

MEDIATING WITH THE ELDERLY

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How do the children tell Mom that she should no longer be driving her car? When does home health care no longer suffice but Dad refuses to go to a skilled nursing facility? Mom just died two years ago. Why does Dad want to remarry that lady? Why should our brother, who stayed on the farm with Mom and Dad to care for our parents and operate the family farm, be able to inherit most of our parents' property? Why can't the nursing home keep Dad from falling out of his bed all of the time?

THE INCREASING NEED FOR MEDIATION

These questions and countless others will be occurring with more frequency as family members struggle with issues of the aging population. Nearly eighty million individuals living in the United States are part of the baby boomers born between the years 1946 to 1964.¹ This bubble of population has already begun to reach age sixty years. The stress of health care and finances will lead family members to conflict and likely surface hurts and disputes that have festered for years. Inviting the intervention of a mediator may permit the elderly person to gain a sense of dignity in his or her last years of life. Just as important, mediation may assist the family of an aging person to resolve those emotional issues that can further strain already adverse relationships within a fragile family.

Missouri Supreme Court Rule 17 uses one definition of mediation as “a process in which a neutral third party facilitates communication between the parties to promote settlement.”² However, with the many issues that can overwhelm family and friends when dealing with an aging person, mediation can serve more than just resolving one dispute at a time. Mediation can be used as a planning session for facing issues upon which family members have differing viewpoints. “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.”³

Issues which can create tensions and conflicts with family members, for which mediation may intervene, may include:

- Medical care decisions
- Caregiver responsibilities
- Housing transitions and living arrangements
- Decision-making authority
- Need for Guardianship/Conservatorship
- Estate planning
- Communication and family dynamics

- End-of-Life decisions
- Inheritance disputes

THE MEDIATOR'S AWARENESS OF AGING

Whether an immediate crisis needs resolution or whether the family wishes to conduct advanced planning, the mediator should have some knowledge of the aging process as well as the ability to create the appropriate environment for discussions of issues related to the life of the elderly person. What are the stereotypes and innate biases that the mediator brings with him or her? Self-awareness is an important aspect to the mediator's presence at the mediation table. The mediator should explore his or her own perceptions and attitudes toward an old man or toward an old woman in order to assure an ability to remain objective and respectful. Being stubborn, forgetful and confused are not necessarily the definitive traits of growing older.

Probably more than other types of mediations, a screening process before the first session may need to occur. Does the elderly individual have the capacity to mediate? Do any factors exist that might impair that person's ability to participate voluntarily? An intake process should note the person's functioning in the areas of cognition, emotion and behavior.⁴ The mediator also may want to be familiar with characteristics of elder abuse.⁵ Ethical issues regarding capacity and abuse will continuously confront the mediator in determining whether to start or to continue the mediation.

The mediator has to be cognizant in making the mediation setting conducive for maximum benefit to the elderly participant. Many mitigating and/or qualifying factors can assist the mediator to accommodate the limitations that may appear. The mediator may need to schedule sessions in the early morning when the elderly person is more alert whether before or after taking medications. The print on documents may need to be larger and be presented in a room with adequate lighting. The mediator may need to conduct the mediation at a place more familiar for the elderly person. Is the seating comfortable and should sessions have shorter durations and with more breaks to move around before stiff joints hurt. The mediator may use more summarizing, reflective listening, clarifying and asking to assure comprehension.

THE MEDIATOR'S KNOWLEDGE

Along with awareness about the process of aging, the mediator may need substantive knowledge about behavioral theories on family systems and the law related to the elderly. Familiarity with the behavioral sciences about viewing the family as a unit with the interdependencies and reactions of its members gives the mediator some confidence with understanding relationships and managing interventions. Being empathic about the issues an aging person faces, whether physical, behavior or legal, can give the mediator more credibility with all parties. The parties may bring to the mediator their misunderstandings that the specialized field of elder law addresses. Is that sibling misusing Mom's financial power of attorney? When does Dad no longer serve as the

Trustee of his revocable living trust? What assets cause Mom not to be eligible for Medicaid? However, the mediator should clearly inform the participants that mediation is not the practice of law or counseling therapy. The mediator can provide information or referrals to other professional resources. Although the mediator has to be knowledgeable about many issues with an elderly participant, enlisting the services of other professionals ensures that the mediator appropriately manages the mediation process.

CONCLUSION

Health care technology will assure the longevity of our elderly population. Natural tensions will increase among family members in determining what is in the best interests of an aging parent. Resources will decrease, whether governmental or private. Family members will need to implement new problem-solving skills. The tough decisions with competing interests need discussions in an appropriate environment. Mediation offers those opportunities to be heard, to evaluate options and to create that familial bond, which aging parents strive to see in their final years.

¹ U.S. Census Bureau, Press Release dated January 3, 2006 found at <<http://www.census.gov/Press-Release/www/2006/cb06ffse01-2.pdf>>

² MO SUP CT. RULE 17.01(B)(3)

³ Rikk Larsen and Crystal Thorpe, *Elder Mediation: Optimizing Major Family Transitions*, 7 MARQUETTE ELDER'S ADVISOR 293, 295 (2006).

⁴ A capacity worksheet may be helpful such as: American Bar Association Commission on Law and Aging & American Psychological Association. (2005). *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*. Washington, D.C. at pages 23 – 26.

⁵ ELDER ABUSE DETECTION AND INTERVENTION: A COLLABORATIVE APPROACH (Bonnie Brandl et al. eds., 2006) Springer Publishing (ISBN: 082613114x)