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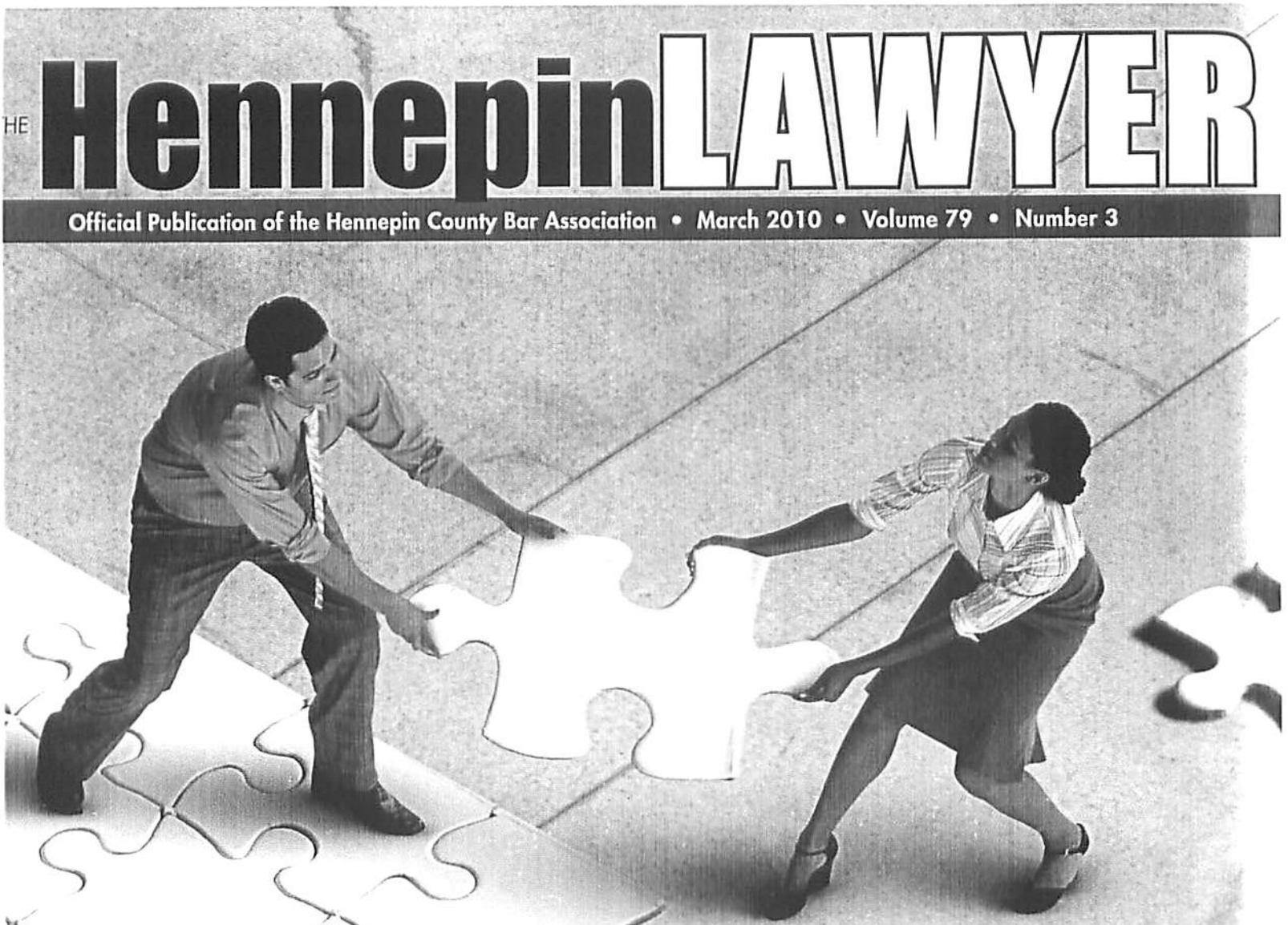

Focus on: Alternative Dispute Resolution

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Guardianship and Conservatorship Mediation

In recent years, guardianship and conservatorship disputes have increased in number and legal expense. These contests are rarely mediated. Probate disputes are not currently subject to alternative dispute resolution under Rule 114.01, Rules of Practice, District Court. Ironically, most parties to a guardianship/conservatorship contest would argue that they are fighting for the same result–the best interests of an incapacitated person. Given this common goal, one would expect the parties to embrace mediation to work out the details. Historically, this has not happened. This article provides an overview of guardianship and conservatorship mediation and its value in reaching a thoughtful settlement.

Issues in Dispute

At the center of every guardianship/conservatorship dispute is the proposed "ward," in the case of a guardianship petition, and the proposed "protected person," in the case of the conservatorship petition. Often, a single petition seeks the establishment of a guardianship and a conservatorship simultaneously. If granted, the petitions result in the appointment of a person or company with the duty and power to act as a substitute decision maker for the incapacitated person.

After the establishment of a guardianship or conservatorship, additional issues may emerge, such as whether the protected person's homestead should be sold, where the protected person should live, whether medical procedures should be performed, and whether the person appointed as guardian or conservator is performing his or her job.

The issues are argued by a variety of parties interested in the dispute. Virtually any individual or person interested in another's welfare can petition for the establishment of a guardianship or conservatorship. Any interested party can object to a petition. Thus, a guardianship or conservatorship dispute can see a cast of characters, including social workers, family members, long-time friends, neighbors, significant others, and clergy. Each interested party brings a particular worldview to the process. Some are fiercely protective of the personal rights and freedoms of the proposed ward/protected person. Others argue strongly for the appointment of a substitute decision maker to proactively eliminate the chance of personal or financial injury to the proposed ward/protected person.

Many guardianship and conservatorship issues fought out in probate court were once handled quietly by the families of the incapacitated individual without any court intervention. Today, many of the same issues are resolved through multiple hearings, at great expense, with a room full of parties and lawyers.

Reasons to Mediate

1. Early Resolution

Contested guardianship and conservatorship matters are now treated as litigation. There are pretrial conferences, scheduling orders, protracted discovery, expert witnesses, and trial exhibits. Twenty years ago a contested conservatorship petition took 20 minutes of the court's time. Today, the conservatorship trial may take a week. For the participants, the process can be life disrupting and burdensome. Mediation offers an opportunity for the parties to focus on the issues and resolve them in days, rather than months.

2. Less Expensive Than Litigation

Guardianship and conservatorship contests can be factually intensive and often require significant client and witness preparation. The issue of incapacity often requires a thorough review of medical records. Establishing the need for a conservatorship can require an examination of financial records. It sometimes takes a number of factual witnesses to establish evidence of the individual's inability to handle personal or financial decisions. Mediation avoids the expense of trial and trial preparation.

3. Family/Interested Party Harmony

A conservatorship or guardianship trial usually results in winners and losers. Trial often represents the point of no return. If one family member is appointed conservator

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instead of another family member, it often results in prolonged animosity. A collaborative agreement by family members represents an opportunity for the whole family to move forward with ownership of their plan, in the best interests of the loved one. When nonfamily members are involved, mediation can allow them to become part of the care plan for their friend. Settlement leaves open the possibility of reconciliation and future goodwill.

4. Privacy

Most probate courts require that a record be made of the need for a guardianship or conservatorship. When settlement is reached prior to court, that record can be brief and respectful. However, when these matters are tried in open court, significantly more information is introduced regarding the purported incapacitated individual. In addition, where family members or others are fighting over who should be the conservator, it is not uncommon for unflattering details about them to be offered into evidence. Mediated settlement allows the parties to craft the most beneficial approach to caring for the purported incapacitated individual without the mudslinging that can accompany the contested matter.

Mediation – Thoughtfully Crafting a Resolution

A contested guardianship or conservatorship proceeding is generally focused on the relief requested by the petition. The petitioning party indicates the need for a guardianship or conservatorship and who the petitioner wants to serve as the substitute decision maker. Too often, the petition rigidly frames the issues for the parties. Mediation offers a more flexible approach to solving the problem. The following are typical issues found in contested guardianship and conservatorship matters and compromise positions that can be considered in mediation.

1. Negotiated Alternatives to Guardianship and Conservatorship

The appointment of a substitute decision maker with the duty and power to act on behalf of an incapacitated individual results in the reduction of personal freedom and autonomy enjoyed by the individual. The stripping of an individual's constitutional rights to make decisions for himself or herself is not done without considerable due process. In every case, the court must not establish a guardianship or conservatorship if there is a less restrictive alternative.[1]

If an individual is unable to manage his or her financial estate, the parties to a mediation can consider a power of attorney as an alternative.[2] The power of attorney can be crafted to have multiple agents working together with checks and balances to ensure that the individual's money is safeguarded. The power of attorney can be bonded to ensure that the money will be replaced in the event it is stolen by the attorney-in-fact. The power of attorney can require various degrees of accounting for all financial transactions taken on behalf of the individual.[3] Any number of these safeguards can be negotiated through mediation as an alternative to a conservatorship. However, it must be evident that the individual executing the power of attorney is competent to do so.[4] It is also recommended that the parties to the contest agree not to assist the individual in revoking the power of attorney at a later date.

If the power of attorney represents a successful approach to ensuring an impaired individual's financial estate is appropriately handled, it can save thousands of dollars of litigation costs, formal court accountings, and probate court administration. The mediation offers a unique opportunity to craft a perfect alternative to a conservatorship.

Similarly, many of the personal issues relating to an impaired person may be resolved through a health care directive.[5] The health care directive would appoint an agent to make medical decisions. In some cases, the agent is empowered to select a living situation for the impaired individual. More than one individual can be appointed as health care agent. A mediation can provide an opportunity for interested parties to identify those personal areas of an individual's life that may ultimately require a substitute decision maker and to foster a discussion of who is best suited to make those decisions. If successful, the mediated health care directive could avoid a more expensive guardianship proceeding and yearly reports to the court. Like the power of attorney, the health care directive would require that the individual is competent to execute the document.

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If either document is unsuccessful in meeting the needs of the impaired individual, the parties would still have the option of petitioning the court at a later date for a guardianship or conservatorship.

2. Negotiating the Guardianship or Conservatorship Order

If less restrictive alternatives are not an option, mediation provides an opportunity for interested parties to craft a proposed court order that would uniquely meet the needs of the impaired individual while satisfying the concerns of the interested parties.

A. Powers Granted

Most guardianship and conservatorship petitions ask for all the rights and powers on behalf of the ward or protected person.[6] Theoretically, the evidence submitted to the court must support each and every power granted the guardian or conservator.[7] In mediation, those powers can be individually negotiated or modified to meet the needs of the individual. Consider the following powers granted to the guardian or conservator and how they may be modified through mediation.

(1) Determine Place of Abode

If granted, this power allows the guardian to determine where the ward will live. The guardian may choose to leave the ward at home or may choose other alternatives, such as assisted living or a nursing home. In mediation, interested parties can negotiate many aspects of the incapacitated individual's living situation. For example, a settlement could include the requirement that the individual not be removed from his

home without an additional court hearing. Settlement could include a requirement that the guardian solicit input of interested parties prior to selecting a nursing home. Settlement could also include limits to the geographical area in which the ward could be placed in the event she was removed from her home. The probate court may simply grant or not grant the power to determine place of abode. A mediated settlement can resolve the concerns of all parties in a more creative fashion.

(2) Medical and Professional Care

If the court elects to grant the guardian the power to consent to medical or professional care, interested parties may feel hopelessly out of the loop. The mediated settlement agreement can modify this power by requiring the guardian to make periodic reports to interested parties regarding the medical condition of the ward, seek an additional court order before medical procedures are performed, or provide access to medical records by interested parties. The court will typically honor such settlement provisions provided they are in the best interests of the ward.

(3) Pay Reasonable Charges for Support

If a conservator is appointed, the court typically grants all powers to pay reasonable charges for support, maintenance, and education of the protected person in a manner suitable to the protected person's station in life and the value of the protected person's estate.[8] A court's granting of this power results in significant discretion on the part of the conservator. This often prompts interested parties to object to the entire conservatorship administration. Mediation would allow for a fine-tuning of the power. For example, if the protected person had a history of taking cruise vacations, the order could give specific authorization for the conservator to continue this expenditure. Or, if interested parties were concerned about inappropriate expenditures, it could require a further order of the court before large expenditures are made.

B. Selection of Guardian or Conservator

If the court determines that a guardianship or conservatorship is necessary, it is required to appoint the most suitable and best qualified individual among those available and willing to discharge the trust.[9] The person initially under consideration for the position is the individual nominated in the petition. It is not uncommon for a competing petition to be filed nominating a different individual or an objection being filed that simply claims no appointment is necessary.

Assuming an appointment is necessary, the court has the option to appoint any nominated individual or, in some cases, a neutral professional conservator. Mediation provides an opportunity for interested parties to consider compromise candidates with whom they are more familiar. A mediated settlement can result in different people serving separately as guardian and conservator. For example, a close family member can be selected to make personal decisions, such as where the individual will live and the medical attention to be received, while a professional conservator can oversee the finances. In other cases, co-guardians can be appointed, providing a system of checks and balances. A conservator appointed by the court is required to submit a yearly annual accounting of all income and expenditures. However, a mediated settlement can negotiate additional reporting requirements, satisfying interested parties that the funds are being handled correctly.

An experienced mediator may propose a list of professional guardians and conservators for the interested parties to interview, creating additional input into the process. In the end, individuals selected by consensus are more likely to have the cooperation of the interested parties as the process moves forward.

Special Challenges in Guardianship and Conservatorship Mediation

1. Multiple Parties

Generally speaking, any individual with an interest in the welfare of the proposed ward or protected person is considered an interested party by the court and can participate in the proceedings to the extent allowed by the court. Their impact on a mediated settlement agreement depends on their relationship to the proposed ward/protected person. If the proposed ward is able to state a preference, that person may, with the assistance of an attorney, be able to negotiate every aspect of a settlement with the petitioner.

If the proposed ward is severely impaired and unable to communicate, there may be multiple "interested parties" asserting settlement positions. Some of these interested parties will be willing to negotiate, while others will not. Parties dissenting to a mediated settlement will have a varying impact on whether the court adopts the mediated settlement. For example, if close family is able to mediate the resolution of their concerns, the court would be more likely to adopt that mediated resolution, despite dissent from a neighbor or a more distant relative.

The court will never accept a mediated settlement agreement between interested parties and the petitioner over the objection of the proposed ward. The proposed ward will always be entitled to his or her day in court.

2. Emotional Participants

Most guardianship and conservatorship disputes involve family members coming to terms with a loved one's incapacity or mental impairment. Interested parties become emotionally invested in determining the best interests of their loved ones. Children from different marriages often communicate poorly with each other. A mediator must try to focus the participants on the best interests of the proposed ward, regardless of the emotional issues of the parties.

3. Greed

Occasionally, interested parties have a financial self-interest that affects the success of the mediation. The adult child who has historically received money from the parent may see the conservatorship as a threat to that income source. Adult children of proposed wards may view a guardianship as the end of their free room and board. Any agreement reached between interested parties must be scrutinized by the proposed ward's court-appointed attorney for fairness, given the vulnerability of the proposed ward.

4. Court Approval

Regardless of the agreement reached by "interested parties," the court will apply the guardianship and conservatorship statute with all of its due process and constitutional safeguards. The court always considers what is in the best interests of the ward/protected person. For example, the court must satisfy itself that those individuals who will serve as guardian or conservator are able to perform the duties in the best interests of the ward or protected person. To this extent, a mediated settlement, while binding on the participants, is not final unless adopted by the court.

Summary

Almost any party interested in the welfare of a proposed ward or protected person can benefit from mediating a resolution of the disputed issues. If the parties are truly interested in the best interests of the proposed ward or protected person, mediation offers options and advantages litigation does not.

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[1] Minn. Stat. § 524.5-310(a)(2).

[2] Minn. Stat. § 523.21 requires an attorney-in-fact to exercise in the same manner as an ordinarily prudent person of discretion and intelligence would exercise in the management of the person's own affairs and to have the interests of the principal utmost in mind.

[3] Minn. Stat. § 523.23.

[4] A person is considered competent if he has "enough mental capacity to understand, to a reasonable extent, the nature and effect of what he is doing." Rebne v. Rebne, 216 Minn. 379, 382, 13 N.W.2d 18, 20 (1944).

[5] Minn. Stat. § 145C.01.

[6] Minn. Stat. § 524.5-313, Minn. Stat. § 524.5-417.

[7] *In re* Conservatorship of Lundgaard, 453 N.W.2d 58, 63 (Minn.Ct.App. 1990).

[8] Minn. Stat. § 525.5-417(c)(1).

[9] Minn. Stat. § 524.5-309, Minn. Stat. § 524.5-413.