THE USE OF MEDIATION IN ADULT GUARDIANSHIP CASES

Course Level: Intermediate

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Course Objectives: The guardian will:

- become familiar with the advantages and disadvantages of using alternative forms of dispute resolution (ADR)
- will learn what mediation is and how it differs from other forms of ADR
- become familiar with the typical mediation process
- be exposed to the possible uses of mediation in the various stages of a guardianship
- be sensitized to the special considerations that a mediator must take into account in a guardianship mediation, including those relating to the adult ward's capacity to mediate; power imbalances; the choice of participants in the mediation; and confidentiality and privacy concerns

Course Resources and Related Resources:

ADA Mediation Guidelines, http://www.mediate.com/articles/adaltr.cfm

Gary, Susan N., *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship & Inheritance,* 32 Wake Forest Law Review 397 (1997).

Grey, Robert, *Mediation of Guardianship and Elder Law Cases*, http://www.mediate.com/articles/grey.cfm

Radford, Mary F., *Is the Use of Mediation Appropriate in Adult Guardianship Cases?* 31 Stetson Law Review 611 (Spring 2002).

Summit County, Ohio Court of Common Please – Probate Division, *Rule 98.1*, http://www.summitohioprobate.com/LocalRules/Rule981.htm

The Center for Social Gerontology, *Adult Guardianship Mediation Manual;*

Videos: *Adult Guardianship Mediation: An Introduction; Adult Guardianship Mediation: A Judge's Perspective*, available for purchase at http://www.tcsg.org/

Uniform Mediation Act, http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm

Wood, Erica F., *Dispute Resolution and Dementia: Seeking Solutions,* 53 Georgia Law Review 785 (2001).

THE USE OF MEDIATION IN ADULT GUARDIANSHIP CASES

Formal guardianship proceedings[1] can be painful and traumatic for all of the participants. The imposition of a guardianship and the choice of who will serve as guardian will have a momentous impact on the personal and financial future of the ward. Additionally, the appointment of a guardian can result in a substantial deprivation of the ward's basic rights, such as the right to consent to medical treatment, to choose where he or she lives, to enter into binding contracts, and to save or spend money. Thus, formal guardianship proceedings are designed to provide maximum protection for the individual for whom the guardianship is sought. These proceedings are typically structured to ensure that the adult receives notice of the pending guardianship proceeding; is evaluated by a neutral physician, psychologist or other evaluator; is allowed to be represented by a lawyer or other representative; is accorded the opportunity to be heard; and is encouraged to participate as fully as possible in the choice of guardian and the structuring of the guardianship. While the judges who handle guardianship cases are generally sensitive to the human drama involved in these proceedings, the courtroom remains a sterile and intimidating environment that leaves little space for creative decision-making or for protecting against the shattering of relationships that have already been worn thin by the emotional context in which a guardianship proceeding takes place.

[1] A formal guardianship proceeding is a judicial procedure in which a court determines whether to appoint a guardian to protect the personal or financial needs, or both, of an incapacitated adult. Although guardians and conservators may also be needed for minors, this training module will deal with the guardianships and conservatorships of adults. The term "guardian" will refer to guardians, conservators, committees, tutors, or others who are appointed by a court to act in a similar capacity.

Mediation offers an alternative form of resolving the disputes inherent in many guardianship cases. Mediation is a process whereby a neutral facilitator encourages the parties to work through their problems and structure their own solutions. The use of mediation in guardianship cases is still in a fledgling state. While there are many perceived advantages to using mediation in lieu of or as a supplement to formal guardianship proceedings, there remains some fear that the informality and creativity of mediation may undermine the protection of an individual's rights that is the underpinning of formal judicial guardianship proceedings. Additionally, questions persist as to how an individual whose capacity is at issue can engage effectively in a process that is dependent upon self-determination by the parties. This training module is designed to introduce those who are experienced in the field of guardianship to mediation and to the special considerations that must be taken into account when integrating mediation into a guardianship case.

I) Alternative Forms of Dispute Resolution

A) Why Seek Alternatives?

In the 1960s, as a general response to the cost, rigidity, inefficiency, and sterility of formal judicial proceedings of all types, a movement emerged to explore alternatives to formalized court proceedings. The umbrella term for the processes that developed from that movement is "alternative dispute resolution" (ADR). A simple exercise will illustrate why people perceive that informal, alternative methods of resolving disputes have many advantages over the formalized methods of dispute resolution that form the backbone of our judicial system.

EXERCISE: Jack and Jill are neighbors. Jack has put a great deal of money and effort into building a two-car garage next to his home. In the process of refinancing her house, Jill discovers that Jack has accidentally extended the garage beyond his own property line and on to her property. Jill has been angry at Jack for years because she doesn't like the fact that he only rarely mows his grass. Jack, on the other hand, often complains that Jill's teenage son drives at unsafe speeds in their neighborhood. Compare what could happen if Jack and Jill chose to resolve this dispute INFORMALLY rather than FORMALLY (that is, by going to court).

FORMAL RESOULTION: Jill can sue Jack and demand that he tear down the part of the garage that is on her property. The case will be focused only on that issue and will not address any of the other aspects of these neighbors' stressful relationship. The court proceeding will be open to the public. Jill and Jack will both need to hire lawyers and to incur other costs of litigation. Their case may not be placed on the court's calendar for months or even years to come. The outcome will be "all or nothing" and their relationship, already fragile, will possibly be irreparably broken, no matter who prevails in the lawsuit.

INFORMAL RESOLUTION: Jack and Jill, with or without the aid of a facilitator or of lawyers, may engage in a private, face-to-face discussion and negotiation about their options. It is possible that the discussion will be confrontational and ultimately fruitless. On the other hand, Jack and Jill may be able to get to the real root of their dissatisfaction with each other's behavior. They may forge creative solutions that deal with more than just the garage and at the same time work to preserve and perhaps even strengthen the relationship between them. Jill may be willing to accept a cash settlement instead of forcing Jack to tear down his new garage. The two may agree that Jack will mow his lawn more often and Jill will curtail her son's speeding. The negotiation will be handled on their schedules (rather than on the court's schedule) and will be far cheaper and more efficient than full-blown litigation.

Mediation is but one of the many forms of alternative dispute resolution that have developed over the past 50 years. These range from processes that exhibit many of the formalities of court procedures (such as arbitration) to processes that have no formalities whatsoever (such as private negotiation). The following sections describe mediation generally and compare and contrast it with formal court proceedings and with the two other most common forms of ADR: negotiation and arbitration.

B) What Mediation is and What Mediation is Not

Mediation is a process for dealing with disputes in which an impartial third party – the *mediator* – facilitates communication among the parties, promotes negotiation, and prompts the parties to engage in voluntary and creative problem-solving. Mediation is a widely-used form of ADR in areas of the law such as family law (divorce and child custody mediations), employment law, commercial relations, consumer law, and international law. Mediation can be quick, flexible, inexpensive, convenient, humane, and empowering. It allows parties to talk to each other in a setting that is confidential and secure and that encourages constructive behavior. Solutions that emerge can be more creative and better suited to individual needs than those that might be possible through traditional legal channels. Also, parties tend to adhere better to solutions they have designed themselves. There is generally high satisfaction among participants in mediation processes.

Mediation is typically thought to have these advantages over the formal adjudication of a dispute:

1) It is non-adversarial, stressing collaboration and cooperation over a "win-lose" approach;

2) It is flexible, allowing the parties to reach creative resolutions rather than predetermined and restricted outcomes;

3) It stresses self-determination by the parties rather than the imposition of a resolution from an outside authority;

4) It is efficient and usually less time-consuming and expensive than litigation;

5) It encourages parties to face the underlying root of lingering relationship problems rather than just the superficial aspects of the issue at hand; and

6) It is designed to strengthen or at least preserve important relationships (such as family relationships) rather than shatter them.

Mediation is sometimes better understood by describing it in contrast to other, more familiar dispute-resolution procedures.

Mediation is not *a court proceeding.*

- A court proceeding (trial, hearing, etc.) is a formal proceeding in which an appointed decision-maker (the judge) dictates the ultimate outcome of the case.
- The proceeding follows a rigid set of procedural rules.
- The parties appear in court at a time chosen by the court.
- The parties have no choice as to which judge will hear their case.
- The parties are usually better served if each is aided by an attorney.
- The parties and their attorneys must abide by the courtesy code of the court and some types of behavior (e.g., temper tantrums or emotional outbursts) are not tolerated.
- The proceeding is, by its nature, adversarial.
- The judge (and/or jury) may only admit certain types of evidence.
- The final decision is made by the judge, who is limited to a few strict legal alternatives.
- That decision is formalized in a written court order.
- The proceeding is open to the public.

- The costs include attorney's fees and court costs.

Mediation is not *arbitration*.

- An arbitration is a formal, non-judicial proceeding in which the parties submit their case to an impartial third party or panel.
- An arbitration usually is conducted in accordance with a set of procedural rules that resemble those of judicial proceedings.
- The parties, in conjunction with the arbitrator, choose the time and place of the arbitration.
- The parties also often engage in choosing one or more of the arbitrators.
- The parties are usually represented by attorneys.
- The parties' presentation of evidence may be restricted by the applicable rules of procedure.
- These rules may allow the arbitrator to rule that certain types of behavior (e.g., temper tantrums or emotional outbursts) are out of bounds.
- The final decision is made by the arbitrator and is usually presented formally and in writing.
- An arbitration may be public or private, according to the wishes of the parties.
- The costs include the arbitrator's fees (which often are split by the parties) as well as the fees of each party's attorney.

Mediation is not *negotiation.*

- A negotiation is an informal interaction in which the parties reach their own decisions without the aid of a formal decision-maker or a facilitator.

- The parties choose the time and location of the negotiation.
- Often the parties are each represented by attorneys but they need not be.
- There usually are no applicable procedural rules.
- The parties engage in face-to-face discussions about the matter at issue.
- The discussions may be adversarial and there are usually no ground rules that place certain behavior (e.g., temper tantrums and emotional outbursts) off limits.
- Each party is free to present any "evidence" that party would like to present.
- The final decision is made by the parties and there are no restrictions on the form the outcome will take.
- The parties may or may not memorialize their agreement in writing.
- A negotiation is almost always private.
- The costs usually only are the fees charged by the attorneys who participate in the negotiation.

<u>How does mediation compare to these other processes?</u>

- Mediation is an informal process, although the mediator and the parties themselves may agree to abide by a set of ground rules of their making.
- The parties to the mediation make their own decisions with the aid of the mediator as facilitator.
- The parties choose the time and place of the mediation.
- The parties choose the mediator.
- The parties may or may not be represented by attorneys.

- The parties' presentation of evidence is unrestricted except as agreed among themselves.
- The parties may agree that certain types of behavior (e.g., temper tantrums or emotional outbursts) are out of bounds or, alternatively, they may agree to allow venting of feelings within boundaries that they themselves set up.
- The parties may or may not reach a resolution of their dispute, but the mediation may still be of value as a means of bringing the parties to a clearer understanding of each other's positions.
- If the parties do reach a resolution, it is usually memorialized in writing.
- The mediation is confidential and private.
- The costs include the mediator's fee and the fees of any attorneys who participate in the process.

The hallmark of mediation is *self-determination.* The parties are not bound by formalized rules of procedure and evidence and they are not restricted to either-or, win-lose resolutions. The mediator has no authority to impose a decision or settlement on the parties, but rather is there solely to assist the parties in resolving the dispute in a way that is mutually agreeable. The parties are free to structure whatever solution serves them best or, alternatively, to reach no resolution at all. The mediation process is often more structured and organized than a private negotiation in that some of the roles of the mediator include keeping the parties on task and helping them to avoid unproductive behavior. At the same time, a skilled mediator will often offer an arena in which the venting of emotion, if appropriate, is neither prohibited nor discouraged.

II. HOW MEDIATION WORKS

A) The Mediation Process

There are many ways in which a mediation may proceed. However, mediations generally proceed in the following pattern:

1) First, the parties must agree to mediate or be ordered to do so by a court. In some cases, a court administrator or the mediator may perform an initial intake to determine in advance whether the case is an appropriate one for mediation. It is not uncommon in some types of mediation (e.g., family mediation) for the mediator to conduct individual, pre-mediation interviews of the parties. The intake process offers an opportunity to determine which persons should attend the mediation and whether all necessary parties are capable of participating. Attendance by all necessary parties is vital to the ultimate success of a mediation.

2) The initial mediation session usually begins with a description by the mediator of the process. The mediator may use this opportunity to reinforce the parties' commitment to resolving the issues before them. At this stage, the mediator suggests “ground rules” for the participants or lets them devise the ground rules themselves.

3) The next step involves issue identification. Each party gives that party's version of the problems at issue without interruption. The mediator provides a summary of each party's concerns after the party has spoken and then, after all have spoken, attempts to narrow the common issues raised.

4) After each party has explained his or her story, an exchange or dialogue may ensue. At this point, the parties are allowed to raise and discuss, in the mediator's presence, issues that arose when the other party spoke.

5) Following this exchange, the mediator typically encourages the parties to "brainstorm" as to potential options for resolution, emphasizing that no party needs to be committed to the ideas presented. The mediator may add some options that the parties have not raised.

6) The final step is for the parties, with the aid of the mediator, to structure mutually acceptable solutions. A written summary of the results is advisable.

At any point during the session, either party or the mediator may request a private meeting. This "caucus" gives the party an opportunity to raise sensitive issues or simply to vent emotions. The mediator informs the parties that nothing revealed in a caucus will be told to the other parties without permission. Mediators often will allow the other party to "caucus" also to dispel the notion that the mediator is partial to one or the other. Sometimes the bulk of the mediation occurs through private caucusing with the mediator acting as a "shuttle diplomat."

B) Confidentiality and Privacy

One of the major perceived advantages of mediation over litigation is the fact that the proceedings are private and confidential. Many states have adopted statutes or ADR rules that require that mediations and other ADR proceedings be kept confidential. In addition, at the outset of a mediation, the mediator will usually ask the parties to sign a confidentiality agreement. The confidentiality feature encourages the parties to be open and candid with each other without fear that whatever they say will at some later point be held against them in some more formalized setting. Confidentiality and privacy are important advantages for adults in adult guardianship cases in that these cases

often include personal, and sometimes embarrassing, information about the adult and the adult's family. As will be discussed later, however, adult guardianship cases raise special issues that challenge the traditional application of the confidentiality requirement.

> **EXERCISE:** Read the rules of privilege and confidentiality that appear in Sections 4-9 of the Uniform Mediation Act, http://www.law.upenn.edu/bll/archives/ulc/mediat/2003finaldraft.htm

C) Styles of Mediation

Mediators have different styles of mediation, and the parties themselves may request that the mediator play varying roles. A distinction is often drawn between "evaluative" mediation and "facilitative" mediation. In general terms, an evaluative mediator offers the parties an assessment of their respective positions and may even predict for the parties what the probable outcome would be were they take their case to court. Although the parties themselves remain the ultimate decision-makers, they often look to the evaluative mediator to offer them some direction in terms of the outcome. On the other hand, a facilitative mediator focuses on maximizing the parties' abilities to structure their own resolutions with minimal input by the mediator. Some feel that, with facilitative mediation, the parties reach resolutions that are not only workable for the matter at issue, but also tend to preserve the parties' ability to work together in the future. In some mediations, the mediator may begin as a facilitative mediator but, at the parties' request, move to an evaluative mode. An adult guardianship case may often demand just such a flexible mix of styles. For example, in an adult guardianship case, a compelling reason for moving to an evaluative mode would be that a power imbalance exists between the parties and results in their structuring an agreement that

is patently unfair to the allegedly incapacitated adult. This may be an appropriate time for a mediator to insert his or her own opinion into the process to protect the interests of the weaker party.

III. MEDIATION IN ADULT GUARDIANSHIP CASES

Guardianship cases typically (but not always) proceed through three or four stages. Mediation may be an appropriate mechanism for dealing with issues that arise in any of these stages.

A. Pre-petition Stage

The pre-petition stage is the period of time that leads up to (or may lead up to) the filing of a petition for guardianship. During this period, the adult is showing signs of diminishing capacity (e.g., forgetfulness, physical and mental disorientation, unusual anxiety) and often engaging in atypical and sometimes disturbing behavior. As the need for assistance in both health-related and financial matters becomes more apparent, family members, caregivers, and friends often engage in informal and sometimes piece-meal strategies for coping with the consequences of the adult's changing state. Frequently the family members and others are proceeding without advice from attorneys, social workers, and other professionals, and sometimes the short-term coping mechanisms backfire.

Mediation may be a particularly suitable process during this stage for a number of reasons. First, mediation allows the parties to deal with the emotional aspects of a situation as well as with the legal issues. The initial phases of an adult's diminishing capacity are traumatic not only to him or her but also to those around him or her.

Feelings of helplessness and impending doom are shared by both the adult and those who love him or her. Worries about financial needs may be heightened as the need for some assistance in day-to-day living becomes more obvious. Repressed family struggles over control and "Mom always liked you best" are resurrected as the children vie to take care of (or to take over the care of) an ailing parent. Early non-judicial intervention in the form of mediation may not only offer the parties information about appropriate coping strategies, but may also help the parties to address tensions before they escalate into emotional combat.

The challenging question for those who advocate mediation at the pre-petition stage is not whether it will be effective, but rather whether the parties will know to use it. Because the general public remains basically unaware of the availability of mediation services, most families would not know to ask for this type of professional assistance. Pilot projects are underway throughout the United States to help parties realize the availability and benefits of mediation at this early stage. Some courts employ a "screening agent" -- that is, an individual who responds to initial inquiries about guardianship and who screens all petitions to divert those that are not appropriate guardianship cases. The screening agent can offer the parties the option of and information necessary to direct the parties to mediation.

> **Exercise:** Read Rule 98.1(f) of the Summit County, Ohio Court of Common Pleas - Probate Division, which allows an agency such as a mental health agency to file a motion to have the court refer the matter to mediation before a guardianship petition is filed.
> http://www.summitohioprobate.com/LocalRules/Rule981.htm

B. Initial Petition Stage

In the pre-petition stage, it is often the case that one of the family members, caregivers or friends becomes so frustrated or so suspicious that he or she contacts an attorney about filing a petition for guardianship. A number of issues, both legal and emotional, are raised by the filing of the petition. Disputes may erupt between the adult and her children as to whether she needs a guardianship at all, or between family members as to who should serve as guardian, or among other friends and family members who do not necessarily want to become the adult's guardian, but who fear that they will be isolated from her.

The filing of the petition triggers a number of due-process guarantees for the adult for whom the guardianship is sought. Designed to be protective of the adult, these guarantees also have the potential of turning the guardianship proceeding into an adversarial process that may result in unintended trauma and expense for the adult and the other parties involved. In addition, at this stage, a number of outsiders will have joined the fray. In many states the adult will have her own attorney, or at least a visitor or guardian ad litem whose charge is to advocate for her wishes. Often, the individual who files for the guardianship will do so with the aid of an attorney. These attorneys will guard zealously the interests of their own clients, perhaps to the detriment of intra-family relationships.

Most formal guardianship proceedings revolve around two issues: 1) whether the adult is legally incapacitated and in need of a guardian; and 2) who will be appointed to serve as guardian. The ultimate decision on both of these issues is for the court, not for the parties themselves. However, mediation at this stage may be useful in bringing the parties to agreement in advance so that they can present a united position to the

court and work with the court to reach a constructive resolution. For example, the parties may explore whether there are alternatives for dealing with the ward's incapacity, such as powers of attorney or trusts. Also, while the court has the responsibility of appointing the guardian, if there is a dispute as to who should serve in that role, the parties may resolve that dispute in advance of the guardianship proceeding. Disputes over who should serve as guardian often mask more deeply-entrenched issues, such as a fear that one family member, if appointed, might isolate the ward from the rest of the family. In mediation, the parties can not only explore the root causes of this suspicion but perhaps also structure a framework for dealing with it, such as a plan for where the ward will reside and a visitation schedule.

C. Ongoing Issues During the Guardianship

The appointment of a guardian rarely resolves the conflicts that surround the adult's aging process. Throughout the guardianship, questions will be raised by family members and others as to the conduct of the guardian, including why certain investments were made or a certain nursing home was chosen, or even whether the guardian is being appropriately diligent about meeting the adult's needs. The court may challenge items on the guardian's annual accounting. The adult's condition may worsen, and the limited guardianship that was initially granted may need to be expanded. The adult may remain opposed to the concept of guardianship and its ensuing loss of freedom. Changing circumstances may force unforeseen decisions, such as a move out of state by the guardian who wants to take the adult with him or her. The guardian may be rendered unable to serve by an accident or illness, and a

successor guardian will need to be appointed. Unusual situations may occur, such as a case of spousal abuse that will warrant the adult's guardian filing for a separation or divorce on his or her behalf. And, as the adult nears death, often painful decisions must be made as to whether to continue life-prolonging but non-curative medical procedures.

Mediation in this stage may result in workable solutions that will not only resolve the immediate conflict, but will also open lines of communication that will help mitigate future conflicts. For example, an adult for whom a guardian of the property has been appointed does not automatically lose his or her freedom to engage in daily activities, such as grocery shopping, buying new clothing, or eating at a restaurant. The guardian, on the other hand, may perceive his or her role as one of maintaining a tight rein on the adult's finances. The adult may find it demeaning to have to ask the guardian for money before every shopping trip, while the guardian may fear that the adult's susceptibility to aggressive marketing will cause the adult to engage in frivolous spending. Mediation could help the parties reach a compromise on this matter, such as the weekly allowance of a certain sum of spending money to the adult. In addition to the advantage of an immediate resolution, the adult and the guardian will now realize that there is an avenue for facilitated communication between them that may ward off future, more formalized complaints by the adult or more unnecessarily restrictive measures by the guardian.

D. Termination of the Guardianship

It seems instinctively obvious that most guardianships of adults, particularly of elderly adults, will terminate only upon the death of the adult. At that point, the guardian may or may not continue to serve in some fiduciary capacity as the personal

representative of the adult's estate. Often the death of the adult will trigger disputes that no one wanted to raise while the adult was still alive.

Some guardianships will end due to the happier cause of the adult regaining enough capacity for a complete restoration of rights. The process of restoration will involve both a legal proceeding and an emotional process. Mediation may be helpful both in determining whether a restoration is in order and, if so, how the transition will be made.

IV. MEDIATION IN ADULT GUARDIANSHIP CASES: SPECIAL CONSIDERATIONS

As noted above, a guardianship case is not a typical dispute between parties in that the only true focal point in a guardianship case is the best interest of the alleged incapacitated adult. The protections of this adult's interest that are built into a formal guardianship case must not be compromised in any related mediation proceedings. Consequently, mediation in guardianship cases entails special considerations that do not dominate most other mediations.

1. The Adult's Capacity to Mediate With or Without Representation

As noted above, self-determination is the hallmark of mediation. Yet the major party in a guardianship mediation is an individual whose very capacity to make her own decisions has been brought into question. Under what circumstances can this adult participate meaningfully and represent her own interests in a mediation?

To date, there exists no statutory or case law that defines "the capacity to mediate." Thus, the determination of whether the allegedly incapacitated adult has the capacity to participate in the mediation will be one that is personal to the mediator and

that must be made on a case-by-case basis. One valuable source for the mediator is a set of guidelines that has been developed by those who engage in mediation with disabled individuals. The *ADA Mediation Guidelines* provide as follows:

> The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement. An adjudication of legal incapacity is not necessarily determinative of capacity to mediate.

The mediator may determine that, while the adult does not have the capacity to mediate on her own, she does have the capacity to participate with competent representation. The chosen representative may or may not be an attorney. It is crucial that the representative be familiar enough with the adult's values and past choices to be able to present those in the mediation. The representative's role is to speak *for* the adult, not *instead of* the adult.

2. Power Imbalances and Freedom from Coercion

Even if the mediator determines that the adult is capable of participating in the mediation, the mediator must pay special attention to the potential for the other participants to overpower the desires of the adult with diminishing capacity. The adult may be experiencing fear, confusion, and anxiety. She may have become dependent on one caretaker and be reluctant to alienate that individual. She is especially vulnerable to real or perceived threats by her family members to abandon her if she

favors one over the other. The mediator must remain alert to these power imbalances and take appropriate measures to neutralize them. In addition to ensuring that the adult has representation if needed, the mediator may take special care to allow the adult to speak without interruption, engage in frequent confidential caucuses with the adult, and be quick to communicate to the parties if he sees such imbalances at work.

A more subtle but equally dangerous challenge in a guardianship mediation is the tendency of family members, attorneys, other parties, and perhaps even mediators to try to structure a framework that is protective of the adult but that may not necessarily guard that adult's fundamental right to autonomy. It is very tempting for those involved in guardianship proceedings to promote what they perceive to be the adult's best interest even if that trammels the adult's basic desires and values. The parties usually do not do so with evil intent but rather under the misguided notion that they are in a better position than the adult herself to know what is right for her. For example, the adult may have expressed many times in the past a wish to remain in her own home rather than be moved to a nursing home. The family members may have compared the cost of home health care and nursing home care and determined that the latter is a far less costly. Before her capacity diminished, the adult had total freedom to choose to spend her money on the choice that she preferred, even if it proved to be more costly. The adult's diminished capacity is not an excuse for this autonomy to be compromised. In the mediation, the mediator should remain constantly aware that family members, acting with all of the best intentions, often tend to ignore the adult's most precious right – her freedom to choose.

3. Participants in the Mediation

Unlike a formal court proceeding, in which only the parties and those allowed by the judge to testify may participate, a mediation is typically open to all whose input and agreement is necessary to address the matters at issue. Many a beautifully-crafted mediation agreement has fallen apart later when some party who should have been included challenges the result. On the other hand, a mediation may become chaotic if too many people are part of the process. A guardianship mediation must definitely include the adult, the proposed guardian (or those who are vying for that position), and the individual who filed the petition. In addition, the mediator should determine who else can offer insight and input that will be relevant to the discussion. This would include family members, caretakers and companions, and maybe close friends of the adult (particularly if the adult's family members live in other towns and do not have frequent interactions with her). The mediator must remain cognizant of the fact that the presence of too many participants may cause the adult to feel that others are "ganging up" on her. In that case, the mediator may be able to ascertain in advance that one or two family members can represent adequately the wishes of a larger number. Finally, the mediator may suggest that an expert be included in the mediation, particularly one who is trained in psychology or social work or gerontology. Such an individual can offer valuable input to the parties. However, the mediator should make it clear that the experts will not be part of the actual decision-making process.

4. Confidentiality and Privacy Concerns

As noted above, mediations are not open to the public. The mediator will usually ask the parties to sign a confidentiality agreement before the mediation begins.

Potential problems may arise, however, if the mediators or one or more of the parties to the mediation discovers information about known or suspected elder abuse. Mediation statutes and guidelines throughout the states vary on whether this information must then be disclosed to the proper authorities. The general recommendation given in these sources is that the mediator and any participant may disclose threatening communications (as a threat to inflict bodily injury) or information about suspected abuse.

Another confidentiality issue that is peculiar to guardianship cases stems from the fact that a guardian ad litem who has been appointed by the guardianship court may participate in the mediation. Again state statutes differ in their treatment of guardians ad litem. However, the common view is that the guardian ad litem, as an appointee of the court, is charged with making a report to the court and with substantiating any recommendations made. This responsibility may clash with the guardian ad litem's ability to honor a confidentiality agreement. The parties to the mediation should be made aware of this conflict before the mediation begins. They may even write into the confidentiality agreement a limited exception for the guardian ad litem's report to the court.

CONCLUSION

Mediation has several advantages over formal court adjudication. Among these advantages are: privacy, expediency, lower cost, and flexibility. There are many ways in which mediation may be integrated into the various stages of a guardianship. However, mediators of such cases must be alert to certain special considerations, including the adult's capacity to engage in a process that is grounded in self-

determination and the power imbalances and subtle coercion that may occur in a process that lacks a formalized protective structure. In most cases, mediation will serve as a helpful adjunct to the formalized guardianship proceedings rather than a replacement of those proceedings. When conducted properly, such mediation may have the added value of preserving family relationships that are endangered when the sensitive issues of a guardianship are confronted.

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