

MEDIATION IN PROBATE AND ESTATE CASES

Susan D. Hartman, J.D. and Susan J. Butterwick, J.D.

In a petition for guardianship and conservatorship over their mother (Mildred), two daughters allege that the durable power of attorney and patient advocate designation their mother signed a year ago is not legally valid, because their mother signed them under undue influence or did not have the legal capacity and understanding to sign at the time. The mother's long-term companion, the donee of the powers, claims the petition should be dismissed—the authority granted in the documents makes court supervision unnecessary—or in the alternative that he should be named as fiduciary. Everyone recognizes that Mildred now meets the definition of an incapacitated individual. The legal issue presented to the court is the validity of the power of attorney and patient advocate designation: the capacity of the mother a year ago and the circumstances of the signing. The real issue between the parties is who is going to control Mildred's life and property from now on. Each side is afraid that the other will restrict access to Mildred and will act in ways that are contrary to Mildred's best interests, as defined by each party. Each is also afraid that the other plans to use Mildred's property improperly. The attorneys for the parties suggest mediation, in order to focus on Mildred's needs, on the needs of each of the parties, and on finding mutual ways to assure that Mildred's resources are used appropriately for her care.

Three siblings are fighting over their father's estate. Although they know that each is to get a one-third share, they can not agree on the division of the personal property. This is complicated by the fact that one sibling sold some of their parents' belongings in a garage sale when their father moved to a nursing home a month before his death. A second sibling is infuriated that her mother's antique sewing machine was apparently sold at a "junk" price at the sale. The judge orders mediation as a way to try to preserve the limited resources of the estate and avoid extensive court hearings.

John and Jane Smith have consulted an attorney for estate planning services. Their daughter is divorced, has four children and is barely able to make ends meet. Their son, a successful businessman, is financially secure. They want to arrange their estate so that their daughter receives a majority of their resources. However, they tell the lawyer that they don't want to tell their son about this because they are afraid he will be upset. Their lawyer advises that it is unlikely that the son will be less upset after their death, and suggests that it may be better to face the conflict now rather than impose it on their children in the form of a contested court situation later. The lawyer suggests a mediated family meeting, in which all family members can discuss their concerns before the parents decide on their estate plan.

Situations like these, along with many other more complex variations, have crossed every probate attorney's desk. In recent years, more and more such cases are being referred to mediation by courts or attorneys, as they discover that mediation is often a very practical tool in these circumstances. Mediation is the use of a neutral third party, with no authoritative decision-making power, to facilitate communication between two or more parties, to assist in identifying issues, and to help the parties analyze, discuss

and explore solutions to promote a mutually acceptable agreement. (See MCR 2.411 (A)(2))

Mediation, with its focus on collaborative process, is often a good fit for probate cases. The mediation process is particularly useful when the claims are not simply legal disputes, but involve ongoing relationships between the parties. Most cases in probate court involve family members or others who have long-term relationships. Mediatable issues can arise in almost any kind of case in the probate jurisdiction: decedent's estates (testamentary and non-testamentary), disputes arising from trusts (e.g. between trustee and beneficiary), guardianships over minors or adults, conservatorships and other protective proceedings, Mental Health Code cases. In addition, a few families are choosing mediation at the time of estate planning, in order to resolve issues that might otherwise arise later.

There are several reasons you and your clients may choose mediation.

- 1) Issues that cannot be decided by the court. Consider whether a decision by the court—whether it is or is not in your client's favor—will in fact solve the problem that your client first presented to you. If not, this may be a clue that mediation may be an appropriate way to address some of the other issues. For example, care planning or caregiving disputes with family members, living facilities, or professional caregivers; safety and health concerns when a person may not be found legally incapacitated but the family is uncomfortable with his or her decisions; family tensions over competent parent "gifting" money or assets to one sibling or to a non-family member; sibling or blended family rivalry; unresolved conflict and family tensions.
- 2) Limited resources. Sometimes the size of the estate or the value of the dispute does not justify an extensive trial, and mediation provides a cost-effective way for parties to feel that their voice has been heard and reach a settlement.
- 3) Situations involving continuing relationships. In a trust, for example, where the trustee and beneficiary may continue to interact after the immediate dispute is resolved, or in a guardianship situation where family members will continue to be involved, the mediation may be able both to resolve the immediate dispute and to help prevent or deal with future disputes.
- 4) Situations in which the relationships are important to the parties. Even if the situation does not per se involve future interactions, such as in a decedent's estate, many parties value the continuing relationship and choose mediation in order to avoid poisoning the relationships through a full-blown court proceeding.
- 5) Cases not yet in court. Consider when a client first comes to you whether it may be appropriate to try mediation before filing a petition. This has the advantage of not pitting parties as adversaries before they begin. If a legal stamp of approval is needed in a particular situation, a consent petition/order can be entered as a result of the mediation.
- 6) Estate planning. Very few families are using family meetings, mediated or not, in estate planning. This is an area that is being developed in some parts of the country for families, such as blended families, those with family

businesses, or others who want to avoid conflicts arising after the death or incapacity.

- 7) Guardianship/conservatorship cases. Mediation provides a forum to consider whether less restrictive alternatives to guardianship or conservatorship are available or appropriate and if not, who the family wants to be guardian/conservator or co-guardians/conservators.
- 8) Whenever a probate proceeding is being used as a “weapon” by one or more parties, rather than as a means to safeguard the interests or property of a vulnerable person or a decedent, or when a dispute arises from misunderstanding or lack of communication. Mediation provides an opportunity for families to increase understanding and repair relationships in a private, confidential setting instead of using the courtroom as a battleground to right personal “injustices” that have accrued over the course of a family relationship.

Of course, not every case or issue is suitable for mediation.

- 1) Proceed with caution if there are allegations of abuse by or to someone who is a necessary party to the mediation. An abuser may not be willing or able to change his or her behavior by agreement and a victim may feel threat or duress and be unable to speak freely or enter into a balanced agreement.
- 2) In cases in which there is no prior or continuing relationship between the parties (e.g., creditor claims in a decedent’s estate), and you and the other attorney have a good professional relationship, a negotiated settlement between attorneys may be as effective as the mediation process.
- 3) If a situation involves strictly a legal issue, the court may be the appropriate decision-maker. Sometimes the case can be divided: the court makes a legal determination, such as a decision that a will is valid, and then the rest of the case goes mediation to decide how the distributions under the will should be made.
- 4) If your clients’ main goal is to “get even” or to punish another party, or they simply want to win at any cost, mediation is probably not going to satisfy them. Although some people’s vision may change when they get to mediation and hear the other side, the give-and-take of mediation requires a basic level of willingness to negotiate that is lacking in this situation.

Even in these cases, mediation may offer potential resolutions outside of what a court could order. For example, in those cases in which clients say “it’s the principle, not the money,” donating disputed funds to a mutually acceptable charity, rather than paying to a the other side, may satisfy both parties.

Note that we are talking here about *your own client’s* goal. Many parties will insist that the other side’s goal or intent is a malicious one. Generally you do not have enough information to judge the intent of the other side. In mediation, you may find that your client’s understanding is reinforced, but in many cases, parties can come to new understandings about the other parties’ behavior.

- 5) If parties who are necessary to the decision-making process are not able or allowed to participate, it may be better for the court to decide the case. For example, if family members do not want the respondent in a guardianship case to participate, the respondent has an opinion on the issues at hand, and neither the respondent nor an advocate is available to participate, a due process proceeding in court may be a more equitable decision-making forum.

Preparing for the mediation

1) Working with the mediator

Speak with the mediator before the mediation to discuss expectations of the process: your role in mediation, who needs to be in mediation, any special needs your client may have, fee arrangements, and what information the mediator needs before the first session. Usually all interested parties should attend the mediation, but if the issue to be mediated is a limited one, or some parties live far away, you may discuss proceeding with fewer than all the parties, or including some through telephone or video-conferencing. Often in family situations, parties have varying expectations of whether spouses, grandchildren, caregivers, or relatives who aren't legal next-of-kin, etc. should be part of the process. If there are people not listed on the petition as interested parties, but who should or should not be part of the mediation, this is the time to raise the issue, so that it can be resolved before the mediation begins. In some cases, particularly situations involving guardianship and complex family relations, the mediator may want to speak with the parties individually by phone or in person before the first joint session.

If you have not worked with this mediator before, you will want to learn about his or her process and style. Are you in agreement on the roles the attorneys and parties will play in the mediation? Is the process appropriate for the parties and issues in this case, or are there special needs that need to be taken into account?

2) Preparing your clients.

Once you and your clients have decided, or have been ordered by the court, to use mediation, you can help assure that the process is a valuable one for them. Important preparation for going into any mediation is knowing what the BATNA and WATNA (Best or Worst Alternative to a Negotiated Agreement) are for your clients. As their attorney, you are in the best position to advise them about the likely range of possibilities if the matter is decided by the court, as well as what the costs to the clients in both time and resources will be if they decide to pursue that path.

In addition, you can help your clients identify their underlying interests. Frequently, the issues that are most important to your client are not the legal issues; instead, other interests or human needs may be motivating factors for your client. The mediator will often ask a party "What is important to you about this?" Help your clients think about this question beforehand. In an estate case, parties may approach the situation quite differently. Some parties will feel entitled to a particular piece of property, or to a certain sum of money. This feeling of entitlement may be based on information that is or is not legally relevant in a probate proceeding. Other parties may be concerned by a sense of fairness. They don't necessarily want a particular amount, but

they do want to assure that they aren't cheated or taken advantage of by other family members. To some people, maintaining a positive family relationship is important; to others, a probate proceeding may involve an opportunity to get back at other family members for perceived past wrongs. When disputes involve people who were in different types of relationships with the decedent, (child, step-child, second spouse, non-married partner, caregiver, etc.), already existing jealousy or distrust may color the perception of fairness and the interpretation of the decedent's intent.

Especially in complex cases, help your clients understand what issues need to be resolved, and whether these issues are the same for both parties. Help your clients understand various options for resolution. Think about options that may not be available in a court decision. To the extent that you know the position or interests of the other parties, explore with your client options for resolution that may meet the needs of all parties. Explore whether there are positions your client is willing to give up or compromise on in order to gain something else.

Before the mediation, discuss with your clients what your role will be in the mediation. If there are complex legal issues, if your clients have difficulty communicating, or feel intimidated by the process, you may be active on their behalf in the mediation session. In other cases, the clients will mainly speak on their own behalf, and you will be there as an advisor, to help them consider options, or to give legal advice as needed. In some situations, if a primary purpose of the mediation is to resolve the case at a lower cost and the clients are comfortable with the process, you may decide that you do not even need to attend the mediation session. In this case, you need to assure that you, your clients, and the mediator understand what your role will be if an agreement is reached in mediation: Will you be available by phone to review the agreement with your clients at the time of signing? Will the agreement be tentative for an agreed-upon time period until you have had the opportunity to review it? What will happen if you suggest changes? Do you and they feel comfortable with their signing a binding agreement within the parameters you have previously discussed?

If the mediator is going to talk with parties individually before the first joint session, be sure your client understands the purpose of the conversation and clarify whether you need to be part of it.

The mediator will explain the mediation process at the first joint session. However, hearing this explanation for the first time at mediation may be confusing for your clients. You should be sure your clients understand that the mediator will not be making a decision for them, and that they will be involved in the shaping of the resolutions. Explain the process yourself to your clients.

Conclusion

It is rare that parties leave the courthouse smiling, shaking hands, and feeling good. It is not uncommon that parties leave mediation doing just that. Mediation provides a private setting for families to "tell their stories" in their own words, discuss

their differences, and share views and opinions with one another in a way that cannot occur in a legal forum. Unlike divorce cases, people enter the probate court as family members and leave the courtroom still related to one another. What occurs between entering and leaving the courtroom in a contested probate hearing can polarize and damage relationships further because the result of a contested hearing, where a third party makes the decision solely on the legal merits of the case, usually creates unhappiness and anger on at least one side of the case. The goal of mediation is to create a solution that everyone can agree to because the participants have control over the process and decision. In mediation, families can discuss many more issues than those contained within the legal questions and make decisions that are tailored to their specific needs and interests.

As an attorney in a probate-related mediation, you have an opportunity to counsel your clients on using the process effectively. Attorneys who are able to prepare themselves and their clients well, to understand what their clients feel is truly important about a case, and to recognize that personal relationships as well as legal issues may have an impact on the agreement, will find that clients benefit from mediated agreements. Even in cases in which agreements are not reached, parties will have gained insight about their own goals and expectations about the case, and many cases, will have set the stage for reaching a settlement through further negotiation.

This article appeared in the State Bar of Michigan Probate and Estates Section Journal in May 2010.