

How Mediation Expands the Pie, Increases Options, and Leads to Win/Win Solutions in Probate Mediation

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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.

Case Study 1: Financial Guardian Story:

- 81-year old male respondent
- Single; proud that he had worked since age 20 in a factory and supported himself on a decent living
- Currently residing in a nursing home with cancer and early dementia
- Respondent's sister, his only close relative, petitioned the court for conservatorship (payments of respondent's nursing home bills, medical bills, etc. were no longer getting paid on time or at all by respondent)
- Respondent opposed court petition and anyone handling his money; proud of his self-sufficiency, he'd earned a decent living, wanted to continue to control his affairs.

Likely Court Decision as Determined by Judge Mack:

"The legal question is whether he needs a conservator. The sister would probably be appointed in this situation."

Parties' Interests

- Respondent's interests / needs: He felt it was a matter of personal dignity to handle his own money.
- Reality check: Respondent admitted that he couldn't keep track of things like he used to and didn't object to his sister handling his bills.
- Respondent's interests/needs: He wanted some spending money to go to the candy machine, buy ice cream, or use at the barber shop.
- Sister's interests: Cash would be lost or stolen at the nursing home; he'd forget where he put it.
- Respondent's interests: It was his money to spend or lose - he'd earned it and deserved to make decisions about how it is used (or lost).

Problem solving: Issue resolved through discussion about how much money was left over after paying bills each month (\$60).

Mediated Agreement: The \$60 left over each month would be given to the respondent. Sister would continue to make medical decisions, as had been her authority, since he entered the nursing home, but that she would consult with her brother if possible before making any medical decisions. Respondent agreed at the end of the mediation to a formal guardianship because he was reassured he would retain some autonomy.

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

Case Study 2: Personal and Financial Guardian

Story:

- Respondent: mother of four children (blended family) in advanced stages of dementia; cared for at home by her second husband and two children from that (second) marriage.
- Her two children from her first marriage were not allowed access to the home, although one of them (a daughter) was a co-guardian with the second husband.
- Children from second marriage petitioned to have first marriage daughter removed as co-guardian and denied her access to the home.
- Second marriage children voiced displeasure that they had to do all the work; first marriage children maintained they could not help if were not allowed access to the home.
- Paid care workers instructed by children in home not to give any information on respondent's health or care to their half-siblings and accused co-guardian sister of "interfering" with care workers by calling for information and issuing orders on their mother's care.
- Second marriage children accused co-guardian first marriage daughter of removing family mementos and furniture from the home, which they felt legitimized their denial of access to the home.
- Second marriage children had removed all photos and reminders of the first marriage children from their mother's room.

Likely Court Decision as Determined by Judge Mack:

"The legal question would be whether to remove the (first marriage) daughter as co-guardian. An additional question would be whether to remove the husband for failing to carry out his duties. The request to remove the daughter would be denied and the husband would instead be removed."

Mediated Agreement:

- The first marriage daughter and second husband remained as co-guardians; they agreed children from first marriage would have access to the family home whenever they wanted.
- They decided first marriage children could remove any of their own personal property still remaining in the house, and half-siblings would give one another notice before removal. They agreed that mementos and photos of the first marriage children would be returned to the mother's room.
- Co-guardian daughter would have access and decision making authority over medical information; all siblings and husband agreed to exchange necessary information for her care by logging information in the mother's care notebook; all family members would have access to the notebook.
- First marriage children would bring groceries, clothing and medications to the home for the family to help out. Co-guardian sister would consult the

list of cleaning items needed and would be responsible for buying and bringing those items to the home. Live-in children would contact her if they needed help with other items. All bills would be submitted to the first daughter for reimbursement from the parents' account at the end of each month.

- All parties agreed if communication broke down again, they would return to mediation before going to court. In the end, the family told old family stories and reminisced. They hugged one another before leaving.

Case Study 3: Estate Division

Story:

Two daughters (step-sisters) of deceased father from two different marriages and their mothers (former wives) were heavily involved in disagreement over who got what pieces of personal property and the house. Accusations surfaced over who had already taken the car, the garage door opener, and personal items.

Likely Court Decision as Determined by Judge Mack:

“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:

- The parties worked out who got each piece of property, item by item.
- Sisters and mothers had their questions answered about who had removed what items and under what circumstances. (They learned that sisters had been given some things by their father and never had some of the items attributed to them.)
- All “lost” items were located, accounted for and settled cooperatively; misunderstandings were cleared up.
- Parties became concerned with one another’s interests and agreed to visit the house together so that each daughter would get the personal items from her father that they wanted.
- They agreed informally on ways they would work to get their relationship back on track.
- Disposition was settled on all contested items, and the settlement was entered on the court record.
- Relieved attorneys said they had not been able to settle this contentious case for months.

Conclusion:

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.