

THE OPTIMAL APPROACH TO MANAGING AND RESOLVING CONFLICTS FOR INDIVIDUALS LIVING WITH DEVELOPMENTAL DISABILITIES AND THEIR FAMILIES: MEDIATION

Conflict management and resolution present unique issues for individuals living with disabilities. This is because although the individual may have a diminished capacity, the person may maintain a requisite level of capacity to be able to engage in various aspects of life, including employment, residing in his or her own home and socialization, just to name a few. And just as we are all equally vulnerable to unmanageable conflict from time to time, so too is the individual living with a developmental disability. However, the management and resolution of conflicts for an individual with a developmental disability presents the unique issue of that person's capacity to engage in a process for management and resolution.

It is important to begin with the premise that we are all presumed competent. However, as we know, competency issues are not black and white and almost virtually all questions of capacity fall within a gray area. The courts as a forum for conflict resolution may not be particularly equipped to deal with these gray areas. However, when working with an individual living with a developmental disability, a thorough understanding of that person's personal circumstances and level of capacity (the "grey" area) is critical in order to reach a just and equitable resolution of conflict. Then what is the best forum in working out these conflicts? Mediation.

There are many different scenarios of potential conflict a person living with a developmental disability may find himself or herself in and mediation is an optimal approach for the resolution of virtually all of these conflicts.

Contested Guardianship

When a developmentally disabled child turns 18 years old, like all of us, he or she is presumed competent to make all decisions regarding his or her life. However, the parents may believe that their child lacks the ability to make some or all life decisions on his or her own. Therefore, parents are often advised to file to become their child's legal guardian. A prerequisite to the appointment of a guardian is a finding, by clear and convincing evidence, that the individual lacks the ability to manage his or her own personal, medical and financial affairs. Because parents ultimately want to protect their child from harm, in the name of doing good, they often file for what is called a "plenary" or full guardianship; that is virtually all decision making authority will be taken from the child and vested with the parents.

As part of the individual's due process protections, an attorney will be appointed by the court for him or her. The role of the attorney is to advocate for the stated wishes of his or her client and to also advocate for lesser restrictive alternatives to the guardianship (i.e. limited guardianship, conservatorship, power of attorney, living will).¹ It may be for

¹ See In the Matter of M.R., 135 N.J. 155

example that the individual wishes to make certain decisions regarding where to live, with whom to socialize, where to be employed, the nature and extent of medical procedures to which he or she will give consent and whether or not to marry and to whom. However, a plenary guardianship will not allow for such decision making.

Therefore the matter may become contested. Rather than litigate these issues in court and subject an otherwise cohesive family unit to the litigation process, why not sit down with a neutral mediator and work out these issues as a family matter. The family has a better chance through mediation of achieving a compromised and principled result that appropriately balances the need to protect the individual from harm on the one hand and the need to respect the individual's autonomy and civil rights on the other. All while giving the individual a voice in the process and recognizing his or her fundamental right of autonomy and self-determination.

Custody Dispute Round Two

Mediation as a mechanism for the resolution of divorce issues is now widely accepted and practiced. This is due in great part because divorce is essentially a family matter concerning deeply personal financial and custody issues over minor children. Mediation is a much more compassionate and private approach to the resolution of such emotionally charged conflicts as opposed to the litigation/adversarial process.

Couples who divorce when their children are minors must make custody decisions that extend primarily only until they reach the age of 18. However, when a couple divorces having a developmentally disabled child, the opposite can be true and entirely new issues will often arise once their child turns 18. Such issues often revolve around guardianship, residential decisions, and medical decisions.

Just as is divorce in general, these issues are often emotionally charged because the parents may have very different notions of what is best for their child. Each parent may balance the need to protect versus the need for the child's self determination and autonomy in different ways, one parent opting for more protection and the other parent opting for more rights to their child, who is now an adult. Mediation will give the parties, including the young adult, a forum to state their concerns and wishes and will also give the parties the ability to generate and weigh various options without the pressures of the court process.

Housing/Neighbor Disputes

Individuals living with developmental disabilities are being offered more and more opportunities to live as independently as possible. The Real Life Choices systems change through the Division of Developmental Disabilities, Department of Human Services, is one example of the push for self-determination and independence.² This systems change is designed around the concept of self directed services for individuals residing in the community, either in the family home or in a home of their own, with the push away

² See www.neighbours-inc.com for more information.

from the traditional boarding homes, group homes and other more institutional residential settings.

Given the fact that individuals living with developmental disabilities are living more and more independently in the community, the prospect of community disputes is a real one. The potential range of disputes runs from alleged discriminatory practices by a landlord or mortgage lender to more simple “neighbor” disputes such as loud noise or pet issues. Because an individual with a developmental disability may have a diminished capacity to either cope with or manage and resolve the conflict, it is important to have an appropriate forum available to address the diminished capacity issue as well as to manage and resolve the conflict. A mediator well versed in capacity issues will be able to effectively deal with all parties and their various levels of capacities and help facilitate a satisfactory result for all. It may be that the individual with the developmental disability will need an advocate or friend along side him or her or it may be that this particular individual has the ability on his or her own to engage in the process to resolve the conflict. Either way, the capacity issue must be understood, addressed and dealt with in the least restrictive manner possible with the goal of resolving the community conflict.

Employment Disputes

Individuals living with disabilities are an integral part of our work force today. And an individual’s employment, now more than ever, may be an essential means of survival. Due to the advent of certain low cost mortgage and other types of financial products, individuals with disabilities have more opportunities for independent living, including home ownership. However, in order to pay on the mortgage, employment is often essential. Not only is employment a means of her financial support, it is also an avenue for socialization and an opportunity to meet others and create social capital. This can be as important if not more important than the financial benefits associated with employment.

Because employment is so critical for so many reasons, it is also important to have a mechanism for the resolution of disputes in the employment context that has as its objective a fair outcome for all interested parties and the preservation of ongoing relationships. Once again, in this context, it is important to select a mediator who is proficient in the issues of capacity and who appreciates the importance of preserving relationships. The individual with the disability may or may not have sufficient capacity to represent his or her own interests in the conflict completely independently. They may need an advocate, friend or other type of representative to assist in the management and resolution of the dispute with their employer. It is also important to select a mediator proficient in this area so that sufficient options can be generated. For example, the dispute may revolve around tardiness for work. This could be due to personal issues in the residence or unreliable transportation to work. The mediator should be knowledgeable of community resources that may be able to assist with ensuring the individual arrives to work as scheduled. Or the dispute could revolve around an individual’s inability to perform a certain task. The mediator should have a general understanding of the law of reasonable accommodations and also be capable of tapping into the advice of other

professionals who may be able to delineate a preferable job description for that individual.

These are only a few examples of why mediation is the optimal process for dispute resolution for individuals living with disabilities and their families. I am hopeful that as time goes on, individuals will resort to mediation as the first line of defense in an attempt to resolve these conflicts.

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