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Mediation of Disputes Arising in Adult Guardianship Cases

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I. Introduction

Mrs. Jones is very angry and upset because her son has just told her that he plans to file a petition to become her guardian. She complains that she does not need a guardian and wants you to represent her. She tells you that her daughter will support her position. /1/

You have been appointed by the court to represent Mr. Williams, an 80-year-old man. His wife has petitioned to be appointed as his guardian. His children from his first marriage are contesting the petition. Mr. Williams is currently hospitalized as a result of a recent fall.

Mrs. Roberts calls you because she is concerned about her father. She says he has not been taking his prescribed medications and has not been to a doctor for a physical since his wife died last year. The neighbors have called her a couple of times because they think he is not safe at home. She asks you what she can do to make her father take care of himself.

Last year, Mrs. Smith's son was appointed as her conservator to handle all her financial matters. No guardian of her person was appointed. Mrs. Smith comes to you because her son refuses to give her any spending money, and she is unable to buy lottery tickets, go bowling, go out to lunch with her friends, or buy cigarettes.

These scenarios may be familiar to an attorney who works with older people or their families. Each is a potential or actual contested case. If the case is handled through usual court procedures, it will be resolved through litigation or settlement, but real underlying issues may not be addressed, and relationships may be soured. The parties, and especially the older person involved, are likely to come away feeling as if they are powerless and the "system" is not interested in them. Both the older person and his or her family members may feel as if the problem that brought them to court has not been solved. Anger and resentment will remain.

In the last 15 years, all states have modified their laws pertaining to guardianship. Many of these changes were designed to increase respondents' due process rights, to assure adequate notice and representation, to limit guardians to those powers necessary to meet the ward's needs, and to assure that respondents have the opportunity to object to the proceedings and that petitioners are held to a meaningful standard of proof. Additionally, some state supreme court decisions, recognizing the

significant deprivation of civil rights that comes from a guardianship, have held that respondents must have specific constitutionally protected rights in the guardianship process. /2/

Advocates must assure that their older clients' constitutional and procedural rights are fully protected in guardianship cases. Yet, in actual practice, many guardianship hearings are short, pro forma, routine procedures. The Center for Social Gerontology (TCSG) conducted a study of guardianship practice in ten states in 1990 and 1991 during which some 566 guardianship hearings were observed. /3/ Twenty-five percent of these hearings took five minutes or less, and a majority took under fifteen minutes. Only 28 percent of respondents attended the hearing that determined their need for a guardian. In only slightly over half of the cases in which the respondent was absent was any discussion of the respondent's absence reported. /4/

These numbers suggest that respondents are not heard in the process. Although 56 percent of the respondents who were present in court voiced objections to receiving help, only 5 percent of those petitions were denied. Further, anecdotal reports of respondents' reaction to the courtroom experience included descriptions of respondents who were "frightened," who found the proceedings "traumatic," and for whom the experience was "degrading, lonely and ill-understood." /5/ Although most statutes specifically favor limitation of powers and "least restrictive alternatives," limited guardians were rarely appointed. /6/

It became apparent to the researchers of this study that procedural reforms alone, vital as they were, were not meeting the needs of persons in the guardianship system. After the initial research stages, TCSG began investigating other means of dispute resolution in guardianship cases -- means that would identify the disputes, empower the older person in the process, and have a real impact on the problems underlying the perceived need to bring a guardianship petition.

With the cooperation of the Washtenaw County (Michigan) Probate Court, and with funding from the National Institute for Dispute Resolution (NIDR) and the Ann Arbor Community Foundation, TCSG started providing mediation services in adult guardianship cases in 1992. In 1995, through a grant from the Retirement Research Foundation, TCSG established four adult guardianship mediation pilot projects in existing mediation centers in Tampa, Chicago, Albuquerque, and Denver. TCSG will shortly publish a complete manual on establishing adult guardianship mediation programs. /7/ Additionally, through a grant from the William and Flora Hewlett Foundation, TCSG provides information and training to mediators, courts, attorneys, and aging agencies that are interested in starting and using such programs.

II. Mediation and Adult Guardianship Cases

Why mediation? What is it, and what can it do to help older persons facing guardianship? Mediation, as practiced in TCSG's projects, is a voluntary process in which the parties to a dispute, with the assistance of a neutral third-party facilitator, explore their own options and reach agreement to resolve their dispute. Unlike a judge or arbitrator, the mediator does not make any judgment or even recommend a solution. Mediation can be used at any stage in a dispute -- before a court petition is filed, before a hearing, or after a guardian has been appointed when someone challenges the need for a continuation of the guardianship or disputes the guardian's action or inaction. In most cases, the mediation process is confidential, and discussions at mediation are not

admissible into evidence in a later court hearing. Agreements reached in mediation are usually made in writing and are binding like any other written contract. In mediation, the parties talk directly with each other, rather than through their attorneys, and have the opportunity to listen to and understand each other's interests and positions.

Mediation in adult guardianship cases raises some interesting and unique issues. TCSG's projects have attempted to address these issues and to answer questions about the application of mediation to these cases.

A. Incapacity

Can a person who is incapacitated take part in mediation? First, of course, it is important to remember that in many cases, such as those described above, no legal determination of the respondent's capacity has yet taken place. Although an allegation may have been made, and medical reports may even have been filed, not all allegations are valid. Second, even if a person does have mental or decisional limitations, that person may still understand enough to have opinions, to discuss issues relevant to his or her own life or activities, to listen to other parties, to consider options, and to understand agreements. Limitations in certain areas of functioning or thinking do not preclude other abilities.

Of course, in some cases the respondent cannot take part in mediation. If the respondent is an active disputant but does not understand the mediation process sufficiently to take part, mediation may not be appropriate. A trained mediator will interview all parties before the mediation session to assure that they are all capable of understanding and taking part in the mediation process. In 72 percent of TCSG's project cases mediated (as of July 1996), the respondent was present at the mediation session. The remaining cases involved disputes between other interested parties, for example, a dispute over who would be guardian of a clearly incapacitated person who could not express an opinion on the issue.

B. Bargaining Power

Even if the respondent can understand how mediation works, can the respondent effectively negotiate on his or her own behalf? This is a serious concern. Even a completely competent respondent is facing an allegation of incapacity. These allegations and the appearance of the need to prove one's ability (although not legally required through burden-of-proof rules) could effect a significant imbalance of power and negotiating ability. If there is evidence of abuse, which suggests that agreement may be reached only because of threats from or fear of the other party, mediation is usually not appropriate. However, absent abuse, the power imbalance in mediation sessions can usually be moderated.

A competent mediator is trained and experienced in ways of balancing power between parties. One important method is to have a representative for the respondent, usually an attorney, present at the mediation session. This representative can, if necessary, act as an advocate, advisor, or negotiator for the respondent.

This solution, however, may lead to another problem. If the respondent has an attorney, should other attorneys be there, too? TCSG has found that parties, attorneys, and mediators have answered this question in various ways. In some cases, the presence of the respondent's representative and the mediation process itself are sufficient to remind the other parties that the respondent is a person who has opinions and interests that merit consideration. When this occurs, the respondent's representative does not take an active part. In these cases, other attorneys are usually satisfied also to take an advisory role. Further, in cases in which the respondent has significant communication difficulties, or in which the respondent is not present, other parties may find it helpful to have the representative take part and may not see his or her presence as threatening.

TCSG has seen a few cases in which attorneys act as the primary negotiators. This is not usually helpful for the parties because personal, not legal, issues are often at the core of problems. One of the greatest benefits of mediation, the opportunity for the parties to take control of their own decision-making process, is lost if attorneys dominate the mediation session. A good mediator will work with parties and attorneys to find the optimal role for all.

C. Court Approval

Does an agreement reached through mediation have to be approved by the court? Certainly, an agreement to have a guardian appointed must be approved by the court. In some states (e.g., Illinois), the court must approve a dismissal. /8/ In other states, if a solution other than guardianship is agreed upon, the petitioner may simply dismiss the petition, and the parties are free to agree to whatever other solution is satisfactory. In the mediated cases that had reached agreement in TCSG's project as of July 1996, 71 percent of the cases involving a petition for guardianship resulted in withdrawal of the petition. /9/

D. Issues for Mediation

What kinds of issues are best resolved in mediation? Almost any contested issue that arises in a guardianship case can be mediated if the parties are able and willing to talk to each other. However, often the issues that get discussed in the mediation session are not the same ones that the parties raise in court. For example, in one case, a woman had previously been appointed guardian of her father. Her brother filed an objection to an annual accounting and a petition to move his father out of the daughter's house. The mediation focused not on the problems with the accounting, which were quickly resolved, but on the father's need for some privacy in his room and his desire to know about how decisions on his behalf were being made. Neither the son nor the father was really interested in moving; that demand had seemed to be the only way that they could get the daughter's attention. The mediation also revealed long-term family tensions and resulted in various parties agreeing to participate in family counseling.

In another case, the legal issue was whether a power of attorney granted to one child was a valid legal document. In court, the parties would have argued over the competency of the parent at the time the document was signed. (If it was valid, there was no need for a guardian.) In mediation, the parties focused not on the legality of the piece of paper, but on the parent's current needs and who could best meet them. Resentment over gifts given to another child was expressed. The parties were able to discuss their feelings about their moral obligation to support their parent, completely

separately from any legal obligations that might exist. In the end, the children were able to agree on a care plan that did not involve the court but that included agreements that they communicate with each other.

Sometimes well-meaning family members are so concerned with the safety of their older relatives that they want to eliminate all risk-taking activity. Many mediated guardianship cases focus on the issues of safety versus autonomy. Adult children, sometimes through guilt over not being able to do as much as they think they should, want to protect their parents. Mediation in these cases sometimes offers the first opportunity for adult children really to listen to their parents' perspective. The mediation process allows each party to "tell his or her story," completely without interruption. In one mediated case, the adult children were amazed to learn that their parents recognized the risks in their living alone and chose to take those risks and remain independent rather than move to a different, and more restrictive, setting.

E. Choosing Mediation

Should an advocate ever suggest mediation if the advocate is confident of winning in court? This of course is a judgment call, and if the client wants his or her "day in court" the advocate and the client may decide not to go to mediation. However, before advising against mediation, consider the benefits of trying it. First, the client has little to lose. Because mediation is voluntary, agreement by definition means that all parties consent. If the parties cannot agree on a resolution, the client can still go to court. Second, mediation is private, and the client's private life and problems will not be open to public inspection as they might be in a court hearing. (Some states do provide closed hearings, however.) Several questions may help an advocate and client decide whether to choose mediation. Will the client feel better if it is legally proved in a court of law that he or she is not incapacitated? Or does the client simply want to be able to go on living life without being restricted? Does the client want to maintain or reestablish a good relationship with his or her children? Or does the client want them out of his or her life? Is a court hearing, even a successful one, going to be traumatic? A client who wants to keep relationships intact, to avoid a court process, and to communicate his or her needs and wishes to other family members may find mediation a good route. However, if the client wants to challenge the constitutionality of the guardianship law, or set a precedent about the definition of incapacity, then mediation would not be appropriate.

Similarly, a petitioner who believes that a guardianship is absolutely necessary may still find mediation helpful. Mediation helps parties evaluate options -- it does not force alternatives. The mediation process itself gives autonomy to the parties. The mediator does not take sides and does not push any particular agreement. The parties may agree on any legal solution. The mediator assures that they understand what they are deciding and will often suggest that they consult with their own attorneys about legal ramifications. An interesting result of mediating adult guardianship cases is that needs and interests of other family members can also be explored and addressed. Often in court, their underlying financial interests may be raised in a negative or adversarial way. In mediation, parties can explore together their financial and emotional needs. For example, in one case, a woman with a history of drug problems and her 12-year-old child moved back in with her mother, who had a history of mental illness. The daughter said she was moving in to take care of her mother. The other siblings, all older than she, married, and leading busy lives, felt that their

sister was taking advantage of their mother. Mediation was able to focus on the needs of all parties -- issues about who was caring for whom, whether rent should be paid, what the other siblings could or should do (if anything) to help out, what the mother really wanted, and how childhood relationships were affecting current actions and expectations.

III. Conclusion

This article serves only as the briefest of introductions to mediation in adult guardianship cases and the mediation process. /10/ Mediation can be an excellent means of helping clients resolve issues that cannot be effectively addressed in the court, maintain autonomy in the decision-making process, and preserve or improve important relationships.

Footnotes

/1/ These cases and those mentioned in the text are based on actual mediated cases, but names and facts have been modified to protect confidentiality.

/2/ See, e.g., Hedin v. Gonzales, 528 N.W.2d 567 (Iowa 1995) (Clearinghouse No. 50,606), which also cites cases from other states.

/3/ Lauren Barritt Lisi et al., National Study of Guardianship Systems: Findings and Recommendations (1994) (available from the Center for Social Gerontology).

/4/ Id. at 44, 49, 51.

/5/ Id. at 53.

/6/ Id. at 63.

/7/ Susan D. Hartman, Adult Guardianship Mediation Manual (forthcoming fall 1996).

/8/ 755 ILCS 5/11a-8.

/9/ This includes a few cases in which the petition was adjourned pending carrying out of the agreement. The parties agreed to drop the petition after the terms of the agreement were satisfactorily completed.

/10/ Many resources discuss mediation in depth. A good introduction to mediation is Christopher W. Moore, The Mediation Process (1986).