² Tracey Tyler, “A 3-day trial likely to cost you \$60,000” *The Toronto Star* (3 March 2007), online: Toronto Star Newsarticles Ltd <www.thestar.com>.

SECTION II: REFORMS, RULE 75.1 AND MANDATORY MEDIATIONS

In light of the struggles the Ontario civil justice system is facing, Ontario Superior Court Justice Donna Haley notes that Ontario has begun “moving purposefully towards the implementation of mandatory mediation as part of its civil litigation rules.”¹³ This has primarily occurred through the introduction of mandatory mediation under Rule 24.1 of the *Rules of Civil Procedure*: “in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes.”¹⁴

However, Rule 24.1.04(2)(a) stipulates that estate disputes do not fall under this general mandatory mediation rule. The Estates Bar resisted the inclusion of estates disputes under Rule 24.1 and voiced concerns about being subsumed under what many viewed as a “one-size-fits all” approach to mediation.¹⁵ Members of the Estates Bar specifically argued that “estate litigation problems are often based on problems surrounding the family” and sought to ensure there would be additional consideration to the emotional elements of these disputes.¹⁶

Lawyer Lisbeth Hollman conceptualizes these family-based dynamics around two classes of parties within an estate dispute: (1) those whom the dispute is about, such as elderly parents facing concerns about their “diminishing capacity” and (2) those with a financial interest in the estate, such as surviving spouses or children applying for dependent support claims.¹⁷ As a result of the prominence of these sensitive family dynamics in estate disputes, Rule 75.1 was developed to address the mandatory mediation of estate matters.¹⁸ However, like Rule 24.1, mandatory estate mediation is only currently required in four regions.¹⁹

SECTION III: EXPANDING ESTATE MEDIATION AND THE “NEW ESTATES LAWYER”

In light of the anticipated implementation of mandatory estate mediation across Ontario, an ideal opportunity has been presented to members of the Estates Bar to assess their ability to transition from a litigation-based practice into a model that explicitly

¹³ Donna Haley, “Ontario’s Mandatory Mediation Rule for Estate Disputes” (2000) 19:2 ETPJ 97 at 97 [Haley].

¹⁴ *Courts of Justice Act*, RRO 1990, Reg 194, s 24.1 [Courts of Justice Act].

¹⁵ *Supra* note 13 at 97.

¹⁶ Lisbeth Hollman, “Mediation and the Incapable Person” (Presentation delivered at the Ontario Bar Association “Mediation is No Mystery: Keep it Simple” Seminar, 22 October 2004), Paul Iacono and M. Gaylanne Phelan, eds, *Mediation is No Mystery: Keep it Simple*, (Toronto: Ontario Bar Association, 2001) at 1.

¹⁷ *Ibid* at 6-9.

¹⁸ Haley, *supra* note 13 at 97.

¹⁹ *Courts of Justice Act*, *supra* note 14 at s 75.1.02(1)(a)(i)-(iv): Toronto; Ottawa-Carleton; Ottawa; Essex County.

emphasizes mediation. Such an assessment may also be of critical importance in terms of career security, particularly in light of emerging conceptions of the “new lawyer” and what is described as the “era of the vanishing trial.”²⁰

For example, in describing the “vanishing trial” phenomenon, Julie Macfarlane has argued that the expense and delay of having a dispute addressed at trial are only two factors that prompt approximately 96 per cent of cases to settle before trial.²¹ In addition, Macfarlane notes overall client dissatisfaction with the process of participating in litigation, and she adds that “people [increasingly] want to be part of the discussion” and actively engaged in the resolution of their disputes.²² Consequently, Macfarlane has noted a progressive shift in proximity between lawyers and clients, whose relationship has transitioned from an arm’s length approach, which is better suited to litigation, to working more closely together in the mediation process.²³

Macfarlane has argued that such changes in client demands and expectations are prompting the emergence of a new lawyer—one that engages in their role as counsel “more deeply and broadly than simply fighting on [their] clients’ behalf.”²⁴ To become a new lawyer, lawyers must ensure that there is no skills gap between the habitual strategies and techniques they embraced in traditional litigation—which is an adversarial process—and the skills needed for working closely with clients, opposing counsel, and opposing parties in mediation.²⁵ Such skills could include intentional listening, collaboration, and creativity as means of achieving consensus—skills once traditionally taught to therapists or social workers.

Law is an increasingly specialized profession, and lawyers within the Estates Bar must strive to secure the realization of Macfarlane’s proposition of the new lawyer. The “new estates lawyer,” who works with sensitive family dynamics in the presence of grief, must also be equipped with a strong grasp of the psychological dynamics of bereavement in order to holistically advise and prepare clients for mediation. Despite the need for the new estates lawyer to develop a legally and psychologically holistic approach to their client, the current bereavement-based literature circulating within the legal profession may actually be leading counsel *away* from actualizing this transition.

²⁰ Macfarlane, *The New Lawyer*, *supra* note 2 at 1, 24.

²¹ Donalee Moulton, “Vanishing trials: Out-of-court settlements on the rise” *Lawyer’s Weekly* (17 October 2008), online: Lawyer’s Weekly <www.lawyersweekly.ca> [Moulton].

²² *Ibid.*

²³ *Supra* note 2 at 11.

²⁴ Moulton, *supra* note 21.

²⁵ Macfarlane, *The New Lawyer*, *supra* note 2 at 18.

SECTION IV: CURRENT PROFESSIONAL APPROACH TO BEREAVED CLIENTS

The implementation and expansion of mandatory estate mediation in Ontario provides the Estates Bar with an ideal opportunity to review the current literature on advising bereaved clients used within the legal community. Grief has long garnered examination in Western culture, and its nature and force was even classified as a cause of death in 1657 England.²⁶ In a modern context, grief is described as a reaction or “a complex syndrome of physical and psychological manifestations”²⁷ that an individual personally experiences after the death of someone significant in their life. It is therefore distinguished from “bereavement,” which specifically describes the state of loss to which the individual is trying to adapt.²⁸

Literature within the Legal Profession regarding Bereaved Clients

The Canadian Bar Association (CBA) has published limited literature addressing the provision of legal counsel to bereaved parties. An article by freelance writer Janice Mucalov discusses the complexities of retaining and advising clients in emotional distress. Mucalov offers classic and widespread advice for working with the bereaved:

Understanding a little psychology can go a long way toward representing these clients more effectively . . . lawyers will find it helpful to understand the Kübler-Ross model of loss and grieving *The Kübler-Ross Five Stages of Grief and Loss* [is] based on psychiatrist Elisabeth Kübler-Ross’s studies of the feelings of terminally ill patients, these five stages of grief apply whenever a person faces a serious loss [emphasis added] . . .²⁹

Mucalov then reiterates these prominent five stages of grief: (1) denial, (2) anger/resentment, (3) bargaining, (4) depression, and (5) acceptance.³⁰

Lawyer Joe Epstein, an award winning mediator and former vice-president of the International Academy of Mediators, highlights his own rephrasing of the Kübler-Ross model when advising lawyers mediating with a bereaved client:

²⁶ Colin Murray Parkes & Holly G Prigerson, *Bereavement: Studies of Grief in Adult Life*, 4th ed (New York: Routledge, 2010) at 15.

²⁷ Margaret S Stroebe, “Bereavement Research: Contemporary Perspectives” in Margaret Stroebe et al, eds, *Handbook of Bereavement Research and Practice: Advances in Theory and Intervention* (Washington: American Psychological Association, 2008) at 5 [Stroebe].

²⁸ J William Worden, *Grief Counseling and Grief Therapy: A Handbook for the Mental Health Practitioner*, 3rd ed (New York: Springer Publishing Company, 2002) at 10 [Worden].

²⁹ Janice Mucalov, “Lawyers: Gatekeepers for Psychological Issues” *Canadian Bar Association*, online: Canadian Bar Association <www.cba.org>.

³⁰ *Ibid.*

If a party has not yet dealt with the grief associated with the loss . . . it may be too early to sit down at the mediation table – the grief may still be too raw. Advocates and mediators need to have some familiarity with the grief process in order to ascertain where parties are in adapting to a profound life change. Is a party so stuck in *anger, remorse, numbness, sadness or denial* that they cannot participate in a rational case assessment? [emphasis added]³¹

Similarly, in the Ohio State Journal on Dispute Resolution, Gary Williams highlighted the Kübler-Ross model as a critical tool for gauging the ability of family members to productively undertake mediation and suggested that mediation may not be helpful until the parties have successfully moved through all five stages of grief:

Scholars assert that a number of factors complicate the grief process, thus making it a slow process. These factors *include denial, anger and eventual acceptance* of the loss. Scholars maintain that prior to accepting a loss in the grieving process, such disputants may lack the psychological state to address financial or other issues during the mediation process . . .

By understanding the grieving process and its effect on parties, the mediator knows that *delaying the mediation until parties have finished grieving* will increase the likelihood of successful mediation [emphasis added].³²

These three articles demonstrate the overall prominence of the Kübler-Ross model within the literature distributed to lawyers working with bereaved clients. However, despite this tendency to conceptualize grief as five stages when evaluating and advising clients, the Kübler-Ross framework has been empirically challenged and resolutely dismissed by grief and bereavement researchers for over thirty years.

Origins of Bereavement Myths in the Professional Literature

The origins of the Kübler-Ross and other “stages of grief” models are typically attributed to psychoanalyst Sigmund Freud. Within his 1917 work entitled “Mourning and Melancholia”, Freud outlined the proposition that grief is a “painful and lengthy struggle”³³ in which the bereaved recounts and reviews his or her memories and

³¹ Joe Epstein & Susan Epstein, “Grief, Anger and Fear in Mediation” (2010) June/July *Trial Talk* at 38 [Epstein].

³² Gary D Williams, “Weighing the Costs and Benefits of Mediating Dispute Planning Issues Before Disputes between Family Members Arise: The scale tips in favour of Mediation” (2000-2001) 16 *Ohio St J Disp Resol* 820 at 844-48.

³³ Paul Rosenblatt, “Grief and Involvement in Wrongful Death Litigation” (Dec 1983) 7:4 *Law and Human Behavior* 351 at 352 [Rosenblatt]; Simon Shimshon Rubin, Ruth Malkinson & Eliezer Witztum, *Working with the Bereaved: Multiple Lenses on Loss and Mourning* (New York: Routledge 2012) at 12 [Rubin].

associations with the deceased in an effort to relinquish the emotions and energy invested in the relationship. This process came to be described as “grief work,” which the bereaved had to actively engage in and complete in order to avoid negative psychological results. By the 1960s, Kübler-Ross incorporated Freud’s work into her own clearly defined theory outlining distinct five stages of grief.³⁴

Modern Bereavement Literature and Resilience Theory

By the 1980s, bereavement studies began to move out of a purely psychoanalytical framework and into rigorous empirical studies. Significantly, these empirical studies noted a lack of correlation between the hypotheses of Freud and the Kübler-Ross model, thus generating a “theoretical vacuum” within bereavement studies.³⁵

George Bonanno of Columbia University has been at the forefront of such empirical studies and efforts to address this theoretical vacuum. Within his groundbreaking studies on bereavement, Bonanno has notably highlighted that:

[O]ne of the most consistent findings is that bereavement is not a one-dimensional experience: it is not the same for everyone and *there do not appear to be specific stages* that everyone must go through. Rather, bereaved people show different patterns or trajectories of grief reactions across time [emphasis added].³⁶

Bonanno’s research posits three “trajectories of grief”: first is a chronic grief reaction in which the individual is utterly overwhelmed and unable to resume his or her normal daily routine for a significant period of time; the second trajectory is a recovery grief reaction, where a more gradual return to normal daily life occurs; and the third trajectory, termed a resilient grief reaction, is the most common, where the individual is also “shocked, [or] even wounded by a loss” but still “hardly seems to miss a beat” when regaining the former equilibrium of his or her daily life.³⁷

By the 1980s, Kübler-Ross’s five stages of grief had taken on a formidable life of its own, as both practitioners and popular culture found clear and discernable stages of grief to be “irresistibly prescriptive.”³⁸ In light of the groundbreaking modern research of Bonanno—and lack of empirical basis for the Kübler-Ross Model—it is critical that the new estates lawyer actively engages with modern bereavement research

³⁴ See Rosenblatt, *ibid*; see Rubin, *ibid* at 13.

³⁵ John Archer, “Theories of Grief: Past, Present, and Future Perspectives” in Stroebe, *supra* note 27 at 57.

³⁶ George Bonanno, *The Other Side of Sadness: What the New Science of Bereavement Tells Us About Life After Loss* (New York: Basic Books, 2009) at 6 [Bonanno, *The Other Side of Sadness*].

³⁷ *Ibid* at 6-8.

³⁸ *Ibid* at 20; Ruth Konigsberg, “New Ways to Think about Grief” *Time Magazine* (29 January 2011), online: Time Magazine <www.time.com> [Konigsberg].

and incorporates such research into the preparation for and participation in estate mediation. This should ensure that accurate and appropriate advice is provided to clients involved in an estate dispute.

REVIEW AND PROPOSAL: ESTATE MEDIATION AND POTENTIAL BEST PRACTISES

As noted above, the literature currently circulating within the legal profession conceptualizes bereavement as a series of stages that the individual must work through—despite the fact that a stages framework has been discredited by modern bereavement researchers such as Bonanno. While an exhaustive review of all considerations pertaining to mediation is not possible in this format, the following portion of this article will compare selected elements from the current literature on mediation and bereavement with the goal of outlining a framework of potential best practices for the new estates lawyer.³⁹

1. Assessing a Client's Suitability for Mediation

Although Rule 75.1 is entitled “Mandatory Mediation,” subsection 75.1.04 allows either party to apply for, or for the court to make an order of, exemption from this rule. In light of the court’s discretion, and in consideration of the client’s holistic best interests, it is important that the new estates lawyer consider whether or not engaging in mediation is beneficial to the bereaved party.

Capacity in the Shadow of Grief

A foundational element of any intake meeting is an assessment of the client’s ability to understand and appreciate the legal advice and information required to provide instruction to counsel. Janice Mucalov outlined the precarious nature of this issue in a bereavement context:

Emotionally distressed clients pose greater risks than non-distressed clients. Because emotions cloud their thinking, you may fail to appreciate the nature of the client’s problems, or they may fail to understand your advice. You’re also at greater risk of being subjected to a professional complaint.⁴⁰

Those interacting with the bereaved in a professional capacity will therefore attempt to gauge how the individual is adapting to the loss and glean insight into his or her mental

³⁹ This discussion is also framed within an assumption that the mediation will be held in joint session and with an audience limited to the clients, their counsel, and a mediator.

⁴⁰ *Supra* note 29.

health. However, as noted above, such assessments of the bereaved are commonly misinformed by the Kübler-Ross model, which fuels a desire to categorize behaviour as “right or wrong . . . proper, fitting, normal, excessive, extreme or abnormal.”⁴¹

An Institute of Medicine report stressed that the “use of the concept of stages [of grieving] could encourage inappropriate expectations in the course of grieving.”⁴² As a result, it is imperative for counsel to “avoid giving the impression that there is a ‘right’ way to grieve.”⁴³ Otherwise, such an impression may subtly or overtly influence a client to alter his or her conduct, and prevent the new estates lawyer from obtaining an accurate assessment of the client’s mental state and capacity to understand or appreciate legal advice.

Identifying a Client Ill-Suited for Mediation

While there is no “right way to grieve,” modern bereavement theory can provide the new estates lawyer with a more appropriate framework for assessing the mental health of a bereaved client, the client’s ability to understand or appreciate legal advice, and his or her potential suitability for mediation. A preliminary framework is outlined below. It highlights which kinds of grief reactions deserve an elevated level of concern or a potential exemption from traditional mediation.

This framework is based on Bonanno’s resilience theory and the five distinct sub-patterns of grief that inform the previously discussed trajectories of grief. These five sub-patterns of grief were assessed at six and eighteen months after the death of a loved one. According to Bonanno’s research, the vast majority of bereaved will be well suited for mediation: 11 per cent of individuals will exhibit a common grief recovery, where initially high levels of depression improve to a low level; 10 per cent will experience depression followed by a more complete improvement; and a significant 46 per cent will experience resilience or stable low-level distress in which little or no depression is reported.⁴⁴ Collectively, this amounts to 67 per cent of the bereaved population and is the basis for Bonanno noting the overall resilience that individuals have to grief.⁴⁵ These resilient individuals also tend to have more financial security, more education, less ongoing stress, better physical health, and a more substantive network of family and friends from whom to obtain emotional support than their less resilient peers.⁴⁶

Bonanno also found that 24 per cent of bereaved individuals struggle significantly for years after their loss: this includes 8 per cent of individuals who will

⁴¹ Rubin, *supra* note 33 at 19.

⁴² Robert S Weiss, “The Nature and Causes of Grief” in Stroebe, *supra* note 27 at 33.

⁴³ Rubin, *supra* note 33 at 20.

⁴⁴ George A Bonanno, Katherin Boerner & Camille B Wortman, “Trajectories of Grieving” in Stroebe, eds, *supra* note 27 at 292 [Bonanno, “Trajectories of Grieving”].

⁴⁵ *Ibid.*

⁴⁶ Bonanno, *The Other Side of Sadness*, *supra* note 36 at 75.

experience chronic depression and 16 per cent who will experience chronic grief.⁴⁷ In terms of assessing the capacity of a client to understand and appreciate legal advice, the new estates lawyer must pay particular attention to this estimated 24 per cent of individuals who experience chronic grief reactions, which are now also referred to as prolonged grief disorder (PGD). The new estates lawyer must be aware of the possibility that mediation may be an unnecessarily negative experience for these individuals and against their best interests.

Prolonged grief disorder is an established psychological category of extreme grief reactions that can typically be diagnosed after a minimum of six months.⁴⁸ It is often characterized by being unable to speak of the deceased without intense and fresh grief; an unwillingness to move material possessions belonging to the deceased; preserving a room or the environment of the deceased; radical changes in lifestyle; self-destructive impulses; and phobias about illness or death.⁴⁹ The proven treatment for those suffering from PGD is called “exposure therapy,” which involves:

[H]aving patients confront those aspects of the event [or critical loss] that they most dread . . . The patient *gradually* relives the traumatic experience in the *safety* of the therapist’s office and with the therapist’s guidance [emphasis added].⁵⁰

However, exposure therapy’s gradual and private discussion of the traumatic loss is grossly different—if not completely in conflict with—the experience of traditional joint-session mediation where an opposing party is present. Arguably, the private and secure space of a therapist’s office is somewhat comparable to the experience of speaking to a neutral third party or mediator in a permanently separate session. As a result, the new estates lawyer with a vulnerable client suffering from PGD should only consider engaging in mediation if separate sessions and a “shuttle” format is available, where the mediator serves as an intermediary between the parties of a dispute, who never interact face to face. In these circumstances, the new estates lawyer should also select a mediator capable of engaging with such sensitive parties, conduct extensive pre-mediation preparation, and encourage professional counselling.

Uncertain Therapeutic Value of Dialogue

In terms of mediation literature, a 2012 publication by authors Kate Aubrey-Johnson and Helen Curtis suggest that mediation can be in a client’s best interest in terms reminiscent of “talk therapy”:

⁴⁷ Bonanno, “Trajectories of Grieving”, *supra* note 44.

⁴⁸ Bonanno, *The Other Side of Sadness*, *supra* note 36 at 110.

⁴⁹ Worden, *supra* note 28 at 96-97.

⁵⁰ Bonanno, *The Other Side of Sadness*, *supra* note 36 at 110.

[M]ediation enables parties to listen and be listened to, and have the impact of a past event acknowledged . . . [this can promote] the less tangible benefits of the process of mediation, such as “closure”, a restored relationship, [or] an apology . . . ⁵¹

Such a perspective corresponds with notions that “the telling of the traumatic story” to others in mediation is potentially the most critical element in adapting to loss or addressing and resolving a conflict—one that is often self-reported as beneficial.⁵²

However, in a bereavement context, the value of speaking and being listened to is of uncertain value for those not suffering from PGD. For example, a 2008 University of Memphis study failed to find any evidence that engaging in therapeutic conversations, such as counselling, helped the average bereaved party “any more than the simple passage of time.”⁵³ Similarly, various studies since 1996 have shown that talk-therapy practices in group settings may actually have a negative impact on participants—especially since “one frazzled person in a group session can infect” or trigger anxiety in others.⁵⁴

While there is a key distinction between engaging with a counsellor regarding grief and an opposing party regarding a legal dispute, these findings suggest that a desire to provide a client with the opportunity to openly discuss his or her perspective and experiences should not be the driving reason to engage in mediation. Client expectations about the therapeutic value of telling their story may also need to be managed by legal counsel in order to avoid later feelings of dissatisfaction with the mediation process. Similarly, in accordance with the latter study, the new estates lawyer also needs to balance the desire to obtain a cost effective dispute settlement against the potential negative impact of statements from a “frazzled” opposing party on their client.

2. Preparing for Mediation

When to Commence Mediation

If a client does not appear to be suffering from PGD, traditional joint-session mediation may be preferred to seeking an exemption from the mandatory session. Determining the ideal stage of the conflict in which mediation should be commenced is always a difficult assessment, regardless of the presence of grief. Professor Harold Abramson of Touro Law School in New York suggests that mediation should occur at the “earliest practical time” since parties are naturally more flexible and predisposed to

⁵¹ Kate Aubrey-Johnson & Helen Curtis, *Making Mediation Work for You: A Practical Handbook* (London: Legal Action Group, 2012) at 43-45.

⁵² Rubin, *supra* note 33 at 11.

⁵³ Konigsberg, *supra* note 38 at 4.

⁵⁴ Gary Stix, “The Neuroscience of True Grit” (2011) 304 *Scientific American Scientific American* 28 at 28.

resolution earlier in their dispute; yet as time passes, parties become more committed to their positions.⁵⁵

In contrast, bereavement literature suggests a slightly slower pace. For example, psychologist Dr. William Worden has noted that three months after a death there is often a “lull in social support” for the surviving parties; this deficit in support may make entering mediation around this time particularly onerous for the client.⁵⁶ In addition, a 2002 study found that for non-chronic grief disorder trajectories the “worst of grief” is typically over within six months, therefore suggesting that the timeframe between three to six months after a death is also not ideal for commencing mediation.⁵⁷ As noted above, a PGD diagnosis is also deferred until at least six months have passed.

Beyond this consideration of waiting at least six months after the death before commencing mediation, the new estates lawyer must also remember other critical dates that may have a negative impact on the client’s successful engagement with mediation. For example, one study completed by Harvard researchers predictably noted that the highest levels of bereavement stress often re-emerge around the first anniversary of the death, especially if the loss was unanticipated.⁵⁸ As a result, the new estates lawyer should inquire and “make a note on their calendar” of such dates, including birthdays or anniversaries.⁵⁹

Selecting a Mediator

Under Rule 75.1.07(1), a mediator must be chosen within thirty days of the court providing directions for the mandatory mediation session.⁶⁰ The mediator may be chosen or assigned from the list for the county, or chosen by consent if not listed.⁶¹ When selecting a mediator, a prevalent debate within the mediation and legal community is whether an evaluative or facilitative mediator is preferred. Facilitative mediators are described as process and communication oriented, and do not make recommendations in terms of settlement options.⁶² In contrast, an evaluative mediator will actively provide the parties with an expert opinion on settlement options, may

⁵⁵ Harold Abramson, *Mediation Representation: Advocating as a Problem-Solver in any Country or Culture*, 2d ed (Louisville: The National Institute for Trial Advocacy, 2010) at 150-151 [Abramson].

⁵⁶ *Supra* note 28 at 65.

⁵⁷ Konigsberg, *supra* note 38 at 3.

⁵⁸ Worden, *supra* note 28 at 65.

⁵⁹ *Ibid.*

⁶⁰ *Courts of Justice Act*, *supra* note 14 at s 75.1.07(1).

⁶¹ *Ibid* at 75.1.06(1)(a)-(c).

⁶² B Mayer, “Facilitative Mediation” in Julie Macfarlane, ed, *Dispute Resolution: Reading and Case Studies*, 3rd ed, (Toronto: Edmond Montgomery Publications Limited, 2011) at 265-266 [Macfarlane, *Dispute Resolution*].

provide settlement recommendations, or even exert appropriate pressure on parties to settle.⁶³

Literature at the intersection of bereavement and mediation has promoted both types of mediators. For example, at a presentation for the Ontario Bar Association (OBA), Lisbeth Hollman endorsed both evaluative and general mediators:

A *specialist* with estates background can provide specific knowledge and may be helpful in the right circumstances, such as the possible outcome in litigation or narrow points of law such as proof of a lost will, [or] testamentary capacity . . . [however if] the matter is truly a family dispute, the legal issues may not be the most important aspect of the litigation and a *general mediator* may be able to impress upon the parties his general background knowledge and induce common sense [emphasis added].⁶⁴

In contrast, Joe Epstein has forcefully argued that an evaluative approach should be avoided since a mediator who “focuses on only the ‘rational’ evaluation of issues leaves parties feeling unheard and unappreciated.”⁶⁵ Consequentially, Epstein suggests that while such an evaluative mediator may assist the parties in reaching a “fair” conclusion, the value derived from the process of the mediation itself will be lost:

[T]he failure to attend to the emotional components of grief, anger and fear leaves parties with unresolved emotions and a palpable sense of perceived injustice. An opportunity for positive closure is lost, even if the case is settled.⁶⁶

Unfortunately, the bereavement literature is unable to definitively settle this debate between counsel and mediators.

For example, for the average bereaved party the actual therapeutic value of engaging in conversations under a facilitative model does not help “any more then the simple passage of time.”⁶⁷ However, while such a facilitative model may not assist a client in terms of *bereavement*, communication which prompts an apology, humanizes the opposing party, and even restores a strained family relationship notably has its own unique benefits in a holistic conception of a client’s best interests.

Similarly, if the parties have been locked in conflict with emotionally entrenched positions, an evaluative mediator who places an emphasis on the legal elements of the dispute could shift the perspectives of the parties and break their

⁶³ Robert Baruch, “Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What it Means for the ADR Field” in Macfarlane, *Dispute Resolution* at 269.

⁶⁴ *Supra* note 16 at 4-5.

⁶⁵ Epstein, *supra* note 31 at 37.

⁶⁶ *Ibid.*

⁶⁷ Konigsberg, *supra* note 38 at 4.

longstanding deadlock.⁶⁸ However, as noted by Epstein, the “story-telling” nature of a facilitative format can also “generate creative problem solving” and possibly break such deadlocks as well.⁶⁹

As a result, bereavement studies may actually promote a flexible or hybrid mediator who, being attentive to the needs of the parties, can navigate between evaluative or facilitative frameworks throughout mediation. Such a flexible and responsive mediator would correspond with Bonanno’s “ideal bereaved behaviour,” as described in his 2004 study of New York college students who had lived through the 9/11 terrorist attacks.⁷⁰ In this study, Bonanno found that

[S]tudents who were skilled in only one of these behaviors—either expressing emotion or suppressing emotion but not both—fared about the same two years after the attack as other students in the study. However, the students who were flexible—that is, who could either express or suppress emotions as needed—were markedly less distressed two years later.⁷¹

As a result, the ideal mediator for bereaved parties would be able to foster rational discussion and engage in emotional suppression of the parties when required, and would also be capable of encouraging facilitative dialogue and the emotional expression of bereaved parties in a mediation. Alternatively, a co-mediator format could be embraced to ensure the inclusion of an individual with legal experience and the presence of another individual with a nuanced appreciation of psychology or bereavement.

3. *Participating in the Mediation*

Conduct and Emotions in the Mediation

Bonanno’s study also raises the critical issue of how the new estates lawyer should prepare a client for a mandatory mediation. Robert Traves and Michael White of Borden Ladner Gervais LLP highlighted this issue in a 2012 presentation to the Ontario Bar Association by bluntly advising lawyers to “not take for granted the fact that your client is prepared for mediation.”⁷² As a result, they suggest pre-mediation client meetings and a joint review of the opposing party’s mediation brief to “fully inform [the client] of the merits of the claim, [its] strengths and weaknesses” and potential

⁶⁸ Abramson, *supra* note 55 at 53.

⁶⁹ Epstein, *supra* note 31 at 38.

⁷⁰ Bonanno, *The Other Side of Sadness*, *supra* note 36 at 78.

⁷¹ *Ibid.*

⁷² Robert Traves & Michael J L White, “Preparing for Mediation” (Presentation delivered at the Toronto *Mediation Boot Camp*, 4 June 2012), Bernard Morrow & Michael White, eds, *Mediation Boot Camp* (Toronto: Ontario Bar Association, 2012) at 10.

outcomes at trial.⁷³ Traves and White also suggest “advis[ing] your client on how to conduct themselves” in the mediation—but unfortunately a clear and detailed description of how exactly clients should conduct themselves is not provided.⁷⁴

For example, mediation frameworks that are more traditional and adversarial have been described as being “rational [and] devoid of all emotions” in the name of efficiently resolving the dispute and not getting sidetracked from the “real” legal issues.⁷⁵ Other authors such as Harold Abramson suggest that it is impossible to avoid all emotions. Abramson divides emotional conduct into two streams: conduct associated with positive emotions that should be included in mediations and conduct associated with negative emotions that must be avoided:

Negative emotions can impact in damaging ways. When a party is controlled by his emotions, his ability to think clearly and creatively can be clouded. Emotions can distort what he sees and hears and can control his behavior. Emotions can quickly escalate the dispute by fueling the emotions of the other side and generating a relationship conflict that can impede moving forward.⁷⁶

However, Roger Fisher and Daniel Shapiro argue that even negative emotions such as anger can be included if framed properly, so that anger is only expressed when it has a purpose.⁷⁷ In direct contrast, Trina Grillo’s work describes a family law mediation framework in the American context that encourages women to suppress all feelings of anger.⁷⁸

Bereavement studies could offer a renewed perspective on mediation’s framework of “positive” or “negative” emotions through an emphasis on the function of sadness, which is described as follows:

[The] emotion of sadness occurs when we know we’ve lost someone or something important and there is nothing we can do about it. Sadness turns our attention inward so that we can take stock and adjust.⁷⁹

Bereavement studies have located positive attributes to those locked in “negative” emotions such as sadness. For example, in their 2005 publication, Justin Storbeck and Gerald Clore noted that those exhibiting negative moods or emotions became less prone to engaging in false memories, in contrast with positive moods that led to more false

⁷³ *Ibid.*

⁷⁴ *Ibid* at 8.

⁷⁵ Trina Grillo, “The Mediation Alternative: Process Dangers for Women” (1991) 100:6 Yale L J 1545 at 1572.

⁷⁶ Abramson, *supra* note 55 at 53.

⁷⁷ *Ibid* at 56.

⁷⁸ *Supra* note 75 at 1572.

⁷⁹ Bonanno, *The Other Side of Sadness*, *supra* note 36 at 31.

memories. As a result, this study was aptly entitled “With Sadness Comes Accuracy”.⁸⁰ Additionally, a 1994 study found that individuals experiencing sadness were “more thoughtful and less biased in their perceptions of other people” and showed “greater resistance to stereotypes when [making] judgments about others”⁸¹ when compared to individuals exhibiting anger. Bonanno therefore concludes that, in general, “sadness helps us focus and promotes deeper and more effective reflection”.⁸²

As a result, bereavement theory would tend to concur with the position that the expression of anger should be avoided in mediation, but that sadness ought to be classified as an almost “pseudo-positive” emotion that can have a beneficial impact on the mediation process, including the avoidance of false memories and stereotypical judgments. Therefore in preparing the client for engaging in a mediation, the new estates lawyer should encourage the suppression of anger within the actual mediation, promote the emotional flexibility highlighted by Bonanno, and foster the development of a client’s ability to suppress or express anger at beneficial times, such as in caucus.⁸³ Overall, sadness may actually assist in promoting dispute resolution and should therefore not be discouraged when advising a client on appropriate mediation conduct.

CONCLUSION, ISSUES AND CONCERNS

Mediation and bereavement theory have both been promoted as a method that provides lofty outcomes for its participants. Some mediators have promised that parties will be able to attain “some higher plane of moral consciousness,”⁸⁴ and proponents of the Kübler-Ross model maintain that a process as dreadful and overwhelming as grief can be captured and defeated in easily discernable stages. Yet the reality is that mediation is not a panacea for all disputes, and bereavement theory can never adequately respond to or capture the infinite number of human reactions to grief. Similarly, while attempts to use bereavement theory to discern the potential best practices for estate mediation can yield some beneficial suggestions, various outstanding issues still remain.

One such issue is that without traditional litigation safeguards in place, and in recognition of the direct interaction between opposing parties in mediation, the new estates lawyer must actively address a critical concern: that bereaved clients could have their grief used against them during a mediation. Just as the traditional adversarial system developed its own repertoire of near-psychological warfare, the psychology of

⁸⁰ Justin Storbeck & Gerald L Clore, “With Sadness Comes Accuracy; With Happiness, False Memory: Mood and the False Memory Effect” (2005) 16:10 *Psychological Science* 785 at 790.

⁸¹ Bonanno, *The Other Side of Sadness*, *supra* note 36 at 31.

⁸² *Ibid.*

⁸³ *Ibid* at 102.

⁸⁴ Gary Caplan, “Of Promise and Despair: Transformation in Law and Mediation” in Michael Silver et al, *Mediation and Negotiation: Representing Your Clients* (Toronto: Butterworths, 2011) at 167.

bereavement could also be utilized to subtly coerce or influence a bereaved party into an unsatisfactory settlement. For example, opposing parties may attempt to emphasize their own grief in an effort to influence the power dynamics between them. Similarly, the opposing party may purposefully provoke painful memories of the deceased to trigger discomfort and a client's desire to "just get it over with" through an immediate settlement. As a result, the new estates lawyer must assist bereaved clients in reviewing their pre-mediation goals and best alternatives to a mediated agreement so that instantaneous emotions are acknowledged yet not permitted to overwhelm the client's ability to understand or appreciate legal advice.

Similarly, in reference to the ambitious outcomes promised by some mediation and bereavement literature, clients may develop expectations that the mandatory estate mediation will transform their relationships with the opposing party and lead to a release of grief. Clearly, it is irresponsible for counsel, mediators, and bereavement counselors to imply that years or even decades of unresolved family conflict can be swiftly resolved—with the parties transformed and justice found—through a mandatory mediation process. As a result, counsel must actively manage client expectations about what mandatory estate mediation can realistically produce.

In addition, as a process without the same procedural safeguards or factual investigation as a formal trial, justice and truth may or may not emerge from mediation, and a client's yearning for such a result may not be realized. However, as argued above, in light of emerging demands on counsel, the new estates lawyer should attempt to compensate and address this apparent trade-off of "justice and truth" for "efficiency and dispute resolution" with a holistic appreciation of the best interests of the client that includes an appreciation of their bereavement.

Despite these concerns, the intersection between legal studies, mediation, and the psychology of bereavement has already occurred. As a result, the new estates lawyer is obliged to actively review the literature in both academic realms to ensure that he or she does not implement strategies and practices which propagate myths and misunderstandings about grief, such as the discredited Kübler-Ross model, and to fulfill their professional obligations by discerning best practices that emphasize a holistic appreciation of their bereaved client's best interests.