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Mediation in Adult Guardianship Matters

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In 2019, a court-system wide mediation program was announced as part of the Chief Judge's Excellence Initiative with a mission to increase efficiency and preserve judicial resources through early intervention. While alternative dispute resolution (ADR) has been successful in Surrogate's Courts, Article 81 guardianship proceedings present unique challenges relating to an alleged incapacitated person (AIP). Reference M. Radford, Is the Use of Mediation Appropriate in Adult Guardianship Cases?, Georgia State University College of Law Reading Room, Jan. 1, 2001. This may explain why presumptive mediation programs have not proliferated as widely in these guardianships as in the Surrogate's Courts.

First and foremost, an Article 81 guardianship necessarily involves someone, usually an elderly person, alleged to be incapacitated. A preliminary consideration is the ability of the AIP to meaningfully participate in the mediation. The focus of an Article 81 is supposed to be on the AIP. However, all too often, the spotlight focus remains on the AIP's family members and their entrenched positions about the AIP. To that end, even if a mediation results in an acceptable settlement, the question arises as to whether the alleged incapacitated person possesses the requisite contractual capacity to enter into the settlement agreement. There is the possibility of an AIP consenting to a guardianship; however, most often the AIP would receive a designation as a person in need of a guardianship (PING) and that consent can always be revoked. This factor does not lend itself to the type of certainty and permanent resolution that is the goal in other dispute resolution contexts.

Many guardianships result because an individual has not engaged in the proper planning of implementing advance directives

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such as a health care proxy, power of attorney, and living will. Sadly, oftentimes this is because the AIP does not have someone to appoint, even if she was inclined to do so. The factors contributing to the AIP not having advance directives are the same factors that heighten tensions in a contested guardianship proceeding and decrease the likelihood of a negotiated resolution.

Most, although admittedly not all, guardianship cases are presented to the court for resolution due to an inability of family members to productively communicate, a dysfunction which is exacerbated by the stress caused by the AIP's condition.

In the absence of a presumptive mediation program, the assigned judge and court staff are often placed in the position of acting as an ad hoc mediator, while also attending to a packed calendar of matters requiring their attention. This is an inefficient use of court resources given the lack of time and specific mediation training needed to fulfill the role of a neutral mediator who can facilitate the requisite communication between the parties—one of whom is an AIP who may have cognitive impairment. A guardianship mediation may require involvement over a longer period of time in difficult cases, where extra time can contribute to a "cool down" and perhaps improvement in the AIP's condition that precipitated the guardianship. This extra time can also allow families to be in a better mindset conducive to resolution. However, the amount of time that can be beneficial to an individual case is also incompatible with the Standards and Goals measures of the courts. A rule that would allow suspension of the Standards and Goals measures during a referral to a mediation program governed by other measures can further the goals of improving court efficiency and encouraging alternative resolution of these disputes.

Many guardianships result because an individual has not engaged in the proper planning of implementing advance directives such as a health care proxy, power of attorney, and living will.

North Carolina seems to have implemented a procedural structure for referring guardianship cases to mediation. In North Carolina, a Clerk may, on the Clerk's own initiative or in response to a motion by a party, refer any eligible matter to mediation, including a guardianship. NC G.S. Ch. 35A. A court may also, in her discretion, order mandatory mediation in a pending guardianship of some or all of the issues of the guardianship. As noted by John Saxon in "Mediation of Adult Guardianship Cases" (2008), some of the guardianship issues on which mediation may be appropriate are:

- Petitioner's allegations regarding the respondent's incapacity;
- The nature and extent of the respondent's incapacity;
- Whether the respondent needs a guardian;
- Whether a plenary or limited guardianship is appropriate; or
- Who should be appointed as the respondent's guardian.

Two cases out of Florida illustrate some of the pitfalls of guardianship mediation with respect to the issue of incapacity. In the first, *Jasser v. Saadeh*, No. 4D09-3974 (Fl. Ct. App. July 18, 2012), five children commenced guardianship proceedings to determine their father Saadeh's incapacity and appoint a temporary guardian to protect him from a young woman to whom he had loaned money. To protect their father from draining his accounts, the children (who were joint account holders on those accounts) transferred over $1 million to other accounts outside of his control. Of course, a dispute ensued. Despite a neurologist's opinion that the father should not retain the right to contract, and his diagnosis with "high stage" Alzheimer's, the question of Saadeh's incapacity was contested. The parties agreed that the father's execution of a trust, pour-over will, and health care proxy would be the "least restrictive alternative" to a guardianship. Saadeh executed the

trust agreement and later contested its validity after the competency proceeding was dismissed. The lower court granted summary judgment that the trust was void ab initio. The court questioned whether it had the authority to order Saadeh to enter into trusts if he were not incapacitated. The appellate court noted that "[t]he guardianship statutes and rules should not be used to protect competent persons from their spendthrift ways or to protect their beneficiaries. An individual who is competent should not be subject to the control of the courts through guardianship proceedings, temporary or plenary." The Florida appellate court held that "because Saadeh had no legal right to execute the trust, the trust was invalid and void" and upheld the trial court's order invalidating the trust.

In other words, at least under Florida law, guardianship judges should only have jurisdiction over cases where a person is incapacitated. If the person is not incapacitated, the court would not then have authority to compel an agreement. If the person is incapacitated, then that person likely lacks contractual capacity to enter into the agreement in the first place. New York law would allow for a guardianship for someone who is not "incapacitated" but is nevertheless "in need of a guardian" or otherwise unable to handle their affairs under certain circumstances, and thus might differ from this result. Mental Hygiene Law §81.01 et seq.

In upholding a settlement agreement, a later Florida decision distinguished the facts from the *Saadeh* case on the basis that the case involved schizophrenia, not dementia, and that the *Saadeh* case involved capacity to sign a trust, not a settlement agreement. The case of *Gort v. Gort*, No. 4D14-3830, 4D15-398 (Fl. Dist. Ct. App. Feb. 3, 2016), involved two brothers, one of whom was the subject of the guardianship, an AIP diagnosed as paranoid schizophrenic and suffering from auditory hallucinations. His brother commenced the proceeding; the AIP and cousin opposed. Before the incapacity hearing, the court referred the parties to mediation. The mediation resulted in a signed settlement agreement in which the petitioner and the cousin would dismiss their pending petitions without the need for prior court approval. As part of the agreement, the AIP and the cousin agreed to provide the petitioner with information relating to the AIP such as financial statements and notice of medical events, and designated a neutral agency to evaluate the AIP's living situation every six months. Despite initial compliance, the AIP stopped complying a year later, and the brother sought a declaration that the settlement agreement was valid and enforceable. The AIP cross-petitioned, seeking to have the agreement declared invalid and unenforceable. The trial court granted summary judgment to the brother-petitioner and upheld the mediated settlement agreement, which the appellate court affirmed. The appellate court rejected the AIP's argument that the *Saadeh* decision prohibits the voluntary dismissal of a petition prior to an adjudicatory hearing, finding the case factually distinct given the difference in diagnoses (Alzheimer's vs. the mental health disorder of schizophrenia, which the court deemed "controllable when properly medicated").

Developing alternative dispute resolution programs in Article 81 guardianship can achieve the goals of increasing court efficiency and preserving judicial resources. See The Guardianship Project, *Incapacitated, Indigent, and Alone: Meeting Guardianship and Decision Support Needs in New York*, Nov. 30, 2018. In addition, incorporating guardianship into the mediation initiatives will have the added benefit of furthering the goals of Article 81 to reach the "least restrictive means" that are "narrowly tailored" to the AIP's specific needs. MHL §81.01 et seq.