

ELDER and DISABILITY LAW

NEWS

New Jersey

®

Legal News for the Aging and Disabled

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Enhancing Family Decision-Making Through Elder Mediation

Aging is a transition that poses physical, legal, financial, and emotional challenges for individuals, families, and professionals. Meeting these challenges can put a tremendous strain on all, as they try to plan for and adapt to the changes. Thus, it is not surprising that families frequently avoid making decisions when they are faced with disagreements and/or lack of information. Unfortunately, this avoidance can result in significant financial and emotional costs.

What Is Elder Mediation?

Elder mediation is a way to find the best possible resolution to the major life challenges inherent in the aging process. In elder mediation, all family members, including the parents, agree to the process, and agree to the inclusion of any other participants. They might choose to include the children's spouses, grandchildren, other relatives, parents' friends, caregivers, medical providers, pastors and lawyers. Mediation is time-limited and goal-focused. The mediation process itself tends to provide a safe place for respectful, civilized conversation. In this atmosphere, differences can be discussed, information can be gathered, and agreements can be reached.

Elder mediation brings family members and professionals together to address the major life changes inherent in this the aging process. Families need to make financial, legal, and

emotional decisions in order to work through this transition. Making it through the senior years requires addressing questions such as: How should money be allocated? What type of trust should I create? and Who should help with caregiving? All too often, these decisions are made in the face of disagreement, difficulty, and geographical distance. The formalized yet fluid decision-making process of mediation helps individuals to make the necessary decisions to meet aging challenges. The specialty of elder mediation focuses on establishing quality elder care, minimizing family conflict, and increasing wise financial planning.

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What Does A Elder Mediator Do?

An elder mediator:

* is a neutral third party who helps the family with appropriate processes by which consensus can be reached on decisions regarding eldercare.

* helps clear up misunderstandings, encourages open exchanges of information and ideas, and keeps the family "on track".

* helps family members heal hurt feelings and avoid blame and self-pity.

* provides a mechanism for future modifications of the elderlaw plans as the need arises.

* involves the parents in the process, focusing on their capabilities rather than their perceived inabilities. Attorneys often deal exclusively with a guardian or attorney-in-fact, but in

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mediation, parents can be included fully or to the extent possible.

- * encourages family members to focus on the best interest of their parents.

- * helps the family members consider as many options as possible, and

- * helps them evaluate options while leaving the decision-making to the family.

What major life changes are most frequently addressed in an elder mediation

The major life changes that are most frequently addressed in an elder mediation practice stem from four main issues: 1) housing changes, 2) loss of financial control, 3) issues surrounding caregiving, and 4) new conversations with adult children about family finances. A family mediation can generate the careful and productive dialogue between aging parents and their adult children which is required to successfully address these challenges.

Housing Issues

Changes in housing bring up numerous issues. For many individuals, the decision between living at home versus moving to an assisted living facility can become immobilizing. For one woman and her family, the initial decision was made for her to remain at home and hire a part-time home health aide. Eventually, this became more expensive due to her changing physical needs and her greater dependence on the aide. While meeting with her financial planner, she shared the question of remaining in her home or moving. He laid out some of the options and costs, and it became clear that her financial needs would be better served by selling her home and moving to an assisted living facility. Despite this, she made the choice to stay in her home. Meanwhile, her family was growing increasingly concerned about her medical and financial needs. Each time they tried to speak with her about her moving to an assisted living facility, a disagreement would ensue and again the decision would be put off. Eventually, the family became so concerned that they sought the help of an elder mediator

in order to convene a family meeting. The mediator suggested that a geriatric care manager join their discussion in order to advise the family about community resources and housing options. At the meeting, the mother and her adult children were finally able to have a productive, comprehensive and creative conversation. As a family, they crafted a successful plan for her to transition to a nearby assisted living facility which satisfied everyone's needs and concerns.

Conversations with adult children about family finances

In another family, the parents and their adult children began to have informal "family business" conversations regarding estate planning and inheritance matters. Together, they reviewed their major assets, including a second home, stocks, and considerable savings. The children disagreed with each other and their parents on how to divide the assets and decided to contact their parents' lawyer. The lawyer then informed his clients, the parents, that their children had contacted him and that they had questioned the soundness of their parents' decisions. This hurt and angered the parents, causing them to terminate all discussions without creating any estate plan. From here, other costly conflicts and delays arose until one of the children contacted a mediator. With the help of a skilled mediator, trained to deal with such disputes, this family was able to have several important conversations about their individual needs. They were ultimately able to mend their relationships and put into place a sound financial plan that satisfactorily addressed everyone's interests.

Issues surrounding caregiving

Pressures faced by caregivers easily erupt into disputes with the elder who requires the care or with other family members, whom the caregiver may feel are not carrying their fair share of *or* difficult for a beneficiary to create a trust for his or her own benefit and still retain eligibility for

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Medicaid benefits. But both programs allow two "safe harbors" permitting the creation of supplemental needs trusts with a beneficiary's own money if the trust meets certain requirements.

The first of these is called a "payback" or "(d)(4)(A)" trust, referring to the authorizing statute. "Payback" trusts are created with the assets of a disabled individual under age 65 and are established by his or her parent, grandparent or legal guardian or by a court. They also must provide that at the beneficiary's death any remaining trust funds will first be used to reimburse the state for Medicaid paid on the beneficiary's behalf.

Medicaid and SSI law also permits "(d)(4)(C)" or "pooled trusts." Such trusts pool the resources of many disabled beneficiaries, and those resources are managed by a non-profit association. Unlike individual disability trusts, which may be created only for those under age 65, pooled trusts may be for beneficiaries of any age and may be created by the beneficiary herself. In addition, at the beneficiary's death the state does not have to be repaid for its Medicaid expenses on her behalf as long as the funds are retained in the trust for the benefit of other disabled beneficiaries. (At least, that's what the federal law says; some states require reimbursement under all circumstances.) Although a pooled trust is an option for a disabled individual over age 65 who is receiving Medicaid or SSI, those over age 65 who make transfers to the trust will incur a transfer penalty.

Income paid from a supplemental needs trust to a beneficiary is another issue, particularly with regard to SSI benefits. In the case of SSI, the trust beneficiary would lose a dollar of SSI benefits for every dollar paid to him directly. In addition, payments by the trust to the benefi-

ary for food, clothing or housing are considered "in kind" income and, again, the SSI benefit will be cut by one dollar for every dollar of value of such "in kind" income. Some attorneys draft the trusts to limit the trustee's discretion to make such payments. Others do not limit the trustee's discretion, but instead counsel the trustee on how the trust funds may be spent, permitting more flexibility for unforeseen events or changes in circumstances in the future. The difference has to do with philosophy, the situation of the client, and the amount of money in the trust.

Choosing a trustee is also an important issue in supplemental needs trusts. Most people do not have the expertise to manage a trust. An alternative is retaining the services of a professional trustee. For those who may be uncomfortable with the idea of an outsider managing a loved one's affairs, it is possible to simultaneously appoint a trust "protector," who has the powers to review accounts and to hire and fire trustees, and a trust "advisor," who instructs the trustee on the beneficiary's needs. However, if the trust fund is small, a professional trustee may not be interested. This can be an argument for pooled trusts.

Supplemental needs trusts may be created by a disabled person to receive gifts, lawsuit awards, or inheritances. Such trusts are also created by a parent or other family member for a disabled adult child. These trusts maintain eligibility for needs-based government benefits.

Life Insurance

Finally, a parent with a disabled child should consider buying life insurance to fund the supplemental needs trust set up for the child's support. The more resources available, the better the support that can be provided to the child. The good news is that advance planning for a disabled child can make a significant difference in his life. You just have to take the first step.



Law Offices of Donald D. Vanarelli
PARTIAL LIST OF UPCOMING SPEAKING ENGAGEMENTS

Winter – Spring 2007 Seminar Dates and Locations

January

- 10 Westfield Office – Long-Term Care Planning under the New Medicaid Rules , 6:30 PM
- 17 NJ Society of Enrolled Agents, Edison– Long-Term Care Planning, 1:00 PM

February

- 8 Westfield Office – Long-Term Care Planning under the New Medicaid Rules, 6:30 PM
- 13 Generations Counseling, Rochelle Park – Special Needs Planning, 9:45 PM
- 17 Maplebrook School, Connecticut – Special Needs Planning, 9:00 AM and 1:30 PM

March

- 8 Maplewood Library – Long-Term Care Planning under the New Medicaid Rules, 1:30 PM
- 18 Atria Assisted Living, Cranford – Housing Options for Seniors, 1:00 PM
- 25 Coalition on Family Caregiving, Summit–Conference on Legal/Financial Issues, 1:00 PM

April

- 10 Lianfair House Nursing and Rehabilitation Center, Wayne, 6:00 PM
- 19 Westfield Office – Long-Term Care Planning under the New Medicaid Rules, 6:30 PM

May

- 11 Alzheimers Association Conference, Somerset – 8:00AM



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Article: Enhancing Family Decision-Making Through Elder Mediation
Article: Supplemental Needs Trust and Planning for Disabled Children

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duties or who may disagree with the things the caregiver is doing, including how the elder's money is being managed or spent. The pressures and demands of long-term caregiving can, and all too frequently does, result in two reactions. First, family disputes and conflicts get worse over time with the frail elder person who needs long term care being placed in the middle of the dispute. Second, petitions are filed, often inappropriately, to place the elder under guardianship, usually in the false hope that such court-ordered intervention will enable decisions to be made which will solve what are, in reality, family caregiver disputes; and with guardianship often being used to place the elder in a long-term care facility, with the resultant loss of home, autonomy and dignity.

Loss of financial control

A fourth major issue that families bring to mediation is a perceived or actual loss of financial control. In one case, a financial planner received the wrong check from her elderly client. The planner then contacted her client and discovered that he had misdirected several other checks. Through further inquiry, she learned that her client's daughter had been worried about her father's ability to manage his own finances and had suggested check writing assistance for him. He had refused help in managing his finances since this was something he has done independently for his entire life and he had concerns about security and privacy regarding his financial accounts. Fortunately, the financial planner was familiar with elder mediation and recommended it to her client and his family. During the mediation, the financial planner provided professional advice to her client. As options for financial assistance were explored, her advocacy supported his ability to participate in the mediation as a fully informed party.

The major life changes that are most frequently addressed in elder mediation stem from four main issues: 1) housing changes, 2) loss of financial control, 3) issues surrounding caregiving, and 4) new conversations with adult children about family finances.

Elder mediator can be a real opportunity for families to preserve well being

Issues regarding elder care are as varied as families themselves. Despite this uniqueness, there are similar financial, legal, and medical decisions that need to be made. These include, but are not limited to, trusts, wills, health care proxies, caregiving issues and housing choices. Too often these issues are avoided, disagreed upon, and/or ignored, resulting in fewer choices, financial loss, and emotional turmoil for the individual and family. While by no means easy, working through these challenges with an elder mediator can be a real opportunity for families to preserve financial and familial well being. An important form of elder mediation is simply to convene a family meeting where a trained neutral third party is present to create the space for everyone in the family to be heard on an important developing family transition.

Unfortunately, the idea of using mediation in the aging process is relatively uncommon. While there are presently initiatives in many probate courts to incorporate mediation as a formal conflict resolution option, the lawyers, financial planners and CPA's, who traditionally get the first call and help direct families through the estate settlement maze, rarely suggest mediation to clients.

As in the above examples, when families and their professional advisors bring their interests to the mediation process, the mediator can facilitate a discussion of these interests and possible solutions. Starting and finishing a comprehensive conversation with all of the decision-makers present transforms family conflict into prudent planning. Through skillful mediation, seniors and their families can gain control of what's important to them and protect family relationships in the process. ✪ ✪

Portions of this article were adopted from various articles on the topic

DISABILITY LAW NEWS: Supplemental Needs Trusts and Planning for Disabled Children

Americans are living longer than they did in years past, including those with disabilities. According to one count, 480,000 adults with mental retardation are living with parents who are 60 or older. This figure does not include adult children with other forms of disability nor those who live separately, but still depend on their parents for vital support.

When these parents can no longer care for their children due to their own disability or death, the responsibility will fall on siblings, other family members, and the community. In many cases, expenses will increase dramatically when care and guidance provided by parents must instead be provided by a professional for a fee.

Planning by parents can make all the difference in the life of the child with a disability, as well as that of his or her siblings who may be left with the responsibility for caretaking (on top of their own careers and caring for their own families and, possibly, ailing parents). Any plan should include the following elements:

A Plan of Care

It will help everyone involved if the parents create a written statement of their wishes for their child's care. They know him better than anyone else. They can explain what helps, what hurts, what scares their child (who, of course, is an adult), and what reassures him. When the parents are gone, their knowledge will go with them unless they pass it on.

In almost all cases where a parent will leave funds at death to a disabled child, this should be done in the form of a trust. Trusts set up for the care of a disabled child generally are called "supplemental" or "special" needs trusts. Money should not go outright to the child, both because she may not be able to manage it properly and because receiving the funds directly may cause the child to lose public benefits, such as Supple-

mental Security Income (SSI) and Medicaid.

Supplemental Needs Trusts

Supplemental needs trusts (also known as "special needs" trusts) allow a disabled beneficiary to receive gifts, lawsuit settlements, or other funds and yet not lose her eligibility for certain government programs. Such trusts are drafted so that the funds will not be considered to belong to the beneficiary in determining her eligibility for public benefits. As their name implies, supplemental needs trusts are designed not to provide basic support, but instead to pay for comforts and luxuries that could not be paid for by public assistance funds. These trusts typically pay for things like education, recreation, counseling, and medical attention beyond the simple necessities of life. (However, the trustee can use trust funds for food, clothing and shelter if the trustee decides doing so is in the beneficiary's best interest despite a possible loss or reduction in public assistance.)

Very often, supplemental needs trusts are created by a parent or other family member for a disabled child (even though the child may be an adult by the time the trust is created or funded). Such "third party" trusts also may be set up in a will as a way for an individual to leave assets to a disabled relative. In addition, the disabled individual can often create the trust himself, depending on the program for which he or she seeks benefits. These "self-settled" trusts are frequently established by individuals who become disabled as the result of an accident or medical malpractice and later receive the proceeds of a personal injury award or settlement.

Each public benefits program has restrictions that the supplemental needs trust must comply with in order not to jeopardize the beneficiary's continued eligibility for public benefits. Both Medicaid and SSI are quite restrictive, making it

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