

THE ROLE OF MEDIATION IN GUARDIANSHIP DISPUTES: CHANGING THE TRADITIONAL APPROACH

I. OUR ELDERLY POPULATION

The 2010 government census reveals that just over 10.5% of the population in Texas is over the age of 65 years. In 2000, the percentage was slightly lower, at 9.9%. The Census Bureau predicts that the population over the age of 65 will continue to increase, and at five year intervals comprise 11.7%, then 13.1%, then 14.6%, and finally 15.6% of the Texas population by 2030. The number of people over the age of 85 in Texas is expected to nearly double between 2000 and the year 2030. The aging baby-boomer generation is fueling this increase, and as that demographic continues to live for longer periods, the number of people over the age of 85 also grows. The 85-and-over age group is expected to increase from 3.6 million in 1995 to 8.5 million in 2030, and to 18.2 million in 2050.¹

Naturally, as people get older, their participation in the workforce declines. Two-thirds of the men and one-half of the women between ages 55 to 64 are employed, but relatively few men or women are still working at ages 75 and over.² Projections done by have been prepared by Rivlin and Weiner (1988), the Urban Institute (1989), and Lewin/ICF (1990). These sets of data reflect the decline of income and the increase in poverty with advancing age in the older age

¹http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/aging21/demography.aspx

²http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/aging21/program.aspx

groups.³

Not only are the elderly facing economic hardship, they also typically report a higher incidence of health-related problems. Assuming that essentially the same proportion of each race group falls in each health category in 2030 as in 1990, the numbers of elderly with poor health are projected to increase sharply from 1990 to 2030, paralleling the population increase.⁴ Moreover, projections done by Kunkel and Applebaum (1992) suggest that the number of disabled persons in the United States may triple between 1986 and 2040, growing from about 5.1 million in 1986 to 22.6 million in 2040, or nearly 350 percent, while the elderly population overall would grow by only 175 percent.⁵ Alzheimer's Disease is one condition that is anticipated to impair a significant portion of the elderly population going forward. These analysts expect 10.2 million cases (middle series) at ages 65 and over by 2050, and possibly 14.3 million cases (high series) by 2040, as compared with about 3.8 million (both middle and high series) in 1990. There is the expected progression in numbers of cases with increasing age, a pattern that intensifies with the passage of time. By 2040, most of these cases, some 70 percent, occur among ages 85 and over. The number of cases at these ages will increase by over 300 percent, as compared with 25 to 50

³*Id.*

⁴http://www.aoa.gov/AoARoot/Aging_Statistics/future_growth/aging21/health.aspx

⁵*Id.*

percent for ages 65 to 74. This change reflects the entry of the baby-boom cohorts into the highest ages by 2040.⁶

Many of the impaired elderly are unable to live alone, and must reside in a nursing home or care facility. Projections of a joint team from the University of Illinois and the University of Chicago indicate that, if residency ratios remain unchanged, the number of persons residing in nursing homes will double or triple by 2030 (Rivlin and Wiener, 1988).⁷

The people who make up this demographic group are facing a myriad of difficulties: healthcare, costs of living, and an inability to earn money to pay for those things due to age and disability. Moreover, the choices available to them are limited as a result of these same factors. Once an inability to make one's own decisions due to diminished or deteriorated mental capacity is added to the list, the problems plaguing seniors seem daunting.

Texas has created a mechanism by which a person who has lost the ability to care for either himself or his finances can be managed; that is through a guardianship. In the best case scenario, the family will unite and stand behind one child as he or she applies for guardianship of the parent. In such a process, the fees are usually reasonable and the legislature's decision to allow reimbursement out of parent's estate is for the best. Unfortunately, there are often disagreement as between the family members as to whether a guardianship is needed or who should serve. Disagreement frequently means litigation, and it is ultimately the proposed

ward who ends up incurring the cost. Such a result hardly seems to be in the ward's best interest, in light of the factors discussed above.

II. TRADITIONAL USE OF MEDIATION IN LITIGATION

Mediation is a guided process used to help adverse parties reach a settlement or compromise.

In a traditional guardianship case, Daughter ("D") files an application for guardianship over Mother ("M") who is suffering from diminished capacity. Son ("S") is served with a copy of D's application and disagrees with it, believing himself to be a better candidate (or in some cases, wanting access to M's funds which he anticipates will be denied by D). S then files a contest and a competing application, and litigation commences. The parties will exchange discovery requests, engage in depositions, hire experts to examine M, hire experts to trace bank accounts to establish that either D or S is unfit to serve as guardian, and file what they hope to be dispositive motions, all before going to mediation.

Finally, by virtue of court order, they will attend mediation, but they will do so months after D's initial application – and in some cases more than a year later. By this time, it is reasonable to presume that M's condition has worsened, a result antithetical to the goals of the guardianship in the first place. It is also fairly certain that the parties will have incurred substantial amounts of attorney's fees and expenses (depositions and experts do not come cheap). The incursion of these fees may cause one or more of the parties to become intractable; after committing to a position and spending thousands, if not tens of thousands of dollars

⁶*Id.*

⁷*Id.*

promoting it, changing that position can be a bitter pill to swallow. That commitment to a position, coupled with engrained family patterns and deeply rooted issues that may be playing out between the adverse parties (i.e., family members), can prevent a resolution that adequately addresses M's needs for care and management.

As a result, the ultimate goal in mediation often cannot be met. Instead of mediation focusing on M, and whether D, S, or a third party is qualified to serve as M's guardian, the mediation becomes a battle between D and S – a battle that often continues to a trial after the mediator has called an impasse.

A trial as to who should be M's guardian means even more attorney's fees and expenses. If both D and S can establish to the trier of fact that they brought their guardianship actions in good faith, then M's estate will bear the ultimate cost. TEX. PROB. CODE ANN. § 665B. Such a result is not only inequitable for M, whose only crime was experiencing diminished capacity, but it is economically damaging to her given that her income is very likely fixed and her resources needed to fund her healthcare and living expenses.

III. ADVANTAGES OF EARLY MEDIATION

Rather than allowing months to elapse between the filing of an Application for Guardianship and mediation, and allowing the attorney's fees and expenses to mount, it is recommended that the parties attend an early mediation.

By attempting to reach a settlement through professional guidance and assistance within weeks after a contest to a guardianship application is filed, the parties may

successfully avoid:

- incurring fees for discovery, depositions, and experts;
- having a temporary administrator appointed whose fees will necessary deplete the ward's estate;
- becoming entrenched in the positions they are prosecuting or defending;
- having the proposed ward deteriorate while the litigation goes on.

In an early mediation, it is imperative that the mediator focus on the proposed ward, and his or her need for stable management, free of family squabbling. The mediator, must simultaneously be sensitive to and attempt to manage the family dynamics that may be driving, or at least exacerbating the fight between the family members. In an unfortunately large number of guardianship cases, attorneys see family dramas playing themselves out, albeit years after the players have outgrown childhood and in a different format. The change of scene, however, does not compromise the feelings of favoritism, punishment, entitlement, love, and/or anger that may fuel a party's actions. The mediator must seek to understand what the true motivation for each party is, so that he or she may use that information to satisfy the need associated with it. To the extent that S has filed his contest to D's guardianship application not because he believes that D is actually unfit to serve, but because he is angry with D and wishes to prove that M "loved him best," the mediator must use this position to help S set that motivation aside and focus on what is in M's best interest. If S's motivation is concern that D is a spendthrift who will destroy M's estate, then the mediator must seek to understand that position and facilitate

a resolution that will protect M from that potential consequence.

Ultimately, no matter what the family dynamic, a mediator intervening early on in the guardianship fight will be in a position to refocus the parties on the proposed ward's best interest before they spend money advocating for their own positions and rehashing family dramas.

IV. ETHICAL CONSIDERATIONS

In light of the fact that clients may be driven by personal issues and not simply and solely the proposed ward's best interest, an attorney may find himself or herself in the uncomfortable position of having to advocate for a result that might not be best for the proposed ward. Alternatively, the attorney may find himself or herself entrenched in litigation against a party whose position is adverse to the ward's best interests, but is powerless to terminate that litigation. A lawyer may represent a proposed ward who does not believe that he or she needs a guardian, despite the existence of objective facts that would indicate the opposite. In each of those cases, the lawyer is faced with participating in the incursion of fees which will be ultimately taxed against the ward's estate; an ethical dilemma.

Participating in early mediation allows the attorney to help his or her client achieve a resolution that is best for the proposed ward, without the same degree of ethical conflict. If adverse parties can be helped to focus on the proposed ward, rather than on their own agendas, the attorneys representing those parties can advocate for an outcome that both protects the ward and satisfies their client's particular concern. The attorney then is not faced with the ethical dilemma of advocating for a position that could be detrimental to the

proposed ward.

In the event that the case does not settle, the attorney will have more information about whether his or her client is concerned with the proposed ward's well being or his or her own agenda. The attorney can use that information to better evaluate whether he or she wishes to continue representing the client. Moreover, if the representation is continued, the attorney will know that he or she used best efforts to assist his or her client in reaching a settlement before heavy litigation and the corresponding fees manifest.

Additionally, such an approach will allow the Probate Bar to demonstrate that it is not the greedy entity that the media has made it out to be; that instead of taking advantage of an opportunity to generate attorney's fees, its members work diligently to resolve guardianship disputes early on and with a focus on the proposed ward as opposed to the litigating parties.