

Mediation: It's Not Just When the Marriage Breaks Up

By Antonia J. Martinez and Robert W. Shaw

Individuals are familiar with the concept of mediation in divorce and child custody disputes as a cost-effective alternative to litigation. It can be an equally effective alternative to litigated guardianship proceedings, or to resolve heated disputes among feuding siblings with opposing views concerning where mom should reside, how much assistance dad really needs, or how money is being spent. The potential for mediation to resolve these sorts of disputes is only beginning to emerge and New York State still has a long way to go.



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Mediation should be distinguished from arbitration, another form of alternative dispute resolution. Arbitration utilizes an independent fact-finder to make decisions for the parties based on the facts presented by all involved in the arbitration. The decision of the arbitrator is final and the parties to the conflict are bound to his or her decision. In mediation, the mediator does not make decisions for the parties. Instead, participants make their own decisions under the mediator's guidance.

A. Diverse Mediation Models

There are several different types of mediation and mediator styles. The *evaluative model* focuses on the law and legal questions pertinent to the matter at hand. That is, the legal issues presented will be the primary focus of the mediation. A second model in which law is not used as the means to resolve a dispute is the *transformative model*, where the mediator is there to help the parties reach agreement, but does not necessarily have a background in the subject matter of the dispute. A third and ideal model for the family conflict arena is the *facilitative model*. In the facilitative modality, the law is brought into the mediation not for the purpose of resolving the dispute, but rather to guide the parties in how the dispute will be settled in the courtroom if the parties are unable to reach an agreement. In a family dispute scenario, a mediator experienced in the field of Elder Law and Trusts and Estates Law is an asset to the resolution of the dispute.

Types of family disputes in which mediation should be considered include the following:

1. A parent is suffering from physical decline and/or early stage dementia. The children, residing

in multiple states, are fighting amongst themselves or with the parent on what type of care plan should be initiated;

2. A now incompetent senior has a validly executed Power of Attorney appointing two separate agents who disagree on what actions will be taken. This is particularly critical where the document requires them to act jointly;
3. A parent recently died and two adult siblings are fighting over the terms and validity of the Will, resulting in delaying probate and appointment of the Estate's Executor. One of the adult children resides in the deceased parent's house and had lived with decedent until his death. The two argue over whether the house should be sold or a financial arrangement put in place allowing the adult child to continue residing in the home. The sibling who does not reside there wants to initiate a lawsuit to force a sale of the premises since the two cannot agree on the arrangement;
4. The continued effectiveness of a care plan already in existence for a senior is now in dispute. Is a home attendant sufficient or does the senior now need assisted living or nursing home care? The three adult children each have a different point of view and the senior's perspective has not been articulated during the heated arguments that have ensued among bickering siblings.



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B. Underlying Interests

What is each dispute really about? Is it really about settling the estate, or is it about the resentment Susie bears towards Bill for all the years mom and dad favored Bill, and bought him expensive gifts, even though he was financially well established? Susie feels unappreciated for everything she did for her parents over the many years she was the one who lived close by, provided care, arranged medical appointments and gave of herself at the expense of her own family of three children and husband who grew resentful over her involvement. The dispute for her is not about the

money in the estate but over the lack of recognition she received throughout her life.

In all of the above examples, there are multiple advantages to avoiding a courtroom as a forum for dispute resolution. Familial “issues” going back to childhood are often the real reasons behind hardened positions. These are relationship conflicts not only between parent and child, but between siblings. Mediation offers the opportunity to go beyond the surface issue and explore the family dynamics behind the problem. Mediation gives the parties an opportunity to vent, and when done successfully will go beneath the issues to uncover what the real needs are of each party, as opposed to their announced purported positions. Often, a family crisis and a stalemate preventing a resolution, stems from a failure to look at underlying needs and feelings of the parties. The courtroom is not an appropriate forum to address these underlying interests, whereas mediation gives the parties the room and time they need to hear one another’s positions. An understanding of the other party’s perspective can result in a shift of position once the mediation looks beyond the surface issues.

C. Efficiency of Mediation in the Elder Law and Probate Arenas

Mediation is an alternative to putting a case through the court system, where cases may be drawn out for several years, costing many thousands of dollars, and utilizing limited court resources. Time, in particular, is critical to senior citizens and the disabled. Mediation, as an alternative, offers a speedier resolution, allows the voice of the senior to be heard, and offers greater privacy as an alternative to litigation.

The benefits of family dispute mediation are both a reduction of stress to the individual parties and the chance for creative problem solving. A mediation can be conducted in a less formalized setting than a trial court, and with the help of the mediator, determine the topics of discussion, including what issues to raise and which ones can be limited. It is an opportunity for the parties to vent with greater flexibility of time than available on a court calendar.

D. Elder Law Attorneys and Mediation

Many elder law attorneys incorrectly perceive themselves as family mediators. They are not. The role of the elder law attorney is significantly different and is that of advocate who must represent his or her client with reasonable diligence.¹ It is rather the role of the mediator to facilitate a solution or set of solutions to parties ensnared in a dispute originating from competing interests that originate with family dynamics and resentments harbored over the course of many years, and sometimes decades. The elder law attorney will make recommendations to provide particular planning

options, whereas the elder mediator offers a forum for each voice to be heard. The role of the elder law attorney is to bring the legal issues to resolution promptly and efficiently, whereas the mediator’s role is to oversee a process that allows all parties to fully articulate their positions and exchange their personal views.

E. Elder and Probate Mediation: Is It in New York State’s Future?

In New York State, given the current state of overloaded court calendars, the climate is ripe for mediation in guardianship proceedings and contested probate matters. Should New York State create a specific framework and methodology to establish criteria for mediation in certain probate proceedings? What is to be gained by such action? First, significant savings of legal expenses will inure to the benefit of the litigants. Second, mediation will conserve limited court resources. Even when mediation fails to resolve all aspects of a dispute, the issues remaining before the Court for resolution are more narrowly focused as a result. Third, the parties to the mediation, no longer constrained by the Rules of Evidence and eager to be heard, will have a forum to talk about the underlying issues that resulted in the conflict. Even in situations in which mediation fails, the litigants return to Court with a better understanding of the court process.

Mediation has been an important part of alternative dispute resolution in other states throughout the United States for many years. It is time to bring mediation to the forefront in New York for the many areas of conflict one encounters in Elder Law and in Trusts and Estates Law practice. Should New York follow other states that have initiated mediation programs such as Texas, Florida, California, Georgia, Hawaii, Arizona, Michigan, New Hampshire, Utah, and Washington? Given that New York was the very last state in our country to authorize no-fault divorce, one cannot be hopeful that such legislation will be forthcoming anytime soon. At a Symposium at Albany Law School in March 2012, New York’s Chief Judge Jonathan Lippman noted the courts were contemplating strategies to reduce expenses, increase efficiency and lighten calendars.² The climate is ripe for the establishment of criteria in the area of trusts and estates and guardianship matters to permit litigious parties to resolve disputes with better long-term results through mediation. It is the responsibility of the bar to inform and educate the public about the opportunity and advantages afforded parties to a mediation.

Endnotes

1. N.Y. State Rules of Prof’l Conduct Rule 1.3 (2012).
2. Mark Mahoney, *Judges From Several States Seek Answers to Court Problems*, New York State Bar Association State Bar News, May/June 2012, at 28.

Antonia J. Martinez, Esq., devotes substantially all her professional time to Trusts and Estates and Elder Law matters. Ms. Martinez is Co-Chair of the Elder Law and Disabilities Committee of the New York Women's Bar Association and a member of the Executive Committee of the New York State Bar Association Elder Law Section and serves as Vice Chair of its Veteran's Benefits and Mediation Committees, and a member of the ADR in the Courts Committee of the Dispute Resolution Section of the New York State Bar Association. Ms. Martinez is a speaker at Continuing Legal Education programs as well as community programs. Her articles in *The Elder Law Times*, *Profes-*

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