

ARTICLES

IS THE USE OF MEDIATION APPROPRIATE IN ADULT GUARDIANSHIP CASES?

Mary F. Radford*

TABLE OF CONTENTS

I.	MEDIATION: A BRIEF OVERVIEW.....	616
A.	Mediation Generally.....	616
B.	Mediation Procedure.....	621
C.	Confidentiality and Privacy	624
II.	OVERVIEW OF ADULT GUARDIANSHIP CASES	626
A.	Determination of Incapacity.....	627
B.	Protection of Welfare	632
C.	Guardianship Procedure.....	635
III.	IS IT APPROPRIATE TO USE MEDIATION IN ADULT GUARDIANSHIP CASES?.....	639
A.	The First Argument: Incompatibility.....	640
B.	The Second Argument: Lack of Protection.....	641
1.	Procedural Protections	644
2.	Substantive Protections	645
C.	The Third Argument: Mediation Is Grounded in Self-Determination.....	646
1.	Self-Determination and Party Capacity	648
2.	Self-Determination and Freedom from Coercion...	651
3.	Self-Determination and Mediator Intervention	655
IV.	WHEN MIGHT MEDIATION BE USED IN ADULT GUARDIANSHIP CASES?.....	661
A.	Pre-petition Stage.....	661

* © 2002, Mary F. Radford. All rights reserved. Professor of Law, Georgia State University College of Law. B.A., Newcomb College of Tulane University, 1974; J.D., Emory University School of Law, 1981. The Author, whose background is in fiduciary law, wishes to express her appreciation to Professor Doug Yarn of Georgia State University College of Law for reviewing this Article and sharing his expertise in Alternative Dispute Resolution.

B.	Initial Petition Stage	663
C.	Ongoing Issues during the Guardianship.....	666
D.	Termination of the Guardianship	667
V.	RECOMMENDATIONS FOR THE INTEGRATION OF MEDIATION INTO ADULT GUARDIANSHIP CASES	668
A.	Education about Mediation	668
B.	Mediator Training	669
C.	Representation of the Adult	674
D.	Conduct of the Mediation	676
1.	Accommodations.....	677
2.	Intake and Pre-mediation Interviews.....	677
3.	Deciding Who Should Participate in the Mediation	679
4.	Privacy and Confidentiality Concerns	681
E.	Development of Standards for Mediators in Adult Guardianship Cases	683
1.	Capacity Determination.....	684
2.	Freedom from Coercion	685
3.	Avoidance of Unwarranted Mediator Intervention.....	685
VI.	CONCLUSION.....	685

The American judicial system has seen much change in the years following the 1988 National Guardianship Symposium, known as Wingspread.¹ Two components of this change — the burgeoning use of “alternative dispute resolution” (ADR)² and the

1. The Johnson Foundation’s Wingspread Conference Center hosted the National Guardianship Symposium, which was sponsored by the ABA Commissions on Legal Problems of the Elderly and on Mental Disability. Commn. on Mentally Disabled & Commn. on Leg. Problems of Elderly, *Guardianship: An Agenda for Reform — Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* (ABA 1989). The 1988 Wingspread Symposium assembled thirty-eight guardianship experts whose “objective was to produce a set of recommendations for reform of the national guardianship system.” *Guardianship, An Agenda for Reform: Recommendations of the National Guardianship Symposium and Policy of the American Bar Association*, 13 *Mental & Physical Disability L. Rep.* 271, 275 (1989) [hereinafter *Wingspread Recommendations*].

2. The term “alternative dispute resolution” is defined as follows in the *Dictionary of Conflict Resolution*:

Catchall generic term referring to ways in which a society with a formal, state-sponsored ADJUDICATIVE PROCESS attempts to resolve disputes without using that process. It is a class of DISPUTE RESOLUTION mechanisms and is commonly understood to include alternatives to the formal adversary method of

proliferation of adult guardianship cases³ — have proceeded virtually independently of each other.⁴ The purpose of this Article is to explore the potential for integration of a specific form of ADR — mediation — into the adult guardianship system.⁵

trial or LITIGATION, as that process is understood in Western, particularly COMMON LAW systems. Thus it includes NEGOTIATION, MEDIATION, ARBITRATION, and their variations.

Dictionary of Conflict Resolution 17 (Douglas H. Yarn ed., Jossey-Bass, Inc. 1999).

The “alternative dispute resolution movement” emerged in the United States in the 1960s. *Id.* at 20; see Bridget Genteman Hoy, *The Draft Uniform Mediation Act in Context: Can It Clear up the Clutter?*, 44 St. Louis U. L.J. 1121, 1126 (2000) (attributing the 1960s emergence of mediation to the American Arbitration Association’s establishment and funding of neighborhood mediation projects). Court-sponsored mediation programs began to proliferate in the mid-1970s. *Id.* at 1127.

3. The proliferation of adult guardianship cases is easily explained by the increased proportion of elderly adults in the American population. The percentage of individuals age sixty-five and over in America grew from 9.8% of the population in 1970 to 12.5% in 1990. Lawrence A. Frolik & Alison McChrystal Barnes, *Elder Law: Cases & Materials* 1 (2d ed., LEXIS L. Publg. 1999). These elder Americans are the ones most profoundly affected by the adult guardianship system in that “[m]ore than 80 percent of wards are age sixty or over, though this age group represents less than 20 percent of the population.” *Id.* at 450. The number of filings of adult guardianship cases increased by twenty-five percent between 1990 and 1992 alone. Paula L. Hannaford & Thomas L. Hafemeister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 Elder L.J. 147, 155 (1994). Widespread national interest in adult guardianship was sparked by a series of congressional hearings, newspaper stories, and television programs, beginning in 1987. See generally *Wingspread Recommendations*, *supra* n. 1, at 274; Hannaford & Hafemeister, *supra* n. 3, at 153 (describing the coverage of this interest); Jamie L. Leary, *A Review of Two Recently Reformed Guardianship Statutes: Balancing the Need to Protect Individuals Who Cannot Protect Themselves against the Need to Guard Individual Autonomy*, 5 Va. J. Soc. Policy & L. 245, 255–259 (1997) (describing the movement of guardianship reform).

4. Commentators have noted that the use of mediation in probate and guardianship cases is “in its infancy.” *E.g.* Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 Wake Forest L. Rev. 397, 434 (1997). “[T]he use of mediation and other forms of dispute resolution for the elderly and persons with disabilities . . . is still in the initial stages.” Erica F. Wood, *Dispute Resolution and Dementia: Seeking Solutions*, 35 Ga. L. Rev. 785, 805 (2001); see Susan D. Hartman, *Adult Guardianship Mediation*, 7 TCSG Best Prac. Notes (Sept. 1996) <<http://www.tcsg.org/bpnotes/sept96/adult.htm>> (discussing possible reasons why mediation is not available to most adults who are facing pending guardianship proceedings). However, the benefit of mediation for cases involving elderly persons has not been completely ignored. Beginning in the 1980s, groups such as the AARP, the American Bar Association Commission on Legal Problems of the Elderly, and the Dispute Resolution Coalition on Aging and Disability have sponsored seminars, publications, and pilot projects on the use of dispute resolution. See generally Gary, *supra* n. 4, at 409–410 (describing projects that led to the development of mediation as a means of resolving patient care disputes); Wood, *supra* n. 4, at 805–807 (describing the initial development of dispute resolution).

5. This Article does not deal with the guardianship of minors, although many of the

The Recommendations of the 1988 Wingspread Symposium (Wingspread Recommendations) included a passing reference to the use of mediation in guardianship proceedings. This reference appeared in Recommendation I-A: Alternatives to Guardianship. The recommendation encouraged the exploration of “alternatives to and more appropriate uses of guardianship” and defined “alternatives” as follows:

Alternatives should include: (1) health care consent statutes and living wills; (2) durable and health care powers of attorney; (3) representative payees; and (4) crisis intervention techniques such as *mediation*, counseling, and respite support services.⁶

The Commentary to this recommendation shed a bit more light on the reference to mediation and added a cautionary note. The Commentary stated as follows:

First, alternatives to guardianship should be explored and then assessed for their advantages and disadvantages. In particular, the conferees noted the need to investigate new methods of dispute resolution. However, in designing alternatives to guardianship and in diverting cases out of guardianship, it is possible that the results of the diversion may be no better and possibly worse than guardianship itself. Thus, alternatives must be thoroughly and critically evaluated for their efficacy and their impact on proposed clients.⁷

It is in the spirit of critical evaluation that this Article is offered.⁸

issues discussed herein would also be applicable in that context. For efficiency purposes, the term “guardianship” will be used in this Article to refer both to a guardianship of the person of an adult and a guardianship of the property of an adult.

6. *Wingspread Recommendations*, *supra* n. 1, at 277 (emphasis added). Recommendation I-D recommended that “screening” be used “to divert inappropriate cases out of the guardianship system” but did not mention mediation, which could be a helpful screening tool. *Id.* at 279.

7. *Id.* at 277–278.

8. The thoughts and recommendations presented in this Article build upon a discussion of this issue that was begun by Professor Susan Gary’s 1997 article. *See* Gary, *supra* n. 4, at 397–444 (arguing that mediation is often the best way to resolve probate disputes). Related issues were also extensively discussed at the 2001 Joint Conference on Legal/Ethical Issues in the Progression of Dementia [hereinafter *Joint Conference on Dementia*] and received excellent coverage by Erica Wood in the article she wrote in conjunction with that conference. *See* Wood, *supra* n. 4, at 787–834 (evaluating how dispute resolution may serve to resolve issues involving persons with dementia). The work of Susan D. Hartman and The Center for Social Gerontology (TCSG) also has inspired

There is little empirical evidence as to the use or effectiveness of mediation in adult guardianship cases. The Center for Social Gerontology (TCSG)⁹ began researching and fostering the use of mediation in adult guardianship cases in the early 1990s and now trains mediators in guardianship mediation throughout the country.¹⁰ Much of the information in this Article is derived from the experiences reported by TCSG.

Part I of the Article gives a brief overview of mediation and describes the commonly accepted advantages that mediation has over formal court proceedings. Part II describes the essential aspects of an adult guardianship case and discusses the intricate issues surrounding the determination that an adult¹¹ is incapacitated¹² and in need of a guardian. Part III analyzes

many of the ideas contained in this Article. For a description of TCSG, consult *infra* note 9 and accompanying text. See generally Susan D. Hartman, *Adult Guardianship Mediation Manual* (TCSG 1996) (a valuable resource for mediators and lawyers); see Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 Real Prop. Prob. & Trust J. 601 (2000) (discussing the mediation process in the probate context).

9. "The Center for Social Gerontology, Inc. (TCSG), since its inception in 1972, has been a non-profit research, training and social policy organization dedicated to promoting the individual autonomy of older persons and advancing their well-being in society." TCSG, *Mediation & Aging* <<http://www.tcsg.org/med.htm>> (last updated Nov. 2001).

10. *Id.* Smaller pilot projects have been launched in probate courts throughout the country. See Stanard T. Klinefelter & Sandra P. Gohn, *Alternative Dispute Resolution: Its Value to Estate Planners*, 22 Est. Plan. 147, 149 (May/June 1995) (using examples of ADR programs in states such as Texas, Florida, and Illinois); Claudia Rosenbaum, *Probate Court Alternative*, 105 S.F. Daily J. 1, 7 (July 9, 1999) (using pro bono mediation to resolve guardianship and conservatorship issues). Gary provides an overview of probate court mediation programs, some of which include guardianship mediation. Gary, *supra* n. 4, at 434-438; see Eva M. Soeka, *An Option for Families and Older Adults: Adult Guardianship Mediation*, 17 Gen. Prac. Solo 58, 60 (Mar. 2000) (discussing a mediation program in Michigan). Mediation is also becoming more popular in cases involving decedents' estates. See Ron Chester, *Less Law, But More Justice? Jury Trials and Mediation as a Means of Resolving Will Contests*, 37 Duq. L. Rev. 173, 181-183 (1999) (arguing that the use of mediation in will contests produces more efficient results); Gary, *supra* n. 4; Robert N. Sacks, *Mediation: An Effective Method to Resolve Estate and Trust Disputes*, 27 Est. Plan. 210, 210 (2000) (advocating mediation in estate and trust matters); Patricia Monroe Wisnom, *Probate Law and Mediation: A Therapeutic Perspective*, 37 Ariz. L. Rev. 1345 (1995) (discussing mediation as it applies to Arizona probate law).

11. The term "adult" (as opposed to "alleged incapacitated adult" or "respondent" or "ward") will be used wherever appropriate to denote the individual over whom a guardianship is sought or for whom a guardian has been appointed.

12. This term in and of itself is problematic, as the ensuing discussion will indicate. The Author has chosen to use this term not as an endorsement of its validity or efficacy, but because of the common use of this term throughout both the literature and the legislation relevant to adult guardianship law. The term "incapacity" was chosen for use in the 1998 Wingspread Symposium under the theory that state guardianship systems

whether it is ever appropriate to submit an adult guardianship case to mediation. This Part examines and responds to three arguments against the use of mediation in guardianship cases: 1) the argument that the theory underlying the mediation process is incompatible with the theory of an adult guardianship case; 2) the argument that mediation does not provide the necessary protection of an adult in a guardianship case; and 3) the argument that the self-determination principle that is the hallmark of mediation precludes the use of mediation in an adult guardianship case. This Part includes a detailed discussion of challenges to the implementation of the self-determination principle in adult guardianship cases. Part IV describes the circumstances in which mediation might play a role in adult guardianship cases, both in the initial proceeding to establish the guardianship and in an ongoing guardianship. Part V considers particular issues that must be addressed if mediation is to be integrated into the guardianship system and sets forth recommendations for special rules and guidelines for the use of mediation in adult guardianship cases.

I. MEDIATION: A BRIEF OVERVIEW

A. Mediation Generally

The term “mediation” has many meanings.¹³ For purposes of this Article, the following definition of the term will be used:

Mediation is a process in which an impartial third party — a mediator — facilitates the resolution of a dispute by promoting voluntary agreement (or “self-determination”) by the parties to

should be “mov[ing] away from the traditional notions of incompetency and toward a focus that [is] more consistent with a functional emphasis — ‘incapacity.’” *Wingspread Recommendations*, *supra* n. 1, at 288.

13. The *Dictionary of Conflict Resolution* defines mediation as follows:

In the United States and in most Western societies affected by the modern mediation movement, mediation is used to denote a range of nonadjudicative, third-party interventions that have evolved in a variety of disputing contexts and subcultures within which the term has acquired different and particularized meanings. These contexts include international relations, labor, community, family, commercial relations, and courts. Academics and practitioners with varying philosophies, heuristic tendencies, and biases use the term to denote their brand of nonadjudicative, third-party intervention.

Dictionary of Conflict Resolution, *supra* n. 2, at 273; see generally Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. Disp. Res. 295, 295–296 (discussing the need for a precise definition of the process that is referred to as “mediation”).

the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem-solving to enable the parties to reach their own agreement.¹⁴

As this definition illustrates, self-determination is the pivotal feature of mediation. Both the process and the outcome are the responsibility of the participants. The mediator has no authority to impose a decision or settlement on the parties, but rather is there solely to assist the parties in resolving the dispute in a way that is mutually agreeable.¹⁵

Mediation is sometimes better understood by describing it in contrast to other, more familiar dispute-resolution procedures. Mediation is neither negotiation nor arbitration. "Many authorities visualize mediation occupying the space between negotiation and arbitration along a continuum of dispute resolution processes with increasing degrees of intervention."¹⁶ Negotiation usually takes place between the parties or their attorneys and does not include an impartial third-party.¹⁷ In an arbitration, on the other hand, the parties submit the case to a neutral third party or panel and it is this third party who subsequently makes the decision on the issues.¹⁸

14. ABA, *ABA Home, Model Standards of Conduct for Mediators* <<http://www.abanet.org/ftp/pub/dispute/modstan.txt>> (accessed Dec. 28, 2001) [hereinafter *Model Standards*]. This definition was developed during 1992–1994 by a joint committee of the American Arbitration Association, American Bar Association, and Society of Professionals in Dispute Resolution. *Id.*

"[H]undreds of state statutes, regulations and rules address mediation in one form or another." Hoy, *supra* n. 2, at 1122. The National Conference of Commissioners on Uniform State Laws and the ABA Section of Dispute Resolution are in the process of drafting a Uniform Mediation Act [hereinafter Draft UMA]. ABA, *ABA Home, Section of Dispute Resolution, ADR Policies* <<http://www.abanet.org/dispute/webpolicy.html>> (accessed Jan. 15, 2002). References in this Article to the act will be to the May 4, 2001 Draft, which is available at Harvard Law School, *Program on Negotiation* <<http://www.pon.harvard.edu/guests/uma>> (accessed Jan. 21, 2002).

15. Ga. ADR R. ch. I (B)(I), *Ethical Standards for Neutrals* app. C <<http://www2.state.ga.us/courts/adr/appendxc.htm>>. Self-determination is the "hallmark of mediation." *Id.*

[S]elf-determination of the parties is the most critical principle underlying the mediation process. Control of the outcome by the parties is the source of the power of the mediation process. Further, it is the characteristic which may lead to an outcome superior to an adjudicated outcome.

Id.

16. *Dictionary of Conflict Resolution*, *supra* n. 2, at 276.

17. *Id.*

18. *Id.* at 28; *see e.g.* Ind. ADR R. 1.3(B) (defining arbitration as "a process in which a

Mediation differs from a formal court proceeding in a variety of ways¹⁹ and is perceived to have many advantages over such proceedings. A judge orders a decision in a court case, whereas in a mediation, if any decision is to be made or settlement is to be reached, the parties craft the decision or settlement themselves.²⁰

A court proceeding is usually public and its outcome a matter of public record, while a mediation is held in private and the proceedings are meant to remain confidential.²¹ A court proceeding is often adversarial and typically results in a victory by only one party.²² It is governed by rigid procedural rules and its outcome is

neutral third person or a panel, called an arbitrator or an arbitration panel, considers the facts and arguments which are presented by the parties and renders a decision. The decision may be binding or nonbinding as provided in these rules.”).

19. The description of formal adjudication that is set forth in this paragraph may not accurately reflect adjudications in probate courts, which are often the forum in which adult guardianship cases are decided. One probate judge describes probate court adjudications as “generally more timely, less costly, and less time-consuming than the superior court” and concludes that “[t]he informal style and format of probate hearings injects a mediation-like quality into probate proceedings.” Hon. John A. Berman & Neil W. Kraner, *Alternate Dispute Resolution in Connecticut Probate Courts*, 11 *Quinnipiac Prob. L.J.* 29, 29–30 (1997).

20. Part of the flexibility of a mediation is that it is not necessary that the parties reach an agreement. Sometimes the parties are unable to agree at all or may be unable to agree on all but a few minor issues. “For example, parties might not be able to decide if a guardian is needed, but can identify who should serve as guardian if the court does decide to appoint anyone.” Hartman, *supra* n. 8, at module 3, 83. The failure to reach an agreement does not mean that the mediation was a waste of time and effort. Gary points out:

A [guardianship] mediation proceeding gives the older adult a voice. The process allows him to speak about his concerns and gives the family members a chance to explain the need for the guardianship. Regardless of whether the resolution is a less restrictive solution or a request that the court appoint a guardian [and presumably, regardless of whether any agreement is reached at all], the older adult will benefit from the chance to hear and be heard.

Gary, *supra* n. 4, at 426; see Love & Kovach, *supra* n. 13, at 301 (describing a mediation over the constitutionality of a city ordinance that did not reach a settlement but did result in improved relations and communications between the town administrators and the minority group most affected by the ordinance).

21. For a discussion of privacy and confidentiality, consult *infra* notes 71–74 and accompanying text.

22. Litigation has been described as a “power-based” as opposed to an “interest-based” process.

Most litigation arises in a rights-based or power-based environment. In rights-based litigation, one party, who feels their rights have been violated, files suit to assert their rights and vindicate their position. This issue is adjudicated and there is a verdict that either upholds or denies the party’s position. The result is WIN/LOSE In mediation, conflict resolution is *interest-based*. In interest-based conflict resolution, the parties attempt to reach agreement themselves with

limited to a few strict legal alternatives.²³ Mediation is designed for cooperative decision-making, uses a flexible and open procedure,²⁴ and is designed to encourage the parties to reach resolutions that meet their needs without necessarily adhering to strict legal principles.²⁵ Because the restrictive rules of evidence do not apply in a mediation, the parties are more free to discuss underlying motivations and tensions. This flexibility is viewed by many as one of the advantages mediation has over more formalized procedures.²⁶ The nonadversarial nature of mediation is another perceived advantage, in that parties to a mediation may be less prone to the shattering of relationships that often accompanies a protracted adversarial proceeding.²⁷ Finally, mediation typically is viewed as being less costly and more efficient than a formal court proceeding.²⁸ One commentator summarizes the advantages of mediation as follows:

the assistance of a neutral third party, the mediator. The parties are active participants in the process. They are there because of their willingness to address their dispute in that forum. They have chosen to make a good-faith effort to resolve their dispute themselves. Through the process of negotiation, the parties reach the agreement themselves. Because the parties have been a part of the dispute resolution, the results are often more satisfying. Face-saving can occur. Thus, a WIN/WIN result may be achieved.

Faryl S. Moss, *Mediating Fiduciary Disputes* app. A, A1 (1998) (unpublished manuscript on file with the Author); see Douglas H. Yarn, *Alternative Dispute Resolution: Practice and Procedure in Georgia* 112 (2d ed., Harrison Co. 1997) (discussing the advantages of mediation).

23. Gary, *supra* n. 4, at 428–431.

24. “Most mediators are flexible about procedure and do not use evidentiary rules.” Love & Kovach, *supra* n. 13, at 299.

25. See generally Gary, *supra* n. 4, at 431 (providing an example of a flexible mediation solution).

26. See *id.* at 426–428 (discussing the emotional benefits of mediation compared to traditional litigation); Brian C. Hewitt, *Probate Mediation: A Means to an End*, 40 *Res Gestae* 41, 41 (Aug. 1996) (noting that mediation can reduce the time and cost of settling a controversy); Radford, *supra* n. 8, at 637–638.

27. See Gary, *supra* n. 4, at 428; Radford, *supra* n. 8, at 637–638.

28. See e.g. Gary, *supra* n. 4, at 431. Professor Gary states that “research in family law has shown that mediation costs less than litigation in resolving divorce cases.” *Id.* However, some controversy exists as to whether mediation and other forms of ADR actually result in lower costs to the parties. See Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 *Willamette L. Rev.* 565, 569–570 (1997) (citing studies that reach conflicting conclusions as to whether mediation contributes substantially to the efficiency of dispute resolution); cf. Darryl Van Duch, *Case Management Reform Ineffective: ADR, Other Reform-Act Fixes Don’t Save Time or Money*, *CJRA Study Says*, 19 *Natl. L.J.* A6, col. 1 (Feb. 3, 1997) (discussing RAND Institute for Civil Justice’s conclusion that ADR fails to reduce costs or delays in federal courts).

Mediation can be quick, flexible, inexpensive, convenient, humane, and empowering. It allows parties to talk to each other in a setting that is constructive and secure. Solutions that emerge can be more creative and better suited to individual needs than might be possible through traditional legal channels. Parties may adhere better to solutions they have designed themselves. There is generally high satisfaction from participating in the process.²⁹

Mediation is not without its critics.³⁰ Some of the common criticisms of mediation and other forms of ADR are relevant to the discussion about whether mediation should be used in guardianship cases.³¹ Among these criticisms are the following:

1. Mediation and other informal forms of dispute resolution may jeopardize the rights of traditional “outsiders” such as women and racial minorities. Those who have voiced this criticism have “worried about situations where the participants were of unequal power, the issues were volatile or involved ‘public rights,’ and the decisionmakers were unconstrained by public scrutiny or a formal record.”³² Potential bias and power misuse by the decisionmakers would not be open to public scrutiny, and those of unequal power would not have the advantage of the procedural protections offered in formal adjudication.³³
2. Because a mediation focuses on settlement, parties may end up giving up valuable legal rights in the favor of a peaceable solution.³⁴
3. As cases increasingly become the subject of private dispute resolution, the valuable contribution made by judicial interpretation of law will recede and legal reform will be

29. Wood, *supra* n. 4, at 803.

30. *E.g.* Paul Wahrhaftig, *The Politics of Informal Justice, The American Experience* vol. 1, ch. 4, 75–97 (Richard L. Abel ed., Academic Press 1982); Laura Nader, *Controlling Processes in the Practice of Law: Hierarchy and Pacification in the Movement to Re-Form Dispute Ideology*, 9 Ohio St. J. Dis. Res. 1, 7–10 (1993).

31. *See generally* Wood, *supra* n. 4, at 803–805 (discussing various criticisms as they apply to persons with dementia).

32. Eric K. Yamamoto, *ADR: Where Have the Critics Gone?*, 36 Santa Clara L. Rev. 1055, 1058–1059 (1996).

33. Owen M. Fiss, *Against Settlement*, 93 Yale L.J. 1073, 1085–1087 (1984) (discussing the problems that people face in traditional litigation); Yamamoto, 36 Santa Clara L. Rev. at 1059–1060.

34. *See* Yarn, *supra* n. 22, at 113. Wood describes this as the parties “getting ‘half a loaf’ when they are entitled to a whole.” Wood, *supra* n. 4, at 803.

hindered.³⁵

Although adult guardianships typically do not involve “public rights” (e.g., the right to nondiscrimination in employment), they often do include parties of traditionally disenfranchised groups (the elderly, the poor) whose basic autonomy rights may become the subject of private negotiation. The application of these criticisms in adult guardianship cases will be developed more fully in Part III.

B. Mediation Procedure

Just as there are many definitions of the term “mediation,” there are many ways in which a mediation may proceed.³⁶ However, mediations generally proceed in the following pattern. First, the parties must agree to mediate or be ordered to do so by a court.³⁷ In some cases, a court administrator or the entity that will handle the mediation may perform an initial intake to determine in advance whether the case is an appropriate one for mediation.³⁸ It is not uncommon in some types of mediation (e.g., family mediation) for the mediator to conduct individual, pre-mediation interviews of the parties.³⁹ The intake process offers an

35. Wood, *supra* n. 4, at 805; Yamamoto, *supra* n. 32, at 1058–1059. For example, the systematic pattern of discrimination that finally was given the name “sexual harassment” was exposed through a long series of highly publicized court cases. See Carrie N. Baker, *Sex, Power, and Politics: The Origins of Sexual Harassment Policy in the United States* 141–207 (unpublished Ph.D. dissertation, Emory U. 2001) (copy on file with Author) (discussing the cases and the feminist attorneys who pushed the issue).

36. See Moore, *infra* n. 43, at 203 (citing “the most common, but not necessarily the most effective” method to begin the mediation process is to focus on the substantive issues).

37. The concept of court-mandated mediation is controversial. The American Bar Association opposes mandatory mediation or arbitration, even if the process is non-binding. Rhonda McMillion, *Expanding ADR Options: Legislation Aimed at Federal Court Advances in Congress*, 84 ABA J. 98 (June 1998). Opponents of court-mandated mediation raise a variety of concerns. Some have argued that forcing mediation constitutes a lack of due process in its denial of access to trial. Dana Shaw, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 U. Toledo L. Rev. 327, 337 (1998); Wissler, *supra* n. 28, at 571–572. Others are concerned “that coercion into the mediation process translates into coercion in the mediation process, creating undue settlement pressures that produce unfair outcomes.” *Id.* at 565. These opponents fear that the “unfair outcomes” may result from power imbalances between the parties to the dispute that are not properly appreciated and compensated for by the mediator. *Id.* at 573–574.

38. See Moore, *infra* n. 43, at 153 (discussing the initial measures of the mediator).

39. See generally *infra* nn. 350–359 (discussing this process in adult guardianship cases). Some mediation sessions may be preceded by a pre-mediation conference call in

opportunity to determine which persons should attend the mediation and whether all necessary parties are capable of participating.⁴⁰ Attendance by all necessary parties is vital to the ultimate success of a mediation.⁴¹

In its classic form,⁴² the initial mediation session⁴³ begins with a description by the mediator of the process.⁴⁴ The mediator may use this opportunity to reinforce the parties' commitment to resolving the issues before them.⁴⁵ At this stage, the mediator lays down "ground rules" for the participants.⁴⁶ The mediator should emphasize that the role of the mediator is not to be a judge, but rather to help the parties reach an outcome on which they all agree.⁴⁷

which the mediator and the parties "iron out procedural details and [which] give[s] the mediator an opportunity to ask preliminary questions or to suggest additional fact development that he believes is necessary." Nadine DeLuca Elder, *A Mediation Primer for the Solo or Small Firm Practitioner*, 4 Ga. B.J. 38, 42 (Dec. 1998).

40. Wood, *supra* n. 4, at 801–802.

41. See Hartman, *supra* n. 8, at module 3, 49 (reporting that mediation has sometimes had to be terminated when it was discovered that all necessary persons were not in attendance); *infra* nn. 360–370 (discussing who should attend an adult guardianship mediation); see generally Yarn, *supra* n. 22, at 160 (discussing essential and non-essential participants).

The Draft Uniform Mediation Act distinguishes between a participant who is a "party" ("whose agreement is necessary to resolve the dispute") and a "nonparty participant." See Draft UMA, *supra* n. 14, at §§ 3(5), (6). The Act allows any party to designate "an attorney or other individual" who will accompany the party to and participate in the mediation. See *id.* at § 9. The Reporter's Working Notes to the Definition section three state that nonparty participants could be "experts, friends, support persons, potential parties and others." The Act distinguishes between parties and nonparty participants because nonparty participants do not have the same privilege against disclosing information as do the mediator and the parties. For a discussion of the confidentiality and nondisclosure provisions of the UMA, consult *infra* notes 71–74 and accompanying text.

42. See generally *Dictionary of Conflict Resolution*, *supra* n. 2, at 276 (describing the "classic mediation-phase model").

43. See generally Christopher W. Moore, *The Mediation Process: Practical Strategies for Resolving Conflict* 153–158 (2d ed., Jossey-Bass, Inc. 1996) (discussing the mediator's tasks when beginning a mediation session). There may be more than one mediation session.

44. See Shaw, *supra* n. 37, at 333 (noting that "[t]his stage is important because the mediation process should be described so that the parties know what will transpire"). *Id.*

45. Moore, *supra* n. 43, at 155.

46. Elder, *supra* n. 39, at 42.

47. Moore, *supra* n. 43, at 155–156. The parties may also have submitted written "opening statements" to the mediator in advance or the parties may make opening statements at the initial session. *Id.* at 203–212. "The mediation statement should contain a concise accounting of the facts and is an opportunity to advise the mediator of any unusual or complicated issues or points of law." Elder, *supra* n. 39, at 41.

The next step involves issue identification.⁴⁸ Each party gives that party's version of the problems at issue without interruption.⁴⁹ The mediator gives a summary of each party's concerns after the party has spoken and then, after all have spoken, attempts to narrow the common issues raised.⁵⁰

At any point during the session, either party or the mediator may request a private meeting.⁵¹ This "caucus" may give the party an opportunity to raise sensitive issues or simply to vent emotions.⁵² The mediator informs the party that nothing revealed in the caucus will be told to the other parties without permission.⁵³ Mediators often will allow the other party to "caucus" also to dispel the notion that the mediator is partial to one or the other.⁵⁴ Sometimes the bulk of the mediation occurs through private caucusing with the mediator acting as a "shuttle diplomat."⁵⁵

After each party has explained his or her story, an exchange or dialogue may ensue. At this point, the parties are allowed to raise and discuss, in the mediator's presence, issues that arose when the other party spoke.⁵⁶ Following this exchange, the mediator typically encourages the parties to "brainstorm" as to potential options for resolution, emphasizing that no party needs to be committed to the ideas presented.⁵⁷ The mediator may add some options that the parties have not raised.⁵⁸ The goal is for the parties, with the aid of the mediator, to structure mutually acceptable solutions.⁵⁹ A written summary of the results is

48. See Yarn, *supra* n. 22, at 116–117 (describing the process of defining the issues).

49. The mediator may ask clarifying questions, but, under the agreed ground rules, the other party is not to say anything. See Elder, *supra* n. 39, at 41 (discussing whether the parties should address each other); Moore, *supra* n. 43 at 157, 209 (discussing the initial rules the parties should follow for communication).

50. Moore, *supra* n. 43, at 172–186.

51. See generally Yarn, *supra* n. 22, at 161 (discussing the use of a caucus).

52. Elder, *supra* n. 39, at 39.

53. The Model Standards of Conduct state that "[i]f the mediator holds private sessions with a party, the nature of these sessions with regard to confidentiality should be discussed prior to undertaking such sessions." *Model Standards*, *supra* n. 14, at Stand. V.

54. See Elder, *supra* n. 39, at 42 (noting that mediator's role in offering an unbiased analysis of the matter).

55. *Id.*

56. See John S. Murray, Alan Scott Rau & Edward F. Sherman, *Processes of Dispute Resolution: The Role of Lawyers* 302 (2d ed., Found. Press 1996) (describing the process of information gathering in mediation).

57. See Moore, *supra* n. 43, at 212–213.

58. Elder, *supra* n. 39, at 43.

59. It is possible that the parties will reach an impasse in their discussions. At this

advisable.⁶⁰

C. Confidentiality and Privacy

One of the perceived advantages of mediation over litigation is the fact that the proceedings are private and confidential.⁶¹ Privacy is particularly important to individuals who value “not airing [the family’s] dirty laundry” in public.⁶² One commentator has noted that this value is particularly prevalent among the current generation of senior citizens.⁶³

Confidentiality has been referred to as

the attribute of the mediation process which promotes candor and full disclosure. Without the protection of confidentiality, parties would be unwilling to communicate freely, and the discussion necessary to resolve disputes would be seriously curtailed.⁶⁴

The confidentiality element of a mediation has a number of prongs. For purposes of adult guardianship cases, two are very important: 1) confidentiality in the form of a privilege against disclosure of information to non-participants, including courts;⁶⁵ and 2) confidentiality in the form of the mediator’s commitment not to disclose information given to the mediator by one party to another party without permission.⁶⁶

point, they may want to ask the mediator’s help in suggesting a solution or take a few hours or days of respite before continuing. *Id.* It is also possible that the parties may not be able to agree and that the mediation will end without a settlement. For a discussion of mediations that were still “successful” despite the inability of the parties to reach a final agreement, consult *supra* note 20.

60. “Once a resolution has been agreed upon, the settlement terms need to be memorialized as soon as possible before anyone’s memory begins to fail them, or the parties begin to have second thoughts.” Elder, *supra* n. 39, at 43. Some states require that certain agreements (such as any agreement that would result in a distribution of a decedent’s property in a manner that is different from the will) be in writing and signed by the party against whom they are to be enforced. *E.g. In re Est. of Leathers*, 876 P.2d 619, 620 (Kan. 1994).

61. See Elder, *supra* n. 39, at 39 (illustrating the benefits of confidentiality in the mediation setting).

62. Suzanne J. Schmitz, *Mediation and the Elderly: What Mediators Need to Know*, 16 *Mediation Q.* 71, 74 (Fall 1998); see Hartman, *supra* n. 8, at module 3, 86 (reasoning that personal affairs are preferred to be left out of the public record).

63. Schmitz, *supra* n. 62, at 74.

64. Ga. ADR R. ch. I (B)(II), *supra* n. 15; see generally Yarn, *supra* n. 22, at 132–133 (discussing confidentiality and privilege).

65. See Yarn, *supra* n. 22, at 132 (stating that a mediator may invoke a privilege).

66. The Model Standards of Conduct provide that “[a] [m]ediator [s]hall [m]aintain the

Common law does not guarantee confidentiality in settlement discussions in that it does not guarantee that information disclosed in a mediation may never be used in litigation.⁶⁷ However, some state courts have adopted rules that prohibit the introduction at a trial of evidence to prove liability when the parties have tried (and failed) to reach a settlement.⁶⁸ Mediation offers even more protection in that several state statutes and ADR rules require that mediations and other ADR proceedings be kept confidential.⁶⁹ Also, mediators have the option of requiring contractual confidentiality agreements before proceeding with the mediation.⁷⁰

The primary substantive section of the Draft Uniform Mediation Act is titled "Confidentiality of Mediation Communications; Privilege Against Disclosure; Admissibility; Discovery."⁷¹ This section and the ensuing three sections set out a

[r]easonable [e]xpectations of the [p]arties with [r]egard to [c]onfidentiality." *Model Standards*, *supra* n. 14, at Stand. V. Georgia's *Ethical Standards for Neutrals* say that "[i]nformation given to a mediator in confidence by one party must never be revealed to another party absent permission of the first party." Ga. ADR R. ch. I (B)(II), *supra* n. 15; see Assn. for Conflict Res., *Standards of Practice for Family and Divorce Mediation, Confidentiality and Exchange of Information* <<http://acresolution.org/research.nsf/key/stand-prac>> (accessed Jan. 21, 2002) (outlining standards of confidentiality).

67. Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship*, 1 Pepp. Dispute Res. L.J. 241 (2001).

68. *E.g.* Ind. R. Evid. 408 (2001); see generally Fed. R. Evid. 408 (2001) (providing the federal analogue to the rule).

69. For example, the Indiana ADR rules provide that:

Mediators shall not be subject to process requiring the disclosure of any matter discussed during the mediation, but rather, such matter shall be considered confidential and privileged in nature. The confidentiality requirement may not be waived by the parties, and an objection to the obtaining of testimony or physical evidence from mediation may be made by any party or by the mediators.

Ind. R. ADR 2.11 (2002).

The Texas ADR Procedures Act requires that party communications during the ADR process be kept confidential and that none of the participants (including the mediator/facilitator) may be called upon to testify in court concerning the ADR proceeding. Tex. Civ. Prac. & Remedies Code Ann. § 154.073 (1997 & Supp. 2001); see Haw. R. Prob. 2.1, Ex. A, R. 7 (LEXIS L. Publg. 2001) (discussing general mediation rules in the probate context).

70. Hartman, *supra* n. 8, at module 3, 88–89. Hartman notes that the ABA Standards of Practice for Lawyer Mediators in Family Disputes, Section IIA encourages the use of such agreements. *Id.* at 89. The Model Standards of Conduct provide that "[t]he parties may make their own rules with respect to confidentiality, or the accepted practice of an individual mediator or institution may dictate a particular set of expectations." *Model Standards*, *supra* n. 14 at Stand. V; see generally Yarn, *supra* n. 22, at 133 (discussing confidentiality agreements).

71. Draft UMA, *supra* n. 14, at § 5.

structure that describes which mediation communications are “privileged.”⁷² If a communication is privileged, the holder of the privilege may refuse to disclose it and prevent its disclosure by any other person.⁷³ The Reporter’s Working Notes indicate that the proposed “privilege structure balances the needs of the justice system against party and mediator needs for confidentiality” and “is consistent with the approach taken by the overwhelming majority of legislatures that have acted to provide broad legal protections for mediation confidentiality.”⁷⁴

Confidentiality and privacy are important advantages for adults in adult guardianship cases in that these cases often include personal, and sometimes embarrassing, information about the adult and the adult’s family. However, as will be discussed further in Part V, adult guardianships raise special issues that challenge the traditional application of these requirements.

II. OVERVIEW OF ADULT GUARDIANSHIP CASES

A formal adjudication⁷⁵ of guardianship is a *procedure* that is, in theory at least, designed to offer *protection of the welfare* of an allegedly *incapacitated* adult.⁷⁶ The three components of this definition — procedure, protection of welfare, and incapacity — will be examined in reverse order.⁷⁷

72. *Id.* §§ 5, 6 (dealing with waiver and preclusion of privilege), *id.* 7 (describing the exceptions to the privilege), *id.* § 8 (providing for confidentiality of mediation communications), and *id.* § 9 (covering disclosure by the mediator).

73. The privilege may be held by a party, the mediator, or even a non-party. *Id.* at § 5(b).

74. *Id.* at rptr. working nn. § 5(2).

75. “Because many guardianship cases are adjudicated in courts exercising probate jurisdiction,” the National College of Probate Judges includes in the National Probate Court Standards a set of standards on the adjudication of guardianships and conservatorship. Hannaford & Hafemeister, *supra* n. 3, at 152–153.

76. Guardianship law varies substantially from state to state. In 1997, the National Conference of Commissioners on Uniform State Laws completed the Uniform Guardianship and Protective Proceedings Act (UGPPA), which is available at <<http://www.law.upenn.edu/bil/ulc/fnact99/1990s/ugppa97.htm>>. The Act has been endorsed by the American Bar Association but to date has only been adopted in Colorado. Uniform Law Commissioners, *A Few Facts About the Uniform Guardianship and Protective Proceedings Act (1997)* <http://www.nccusl.org/uniformact_factsheets/uniformacts-fs-ugppa97.asp> (accessed Jan. 21, 2002).

77. This separation into three elements is admittedly artificial. As will be seen in the ensuing discussion, there is an intricate interplay among the elements such that the procedure is essential to the protection of the adult’s welfare and the determination of incapacity is a dominant aspect of the procedure. One expert has pointed out that “the

A. Determination of Incapacity

Unlike the guardianship of a minor, whose very age is determinative of legal incapacity,⁷⁸ the imposition of a guardianship upon an adult requires some finding that the adult is legally incapacitated, and thus, unable to continue to operate autonomously and enjoy the full panoply of rights to which “capacitated” adults are entitled.⁷⁹ Legal incapacity is a concept that, in modern jurisprudence, is typically linked to an act — for example, the capacity to make a will or the capacity to enter into a contract.⁸⁰ When the legal capacity to engage in an act is lacking, the act itself is null and void, or at least voidable.⁸¹ When an adult is found to be legally incapacitated and a plenary guardianship is imposed,⁸² the adult typically will lose such fundamental rights as the right to marry, the right to consent to

more vital protector of individual rights in the context of guardianship is the procedural component — what we call *due process*.” Charles P. Sabatino, *Competency: Refining Our Legal Fictions, Older Adults’ Decision-Making and the Law* 1, 2 (Michael Smyer, K. Warner Schaie & Marshall B. Kapp eds., Springer Publ. 1996).

78. “Because society presumes children’s incapacity based on their age, they have few legal rights and necessarily rely on their parents for care.” Leary, *supra*, n. 3, at 246. State statutes typically designate an age of majority. *E.g.* Ala. Code § 26-1-1 (Michie Co. 1992) (age nineteen); Fla. Stat. § 39.01(12) (2001) (age eighteen). Individuals under that age do not have the same capacity as adults in matters such as making binding contracts or valid wills. *See e.g.* Ga. Code Ann. § 13-3-20 (1982) (minors’ contracts are voidable); *see* 18-A Me. Rev. Stat. Ann. § 2-501 (1998) (must be age eighteen to make a will). Also, minors cannot engage in certain legal acts (e.g., marriage) without their parents’ consent. *E.g.* Ind. Code Ann. § 31-11-2-1 (West 1999).

79. Some states allow the appointment of a guardian upon the voluntary petition of the adult. *E.g.* Iowa Code Ann. § 633.557 (West 1992 & Supp. 2001) (allowing voluntary appointment in “the best interest of the applicant”); Vt. Stat. Ann. tit. 14, § 2671 (1999); Wyo. Stat. Ann. § 3-2-105 (LEXIS L. Publ. 2001). The National Probate Court Standards recommend that a determination of incapacity should not be required in these voluntary guardianship cases. Natl. College of Prob. JJ., *Standards, National Probate Court Standards* Stand. 3.3.9(c) <<http://www.ncpj.org/standard.html>> (last revised Feb. 10, 2002) [hereinafter *National Probate Court Standards*].

80. Sabatino points out that “our legal system has always recognized situation-specific standards of competency that depend on the specific event or transaction in question — such as capacity to make a will, marry, enter into a contract, vote, drive a car, stand trial in a criminal prosecution and so on.” Sabatino, *supra* n. 77, at 4. Capacity similarly has been referred to as a “decision-specific concept.” *ADA Mediation Guidelines* Guideline I(D) <http://www.cardozo.yu.edu/cojcr/final_site/ADA_guidelines/guidelines.html> (accessed Jan. 4, 2002).

81. *Supra* n. 79.

82. Many states offer the option of the imposition of a guardianship that is “limited” in that the guardianship results in legally disempowering the adult only to the extent necessitated by that adult’s limitations. *See infra* nn. 98–99 (discussing limited guardianships).

or refuse medical treatment, and the right to enter into contracts⁸³ so that such acts, if engaged in by the individual, will no longer have legal validity. Legal incapacity has thus been described as a “legal fiction” that is justified in that “we need a trigger to tell us when a state legitimately may take action to limit an individual’s rights to make decisions about his or her own person or property.”⁸⁴ The court’s conundrum in a guardianship case is determining the point at which an adult’s *actual* incapacity warrants declaring that adult to be legally incapacitated.⁸⁵

The Wingspread Recommendations suggested that the following principles be considered when states adopt statutory definitions of the type of actual incapacity that warrants a finding of legal incapacity and the imposition of a guardianship:

- (a) incapacity may be partial or complete;
- (b) incapacity is a legal, not a medical, term;
- (c) a finding of incapacity should be supported by evidence of functional impairment over time;
- (d) the finding of incapacity should include a determination that the person is likely to suffer substantial harm by reason of an inability to provide adequate personal care or management of property or financial affairs; and
- (e) age, eccentricity, poverty, or medical diagnosis alone should not be sufficient to justify a finding of

83. The capacity to perform some of these acts (e.g., enter contracts, make medical decisions) on behalf of the ward are relegated to the guardian, while the capacity to perform other acts (e.g., to marry) is simply removed from the adult and not transferred to anyone else. See Ga. Code Ann. §§ 29-2-11, 29-5-7(d), (e) (2001).

84. Sabatino, *supra* n. 77, at 3.

85. The following excerpt illustrates how even medical diagnoses of common mental illnesses do not dictate whether an individual has legal capacity:

Patients with dementia, delirium, schizophrenia, bipolar affective disorder, and other psychiatric conditions *may* be capable of making responsible decisions. Establishing that a patient lacks decisional capacity requires more than making a psychiatric diagnosis; it also requires demonstrating that the specific symptoms of that disorder interfere with making or communicating responsible decisions about the matter at hand.

Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 Fordham L. Rev. 1177, 1187 (1994).

The Wingspread experts noted that the lack of precision in and confusion about “incapacity” results partially from the historical linking of guardianship proceedings with civil commitment hearings which would result in institutionalization in a mental health facility. *Wingspread Recommendations, supra* n. 1, at 288.

incapacity.⁸⁶

Not all state legislatures followed this recommendation, however, with the result that different state statutes define the type of incapacity⁸⁷ that dictates the imposition of a guardianship in a variety of ways.⁸⁸ Basically, however, the criteria for a determination of incapacity fall into two categories: a status-focused determination or a functional assessment.⁸⁹ A determination that is based on status uses some semi-objective criteria, such as “mental illness” or “physical disability” or even “advanced age,” as a basis for determining whether an adult is in need of a guardian.⁹⁰ The functional assessment looks not to the adult’s status but rather to “what that person can and cannot do to care for personal safety and finances.”⁹¹ Although the latter approach is designed to provide a more realistic assessment of the adult’s limitations and capabilities,⁹² both approaches are inevitably influenced by the culture, norms, and values of those charged

86. *Id.*

87. Not all states use the term “incapacity.” *See e.g.* Ind. Code Ann. § 34-45-2-3 (using “incompetent”); Tenn. Code Ann. § 34-11-101(7) (LEXIS L. Publg. 2001) (using “disabled person”).

88. Sabatino, *supra* n. 77, at 5–11.

89. Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 Md. J. Contemp. Leg. Issues 143, 157 n. 74–75 (1995–1996) (discussing the various approaches that states may adopt for definition of guardianship); Leary, *supra* n. 3, at 7; Sabatino, *supra* n. 73, at 5–16.

90. Ala. Stat. Ann. Section 26-2A-20 defines an “incapacitated person” as:

Any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, physical or mental infirmities accompanying advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

E.g. Tenn. Code Ann. § 24-11-101(7), which provides as follows:

“Disabled person” means any person eighteen (18) years of age or older determined by the court to be in need of partial or full supervision, protection and assistance by reason of mental illness, physical illness or injury, developmental disability or other mental or physical incapacity.

91. Hurme, *supra* n. 89, at 157. An example of a functional assessment appears in the UGPPA. The UGPPA defines “incapacitated person” as

an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.

UGPPA, *supra* n. 76, at § 102(5).

92. This assessment also ties in with the Wingspread Recommendation that “[t]he authority granted to a guardian should be directly related to the functional impairment of the ward.” *Wingspread Recommendations*, *supra* n. 1, at 289.

with making the preliminary and ultimate evaluations and those who add information to the formal adjudication process. Legal experts have noted that “capacity is a shifting network of values and circumstances”⁹³ and that,

no matter how articulate, detailed, or comprehensive the legislative definitions or substantive standards, incapacity determinations for all but the most clear cases will depend on a malleable weighing process – that is, the judicial task, ultimately, is to weigh medical variables, social variables, and a constellation of very practical variables, relating to the need for state intervention in a unique human situation.⁹⁴

A finding of incapacity is not the only determination that must be made for a guardianship to be imposed. Additionally, state statutes usually require that the court determine whether there is a need for the guardianship.⁹⁵ The necessity prong of the guardianship determination⁹⁶ should encourage the court, when feasible, to limit the guardianship by granting to the guardian “only those powers necessitated by the ward’s limitations and demonstrated needs.”⁹⁷

93. Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity*, 62 *Fordham L. Rev.* 1073, 1083 (1994). For a lawyer who represents a client whose capacity is or becomes questionable, Margulies suggests the use of another model, the “contextual capacity” model, which considers the following six factors:

- (1) ability to articulate reasoning behind decision;
- (2) variability of state of mind;
- (3) appreciation of consequences of decision;
- (4) irreversibility of decision;
- (5) substantive fairness of transaction; and
- (6) consistency with lifetime commitments.

Id. at 1085.

94. Sabatino, *supra* n. 77, at 2.

95. *See e.g.* Cal. Prob. Code § 1800.3 (West 2001) (conservatorship is available if the need is established by the court); Ga. Code Ann. § 29-5-6(e)(4)–(5) (court should make a determination of need before establishing guardianship); N.Y. Mental Hygiene L. Ann. § 81-02(a) (McKinney 2001) (appointment is proper if necessary for proper care of the ward).

96. Sabatino describes the necessity determination as follows:

Necessity properly implies, or should imply, a weighing of multiple variables, and a weighing of the possible harms and benefits of court intervention versus other options. Courts must take into account the individual’s context – his or her living situation, family, caregivers, the types of decisions that have to be made, alternative legal arrangements that are in place, and so on.

Sabatino, *supra* n. 77, at 19.

97. UGPPA, *supra* n. 76, at § 310(c). The Wingspread experts recommended that states adopt a “statutory presumption in favor of limited guardianship.” *Wingspread*

In some states, the finding of necessity for the guardianship cannot be made without an examination of whether means less onerous than the imposition of a guardianship could accomplish the same ends.⁹⁸ For example, an adult who is in a coma is usually incapable of making medical decisions, and is thus in need of someone who can make such decisions on that adult's behalf. If the adult already has in place a valid health-care power of attorney, the appointment of a guardian may not be necessary. The same reasoning applies to the need for a guardian to manage the adult's property. If the adult has already transferred all of his or her property to a trust, the appointment of a guardian for the purpose of property management would be superfluous.⁹⁹

B. Protection of Welfare

The right of a state to impose a guardianship is deeply rooted

Recommendations, *supra* n. 1, at 290. Hurme points out that limited guardianships were a "key reason" for the UGPPA. Hurme, *supra* n. 89, at 161.

98. For example, the UGPPA allows the court to appoint a guardian only upon a finding that:

- (A) the respondent is an incapacitated person; and
- (B) the respondent's identified needs cannot be met by less restrictive means, including appropriate technological assistance.

UGPPA, *supra* n. 76, at § 311. This requirement was also adopted in the National Probate Court Standards. *National Probate Court Standards*, *supra* n. 79, at Stand. 3.3.10(a). A discussion of the panoply of arrangements that could be used as substitutes for a formal guardianship is beyond the scope this Article. See Lori A. Stiegel, *Alternatives to Guardianship: Substantive Training Materials for Professionals Working with the Elderly and Persons with Disabilities 1* (ABA Commn. on Leg. Problems of the Elderly, Commn. on Mental & Physical Disability L. 1992) (describing these arrangements in detail and their inherent benefits and defects).

99. However, a recent case, *SunTrust Bank, Middle Ga. v. Harper*, 551 S.E.2d 419 (Ga. App. 2001), illustrates why the imposition of a guardianship and its concomitant determination of legal incapacity might still be preferable in some respects. In this case, Mr. Harper had been declared legally incapacitated and his son had been appointed the guardian of his person and property. *Id.* at 422. Among the powers that were removed from him were the power to make contracts and the power to buy or sell property. *Id.* After the guardianship was established, the son took his father to the bank and the father changed his IRA beneficiary so that the account was payable solely to the son and also had the bank add the son's name to his bank account, thus giving the son survivorship rights in the account. *Id.* at 423. After Mr. Harper died, the court determined that these changes were void in that Mr. Harper had been found to lack the legal capacity to make them. *Id.* at 426. This case could well have come out differently if the probate court had determined that there were less restrictive alternatives available to Mr. Harper (e.g., a financial power of attorney) and had thus found that he did not need a guardian. Legally, then, Mr. Harper would have retained the power to contract, and thus the changes of beneficiary and account designations may have been valid.

in the doctrine of *parens patriae*.¹⁰⁰ That doctrine relegates to the sovereign (or, in the United States, to the state) the responsibility to protect the person and property of individuals who are incapacitated.¹⁰¹ Unfortunately, the paternalistic concern for protection of the welfare of an incapacitated individual is, by its nature, coupled with a substantial infringement upon that individual's autonomy.¹⁰²

The current guardianship system is designed to protect an allegedly incapacitated adult in a variety of ways.¹⁰³ First, a formal proceeding must occur before the guardianship can be imposed.¹⁰⁴ Second, if the guardianship involves guardianship of property, a bond is usually required to protect the adult from mismanagement of the property by the guardian. Third, the adult's property is protected in that many state statutes limit the guardian's ability to invest the adult's funds to so-called "conservative" investments, such as government bonds.¹⁰⁵ Fourth, a guardianship is subject to ongoing oversight by the court. Some states require periodic assessments of the guardianship by an independent third party, such as a guardian ad litem or a court visitor. Almost all statutes require the guardian to report to the court, usually annually, as to the personal status of the adult and the state of the adult's property.¹⁰⁶ Finally, guardianship statutes give the court the right to issue a citation requiring a guardian who is suspected of wrongdoing to appear before the court.¹⁰⁷ Remedies for wrongdoing by a guardian include removal and restitution of the adult's property.¹⁰⁸

100. A. Frank Johns & Vicki Joiner Bowers, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century — A March of Folly? Or Just a Mask of Virtual Reality?*, 27 Stetson L. Rev. 1, 5–6 (1997); Joan L. O'Sullivan & Diane E. Hoffman, *The Guardianship Puzzle: Whatever Happened to Due Process?*, 7 Md. J. Contemp. Leg. Issues 11, 13–16 (1995–1996).

101. O'Sullivan & Hoffman, *supra* n. 100, at 13.

102. See generally Leary, *supra* n. 3, at 249–253 (discussing protection and autonomy).

103. See generally *id.* at 259–269 (discussing protections brought about by recent guardianship reforms).

104. See e.g. Fla. Stat. § 744.3371 (outlining rules for appointment of guardianship).

105. See e.g. *id.* §§ 744.351–744.354 (discussing rules on bonds on guardians and the validity of bonds).

106. See e.g. *id.* § 744.367 (requiring each guardian to file an annual guardianship plan).

107. See e.g. *id.* § 744.477 (allowing the court to institute proceedings for the removal of a guardian).

108. See *id.* § 744.514.

Unfortunately, the price of this state-enforced protection is a substantial deprivation of autonomy and rights. When a guardian is appointed, the adult may lose the right to make such basic decisions as the decision to refuse medical treatment.¹⁰⁹ An individual for whom a guardian has been appointed may also lose the power to enter into valid contracts,¹¹⁰ to marry,¹¹¹ or even to have a driver's license.¹¹² The deprivation of rights is deemed necessary once the individual has been found to be incapable of making significant, responsible decisions about the individual's person or property. For example, if a plenary guardianship of the property has been imposed on an individual who has been found to be incapable of managing his or her estate, that guardianship could be completely undermined if the individual retained the right to enter into contracts.¹¹³ Also, the safety of an individual who has been found to be endangering his or her own health would be seriously undermined if that individual retained the right to refuse necessary medical treatment.

The debate of welfare versus autonomy¹¹⁴ is one that has dominated not only guardianship reform, but also reform related to health-care decision-making, end-of-life directives, involuntary commitment, lawyers' professional responsibility, and many other areas that involve individuals with diminishing capacity.¹¹⁵ The

109. Ga. Code Ann. § 29-5-7(d)(3).

110. *E.g. id.* § 29-5-7(d)(2), 29-5-7(e)(2).

111. *Id.* § 29-5-7(d)(1).

112. Fla. Stat. § 744.3215(2)(d).

113. *E.g. Sun Trust Bank*, 551 S.E.2d at 426.

114. *See generally* Frolik & Barnes, *supra* n. 3, at 24–27 (generally discussing the conflict between the values of autonomy and protection).

115. *See generally* Alison Patrucco Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 Emory L.J. 633 (1992) (discussing the various problems the elderly face in decision-making); Mark Falk, *Ethical Considerations in Representing the Elderly*, 36 S.D. L. Rev. 54 (1991) (discussing the problems elderly people face when seeking legal representation); Linda C. Fentiman, *Privacy and Personhood Revisited: A New Framework for Substitute Decision-Making for the Incompetent, Incurably Ill Adults*, 57 Geo. Wash. L. Rev. 801 (1989) (discussing the effect of modern medical technology on the autonomy of the individual); Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y. U. Rev. L. & Soc. Change 609 (1989–1990) (discussing techniques for the representation of clients with mental disabilities); A. Frank Johns, *Fickett's Thicket: The Lawyer's Expanding Fiduciary and Ethical Boundaries When Serving Older Americans of Moderate Wealth*, 32 Wake Forest L. Rev. 445 (1997) (discussing the impact of attorneys' expanded duty to non-clients on the decisions of the elderly); Marshall B. Kapp & Douglas Mossman, *Measuring Decisional Capacity: Cautions on the Construction of a "Capacimeter"*, 2 Psychol. Pub. Policy & L. 73 (1996); Margulies,

parties to the debate have tended to view the concepts of welfare and autonomy as mutually exclusive and have faulted guardianship laws for elevating welfare over autonomy.¹¹⁶ However, recent trends in guardianship reform have transcended the dichotomy by adding the protection of the adult's autonomy to the panoply of protections in guardianship law.¹¹⁷ As noted above, autonomy in the form of self-determination is also an essential element of mediation.¹¹⁸ As will be discussed in detail in Part III, the traditional tension between protecting an individual's welfare and ensuring that individual's autonomy must be addressed if mediation is to be incorporated into guardianship proceedings.

C. Guardianship Procedure

Because guardianship entails such a drastic deprivation of basic rights, it is essential that the procedure for the imposition of a guardianship guarantee the due-process rights of the allegedly incapacitated adult.¹¹⁹ State guardianship statutes contain a

supra n. 93 (discussing coping mechanisms for lawyers dealing with senior citizens of questionable capacity); *Proceedings of the Conference on Ethical Issues in Representing Older Clients*, 62 *Fordham Law Rev.* 1003 (1994) (discussing issues of client capacity faced by attorneys); Adrienne E. Quinn, *Who Should Make Medical Decisions for Incompetent Adults? A Critique of RCW 7.70.065*, 20 *Seattle U. L. Rev.* 573 (1997) (discussing the need to reform the revised code of Washington to protect the autonomy of the incompetent); Charles P. Sabatino, *Representing a Client with Diminished Capacity: How Do You Know It and What Do You Do About It?*, 16 *J. Am. Acad. Matrimonial Law.* 481 (2000) (discussing the need for lawyers in many practice areas to understand capacity issues); Elizabeth Shaver, *Do Not Resuscitate: The Failure to Protect the Incompetent Patient's Right of Self-Determination*, 75 *Cornell L. Rev.* 218 (1989) (discussing the implications for medical autonomy and incompetency).

116. Margulies, *supra* n. 93, at 1073–1075.

117. For example, the UGPPA requires the court to “make appointive and other orders that will encourage the development of the ward’s maximum self-reliance and independence.” UGPPA, *supra* n. 76, at § 310(c). Margulies describes this new approach well when he argues that “there is an artificiality about this distinction between autonomy and welfare. Contrary to the [view that these concepts are mutually exclusive], autonomy is also a need. Conversely, financial, medical, and legal welfare are essential elements of autonomy.” Margulies, *supra* n. 93, at 1074.

The National Probate Court Standards recommend that courts establish a screening process to divert “inappropriate petitions” before they are allowed to proceed further in the system. *National Probate Court Standards*, *supra* n. 79, at Stand. 3.3.2(a). However, the Commentary points out that such a screening is probably not necessary when the petition is filed by an individual requesting his or her own guardianship. *Id.*, at stand. 3.3.2 cmt.

118. See *supra* n. 15 & pt. I(A) (discussing the nature of mediation and self-determination).

119. Sabatino, *supra* n. 77, at 21. The Wingspread Recommendations advised that the due process protections “not only should be incorporated into the statutes of each state,

variety of requirements that are meant to accomplish this aim.¹²⁰ The statutes usually describe a procedure that begins with the filing of a petition for the appointment of a guardian for an adult who is allegedly incapacitated and in need of a guardian.¹²¹ The petitioner may be anyone, including the adult.¹²² The statutes typically require the petition to identify the petitioner, the adult for whom the guardianship is sought, and the proposed guardian, and to include information about the parties and why the guardianship is being sought.¹²³ The petition must also include the names of those close relatives or others entrusted with the adult's care.¹²⁴

In some states, frivolous petitions are discouraged by the

but steps should be taken to ensure that these protections are carefully implemented in all guardianship proceedings." *Wingspread Recommendations*, *supra* n. 1, at 282.

120. These state procedural safeguards were adopted based on the recommendations that were developed in 1988 at Wingspread. Susan G. Haines & John J. Campbell, *Defects, Due Process, and Protective Proceedings: Are Our Probate Codes Unconstitutional?*, 33 *Real Prop. Prob. & Trust J.* 215, 245 (1998). Unfortunately, the protections offered in the state statutes are not always carried through in actual guardianship proceedings. *Id.* at 245–269; O'Sullivan & Hoffman, *supra* n. 100, at 28–48.

121. UGPPA, *supra* n. 76, at § 304. The Wingspread experts recommended that courts provide a "[s]implified [b]ut [s]pecific [p]etition [f]orm." *Wingspread Recommendations*, *supra* n. 1, at 282.

122. For example, the Georgia statute allows the petition to be filed by "[a]ny interested person or persons, including the alleged incapacitated person." Ga. Code Ann. § 29-5-6(a)(1); *e.g.* Iowa Code Ann. § 633.557; Vt. Stat. Ann. tit. 14, § 2671; Wyo. Stat. Ann. § 3-2-105 (allowing voluntary petitions for guardianship). The UGPPA states that the petition may be filed by "[a]n individual or a person interested in the individual's welfare." UGPPA, *supra* n. 76, at § 304.

123. *E.g.* Ga. Code Ann. § 29-5-6(a)(2) (indicating petition requirements).

124. UGPPA, *supra* n. 76, at §§ 303–304, which requires that the following information be included:

- 1) the petitioner's relationship to the adult for whom the guardianship is sought;
- 2) a description of the reasons for seeking the guardianship and a description of the alleged incapacity;
- 3) the foreseeable duration of and limitations on the guardianship;
- 4) a description of the adult's property and its estimated value; and
- 5) the names of the adult's closest relatives, caregivers, legal representatives, and anyone nominated by the adult to serve as guardian.

The Wingspread Recommendations would also require the following information in the petition:

- (a) a description of the functional limitations and physical and mental condition of the ward;
- (b) the specific reasons why the guardianship is being requested;
- (c) the steps taken to find less restrictive alternatives to guardianship;
- (d) the guardianship powers being requested; and
- (e) the qualifications of the individual proposed to serve as guardian.

Wingspread Recommendations, *supra* n. 1, at 282.

requirement that the initial petition be sworn to by at least two petitioners or be accompanied by an affidavit from a physician or psychologist who has recently examined the adult and determined that the adult may be incapacitated.¹²⁵ Some states also protect the adult from unsubstantiated claims by setting up thresholds that must be crossed before the proceeding can go forward.¹²⁶

Notice is a crucial component of due process, and statutory changes in recent years have placed a great emphasis on ensuring that the adult receive proper notice of the pending guardianship proceeding.¹²⁷ Typically, notice of the filing of the petition is given to the adult by personal service.¹²⁸ Recent reforms have required that the notice be in a form that clearly informs the recipient of the consequences if a guardianship should be imposed and that is physically easy to read.¹²⁹ Notice is also given to those who would

125. Ga. Code Ann. § 29-5-6(a)(3).

126. For example, in Georgia, when the petition is filed, the judge must make an immediate assessment of whether the petition and any accompanying affidavits provide "sufficient evidence to believe that the proposed ward is incapacitated." If the judge does not find such evidence, the petition is dismissed and a copy is sent to the adult. Even if the judge finds sufficient evidence to continue the initial proceeding, the judge is required again to make a decision whether the proceeding should continue after the evaluation report has been filed. At this latter time, the proceeding may continue only if there is "probable cause to support a finding" of incapacity. *Id.* § 29-5-6(b)(1), (b)(3), (d)(1).

127. Hurme, *supra* n. 89, at 146-148.

128. Even in 1988, the "laws in 48 states mandate[d] direct contact with the proposed wards." *Wingspread Recommendations, supra* n. 1, at 283.

129. *E.g.* Va. Code Ann. § 37.1-134.10(D) (1996 & Supp. 2001). The Virginia Code requires that the following warning be given to the adult:

AT THE HEARING YOU MAY LOSE MANY OF YOUR RIGHTS. A GUARDIAN MAY BE APPOINTED TO MAKE PERSONAL DECISIONS FOR YOU. A CONSERVATOR MAY BE APPOINTED TO MAKE DECISIONS CONCERNING YOUR PROPERTY AND FINANCES. THE APPOINTMENT MAY AFFECT CONTROL OF HOW YOU SPEND YOUR MONEY, HOW YOUR PROPERTY IS MANAGED AND CONTROLLED, WHO MAKES YOUR MEDICAL DECISIONS, WHERE YOU LIVE, WHETHER YOU ARE ALLOWED TO VOTE, AND OTHER IMPORTANT RIGHTS.

Id.

The Wingspread Recommendations gave a detailed description of the preferred procedure for notice:

A court officer dressed in plain clothes and trained to communicate and interact with elderly and disabled persons should serve the respondent personally and present the information to the respondent in the mode of communication that the respondent is most likely to understand. The written notice should be in plain language and large type. It should indicate the time and place of the hearing, the possible adverse consequences to the respondent of the proceedings and list the rights to which the respondent is entitled.

most likely be in a position to protect the adult's interests — that is, the adult's relatives and caregivers.¹³⁰

Because the imposition of a guardianship requires a finding of incapacity,¹³¹ guardianship statutes often mandate that the adult be evaluated by a professional who then communicates to the judge an opinion as to the adult's capacity and an assessment of the expected duration of any incapacity.¹³² The professional should have the background and expertise to make such an assessment, although the credentials that are required may differ depending upon whether the incapacity finding is one of status or function.¹³³

Any system that purports to guarantee the due-process rights

Wingspread Recommendations, supra n. 1, at 282–283.

130. For example, the UGPPA requires that notice be given “to the persons listed in the petition.” UGPPA, *supra n. 76, at § 309(b)*. These persons include the adult's spouse, or, if none, another adult with whom the adult has been living, the adult children of the adult, or if none, the adult's parents and adult siblings, or, if none, the adult's next of kin, and the adult's caregiver, if any. *Id. at § 304(b)*.

131. *See supra* notes 78–102 and accompanying text (discussing the determination of incapacity).

132. *E.g.* Ga. Code Ann. § 29-5-6(c) (requiring an evaluation by a physician or psychologist). The UGPPA does not require a professional evaluation unless the adult demands one. UGPPA, *supra n. 76, at § 306*.

133. The Georgia assessment is based on whether the adult is “incapacitated by reason of mental illness, mental retardation, mental disability, physical illness or disability, chronic use of drugs or alcohol or other cause” and the professional evaluation must be performed by a licensed physician or psychologist. Ga. Code Ann. §§ 29-5-1(a), 29-5-6(c). The UGPPA requires that the evaluator be a “physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment.” UGPPA, *supra n. 76, at § 306*. The Wingspread conferees urged courts to “hear expert testimony from any professional whose training and experience aids in the assessment of functional impairment.” *Wingspread Recommendations, supra n. 1, at 289*. The National Probate Court Standards provide as follows:

Although it may not be necessary to receive evidence from a professional or expert in every case (e.g., where the evidence regarding incapacity is relatively clear), the court should avail itself of the assistance of professionals and experts when their knowledge will assist the court in making a decision on whether a guardianship is necessary. These professionals and experts include, but are not limited to, physicians, nurses, psychologists, social workers, developmental disability professionals, physical and occupational therapists, educators, habitation workers, and community mental health workers. The determination of the need for the appointment of a guardian is frequently made by a physician after conducting an examination of the respondent. Although a physician may provide valuable information regarding the capacity of the respondent, incapacity is a multifaceted issue and the court may consider using other professionals whose expertise and training may give them greater insight into representations of incapacity.

National Probate Court Standards, supra n. 79, at 68, at Stand. 3.3.9 cmt. (footnote omitted).

of an individual of diminishing capacity must include a mandate that the individual be represented in the deprivation-of-rights hearing. Many states require that counsel be appointed to represent the adult once a guardianship petition has been filed.¹³⁴ Other states require that a guardian ad litem or visitor be appointed and that the appointment of counsel be mandatory only if the adult so requests or the visitor so advises.¹³⁵ The role of an attorney who is appointed to represent an adult in a guardianship case is a complicated one.¹³⁶ As with all clients, the attorney is charged with zealously representing the client's wishes and desires.¹³⁷ An attorney for an individual of diminishing capacity is challenged by the concept that the individual may not be able to formulate or communicate such desires, or may insist vehemently and perhaps irrationally that the guardianship not be imposed.¹³⁸ Attorneys in many states are aided by statutes that allow the court to appoint a guardian ad litem in addition to an attorney.¹³⁹ The guardian ad litem, who is not allowed to be the same person as the attorney,¹⁴⁰ is often charged with protecting the adult's best interests rather than advocating the adult's desires.¹⁴¹ Finally, the adult's due-process rights are also protected by the common requirement that the adult be granted a hearing before the

134. *E.g.* Conn. Gen. Stat. § 45a-673 (1958 & Supp. 2001); Ga. Code Ann. § 29-5-6(b)(2)(B). Wingspread Recommendation II-B also endorses a mandatory right to counsel. *Wingspread Recommendations*, *supra* n. 1, at 283. Despite this recommendation, "a significant minority of the symposium attendees felt that a mandatory right to an attorney went too far and in certain circumstances might not be in the proposed ward's best interests." *Wingspread Recommendations*, *supra* n. 1, at 284.

135. *E.g.* Va. Code Ann. § 37.1-134.9(A) (Supp. 2001). The UGPPA offers two alternative statutes for adopting states, one that requires an attorney to be appointed for the adult and another that requires appointment of an attorney only if the adult requests one or the court visitor or the court itself determines that one is necessary. UGPPA, *supra* n. 76, at § 305(b).

136. *See generally* Hurme, *supra* n. 89, at 148-153 (discussing the various roles of counsel in a guardianship case).

137. The Wingspread experts would require the attorney to "zealously advocate the course of actions chosen by the client." *Wingspread Recommendations*, *supra* n. 1, at 285.

138. For discussions on the representation of clients with diminishing capacity *see* Falk, *supra* n. 115 (addressing representation of the elderly); Johns, *supra* n. 115 (addressing the lawyer's duties to older Americans); Margulies, *supra* n. 93 (addressing the representation of senior citizens with questionable capacity).

139. *E.g.* Ga. Code Ann. § 29-5-6(b)(2)(D).

140. *E.g. id.* § 29-1-2. This also was recommended by the Wingspread conferees. *Wingspread Recommendations*, *supra* n. 1, at 285.

141. *See generally* *infra* n. 340-344 (discussing the role of the guardian ad litem in guardianship mediators).

guardianship is imposed, and that the adult has the right to attend that hearing.¹⁴² The person who is petitioning for the guardianship usually has the burden of proving the need for the guardianship by clear and convincing evidence.¹⁴³

As is discussed more fully below, these guarantees of due process may be compromised if guardianship questions are relegated to more informal resolution, such as mediation. Thus, any recommendations for the use of mediation in guardianship proceedings must balance the advantages of mediation with the disadvantages of an informal proceeding in which these due-process rights may not be as scrupulously guarded.

III. IS IT APPROPRIATE TO USE MEDIATION IN ADULT GUARDIANSHIP CASES?

Mediation would seem to be particularly suitable for adult guardianship cases for a number of reasons. These cases usually 1) involve ongoing family relationships and the inevitably-attendant emotional issues; 2) include sensitive information that the participants would prefer to keep private; 3) sometimes require flexible and creative resolutions; and 4) often involve parties who cannot afford protracted litigation.¹⁴⁴ Yet the use of mediation in adult guardianship cases raises a host of questions. Primary among them is whether the goals and presumptions of mediation theory can be reconciled with the goals and presumptions of the underlying theory in an adult guardianship case. An adult guardianship case, by its very nature, centers on an individual whose capacity is in question. Guardianship adjudications are designed to offer maximum protection to that individual because he or she may not be capable of protecting himself or herself. Mediation, on the other hand, is grounded in the principle of self-determination and presumes that the parties are capable of participating in the process and bargaining for their own interests.¹⁴⁵ Can these two concepts be reconciled? This Part examines that question. Three arguments against the use of mediation in guardianship cases are set forth in reverse order of magnitude. The discussion of the final argument — the self-

142. *E.g.* 20 Pa. Consol. Stat. § 5511 (1975 & Supp. 2001); S.D. Codified Laws § 29A-5-312 (1997).

143. *E.g.* Ga. Code Ann. § 29-5-6(e)(4); Va. Code Ann. § 37.1-134.13 (Supp. 2001).

144. Gary, *supra* n. 4, at 413–415 (addressing the causes of conflict that make mediation appropriate in probate disputes); Soeka, *supra* n. 10, at 58.

145. *Models Standards, supra* n. 14, at Stand. I.

determination argument — is expanded to include an exploration of the special challenges involved in integrating the self-determination principle into adult guardianship cases.

A. The First Argument: Incompatibility

The first argument against the use of mediation in adult guardianship cases highlights the contrast between the theoretical construct underlying the mediation of legal disputes and that underlying an adult guardianship case. The argument presumes that mediation¹⁴⁶ is designed to resolve disputes¹⁴⁷ in a dyadic¹⁴⁸ situation — that is, to resolve specific disagreements between two parties. An adult guardianship case, on the other hand, is neither a traditional legal dispute nor is it dyadic. The outcome of an adult guardianship case is crucial primarily (and arguably *only*) to the individual who is the focus of the case. Unlike litigation, in which two or more parties have competing interests at stake, the only individual whose interest is at stake in an adult guardianship case is that adult. Although a guardianship case does involve a petitioner and a respondent, the petitioner presumptively is not pursuing his or her own interests at the expense of the respondent's interests. Rather, the very fact that a guardianship is being sought by the petitioner indicates a focus solely on the respondent's interest. The basic questions in a traditional guardianship case are whether the individual should be declared legally incapacitated and, if so, to what extent that individual's autonomy and basic rights should be sacrificed for the purpose of protecting that individual's welfare. These are not questions that can be "agreed upon" by disputing parties.

The first flaw in this argument is that it restricts too severely the breadth of issues that may arise in an adult guardianship case. Although the core issue in a guardianship case is the protection of the adult's autonomy and welfare, related issues may involve disputes between two parties that resemble traditional dyadic disputes. For example, two siblings may be arguing over which of them should be appointed the guardian of their comatose parent. A mediator can help the siblings explore

146. This argument focuses on mediation in the context of a legal dispute rather than in the broader contexts in which mediation or other neutral third-party interventions have been used throughout the centuries. See *Dictionary of Conflict Resolution*, *supra* n. 2, at 272–284 (outlining mediation in the context of a legal dispute).

147. *Id.* at 152–153 (describing various definitions of the term "dispute").

148. *Id.* at 161 (defining "dyadic dispute processing").

the “real” reason underlying the dispute (e.g., one sibling is worried that, if appointed guardian, the other sibling will move the adult out-of-state and essentially isolate him or her from the rest of the family). The flexibility of a mediation also allows the siblings to craft a solution that addresses their own interests (for instance, a co-guardianship) while still protecting the adult.

The second flaw is that this argument views mediation in too narrow a way. As is discussed in more detail in subsection (3) below, the mediation process may have far more profound effects than simply the resolution of a dispute between two parties. Mediation offers opportunities not only for dispute resolution, but also for *conflict*¹⁴⁹ resolution in that it allows the parties to recognize and deal with their incompatibilities and work together productively to manage them.

B. The Second Argument: Lack of Protection

The second argument against the use of mediation in an adult guardianship case is that mediation does not provide the protection of the adult that is the foundation of the formal guardianship system. As described in Part II, the proceeding for imposing a guardianship is laden with due-process guarantees for the adult respondent. These due-process components “work to ensure that putative wards are fully informed, properly evaluated, zealously defended, that the issues are fully developed and heard, and that an intervention is finely tuned to the needs and preferences of individuals.”¹⁵⁰ Mediation, on the other hand, focuses on informal process and agreement among the parties.¹⁵¹ In a mediation, there is a danger that the family or other participants will not ensure proper representation and evaluation of the adult and will structure a solution that meets only their own needs, or one they deem to be in the adult’s best interest rather than one that respects the adult’s autonomy.¹⁵²

The first response to the lack-of-protection argument is more of a retort than a rebuttal. This response simply points to the

149. “[C]onflict refers to the broader state of incompatibility that may or may not give rise to a dispute This definition thereby makes dispute resolution a subset of the more inclusive term *conflict resolution*.” *Id.* at 120.

150. Sabatino, *supra* n. 77, at 21.

151. This argument is a variation of the criticism raised against mediation in general that its informal and private nature jeopardizes parties who are traditionally weaker and of unequal bargaining power. *See supra* text accompanying nn. 32–33.

152. *Infra* nn. 331–343 (discussing representation of the adult).

uncomfortable realization, borne out by recent state and national surveys, that guardianship proceedings do not in practice truly offer the protections that the statutes would seem to guarantee.¹⁵³ Unfortunately, due to lack of information about alternatives,¹⁵⁴ lack of training of attorneys,¹⁵⁵ guardians ad litem,¹⁵⁶ and judges,¹⁵⁷ general misconceptions about guardianship and capacity, and the fact that some states do not require that the adult be represented by an attorney,¹⁵⁸ many guardianship proceedings result in the family members and the judge successfully promoting what they believe to be the adult's best interest over the adult's autonomy.¹⁵⁹

The second response to the argument focuses on the meaning of the term "protection." The price of the due-process "protections"

153. Haines & Campbell, *supra* n. 120, at 245–269; O'Sullivan & Hoffman, *supra* n. 100, at 28–48.

154. The findings of O'Sullivan and Hoffman prompted them to recommend that attorneys appointed to represent the [adult] receive training about the importance of due process protections for their clients and about their role in the proceedings. Such training should also cover alternatives to guardianship, the benefits and elements of functional assessments of those with disabilities, and ways to work with clients of questionable competence. O'Sullivan & Hoffman, *supra* n. 100, at 78.

155. The Maryland studies conducted by O'Sullivan and Hoffman revealed that "confusion reigns regarding what role the appointed attorney is to play. The study of case files shows that attorneys generally do not take an advocate's role, though the words of the statute and the legislative history indicate that is what the legislature intended." *Id.* at 66. Additionally they found that both judges and attorneys were confused as to whether the appointed attorney is to act only as an advocate for the adult or as both an advocate and an investigator/reporter for the court. *Id.*

156. Haines and Campbell found that, in Colorado, the court-appointed visitors who were charged with investigating the circumstances of the adult when a petition for guardianship was filed "often lack adequate training." Haines & Campbell, *supra* n. 120, at 247. They also note that "[t]he absence of uniform and specific guidelines in the specialized context of adult guardianship and conservatorship proceedings has caused confusion from court to court regarding the role of the guardian ad litem and how that role is to be fulfilled." *Id.* at 255.

157. O'Sullivan and Hoffman's survey of judges indicated a misconception about the role of the attorney in the guardianship proceeding and a general unwillingness on their parts to issue orders of limited rather than plenary guardianship. O'Sullivan & Hoffman, *supra* n. 100, at 67–73.

158. Haines and Campbell point out that, even in those states where the court is required to appoint counsel if the adult so requests, "the person to be protected may desire counsel, yet lack the capacity independently to move the court to appoint counsel." Haines & Campbell, *supra* n. 120, at 249.

159. O'Sullivan and Hoffman report that "there was strong agreement among the judges that most petitioners have the best interest of the [adult] at heart and believe that the appointment of a guardian is necessary." O'Sullivan & Hoffman, *supra* n. 100, at 69.

that are built into adult guardianship proceedings may be the emotional well-being of the adult. As noted above, an adult guardianship case is structured as an adversarial process and the burden of proof is a high one.¹⁶⁰ The petitioner's presentation is designed to persuade the judge that the adult is no longer capable of making his or her own decisions. As stated by one commentator,

the petitioner's success is largely based on an ability to demonstrate the weakness and limitations of the [adult] while avoiding his or her strengths. As a result, the [adult], who is required to be present, may feel devalued and denied the recognition of his or her true condition. Clearly, this is particularly harmful when the petitioner is a family member because the [adult] may feel betrayed.¹⁶¹

This commentator points out that the court proceedings in a similar type of case — civil commitment hearings — have been shown to have a profoundly negative psychological effect on the adult.¹⁶² Although the potential for this traumatic effect should not override the need to protect the adult's due-process rights, the anti-therapeutic results of such hearings indicate a need for research into whether the adult's rights can still be protected via a process that is less emotionally devastating. A proceeding that is truly designed to protect the adult must take this into account.

The third response to the argument is that a mediation offers its own set of protections for the adult, some of which equal or are more expansive than those offered by the guardianship laws. These protections are both procedural and substantive.

1. Procedural Protections: As noted above, the procedural protections offered in an adult guardianship case take the form of notice, the requirement for a professional evaluation, representation, and a hearing.¹⁶³ These procedural protections are also available in mediation and can be tailored specifically to

160. See *supra* text accompanying n. 143.

161. Julie Michaels Keegan, *Court Referred Guardianship Mediation: A Practical Alternative to Article 81 Proceedings* <<http://www.nysba.org/media/newsreleases/keegan.html>> (accessed Jan. 22, 2002).

162. *Id.*; see generally Janet B. Abisch, *Mediational Lawyering in the Civil Commitment Context: A Therapeutic Jurisprudence Solution to the Counsel Role Dilemma*, 1 *Psychol. Pub. Policy & L.* 120, 121 (1995) (arguing that "the lawyer's role in a functioning civil commitment system" is necessarily adversarial).

163. *Supra* text accompanying nn. 128–143.

meet the unusual requirements of an adult guardianship case.

The first protection — the notice requirement — is designed to a) inform the adult of the pending proceeding, its consequences, and the adult's rights in the proceeding,¹⁶⁴ and b) give notice of the proceeding to others who are close to the adult and thus may have information that is of value to the court.¹⁶⁵ Notice to the adult is also an essential element in mediation in that the mediation cannot proceed without the consent and participation of all the parties whose interests are at stake.¹⁶⁶ The mediator thus will ensure not only that the adult knows of the mediation, but also that the adult has and understands the information needed to participate freely and voluntarily in the process. The mediation session will typically begin with an explanation of the process by the mediator, so that both the adult and the other parties are aware of their rights in the process.¹⁶⁷ Also, the people who will receive notice of the mediation may include people who are not required by law to receive notice of the filing of a guardianship petition, thus expanding the opportunity for the disclosure of crucial information about the adult's condition.¹⁶⁸

The second procedural protection — the professional evaluation¹⁶⁹ — is easily integrated into a mediation. It is not unusual for a mediator to include in the process a “neutral expert” who can give the parties advice and an opinion on matters in which that individual has expertise.¹⁷⁰ In addition to offering this option, the flexibility of mediation allows the mediator to include the evaluations of a wider variety of outside neutral experts than is offered by some state statutes.¹⁷¹ The third protection — representation of the adult — is equally available in a mediation. An attorney may represent any party in a mediation

164. *Supra* text accompanying n. 129.

165. *Supra* text accompanying n. 130.

166. See discussion of who should attend the mediation *infra* at text accompanying notes 361–371.

167. Arguably, a good mediator would not proceed with a mediation unless he or she is assured at the outset that the adult comprehends the process and its potential consequences.

168. See discussion of who is required to receive notice of the filing of a guardianship petition *supra* at text accompanying note 130.

169. *Supra* text accompanying nn. 131–133.

170. Love & Kovach, *supra* n. 13, at 297.

171. For example, in Georgia, the only experts who are authorized to perform the court-ordered evaluation are physicians or psychologists. Ga. Code Ann. § 29-5-6(c)(1).

or may simply be present to advise a party and perhaps to assist the adult in presenting his or her wishes.¹⁷² Additionally, mediation is flexible enough to allow the participation by both an attorney and a guardian ad litem, allowing consideration of both the personal wishes and the best interests of the adult in an adult guardianship mediation.¹⁷³

The fourth requirement — the opportunity to be heard — is met in a mediation in that the adult not only is physically present at the session, but also is encouraged to be a true voice in that process.

2. Substantive Protections: In addition to the procedural protections that are or may be built into mediation, mediation may offer the adult a more effective means for protecting the adult's substantive autonomy rights. For example, mediation offers an opportunity to explore and tailor alternatives to guardianship. In many states, this concept receives only minimal consideration in court proceedings.¹⁷⁴ Additionally, even if alternatives are chosen, they may not be adequate to meet the adult's true needs. Mediation maximizes the adult's participation in structuring creative mechanisms that offer the same or better protection than the imposition of a guardianship.¹⁷⁵ Even if a guardianship is eventually imposed, mediation gives the adult and the other parties an environment in which to explore ways to

172. Hartman, *supra* n. 8, at module 3, 62–63.

173. See discussion of the representation of the adult in an adult guardianship mediation *infra* at text accompanying notes 336–344.

174. O'Sullivan & Hoffmann, *supra* n. 100, at 46–47.

175. For example, the alternatives may incorporate ongoing oversight (e.g., a family committee to approve investments) and other forms of protection (e.g., a bank account that requires two signatures for withdrawal, a bond or other security on assets held in a trust). The parties may agree to “check back” with the mediator and each other at periodic intervals to determine whether adjustments need to be made to the agreed-upon procedures.

See, for example, the protections and flexibility built into the following mediated agreement:

The three siblings will each help their mother for one month at a time, on a rotating basis, to pay bills. The mother will write and sign the checks, and the family members will oversee to assure all bills are paid, calculations are correct, etc. The mother agrees not to give away or lend any money in the next six months, except for regular gifts to her church. The petitioner agrees to adjourn the guardianship petition for six months. If at the end of that time things are going well, the petition will be dismissed.

TCSG, *Examples of Mediated Agreements*, The Exchange (May/June 1998) <<http://www.tcsg.org/exchange/mayjune98.htm>>.

limit the guardianship so that it mirrors the adult's actual incapacities.

Mediation also offers a superior form of protection of the adult in those cases in which it is determined that a guardianship petition should never have been filed. Due to culture, training, stereotyping, and even simple lack of informed judgment, those who are in a position to file petitions for guardianship may easily mistake an adult's eccentricity, vulnerability, or poor judgment for "incapacity."¹⁷⁶ Family members, caretakers, and others also often see guardianship as the only solution to pressing problems, such as the need for medical consent or for management of an individual's financial affairs.¹⁷⁷ In a formal guardianship proceeding, if the judge finds that there is no cause for imposing the guardianship, the petition is dismissed and the parties are left to return home to the same problems that prompted them to come to court in the first place. Mediation can help the parties to realize that other formal and informal solutions are available to address these problems.

C. The Third Argument: Mediation Is Grounded in Self-Determination

"Self-determination is the fundamental principle of mediation. It requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement."¹⁷⁸ Proponents of the third argument would assert that issues involving an individual with diminishing capacity are not suited to mediation because mediation presumes participation by individuals who are capable of self-determination.

Many adult guardianship cases are not referred to mediation for precisely the reason stated in the self-determination argument, in that the principal player in the case (the adult for whom the guardianship is sought) is not able to participate in the mediation. Furthermore, if the mediator begins an adult guardianship mediation but then determines that a party has become incapable of participating in the mediation, the mediation will terminate. However, the mere fact that an adult has

176. This type of widespread misinterpretation led the Wingspread experts to add the following to the Guidelines for Judges: "Respondents' values should be respected. Respondents have a right to choose risk-associated lifestyles." *Wingspread Recommendations*, *supra* n. 1, at 289.

177. *Id.* at 277.

178. *Model Standards*, *supra* n. 14, at Stand. 1.

diminished capacity does not automatically mean that he or she does not retain the ability to enter into an agreement or, at the very least, express an opinion and thus participate in a mediation, perhaps with the aid of an attorney or other representative.

The self-determination argument takes a somewhat narrow view of mediation in that it assumes that the only measure of success in a mediation is whether the parties are able to reach agreement.¹⁷⁹ It is true that a mediation often will end with an agreement, which means that all the parties must have the capacity to enter into a legally binding agreement. However, a mediation need not always result in a tangible settlement of issues. Sometimes a mediation will end without the parties reaching any agreement, but the process itself will have been “successful” if it promotes understanding and communication among them and facilitates future interaction.¹⁸⁰ For example, a mediation may result in the children of an incapacitated adult becoming more sensitive to the effect the guardianship proceeding is having on the parent and also becoming less suspicious of each other’s motives in pursuing a guardianship for the parent. Finally, it should be noted that, even if the adult is completely unable to participate (e.g., an adult in a persistent vegetative state), the actual matters in dispute in some adult guardianship mediations may not require that individual’s participation (e.g., an argument between guardian of person and guardian of property as to which of them should choose the nursing home).¹⁸¹

The self-determination principle presents unique challenges for adult guardianship mediation. The principle encompasses two concepts: 1) each party must be capable of entering into a “voluntary, uncoerced agreement”¹⁸² and 2) it is the parties themselves who reach the agreement rather than having an outsider impose a decision on the parties.¹⁸³ Application of the first concept in an adult guardianship case mandates special attention to the adult’s capacity and to the vulnerability of the adult to coercion by other parties. Application of the second concept raises questions as to the style of mediation that is most

179. See discussion of outcomes, *infra* at text accompanying notes 257–262.

180. *Supra* n. 20.

181. Hartman, *supra* n. 8, at module 3, 50–51.

182. *Model Standards*, *supra* n. 14, at Stand. I.

183. *Dictionary of Conflict Resolution*, *supra* n. 2, at 279.

appropriate for an adult guardianship case.

1. *Self-Determination and Party Capacity*

The self-determination principle places a number of requirements on a mediator. Among these is the requirement that the mediator ensure that all parties have the capacity to participate in the process.¹⁸⁴ A mediator is required either not to commence or to terminate a mediation if one of the parties does not have the capacity to participate.¹⁸⁵ However, a determination of capacity is not an easy one to make, and the consequences of finding that a party is incapacitated are serious.¹⁸⁶

Although mediation rules and standards generally require that the parties have capacity, very few give the mediator guidance as to how to assess capacity.¹⁸⁷ Fortunately, lawyers and others who have expertise in guardianship law have devoted much time and thought to the notions of capacity and incapacity¹⁸⁸ and thus may be able to offer unique contributions to this mediation quandary.¹⁸⁹

As noted in Part II above, capacity to engage in some acts may coexist with incapacity to engage in others. In other words,

184. *Model Standards*, *supra* n. 14, at Stand. VI.

185. *Id.*

186. The Georgia Ethical Standards for Neutrals describe the dilemma in this way:

Georgia mediators are confident of their ability to recognize serious incapacity. Situations in which there is a subtle incapacity are more troubling. Several mediators expressed concerns about situations in which they questioned capacity to bargain but felt certain that the agreement in question would be in the best interest of the party and that going to court would be very traumatic.

Ga. ADR R., *supra* n. 15, at app. C., Stand. 1(B) cmt.

187. See e.g. *Model Standards*, *supra* n. 14, at Stand. VI (requiring a mediator to withdraw from mediation “if a party is unable to participate due to . . . physical or mental incapacity” but containing no further definition of “incapacity”); Academy of Family Affairs, *Standards of Practice for Family and Divorce Mediation*, Stand. IX <<http://acresolution.org/research.nsf/key/stand-prac>> (accessed Jan. 22, 2002) [hereinafter *Family Mediation Standards*] (requiring the mediator to “explore whether the participants are capable of participating in informed negotiations” but offering no guidelines as to how to make this determination); but see *ADA Mediation Guidelines*, *supra* n. 80, at Guideline I(D) (listing factors to be used in making a capacity assessment). This Guideline is discussed *infra* at text accompanying note 192.

188. See discussion *supra* at text accompanying notes 78–99.

189. The capacity issue is discussed in detail by Wood, *supra* n. 4, at 808–818. She discusses the *ADA Mediation Guidelines* as well as a set of “eight ‘minimal requirements for participation in community mediation’” set forth by mediation experts Patrick G. Coy and Timothy M. Hedeem. *Id.* at 809 n. 73.

incapacity is context-specific.¹⁹⁰ The challenge in the mediation of an adult guardianship case is to determine whether the adult has the capacity to participate as a party to the mediation, either with or without representation.¹⁹¹ The *ADA Mediation Guidelines* presume that one of the parties to the mediation will be laboring under some sort of disability and thus contain a list of factors that a mediator should consider in determining whether all the parties have capacity. The *ADA Mediation Guidelines* provide as follows:

The mediator should ascertain that a party understands the nature of the mediation process, who the parties are, the role of the mediator, the parties' relationship to the mediator, and the issues at hand. The mediator should determine whether the party can assess options and make and keep an agreement. An adjudication of legal incapacity is not necessarily determinative of capacity to mediate.¹⁹²

TCSG's *Adult Guardianship Mediation Manual* also offers mediators a set of guidelines for determining whether the adult has capacity to participate in the mediation.¹⁹³ These guidelines appear in the form of eight questions that are similar in content to and expand the *ADA Mediation Guidelines*.¹⁹⁴ The questions are as follows:

- 1) Can the respondent understand what is being discussed?
- 2) Does he or she understand who the parties are?
- 3) Can the respondent understand the role of the mediator?
- 4) Can the respondent listen to and comprehend the story of the other party?
- 5) Can he or she generate options for a solution?
- 6) Can he or she assess options?

190. The *ADA Mediation Guidelines* refer to capacity as "a decision-specific concept." The Guidelines provide further that "[c]apacity to mediate may not be the same as capacity to make financial or health care decisions, to vote, marry, or drive." *ADA Mediation Guidelines*, *supra* n. 80, at Guideline I(D).

191. Even if the adult does not have capacity to participate as a party to the mediation, the mediator may still decide that the adult has the right to be heard in any mediation sessions.

192. *ADA Mediation Guidelines*, *supra* n. 80, at Guideline I(D). These Guidelines for determining capacity were included among the ethical and operational guidelines recommended by the Joint Conference on Dementia. *Recommendations of the Joint Conference*, 35 Ga. L. Rev. 423, 447 (2001).

193. Hartman, *supra* n. 8, at module 3, 53.

194. *ADA Mediation Guidelines*, *supra* n. 80, at Guideline I(D).

- 7) Is the respondent expressing a consistent opinion?
 8) Can he or she make and keep an agreement?¹⁹⁵

Both the *ADA Mediation Guidelines* and the *Adult Guardianship Mediation Manual* include as a component of the capacity determination a determination as to whether the adult can participate in mediation with the support or representation of another,¹⁹⁶ such as a family member or attorney or some other caregiver or professional.¹⁹⁷ The *ADA Mediation Guidelines* allow a mediation to proceed even when the adult does not have the capacity to participate, if a surrogate participates in the mediation on the adult's behalf.¹⁹⁸ The surrogate's role is "to express the party's interests, values and preferences."¹⁹⁹ The *Adult Guardianship Mediation Manual* approaches the issue of surrogates ("representatives") in a slightly different way. If the adult has expressed an opinion in the past on one of the issues to be mediated (such as the choice of who will serve as guardian),²⁰⁰ the surrogate is to advocate that choice.²⁰¹ If the adult has not expressed a choice, the surrogate must advocate for the adult's best interest.²⁰²

2. Self-Determination and Freedom from Coercion

Even if the adult is capable of participating in the mediation,

195. Hartman, *supra* n. 8, at module 3, 53.

196. *ADA Mediation Guidelines*, *supra* n. 80, at Guideline I(D); Hartman, *supra* n. 8, at module 3, p. 53. The Joint Conference on Dementia conferees also adopted this portion of the ADA Guidelines. See *Recommendations of the Joint Conference*, *supra* n. 192, at 447; Wood, *supra* n. 4, at 814–819.

197. In a court-referred guardianship mediation, this representative may be a guardian ad litem. See discussion of guardians ad litem, *supra* nn. 139–141 and accompanying text.

198. *ADA Mediation Guidelines*, *supra* n. 76, at Guideline I(D). "Surrogates are defined according to state law, and might be agents under durable and health care powers of attorney, guardians, or family members." *Id.*

199. *Id.*

200. This choice may have been expressed "through advance directive nominating [the] guardian, through conversation, or otherwise." Hartman, *supra* n. 8, at module 3, 53.

201. *Id.* This type of decision-making is referred to as "substituted judgment." Wood, *supra* n. 4, at 818.

202. Hartman, *supra* n. 8, at module 3, 53. Wood notes three issues that must be considered when a surrogate is used. First, to the degree the surrogate determines how and to what extent the adult participates in the mediation, care must be taken to ensure that the adult remains as fully involved as possible even if the other participants believe that involvement would be unnecessary or too upsetting for the adult. Second, "mediators should be aware of the scope of the surrogate's authority." Third, the standards employed by the surrogate should reflect the adult's substituted judgment (if past expressions are available) rather than the surrogate's assessment of what would be in the adult's best interest. Wood, *supra* n. 4, at 817–818.

two other major obstacles may inhibit the adult from entering into an uncoerced agreement. The first of these is the power imbalance that frequently exists due to the adult's diminishing capacity.²⁰³ This imbalance allows family members and others to elevate their own interests above that of the adult. The second obstacle is the tendency of persons who are involved in adult guardianship cases to think they know "what's best" for the adult and to structure solutions around that perception.²⁰⁴ This tendency results in decision-making that elevates the adult's best interest over the adult's autonomy.

An adult who is the subject of a guardianship case is most likely suffering from a diminution in his or her physical or mental capabilities.²⁰⁵ This may lead to feelings of fear, confusion, and anxiety that make the adult particularly vulnerable to outside influences.²⁰⁶ Thus, an adult guardianship case is replete with opportunities for a variety of individuals to exert power or control over the adult.²⁰⁷ Foremost among these is the family member who has filed or threatened to file a petition for guardianship.²⁰⁸ To the degree the adult is aware of the potential for a complete deprivation of his or her rights, this family member is in a unique position to influence the adult to make concessions that the adult would not otherwise be willing to make.²⁰⁹ Another potential exertion of control may come from a caregiver or family member upon whom the adult has become increasingly dependent due to his or her own diminishing abilities.²¹⁰ The mediator of an adult guardianship case must remain alert to such power imbalances and take appropriate measures to neutralize them.²¹¹ In the mediation session itself, such measures may include ensuring that the adult is adequately represented,²¹² structuring initial

203. The potential for power imbalance in these cases is discussed in Hartman, *supra* n. 8, at module 3, 57–59; Gary, *supra* n. 4, at 399, 432–433; Wood, *supra* n. 4, at 820–821.

204. Hartman, *supra* n. 8, at module 3, 64–66.

205. *Id.* at 3.

206. *Id.* at 57.

207. *Id.*

208. *Id.* at 57–58.

209. "A threat of guardianship may pressure a respondent into an agreement which gives up rights that would otherwise have been preserved." *Id.* at 57.

210. Hartman cites lack of information and the intimidation inherent in dealing with "experts" as other causes for a power imbalance in an adult guardianship case. *Id.* at 57–58.

211. Wood discusses the degree to which a mediator, who is supposed to be neutral and impartial, can intervene to rectify a power imbalance. Wood, *supra* n. 4, at 820–821.

212. *Id.* at 821.

presentations so that the adult is allowed to speak first,²¹³ ensuring the neutrality of the site of the mediation,²¹⁴ inviting experts for the adult who can convey information in an understandable manner,²¹⁵ and intervening and engaging in “reality checks” when necessary to clear up confusion and assuage the adult’s fears.²¹⁶ On a broader scale, special emphasis should be required in the training of mediators for adult guardianship cases.²¹⁷

The more subtle obstacle to self-determination by an adult in an adult guardianship case is the tendency of family members, attorneys, judges, and perhaps even mediators to want to structure a framework that is protective of the adult but that may not necessarily protect the adult’s fundamental right to autonomy.²¹⁸ A brief hypothetical illustrates this dilemma: An aging father who can no longer live on his own moves in with his very religious daughter. Soon after he moves in, the daughter discovers, to her horror, that the father spends about 20% of his monthly income on soft-core pornographic magazines and videos. He also has been giving increasingly large gifts to his local church. The daughter fears that this depletion of his income will harm him financially and is convinced that his interest in pornography is a sign that he has “lost it,” so she applies to be the guardian of his property. It is possible that the guardianship will be granted (particularly if the father has a very low income and has not been retaining enough money to support himself) and probable that the daughter, as his guardian, will stop the pornography purchases but allow at least some of the gifts to the church to continue. This will be done in the name of the adult’s “best interest” and the system will probably offer no protection of the father’s right to decide to spend his money on pornography.

The tendency of those involved in an adult guardianship case to promote the adult’s best interest over the adult’s autonomy was the focus of much concern at Wingspread.²¹⁹ First, the

213. Hartman, *supra* n. 8, at module 3, 59; Wood, *supra* n. 4, at 821.

214. Hartman, *supra* n. 8, at module 3, 59. For example, if the adult is living with the child who is promoting the guardianship, a neutral site would be preferable over their home. *Id.*

215. *Id.*; Wood, *supra* n. 4, at 821.

216. Wood, *supra* n. 4, at 821.

217. *Id.*

218. *Supra* nn. 109–117 and accompanying text.

219. See generally *Wingspread Recommendations*, *supra* n. 1 (discussing the debate over

Wingspread conferees determined that all respondents in a guardianship proceeding should have the right to an attorney whose charge was to “zealously advocate the course of actions chosen by the client.”²²⁰ Second, the conferees urged judges to respect the respondent’s values when deciding whether to impose a guardianship and cautioned judges to remember that “[r]espondents have a right to choose risk-associated lifestyles.”²²¹ Third, the conferees stated that any decision made by the court or by a guardian should be made under the standard of “substituted judgment.”²²² This standard requires that the decision-maker take into account the ward’s values and preferences when making decisions.²²³ “The doctrine of ‘best interest of the ward’ should be employed only in those instances where no evidence of the ward’s preference exists.”²²⁴ The conferees’ focus on the adult’s values and preferences was designed to offset the penchant for judges and others involved in adult guardianship cases to make decisions that mirrored their own perception of how an adult should live and behave.²²⁵ The conferees noted that “[i]n guardianship, the role of the judicial system is not to ensure that everyone acts appropriately as measured by what society favors or the values of the probate judges.”²²⁶

the adult’s best interests versus the adult’s autonomy).

220. *Wingspread Recommendations*, *supra* n. 1, at 285; *see id.* at 283 (addressing a mandatory right to counsel).

221. *Id.* at 289.

222. *Id.* at 290.

223. *Id.*

224. *Id.*

225. *Id.* at 289.

226. *Id.* A similar issue arises in cases in which family members are cut out of a decedent’s will and the decedent’s estate is left to a non-family member, such as a live-in partner or a religious or political group. The excluded family members contest the will on the ground that the decedent lacked testamentary capacity. Studies have shown that when such cases are decided by juries, the jurors tend to resolve the matter in a way that they think is fair and that conforms to societal norms. Chester, *supra* n. 10, at 185. Chester points out that juries “[focus] more on the disposition itself [rather] than on protecting a testator’s intent as expressed in the will and, therefore, they will concentrate more on fairness to the living than on fairness to the dead.” *Id.* at 187. Because societal values traditionally favor family over non-family members, the will contest will usually be decided in favor of the family member and the testator’s will is not honored. *Id.*; E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms through Minority Culture Arbitration*, 49 Case W. Res. L. Rev. 275, 279–289 (1999). Interestingly, Chester argues that one of the major benefits of using mediation in will contests is that the societal sense of fairness often prevails, while Spitko advocates the use of another ADR mechanism — arbitration — to ensure that the testator’s intent is carried out.

This caution is perhaps even more warranted in a mediation in which the parties, rather than an objective third-party, are structuring agreements and resolutions. The mediator, as guardian of the principle of self-determination, must remain alert to the distinct possibility that the other, “saner,” parties to the mediation are asserting their own values rather than reflecting the values of the adult. If the hypothetical case above goes to mediation, the daughter’s religious commitment as well as the general societal stereotype about and distaste for “dirty old men” should not be allowed to coerce the outcome. The father’s spending values (both for the church and for pornography) should be considered. Even if a guardianship is eventually imposed, the mediation gives the parties the opportunity to structure a limited guardianship that allows the father a certain amount of money to spend as he pleases.

The need for the mediator to protect the autonomy of the adult in a guardianship case does not necessarily violate the mediator’s impartiality and neutrality.²²⁷ A somewhat analogous type of mediation is a divorce mediation that involves child custody. Although the interest to be protected in that type of mediation is the child’s “best interest” (rather than the adult’s autonomy), and the child often will not be a party to the mediation, the mediation standards developed for this type of practice require the mediator to promote the child’s best interest. This is usually phrased as a responsibility on the part of the mediator to promote the parties (the parents) to work toward a resolution that is in the child’s best interest.²²⁸ The *Family Mediation Standards* include this responsibility under the Standard that is entitled “Self-Determination.”²²⁹

227. See generally Wood, *supra* n. 4, at 820–822 (discussing mediator neutrality).

228. See e.g. *Model Standards of Practice for Family and Divorce Mediation* Stand. VIII <http://www.sconet.state.oh.us/dispute_resolution/divorce/> (last updated July 5, 2001) [hereinafter *Model Family Mediation Standards*] (noting that “[a] family mediator shall assist participants in determining how to promote the best interests of children”); *Family Mediation Standards*, *supra* n. 187, at Stand. VII (noting that “[t]he mediator has a responsibility to promote the participants’ consideration of the interests of children and other persons affected by the agreement”); see generally Kimberly A. Smoron, *Cowinning Essay: 1997 Law School Essay Contest: Conflicting Roles in Child Custody Mediation; Impartiality/Neutrality and the Best Interests of the Child*, 36 *Fam. & Conciliation Cts. Rev.* 258 (1998) (discussing the role of the mediator in a child custody case).

229. *Family Mediation Standards*, *supra* n. 187, at Stand. VII(B). This is the same standard that rests “primary responsibility for the resolution of a dispute . . . with the participants” and that prohibits the mediator from making decisions or coercing decisions. *Id.* at Stand. VII(A).

3. Self-Determination and Mediator Intervention

The principle of self-determination is defined in terms of the parties *themselves* reaching their own resolutions.²³⁰ This definition calls into question the degree to which a mediator should insert his or her own opinions or judgments into the mediation process.²³¹

A mediator, while neutral, is not a passive party to the mediation. The mediator may play a variety of roles,²³² including facilitator,²³³ communicator,²³⁴ educator,²³⁵ resource expander,²³⁶ reality tester and devil's advocate,²³⁷ guardian of the details,²³⁸ reconciliator,²³⁹ and "translator and interpreter of the positions that each party wants to discuss."²⁴⁰ Mediators have different styles of mediation,²⁴¹ and the parties themselves may request that the mediator play varying roles.

Mediation styles have been the focus of much study and controversy in recent years.²⁴² A theme that pervades the

230. *Dictionary of Conflict Resolution*, *supra* n. 2, at 279.

231. The *Family Mediation Standards*, in the Standard entitled "Self-Determination," prohibit a mediator from coercing the parties into agreement or making substantive decisions for any participant. *Family Mediation Standards*, *supra* n. 187, at Stand. VII(A).

232. Yarn, *supra* n. 22, at 114–115.

233. Yarn describes this, the "foremost" role of the mediator, as the act of assisting the parties in structuring the mediation in a way that is efficient and maximizes the opportunities for success. *Id.* at 114.

234. This term is used to describe the mediator's role in helping the parties to establish or re-establish communication among themselves. *Id.*

235. The mediator may educate the parties both as to the substance of the dispute and the process of effective negotiation. *Id.*

236. Yarn points out that a mediator who is also an expert in the disputed matter may offer added insight to the parties. *Id.* Alternatively, the mediator may serve as the source of information as to alternative processes, including adjudication. *Id.* at 114–115.

237. This role is that of "an objective, neutral sounding board" who may serve to dissuade the parties from unrealistic views of the merits or value of their position. *Id.* at 115.

238. Yarn states that the mediator "will monitor the details and bring to the disputants' attention issues that may impede implementation of an emerging agreement." *Id.*

239. *Id.*

240. Shaw, *supra* n. 37, at 328.

241. Shaw states: "Mediators generally have a basic orientation that can be attributed to the individual's personality, education, training, and experience," and points out that "former judges tend to be more evaluative." *Id.* at 336–337.

242. Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. Dis. Res. 247; *Dictionary of Conflict Resolution*, *supra* n. 2, at 279. Stempel refers to this as "perhaps the most pronounced debate in alternative dispute resolution circles." *Id.* Professor James Alfini describes the debate as one that "is raging in the law reviews and the literature on dispute resolution." James J. Alfini, Moderator, *Evaluative Versus*

mediation literature is the dichotomy²⁴³ between “evaluative” mediation and “facilitative” mediation.²⁴⁴ In general terms, an “evaluative” mediator “assesses strengths and weaknesses in parties’ cases and predicts court outcomes,”²⁴⁵ and “steers the parties toward a resolution.”²⁴⁶ A “facilitative” mediator focuses on maximizing the parties’ abilities to reach their own resolutions rather than resolutions that are directed by the mediator.²⁴⁷ A

Facilitative Mediation: A Discussion, 24 Fla. St. U. L. Rev. 919, 919 (1997). Among the most recent contributions to the debate are the Stempel article, *id.*, and the Love & Kovach response, *supra* n. 13, and a set of articles by the same authors and Joseph B. Stulberg in a Symposium published at 24 Fla. St. U. L. Rev. 919–1008 (1997).

243. Professor Stempel argues that this is a “false dichotomy.” Stempel, *supra* n. 242, at 247. Stempel argues for an “eclectic” mix of styles that conforms to the content of the dispute and the circumstances of the participants. *Id.* at 292.

244. The major source of this categorization is Professor Leonard Riskin, who, in 1994 and 1996, laid out a “grid” of mediator orientations, which included both the facilitative, evaluative component and a broad-narrow component. Leonard L. Riskin, *Mediator Orientation, Strategies and Techniques*, 12 *Alts. to High Cost Litig.* 111 (1994) [hereinafter Riskin, *Mediator Orientation*]; Leonard L. Riskin, *Understanding Mediators’ Orientation, Strategies, and Techniques: A Grid for the Perplexed*, 1 *Harv. Negot. L. Rev.* 7 (1996) [hereinafter Riskin, *Understanding Mediators’ Orientation*]. Riskin described a range of evaluative activities in which a mediator might engage:

- 1) Assess “the strengths and weaknesses of each side’s case.”
- 2) Predict outcomes of court or other processes.
- 3) Propose position-based compromise agreements.
- 4) Urge or push the parties to settle or to accept a particular settlement proposal or range.

Riskin, *Understanding Mediators’ Orientations*, *supra* n. 244, at 28, 31–32.

245. Nancy Kauffman & Barbara Davis, *What Type of Mediation Do You Need?*, 53 *Dis. Res. J.* 8, 10 (May 1998). Evaluative mediation has been described as follows:

Evaluative mediation, by contrast [to facilitative mediation], is the technique in which a mediator may candidly inform the disputants (either individually or collectively) of the mediator’s evaluation of their dispute. Under a pure evaluative approach, for example, the mediator may tell the parties that both are making unreasonable demands and provide the parties with a range of likely court outcomes if the case is litigated. Under this most blunt example of an evaluative approach, the mediator may give the disputants an opinion of the likely bottom line of litigation and encourage the parties to either compromise toward that mean or to develop alternative means of resolution that avoid the likely court outcome or avoid the risk of loss in disputes that tend more to the zero-sum.

Stempel, *supra* n. 242, at 252. Stempel points out that Florida has recently amended its mediation rules to allow the mediator to provide “legal information and insight . . . but only at the request of the parties.” *Id.* at 262.

246. Shaw, *supra* n. 37, at 335.

247. The Georgia Supreme Court Alternative Dispute Resolution Rules define mediation as a “facilitative” process, as follows:

[Mediation is a] process in which a neutral facilitates settlements discussions between the parties. The neutral has no authority to make a decision or impose a settlement upon the parties. The neutral attempts to focus the attention of the

facilitative mediator believes that the appropriate approach is “to assist disputing parties in making their own decisions and evaluating their own situations.”²⁴⁸ An additional perceived benefit to the facilitative style is that the parties reach resolutions that are not only workable for the matter at issue, but also tend to preserve the parties’ ability to work together in the future.²⁴⁹ Proponents of the facilitative style of mediation do not dispute the value of neutral opinion-giving by experts, but argue that evaluative intervention as to the substantive issues of the mediation is inconsistent with the role of a mediator.²⁵⁰

Proponents of evaluative mediation argue that, although facilitation should remain the primary focus in mediation, mediators should have the discretion to move to an evaluative mode if necessary.²⁵¹ For instance, in an adult guardianship case, a compelling reason for moving to an evaluative mode would be that a power imbalance exists between the parties and results in their structuring an agreement that is patently unfair to the weaker party.²⁵² At this point, proponents of evaluative mediation

parties upon their needs and interests rather than upon rights and positions.”

Ga. ADR R., *supra* n. 15, at app. C.

248. Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 Fla. St. U. L. Rev. 937, 939 (1997). Love & Kovach, *supra* n. 13, at 303–304, point out that it is appropriate for a mediator to engage in “reality testing,” which is designed to spark the parties to make their own assessments rather than to allow the mediator to insert her opinion into the process.

249. Kauffman & Davis, *supra* n. 245, at 10; Riskin, *Understanding Mediators’ Orientation*, *supra* n. 244, at 24. “Evaluative mediators sometimes dismiss proponents of a facilitative approach as being out of touch with the way the world really works.” John Lande, *Stop Bickering! A Call for Collaboration*, 16 *Alts. to High Cost Litig.* 1 (Jan. 1998).

250. Love & Kovach, *supra* n. 13, at 299–300. Evaluative mediation has been called an oxymoron in that it is inherently adjudicative. See Kimberlee K. Kovach & Lela P. Love, “Evaluative” Mediation is an Oxymoron, 14 *Alts. to High Cost Litig.* 31 (1996); Joseph B. Stuhlberg, *Facilitative Versus Evaluative Mediator Orientations: Piercing the “Grid” Lock*, 24 Fla. St. U. L. Rev. 985, 988 (1997). Love & Kovach, *supra* n. 13, at 297, suggest that if a mediator is offering evaluation in addition to mediation the process can be more accurately delineated as “mediation plus [neutral] evaluation.” A mediator does bring his or her expertise to bear when making evaluations about the process itself, such as “siting and seating arrangements, participant mixes, agenda constructions, session configurations, food breaks, deadlines, reality testing, and drafting choices.” *Id.* at 303. Although the participants may contribute to these decisions, “participants can justifiably look to the mediator’s expertise in these matters of process.” *Id.*

251. Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator’s Role*, 24 Fla. St. U. L. Rev. 949, 956 (1997).

252. An underlying presumption by an evaluative mediator is that she has the knowledge, expertise, training, and information necessary to give an informed opinion.

argue, “the mediator’s silence also carries enormous weight.”²⁵³ In other words, this is an appropriate time for a mediator to insert his or her own opinion into the process to protect the interests of the weaker party.²⁵⁴ Proponents of evaluative mediation also argue that few mediators act as pure facilitators²⁵⁵ and that evaluation plays a role in many successful mediations.²⁵⁶

The discourse about mediator styles is further complicated by another current debate — that over appropriate mediation outcomes.²⁵⁷ Some argue that a successful mediation is one in which a tangible settlement is reached.²⁵⁸ Others focus more on the intangible psychological benefits of mediation and look to see “whether the parties have gained some sense of empowerment to make decisions and have recognized the other’s perspective.”²⁵⁹ Evaluative mediation may enhance the first of these outcomes, while facilitative mediation is well-suited for both types of outcomes.²⁶⁰ The second outcome is also the goal of a newer model of mediation referred to as “transformative” mediation.²⁶¹ Transformative mediation is designed to allow the participants to “increase their personal sense of power, capacity, and effectiveness while also reaching beyond their own perspective and interests to understand the other person’s perspective.”²⁶²

This Author has neither the background nor the expertise to

Douglas E. Noll, *A Theory of Mediation*, 2001 Dis. Res. J. 78, 81.

253. Stempel, *supra* n. 251, at 958.

254. A proponent of facilitative mediation would argue that the appropriate move at this point is to urge each party to consult with his or her own legal counsel. *Id.* at 957. Alternatively, the mediation should “be terminated, or formally converted to a more evaluative process.” Stempel, *supra* n. 242, at 287.

255. Golann’s observations of a number of professional mediators showed that “the use of evaluative techniques is . . . frequent, even among those mediators who favor a broad, facilitative approach.” Dwight Golann, *Variations in Mediation: How — and Why — Legal Mediators Change Styles in the Course of a Case*, 2000 Jnl. Of Disp. Res. 41.

256. Stempel, *supra* n. 251, at 973 notes that “it appears that the most highly sought mediators are those who provide exactly this sort of evaluative feedback to the parties and use some measure of evaluation as part of their facilitation of reasonable party dialogue leading to settlement.”

257. See Noll, *supra* n. 252, at 83.

258. This measure is favored by “court administrators and a large number of practitioners.” *Id.* “A good outcome occurs when an agreement is reached and the case is removed from the docket by a dismissal.” *Id.*

259. *Id.* Noll adds a third type of outcome that is measured “by the degree of personal reconciliation that occurs between the parties.” *Id.*

260. See Kauffman & Davis, *supra* n. 245, at 10.

261. Noll, *supra* n. 252, at 83.

262. *Dictionary of Conflict Resolution*, *supra* n. 2, at 418.

take sides in the debate over facilitative versus evaluative mediation. A simple hypothetical, however, would seem to illustrate that an adult guardianship case demands a flexible mix of styles ranging from non-directive to directive.²⁶³ The central figure in the hypothetical is an elderly father who has shown increasing signs of disorientation, forgetfulness, and carelessness, and has engaged in behavior that could have endangered his own safety (e.g., left a pot on a lighted stove or lost his Social Security check). In earlier, more lucid years, Father had repeatedly said that he did not want a guardian “unless it is absolutely necessary.” Both of Father’s daughters feel that he now needs a guardian of both his person and property, but they do not agree as to which of them should be appointed. The first daughter lives near Father and has already taken responsibility for preparing his meals and checking up on him on a daily basis. The second daughter, on the other hand, is a financial advisor who has always handled Father’s investments. The daughters have argued bitterly over this point and each has come to be exceedingly distrustful of the other’s motives. One files a guardianship petition. An attorney is appointed for Father, and the case is referred to mediation.

A facilitative mediation of this case would be beneficial for a variety of reasons. The dispute over who should be appointed guardian could be resolved with a solution that is tailored to meet the daughters’ concerns. For example, the proposed solution may be that the first daughter will be appointed guardian of the person and property of Father and the second daughter will manage a trust to which will be transferred the bulk of Father’s assets. The shattered relationships between the parties may be mended at least partially as the parties hear each other’s concerns and work together to reach an agreement. (This second benefit could also occur through the use of the transformative style, with its emphasis on recognition and empowerment.)²⁶⁴ The communication channels and the collaborative spirit engendered by facilitative mediation may also greatly improve the quality of

263. Stempel, *supra* n. 242, at 292–293, argues for a mix of styles, and Golann, *supra* n. 255, at 61, notes such a mix among the professional mediators he observed. The Joint Conference on Dementia recommendations state that “[m]ediators working with persons with dementia should adopt a facilitative rather than directive style.” *Recommendations of the Joint Conference*, *supra* n. 192, at 448.

264. See discussion of transformative mediation *supra* at text accompanying notes 261–262.

interactions between the daughters in the future.

On the other hand, an exclusively non-directive approach by the mediator might not be appropriate in this case in that the interests of the central figure — Father — may not be adequately protected. A recognized danger in allowing parties to structure their own settlements is that a stronger party's wishes may prevail over those of a weaker party.²⁶⁵ In this case, the danger is more subtle. The two daughters may view the dispute as simply a dispute over who should be Father's guardian. The fact of Father's past resistance to a guardianship may not even be revealed in their discussions, not due to any bad faith on their parts, but due to the fact that both agree that a guardianship is necessary. Father may be too confused to remember his former resistance or to understand the legal ramifications of a guardianship. Father's attorney may not know of Father's past resistance and may not be aware of the array of alternatives to guardianship. The mediator could step in at this point and call into question the basic assumption that Father needs a guardian. The mediator could insert into the process his or her opinion that the court will require that Father be professionally evaluated and may not see enough evidence of a need to appoint a guardian of Father's person or property. Even if the mediator feels that some protection of Father is warranted by his diminishing capacity, the mediator may point out that guardianship is not always the best option. The mediator could explain to the parties that a guardianship is a cumbersome procedure, that the court proceedings are often stressful and traumatic for all parties, and that the appointment of a guardian will result in a deprivation of a number of Father's basic rights. Upon offering this opinion, the mediator could then go on to suggest that the parties consider alternatives to both types of guardianship. It is not important whether this intervention is labeled "evaluation" or "reality-testing."²⁶⁶ The basic issue is whether Father's combined autonomy and welfare needs are protected.

265. See discussion *supra* at text accompanying nn. 203–217.

266. Reality-testing is considered an appropriate mediator role by the proponents of facilitative mediation. *Supra* n. 248.

*IV. WHEN MIGHT MEDIATION BE USED IN ADULT
GUARDIANSHIP CASES?*²⁶⁷

Guardianship cases typically (but not always) proceed through three or four stages. Although the analysis in Part III of this Article focuses primarily on the first two stages, mediation may be an appropriate mechanism for resolving disputes in any of these stages.²⁶⁸

A. Pre-petition Stage

The pre-petition stage is the period of time that leads up to (or may lead up to) the filing of a petition for guardianship.²⁶⁹ During this period, the adult is showing signs of diminishing capacity (e.g., forgetfulness, physical and mental disorientation, unusual anxiety) and often engaging in atypical and sometimes disturbing behavior.²⁷⁰ As the need for assistance in both health-related and financial matters becomes more apparent, family members, caregivers, and friends often engage in informal and sometimes piece-meal strategies for coping with the consequences of the adult's changing state.²⁷¹ For example, a son will suggest to Mother that his name be added to her checking account so that he can "help with her bills," or a daughter will insist that she accompany Mother to every doctor's visit and be allowed to sit in on the consultation. Frequently the family members and others are proceeding without advice from attorneys, social workers, and other professionals, and sometimes the short-term coping mechanisms backfire. When the daughter finds out that the son has not only added his name to Mother's bank account but also convinced Mother to sign a general financial power of attorney naming him as her agent, she becomes suspicious that the son is

267. This Article focuses solely on the use of mediation in adult guardianship cases. For a discussion of the broader array of alternative dispute mechanisms that may be brought to bear in cases involving individuals with diminishing capacity, see Wood, *supra* n. 4, at 822–833. The Joint Conference on Dementia adopted Wood's recommendation that collaborative problem-solving approaches, including "informal negotiation, negotiation involving advocates, facilitated discussions, mediation, and ombudsman programs," be "the first option considered in addressing disputes of persons with dementia." *Recommendations of the Joint Conference*, *supra* n. 192, at 446–447.

268. See Gary, *supra* n. 4, at 399; Soeka, *supra* n. 10, at 58–59.

269. Only a few of the TCSG cases involved pre-petition situations because the pilot programs worked primarily from court referrals. Hartman, *supra* n. 4, at 3.

270. *Id.* at 1.

271. *Id.* at 2.

really trying to divert Mother's assets to himself. Alternatively, when the daughter tries to act under a medical power of attorney in which Mother names her as her agent, Mother may start to second-guess the wishes she set out in the power of attorney and become paranoid that her daughter is out to harm her.

Mediation may be a particularly suitable process during this stage for a number of reasons. First, mediation allows the parties to deal with the emotional aspects of a situation as well as with the legal issues.²⁷² The initial phases of an adult's diminishing capacity are traumatic not only to him or her but also to those around him or her.²⁷³ Feelings of helplessness and impending doom are shared by both the adult and those who love him or her. Worries about financial needs may be heightened as the need for some assistance in day-to-day living becomes more obvious. Repressed family struggles over control and "Mom always liked you best" are resurrected as the children vie to take care of (or to take over the care of) an ailing parent. Early non-judicial intervention in the form of mediation may not only offer the parties information about appropriate coping strategies, but may also help the parties to address tensions before they escalate into emotional combat.

The more challenging question for those who advocate mediation at the pre-petition stage is not whether it will be effective, but rather whether the parties will know to use it.²⁷⁴ Because the general public remains basically unaware of the availability of mediation services, most families would not know to ask for this type of professional assistance. TCSG reports one possible way to channel more families into mediation at this crucial stage. Pilot projects in two Ohio counties provide "screener

272. Gary, *supra* n. 4, at 425-426.

273. Professor Gary describes the emotional dimension as follows:

In a guardianship proceeding, the older adult faces a potential loss of dignity, as well as the loss of legal and civil rights. The appointment of a guardian may assist the older adult with practical or financial needs, but by ignoring the emotional aspect of the proceeding, may leave the protected person confused, angry, or bitter.

A mediation proceeding gives the older adult a voice.

Id. at 426.

274. Hartman describes the problem as follows:

The second reason that more cases do not go to mediation is that older people, their families, advocates, attorneys, aging agencies, and courts either do not know that mediation is possible, or are not sure that it is appropriate in adult guardianship cases. Mediation is a new and emerging field, and many individuals have never heard of it.

Hartman, *supra* n. 4, at 3-4.

training” (training people to recognize potential cases for mediation) to individuals in county agencies, social-services agencies, and hospitals, and allow those agencies to petition the court to have a matter referred to the guardianship mediation pilot project even if a petition for guardianship has not been filed.²⁷⁵ Similarly, if a court has a “screening agent” (an individual who responds to initial inquiries about guardianship and who screens all petitions to divert those that are not appropriate guardianship cases),²⁷⁶ the screening agent can be given the option of and information necessary to direct the parties to mediation.

B. Initial Petition Stage

In the pre-petition stage, it is often the case that one of the family members, caregivers or friends becomes so frustrated or so suspicious that he or she contacts an attorney about filing a petition for guardianship.²⁷⁷ A number of issues, both legal and emotional, are raised by the filing of the petition. Disputes may erupt between Mother and her children as to whether she needs a guardianship at all, or between the two children as to who should serve as guardian, or among other friends and family members who do not necessarily want to become Mother’s guardian, but

275. Exchange TCSG, *Guardianship Mediation Question & Answer* <<http://www.tcsg.org/exchange/april98.htm>> (last updated Mar. 14, 2002). Summit County, Ohio, has proposed the following revision to its Probate Court Rules:

If a dispute involves a matter under the jurisdiction of Probate Court, including a client with mental health, mental retardation and developmental disability, or aging adult issues, but a guardianship case has not been filed, an agency may file a motion with the Court to refer the matter to the adult guardianship mediation pilot project. A case shall be referred if mediation is likely to resolve the dispute as a less restrictive alternative to guardianship.

Summit County Ct. of Common Pleas R. of the Prob. Div., R. 98.1(E).

276. As noted above, Wingspread Recommendation I-D recommended that “screening” be used “to divert inappropriate cases out of the guardianship system.” *Wingspread Recommendations*, *supra* n. 1, at 279. The National Probate Court Standards also recommend that the court establish a screening process. *National Probate Court Standards*, *supra* n. 79, at Stand. 3.3.2.

277. TCSG’s study of guardianship practice in ten states found the following factors to be common “triggers” for the filing of a guardianship petition: 1) Health problems: “84% [of petitioners] identified a diagnosed medical or psychiatric condition as a reason for filing the petition.” Hartman, *supra* n. 8, at module 3, 3. 2) Institutionalization: “Almost one half of the petitioners . . . identified the need for placement as a reason for filing the petition.” *Id.* at 5. 3) Financial Problems: “Over half of the petitioners interviewed in the TCSG guardianship survey indicated that need for better financial management was one of the main reasons a guardianship petition was filed.” *Id.* at 7.

who fear that they will be isolated from her. Some will argue that less restrictive alternatives (trusts, powers of attorney, etc.) or a limited guardianship will meet Mother's needs, while others will contend that a plenary guardianship is the only viable solution.

At this stage, a number of outsiders have also joined the fray. As noted above, in many states Mother will have her own attorney, or at least a visitor or guardian ad litem whose charge is to guard her best interest.²⁷⁸ Often, the individual who files for the guardianship will do so with the aid of an attorney.²⁷⁹ Independent professional evaluators (physicians, psychologists, etc.) are enlisted to submit their opinions, and the whole process is overseen by the judge and court personnel.

As noted in Part II, the filing of the petition triggers a number of due-process guarantees for the adult for whom the guardianship is sought. Designed to be protective of the adult, these guarantees also have the potential of turning the guardianship proceeding into an adversarial process that may result in unintended trauma and expense for the adult and the other parties involved.²⁸⁰ If the court refers the parties to mediation upon the filing of the petition,²⁸¹ the parties may resolve in advance many of the disputes that surround the appointment of a guardian (such as who will serve as guardian,²⁸² what limitations there will be on the guardianship,²⁸³ and where

278. *Id.* at 30.

279. *Id.*

280. Hartman explains the dilemma in this way:

[T]he adversarial process itself imposes unnecessary economic and emotional costs to the parties in many cases. The adversarial model typically results in "a win-lose" situation and forecloses possibilities of dialogue among the parties to explore alternative approaches and reach mutually satisfactory solutions. A petition for guardianship can have dramatic and traumatic consequences not only for the older individual, but for all the people involved . . . Moreover, the process itself is often bitterly destructive of family relations.

Hartman, *supra* n. 4.

281. The National Probate Court Standards recommend that the court "when appropriate, make available to guardianship cases pre-trial procedures to narrow the issues and facilitate their prompt and fair resolution." *National Probate Court Standards*, *supra* n. 79, at Stand. 3.3.3. Mediation could be included as a viable option among these pre-trial procedures.

282. For example, TCSG reports a mediated agreement in which one sibling would serve as guardian of the mother's property and two others would serve as co-guardians of her person. Ctr. for Soc. Gerontology, *The Exchange, Examples of Mediated Agreements 1* <<http://www.tcsg.org/exchange/mayjune98.htm>> (accessed Jan. 21, 2002).

283. For example, TCSG reports a mediated agreement in which the sibling who was to serve as guardian of the estate agreed to consult with various financial planning

the adult will live after the guardianship is imposed²⁸⁴) and may even devise a framework that will make the imposition of a guardianship unnecessary.²⁸⁵

Access to information about mediation is easier at this point in that the court in which the petition is filed either may have a formal referral procedure or may at least know what mediation services are available to the parties. However, referral to mediation is far from becoming a common practice in adult guardianship cases. As discussed in Part III, a variety of questions remain unanswered concerning both the appropriateness and actual process of mediating a case that includes a party of diminishing capacity. Another obstacle to the widespread use of mediation in adult guardianship cases is the scarcity of mediators who are trained for this type of mediation.²⁸⁶ Part V includes a recommendation for training that stems from the observation that this type of mediation seems to require not only mediation skills, but training in the wide variety of other legal, psychological, and social issues that are implicated in cases that involve adults with diminishing capacity.

C. Ongoing Issues During the Guardianship²⁸⁷

The appointment of a guardian rarely resolves the conflicts that surround the adult's aging process. Throughout the guardianship, questions will be raised by family members and others as to the conduct of the guardian, including why certain investments were made or a certain nursing home was chosen, or even whether the guardian is being appropriately diligent about meeting the adult's needs. The court may challenge items on the

professionals concerning the investment and management of the adult's funds and to invite the other siblings to attend three consultation meetings. *Id.*

284. For example, TCSG reports a mediated agreement in which the adult's girlfriend would be his guardian and the parties agreed on a nursing home and on visitation for all involved. *Id.*

285. For example, TCSG reports a mediated agreement in which the individual who filed the guardianship petition agreed to instead become the adult's agent under a limited immediate financial power of attorney and a medical power of attorney that would become effective when the adult could no longer make medical decisions for herself. *Id.*

286. Hartman, *supra* n. 4.

287. See Wood, *supra* n. 4, at 791–796 (discussing the use of alternative dispute resolution in common disputes for people with dementia; these include disputes over housing, in community based settings, institutional long-term care, intergenerational disputes, guardianship, disability, health-care delivery, and bioethical and health-care disputes).

guardian's annual accounting. The adult's condition may worsen, and the limited guardianship that was initially granted may need to be expanded. The adult may remain opposed to the concept of guardianship and its ensuing loss of freedom. Changing circumstances may force unforeseen decisions, such as a move out of state by the guardian who wants to take the adult with him or her. The guardian may be rendered unable to serve by an accident or illness, and a successor guardian will need to be appointed. Unusual situations may occur, such as a case of spousal abuse that will warrant the adult's guardian filing for a separation or divorce on his or her behalf. And, as the adult nears death, painful decisions will be made as to whether to continue life-prolonging but non-curative medical procedures.

Mediation in this stage may result in workable solutions that will not only resolve the immediate conflict, but will also open lines of communication that will help mitigate future conflicts.²⁸⁸ For example, an adult for whom a guardian of the property has been appointed does not automatically lose his or her freedom to

288. A recent case illustrates the type of emotional trauma and expensive litigation that could have been avoided had mediation occurred during the guardianship. In *Howard v. Estate of Howard*, 548 S.E.2d 48 (Ga. App. 4th Dist. 2001), Mr. and Mrs. Howard married late in life. *Id.* at 50. Both had children from previous marriages. *Id.* Before they married, Mr. Howard promised his wife-to-be that he would make arrangements to take care of her should he die before she did. *Id.* The day after they married, he changed a bank account (which then had \$33,000.00 in it) to a joint account in both their names. *Id.* Five years after their marriage, he executed a will in which he left her a life estate in their residence and all the funds in "the joint bank account." *Id.* He left the residue of his estate to his daughters. *Id.* He later withdrew \$5,000 from the joint account and bought an annuity which he had issued in his wife's name as sole beneficiary. *Id.* Three years after he executed his will, Mr. Howard was found to be in need of a guardian and one of his daughters was appointed. *Id.* The day after she was issued letters of guardianship, the daughter closed the joint account (then consisting of \$41,500.00) and transferred the funds to a guardianship account in her name. *Id.* at 50-51. After determining that Mrs. Howard had contributed \$400 to the account, the guardian wrote her a check for that amount. *Id.* at 51. The next year, the guardian discovered the annuity and, with court permission, liquidated that and put the funds into the guardianship account. *Id.* The guardian apparently did not know about Mr. Howard's will. *Id.* When he died, Mrs. Howard sued the guardian, claiming she had converted the funds. *Id.* The outcome of this litigation is still pending. How could this case have been different if the parties and the court had known of and been familiar with using mediation? Mrs. Howard may have asked for mediation when she received the \$400 check. Mr. Howard may have known that his daughter was closing the accounts and asked for a third-party neutral to facilitate a discussion between them. Even the court could have referred the case to mediation when the guardian petitioned to close the annuity account. Although this is mere speculation, it is not implausible that the expense and trauma of the litigation that followed Mr. Howard's death could have been avoided by an earlier intervention.

engage in daily activities, such as grocery shopping, buying new clothing, or eating at a restaurant. The guardian, on the other hand, may perceive his or her role as one of maintaining tight reins on the adult's finances. The adult may find it demeaning to have to ask the guardian for money before every shopping trip, while the guardian may fear that the adult's susceptibility to aggressive marketing will cause the adult to engage in frivolous spending. Mediation could help the parties reach a compromise on this matter, such as the weekly allowance of a certain sum of spending money to the adult.²⁸⁹ In addition to the advantage of an immediate resolution, the adult and the guardian will now realize that there is an avenue for facilitated communication between them that may ward off future, more formalized complaints by the adult or more unnecessarily restrictive measures by the guardian.

D. Termination of the Guardianship

It seems instinctively obvious that most guardianships of adults, particularly of elderly adults, will terminate only upon the death of the adult. At that point, the guardian may or may not continue to serve in some fiduciary capacity as the personal representative of the adult's estate.²⁹⁰ Often the death of the adult will trigger disputes that no one wanted to raise while the adult was still alive.

Some guardianships will end due to the happier cause of the adult regaining enough capacity for a complete restoration of rights.²⁹¹ The process of restoration will involve both a legal proceeding and an emotional process. Mediation may be helpful both in determining whether a restoration is in order²⁹² and, if so, how the transition will be made.

289. TCSG reports a mediated agreement that reached this result. Exchange TCSG, *Examples of Mediated Agreements* <<http://www.tcsg.org/exchange/mayjune98.htm>> (last updated May/June 1998).

290. For example, the Georgia Code provides that, upon the death of a ward who dies intestate, the guardian of the property will act as administrator of the ward's estate. Ga. Code Ann. § 29-2-23.

291. A petition for termination of the guardianship may be filed if the adult no longer needs a guardian. *E.g.* UGPPA, *supra* n. 76, at § 318.

292. TCSG reports a mediated agreement that resulted after an adult had filed a petition to terminate the guardianship. TCSG, *supra* n. 289, at 2. Under the agreement, the adult was to move to an apartment and the guardian would cooperate with home health aides. *Id.* The adult agreed to delay the petition for six months and, after a follow-up mediation, to dismiss the petition if the living arrangement proved satisfactory. *Id.*

Mediation can thus serve as a useful dispute-resolution process in all stages of a guardianship. Part V examines the practical problems that may arise when issues in an adult guardianship case are submitted to mediation.

*V. RECOMMENDATIONS FOR THE INTEGRATION OF
MEDIATION INTO ADULT GUARDIANSHIP CASES*

A reconciliation of the intellectual concepts of mediation and guardianship may assuage those who have, on theoretical grounds, resisted using mediation in adult guardianship cases. However, that is only the beginning. A new set of challenges arises when traditional mediation techniques and procedures are applied to traditional adult guardianship cases. This Part explores these challenges and makes recommendations for the integration of mediation into adult guardianship cases. These recommendations are preliminary in nature and are offered as the starting point for a detailed study of these issues by experts in both mediation and adult guardianship.

A. Education about Mediation

As noted above, one of the major reasons why mediation is not used in adult guardianship cases is simply that those involved in the process do not know it is available.²⁹³ The education of judges, court personnel, attorneys, hospitals, social-service agencies, and the general public about the availability of mediation services is a crucial component of the integration of mediation into the adult guardianship arena.²⁹⁴ TCSG's approach of disseminating information through "screeener training"²⁹⁵ is an excellent one. Additional efforts should be made to inform judges and attorneys who deal with adult guardianship cases, through continuing legal education, seminars, and the production and distribution of written materials about mediation. Also, lists of mediators who are trained in guardianship mediation should be made available to judges and court personnel.

293. See discussion *supra* at text accompanying nn. 274–276.

294. The Joint Conference on Dementia recommended measures for "enhancing awareness/interest in dispute resolution," including the sponsoring of workshops and dissemination of information by judges' organizations, local and national bar associations, elder law organizations, and organizations that deal specifically with dementia, such as the Alzheimer's Association. *Recommendations of the Joint Conference, supra* n. 192, at 445–446.

295. See discussion *supra* at text accompanying nn. 275–276.

The education of the general public about the use and availability of guardianship mediation can be accomplished through the many existing organizations and entities who serve the senior population. Some of these entities already include information about the use of mediation in their materials on other types of disputes, such as consumer cases, health-care issues,²⁹⁶ or grandparents' visitation rights.²⁹⁷ Information about mediation in adult guardianship cases should also be included in the variety of publications that advise older adults and their families about alternatives to guardianship. Simple brochures about guardianship, the alternatives, and the use of mediation should be produced and made available to senior community centers and housing facilities, including assisted-living and nursing homes.

B. Mediator Training

The need for specialized mediator training — particularly training in substantive areas of law — is a topic of continuing debate among mediators.²⁹⁸ The parties to a private mediation may choose whomever they please as mediator, regardless of whether that individual has training even in basic mediation skills.²⁹⁹ However, as mediation is both an art and a science, it is generally agreed that the best mediators are those who have not only innate capabilities,³⁰⁰ but also a good balance of training³⁰¹

296. *E.g.* Secure Seniors, Inc., *When It's Time for a Helping Hand* <<http://www.secure-seniors1.com/>> (accessed Jan. 21, 2002).

297. *E.g.* AARP, *Grandparents Raising Grandchildren: Where to Find Help* <<http://www.aarp.org/confacts/programs/grandraising.html>> (accessed Jan. 21, 2002).

298. *See generally* Love & Kovach, *supra* n. 13, at 298–300 (a debate that overlaps the facilitative versus evaluative debate, discussed *supra* at text accompanying notes 219–239, in that a purely facilitative mediator may not have the need to have mastered the substantive law while an evaluative mediator will not be able to give an informed opinion without having done so).

299. The ABA Model Standards reinforce this notion: “Any person may be selected as a mediator, provided that the parties are satisfied with the mediator qualifications.” *Model Standards*, *supra* n. 14, at Stand. IV.

300. Yarn states that the “primary qualities one should be looking for [when choosing a mediator] are impartiality, objectiveness, intelligence, empathy, reliability, optimism, creativeness, flexibility, patience, perseverance, and ability to communicate (both to express and to hear).” Yarn, *supra* n. 22, at 126. He points out that “few people can be taught to mediate effectively unless they already have developed these qualities to some extent.” *Id.*

301. Yarn notes, “Mediating may be an art, and some people may have an aptitude, but there is some essential craft that can and should be learned.” *Id.* at 127.

and experience,³⁰² at least in the area of basic mediation skills.³⁰³ Also, as more mediations fall within the province of the courts, interest is growing in developing standards and guidelines, or even licensing and certification requirements, for mediators.³⁰⁴ National organizations such as the American Bar Association and the American Arbitration Association have developed standards that address the qualifications and training of mediators.³⁰⁵ These organizations are faced with the challenge of striking a balance between ensuring that mediators are appropriately qualified and retaining the flexibility of mediation as a process that is driven by the parties themselves.³⁰⁶ Additionally, these organizations must

302. Research indicates “that mediators who had formerly mediated six to ten cases had a 64% settlement rate, whereas new mediators had only a 30% success rate.” Shaw, *supra* n. 37, at 347.

303. The following list illustrates the types of topics that are covered in a basic mediation training course:

Analyzing the causes of conflict and learning strategies to manage them[;]
Structuring the mediation process through a step-by-step problem-solving procedure[;]
Negotiating strategies that lead to joint problem solving[;]
Communicating effectively as a mediator (listening, framing, and reframing)[;]
Handling strong emotions that interfere with problem solving[;]
Exercising power effectively[;]
Responding to ethical dilemmas that arise in mediation[;]
Implementing a mediation program as a private practitioner or as part of an organization’s problem-solving process

CDR Assoc., *Training, The Mediation Process* <<http://www.mediate.org./med-proc.htm>> 1 (accessed Jan. 21, 2002).

304. Shaw, *supra* n. 37, at 348–349. Standard IV of the ABA Model Standards provides in part as follows: “In court-connected or other forms of mandated mediation, it is essential that mediators assigned to the parties have the requisite training and experience.” The comments add “[w]hen mediators are appointed by a court or institution, the appointing agency shall make reasonable efforts to ensure that each mediator is qualified for the particular mediation.” *Model Standards, supra* n. 14, at Stand. IV.

305. *E.g. Model Standards, supra* n. 14, at Stand. IV (discussed at *supra* n. 304).

306. Shaw, *supra* n. 37, at 339. One commentator describes another set of concerns arising from the trend to require mediator training and licensure as follows:

There is an ongoing debate as to whether mediators should be licensed or certified. Some believe that mediators should be licensed in order to prevent unqualified persons from becoming mediators. They believe that a system of licensing or certification is necessary in order to protect consumers of mediation services. Others do not want to see mediation become a profession open only to those who hold certain degrees or have completed specified training. They believe that certification of mediators would create a monopoly, making mediation more expensive and the pool of mediators less diverse.

Jay E. Grenig, *Alternative Dispute Resolution with Forms* § 7.43, 131 (2d ed., West 1997) (footnotes omitted).

Shaw lists the following arguments in favor of increased training: (1) the eventual success of mediation is linked to the public’s perception that it is a “high quality” alternative; (2) training requirements and standards of conduct will increase quality in

consider the added cost of requiring substantive training and the risk that such a prerequisite will preclude some highly qualified mediators from arenas in which their facilitative skills may be most needed.³⁰⁷

As mediation practitioners have become more attuned to the special concerns of mediators in specific types of cases (e.g., divorce cases, consumer-protection cases), specialized standards of conduct and training for mediators in these cases have been developed. Three sets of standards that are also informative for the mediation of guardianship cases are the *Standards of Practice for Family and Divorce Mediation*, developed by the Association for Conflict Resolution (*Family Mediation Standards*),³⁰⁸ the *Model Standards of Practice for Family and Divorce Mediation (Model Family Mediation Standards)*,³⁰⁹ and the *ADA Mediation Guidelines*,³¹⁰ which were created to address the particular problems that arise in mediating claims of cases that arise under the Americans with Disabilities Act.³¹¹ The *Family Mediation Standards* contain the generalized requirement that a mediator “shall acquire substantive knowledge and procedural skill in the specialized area of practice”³¹² and then adds a non-exclusive list of the areas of training, including “family and human development, family law, divorce procedures, family finances, community resources, the mediation process, and professional ethics.”³¹³ The *Model Family Mediation Standards* require that the mediator “be qualified by education and training to undertake the mediation”³¹⁴ and state that a mediator, in addition to

mediation; and (3) an increased focus on standards will ameliorate the public’s view of mediators as professionals. Shaw, *supra* n. 37, at 347–349.

307. Love & Kovach, *supra* n. 13, at 299, point out that “a requirement that mediators have substantive expertise in each given arena of their practice, such as a requirement that only architects or general contractors be able to mediate any construction dispute, would cut out many talented practitioners.”

308. *Family Mediation Standards*, *supra* n. 187.

309. See *Model Family Mediation Standards*, *supra* n. 228 (describing the development of these standards). The *Model Family Mediation Standards* were developed in part to update the 1984 ABA *Standards of Practice for Lawyer Mediators in Family Law Disputes* and to “address many critical issues in mediation practice that have been identified since [the 1984 Standards] were initially promulgated.” *Id.* at Reporter’s Foreword.

310. *ADA Mediation Guidelines*, *supra* n. 76.

311. 42 U.S.C. § 12101 (1990).

312. *Family Mediation Standards*, *supra* n. 187, at Stand. IX(A).

313. *Id.* Stand. XI(A).

314. *Model Family Mediation Standards*, *supra* n. 228, at Stand. II. The Reporter for the *Model Family Mediation Standards* noted that the earlier 1984 ABA Standards “made

mediation training, should “have knowledge of family law”;³¹⁵ “have knowledge of and training in the impact of family conflict on parents, children, and other participants”;³¹⁶ and “be able to recognize the impact of culture and diversity.”³¹⁷ The *ADA Mediation Guidelines* require training which “[a]t a minimum” must include training in 1) “substantive law and procedural issues”;³¹⁸ 2) “[d]isability awareness”;³¹⁹ and 3) “[p]ractical application.”³²⁰ For example, the Guidelines describe two possible approaches to a mediation in which one of the parties is blind.³²¹ In the first approach, the mediator “without disability etiquette” introduces all the parties by name and points to each party as he or she states that party’s name.³²² The blind individual has heard no one’s voice and is confused throughout the mediation as to who is speaking. In the second approach, the mediator “with disability etiquette” has each party introduce himself or herself and state his or her role in the mediation.³²³ The blind individual is then able to recognize voices throughout the rest of the session.

The Wingspread conferees advocated for special training of judges and attorneys in adult guardianship cases as these cases present a set of challenges that do not typically exist in other cases.³²⁴ These challenges fall into three basic categories: 1) mastering the intricacies involved in the substantive law of

no mention of the need for special expertise and training in mediation or family violence.” *Model Family Mediation Standards*, *supra* n. 228, at Reporter’s Foreword.

315. *Model Family Mediation Standards*, *supra* n. 228, at Stand. II(A)(1).

316. *Id.* Stand. II(A)(2).

317. *Id.* Stand. II(A)(4).

318. *ADA Mediation Guidelines*, *supra* n. 80, at Guideline III(A)(1). This includes training in the ADA, other federal and state statutes, case law, administrative processes and “options . . . for resolutions where the employee does not return to work.” *Id.*

319. *Id.* at Guideline III(A)(2). This includes not only training about disabilities, but also training about disability resources, about one’s own biases about disability, and about appropriate “etiquette” to be used when interacting with disabled individuals. *Id.*

320. *Id.* at Guideline III(A)(3). This includes training about “a) [c]ommon ADA dispute issues and options in the area to be handled, the mediators . . . b) [a]daptation of mediation techniques to ADA mediation and unique circumstances of people with particular disabilities, c) [e]thical considerations, d) ADA Mediation Guidelines.” *Id.* The ADA Guidelines also contain helpful tips for communicating with individuals with disabilities. The Guidelines include scenarios that show how slight changes in communication techniques can affect greatly the ability of a disabled person to participate in a mediation. *Id.* at app. II, pt. II.

321. *Id.*

322. *Id.*

323. *Id.*

324. *Wingspread Recommendations*, *supra* n. 1, at 286.

guardianship and guardianship alternatives;³²⁵ 2) appreciating the special considerations that come into play when dealing with individuals of diminishing capacity;³²⁶ and 3) understanding the interplay between an individual's autonomy and an individual's "best interest."³²⁷ If specialized training is desirable for mediators in family and ADA cases and for judges and attorneys in adult guardianship cases, consideration must be given as to whether mediators who mediate adult guardianship cases should receive special training and, if so, what type of training they should receive.

TCSG training is based on the presumption that a mediator in an adult guardianship case should receive training in areas beyond basic mediation skills.³²⁸ TCSG training includes modules that cover 1) the factors that trigger the filing of guardianship petitions, 2) alternatives to guardianship, 3) guardianship law and practice, and 4) working with older persons and persons with disabilities, as well as training on the conduct of a guardianship mediation.³²⁹ Training in this range of subjects is highly desirable for mediators of adult guardianship cases.

In addition, a few of the topics within these subject areas should be given special attention. For example, when training mediators about the alternatives to guardianship, it is important that the mediator learn of the risks, as well as the advantages, of these arrangements, and be informed about the ways in which these risks can be minimized.³³⁰ It is also crucial that the

325. *Id.*

326. *Id.* The conferees advocated training in the following areas:

- 1) the aging process and disability conditions, and the myths and stereotypes concerning older and disabled persons;
- 2) the skills required to effectively communicate with disabled and elderly persons;
- 3) the applicable medical and mental health terminology and the possible effects of various medications on the respondent; and
- 4) services and programs available in the community for elderly and/or disabled persons.

Id.

327. *Wingspread Recommendations*, *supra* n. 1, at 295. The Commentary to this recommendation urges judges to take responsibility for "[i]nstructing each attorney as to his or her role and how this role differs from that of a guardian ad litem." *Id.*

328. TCSG adult guardianship training programs are "targeted to trained mediators who would like to expand their practice to include mediation of disputes that arise when guardianship over an adult is being considered." TCSG, *Mediation & Aging* <<http://www.tcsg.org.med.htm>> (accessed Jan. 22, 2002).

329. Hartman, *supra* n. 8, at module 3, i-iv.

330. For example, if one family member is appointed an agent under a financial power of attorney, that agent can be required to report transactions over a certain value to an

mediator receive intensive training in capacity issues and the recognition of power imbalances in cases involving adults with diminishing capacity. Finally, mediators should receive information from experts as to how to recognize abuse situations.

C. Representation of the Adult

In a typical mediation, the decision of a participant to appear with or without representation is usually left to the participant.³³¹ The participants are presumed to be capable of making their own decisions.³³² However, the nature of most adult guardianship mediations mandates that the adult be represented by an attorney (preferably) or someone else who is trained to advocate zealously and represent the adult's wishes.³³³ If a petition for guardianship has been filed, the adult may already have an attorney who was appointed by the court.³³⁴

The adult's attorney's role in the mediation should be clarified in advance.³³⁵ In some mediations, the attorneys will play the primary role of representing the client's interests, while in others, the attorney will not play an active role in the mediation, but will be available to offer assistance as needed.³³⁶ One of the mediator's challenges is to ensure that the attorney is speaking

"oversight committee" composed perhaps of other members of the adult's family. *See id.* at 23–24 (discussing the use of informal family maintained oversight).

331. *Id.* at module 3, 62–64.

332. *Id.* at 63.

333. The *ADA Mediation Guidelines* distinguish between a "representative . . . who serves as an agent and advocate for the party, advising, counseling, or presenting the party's views," from a "surrogate, who is legally authorized to make decisions on behalf of the party." "The representative may be a disability rights advocate, expert, vocational rehabilitation counselor, job coach, family member, attorney, union representative, or other person." *ADA Mediation Guidelines*, *supra* n. 80, at Guideline II(B)(1); *see generally* Wood, *supra* n. 4, at 814–818 (discussing the roles of support persons, advocates, and surrogates).

334. *See* discussion *supra* text accompanying nn. 134–143.

335. This is borne out by the TCSG experience with attorneys in mediation:

Pilot project mediators found that in some cases, attorneys were extremely helpful, while in others, their lack of understanding of the process or refusal to allow their clients to be the primary participants hindered the ability of the parties to resolve their disputes. We found that direct contact between the mediators and attorneys before the mediation session was helpful in educating attorneys about their expected role and the mediation process itself.

Hartman, *supra* n. 8, at module 3, 62.

336. Martin A. Frey, *Representing Clients Effectively in an ADR Environment*, 33 *Tulsa L.J.* 443, 459–460 (1997).

for the client rather than *instead of* the client.³³⁷ The need for this vigilance is heightened in adult guardianship cases in that many elderly individuals have never dealt with an attorney before and may be intimidated and perceive the attorney as an authority figure. Also, if the attorney is court-appointed, the attorney may be an individual with whom the adult has had only minimal contact prior to the mediation.

Many state statutes require or allow the appointment of a guardian ad litem for the adult when a petition for guardianship has been filed.³³⁸ Thus, the adult may have both an attorney and a guardian ad litem and both may be in attendance at the mediation. It is again important that the roles of these two individuals be clarified in advance. Even if the guardian ad litem is the only “representative” at the mediation, the mediator, the adult, and the guardian ad litem will still need to focus on what role the guardian ad litem is playing. As noted above,³³⁹ a guardian ad litem is sometimes viewed as the guardian of the adult’s “best interest” as opposed to being the adult’s zealous advocate.³⁴⁰ The guardian ad litem is also often charged with reporting his findings to the court.³⁴¹ The guardian ad litem’s participation in the mediation should mirror his expected role in the court proceeding. For example, it would be inappropriate for the guardian ad litem to claim to represent the adult’s wishes in the mediation and then advocate for the adult’s best interest in any subsequent court proceedings.³⁴² Although it is true that the wishes of the adult may, in fact, be in the adult’s best interest, the mediator and the guardian ad litem should still keep the roles distinct, particularly given the fact that the court will assess the guardian

337. For example, the mediator should be wary if the attorney continuously interrupts the adult when she is trying to express an opinion and either tells her to remain quiet or even attempts to state her opinion for her. *Id.*

338. See discussion of role of guardian ad litem *supra* at text accompanying nn. 139–140.

339. See discussion *supra* text accompanying nn. 331–337.

340. TCSG reports that this split of roles does not occur often:

Our experience has been that the guardian ad litem has usually acted as advisor to the respondent, in the same role an attorney would hold. Rarely has the guardian ad litem had to assume the role of protector for a respondent who will otherwise agree to an unreasonable solution.

Hartman, *supra* n. 8, at module 3, 65.

341. See discussion of the confidentiality issues this raises *infra* at text accompanying notes 383–385.

342. The Wingspread Recommendations made clear that the attorney and the guardian ad litem should not be the same person. *Wingspread Recommendations, supra* n. 1.

ad litem's recommendations as those of an objective observer rather than an advocate. Also, if the guardian ad litem is representing the adult's best interest, the guardian ad litem should not be seen as one who is authorized to make an agreement on the adult's behalf.³⁴³

Even if the court has not appointed a guardian ad litem, the mediator should consider whether one would be appropriate for certain cases. In a typical mediation, the mediator looks to the parties to "tell their stories" and lay out the facts of the case. However, in a guardianship case, the party who is the focus of the inquiry may not be able to discern and lay out all of the facts and the other parties may have no incentive to do so. This problem may be aggravated by the fact that the parties, all acting in good faith, are consciously or unconsciously leaving out facts because they are striving for what they feel is the "best result" for the adult. A guardian ad litem may be able to offer an objective rendition of the relevant facts when there is reason to believe that the adult is unable to do so.

D. Conduct of the Mediation

The unique nature of adult guardianship cases also requires special consideration of the time, place, and manner in which the mediation proceeds.

1. Accommodations

As adult guardianship cases often involve individuals whose physical or mental faculties are diminishing due to the effects of disease, injury, or aging, it is important that the mediator be aware of the need to make accommodations to maximize those individuals' ability to participate in the process.³⁴⁴ These accommodations include the obvious physical accommodations,

343. "It is not appropriate in mediation for the guardian ad litem to accept on the respondent's behalf an agreement which the respondent opposes." Hartman, *supra* n. 8, at module 3, 65.

344. Wood, *supra* n. 4, at 812-815; Erica F. Wood & Jeanne Dooley, *Targeting Disability Needs: A Guide to the Americans with Disabilities Act for Dispute Resolution Programs* (ABA & AARP for the National Institute for Dispute Resolution) (1994). The need to make courtrooms more accessible and to make judges more sensitive to the special needs of the elderly in guardianship hearings was also recognized by the Wingspread conferees. *Wingspread Recommendations*, *supra* n. 1, at Recommendation IV-A. Recommendation IV-A deals with improving physical access to the courtroom, scheduling hearings to take into account the needs of the elder individual, and maximizing communication in the hearing itself. *Id.*

such as choosing a site that has a wheelchair ramp, avoiding low lighting, or providing TDD and other devices for those who have hearing loss.³⁴⁵ The mediator should also ascertain whether medications or other sources of loss of stamina should be considered when scheduling the timing and length of mediation sessions.³⁴⁶

2. Intake and Pre-mediation Interviews

Pre-mediation intake and contact are components of many mediation programs.³⁴⁷ However, the emphasis placed on the intake and the amount of pre-mediation contact that the mediator has with the parties may vary according to the type of case.³⁴⁸ “Some mediators believe that the first contact between the mediator and the parties should be at the joint mediation session, in order to preserve the appearance of neutrality.”³⁴⁹ The experiences in the TCSG pilot projects have shown that pre-mediation intake and pre-mediation individual interviews by the mediator contribute to the success of an adult guardianship mediation.³⁵⁰

Pre-mediation intake (which need not necessarily be done by the mediator) involves not just data collection, but also an initial assessment of what parties should be involved in the mediation and whether the case is even appropriate for mediation at all.³⁵¹ In adult guardianship cases, an important goal of pre-mediation intake is to screen out cases that involve alleged abuse of the adult under the theory that such cases belong in the courts rather than in mediation.³⁵²

After the intake, TCSG suggests that initial individual

345. Hartman reports that “[h]earing loss affects about one third of all persons between 65 and 74, and about half of those between 75 and 79.” Hartman, *supra* n. 8, at module 3, 44. The Wingspread conferees also isolated hearing and vision loss as special issues about which judges should be sensitive. *Wingspread Recommendations*, *supra* n. 1, at 292.

346. The ADA Guidelines describe an example in which a mediator fails to take into account that one of the parties suffers from depression and that the drugs he is taking sedate him so much in the morning hours that he is not capable of functioning in the mediation. *ADA Mediation Guidelines*, *supra* n. 80, at app. II, pt. II.

347. Hartman, *supra* n. 8, at module 3, 48.

348. *Id.* at 49.

349. *Id.* at 48. Hartman notes that “[m]ediators who have done family mediation may be comfortable with pre-mediation contact with the parties. This may be a new idea for mediators in a community mediation context.” *Id.* at module 2, 13.

350. *Id.* at module 3, 48–49.

351. *Id.* at 49.

352. *Id.* at 59–60.

interviews of the parties by the mediator³⁵³ are helpful for the following reasons:

- 1) Establishing whether mediation is appropriate;³⁵⁴
- 2) Confirming that all parties are capable of participating;³⁵⁵
- 3) Assuring that all necessary parties will participate;³⁵⁶
- 4) Allowing the mediator to sort through complex family histories and other issues in advance if (as is often the case in adult guardianship mediations) multiple parties will be involved;³⁵⁷
- 5) Explaining the procedure to the parties and their attorneys and establishing appropriate expectations;³⁵⁸ and
- 6) Noting the need for any additional accommodations (e.g., TDD device if one party is hard of hearing, etc.).³⁵⁹

TCSG's positive experience with pre-mediation interviews indicates that they should be the norm in adult guardianship mediations.

3. *Deciding Who Should Participate in the Mediation*

One of the many advantages of the flexibility of the mediation process is that it allows a variety of individuals to participate who might not have the standing to be heard in a judicial procedure.³⁶⁰ This flexibility also presents a challenge to

353. *Id.* at 48. These interviews may be in person or by telephone. *Id.* at 48.

354. *Id.* at 48–49.

355. *Id.*

356. *Id.* Hartman notes that “[c]ases in which mediators were not able to talk to parties beforehand sometimes ended prematurely because not all necessary persons were present.” *Id.* at 49.

357. *Id.* at 49. For adults who lack stamina and ability to concentrate for long periods of time, this has the added benefit of shortening the time spent in the mediation session. *Id.*

358. *Id.* at 48–49. Hartman notes that sometimes mediations had to be prematurely terminated “because parties expected the mediators to play an arbitrator role.” *Id.* at 49. She also points out that “direct contact between the mediators and attorneys before the mediation session was helpful in educating attorneys about their expected role and the mediation process itself.” *Id.* at 62.

359. *Id.* at 49.

360. The UGPPA allows interested individuals to be heard at a guardianship proceeding under certain conditions. UGPPA, *supra* n. 76, at 55. Section 308(b) provides as follows:

Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation.

the mediator to decide who should take part in the mediation.³⁶¹ On the one hand, a beautifully crafted mediation agreement may be rendered useless if some party necessary to the agreement does not attend.³⁶² On the other hand, a mediation may become chaotic and too tedious (particularly for an elderly individual) if too many people insist on being part of the process.

If a petition for guardianship has been filed, a good starting point for deciding who should participate is the petition itself. Technically, the adult and the petitioner are the only “parties” in the case, and they, of course, should attend. It is important that the proposed guardian attend and participate in the mediation, particularly if the mediation involves a discussion of what limitations should be placed on the guardianship if a guardian is appointed.³⁶³ The petition will also contain the names of others (typically family members) who are entitled to notice that the petition has been filed. These individuals should be given notice of the mediation and be invited to attend and participate.³⁶⁴

In addition to those individuals named in the petition, the mediator should determine whether there are others whose insight and input might be relevant to the mediation discussions and whose influence may affect whether an agreement can be reached and honored. These may be other family members who, although not entitled to notice of the guardianship petition, are

Id. The National Probate Court Standards also contain the recommendation that “any interested person should be able to participate in [guardianship] proceedings provided that the best interests of the respondent will be served thereby.” *National Probate Court Standards*, *supra* n. 79, at Stand. 3.3.8 cmt.

361. This section focuses on participation rather than mere attendance. If the adult has a personal assistant or needs a sign language interpreter, those individuals clearly should be welcome to attend the mediation session.

362. TCSG takes the approach of being more inclusive rather than more exclusive under the theory that “nothing can be resolved if a person who could undermine the agreement is not there.” Hartman, *supra* n. 8, at module 3, 56; *see generally id.* at 49–57 (describing how TCSG identifies which parties should attend).

363. The UGPPA requires the proposed guardian to attend the hearing unless excused by the court for “good cause.” UGPPA, *supra* n. 76, at § 308.

364. If these individuals all share the same feelings about whether the guardianship should be imposed, it may be appropriate for only one of them to attend to present their view. *See* Hartman, *supra* n. 8, at module 3, 54. However, the mediator should assure herself that virtual representation of a class of parties by one party does in fact represent the wishes of all the parties. *See Morrow v. Vineville United Methodist Church*, 489 S.E.2d 310 (Ga. App. 1997) (determining that a request to have one beneficiary under a trust serve as the virtual representative of all the beneficiaries — including one noted for her “intransigence” — was a potential denial of the due process rights of the dissenting beneficiary).

psychologically the “closest” relatives of the adult.³⁶⁵ The opinions of these family members are probably the opinions that the adult most respects and thus their participation will not only enrich the mediation process, but may also contribute to its ultimate success.³⁶⁶

The mediator should inquire as to whether the adult has a companion or caretaker. This individual will probably be able to offer the most accurate description of the adult’s current functional abilities, particularly if he or she lives with or works with the adult on a daily basis. The effects of aging or of disease often occur gradually. Family members who have not seen the adult for a period of months and thus not observed the gradual decline might be shocked at the adult’s physical deterioration and thus be unable to make a realistic assessment of the adult’s actual capabilities.³⁶⁷ A daily caretaker, on the other hand, is accustomed to the adult’s current physical appearance and is knowledgeable about the adult’s continuing abilities. The companion or caretaker may play one or two roles in the mediation. The companion may participate only to the extent of offering information and observations. Additionally, the companion may actually participate as a decision-maker if the decision may have an effect on the companion’s relationship with the adult.³⁶⁸

Adult guardianship cases often cannot be examined adequately without the input of experts. As noted above, many guardianship statutes require that the adult be evaluated by a physician or psychologist or other expert to determine the extent

365. “For example, a stepchild or niece, who is not the closest relative, may have as close or closer relationship to the respondent than a geographically distant child.” Hartman, *supra* n. 8, at module 3, 54. Wood points out another advantage of including a variety of family members when a power imbalance is suspected: “Involving family, friends, and advocates in decisionmaking and mediation can not only heighten capacity but also help to level the playing field.” Wood, *supra* n. 4, at 814–815.

366. Their non-participation could also undermine the success of the mediation. For example, if the adult agrees in the mediation that she will not oppose the imposition of a limited guardianship and then a relative whose opinion she values balks when she hears that the adult has agreed to any guardianship at all, the mediation may have been in vain.

367. For example, family members of an adult who has Parkinson’s disease might be so overwhelmed by the adult’s trembling, slurred speech and poor balance that they cannot comprehend the extent to which the parent is still capable of thinking lucidly and taking care of herself.

368. For example, if the mediation is over the choice of guardian between two equally qualified individuals and the adult’s long-time live-in companion cannot get along with one of them, the companion’s participation is important.

of the individual's capabilities.³⁶⁹ It may also be advantageous to receive the input of such experts in the mediation of an adult guardianship case.³⁷⁰ The mediator should make clear, however, that these experts are participating solely for the purpose of providing information and that they will not take part in any actual decision-making by the parties.

4. Privacy and Confidentiality Concerns

As noted above, mediation is viewed by many as preferable over a formal court proceeding in that the mediation is private and confidential.³⁷¹ With respect to privacy, mediation may not differ as much from adult guardianship proceedings as it does from other civil proceedings in that adult guardianship proceedings typically are not open to the public. In any event, "mediation is generally more private than litigation."³⁷² This is particularly true when a case is made a matter of public record.³⁷³ In mediation proceedings, no public records are kept and the parties have control of the level of privacy involved.³⁷⁴

Privacy may not always work to the advantage of an adult in a guardianship proceeding or an accompanying mediation. Mediators must remain conscious of the fact that family members and others may perform "in private" differently than they would in a formal courtroom setting. Although this allows for more honest expression of feelings, as well as often healthy venting of issues, the mediator and the adult's representative must remain alert to the potential for emotional tension and subtle abuse and influence that may occur when family members finally discuss issues that have been kept for years in the family's emotional closet.

The mediator's commitment to confidentiality may present difficulties in adult guardianship cases. As noted in Part II, the mediator is not allowed to disclose information learned in the caucus without the participant's permission.³⁷⁵ Yet the integrity of the process may be compromised without disclosure of that

369. See discussion *supra* at text accompanying nn. 132–133.

370. This will not be necessary in every case — e.g., a mediation over the question of which of two siblings should serve as guardian of their parent.

371. Gary, *supra* n. 4, at 424; see discussion *supra* at text accompanying nn. 62–64.

372. *Id.*

373. *Id.* at 425.

374. *Id.*

375. Woods, *supra* n. 4, at 819.

information.³⁷⁶ For example, suppose that, in a mediation designed to determine which child should serve as the parent's guardian, the mediator learns from the oldest child that he is undergoing psychiatric treatment stemming from a past history of abuse of his wife. Although the mediator can encourage the party to disclose this information to the other parties, the mediator cannot require the party to do so. What is the mediator to do when the parties reach an agreement that the same child would be the best guardian for the adult and that the adult will live with him?

The Joint Conference on Dementia recommendations include a recommendation that "[n]o participant in mediation should be prohibited from reporting known or suspected elder abuse to adult protective services."³⁷⁷ Although this recommendation covers cases in which the mediator learns or suspects that elder abuse has already occurred, it does not answer the mediator's dilemma when faced with potential abuse in the future.³⁷⁸ The Draft Uniform Mediation Act is only slightly more helpful in that, in addition to allowing disclosure to adult protective agencies of information about abuse and neglect, a participant may also disclose any communication that is "a threat to inflict bodily injury."³⁷⁹ Confidentiality guidelines for mediators should be developed through a joint effort by experts in mediation, in adult guardianships, and in adult abuse.

Confidentiality also may become an issue if a court-appointed guardian ad litem or visitor participates in the mediation.³⁸⁰ Often the guardian ad litem is charged with reporting to the court on the progress of the case and with making a substantiated

376. *Id.* A related example is discussed in the *Georgia Ethical Standards for Neutrals*. Ga. ADR R., *supra* n. 15. The example describes the revelation by one party to the mediator that he has cancer but does not want his ex-wife to know about it. *Id.* § II. The Recommendation begins by stating: "This presents the classic dilemma of the collision between the promise of confidentiality and the need of the parties for complete information if they are to enter into an agreement voluntarily." *Id.* After suggesting that the mediator encourage the party to reveal that secret, the Recommendation concludes that, "[i]f the secret is central to the creation of a solid agreement, . . . [the mediator] may have no alternative but to terminate the mediation." *Id.*

377. *Recommendations of the Joint Conference*, *supra* n. 192, at 448.

378. TCSG adopted the policy that it would not mediate cases in which there were allegations of abuse. Hartman, *supra* n. 8, at module 3, p. 60. The policy was based on the belief "that disputes between the respondent and petitioner when such issues are alleged are generally better left in the court setting." *Id.*

379. Draft UMA, *supra* n. 14, at §§ 7(a)(3), (5), 8(a)(3).

380. Hartman, *supra* n. 8, at module 3, 90; Schmitz, *supra* n. 62, at 78.

recommendation as to the best interests of the adult for whom the guardianship is sought.³⁸¹ The TCSG pilot project resolved this issue as follows:

[H]ave the parties agree, in the original consent to mediate, that although the mediation proceedings were otherwise confidential, an exception to confidentiality existed if the guardian ad litem believed that the best interests of the respondent required the reporting to the court of the information gained in mediation. This approach balances interests of confidentiality, protection of best interests, and continuity.³⁸²

This TCSG approach should be adopted in adult guardianship cases that include a court-appointed guardian ad litem.

E. Development of Standards for Mediators in Adult Guardianship Cases

As noted above, a somewhat recent trend in mediation is the development of separate standards for mediators in specialized areas, such as divorce mediation.³⁸³ These standards include many elements of the generic codes of conduct for mediators,³⁸⁴ but also address specifically those issues that arise due to the nature of the cases that are being mediated. For example, standards for mediators in divorce cases take into account that children, while not parties to the divorce, will be profoundly affected by any settlement that is reached.³⁸⁵ Standards for mediators who are dealing with Americans with Disabilities Act cases include a detailed segment on determining whether the disabled adult has the capacity to mediate.³⁸⁶ The unique challenge of implementing the self-determination principle in adult guardianship cases indicates the need for standards

381. Schmitz, *supra* n. 62, at 78; *see also* Haines & Campbell, *supra* n. 120, at 253 (discussing the confusing confidentiality issues that arise if the same individual strives to act as both attorney and guardian ad litem for an adult in a guardianship proceeding).

382. Hartman, *supra* n. 8, at module 3, 90–91.

383. *E.g. Model Standards of Practice for Family and Divorce Mediation*, *supra* n. 228.

384. Examples of generic codes of conduct include the *Model Standards*, *supra* n. 14 and the Georgia ADR R., *supra* n. 15, at app. C.

385. *Model Standards of Practice for Family and Divorce Mediation*, *supra* n. 228, at stand. VIII (stating the mediator's responsibility to encourage the parties to consider the children's interests).

386. *ADA Mediation Guidelines*, *supra* n. 80, at Guideline I(D).

specifically designed for mediators in these cases. These standards should be developed by a combination of mediation experts and adult guardianship experts. Three crucial issues that these standards should address are: determining the adult's capacity to mediate,³⁸⁷ ensuring the adult is free from coercion,³⁸⁸ and protecting the adult and the other parties against unwarranted mediator intervention.³⁸⁹

1. Capacity Determination: As noted in Part III above, guidelines for assessing the capacity to mediate have already been developed for mediators in cases that include parties who are disabled.³⁹⁰ Guidelines for assessing capacity in adult guardianship cases have also been developed by TCSG³⁹¹ and by other experts in the field.³⁹² Any of these sets of guidelines or some combination of them may prove to be appropriate for adoption.

2. Freedom from Coercion: As discussed above in Part III, self-determination in an adult guardianship case can be threatened both by parties who wish to place their own interests above that of the adult and more subtly by the desire of the participants to do what is in the adult's best interest. The standards for mediators should emphasize the mediator's role in protecting against such coerced agreements. The standards should focus first on power imbalances. They should clarify that a mediator's impartiality is not compromised by attempts to highlight and rectify power imbalances. Second, the standards should stress that one of the mediator's roles as guardian of the self-determination principle is to assure that the adult's autonomous decision-making is to take priority over attempts by any of the parties to reach a solution that is perceived to protect the adult's best interest.

3. Avoidance of Unwarranted Mediator Intervention:

387. See discussion *supra* text accompanying nn. 184–202.

388. See discussion *supra* text accompanying nn. 203–229.

389. See discussion *supra* text accompanying nn. 230–266.

390. See discussion *supra* text accompanying n. 192. These Guidelines were included among the ethical and operational guidelines recommended by the Joint Conference on Dementia. *Recommendations of the Joint Conference*, *supra* n. 192, at 447.

391. See discussion *supra* at text accompanying n. 195.

392. See Margulies, *supra* n. 93, at 1085 (discussing factors that lawyers should use to determine the capacity of potential clients); Wood, *supra* n. 4, at 809–812 (discussing “eight ‘minimal requirements for participation in community mediation’” set forth by mediation experts Coy and Hedeem).

This standard will perhaps be the most difficult to design in that it would be set against the backdrop of the long-running debate about mediator styles.³⁹³ Those who develop this standard should assess the degree to which all mediator styles can enhance the dual goals of protecting the welfare and the autonomy of the adult who is the central figure of the guardianship case. Consideration should be given to encouraging the mediator to use a mix of styles as dictated by the demands of each particular mediation, as opposed to requiring the mediator always to engage in one form of mediation instead of another.

CONCLUSION

For many reasons, mediation seems to be a beneficial way of resolving disputes in adult guardianship cases. Mediation is informal, flexible, and less threatening than a court procedure. It is not adversarial. It offers parties the opportunity to discuss emotional as well as legal issues and to work towards a solution that solidifies pre-existing relationships rather than shattering them. However, the use of mediation in adult guardianships must not be whole heartedly embraced without a critical assessment of its potential to deny the adult the procedural and substantive due-process rights that a formal, adversarial guardianship proceeding is designed to protect. Serious consideration must be given as to how to ensure that the rights of the adult remain the focal point of the mediation. Experts in the field of mediation have devoted much time and study to the principle of self-determination³⁹⁴ while those in the field of adult guardianships have devoted equal efforts to protection of the adult's autonomy.³⁹⁵ They have much to offer each other in this endeavor. A collaboration of their wisdom and experience is a crucial component of the successful integration of mediation into adult guardianship cases.

393. See discussion *supra* at text accompanying nn. 203–229.

394. See discussion *supra* at text accompanying nn. 184–202.

395. See discussion *supra* at text accompanying nn. 109–117.