



**ELDER DECISIONS®**  
Adult Family Conflict Resolution • Training  
A Division of Agreement Resources, LLC

## **Elder / Adult Family Mediation – Challenges and Opportunities**

**Association for Conflict Resolution  
2017 Annual Conference**

**Thursday, October 12, 2017  
2:00 PM – 3:30 PM**

### **Session Description**

As the population ages, families are facing difficult decisions about elder care, living situations, family homes, and personal property. These decisions can be emotional and challenging even when everyone is “on the same page,” and they become rapidly more complex when there is disagreement in the ranks. Learn how Elder Mediation can help, and consider the skill sets needed to offer this increasingly sought-after service. Hear about challenges in this practice area, including: determining who needs to be at the table; concerns about capacity; working with multiple stakeholders; geographically-dispersed families; and involving other professionals; to name a few.

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### **Attached**

- **Suggested Readings and Resources**
- **Article** – Elder Mediation: Optimizing major family transitions. Larsen, R. & Thorpe, C. (2006). *Marquette Elder's Advisor Law Journal*, Volume 7, Number 2.
- **Presenter Biography**

**[www.ElderDecisions.com](http://www.ElderDecisions.com)**

**617-621-7009**



## Resources for Adult Families

***Mom Always Liked You Best: A Guide for Resolving Family Feuds, Inheritance Battles & Eldercare Crises***, by Kardasis, A., Larsen, R., Thorpe, C. & Trippe, B. (2011). Norwood, MA: Agreement Resources, LLC. (Download a complimentary chapter on Family Meetings via [www.MomAlwaysLikedYouBest.com](http://www.MomAlwaysLikedYouBest.com))

***Who Gets Grandma's Yellow Pie Plate?™ Workbook: A Guide to Passing on Personal Possessions***. (1999). St. Paul, MN: University of Minnesota Extension Service. (Workbook, video, and other resources available from [www.yellowpieplate.umn.edu](http://www.yellowpieplate.umn.edu))

***Five Wishes*** from Aging with Dignity, a “living will that talks about . . . personal, emotional and spiritual needs as well as . . . medical wishes” and meets legal requirements in 42 states. ([www.agingwithdignity.org/five-wishes.php](http://www.agingwithdignity.org/five-wishes.php))

***At the Crossroads: Family Conversations about Alzheimer's Disease, Dementia & Driving*** from The Hartford Financial Services Group, Inc., and the MIT AgeLab. Free Booklet and Support Group Kit available. ([www.thehartford.com/alzheimers](http://www.thehartford.com/alzheimers))

***We Need to Talk: Family Conversations with Older Drivers*** online seminar produced by AARP based on information created jointly by The Hartford and the MIT AgeLab. ([www.aarp.org/home-garden/transportation/we\\_need\\_to\\_talk/](http://www.aarp.org/home-garden/transportation/we_need_to_talk/))

***Lotsa Helping Hands*** - Free website to organize caregiving help. ([www.lotsahelpinghands.com](http://www.lotsahelpinghands.com))

## General Conflict Resolution Resources

***Getting to Yes: Negotiating Agreement Without Giving In***. Fisher, R., & Ury, W. (1981). NY: Penguin.

***Breaking Robert's Rules***. Susskind, L. E. & Cruikshank, J. L. (2006). New York, NY: Oxford University Press.

## Articles on Elder Mediation

**Elder Mediation: Optimizing Major Family Transitions**. Larsen, R. & Thorpe, C. (2006). *Marquette Elder's Advisor Law Journal*, Volume 7, Number 2.

**Oh, Brother! With Parents Aging, Squabbling Siblings Turn to Elder Mediation**. Abrahms, S. (2010). *AARP Bulletin*, September 20, 2010.

**A Referee for Family Disputes**. Tergesen, A. (2011). *The Wall Street Journal*, February 5, 2011.

**The Ties that Bind: Elder Mediators Help Brothers and Sisters Stop Fighting and Make Decisions about Aging Parents**. Henig, R. M. (2012). *Slate*, February 9, 2012.

**Strengthening Troubled Sibling Bonds to Deal with an Aging Parent**. Ellin, A. (2015). *The New York Times*, May 29, 2015.

**Solving Sibling Squabbles Over a Parent's Care**. Brophy, B. (2015). *Kiplinger's Retirement Report*, August 2015.

**How to Choose an Elder Mediator: Tips on Finding Someone to Help Your Family Navigate Thorny Caregiving Issues**. Ianzito, C. (2017). *AARP*, February 21, 2017. (<http://tinyurl.com/AARP-ElderMediation>)

## **ELDER MEDIATION: OPTIMIZING MAJOR FAMILY TRANSITIONS**

Rikk Larsen\* and Crystal Thorpe\*\*

Elders and their families facing end-of-life transitions are entering a maze of options and tough decisions. When should the elder stop driving? What living situation is best at this time? How should the family fund needed services? What will happen to mom's house if she moves out? Should the family caregivers be compensated, and if so, how? Should guardianships or other legal procedures be considered?

Professional advisors provide a tremendous service to clients by giving information and helping them sort through alternatives. By advising a client on "what is best," lawyers, doctors, and geriatric care managers contribute to efficient decision-making that often meets the needs of the client and the client's family.

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\* Rikk Larsen is a founding partner, along with Crystal Thorpe, of Elder Decisions, a Massachusetts-based elder mediation firm. Elder Decisions is an approved mediation provider for the Middlesex, Norfolk, and Suffolk divisions of the Massachusetts Probate and Family Court Department. Mr. Larsen is a mediator, trainer, conflict coach, and managing partner at Howell Larsen Associates. He combines a family mediation practice with estate settlement work. He is a member of the New England Chapter of the Association for Conflict Resolution and the Massachusetts Council on Family Mediation. He also serves on a working group of the Massachusetts Trial Court Standing Committee on Dispute Resolution.

\*\* In addition to her elder mediation work with Elder Decisions, Crystal Thorpe is a mediator, trainer, and principal of Agreement Resources, LLC, where her practice focuses on divorce and family mediation. She serves on several mediation panels and is a member of the Association for Conflict Resolution (International and New England Chapter) and the Massachusetts Council on Family Mediation. Currently, she serves on two working groups of the Massachusetts Trial Court Standing Committee on Dispute Resolution.

But, what if “what is best” for one family member is not perceived to be the best for the family as a whole? What if a “sensible and practical” solution is met with resistance? What if implementing the solution will increase friction or cause strained relationships within the family? Often, family histories and dynamics bring smoldering conflict to the surface when family members interact around such decisions.<sup>1</sup> Adult children living far away may deny the need for any change in living situation or services. Siblings in conflict may even immediately discount the advice of professionals hired by other siblings because of a perceived bias. A family’s attempts at working together may result in misunderstandings or direct accusations. Conference calls or meetings can result in emotional outbursts and little progress towards decisions.

We propose a goal for all professionals involved in the elder field: the notion of optimizing a family-elder transition where the outcome is not just a “good” one from a practitioner’s point of view but is “owned” in important ways by the whole family.

Far too often when seniors face major life transitions and their adult children are embroiled in conflict, important process issues are not addressed. When family members participate in a decision-making process that allows them to feel heard and understood, they often feel better about the transition. They develop a stronger stake in the evolving solution and may strengthen tender relationships along the way.

#### **ELDER MEDIATION: HOLISTIC DECISION-MAKING**

Elder mediation provides a “holistic” decision-making process. In mediation, families discuss difficult issues with the help of a neutral facilitator. Rather than advocate for any one person or position, the mediator ensures that each person and viewpoint is heard. The mediator does not provide advice nor “take sides,” but brings value to the table as a highly-skilled conflict

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1. See Deborah. B. Gentry, *Resolving Middle-Age Sibling Conflict Regarding Parent Care*, 19 CONFLICT RESOL. Q. 31, 31-47 (2001).

resolution “process expert.” By managing the process, mediators provide a safe space for family members to face disagreements, hear what is important to each participant, find common ground, and brainstorm new creative solutions that may meet everyone’s interests. Often, the family generates imaginative solutions that only they could craft with their intimate knowledge of their own situations. Even in those times when the outcome looks remarkably like one proposed by a family member’s advisor, the process of getting there can make all the difference to the family’s interactions in the future.

Unfortunately, in family life there are always many reasons not to address a complex emotional issue today. A challenge in the mediation field is to encourage families to enter a decision process before the broken hip, the serious car accident, or the fire in the kitchen.<sup>2</sup>

#### **MEDIATION VS. ARBITRATION**

At the outset, it is important to note that professionals and the public often confuse mediation with arbitration. In mediation, the parties control the outcome and the mediator’s role is as a neutral facilitator to the process.<sup>3</sup> The mediator does not decide for the parties, and none of the parties will be asked to agree to something they are not comfortable with. Parties come to agreement only if the agreement is satisfactory to each of them. In arbitration, the arbitrator acts as a judge, hearing both sides and then making a decision for the parties as to the outcome. In arbitration, as in litigation, it is possible that both sides will feel that they have reached a less than optimal outcome.<sup>4</sup> In mediation, parties often think of their jointly crafted agreement as “win-win.” This feeling of satisfaction and participation in

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2. Rikk Larsen & Blair Trippe, Presentation at the Dartmouth Alzheimer’s Conference: When Families Struggle with Dementia Facilitating Solutions through Mediation (Oct. 29, 2005).

3. HARVARD MEDIATION PROGRAM, *MEDIATOR’S HANDBOOK*, (Fall 2005). 2005 edition

4. HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING IN A PROBLEM-SOLVING PROCESS* 33 (2004).

the process contributes to increased compliance with mediated agreements.

### HOW DOES ELDER MEDIATION WORK?

The elements of a mediation process are simple on the surface: the use of private sessions and group meetings led by a neutral facilitator who monitors and manages the process while upholding the key principles of:

- confidentiality<sup>5</sup>
- voluntary participation
- mediator neutrality
- informed consent
- self determination

One challenge of the mediation process is to mesh the five principles with the internal complexity of elder decisions:<sup>6</sup>

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5. Susan D. Hartman et al., *Adult Guardianship Mediation Manual, Module One 67* (May 2002) (unpublished manual, on file with the Center for Social Gerontology) [hereinafter *Adult Guardianship*]. Confidentiality is a cornerstone of mediation. The Uniform Mediation Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 2001, and amended in 2003, "establishes a privilege of confidentiality for mediators and participants that prohibits what is said during mediation from being used in later legal proceedings." Uniform Law Commissioners, *Why States Should Adopt the Uniform Mediation Act of 2001* (2002),

[www.nccusl.org/Update/uniformact\\_why/uniformacts-why-uma.asp](http://www.nccusl.org/Update/uniformact_why/uniformacts-why-uma.asp).

As of this writing, the Uniform Mediation Act has been enacted in six states and the District of Columbia and introduced in six other states. Uniform Law Commissioners, *A Few Facts About The Uniform Mediation Act (2001)(2003)* (2002),

[www.nccusl.org/Update/uniformact\\_factsheets/uniformacts-fs-uma2001.asp](http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uma2001.asp).

Confidentiality of mediation also is addressed in various state and federal statutes, in which it is protected to varying degrees. It is important for the mediator to communicate the jurisdiction's protections and limitations of confidentiality to parties. Mediators typically require parties to sign a "consent to mediate" form in which confidentiality also is addressed, and this form, which is signed by the parties, "may be accepted as an enforceable contract by a court and will certainly at least be an influence on the parties if they later attempt to subpoena the mediator or introduce evidence of the mediation discussion." Hartman, *Adult Guardianship*, at 67. Note that in private sessions, in which the mediator meets individually with the parties or with small subsets of the mediation participants, there is an added layer of confidentiality. The mediator will not disclose information learned in such sessions with the larger group if asked to keep such information confidential.

6. Blair Tripp & Rikk Larsen, *Speech at the Massachusetts Chapter of the National Academy of Elder Law Attorneys: Using Mediation in Elder Law* (Apr. 26, 2005).

- Rarely is there only one issue involved.** One presenting issue is inevitably linked to other elements of an elder's life.
- There is inherent tension between issues of dependence versus independence in multiple areas of life.** Physical, cognitive, social, domestic, and financial changes make for a period of intense decision-making.
- Multiple parties are often involved in decisions.** Individuals, families, and professionals may have trouble communicating with each other in trying to identify, plan for, and act on key questions.
- Decision-making difficulty and conflict may arise in many ways.** Misunderstandings, superstitions, prejudices, poor planning, entrenched relationship patterns, disagreement about what is needed, or lack of information about what services are available can all be contributing factors.
- Waiting too long can lead to crisis mode decision-making.** Without "decision deadlines," such as court dates, families facing these challenges often wait too long to make decisions. These delays often decrease options, increase costs, and may put the elder's health and safety at risk.

The traditional elder mediation process begins with intake where the mediator gathers information, assesses whether mediation is appropriate, and makes sure each party understands the five mediation principles stated above. Location is decided, often with accommodations made for a participating elder. These accommodations may include meeting in the elder's home/living space, keeping meetings shorter, or scheduling at a particular time of day. Decisions are made as to which parties need to be involved and whether advocates should be present. Does the process require teleconferencing or conference calls for geographically separated families? Often intake can take as long as the "formal"

mediation.

The actual mediation sessions managed by the mediator focus on helping parties identify important issues, clarify their interests, and brainstorm options. Sessions are tailored to the individual family's needs, as each family situation is unique. This is where the "art" of mediation becomes important and where a good mediator will use the elements of active listening skills combined with various types of sessions to create a safe and effective decision-making environment.<sup>7</sup> If the parties come to agreement, they may choose to have the mediator document the agreement in a memorandum of understanding. Then, a representing attorney may use this memorandum to draft a formal contract or court filing if the parties so choose.<sup>8</sup>

#### THE ROLE OF THE MEDIATOR

In order to be effective facilitators, mediators need to be process experts. Mediators must be able to:

- Facilitate discussion well;
- Summarize what is being said – for all parties – in ways that help the speaker feel understood and that makes the other parties to be more open to hearing his or her view;
- Ask clarifying questions that are non-judgmental;

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7. HARVARD MEDIATION PROGRAM, *supra* note 3.

8. ABA SECTION OF DISPUTE RESOLUTION, RESOLUTION ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW 1 (2002), <http://www.abanet.org/dispute/resolution2002.pdf>. By drafting a memorandum of understanding or agreement that documents only "the terms specified by the parties," the mediator avoids the "unauthorized practice of law." *Id.* "Mediation is not the practice of law." *Id.* at 2.

When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law. However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys. *Id.* at 1.



- Identify the interests hidden in parties' positions;<sup>9</sup>
- Encourage parties to brainstorm options that can meet each party's interests;
- Guide the process of the discussions; and
- Acknowledge and allow emotion.<sup>10</sup>

Much like an orchestra conductor, throughout the process, a mediator must continually monitor group dynamics to see that everyone is heard, no one dominates, interests are communicated, and all options are considered.

We also believe that it is important for the mediator to have a certain level of content expertise. The mediator should have a working knowledge of the elements of typical family dynamics; a general understanding of the social, cognitive, and physical changes brought on by aging and its related diseases; and an awareness of the related areas of elder law. It is also important that the mediator be aware of key external information, resources, and options that may factor into a family's decisions. Typical family dynamics in the elder arena can consist of:

**Emotions.** 'I never knew I cared so much about that house.'

**Myths.** 'Talking about money subverts parental authority.'

**Superstitions.** 'Writing a will could hasten my death.'

**Closely held prejudices.** 'My definition of maturity is [ten] years older than whatever age you are now.'

**Entrenched relationships.** 'I just can't talk to him about anything.'

**Complicated role reversals.** Parents become children and children become parents.

**Passivity.** Being overwhelmed with multiple issues causes inertia ('deer in the headlights' mentality).<sup>11</sup>

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9. ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 40-55 (1981).

10. ABRAMSON, *supra* note 4, at 77; Albie M. Davis, *The Logic Behind the Magic of Mediation*, 5 NEGOTIATION J. 17, 21 (1989).

11. Arline Kardasis & Rikk Larsen, *When Aging Issues Lead to Family Conflict*, 33 MASS. LAW. WKLY. 1785 (2005), <http://www.elderdecisions.com/docs/lawyersweekly.pdf>.

Key external information that families may introduce to mediation and important professional service options available to them may include:

**Medical work ups** – from a basic physical to advanced diagnostics;

**Legal steps** – wills, trusts, [powers of attorneys], [health care proxies];

**Financial Planning** – investment strategies, tax planning, monthly budgets . . . Medicaid planning, real-estate advice and appraisals;

**Insurance Issues** – life insurance, medical insurance, long term care insurance;

**Living Options** – range of choices from [staying at home to] independent living [or assisted living facilities] to nursing homes.<sup>12</sup>

Each category of choice has its own subset of complicated decisions. For example, staying at home requires making a series of generally escalating decisions about home, support options, when to stop driving, and general transportation issues.

According to the Center for Social Gerontology, which pioneered the use of mediation in adult guardianship cases, “an important role for the mediator can be to help the parties come up with alternatives and identify supportive services that are available, but he or she will not recommend solutions to the parties or the court, nor will he or she make decisions that the parties must follow.”<sup>13</sup>

#### THE ROLE OF PROFESSIONALS

Professionals (e.g., legal, financial, medical, social work, home care, etc.) are welcomed into the mediation process. Whether professionals actually participate in some or all of the mediation sessions, or simply function in an advisory role between sessions, mediators generally encourage parties to involve

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12. *Id.*

13. Hartman et al., *supra* note 5, at 46.

relevant professionals for detailed advice and support.

While mediators can flag issues that the parties may need to consider and provide general information, mediators may not give legal, financial, or medical advice. If any party is not sufficiently informed about an issue to make an informed decision, it is the mediator's duty to recommend that the party seek outside counsel or advice. Thus, mediators welcome the important roles of other professionals; they make the mediator's job easier and help mediators uphold the principle of informed consent.

Professional advisors also can help the mediator to maintain neutrality by expanding on general information given by the mediator. A lawyer may give tactical advice that is in the interests of his or her client, essentially protecting the mediator from the potential perception of being a positional advocate. In addition to direct technical knowledge, professionals can help establish what is fair, what is legally possible, and what is common practice for all the parties to hear.<sup>14</sup>

Attorneys are the outside professionals most frequently involved in the mediation process, and it is important to note that successful mediator-attorney relationships allow each to do what he or she does best. An attorney, even while giving good advice, may face potential conflicts of interest when representing family members with different interests. For example, an elderly couple developing an estate plan may have competing interests. "Whenever a potential conflict of interest requires separate counsel or a 'consent to joint representation,' clients should be advised about the benefits of a skilled mediator."<sup>15</sup> Mediation

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14. ABRAMSON, *supra* note 4, at 293.

15. John A. Gromala, *The Use of Mediation in Estate Planning: A Preemptive Strike Against Potential Litigation*, (May 1999), <http://mediate.com/articles/estate.cfm>.

Having a 'consent to joint representation' or suggesting separate attorneys may satisfy ethical requirements (and concern over malpractice exposure) without satisfying the real need of clients for a plan that satisfies their joint desires. This need may be lost when each party communicates through a different lawyer and is suppressed if using the same counselor. If the clients elect to use the same attorney, he or she cannot have separate confidential discussions with each of them. Use of a mediator provides the attorney with a way to be professionally ethical without sacrificing the clarity that is achieved when one person has

also provides attorneys with an effective option when representing difficult clients who demand extra time and attention due to the nature of their needs, communication styles, or family dynamics.

#### ISSUES ADDRESSED IN MEDIATION

Parties may seek mediation to resolve the following issues:

- **Disputes Among Adult Siblings** – Decisions about elders are often contaminated by long simmering sibling issues. “Mom loved you best” or “I can’t stand your lifestyle, so I won’t value your judgment when it comes to Dad’s issues” are common dispute drivers.
- **Financial Decisions** – How will money be spent or invested, and who will be involved?
- **Residence Decisions** – Prejudice about assisted living and nursing homes combined with guilt about moving a parent unwillingly from his or her primary home can be a powerful formula for dispute. Adult children living far away may not understand the need for any change in living situation or services.
- **Estate Planning** – Often adult children worry about how much will be left in their inheritance but are unable to openly acknowledge this important interest, while parents make untested assumptions about what their children want from the estate and may build their plans around faulty assumptions.
- **Considering Selling the House or Other Valuable Assets** – When there is a primary home or a vacation home in the estate, and there are different positions among siblings

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separate discussions with each interested party . . . . [In mediation,] [o]nly information that is authorized to be disclosed by each person will be shared with others. The mediation process can provide attorneys, accountants and financial advisors with valuable information about the clients’ subjective interests and needs that should be addressed in the estate plan . . . . None of the planning professionals (attorneys, accountants and financial advisors) can fill the need to speak separately and confidentially with each interested party. *Id.*

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about who should live there or where the money should go, paralyzing conflict often occurs.

- **Inheritance Disputes** – Pre- or post-death feelings about assets may well up when parties least expect it; the siblings may find themselves fighting over Mom's cracked teapot.
- **Medical Treatment Decisions** – Slow, progressive diseases like dementia can strain families when proper timing of decisions is not completely clear.
- **Guardianship** – One sibling may make a decision to pursue a guardianship petition, before all options have been explored, causing a rift among family members.
- **Post-Appointment Decisions (Guardianship)** - A guardian may become a lightning rod for unresolved family issues that were not dealt with before the guardianship was considered.

#### IS MEDIATION FOR EVERYONE?

Certainly not all families facing tough decisions need mediation. In our work, we see families responding in four general ways to major family life changes.<sup>16</sup>

#### GRACEFUL TRANSITIONS

These cases involve families that look aging and family transitions in the eye, do targeted planning and have effective communication. They get good legal and financial advice. They make reasoned, timely, and harmonious decisions about elder activities and the transfer of power to the next generation. Finally, they manage their elders' physical declines with dignity and respect.<sup>17</sup>

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16. Kardasis & Larsen, *supra* note 11.

17. *Id.*

### *SUCCESSFUL STRUGGLES*

Here, we see families that have one or two major issues to work through, but they manage to come to a perceived positive outcome with the support of friends, family, and advisors. Whether it is dealing with a "stubborn" parent or an adult child who perceives inequities in care-giving commitment, outcomes are successful and family members feel comfortable with the final decisions.<sup>18</sup>

### *QUIETLY BRUISED FAMILIES*

Here, we see families who are not in massive crisis at the end of a generational transition but have a sense of discomfort with choices made. This is perhaps the most common category. Disagreements may be festering under the surface about housing decisions made. Some continued family alienation may exist. Basic relationships with parents may have gotten worse instead of better.<sup>19</sup>

### *LITIGIOUS SOLUTIONS*

Finally, we see families who feel they need to resort to litigious solutions to resolve their issues. Either the threat of litigation or actually going to court seems to be required to get decisions made. Wounds abound even after a guardianship has been awarded or a will contest decided. Often family communications are destroyed forever between some members.<sup>20</sup>

While most cases ripe for mediation fall into the categories of Quietly Bruised Families and Litigious Solutions, we have found that families in the first two categories can and do use a facilitated session or two to help them decide how they are

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18. *Id.*

19. *Id.*

20. *Id.*

going to proceed to make tough decisions. On what basis will decisions be made? Should decisions be unanimous? If not, what are the alternatives? As a result of these sessions, families may agree on information sharing techniques and communication rules, like not interrupting, to guide their future non-facilitated family discussions.

Deciding whether mediation is appropriate is one of the ethical considerations in mediation. Note that there are certain circumstances when mediation may not be appropriate, such as when there is suspected abuse, possible criminal activity, severe power imbalances, or capacity<sup>21</sup> issues of key parties.<sup>22</sup>

### ETHICAL CONSIDERATIONS

Mediators may face ethical issues at any time in the mediation process – beginning with the initial screening and continuing through the sessions. Mediators operate in complicated family environments, and there are many possible scenarios where ethical issues can become a factor. We provide a few examples here:

- Elders may be vulnerable, frail, timid, intimidated by the process, unable to hear well, or unable to fully comprehend complicated estate issues or medical conversations.
- The elder or other participants, including adult siblings, may have competence or capacity issues that need to be

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21. ABA, Facts About Law and the Elderly, <http://www.abanet.org/media/factbooks/eldq3.html> (last visited Mar. 19, 2006).

22. Hartman et al., *supra* note 5, at 53 (The Center for Social Gerontology recommends that mediation programs consider the following key factors in developing a “policy on appropriate and inappropriate cases for [guardianship] mediation [which] include: the existence of contested issues or decisions that need to be made; the ability of the respondent to take part in the mediation process; the need for a fast or emergency decision; [and] the existence of or allegations of abuse (including domestic violence and intimidation).” Such policies can “guide mediation staff in screening cases so that time is not wasted and people are not frustrated, or worse, hurt, by an inappropriate process. Yet, [programs] do want all cases that can benefit from mediation to have the opportunity, so [they] will not want to be unnecessarily limiting.”).

considered in structuring a mediation process.<sup>23</sup>

- It may become apparent that there is coercion of an elder by “powerful” children who might be their parent’s link to the outside world or who may be the only ones who provide companionship or financial security.
- Rather than participating in good faith, a party may seem to be just “going through the motions” in mediation to gain a tactical advantage over other siblings for a court case or a general negotiation.
- A family might be considering a drastic solution for a simple problem (e.g., considering guardianship when the elder just needs help paying bills). While elder mediators must constantly guard against positional advocacy, we do have an underlying philosophical point of view – to help families preserve as much elder independence as possible.
- Mediators may learn of abuse or neglect. As noted above, mediation is generally not appropriate in cases of abuse, and mediators frequently list reports of abuse and neglect among the exceptions to confidentiality of the mediation process. However, if the abuse issues are in the past and there is clearly no potential for future wrongdoing, it may be appropriate to continue the

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23. Committee on Legal Issues Affecting People with Disabilities, N.Y. Bar Ass’n, *Mediation Capacity and Self-Determination: A Recommendation on the Model Standards of Conduct*, <http://mediate.com/articles/nycbar1.cfm> (Competence/capacity itself cannot be mediated but is determined by a judge. It is important to note that, while most often the capacity discussion focuses around the elder, it is not only the elder who may have capacity issues. Adult siblings may also have competence or capacity issues that need to be considered in structuring a mediation process.).

Mediation practitioners recognize that ‘capacity’ to mediate, or mediation readiness, is not just a disability issue. Capacity to mediate is an aspect of self-determination that extends to a continuum of potential obstacles to full participation by a broad range of persons. Limiting the scope of mediation capacity neglects the needs of persons without disabilities who need accommodations or adjustments to enable their participation in the process. Difficulties in participation may be experienced, for example, by persons who do not speak the language, elderly persons who may have trouble processing information or who fatigue easily, parents who are distracted because they need to care for their children during a session, and persons who have different cultural communication modes from that of the dominant culture, among others. *Id.*



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mediation. This is one of the toughest decisions a mediator has to make.

The right to privacy and the potential sharing of financial and medical records can be an important ethical issue. The concept of voluntariness in mediation extends beyond just a party's presence in mediation; it also includes issues of privacy and disclosure. While mediators must strive to uphold the principles of informed consent and self-determination for all parties, they also must help parties to find a workable balance for each individual's right to privacy. Thus, there may be a tension between the right to privacy and the need for disclosure when disclosure is required in order to provide for informed decision making. In some situations it may even be the case that the elder sees "friendly" or well intended interventions as "an invasion of privacy rather than as an offer of assistance."<sup>24</sup> These are delicate matters and a skilled elder mediator will help all participants to fully discuss their concerns and to determine what will be shared, by whom, with whom, and for what greater purpose.

To help address some of these issues, mediators may suggest that an advocate for the senior participate with the senior in the sessions. Sometimes mediators also may recommend the involvement of a professional family advisor, either within or outside of the session. In fact, one of the most important discussions mediators have with family members during the intake process is on the topic of who should be invited to the table; the list may include adult children's spouses, adult grandchildren, the elder's new friend or significant other, friends, and key professionals.

If parties opt to divide the cost of the mediation unequally (e.g., based on ability to pay or desire to mediate), the unequal payments may contribute to a perception of mediator bias or a feeling of power imbalance among the parties. Mediators need to be aware of these possibilities. It may be useful to have a

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24. Hartman et al., *supra* note 5, at 83.

frank discussion about the unequal contributions in order for everyone to air their thoughts and feelings about the division of financial responsibility and its potential consequences.

If and when ethical dilemmas arise, mediators may discuss potentially difficult issues among partners and other colleagues, while preserving the confidentiality of the family. In addition to being committed to neutrality, mediators also are committed to a fair process in which parties participate voluntarily, are fully informed, and determine their own outcomes. If any of these principles are compromised, if there is potential for harm, or if an ethical issue overpowers other elements of the process, a mediator may be faced with a decision about whether to temporarily stop or fully withdraw from the mediation.<sup>25</sup>

#### THE NOTION OF SUCCESS

Note that even when a mediation is ended before a full agreement is reached, families still may have benefited greatly from the time they spent together having rich and authentic conversation. They still may consider the mediation to have been successful, because they may all have had the opportunity to be heard in ways that never occurred before. Parties may have been able to frame their positions, interests, and options in more effective ways. The experience may result in increased understanding, communication, and empathy between the parties. These outcomes in themselves may be remarkable, and may, in turn, pave the way for improved communication and potential agreement in the future.

When agreement *is* reached, participation in the process generally leads to parties' increased satisfaction and compliance as compared with non-mediated outcomes.

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25. *Id.* at 84.

### SELECTING AN ELDER MEDIATOR

In selecting a mediator, in addition to considering familiarity with elder issues, as mentioned above, parties also need to decide which mediator style best suits their family's needs. While all mediators attempt to uphold the five mediation principles, there are many mediation styles.<sup>26</sup> A mediator may be extremely facilitative<sup>27</sup> and avoid giving recommendations, advice or opinions,<sup>28</sup> even to the point of not suggesting a possible option even when it is common practice or seems obvious. This school of mediation believes that solutions created by the parties have a higher chance of the parties owning and, thus, effectively implemented. At the other end of the spectrum are evaluative mediators who do suggest options and, when asked, will express their opinion about appropriate or best solutions.<sup>29</sup> Often, they are retired judges who use the weight of their experiential background to make families feel comfortable with a tough decision. Mediators fall all across the spectrum<sup>30</sup> and many may vary their approach depending on the stage of the mediation and the needs of the family at the time.<sup>31</sup>

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26. Mediator styles have been widely discussed and debated in the mediation literature. The styles listed here are two commonly described categories frequently used as descriptors in the field.

27. See Leonard L. Riskin, *Decision-Making in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1, 1-53 (2003); Leonard L. Riskin, *Understanding Mediator Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 28 (1996) [hereinafter *Understanding Mediator Orientations*].

28. Zena D. Zumeta, *Styles of Mediation: Facilitative, Evaluative and Transformative Mediation*, (2006) <http://learn2mediate.com/resources/nafcmm.php>.

29. Riskin, *Understanding Mediator Orientations*, *supra* note 27, at 26.

30. Yet another approach on the spectrum is called "transformative" mediation. ROBERT A. GUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (rev. ed. Oct. 2004).

Transformative mediation is based on the values of 'empowerment' of each of the parties as much as possible, and 'recognition' by each [party] of the other parties' needs, interests, values and points of view. The potential for transformative mediation is that any or all parties or their relationships may be transformed during the mediation. Zumeta, *supra* note 28.

31. David Hoffman, Presentation to the Harvard Mediation Program and Metropolitan Services, *Breaking Impasses: A Look Inside a Work Day Mediator's Toolbox*, (Apr. 4,

### HISTORY OF ELDER MEDIATION

Family mediation, as a field, became formally organized in the late seventies, and the focus area of elder mediation probably had its beginnings in the late 1980s. In 1988, the National Guardianship Symposium<sup>32</sup> generated recommendations regarding alternatives to guardianship and one such recommendation was for "crisis intervention techniques such as mediation, counseling, and respite support services."<sup>33</sup> The Center for Social Gerontology pioneered the use of mediation in resolving adult guardianship cases. The Center for Social Gerontology conducted pilot projects in several states, the first of which began in Michigan in 1991.<sup>34</sup> After nine years of pilots, the center launched a study entitled "Evaluating Mediation as a Means of Resolving Adult Guardianship Cases,"<sup>35</sup> which concluded:

[mediation] appear[ed] to be effective in helping disputing parties reach agreements in three-quarters of the cases in which it [was] used . . . . [Further, older persons, family members,] program administrators and mediators [were found to] believe that mediation in adult guardianship cases [was] effective in finding better or more satisfactory resolutions such as fewer guardianships, less restrictive orders, or limited rather

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2005).

32. Wingspan – The Second National Guardianship Conference, Recommendations, 31 STETSON L. REV. 595, 599 (2002). "In 1988, the Johnson Foundation's Wingspread Conference Center in Wisconsin hosted the National Guardianship Symposium, which was sponsored by the ABA Commission on Legal Problems of the Elderly and on Mental Disability." *Id.* at 601.

33. Alice Keefer, Mediation in Guardianship Cases (May 1999), [www.neln.org/bibs/keefe2.html](http://www.neln.org/bibs/keefe2.html).

34. Susan Hartman, Ctr. for Social Gerontology, *Best Practice Notes Adult Guardianship Mediation* (Sept. 1996), available at <http://www.tcsg.org/bpnotes/sept96/adult.htm>.

35. SUSAN J. BUTTERWICK, PENELOPE A. HOMMEL & INGO KEILITZ, CTR. FOR SOCIAL GERONTOLOGY, EVALUATING MEDIATION AS A MEANS OF RESOLVING ADULT GUARDIANSHIP CASES (2001), <http://www.tcsg.org> (follow "Mediation & Aging" hyperlink; then follow "here" hyperlink under "TCSC Publishes Major Report: 'Evaluation of Mediation as a means of Resolving Adult Guardianship Cases'").

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than full guardianships.<sup>36</sup>

The elder mediation field has expanded to include other issues involving elders and caregivers. For example, "[i]n a three-year project supported by The Commonwealth Fund and the AARP Andrus Foundation, the ABA Commission on Legal Problems of the Elderly tested a co-mediation<sup>37</sup> approach to resolving care conflicts in nursing homes."<sup>38</sup> Elder mediation also is being used in hospital settings,<sup>39</sup> with caregivers, and in planning<sup>40</sup> and settling estates.<sup>41</sup> Now, elder mediation is provided through some community mediation centers, peer mediation programs, and private practices in the United States, Canada, the United Kingdom, and several other countries.<sup>42</sup>

## CONCLUSION

Despite barriers to mediation, including challenges of getting the parties to the table, and the need for more education of professionals and the public about mediation, we project an increase in the use of elder mediation in the years ahead.

As baby boomers age and government resources diminish, we will face many difficult choices concerning how we handle transitions during our elders' declining years. Families will have to be able to evaluate resources and options and develop ever changing strategies to support their elders. This will

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36. *Id.* at 1.

37. Co-mediation refers to the use of two mediators who meet together with the parties. CARRIE MENKEL-MEADOW ET AL., *MEDIATION: PRACTICE, POLICY, AND ETHICS* 256 (2006).

38. Commission on Legal Problems of the Elderly, ABA, *Building Coalitions in Aging, Disability and Dispute Resolution* (2006), <http://mediate.com/articles/aba1.cfm>.

39. Patricia Ruffin & Patricia Bertschler, *Elder Mediation: New Role in Healthcare*, <http://www.mediate.com/articles/ruffinP1.cfm>.

40. David Gage & John A. Gromala, *Mediation in Estate Planning: A Strategy for Everyone's Benefit*, 4 *ELDER'S ADVISOR* 23, 26-27 (2002).

41. Rikk Larsen, *Mediation in Today's Estate Settlement World* (Sept. 2002), <http://mediate.com/articles/larsenr.cfm>.

42. Yvonne Craig, *Elder Mediation Project*, 12 *Peer Counsellor Journal* 1 (1994), <http://www.islandnet.com/~rcarr/PCJ12.1EMP.html>.

require communication and problem solving skills that will need to be increasingly sophisticated.<sup>43</sup>

Unfortunately, in the world of today it is difficult for families to receive all the support they need. As more and more families confront care-giving concerns,<sup>44</sup> while juggling the demands of work and home, families will be facing more conflict with less time to address it.

Current professional structures do not make it easy to approach problems holistically. Often, there is little incentive for an elder/family lawyer, a doctor, or a geriatric care manager to think in broad terms. In fact, his or her service contract and training may not allow the professional to do more than give sage advice to the client he or she is contracted to serve. The solution proposed to a particular elder transition may be sensible and practical, but will the family reach an optimal solution? Mediation provides the opportunity to explore other ways of achieving resolution and a balance between safety and independence for the elder.

Through the mediation process, family members can feel better about the transition. They are able to feel heard in important ways. They are able to listen to and learn from one another, and to develop a stronger stake in the evolving solution. Elder mediation provides the opportunity for elders and their families to make sound, well-considered decisions that can meet the needs and interests of the elder and the family, while potentially improving communication and strengthening relationships along the way.

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43. Rikk Larsen & Blair Trippe, *Tough Elder Decisions: The Mediation Option* (May 2004), <http://mediate.com/articles/larsen3.cfm>.

44. See NATIONAL ALLIANCE FOR CAREGIVING AND AARP, *CAREGIVING IN THE U.S.* (Apr. 2004), *available at* [http://assets.aarp.org/rgcenter/il/us\\_caregiving.pdf](http://assets.aarp.org/rgcenter/il/us_caregiving.pdf).



**Crystal Thorpe, MSW, MBA**, is a mediator, trainer, co-founder and principal of Elder Decisions® and its parent company Agreement Resources, LLC. She mediates disputes among adult family members about caregiving, living arrangements, family communication, Powers of Attorney, Health Care Proxies, estate planning, family real estate, and personal property distribution.

Crystal has trained hundreds of mediators from around the world in the growing field of Elder & Adult Family Mediation, and she provides trainings in Conflict Resolution Skills for public audiences, eldercare professionals, work groups and others. She has presented seminars and workshops for the Academy of Professional Family Mediators, the Association for Conflict Resolution, the Program on Negotiation at Harvard Law School, and the Northeast Human Resources Association, among others.

Crystal is the co-author, with Rikk Larsen, of "*Elder Mediation: Optimizing Major Family Transitions*" for Marquette Elder's Advisor Law Journal. She was the guest expert for The Washington Post online discussion "*Family Mediation for Elderly Care*" and has been quoted in The New York Times and other national press. She and her colleagues co-authored the book Mom Always Liked You Best: A Guide for Resolving Family Feuds, Inheritance Battles & Eldercare Crises.

She serves on the Board of Directors of the Massachusetts Council on Family Mediation and is a member of the Academy of Professional Family Mediators and the Association for Conflict Resolution. She served on the Public Awareness Working Group and the Court Systems Working Group for the Massachusetts Trial Court's Standing Committee on Dispute Resolution.

Crystal holds an MSW and an MBA from Boston College and an undergraduate degree in Cognitive Science/Psycholinguistics, magna cum laude, from Brown University.

Crystal Thorpe, Principal

**Elder Decisions®**

A division of Agreement Resources, LLC

Mediation, Consulting & Training

30 Walpole Street

Norwood, MA 02062

617-621-7009 x24

[www.ElderDecisions.com](http://www.ElderDecisions.com)

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