

## Using Elder Mediation in Adult Guardianship Cases A New Approach for the Court Appointed Attorney

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Part 2 of a 3 part article series presented by the members of SerraWeiss

For a host of reasons, being appointed to represent a person alleged to be incapacitated can be one of the most challenging and conflicting endeavors for an attorney. On the one hand, the attorney is to be a zealous advocate for the stated wishes of his client (to the extent they can be ascertained), yet at the same time the attorney may well see and appreciate the fact that his client is struggling and in need of assistance. Balancing a person's right to autonomy and self-determination while also protecting them from self-neglect and outside abuse is a tricky proposition to be sure, though made considerably more difficult when we are trying to figure it out in the context of an adversarial guardianship proceeding where the legal issues are fairly narrow – is the person incapacitated and if so, who should serve as her guardian?

For the lawyer who sees himself purely as an advocate and protector of his client's legal right of autonomy, the dilemma is somewhat obscured by the fact that the attorney perceives himself as being nothing more than a necessary player in a much larger adjudicatory process designed ostensibly to reveal the "truth" and achieve "justice" (at least that is what we were told in law school). Lawyers who see themselves in this way tend to put blinders on to other conditions that might be present in their client's life and are focused primarily on defending the guardianship and "winning" for their client; after all, isn't that what they were appointed to do? Conversely, other lawyers may take a much less "adversarial" approach and

view themselves more in the nature of a guardian ad litem or the "ears and eyes" of the court charged with the responsibility for doing what is in their client's best interests, even if contrary to what their client may be saying or wants. Lawyers who see themselves in this way run the risk of compromising their ethical obligation of undivided loyalty to their client and leaving their client without a voice, though feel justified in doing so in the name of protecting their client from undue harm and neglect; in a word, they are paternalistic. Which is the right or best approach is the subject of much debate, though it is understandable that attorneys, when put in these types of situations, feel conflicted and unsure about their role and how to proceed.

Much of the angst and uncertainty felt by court appointed counsel is derived not from the complexity of their client's predicament, but rather in trying to balance advocacy with addressing a client's needs in the context of an adversarial proceeding. The adversarial process is designed to address specific and well defined legal issues in a manner that results in clear winners and losers; an approach often times at odds with what the person with diminished mental capacity actually needs at a given point in time. Recently our legislature passed new legislation that allows for the appointment of a limited guardian (as opposed to full or plenary guardian – see N.J.S.A. 3B:12-24.1) intended to recognize what the medical and social professions have known for years, namely that there is a spectrum of mental capacity (or incapacity to be more

direct) and that the restrictions on one's right of self-determination should be calibrated accordingly. This is a positive and encouraging step in the right direction, but again, adjudicating such issues as "partial" incapacitation in the context of a judicial proceeding is like fitting a square peg in a round hole. The intent is there, to be sure, but the mechanism for arriving at the correct spot along the wide spectrum of "capacity" and care options is deficient.

The reality is that most courts give guardianship matters very little attention and with the ever increasing pressure to move cases along and a growing number of these types of cases (we are, after all, an aging society), it is doubtful that the courts will be in a position to devote the time, energy and resources necessary to properly decide limited guardianship cases. Deciding where those limitations may actually lie and developing a narrowly tailored support system to address a person's specific needs requires a thorough assessment of the person's mental and cognitive capacity, to be sure, but equally important is the need for a thoughtful and comprehensive assessment of the person's living situation, available support in the form of family and friends (what we call social capital), options for addressing care and housing needs, the availability of community services and resources and, of course, the willingness on the part of the person to accept the help of others.

While all this sounds nice and simplistic, the real challenge is getting this information before the court when the

legal issues are narrowly defined; again: is the person incapacitated (limited or otherwise) and if so who should serve as guardian? Many judges see their role in this limited fashion and defer to the guardian to arrange the necessary care plan, without a full understanding or appreciation of the fact that such an assessment is a necessary prerequisite to deciding the legal issue of whether and to what extent a person requires a guardian. To appoint what amounts to a plenary guardian with suggestive language in the Judgment that the guardian is to consider the wishes and desires of her ward is no substitute for a judicial finding of partial incapacity and the appointment of a limited guardian. In the context of an adversarial proceeding where the plaintiff is motivated to "win" her case and the alleged incapacitated person is less than fully capable, is it any wonder that the well intended court appointed attorney finds herself standing alone and a bit dumbfounded, not quite sure how to proceed or what to do? If only there was another way of approaching the problem.

Fortunately there is another way of approaching this dilemma and while the underlying concept is not new, its use in the context of contested adult guardianship cases is a relatively recent phenomenon. And that approach is called Elder Mediation.

Elder Mediation is an approach to resolving the care issues of an elderly or disabled person that is based fundamentally on the ethical principle that the elder or disabled person, who is often at the center of the conflict, is the most important participant in

the case and that all efforts should be made to protect the rights and safety, as well as to respect the dignity, of that person. At its core is the unyielding belief that the voice of the elderly or disabled person must be heard, understood and respected if the conflict is to be resolved in a fair and reasonable manner. Underlying themes to the Elder Mediation process include an honest respect for one's autonomy and right of self-determination, notions of beneficence (i.e., a commitment to do no harm), a commitment to fidelity and faithfulness to the person in need, encouragement to the family members and friends to work to achieve creative solutions and respect of, and fairness to, all parties involved.

Viewed in this way, the narrow legal issues of: is the person incapacitated and who should be guardian, no longer take front and center stage, but rather the principal effort now becomes: what are the person's needs, what does the person want and how can the person's needs and wants best be reconciled and addressed? Is there a role for the courts in such a process? Of course there is, since ultimately if there needs to be an adjudication of incapacity (limited or otherwise), only the courts can make that determination. However, the Elder Mediation process is intended to take a more holistic view of the circumstances of a particular person and their family in an attempt to ensure that the needs of the person are addressed in the least restrictive manner possible. We would encourage all attorneys and the courts to consider utilizing Elder Mediation as a viable mechanism for achieving the best result for those in need.

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