

## MEDIATION IN PROBATE CASES

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*The following summaries are based on mediations of probate cases. Judge Milton Mack, Chief Judge of Wayne County Probate Court, reviewed the summaries and submitted likely court decisions based on the facts of each case. The actual mediated agreements, following the judge's opinions below, illustrate the differences between court decisions and mediated settlements.*

**Estate division case.** Two daughters (step-sisters) of deceased father disagreed over personal property and the house. Angry accusations surfaced over who had removed several valuable personal items.

**Court Decision:** "The question is who should be the Personal Representative of the estate. In this case, a Public Administrator would be appointed who would then propose how to distribute the property. The Public Administrator's plan would probably be approved by the court."

**Mediated Agreement:**

- All "missing" and contested items were located, accounted for and distributed cooperatively.
- Both families agreed informally on ways to repair their strained relationships.

*Note: Relieved attorneys noted they had not been able to settle this contentious case for months.*

**Guardianship case.** A woman in advanced stages of dementia was cared for at home by her two daughters, one of whom was co-guardian with their brother. The sisters accused their two brothers of removing mementos and furniture from the home, and denied both brothers access to the home. The sisters removed all photos of their brothers from their mother's room. The paid care workers, on the sisters' instruction, gave no health information to the brothers. The sisters characterized the co-guardian brother's calls for information and issuing care orders as interference.

The sister co-guardian petitioned to have her brother removed as co-guardian. Both sisters were unhappy that they had to "do all the work," while their brothers maintained they could not help while being denied access.

**Court Decision:** "The legal question would be whether to remove the brother as co-guardian. An additional question would be whether to remove the sister for failing to carry out her duties. The request to remove the brother would be denied and the sister would instead be removed."

**Mediated Agreement:**

- Sister and brother remain co-guardians.
- Brothers' photos to be returned to the mother's room.
- Co-guardian brother to make medical decisions.
- All siblings to exchange information for mother's care by logging information in her care notebook.
- Brothers to bring groceries, clothing, and medications to the home.
- Bills to be submitted to the brother for reimbursement from respondent's account.
- If further disputes arise, they will return to mediation before going to court.

*Note: After the mediation, the siblings told old family stories, reminisced, and hugged one another.*

**Conservatorship case.** An 81-year old single nursing home resident with cancer and early dementia was extremely proud that she had worked in a factory since age 20 and supported herself. Her brother petitioned the court for conservatorship so that he could pay her nursing home and other bills, which she had not been paying. Respondent opposed the court petition and the idea of anyone handling her finances.

**Court Decision:** "The legal question is whether she needs a conservator. The brother would probably be appointed in this situation."

**Mediated Agreement:**

- Respondent agreed to a conservatorship because she was reassured she would have some autonomy. Respondent received the \$60 left over each month after payment of bills to use as she pleased.

*Note: While the mediated agreement appears similar to the court decision in this case, the effect was different. During the mediation, respondent admitted that she couldn't keep track of things as well as she used to and didn't really object to her brother handling her bills. Her primary interest was in retaining some spending money ("to jingle in my pockets") and feeling that she still could make some choices. Had the court imposed the same conservatorship, she would have continued to resist her brother's authority and might never have discussed her interest in maintaining some autonomy while losing control over other aspects of her life.*

With its focus on collaborative process, mediation is often a good fit for probate cases. As in these examples, mediation is particularly useful when the claims are not simply legal disputes, but involve ongoing relationships. The process in a contested probate hearing can polarize and damage relationships further; a third-party decision based solely on the legal merits of the case usually creates unhappiness and anger on at least one side.

Mediatable issues can arise in almost any kind of case in the probate jurisdiction: decedent's estates, disputes arising from trusts, guardianships over minors or adults, conservatorships, other protective proceedings and Mental Health Code cases. In guardianship and mental health cases, although the question of capacity remains an issue for court decision, there are often a multitude of other issues, regarding care and planning and assignment of responsibilities, that are well suited to collaborative decision making.

As an attorney in probate-related mediation, you have an opportunity to counsel your clients on using the process effectively. You can educate your clients on their legal options and the legal effects of actions, letting them know the risks as well as benefits of a court hearing, and then allow them to be the final decision-maker once you have given them the necessary information. Guardians ad litem, or sometimes the vulnerable person's attorney, can help by focusing on the interests of the vulnerable person, by moving the focus onto meeting needs of the parties.

Attorneys who are able to prepare themselves and their clients well, to understand what their clients believe is truly important about a case, and to recognize that personal relationships as well as legal issues may have an impact on the agreement, will find that clients benefit from mediated agreements. Even when agreements are not reached, parties will have gained insight about their own goals and expectations about the case, and often will have set the stage for reaching a settlement through further negotiation.

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