



## **Creative Approaches to Mediating Elder Care and Capacity Issues**



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*“All families are psychotic. Everybody has basically the same family / it’s just reconfigured slightly different from one to the next.”*

— *Douglas Coupland*

When an elderly family member dies or becomes (or seems to be) incapacitated, the odds are good that at least one member of the family will become a curse upon the rest of the family. Step child versus step parent; sibling versus sibling; grandchild versus aunt or uncle: In a crisis, family dynamics can erupt and litigation only fuels it.

*“An ounce of mediation is worth a pound of arbitration and a ton of litigation!”*

— *Joseph Grynbaum*

Litigated disputes among family members can lead to divisions within a family that never heal. We see these types of disputes arise too often in the probate practice. While some probate actions are in rem and therefore cannot be resolved privately, most disputes can benefit from creative problem solving within a mediation framework. This is especially true in elder care cases.

A common issue that arises within a family is whether an aged parent or other relative has capacity to direct and control his or her own life. Sometimes a child's belief that the parent is incapacitated is based on the child's disapproval of the parent's decisions. For example, many children resent their aging parent dating- perhaps a fear that their inheritance will be disrupted or a disrespect for the feelings of the elderly fuels this resentment but the resentment can run deep and trigger long standing animosity among the siblings. ("Mom always liked you best" Smothers Brothers). This often leads to one or more children filing for conservatorship. Rather than preparing for war, the parties are better served by approaching a resolution with mediation. Knowledge about and use of outside resources increase the odds of success.

Let's look at one example: John believes that the man his widowed mother met at church is after her money. John finds Mom's giddy excitement about this new romance to be disconcerting. His sister, Susan, is happy for their mother. John files for conservatorship to "protect his mother." Susan and her mother oppose the action. The parties can battle to the end, with one side losing and other "winning". Often that "win" is elusive because of the depth of the chasm created within the family.

A better approach is to identify what John is really concerned about. He may start out stating that his mother's happiness and safety are his only concerns, but after a bit of talking he may finally admit that he is concerned that his mother might amend her estate plan to include this new boyfriend. Consider these possible agreements that obviate the necessity for a conservatorship proceeding:

- (1) Mother will amend her estate plan to provide that the dispositive provisions can only be amended in the future with the consent of the two children.
- (2) Mother will amend her estate plan to provide that she can only amend her estate plan if she has a letter from her physician stating that she has the mental capacity to amend her plan.
- (3) A bookkeeper will take over paying mother's bills and shall alert the children if any money is withdrawn by the new boyfriend or if any questionable disbursements are made.
- (4) Mother will resign as trustee of her trust and have a professional fiduciary take over management.

(5) If there are concerns about the new friend's treatment of Mom, perhaps a case manager could be employed to check on mom periodically.

If the parties deem the appointment of a conservator necessary, there is still room for agreements. The parties can stipulate to ask the court to include all types of protective orders in the order appointing the conservator. The type of protective order will depend on the particulars of the case but in the above example, perhaps the order could provide that Mother cannot amend her estate plan or marry without a prior court order. The order could also set forth a monthly budget and allow for additional expenditures only with a court order. The identity of the conservator can be vitally important and Mom must have significant input on that. It is generally best if neither child serves as conservator because of their opposing opinions and the probable lack of trust between them. A private fiduciary may be the best choice. The nature of timing of accountings can also be the subject of agreement.

Fortunately the majority of families never have to face these types of issues and challenges. For those families facing these challenges, mediation is the best choice for obtaining a resolution that meets everyone's needs.