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# Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters<sup>1</sup>

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Mediation is the ADR process by which a neutral third party works with disputants to reach a mutually agreeable resolution.<sup>2</sup> Mediation is arguably the oldest<sup>3</sup> and most popular<sup>4</sup> ADR technique in use today. Part I of this essay discusses the commonly accepted advantages of mediation as an alternative to litigation, and, in some instances, questions whether those advantages become disadvantages in the context of probate, trust, and guardianship cases. Part II examines the use of mediation as a component of the actual estate planning process rather than as an alternative to litigation.

## I. THE ADVANTAGES OF MEDIATION AS AN ALTERNATIVE TO LITIGATION

### A. *Privacy*

If a probate or trust matter ends up in court, the hearing is usually open to the public and becomes a matter of public record. Even a guardianship

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1. This essay is an excerpt from an article entitled *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 A.B.A. REAL PROP., PROB. & TR. J. 601 (2000).

2. Professor Yarn distinguishes mediation from "conciliation" ("the actions of a third party in persuading disputants to negotiate") and "facilitation" ("the actions of a third party in managing a meeting between disputants") and points out that "typically, a mediator is empowered to intervene to a greater extent than a conciliator or facilitator . . . ." DOUGLAS H. YARN, *ALTERNATIVE DISPUTE RESOLUTION: PRACTICE AND PROCEDURE IN GEORGIA*, § 6-2 (2d ed. 1997).

3. See *id.* at 110; see also, 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. TOL. L. REV. 327, 329-31 (examining the history of mediation).

4. Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges & Lawyers*, 1996 FED. JUD. CENT. & C.P.R. INST. FOR DISP. RESOL. 4; see also, Nancy Kauffman & Barbara Davis, *What Type of Mediation Do You Need?* 53 DISP. RESOL. J., 8 (1998).

hearing, while generally not open to the public, involves the exposure of the putatively incapacitated person and other family members to the strain of testifying in front of strangers about intimate matters. Privacy is an advantage of mediation that may be of particular importance in cases of this type.<sup>5</sup> Probate, trust, and guardianship matters often involve family secrets and disputes that are embarrassing to the parties. The confidentiality of a mediation may encourage families to speak more openly and allow the true reasons for the disputes to emerge more quickly. Privacy is particularly important to those parties who value “not airing the family’s dirty laundry” in public.<sup>6</sup> Additionally, parties who will continue to live or operate in the same social or business community may benefit from a “discreet conclusion” to their problems.<sup>7</sup>

Common law does not guarantee privacy or confidentiality in settlement discussions. However, it is not uncommon for state statutes to prohibit the introduction of evidence that the parties have tried (unsuccessfully) to reach a settlement.<sup>8</sup> Many state statutes and ADR rules require that mediations and other ADR proceedings be kept confidential.<sup>9</sup>

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5. See generally, Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 424 (1997).

6. Ms. Schmitz notes that this preference is particularly prevalent among the current generation of senior citizens. Suzanne J. Schmitz, *Mediation and the Elderly: What Mediators Need to Know*, MEDIATION Q., Fall 1998, at 71, 74.

7. Nadine DeLuca Elder, *A Mediation Primer for the Solo or Small Firm Practitioner*, 4 GA. B.J., 38 (Dec. 1998).

8. See, e.g., IND. R. EVID. 408.

9. For example, the Indiana ADR rules provide that “ADR processes will be subject to the same degree of confidentiality as is set out in *Evidence Rule 408*, *supra* n. 174,” and state additionally:

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. A.D.R. 2.11. The Texas ADR Procedures Act requires that party communications during 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. & REM. CODE ANN. § 154.073 (West 1997). Hawaii’s rules provide:

The mediator shall not communicate any matters discussed at the conference to any court. Likewise, parties and attorneys are prohibited from informing the court of discussions or actions taken at the mediation. This rule does not require the exclusion of any evidence otherwise discoverable merely because it was presented in the course of the mediation. This rule also does not require exclusion of evidence that is offered for another purpose such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

HAW. R. PROB. 2.1, APP. A, RULE 7

Special problems of confidentiality may arise in a mediation if one or more parties is represented by a guardian ad litem. In many probate or trust cases, a guardian ad litem is appointed to represent parties who are unborn or unknown.<sup>10</sup> Additionally, guardianship statutes in many states require or encourage the appointment of a guardian ad litem in place of or in addition to the appointment of an attorney to represent the interests of the proposed ward.<sup>11</sup> The court appoints the guardian ad litem, who is thus often obligated to report back to the court on the progress of the case.<sup>12</sup> Thus, although the mediation may take place in a private setting (which is advantageous in and of itself), the confidentiality requirement may not offer the same protections here that it does in cases that do not include a guardian ad litem.

### *B. Dealing with Emotional Aspects of Cases*

Both the confidentiality and informal nature of mediation give the parties the opportunity to deal with the emotional issues of a case.<sup>13</sup> Disputes in the context of probate, trust, or guardianship law may result in the tangible manifestation of long-standing family problems (e.g., sibling rivalry, perceived favoritism, jealousy over or disapproval of a marriage or other relationship).<sup>14</sup> Parties in these cases may sometimes seek no more than an “emotional” result— an apology perhaps, or an opportunity to vent anger over a situation they perceive as unfair.

In the context of a guardianship, emotions such as fear, jealousy and greed may underlie the legal dynamic. A dispute over who should serve as guardian may reflect deeply entrenched emotional issues. For example, questions over which child should be an elderly parent’s guardian may mask deeper suspicions as to who should have easy access to the parent, and thus an opportunity to garner his or her favor. This emotional dimension could make mediation in such cases much more challenging than in “stranger vs. stranger” cases. On the other hand, it is this dimension that requires an alternative to a court hearing. The judge in a guardianship hearing is relatively

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10. See, e.g., GA. CODE ANN. § 53-11-2 (Michie 1997), which requires the appointment of a guardian for parties in a probate case who are not *sui juris*, are unborn, or unknown.

11. See, e.g., IND. CODE ANN. § 29-3-2-3 (Michie Supp. 1997).

12. See Schmitz, *supra* note 6, at 78.

13. See generally, Gary, *supra* note 5, at 426-27; see also, Brian C. Hewitt, *Probate Mediation: A Means to an End*, 40 RES GESTAE, 41 (1996).

14. See Gary, *supra* note 5, at 426-27.

Pepperdine Dispute Resolution Law Journal, Vol. 1, Iss. 2 [2001], Art. 4 limited in terms of possible result. More importantly, the courtroom is not the appropriate arena for the airing and potential resolution of the underlying emotional issues.<sup>15</sup>

The emotional context should be considered when planning the timing of a mediation. Typically, early mediation is recommended.<sup>16</sup> However, the parties to a will contest may still be in the process of grieving over the loss of a family member.<sup>17</sup> Similarly, the parties in a guardianship case may still be confronting the shock of the visible decline in capacity of a loved one. The strong emotions surrounding a death or pending disability may well hamper the parties' ability to think clearly, either in the context of litigation or of mediation.<sup>18</sup>

### C. Preservation of Relationships

Preservation of the family and other ongoing relationships is another advantage to mediation.<sup>19</sup>

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15. Professor Gary writes that another benefit of using mediation in guardianship hearing is that it "gives the older adult a voice," thus "the older adult will benefit from the chance to hear and be heard." *Id.* at 426. She also notes, "The litigation process itself can be traumatic. The process creates stress and anxiety for the participants—even more so when the opponent is a family member. In litigation, even the winner may feel that she has lost." *Id.* at 428.

16. See Faryl S. Moss, *Mediating Fiduciary Disputes*, app. A at A-4 (1998) (unpublished manuscript, on file with author). Moss describes the advantages of early mediation as follows:

Disputes are usually more likely to be settled through mediation when mediation is recommended early. For example, when a dispute arises between a fiduciary and a beneficiary involving interpretation of the trust agreement, there is a high probability of success if the parties attempt to have their disagreement mediated before a lawsuit is filed. The parties should be able to compromise before either side becomes too inflexible in the "rightness" of their position.

*Id.*

Even though early mediation is recommended as a time and money-saver, Moss points out that it can also be quite successful when litigation has run for such a protracted period of time that the parties have become frustrated. Also, she notes that a second mediation may be successful even if an earlier one was not. Finally, a mediation, even if unsuccessful, may serve a benefit by facilitating the collection of information in a way far less costly and time-consuming than formal discovery. See *id.* at A-5.

17. Professor Gary states "grief may be a factor in the dispute itself, since the desire to blame someone for the death of a loved one may lead to a lawsuit." Gary, *supra* note 5, at 432. She continues that anger is "a common by-product of grief" that may be "redirect[ed] toward family members and friends of the decedent." *Id.* at 399, n.6.

18. See *id.* at 421. "If the mediation process is commenced too early in [the grieving] process, the parties may be ill-equipped emotionally to make rational decisions that will permit settlement of the controversy." Hewitt, *supra* note 13, at 41.

19. See generally, Gary, *supra* note 5, at 428.

Many, if not most, of the cases that arise in the probate, trust and guardianship context involve families whose lives together could be irreparably shattered by bitter and prolonged litigation.<sup>20</sup> In some of these cases, regardless of the outcome, it is vital that the relationship be preserved, as one family member may remain dependent on another for care-giving or financial assistance.<sup>21</sup>

Relationships between a trustee or other fiduciary and the beneficiaries may also suffer unnecessarily from the adversarial context of litigation. Upon listening to the beneficiaries express their needs in their own words, a fiduciary may understand how to deal not only with the present issue in controversy, but with issues that arise in the future as well.

#### *D. Control & Power Imbalances*

In an ADR proceeding, particularly mediation, the parties retain a great deal of control over the procedure and outcome of the case. In mediation, the parties themselves design their own resolution and thus may be more likely to be committed to its success.<sup>22</sup> Even in arbitration or other quasi-judicial proceedings, parties who have chosen to enter this type of dispute resolution may feel less at the mercy of a legal system that they do not understand.

A disadvantage of the parties retaining control is the potential for a more powerful party to overpower a weaker party. This power imbalance may manifest itself in a variety of ways, thus challenging mediators to resist the urge to stereotype any given situation. For example, mediators should exercise special care when an elderly family member is party to a dispute because the elderly person may have "some loss of capacity or is likely, due to societal conditioning, not to assert her own interests."<sup>23</sup> On the other hand, while elderly people are often viewed as "inflexible, grouchy, and confused,"<sup>24</sup>

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20. See Hewitt, *supra* note 13, at 41. Professor Gary points out that "family harmony" is a "tangential, but important goal" of the processes of estate planning and dealing with guardianship-type issues; she notes that "the way in which the family resolves the dispute may determine not only property rights, but also whether the family relationship will survive or suffer irreparable damage." Gary, *supra* note 5, at 397.

21. See *id.*

22. Ms. Schmitz states the need for control is common among senior citizens, whose recent years have often been characterized as a loss of control, experienced in terms of loss of one's physical or financial independence. See Schmitz, *supra* note 6, at 74, 79.

23. Gary, *supra* note 5, at 399.

24. Schmitz, *supra* note 6, at 73.

the aging matriarch of the family may actually rule (emotionally) with an iron fist and thus hinder other parties to the mediation from acting in any manner that would show disrespect or lack of deference.<sup>25</sup>

The potential power imbalance in a mediation may make such an approach particularly undesirable for determining the appropriateness of guardianship. For example, a case involving a petition for the guardianship of a parent filed by one of the children may bring a variety of factors into play. Properly directed mediation could help the children reach an agreement on which of them is better suited to serve in a guardianship role for the parent. The forum may lead them to see that one of them is an appropriate guardian of the person, while the other should serve as guardian of the parent's property. Thus the use of mediation at an early stage may well preserve the siblings' ability to work together later for their parent's benefit.

On the other hand, a major issue in such a case may be whether the proposed ward needs a guardian at that time. In states that require the appointment of an attorney for a proposed ward,<sup>26</sup> an individual's interest in maintaining his or her independence would be zealously protected by an attorney in the formal guardianship proceeding.<sup>27</sup> This zealous advocacy in the proposed ward's favor may shatter pre-existing family relationships.<sup>28</sup> Yet, without this protection, there remains the danger that the court may inappropriately impose a guardianship. Were such a case to go to mediation, ideally the mediator would seek to protect the proposed ward's interests, as well as the interests of the other parties. The mediator, however, would probably oppose the guardianship less vehemently than the attorney of the proposed ward. In addition, if the children present themselves as capable, caring relatives who want only the best for their parent, and the parent seems to be an angry person with vacillating emotions about the guardianship, even a skilled mediator may fall victim to helping the family reach a result that is in the parent's best interests, rather than a result in which he truly played an independent role.

The same danger exists when the proposed ward is a minor. An example family manipulation of a child's future in a mediation context occurred in *In re Jason E.*<sup>29</sup> The case began with a hearing on whether Jason's parents' rights should be terminated. At the request of one parent, the hearing was

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25. See *id.* at 79.

26. See, e.g., GA. CODE ANN. § 29-5-6(b)(2) (Michie 1993).

27. See, e.g., *In re Guardianship of Herke*, No. 16852-2-III (Wash. App. Div. 3 Jan. 19, 1999), in which the court-appointed attorney for Ms. Herke strongly opposed the guardianship, even going so far as to file divorce proceedings against Ms. Herke's husband to discouraging him from pursuing the guardianship application.

28. See *id.*

29. See generally, *In re Jason E.*, 62 Cal. Rptr. 2d 416 (1997).

continued to give the parents a chance to work through pending issues in a mediation session. Jason's parents, foster parents and paternal grandparents attended this session. The parties agreed on a long-term plan for guardianship of the child. However, the trial court did not honor the mediation agreement and instead terminated parental rights and approved the adoption of Jason by his uncle and aunt. In justifying its decision, the court noted several problems with the agreement. Among these problems was the fact that neither the child nor his attorney had participated in the session.<sup>30</sup>

### *E. Flexibility*

Litigation suffers from two major restrictions that do not apply to mediation. First, litigation assumes a result in which only one party is successful.<sup>31</sup> Second, litigation limits the results to strict legal alternatives. Mediation allows the parties the opportunity to design solutions that meet their needs, while not necessarily adhering to technical legal principles.<sup>32</sup> The parties may reach results that would be outside the confines of a typical judicial order.

The flexibility of mediation also allows the parties to construct a resolution they perceive as "fair," perhaps proving more satisfying than a formalistic legal resolution.<sup>33</sup> Consider, for example, the flexible results that could be

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30. *See id.* at 427.

31. Litigation has been described as a "power-based" process as opposed to an "interest-based" process. Moss states:

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 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.

Moss, *supra* note 16, at A-1.

32. *See generally*, Gary, *supra* note 5, at 430-31.

33. Professor Gary illustrates, for example, that many will contests are brought not because the contestant sincerely believes that the testator lacked capacity or was unduly influenced, but because the distribution scheme of the will violates the contestant's basic notion of "fairness." *See id.* at 416-17.

achieved in the following case scenario:

Tom has died recently, survived by the three children of his first marriage and his second wife. Tom had married his second wife (who is the same age as his oldest child) thirteen months prior to his death. Six months prior to his death, he transferred \$500,000 to his wife. There is some question as to whether this was a gift or a loan. Two weeks before he died, while in the hospital, Tom changed his will (which had formerly divided his estate among his children). In his new will, he bequeathed to his second wife a collection of fine antique watches that had been collected by him and his first wife during their marriage. The will directed that  $\frac{2}{3}$  of the residue of his estate be placed in a trust from which his second wife was entitled to the income every year. The trustee also was given the discretion to use any of the trust property necessary for the health or maintenance needs of Tom's wife or children, with the remainder to be paid to Tom's children. Tom's will directed that the rest of his estate was to be divided equally among his three children. Each of his children has living minor children. One of Tom's grandchildren has severe health problems.

In this case, one of Tom's children has a son with chronic health problems for which Tom may have promised financial assistance. This child expected to receive a bequest potentially greater than that of his siblings. Another of Tom's children helped amass the collection of antique watches and expected that they would be passed down to her.<sup>34</sup> The "legal" alternative is to declare Tom's will invalid and have the property distributed through the laws of intestate succession. This alternative may not resolve the fairness issue, may undermine the testator's wishes, and will probably exacerbate any already-existing family strife. Mediation, on the other hand, is not limited to this resolution. Through mediation, the parties can divide the property to reach a more "fair" outcome.<sup>35</sup> For example, they could agree to a cash payment to the second wife, a distribution of the watches to one child, and the establishment of a trust fund to cover the medical costs of the grandchild, with the remainder divided accordingly among Tom's issue.

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34. "Significant attachment to isolated items of personal property often represents the genesis of probate disputes." Hewitt, *supra* note 13, at 43.

35. Professor Stulberg argues that "the meaning of fairness is not exhausted by the concept of 'legal justice'." Joseph B. Stulberg, *Fairness and Mediation*, 13 OHIO ST. J. ON DISP. RESOL. 909, 910 (1998). He argues mediation statutes should be designed to promote outcomes that are "fair" rather than comport with a preconceived notion of which rights or outcomes should be secured—for example, he criticizes a family law mediation statute intended to promote "close and continuing contact with both parents after the marriage is dissolved" because it ignores the possibility that such an outcome may not be the most fair in every circumstance. *Id.* at 919. Similarly, Professor Gary explains that commonly held beliefs about how property should be distributed (e.g., individuals of equal relationship to the decedent should receive equal shares) may ignore circumstantial factors, such as the sentimental value of items of property or greater emotional ties among some family members. *See* Gary, *supra* note 5, at 417.

Because mediation is not strictly limited to relevant matters, the process may also result in the resolution of issues that could cause unnecessary litigation in the future. For example, using the example above, if Tom's children are unsuccessful in caveating his will, they may later claim that his second wife entered into a contract with Tom that she would leave some or all of "his" property to his children in her own will. This issue can be raised and dealt with in the mediation, even though not yet ripe for litigation.

### F. Efficiency

Reduced cost is often cited as one of the primary advantage of mediation.<sup>36</sup> Its informal process allows for meetings to occur more quickly and for decisions to be made, if not in the session itself, soon thereafter. This efficiency may result in decreased legal fees.<sup>37</sup> Court costs (court reporter, transcript, etc.) are avoided. Mediators may charge for their services,<sup>38</sup> but many programs provide for minimal fee structures or even voluntary work by mediators.

While efficiency and low cost are often touted as benefits of mediation, Professor Stulberg points out that care should be taken lest these benefits become "goals" and override the basic fairness of the process.<sup>39</sup> He argues that the pressure to be efficient may cause a mediator to restrict the parties' participation in the mediation session, favoring legal counsel (over the parties themselves) due to the attorneys' training in presenting issues in a concise

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36. *See id.* at 431. However, some controversy exists as to whether mediation and other forms of ADR actually end 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, 569-70 (1997) (citing studies that disagree as to whether mediation contributes substantially to the efficiency of dispute resolution). *See also*, Darryl Van Duch, *Case Management Reform Ineffective: ADR, Other Reform-Act Fixes Don't Save Time or Money, CJRA Study Says*, NAT'L L. J., Feb. 3, 1997, at A6, col. 1 (discussing conclusions of Rand Institute for Civil Justice study on reforms mandated by the Civil Justice Reform Act).

37. Professor Gary states "research in family law has shown that mediation costs less than litigation in resolving divorce cases." Gary, *supra* note 5, at 431. She continues that many probate cases involve small estates that are substantially depleted by litigation costs. *See id.*

38. These charges may not necessarily be lower than attorneys' fees. For example, one retired judge in Virginia charges a flat rate of \$350 per hour. Dawn Chase, *Judge Bob Harris Averages One Mediation Session Every Day of the Work Week*, VA. LAW. WKLY., Oct. 5, 1998, at B-1.

39. *See* Stulberg, *supra* note 35, at 922.

and “efficient” manner.<sup>40</sup> This issue merits special consideration in mediations that involve people who cannot participate in extended sessions, express their views clearly, or reach decisions quickly.<sup>41</sup>

Beyond this issue of flexibility in time and cost, mediation offers basic convenience, which may be of paramount importance for working parties or for family members who are not mobile. The proceeding is not confined to a specific courtroom at a specific date and time, but rather is subject to the needs of the participants.<sup>42</sup>

## II. THE USE OF MEDIATION IN THE ESTATE PLANNING PROCESS

Mediation is typically viewed as a technique for resolving disputes headed for or already embroiled in litigation. However, if a family dispute actually reaches litigation, irreparable harm to the family relationship may be unavoidable.<sup>43</sup> In recognition of this sad possibility, the utilization of mediation or “process consultation”<sup>44</sup> as a “preemptive strike against potential litigation”<sup>45</sup> has begun to take root in the community of lawyers and other estate planners.<sup>46</sup> The emphasis in this type of mediation, just as in all other mediations, is to urge the interested parties to construct their own resolutions, rather than settle for those imposed upon them.<sup>47</sup>

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40. *See id.*

41. While not limited to elderly persons alone, these characteristics are more likely concerns when elderly persons are parties to the mediation or other process. *See Schmitz, supra* note 6, at 76, 79, 80-81.

42. Schmitz notes, however, that if a mediation is held in a private home, “the mediator must gently take control of issues such as seating, lighting, potential disruptions, and undesired participants in order to ensure privacy.” *Id.* at 76.

43. Gerald LeVan refers to family litigation as a “Doomsday Machine,” meaning “a destructive device so powerful that once activated, it can’t be shut down . . . Its destructive power can’t be recalled. Everyone loses. Nobody wins.” Gerald LeVan, *Litigation - The Family ‘Doomsday Machine,’* LEVAN’S CORNER, February 1999, <<http://www.levanco.com/corner.htm>>.

44. The LeVan Company, which specializes in multi-disciplinary family business consulting, uses the term “mediator” in the context of litigation and the term “process consultants” in the family planning context in their correspondence. E-mail from Gerald LeVan on behalf of The LeVan Company (Feb. 12, 1999) (on file with the author).

45. John A. Gromala, *The Use of Mediation in Estate Planning: A Preemptive Strike against Potential Litigation*, CA. TR. & EST. Q., Fall 1996, at 29.

46. Mr. Gromala states “Mediation in conflict resolution is a profession in its adolescence. Mediation in estate planning is in its infancy.” *Id.* at 31. Mr. LeVan reports that “[t]here has been much ‘consciousness raising’ among lawyers and other advisors since we began consulting in 1986. Lawyers are much more respectful of relationship issues in families, less dismissive of their importance as “touchy feely.” LeVan, *supra* note 44.

47. Mr. LeVan describes the emphasis his company places on family involvement as follows: “It is our credo that a family that has the resources to create a valuable business or amass significant wealth ordinarily also has the resources to work out the family relationship issues

Lawyers who represent clients in estate or business planning may underestimate the importance of recognizing the emotional climate of such a situation. They may tend to stress transfer tax planning and assume "that a successful transfer [of the business to the next generation] can be produced with quality legal tools."<sup>48</sup> Yet, while studies show that only about one third of family businesses survive the intergenerational transfer process,<sup>49</sup> these same studies attest that only 10% of these failures are "attributable to transfer taxation."<sup>50</sup> As noted by one commentator, "personal interactions among successors are six times more detrimental to business successions than transfer taxation."<sup>51</sup>

An estate planning attorney's inability to deal thoroughly with such issues, as in the case of intergenerational transfer of a family business, is due to both ethical restrictions and lack of training in relevant disciplines.<sup>52</sup> Ethical issues arise because, for attorneys, planning for the succession of a family business "involves minefields of conflicting interests."<sup>53</sup> Not only the parents' attorney but the children's attorneys (if they have retained separate counsel) as well may be restricted from bringing relevant issues to the attention of the other family members by conflict of interest and confidentiality concerns.<sup>54</sup> Consequently, the parents' estate planning may be done "secretively,"<sup>55</sup> whereas an open communication among the various parties could

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with regard to that valuable property. They can't avoid the "family work," nor can they designate it to their advisors. They must do that work for themselves. We help them identify the issues, organize an agenda, create the forum, hold the discussions, make the decisions, and follow through on what they decide. We are catalysts, not advisors, not experts. We respect the family's sole jurisdiction over their issues." *Id.*

48. Michael D. Allen, *Succession Strategies for the Family Business*, A.L.I.-A.B.A. EST. PLAN. FOR THE FAM. BUS. OWNER COURSE OF STUD. MATERIALS (Mar. 12, 1998) at 4. Mr. Allen refers to such planning as "tax driven wealth preservation planning." *Id.* at 10.

49. *See id.* at 3.

50. *Id.*

51. *Id.* at 4.

52. *See* GERALD LEVAN, *THE SURVIVAL GUIDE FOR BUSINESS FAMILIES*, ix.

53. Allen, *supra* note 48, at 7; *see also*, LeVan, *supra* note 52, at ix.

54. *See* Gromala, *supra* note 45, at 29.

55. Gerald LeVan, *Intergenerational Accord Eases Estate Planning*, NAT'L L.J., Dec. 9, 1996. Mr. Allen refers to such plans as "closet plans," which "are based on what parents think is right for their assets and loved ones without the benefit of candid conversations with family members. Eventually, closet plans are sprung upon surviving family members, and the element of surprise, even if the news is good, can produce big problems." Allen, *supra* note 48, at 12.

serve to minimize the threat of later litigation.<sup>56</sup> A neutral third party in this situation may play the vital role of assisting the attorneys “in collecting all segments of the family puzzle.”<sup>57</sup>

The mediator’s role is to assist attorneys in fulfilling their responsibility to craft a plan that will accomplish the testamentary desires of the attorneys’ clients. The mediator confers, on a confidential basis, with each person separately and with the parties jointly. Only information that is authorized to be disclosed by each person will be shared with others.”<sup>58</sup>

As in other mediations, family members can agree not to ask the mediator to testify later about matters that are discussed in confidence in the course of the mediation in a confidentiality agreement at the outset of the proceedings.<sup>59</sup>

The facilitators or mediators who work with families in the planning context often possess skills and expertise that most attorneys lack.<sup>60</sup> Their training as family therapists<sup>61</sup> or as communications experts<sup>62</sup> brings a dimension to the planning process that is often ignored by lawyers focused primarily on the “hard side” legal and financial issues.<sup>63</sup> These trained individuals act as “catalysts” to help the family develop a mutually satisfactory plan.<sup>64</sup>

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56. See LeVan, *supra* note 52, at 2. Mr. LeVan points out that “a potential heir who is given a chance to be heard and who has an opportunity to adjust to dispositions he or she may not favor is much less likely to challenge the will.” *Id.* He continues, “Open intergenerational dialogues should help to minimize any suspicions of influence by other heirs.” *Id.*

57. Gromala, *supra* note 45, at 30.

58. *Id.*

59. See LeVan, *supra* note 52, at 29.

60. The LeVan Company often employs persons with expertise in “business organization, quality, mentoring, and career assessment” along with family therapists on its family business consulting teams. LeVan, *supra* note 52, at 8.

61. Mr. LeVan reports that “[h]aving a family therapist . . . is indispensable . . . [F]amily members [rarely] object[] to having a therapist on the team . . . . [They] recognize the need for the therapists’ skills and insights. Some lawyers (mistakenly) assume that the family will object to a therapist. Trial lawyers perceive therapists in expert witness roles rather than as colleagues in solving business problems. This takes some adjustment.” *Id.* at 8.

62. See Allen, *supra* n. 48, at 8. He writes:

Most communication problems in succession contexts boil down to abilities (or lack of abilities) of persons having primary influence over an enterprise to engage in coordinated actions. Family members can be taught the abilities to understand and utilize the basic speech acts which produce effective communication and enable coordinated actions. The challenges are to find and retain competent communication advisors to work with the families of our clients.

*Id.*

63. LeVan, *supra* note 44.

64. *Id.*

Their role is not to supplant the estate planning attorney,<sup>65</sup> but rather to work with the attorney as part of a team focused on helping the family structure its own optimal plan.

### CONCLUSION

While mediation is becoming increasingly popular in many areas of litigation, lawyers in probate and guardianship litigation are only beginning to realize its value. The use of mediation as an alternative to litigation in these types of cases offers a host of advantages. Additionally, the integration of mediation into the estate planning process offers attorneys and clients alike a broader opportunity to work together with all of the interested parties, maximizing the possibility that the client's wishes will not be thwarted by unwanted, unnecessary, and expensive litigation.

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65. Gromala writes:

A mediator recognizes the attorney's lead role and will not question the advice given by an attorney . . . . Mediation assists the attorneys . . . . Mediation builds on latent good will. It is the catalyst used to transform disparate messages into a meaningful collage. The estate planners use their expertise to integrate this information with other data in developing the plan. Gromala, *supra* note 45, at 29.

