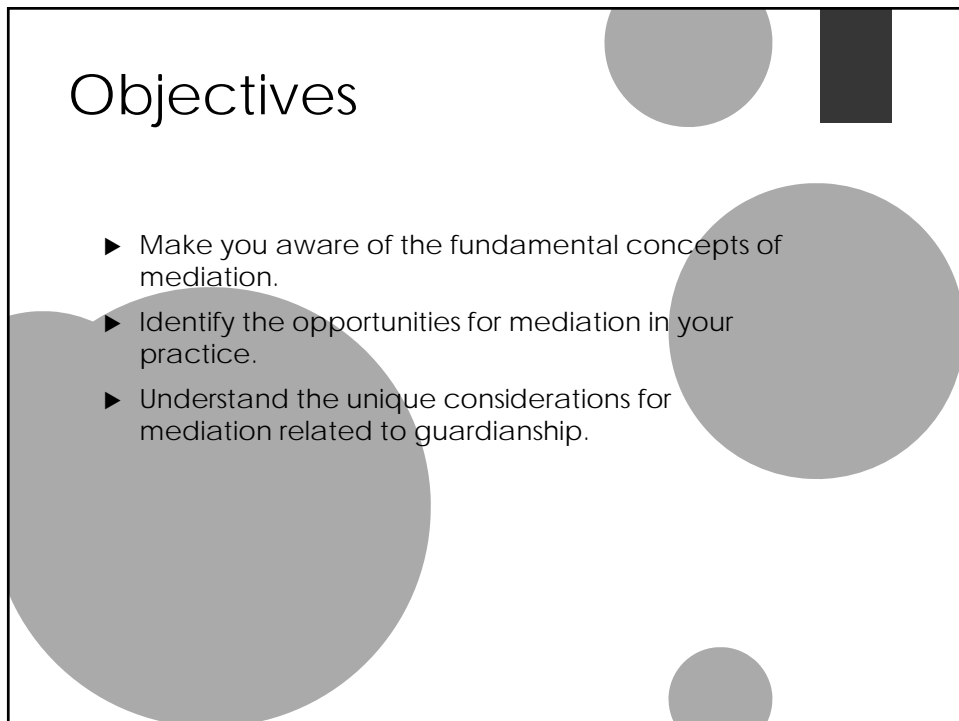




Mediation in Guardianship

BY LENNIE BURKE, NCG
OCTOBER 13, 2019

1



Objectives

- ▶ Make you aware of the fundamental concepts of mediation.
- ▶ Identify the opportunities for mediation in your practice.
- ▶ Understand the unique considerations for mediation related to guardianship.

2

Outline

PART 1

- ▶ Example of a mediation
- ▶ Fundamental concepts
- ▶ When you are the customer

PART 2

- ▶ When might mediation be used in guardianship
- ▶ Unique considerations for guardianship mediation

3

Basics of Mediation

PART 1

- ▶ Example : The big bad wolf and the 3 little pigs
(http://www.va.gov/orm/Mediation/Pigs_all_scenes.swf)

4

Basics of Mediation

- ▶ Fundamentals
 - ▶ A form of Alternative Dispute Resolution (ADR)
 - ▶ Led by a trained intermediary
 - ▶ Parties make their own agreements or commitments
 - ▶ Private/confidential

5

Basics of Mediation

- ▶ Fundamentals
 - ▶ A form of Alternative Dispute Resolution (ADR)
 - ▶ Compare to arbitration, private trial, elder caring coordination, etc.
 - ▶ Led by a trained intermediary
 - ▶ Parties make their own agreements or commitments
 - ▶ Private/confidential

6

Basics of Mediation

- ▶ Fundamentals
 - ▶ A form of Alternative Dispute Resolution (ADR)
 - ▶ Led by a trained intermediary
 - ▶ Neutral and impartial
 - ▶ Parties make their own agreements or commitments
- ▶ Private/confidential

7

Basics of Mediation

- ▶ Fundamentals
 - ▶ A form of Alternative Dispute Resolution (ADR)
 - ▶ Led by a trained intermediary
 - ▶ Parties make their own agreements or commitments
 - ▶ Self determination
- ▶ Private/confidential

8

Basics of Mediation

- ▶ Fundamentals
 - ▶ A form of Alternative Dispute Resolution (ADR)
 - ▶ Led by a trained intermediary
 - ▶ Parties make their own agreements or commitments
- ▶ Private/confidential
 - ▶ Information learned in mediation cannot be used elsewhere
 - ▶ Exceptions

9

Basics of Mediation

Kinds of disputes

- ▶ Employment
- ▶ Church
- ▶ Investment
- ▶ Personal injury
- ▶ Guardianship
- ▶ Many more

Almost every area of civil dispute

10

Basics of Mediation

- ▶ Possible Paths:
 - ▶ You file an action with the Court and the Court orders you to mediation
 - ▶ You initiate mediation in advance of filing
 - ▶ You initiate mediation to get assistance
 - ▶ Perhaps avoid filing

11

Misconceptions

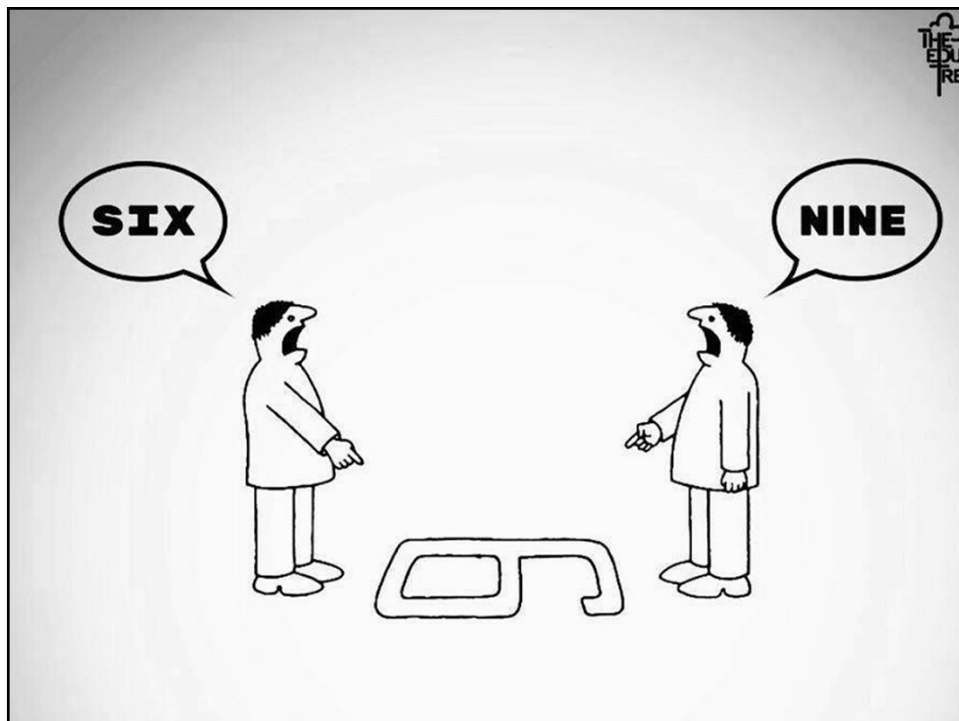
- ▶ Mediation and arbitration are the same thing.
- ▶ Good Faith negotiation is expected.
- ▶ It's a waste of time and money - I'll have to go to court anyway.
- ▶ The mediator will tell us how to settle the case.
- ▶ Mediator will tell the judge about the mediation.
- ▶ What's the point of a mediation if the judge is going to decide anyway?

12

What Can You Expect?

- ▶ Opening statement
- ▶ Who may participate
 - ▶ Parties and their attorneys
 - ▶ Participants
- ▶ Positions versus interests
- ▶ Caucus
- ▶ Exploration of alternatives
- ▶ Negotiation
- ▶ Agreement
- ▶ Reduction to writing

13



14

What Can You Expect?

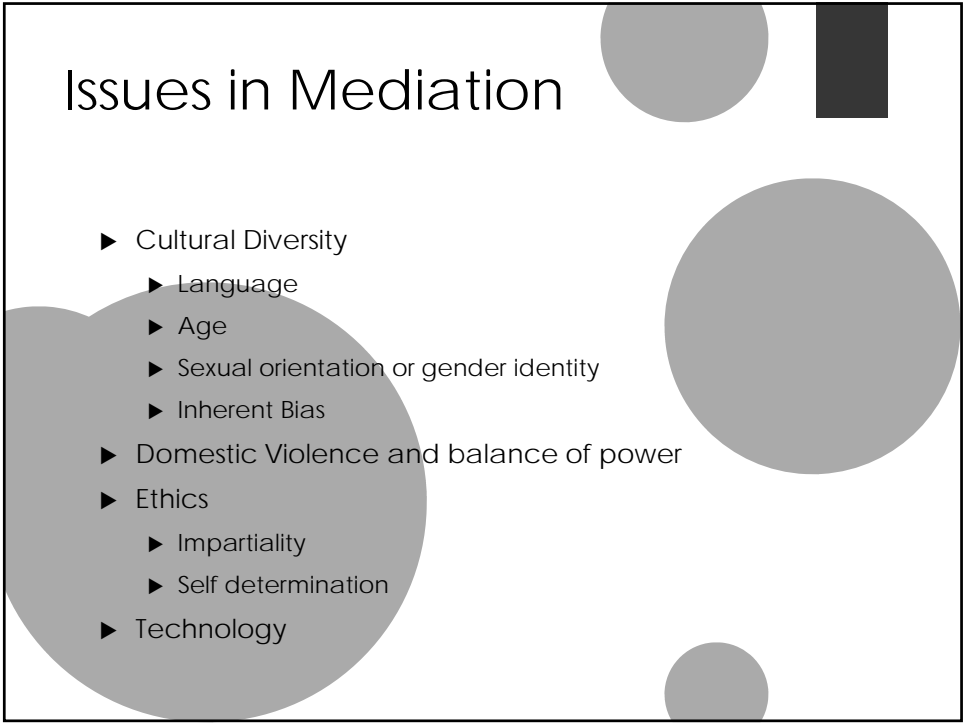
- ▶ Opening statement
- ▶ Who may participate
 - ▶ Parties and their attorneys
 - ▶ Full authority to settle
- ▶ Positions versus interests
- ▶ Caucus
- ▶ Exploration of alternatives
- ▶ Negotiation
- ▶ Agreement
- ▶ Reducing to writing

15

Possible Outcomes

- Possibilities:
- ▶ Mediated settlement
 - ▶ No agreement
 - ▶ Partial agreement
 - ▶ Continuation

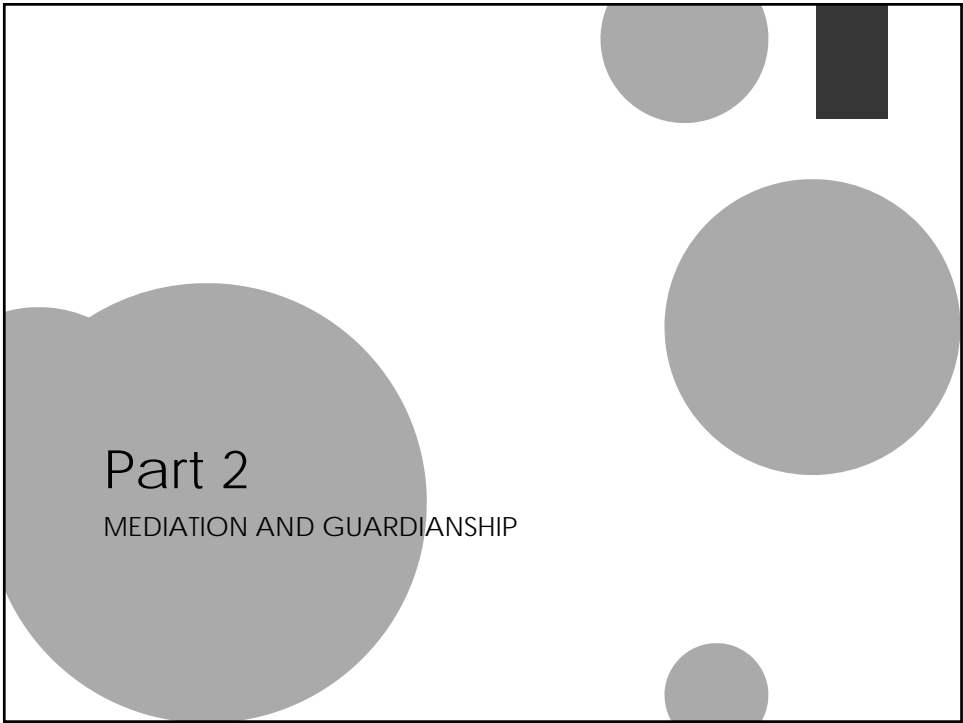
16



Issues in Mediation

- ▶ Cultural Diversity
 - ▶ Language
 - ▶ Age
 - ▶ Sexual orientation or gender identity
 - ▶ Inherent Bias
- ▶ Domestic Violence and balance of power
- ▶ Ethics
 - ▶ Impartiality
 - ▶ Self determination
- ▶ Technology

17



Part 2

MEDIATION AND GUARDIANSHIP

18

When Might Mediation Be Used: Examples

- ▶ To resolve questions about financial actions.
- ▶ In lieu of filing a Suggestion of Incapacity.
- ▶ Where filing will be done and by whom.
- ▶ To determine who will petition to be appointed guardian.
- ▶ To decide if there will be a petition to remove a Health Care Surrogate .
- ▶ To resolve disputes about the actions of the guardian (prospective or retroactive).

19

Comparison

Mediation

- ▶ Established practice
- ▶ Broad applicability
- ▶ Many choices of mediators (qualifications, styles and costs)
- ▶ Agreements voluntary
- ▶ Typically short term

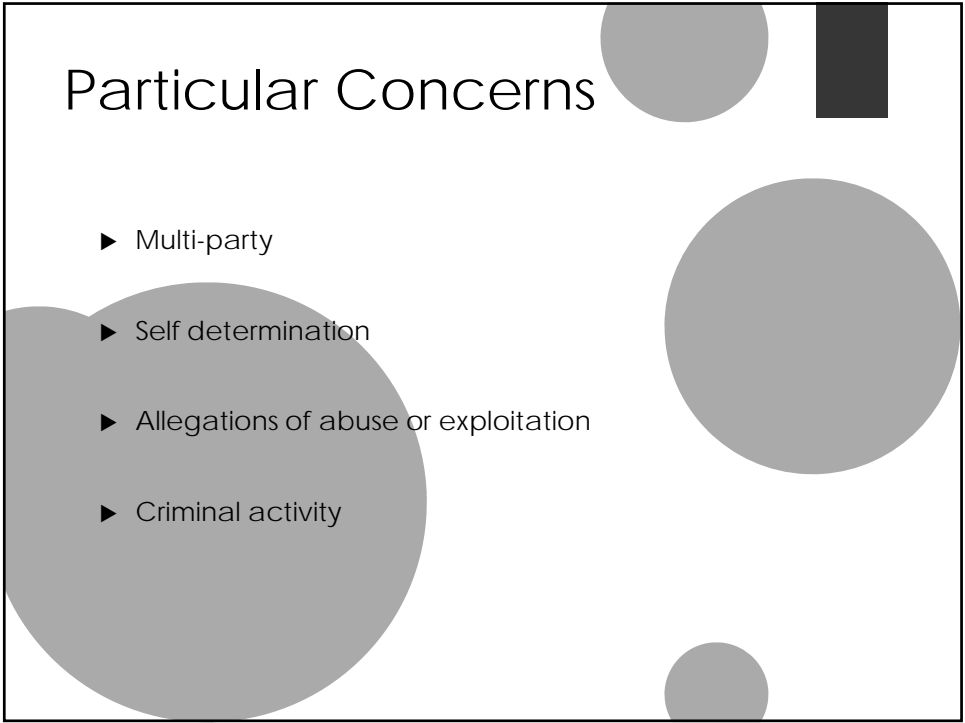
ElderCaring Coordination

- ▶ Pilot program
- ▶ For most complex, intractable disputes
- ▶ Few individuals qualified
- ▶ Coordinator more directive
- ▶ Compatible with on-going disputes

20

Particular Concerns

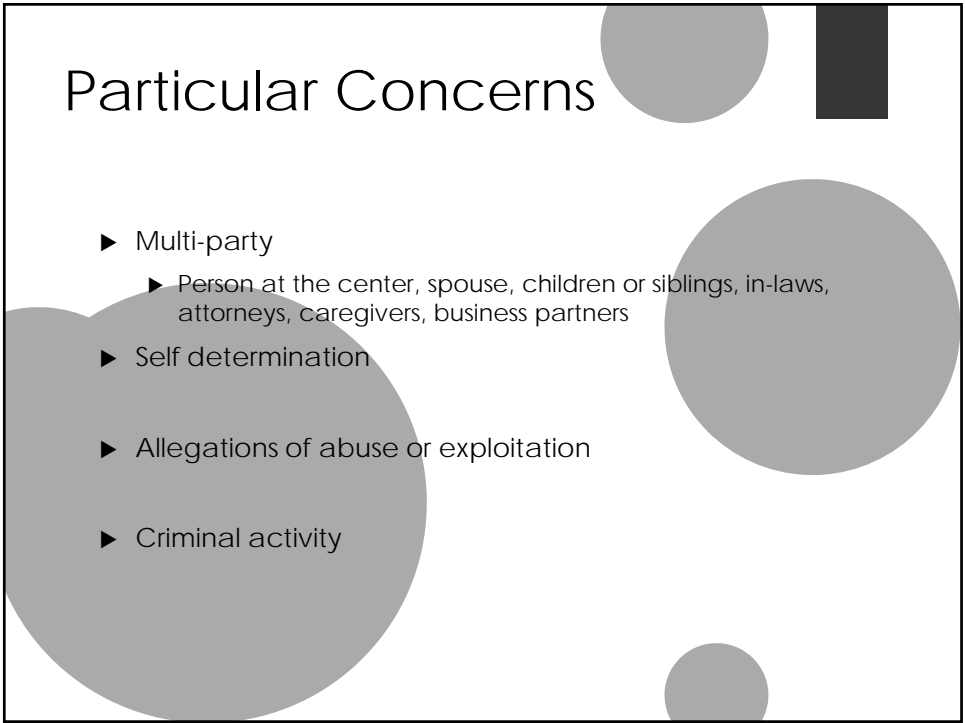
- ▶ Multi-party
- ▶ Self determination
- ▶ Allegations of abuse or exploitation
- ▶ Criminal activity



21

Particular Concerns

- ▶ Multi-party
 - ▶ Person at the center, spouse, children or siblings, in-laws, attorneys, caregivers, business partners
- ▶ Self determination
- ▶ Allegations of abuse or exploitation
- ▶ Criminal activity



22

Particular Concerns

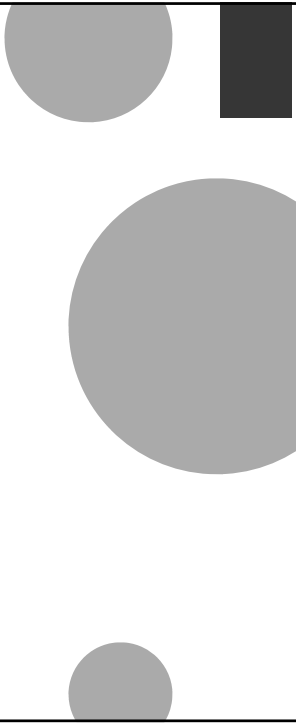
- ▶ Multi-party
- ▶ Self determination
 - ▶ Informed and voluntary decisions
 - ▶ Willing participation
- ▶ Allegations of abuse or exploitation
- ▶ Criminal activity

23

Self Determination Issues

- ▶ Incapacity
- ▶ Balance of power
 - ▶ Fear and domestic violence
 - ▶ Dependence
- ▶ Coercion

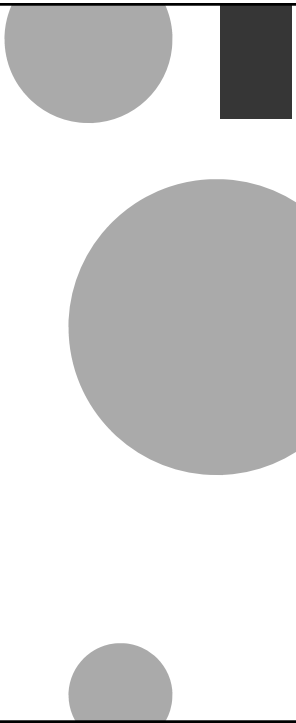
24



Particular Concerns

- ▶ Multi-party
- ▶ Self determination
- ▶ Allegations of abuse or exploitation
 - ▶ Exception to confidentiality
 - ▶ Mediation inappropriate
- ▶ Criminal activity

25



Particular Concerns

- ▶ Multi-party
- ▶ Self determination
- ▶ Allegations of abuse or exploitation
- ▶ Criminal activity
 - ▶ Mediation inappropriate

26

What To Look For In A Mediator

- ▶ Competence
 - ▶ Training
 - ▶ Experience
 - ▶ Availability
- ▶ Style
 - ▶ Do they prefer caucus or joint session?
 - ▶ How directive are they?
- ▶ Ethics
 - ▶ Examples (conflict of interest, self determination)

27

Example

- ▶ Children agree mom does not have the capacity to make any decisions.
- ▶ Mom created a Durable Power of Attorney when she was competent; designated a Health Care Surrogate and placed substantial property in a trust.
- ▶ Children are concerned about actions of the attorney-in-fact, the HCS and the trustee.
- ▶ How can they get answers and their concerns resolved?

28

Example - continued

Alternatives

- ▶ They suggest mom's incapacity and petition for a guardian to be appointed
 - ▶ Battle over who will be appointed guardian
 - ▶ Their concerns may not be addressed
- ▶ Or, they can work it out between themselves (with the help of a neutral facilitator)
 - ▶ Preserve their mother's wishes

29

Conclusions

- ▶ Mediation (or supported family decision making) can be a useful tool;
 - ▶ To respect the dignity and self-determination of an individual,
 - ▶ To save money and time, and
 - ▶ To achieve a better outcome.
- ▶ As a party in a mediation, you have a say in the process and the outcome.

30

Bibliography

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

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

Curcio, S. (2009) *Elder Mediation Matters: Probate, Guardianship and Family Care-giving*, Mediate.com

Bertschler, J. & Bertschler, P. (2009) *Elder Mediation: A New Solution to Age-Old Problems*, Seven Hills, OH: Northcoast Conflict Solutions, LLC (also available in a Kindle version)

Rosenblatt, C. (2008) *The Boomer's Guide to Aging Parents, Vol 7: How to Handle Family Conflict About Elders*, AgingParents.com

Bertschler, P., & Cocklin, L. (2004) *Truce! Using elder mediation to resolve conflict among families, seniors and organizations*. Seven Hills, OH: Northcoast Conflict Solutions, LLC.

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

Taylor, A. (2002). *The Handbook of Family Dispute Resolution*. Hoboken, NJ: Jossey-Bass; John Wiley & Sons.

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

Butterwick, S., Hommel, P., & Keilitz, I (2001). *Evaluating Mediation as a Means of Resolving Adult Guardianship Cases*. Ann Arbor: The Center for Social Gerontology, Inc.

Stone, D., Patton, B., & Heen, S. (1999). *Difficult Conversations, How to Discuss What Matters Most*. East Rutherford, NJ: Viking Press; Penguin Press