

Benefits of the Use of Mediation in Elder Law Related Disputes

By Mark J. Bunim, Barbara Mentz, Leona Beane and Clare A. Piro

Sibling Disputes Concerning Care of a Parent

By Mark J. Bunim

These are the facts of a case I recently mediated. A brother and sister were involved in a long-running dispute concerning the care of their elderly mother. The brother and sister are in their 60s and the mother in her mid-90s. The mother lives in New York, the brother in Seattle and the sister in rural Pennsylvania. The mother's faculties are fading fast and the sister has always been much closer to the mother and wants the mother to come live with her.

The brother is a wealthy business executive and the sister has very little money. Neither is married although they have live-in companions. It is safe to assume that in addition to the brother and sister truly disliking each other, the companions do as well. The sister owes the brother about \$1 million for loans he has made to her over time. The brother is financially savvy but the sister has a lot of trouble dealing with money and budgets.

The mother needs 24/7 care. The sister wants to be paid a salary to take care of the mother [they now have full time aides]. The aides are paid by the mother's assets which will run dry if the mother lives more than another year. The mother's only non-liquidating asset is her large home in suburban New York City. If the mother moves to live with the sister, they could sell the house but that would also dissipate the mother's estate. The brother will not agree to pay the sister anything for caring for the mother and he wants her to stay in her New York home.

The sister runs the mother's business which involves the management and collection of royalties from the mother's career. She wants to continue doing that and to receive a stipend for her hours.

The mother's will divides everything 50/50, but there are, by subsequent agreements, set-offs in favor of the brother for sums owed to him. The brother also holds the second mortgage on the sister's house.

The sister comes to New York every two-three weeks to see the mother, supervise her care and work with the aides. She wants to be reimbursed for her travel from the mother's "pot." The brother comes to visit about twice per year.

The sister is seeking a reduction in her loan balance [from her 50% of the estate] for her "care-giving time," in addition to the dispute concerning the location of their

mother's residence going forward and decision making authority regarding the mother's finances and health care.

The brother was threatening to go to court to have a guardian appointed for the mother unless the sister agreed to his plan of action. Realistically the sister did not have the funds to fight the brother in court.

Clearly this situation cried out for mediation. It is not atypical of a sibling dispute over the care of an elderly parent. While each case has its own nuances, the pent-up emotions of years of rivalry come to the fore in these types of disputes. In sibling disputes concerning a parent the emotional levels and complexities that are routine in stranger-based civil litigation only escalate. To promote a dialogue that will result in a resolution, the formalities and strictures of an adversary proceeding in a court are certainly against the best interest of the parties.

Family disputes are rarely black and white. They are inherently filled with gray and thus solution creativity that mediation can bring about is appropriate. On top of this, mediation is quick, certainty results and participants' own input results in formulating the outcome. Most mediations take months, not years. A mediator will devote as much time as needed to helping the parties achieve an Agreement that will be beneficial. Good mediators are persistent and creative and do not give up until a settlement is reached.

Benefits of Using Mediation to Resolve End-of-Life Disputes

By Barbara Mentz

As lawyers, we are always seeking to provide our clients with a win. But, what does it mean to "win" for a client in an end-of life dispute and how can mediation by a well-trained neutral mediator qualified to mediate end-of-life disputes be of benefit to lawyers representing a client in such disputes?

The benefit of early mediation by a qualified neutral mediator in an end-of-life dispute is perhaps best illustrated by the infamous debacle of over six years of litigation involving Terri Schiavo, who was in a persistent vegetative state being kept alive by a feeding tube. Although Terri Schiavo was a young woman, the issue involved whether to remove the feeding tube, which would result in her death, an issue that also arises in end-of-life disputes involving elderly patients. The lengthy and protracted litigation in the Schiavo case involved, among other things, the Florida State Courts, petitions to the United States Supreme Court, a stay by the governor

of Florida overriding a Florida court's order to remove the feeding tube, intense media scrutiny, intervention by interest groups and, worst of all, seven years of agony and tearing apart family relationships.

End-of-life disputes involving the elderly can arise in situations such as the Schiavo situation, or its mirror image, whether to insert a feeding tube to sustain life as well as whether to have a life-saving operation or whether to engage in a course of treatment such as radiation or chemotherapy.

Those embroiled in end-of-life disputes in addition to the patient, whose interest is paramount, can include family members, guardians, friends, hospitals, hospital ethics committees, doctors, caregivers and political, religious and other organizations. These emotionally charged and complex disputes may pit any combination of parties against each other, each with his, her or its own agenda involving conscious and subconscious interests, feelings and concerns. The benefits of mediation in end-of-life disputes make mediation a most appropriate method to resolve these disputes.

Mediation offers the parties the opportunity at the earliest stages of an end-of-life dispute, where time is truly of the essence, before litigation begins and the parties are entrenched in their positions, to come to a timely resolution that is in the best interest of the patient.

The mediation process can afford the parties the necessary privacy, rather than having a case proceed under public scrutiny through the court system, in a protracted adversarial proceeding, often at significant financial costs and fractured family relationships.

A skilled and well-trained neutral mediator, qualified to mediate end-of-life disputes, who should be trained in bioethics, encourages the parties, including a competent patient, to identify the feelings, interests and concerns that really underlie their positions. These may involve anger or frustration, feelings of guilt, fear of loss, differing ideas about death with dignity, different interpretations of a non-competent patient's actions, exhaustion of a caregiver, religious beliefs, moral values, ethical issues, financial costs of life-sustaining treatment, cultural differences between generations of family members or between family members and physicians or hospitals, a misunderstanding of the medical condition, treatment or prognosis, a mistrust of physicians or hospitals, a hospital or physician's concerns over liability, sibling rivalries, or a combination of these and many other feelings or concerns.

Most courts and family members support a competent patient's right of autonomy and self-determination to choose. Where disputes arise, whether because of family members or a doctor who declines to undertake life-sustaining procedures or declines to withdraw life-sustaining procedures, the mediation process can provide a compe-

tent patient with the opportunity for autonomy and self-determination short of litigation. Absent mediation, the patient may never express his or her true feelings that the choice being made is out of fear of being a burden to others, financial concerns over treatment or costs, mistrust of the medical profession, a misunderstanding of the medical prognosis or life-sustaining treatment or other reasons.

When a patient is not competent, the mediation process allows the parties to the dispute to focus on the patient's best interest. The mediation process affords the parties the opportunity to express and discuss their emotions, interests, values and concerns in a considerably less contentious atmosphere than a litigation setting. A mediator, having heard the participants and observed their personalities and attitudes, can facilitate the parties' understanding of each other's interests and concerns, including ethical and moral issues and religious beliefs, facilitate the parties' understanding of the medical information and remove mistrust.

Because the mediation process encourages the parties to discuss with each other their concerns and feelings, it allows the parties to feel that they have been heard and their positions acknowledged. This process can facilitate the parties achieving a resolution that is best for the patient while alleviating some of their own fears, concerns and feelings. These candid and open discussions can also aid the grieving process which may well have begun before the patient dies.

Not all mediations involving end-of-life disputes will be resolved through the mediation process, and compromises on ethical and legal issues involving laws, rules or regulations cannot always be made. Even if there is no resolution short of litigation, having engaged in the mediation can provide a win for your client. The result of having first utilized the mediation process may be a shortened, less adversarial litigation. More importantly, mediation can serve as an effective method for all participants to work through their feelings, interests and concerns, to focus on the patient's needs, desires and autonomy and to deal with the grieving process.

Guardianship Disputes

By Leona Beane

A guardianship proceeding pursuant to Article 81 of the Mental Hygiene Law can become extremely contentious as it is an adversarial proceeding; the extensive litigation can get out of hand, requiring the parties to pay excessive fees as part of the litigation. The tool of mediation should be considered to assist in the resolution of a litigated guardianship proceeding.

A court is limited to statutory solutions—should a guardian be appointed; what powers should be granted pursuant to article 81 of the MHL. Mediation focuses on

solving the problem, and allows the persons involved to search for more creative responses. Before appointing a guardian, the court must determine if the appointment is necessary to provide for the personal needs and/or to manage the property and financial affairs of the “alleged incapacitated person” (AIP), and in addition, that the AIP agrees, or that the AIP is “incapacitated.” The determination of “incapacity” is based on clear and convincing evidence that the AIP is likely to suffer harm because the AIP is unable to provide for his or her own personal needs and/or property management and cannot adequately understand and appreciate the nature and consequences of such inability. To prove by clear and convincing evidence is a very high standard. In many situations the guardianship proceeding can become embroiled in convoluted contentious litigation. Sometimes the ward (AIP) really needs a guardian, but because of the extensive litigation, the petitioner was not able to meet that standard, and thus a guardian was not appointed, when perhaps it would have been beneficial to have a guardian who would provide assistance to the ward.

The issue of incapacity itself should not be decided by mediation, because this is a legal issue requiring a decision by a judge. Thus, there must be a court determination of incapacity before a guardian is appointed. But, if all the other issues are resolved by a mediated agreement, any necessary hearing should proceed quite smoothly.

With the use of mediation, there may be additional alternatives for the court, such as a very limited guardianship, authorized to provide whatever is needed to assist the AIP, and nothing further, and there does not have to be a determination of “incapacity.”

Sometimes there is a “power struggle” among members of a dysfunctional family seeking to acquire control over the elderly or disabled person. Quite frequently there are many ongoing disputes among family members. The legal issues presented in court are usually not the underlying issues causing the family turmoil. Sometimes there are no contested legal issues, but there are still family disputes or concerns that need to be addressed.

In a family situation, even though there may be many disputes between the siblings or other relatives (nieces, nephews, cousins, etc), they may still prefer to keep it “private”—they don’t want to air all their family disputes in a courtroom in a litigated court proceeding. Many of these individuals have never been involved in any court proceeding, and this is their first encounter—involving guardianship for their mother. In such situations, mediation may provide the necessary tool to address the concerns of all the family members.

Guardianship proceedings are quite different from other proceedings in court. In most other proceedings, once a decision (court Order or Judgment) is rendered,

the court is finished with that case, but not so with guardianships. A guardian is required to file an annual report each year (which might create controversy over expenditures); any major expenditure of the guardian may require a further hearing, such as, e.g., purchase of a house, sale of a house, purchase of major equipment for the ward; changes in the living conditions if at a specific nursing home, and for many other proceedings within the guardianship. Each of these proceedings seeking further court permission may entail further litigation between the relatives. Also, at the termination of the guardianship, the guardian must file a final report and account with notice to interested parties. That proceeding many times entails further litigation, regarding the expenditures that were or were not made, the investments, and everything else.

Mediation can be extremely useful whenever any of those proceedings are instituted with contentious litigation.

Many times courts appoint co-guardians. Sometimes there is contention between the co-guardians that could provide for litigation. Mediation can be very useful in this situation as well, if it is provided that the co-guardians are required to proceed with mediation first before making any application to the court.

Many guardianships are commenced for improper motives. I was once involved in a proceeding wherein the elderly lady had 4 children—the 4 children were arguing over the mother’s estate plan. When one side was very unhappy, the son commenced a guardianship proceeding against his mother. That proceeding entailed very large amounts being unnecessarily expended. The dispute was really a pre-probate dispute among the children. But, the guardianship proceeding unnecessarily brought the mother into the dispute, causing her great grief, and causing everyone to expend large sums of money. That proceeding was very suitable for mediation.

Benefits of Mediation in Elder Care Law—Hearing the Voice of the Elder Person

By Clare A. Piro

Other parts of this article address the benefits of mediation in guardianships, meeting end-of-life decisions and in resolving disputes as to care of the elder person among family members. They all have in common the fact that the process of mediation insures that the family actually hears the voice of the elder person.

How many of us have had meetings with our clients and their children where the children completely take over the session, speaking for, and even over, their parent, often as if the elder person is not even present? Mediation takes the exact opposite approach and emphasizes that the client is the elder person who has a voice which deserves to be heard and respected.

First, the mediator needs to address the issue of the elder person's ability to make decisions, keeping in mind that not all decisions should be treated the same. Just because a person may not be competent to make financial decisions or live independently, he or she still has valid opinions as to where to live, with whom to live and who should be appointed to care for them. These opinions deserve to be heard and respected even if they are not determinative.

Second, the mediator will conduct the mediation in the manner in which it is most advantageous to the elder person. This means that the mediation needs to be scheduled in a place where the elder person would feel most comfortable, such as the home or nursing home, so as to minimize confusion. The mediation must also be scheduled at the time of day when the elder person is most cognitive and alert, typically morning. Finally, the mediator should ask the elder person if he or she wants a person there who will be there to offer support. Not surprisingly, that person is often a paid caregiver with whom the elder person has developed a relationship as opposed to a child or other relative.

Finally, since elder care mediations are usually multi-party sessions consisting of the elder person, a support person, children and possibly the children's spouses, you can imagine it is difficult to hear the voice of anyone except the most aggressive person in the group. That is why the mediator employs a policy of checking in with the elder person. The mediator always remains aware of the elder person's reactions, and if the mediator feels that the elder person is not hearing what is being said (both literally and figuratively), the mediator checks in with him or her and uses the mediation skills of reframing and restating what has been said to insure that the speaker's meaning is understood by all parties. Thus, the mediator is there to support each party's deliberation and efforts to understand the other's perspective without encouraging any party to adopt any particular point of view or resolution but always insuring that the elder person is part of the conversation. Given the number of participants, it is common that elder care mediation will be facilitated by co-mediators.

If you are familiar with mediation in general, elder care mediation may be very different from what you might expect. For instance, in divorce mediation, there are terms which need to be discussed and resolved in order for the parties to enter into a separation agreement, and the focus of the mediation typically is on reaching agreement. In elder care mediation, however, a primary focus is on the communication between the parties and the empowerment of the elder person. This will ultimately lead to the elder person's willingness to accept an outcome in which he or she participated in the decision making process while the other family members are able to actually hear and respect the wishes of the elder person. Thus, mediation provided more than just a resolution in

that it gave the elder person a voice and respect that he or she may not have achieved in an adversarial process.

Financial Transactions Between the Parent and Children

By Leona Beane

There are many situations where disputes arise when there are financial transactions, between a parent and children, and later there is a dispute as to whether the financial transaction was a "gift" with no expectation of its return, or whether it was a "loan," where there was an expectation of repayment with interest.

Many of these transactions are entered into without the advice of counsel and without any supporting documents to determine whether there was a "loan" or a "gift."

Mediation would be extremely useful in these situations.

Quite frequently, these types of transactions come to the surface in a guardianship proceeding. Sometimes these types of transactions also come to the surface via use of a power of attorney—questions being, did the agent under the power of attorney make proper disbursements, or was there breach of a fiduciary duty?

All of these situations are ripe for mediation because they involve interpersonal disputes with extreme emotional conflict. The courts really can't handle such disputes in ways that will be beneficial to all. With mediation, quite frequently the end result is beneficial to all because creative solutions are being considered.

There are additional areas of Elder Law that lend themselves very well to mediation, such as disputes involving senior housing, neighbor disputes, assisted living issues, grandparents and grandchildren, elder abuse, insurance issues, etc. Many of these are being mediated by community-based free mediation centers, such as the one in Dutchess County.

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