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## Eldercaring Coordination: The New Dispute Resolution Process to Address the Age-Old Problem of Old-Age

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# **ELDERCARING COORDINATION: THE NEW DISPUTE RESOLUTION PROCESS TO ADDRESS THE AGE-OLD PROBLEM OF OLD-AGE**

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TABLE OF CONTENTS

I.	INTRODUCTION.....	271
II.	THE NEED FOR ELDERCARING COORDINATION.....	272
III.	BRIEF OVERVIEW OF ELDERCARING COORDINATION.....	275
IV.	THE PROCESS OF CREATING A NEW DISPUTE RESOLUTION PROCESS.....	277
V.	ELDERCARING COORDINATION LAW.....	281
	A. HOW CASES GET TO ELDERCARING COORDINATION... 282	
	B. ROLE OF THE ELDERCARING COORDINATOR.....	283
	C. REFERRAL AND APPOINTMENT.....	284
	D. ELDERCARING COORDINATOR QUALIFICATION.....	285
	E. CONFIDENTIALITY AND PRIVILEGE.....	286
	F. EMERGENCY REPORTING TO THE COURT.....	288
	G. ROLE OF THE FLORIDA SUPREME COURT.....	289
VI.	COMPARISON OF ELDER MEDIATION AND ELDERCARING COORDINATION.....	290
VII.	GUARDIANSHIP REFORM AND LEGISLATIVE INTENT.....	291
	A. UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT.....	291
	B. FLORIDA’S GUARDIANSHIP STATUTE.....	293
VIII.	RECOMMENDATIONS.....	294
	A. ELDERCARING COORDINATION INFORMATION AND TRAINING.....	294
	B. ACCESS TO TIMELY PLANNING INFORMATION.....	295
	C. COURT AND LEGAL MATTERS.....	296
	D. FUNDING AND ACCESS TO SERVICES.....	297
	E. TRANSITION TO ELDERCARING COORDINATION.....	297
IX.	CONCLUSION.....	298

**I. INTRODUCTION**

Eldercaring Coordination is the new dispute resolution process to address the needs of the old. It is not mediation on steroids, gentle arbitration, the practice of law, or family therapy. Eldercaring Coordination counteracts the age-old problem of family conflict impeding decision making based on the needs and interests of elders. Family conflict goes back millennia. Biblical stories are replete with family members looking to gain power, control, and financial advantage to the detriment of siblings or parents.<sup>1</sup> This conflict has not changed. What has changed over the years is the commonplace use of courts to gain legal rights to control the lives and finances of aging family members. What has changed is the fortuitous birth of the dispute resolution process of eldercaring coordination to address this age-old problem.

Eldercaring coordination is born of the need to provide a voice for elders<sup>2</sup> in decisions made about them, and to assist families with high conflict cases in productive decision-making focused on the best interests of elders.<sup>3</sup> With worldwide potential, the United Nations recognizes eldercaring coordination as an Action Model for the Welfare of Ageing Persons.<sup>4</sup> This United Nations recognition highlights the global nature of the problem, without geographic boundaries and inclusive of varying nationalities, races, and religions.<sup>5</sup>

The eldercaring coordinator works with legally authorized decision-makers and other participants to help resolve disputes regarding an elder's safety and autonomy.<sup>6</sup> The process serves to enhance—not replace—participation with professionals, including lawyers, financial advisers, therapists, doctors, and mediators.<sup>7</sup>

<sup>1</sup> See, e.g., *Genesis* 4:1–26; *Luke* 15:11–32; *Genesis* 21:1–21.

<sup>2</sup> For purposes of this article, there is no prescribed definition of “elder.” Definitions vary for different laws and benefit determinations. No age acquisition is set here so the reader is free to define the term. An elder may be determined based on having achieved a specific age or for other reasons, such as showing infirmities of aging.

<sup>3</sup> See Jessica Ticktin & Margaret W. Hudson, *Finishing the Family Feud*, 20 ACRESOL. 12, 13–14 (2020).

<sup>4</sup> Linda Fieldstone et al., *From The Guest Editors*, 20 ACRESOL. 4, 5 (2020) (Linda Fieldstone, Sue Bronson, and Michele Morley presented on eldercaring coordination at the United Nations on June 14, 2018).

<sup>5</sup> *Id.*

<sup>6</sup> *Guidelines for Eldercaring Coordination*, ASS’N CONFLICT RESOL. 1, 5 (Oct. 2014) <http://static1.squarespace.com/static/5e7a0fdc29215474d078e3f2/t/627bcff355ac8b0c6c29e904/1652281331677/ACR+Guidelines+for+Eldercaring+Coordination++ABRIDGED+16+p.pdf>.

<sup>7</sup> *Id.*

Eldercaring coordinators hail from and train in Canada and Australia, as well as in Alabama, California, Florida, Idaho, Indiana, Maryland, Michigan, Minnesota, Ohio and Virginia in the United States.<sup>8</sup> Florida is the first and presently only state to have enacted a comprehensive eldercaring coordination statute authorizing judges to refer cases to the process.<sup>9</sup> Independent researchers who have studied eldercaring coordination cases have reported its strength in prioritizing the needs of the elder.<sup>10</sup>

To begin, this article will identify the need for eldercaring coordination. It will provide a brief overview of eldercaring coordination, along with a review of the process used to create this new dispute resolution process. Florida's comprehensive eldercaring coordination statutory law will then be explored, comparing the processes of mediation and eldercaring coordination, discussing the relationship between recommendations for guardianship reform and eldercaring coordination, and finally making recommendations for eldercaring coordination to best serve elders, their families, assisting professionals, and the court.<sup>11</sup>

## II. THE NEED FOR ELDERCARING COORDINATION

This article in no way suggests that with advanced age necessarily comes frailty or senility.<sup>12</sup> While many elders are firm of body and sound of mind, many are not.<sup>13</sup> The elder population is particularly vulnerable to abuse, neglect, and exploitation,<sup>14</sup> and are likely to have health issues requiring assistance for daily living

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<sup>8</sup> Fieldstone et al., *supra* note 4, at 5; Linda Fieldstone et al., *Eldercaring Coordination: An Introduction to the Newest Alternative Dispute Resolution in Florida*, 26 FL. BAR FAM. L. SECTION COMMENTATOR 15, 18–19 (2022).

<sup>9</sup> See generally FLA. STAT. § 44.407 (2023).

<sup>10</sup> Fieldstone et al., *supra* note 8, at 17–18; Ashley A. King et al., *Preliminary Findings from an Evaluation of Eldercaring Coordination*, 20 ACRESOL. 37, 39 (2020).

<sup>11</sup> This article focuses on the process of eldercaring coordination and the law supporting it. An in-depth analysis of the Rules and Training Standards for Eldercaring Coordinators is beyond the scope of this article and appropriate for a future article.

<sup>12</sup> See World Health Organization, *Ageing and Health*, WHO (Oct. 1, 2022), <https://www.who.int/news-room/fact-sheets/detail/ageing-and-health>.

<sup>13</sup> *Id.*

<sup>14</sup> Andy Mao, *May Is Older Americans Month: Elder Abuse Is a Social Determinant of Health*, U.S. DEPT. HEALTH & HUM. SERV. (Apr. 28, 2022), <http://health.gov/news/202204/may-older-americans-month-elder-abuse-social-determinant-health>.

activities.<sup>15</sup> By 2034, for the first time in history, people in the United States over the age of 65 will outnumber children.<sup>16</sup> These aging individuals are often dependent on others for their care and may not have kind-hearted, well-intentioned people on whom they can rely.<sup>17</sup> Elders may be isolated from those who might assist them, or unable to communicate their plight because of their limitations or society's failure to hear their voices.<sup>18</sup> Problems multiply when family dysfunction and conflict cause members to focus on their concerns and grievances rather than the elders' care and safety.<sup>19</sup>

Elders have unique dispute resolution process needs for reasons beyond their multiple birthdays.<sup>20</sup> Disputing family members exacerbate elders' physical and mental changes by making decisions for and about them.<sup>21</sup> Court appearances may be particularly frightening for elders as they are "in the spotlight—alone, afraid, confused, and often unheard—as family members argue about their personal abilities and future."<sup>22</sup> When possible, elders should make important decisions regarding their health, long-term care, assets, and end of life matters to ensure respect for their wishes.<sup>23</sup> Family members driven by their own high conflict or self-interest, rather than the elders' well-being, should not make decisions for them.<sup>24</sup> Advanced age or diminishing abilities should not deny elders being treated with dignity, respect, and having their voices heard.<sup>25</sup>

<sup>15</sup> See *Promoting Health for Older Adults*, CDC (Sept. 8, 2022), <http://www.cdc.gov/chronicdisease/resources/publications/factsheets/promoting-health-for-older-adults.htm>.

<sup>16</sup> Jonathan Vespa, *The U.S. Joins Other Countries with Large Aging Populations*, U.S. CENSUS BUREAU (Oct. 8, 2019), <http://www.census.gov/library/stories/2018/03/graying-america.html#:~:text=Americans%20are%20having%20fewer%20children,aging%20is%20the%20baby%20boomers>.

<sup>17</sup> Amelia Crotwell & Anthony Diblasi, *Using a Proactive Approach to Address Elder Care Conflict and Avoid Litigation* 20 ACRESOL., 26, 28 (2020); Fieldstone et al., *supra* note 9, at 15.

<sup>18</sup> Crotwell & Diblasi, *supra* note 18, at 27–28; Mao, *supra* note 14.

<sup>19</sup> Ticktin & Hudson, *supra* note 3, at 13.

<sup>20</sup> See Erica F. Wood, *Dispute Resolution and Aging: What is the Nexus and Where Do We Stand?*, 36 BIFOCAL 73, 73 (2015).

<sup>21</sup> *Id.*

<sup>22</sup> Press Release, Linda Fieldstone, Florida Enacts Landmark Eldercaring Coordination Law, FLAFCC (Jul. 9, 2021).

<sup>23</sup> ASS'N CONFLICT RESOL., *supra* note 6, at 9.

<sup>24</sup> Linda Fieldstone & Sue Bronson, *Eldercaring Coordination in Your Community or Your Law Practice: New Approaches to Dealing with High-Conflict Families*, 14 NAT'L ACAD. ELDER L. ATTY'S J. 27, 28–29 (2018).

<sup>25</sup> *Id.* at 28; ASS'N CONFLICT RESOL., *supra* note 6, at 9.

The types of disputes confronted and resolved in eldercaring coordination may include:<sup>26</sup>

- Son unable to see his mother for four years—then getting to spend significant quality time with her before her death, giving them both a sense of peace;
- Family members who were unable to talk civilly and constructively—then able to grieve together at father’s funeral and agree to divide his ashes;
- Siblings arguing about appropriate living facility and disagreeing about obligation to pay for parent’s care—then agreeing on a facility, with parent getting good care and facility getting full payment;
- Adult children looking to have their father’s new wife stopped from taking Dad to the doctor—then understanding he wants her to do so, and agree it is fine now that she is advising them of appointments, health issues and treatment;
- A son who filed for Guardianship to stop his siblings from using their Durable Power of Attorney and Health Care Surrogate—then deciding that Guardianship is not necessary when family members have ongoing communication about the elder’s health and finances, and all family members have visitation opportunities to gather firsthand information about the elder’s health and care;
- Siblings arguing over the medical care their father should be receiving resulting in father not receiving medical care—then able to decide on appropriate treatment, with father receiving the care he needed, preventing worsening of his health and intervening before his premature death.

This new dispute resolution process of eldercaring coordination assists families in high conflict to maintain focus on the needs, interests, and voice of the elders.<sup>27</sup> Eldercaring

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<sup>26</sup> The examples are based on the experiences of eldercaring coordinators, attorneys, and judges serving on eldercaring coordination cases. They represent the types of cases rather than actual cases. See Sue Bronson & Linda Fieldstone, *From Friction to Fireworks to Focus: Eldercaring Coordination Sheds Light in High-Conflict Cases*, 24 EXPERIENCE 29, 32–33 (2015); Crotwell & Dibiasi, *supra* note 17, at 28; Jan Pudlow, *A New Way to Resolve ‘High Conflict Family Dynamics’ for Elders*, FLA. BAR NEWS (June 1, 2016).

<sup>27</sup> Sarah J. Gross, *Eldering Coordination: A Needed Dispute Resolution Option*, 40 BIFOCAL 22, 22 (2018).

coordinators typically work with families for two years to improve communication skills, help develop an eldercaring plan, learn about and access community resources, screen for abuse, neglect, and exploitation, keep focus on the care, safety, and autonomy of the elder, and include the elder's voice as central to decision making.<sup>28</sup> The eldercaring coordinators' work on nonlegal issues frees court resources and lawyers to concentrate on the legal matters.<sup>29</sup> The Florida Legislature recognized the need for eldercaring coordination, finding "it is in the best interest of an elder, his or her family members, and legally recognized decisionmakers to have access to a non-adversarial process to resolve disputes relating to the elder which focuses on the elder's wants, needs, and best interests."<sup>30</sup>

### III. BRIEF OVERVIEW OF ELDERCARING COORDINATION

A typical eldercaring coordination case is a court-referred guardianship matter with contentious parties filing numerous, emotionally-charged pleadings, often regarding nonlegal issues.<sup>31</sup> The eldercaring coordination process is helpful not only where spite, intimidation, or vengeance are at play,<sup>32</sup> but also when tempers flare over whether mom should get ice cream or dad should stay up late.<sup>33</sup> The parties are often conflict driven rather than content driven, focusing extensively on their problems and disagreements with each other rather than the elder's care and safety.<sup>34</sup>

A court appoints the eldercaring coordinator for up to two years, with the option to abbreviate or extend the term following periodic reviews of the efficacy of the process in each case.<sup>35</sup> This time frame allows the eldercaring coordinator to work with family

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<sup>28</sup> FLA. STAT. § 44.407(2)(d)–(f) (2023); *see also* FLA. STAT. § 44.407(4)(a)(2023).

<sup>29</sup> *See* Gross, *supra* note 27, at 24.

<sup>30</sup> FLA. STAT. § 44.407(1)(b) (2023).

<sup>31</sup> *See* Bronson & Fieldstone, *supra* note 26, at 30.

<sup>32</sup> *Id.* at 32 (citing examples from General Magistrate's Report of Recommendations for Cases in which "one sibling won't give other siblings and their spouses access to a parent; the current wife moved the husband/father and won't tell his sons where he is; or a sibling with greater financial resources, represented by an attorney, wants to pay for a corporate professional guardian instead of a better-suited family member").

<sup>33</sup> Nanci Thamer et al., *Eldercaring Coordination: Managing Conflict Outside the Courtroom*, 20 ACRESOL. 22, 23 (2020).

<sup>34</sup> Tickin & Hudson, *supra* note 3, at 13.

<sup>35</sup> *See* FLA. STAT. § 44.407(4)(a) (2023).



members to formulate their vision for the elder's present and future life.<sup>36</sup> The coordinator then assists the family to develop its communication skills to constructively identify and address the needs and interests of the elder.<sup>37</sup> The voice of the elder continually guides the decision making.<sup>38</sup>

The eldercaring coordinator may refer parties for professional services, help parties access community resources, and educate on aging.<sup>39</sup> The eldercaring coordinator may also make recommendations concerning the care and safety of the elder,<sup>40</sup> as well as limited, non-substantive decisions consistent with the court order.<sup>41</sup> The ongoing relationship with the family positions the eldercaring coordinator to recognize and address safety issues and warning signs of abuse, neglect, or exploitation.<sup>42</sup>

The process is both confidential<sup>43</sup> and transparent.<sup>44</sup> Eldercaring coordination communications are confidential and are not shared with those outside the process unless a statutory exception applies.<sup>45</sup> Transparent communication among participants is a valued feature of the process.<sup>46</sup> Accordingly, eldercaring coordinators, unlike mediators, do not caucus with individual parties to hear confidential information that will be kept from other parties.<sup>47</sup> This helps establish a comfortable working relationship where parties are not concerned that other parties are telling "secrets" about them.<sup>48</sup>

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<sup>36</sup> Fieldstone et al., *supra* note 8, at 17.

<sup>37</sup> Crotwell & Diblasi, *supra* note 17, at 28–29.

<sup>38</sup> See ASS'N CONFLICT RESOL., *supra* note 6, at 9; see also King et al., *supra* note 10, at 39 (“[E]ldercaring coordinators, judges, and court administrators or magistrates noted that the eldercaring coordination process empowers the elder by allowing his or her voice to be prioritized.”).

<sup>39</sup> Bronson & Fieldstone, *supra* note 26, at 33.

<sup>40</sup> FLA. STAT. § 44.407(2)(d)4 (2023).

<sup>41</sup> FLA. STAT. § 44.407(2)(d)5 (2023).

<sup>42</sup> Gross, *supra* note 27, at 25.

<sup>43</sup> *Guidelines for Eldercaring Coordination*, FLA. CH. ASS'N FAM. & CONCILIATION CTS 1, 14 (2014), [http://flafcc.org/wp-content/uploads/2020/08/flafcc\\_guidelines\\_for\\_eldercaring\\_coordination\\_website.pdf](http://flafcc.org/wp-content/uploads/2020/08/flafcc_guidelines_for_eldercaring_coordination_website.pdf).

<sup>44</sup> *Id.* at 13.

<sup>45</sup> See FLA. STAT. § 44.407 (9)(a) (2023); see also *infra* Part V(E) discussing exceptions to confidentiality.

<sup>46</sup> See FLA. CH. ASS'N FAM. & CONCILIATION CTS, *supra* note 43.

<sup>47</sup> Compare FLA. CH. ASS'N FAM. & CONCILIATION CTS, *supra* note 43, at 14 with FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.360(b) (providing for caucus confidentiality).

<sup>48</sup> Fieldstone et al., *supra* note 9, at 16–17.

Parties work with the eldercaring coordinator to devise an eldercaring plan focusing on the elder's wishes and preferences.<sup>49</sup> This plan is not a legally binding agreement shared with the court.<sup>50</sup> The issues addressed are not the legal issues before the court, but are those regarding the elder's care and safety.<sup>51</sup> The eldercaring plan specifically identifies the elder's care needs providing information on how, when and by whom the needs will be met.<sup>52</sup> It serves as a "roadmap" for the family's use, with the family regularly reviewing and revising it to meet the elder's changing needs.<sup>53</sup>

As the family's ability to work together improves, eldercaring coordination sessions are further apart.<sup>54</sup> When family conflict has diminished, the elder and family members are better able to work with attorneys, financial advisers, and health care providers.<sup>55</sup> The eldercaring coordinator remains available to help them navigate transitions and manage conflict to minimize interference with court proceedings.<sup>56</sup> Importantly, diminishing conflict creates a healthier environment for the elder to spend peaceful, quality time with friends and family.<sup>57</sup>

#### IV. THE PROCESS OF CREATING A NEW DISPUTE RESOLUTION PROCESS

"Never doubt that a small group of thoughtful, committed citizens can change the world: indeed, it's the only thing that ever has."<sup>58</sup> Margaret Mead's quote foreshadowed the creation of eldercaring coordination, an unprecedented collaboration led by three women working with forty well-respected entities.<sup>59</sup> As the brainchild of Linda Fieldstone, eldercaring coordination recognizes that elders, as well as children, are vulnerable family members requiring a dispute resolution process specific to their aging

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<sup>49</sup> See FLA. STAT. § 44.407 (2)(g) (2023); Fieldstone et al., *supra* note 8, at 17.

<sup>50</sup> See Fieldstone et al., *supra* note 8, at 16–17.

<sup>51</sup> See ASS'N CONFLICT RESOL., *supra* note 6, at 5.

<sup>52</sup> See Fieldstone et al., *supra* note 8, at 16–17.

<sup>53</sup> *Id.* at 17; FLA. STAT. § 44.407 (2)(g) (2023).

<sup>54</sup> See Gross, *supra* note 27, at 24.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Fieldstone et al., *supra* note 8, at 18.

<sup>58</sup> Attributed to anthropologist, Margaret Meade, recipient of the 1978 Planetary Citizen of the Year Award.

<sup>59</sup> See *infra* notes 73 and 74 for the twenty Florida organizations and twenty American and Canadian organizations involved in this collaboration.

challenges.<sup>60</sup> Modeled after parenting coordination,<sup>61</sup> eldercaring coordinators work with families in high conflict to maintain focus on the best interests of the vulnerable family members.<sup>62</sup> The three founding mothers, Linda Fieldstone, a Family Court Services Supervisor providing services for families in high conflict, Michelle Morley, a sitting judge, and Sue Bronson, a psychotherapist and mediator, each understood the need for eldercaring coordination based on their professional experiences and perspectives.<sup>63</sup> They came together to share Linda's vision with others, and to collectively bring it to fruition.<sup>64</sup>

In 2012, while working as Supervisor of Family Court Services in the 11th Judicial Circuit in Florida, Fieldstone brought her concept of eldercaring coordination to Sandy Karlan, an Administrative Judge for the same Circuit.<sup>65</sup> Judge Karlan immediately saw its value and approached the President of the Florida Chapter of the Association of Family and Conciliation Courts (FLAFCC) to share the prospect of this new process.<sup>66</sup> The

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<sup>60</sup> See generally Bronson & Fieldstone, *supra* note 26; see also Elder Care Law Blogger, *Eldercaring Coordination: New Hope for Feuding Families*, JOHNSON MCGINNIS (Oct. 6, 2022), <https://www.tn-elderlaw.com/post/eldercaring-coordination-new-hope-for-feuding-families> (noting that “Eldercaring coordination provides . . . [a] humane and dignifying approach when high conflict is an issue, giving the family an opportunity to replace its dysfunction with a support system that promotes the welfare and safety of vulnerable elders as it lays the foundation for more harmonious family interaction in subsequent generations”).

<sup>61</sup> See FLA. STAT. § 61.125 (2020); *Guidelines for Parenting Coordination*, ASS'N FAM. & CONCILIATION CTS. (2019), [http://www.afccnet.org/Portals/0/PDF/Guidelines%20for%20PC%20with%20Appendex.pdf?ver=8uMRjaZ\\_LXGcEuxcKhSCcg%3D%3D](http://www.afccnet.org/Portals/0/PDF/Guidelines%20for%20PC%20with%20Appendex.pdf?ver=8uMRjaZ_LXGcEuxcKhSCcg%3D%3D) (last visited Apr. 3, 2024).

<sup>62</sup> See Linda Fieldstone et al., *You Should Know About Eldercaring Coordination!*, FLA. ASS'N FAM. & CONCILIATION CTS. BLOG (July 11, 2023), <https://flafcc.org/you-should-know-about-eldercaring-coordination/>.

<sup>63</sup> See, e.g., Linda Fieldstone et al., *United Nations Presentation in Honor of World Elder Abuse Awareness Day: Focusing on Advancing Autonomy for Older Persons and Preventing Abuse and Neglect*, FLA. ASS'N FAM. & CONCILIATION CTS. BLOG (Aug. 8, 2018), <https://flafcc.org/eldercaring-coordination-an-intergenerational-model-of-conflict-resolution/>.

<sup>64</sup> See *id.*

<sup>65</sup> See Linda Fieldstone & Michelle Morley, *Background of Eldercaring Coordination Initiative*, FLA. ASS'N FAM. & CONCILIATION CTS. BLOG (Aug. 8, 2018), <https://flafcc.org/background-of-eldercaring-coordination-initiative/>.

<sup>66</sup> See *id.*

FLAFCC Board backed eldercaring coordination, beginning the long list of national and Florida entities working together to support the process.<sup>67</sup> Fieldstone also approached Sue Bronson, Co-Chair of the Association for Conflict Resolution (ACR) Elder Section, to explore developing eldercaring coordination.<sup>68</sup> The ACR leadership saw the process's potential benefit and believed it "forwarded their mission to give voice to the choices for quality conflict resolution."<sup>69</sup> They created the ACR Task Force on Eldercaring Coordination in January 2013, with Sue Bronson and Linda Fieldstone as co-chairs.<sup>70</sup>

The Florida Chapter of the AFCC established its eldercaring coordination task force with Linda Fieldstone and Judge Michelle Morley as co-chairs.<sup>71</sup> With Linda Fieldstone as liaison, the two eldercaring coordination task forces worked in partnership, sharing the same mission.<sup>72</sup> In 2013, the Association for Conflict Resolution (ACR) hosted twenty American and Canadian organizations for a groundbreaking collaboration.<sup>73</sup> Working concurrently with the ACR, the FLAFCC convened twenty Florida entities.<sup>74</sup> The ACR

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<sup>67</sup> See, e.g., Michelle Morley, *OSCA Final Friday Family Court Communique*, FLA. ASS'N FAM. & CONCILIATION CTS. BLOG (Aug. 8, 2018), <https://flafcc.org/osca-final-friday-family-court-communique/>.

<sup>68</sup> See ASS'N CONFLICT RESOL., *supra* note 6, at 3.

<sup>69</sup> *Id.*

<sup>70</sup> See *id.* at 4.

<sup>71</sup> FLA. CH. ASS'N FAM. & CONCILIATION CTS, *supra* note 43, at 4.

<sup>72</sup> *Id.* at 3 ("To develop a dispute resolution option specifically for high conflict cases involving issues related to the care and needs of elders in order to complement and enhance, not replace, other services such as provision of legal information or legal representation, individual/family therapy, medical, psychological or psychiatric evaluation or mediation."); ASS'N CONFLICT RESOL., *supra* note 6, at 3.

<sup>73</sup> See ASS'N CONFLICT RESOL., *supra* note 6, at 2–3. These organizations included: Alternative Dispute Resolution Institute of Canada, American Bar Association for Marriage and Family Therapy, American Bar Association on Law and Aging, American Bar Association Dispute Resolution Section, American Psychological Association, Association of American Retired Persons, Association of Conflict Resolution, Association of Family and Conciliation Courts, Elder Justice Coalition, Florida Chapter of the Association of Family and Conciliation Courts, National Academy of Elder Law Attorneys, National Association of Professional Geriatric Care Managers, National Adult Protective Services Association, National Association of Area Agencies on Aging, National Association of Social Workers, National Center for State Courts, National College of probate Judges, National Committee on the Prevention of Elder Abuse, National Council of Juvenile and Family Judges, National Guardianship Association, and National Guardianship Network.

<sup>74</sup> See FLA. CH. ASS'N FAM. & CONCILIATION CTS, *supra* note 43, at 4. These entities included: Department of Children and Families Adult

and FLAFCC task forces worked collaboratively to develop guidelines for eldercaring coordination, aiming to create Eldercaring Coordination Guidelines with training protocols applicable for various jurisdictions.<sup>75</sup> In October 2014, the ACR Board of Directors unanimously approved its task force's work.<sup>76</sup> In November 2014, the AFFC endorsed the ACR Guidelines,<sup>77</sup> and the FLAFCC Board of Directors approved the FLAFCC Eldercaring Coordination Guidelines.<sup>78</sup> In 2015, the ACR and FLAFCC task forces merged to form the Elder Justice Initiative on Eldercaring Coordination, with Judge Michelle Morley, Linda Fieldstone, and Sue Bronson as the co-chairs.<sup>79</sup>

The founding mothers not only brought the new dispute resolution process into existence, but also planned for its nurture and development. They established pilot sites and arranged for research to be conducted from the pilot sites' inception.<sup>80</sup> An independent

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Protective Services, Elder Justice Institute, Florida Association for Marriage and Family Therapy, Florida Attorney General's Office, Florida Bar Elder Section, Florida Chapter of the Association of Family and Conciliation Courts, Florida Chapter of the National Association of Social Workers, Florida Coalition Against Domestic Violence, Florida Dispute Resolution Center, Florida Health Care Association, Florida Legal Services, Florida Psychological Association, Florida State ombudsman, National Association of Professional Geriatric Care Managers, National Patient Advocate, Inc., Mediation Training Group, Florida Department of Elder Affairs Office of the Public Guardian, Stetson University College of Law Center for Excellence in Elder Law, and University of South Florida Conflict Resolution Collaborative.

<sup>75</sup> See ASS'N CONFLICT RESOL., *supra* note 6, at 4–6.

<sup>76</sup> See *id.* at 5.

<sup>77</sup> *Id.* (providing information on the Foundational Ethical Principles of Autonomy, Beneficence, Collaboration, Professional Competence, Fidelity, Integrity, Justice, Nonmaleficence, and Cultural competence as well as an appendix with Complaint Procedure Regarding Eldercaring Coordinators).

<sup>78</sup> See FLA. CH. ASS'N FAM. & CONCILIATION CTS, *supra* note 43, at 9–17. The FLAFCC guidelines provide more specific guidance than those of the ACR, as they are akin to the Florida Rules for Parenting Coordinators. They include: Competence; Integrity; Advice, Recommendations, and Information; Impartiality; Conflicts of Interest; Scheduling; Compliance with Authority; Improper Influence; Concurrent Standards; Relationships with Other professionals; Confidentiality; Notice and Initial Session; Fees and Costs; Records; Safety, Capacity, and Protection; Education and Training; Responsibility to the Courts; and Discipline.

<sup>79</sup> See Fieldstone et al., *supra* note 8, at 17.

<sup>80</sup> *Id.*

research team from Virginia Tech conducted a study,<sup>81</sup> which involved collecting information through surveys of elders, participants, eldercaring coordinators, and pilot site coordinators.<sup>82</sup> This data informs the process and helps to devise best practices.<sup>83</sup>

Continuing their collaborative initiatives for program infrastructure and support, Judge Michelle Morley, Linda Fieldstone, and Sue Bronson provide education and training for courts, professionals, and families on the process, holding monthly meetings for discussion and consultation to identify challenges and initiate change.<sup>84</sup> Additionally, they provide ongoing educational opportunities for eldercaring coordinators and publish articles to educate on the existence and benefits of the process.<sup>85</sup>

## V. ELDERCARING COORDINATION LAW

Presently, Florida is the only state with a comprehensive statute authorizing judges to refer cases to eldercaring coordination.<sup>86</sup> The Florida legislature established “a unique dispute resolution option to complement and enhance, not replace, other services, such as the provision of legal information or legal representation; financial advice; individual or family therapy; medical, psychological, or psychiatric evaluation; or mediation, specifically for issues related to the care and needs of elders.”<sup>87</sup> The state of Ohio, by court rule rather than statute, also authorizes judges to use the eldercaring coordination process.<sup>88</sup> A probate judge is authorized to facilitate alternative dispute resolution by “[i]nforming the parties about eldercaring coordination, if available, and, upon agreement of the parties, entering an appropriate order either referring the dispute to eldercaring coordination or implementing the result of the eldercaring coordination process.”<sup>89</sup>

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<sup>81</sup> See King et al., *supra* note 10, at 37. Dr. Megan L. Dolbin-McNab and Dr. Pamela B. Teaster collected surveys before and after the eldercaring coordination process.

<sup>82</sup> See Fieldstone & Bronson, *supra* note 24, at 37.

<sup>83</sup> *Id.*

<sup>84</sup> See *Elder Justice Initiative on Eldercaring Coordination: 2020 Five Year Progress Report*, FLA. CH. ASS’N FAM. & CONCILIATION CTS. 1, 5 (2020), <http://static1.squarespace.com/static/5e7a0fdc29215474d078e3f2/t/5fd0edc20534ab11e4007c83/1607527874673/Eldercaring+Coordination+Initiative+5-Year+Progress+Report+11-2020.pdf>.

<sup>85</sup> *Id.*

<sup>86</sup> FLA. STAT. § 44.407 (2023).

<sup>87</sup> FLA. STAT. § 44.407(1)(c).

<sup>88</sup> OHIO SUP R. 79 (2023).

<sup>89</sup> *Id.*

Florida has been using and benefiting from eldercaring coordination since 2015.<sup>90</sup> Prior to the enactment of Florida's eldercaring coordination statute on July 1, 2021, judges were referring cases to the process based on guardianship law.<sup>91</sup> The legislative intent of Florida's guardianship statute allows for alleged-incapacitated and incapacitated persons to participate to the fullest extent possible in decisions regarding their physical health and safety, managing resources, developing or regaining abilities, and protecting their rights.<sup>92</sup>

Florida's eldercaring coordination statute provides insightful legislative intent. Notably, the legislature found that "[d]enying an elder a voice in decisions regarding himself or herself may negatively affect the elder's health and well-being, as well as deprive the elder his or her legal rights."<sup>93</sup> It recognized that elders are entitled to have their voices heard even if they are unable to make major decisions themselves.<sup>94</sup> Accordingly, it found that to protect and preserve elders' rights, in conjunction with court proceedings, it is in the best interests of elders, their families, and decisionmakers "to have access to a non-adversarial process to resolve disputes relating to the elder which focuses on the elder's wants, needs, and best interests."<sup>95</sup>

Florida provides a model of a comprehensive statute offering topics for possible inclusion in other eldercaring coordination statutes. This section will identify some key statutory provisions and note significant differences between eldercaring coordination and mediation statutory law. The Florida Mediation and Confidentiality Act<sup>96</sup> will be used as a comparison mediation statute to avoid confusion of varying distinctions in terminology and state specific law.

### A. HOW CASES GET TO ELDERCARING COORDINATION

The eldercaring coordination statute identifies the process as court-ordered with judges authorized to appoint qualified eldercaring coordinators and refer cases to eldercaring coordination.<sup>97</sup> While judges have the authority to refer cases to mediation, mediation cases need not commence with a court order.<sup>98</sup>

<sup>90</sup> FLA. STAT. §§ 744.101–1098 (2023).

<sup>91</sup> *Id.*

<sup>92</sup> FLA. STAT. § 744.1012(3) (2023).

<sup>93</sup> FLA. STAT. § 44.407.(1)(a) (2023).

<sup>94</sup> *See id.*

<sup>95</sup> FLA. STAT. § 44.407.(1)(a) (1)(b) (2023).

<sup>96</sup> FLA. STAT. § 44.401–06 (2023).

<sup>97</sup> FLA. STAT. §§ 44.407(5), (3)(a) (2023).

<sup>98</sup> FLA. STAT. § 44.402 (2023).

Parties may choose to mediate at any time—even when they do not contemplate court action.<sup>99</sup> Eldercaring coordination cases require an elder as a party.<sup>100</sup> The statute defines elder as “a person 60 years of age or older who is alleged to be suffering from the infirmities of aging as manifested by a physical, mental, or emotional dysfunction to the extent that the elder’s ability to provide adequately for the protection or care of his or her own person or property is impaired.”<sup>101</sup>

## B. ROLE OF THE ELDERCARING COORDINATOR

During eldercaring coordination, the “eldercaring coordinator assists an elder, legally authorized decisionmakers, and others who participate by court order or by invitation of the eldercaring coordinator in resolving disputes regarding the care and safety of an elder.”<sup>102</sup> The eldercaring coordinator assists in resolving these disputes by:<sup>103</sup>

1. Facilitating effective communication and problem-solving skills.
2. Providing education about eldercare resources.
3. Facilitating the creation, modification, or implementation of an eldercaring plan and reassessing it as necessary to reach a resolution of ongoing disputes concerning the care and safety of the elder.
4. Making recommendations for the resolution of disputes concerning the care and safety of the elder.
5. With the prior approval of the parties to an action or of the court, making limited decisions within the scope of the court's order of referral.

The mediator’s role is more limited, with the mediator acting to “encourage and facilitate the resolution of a dispute.”<sup>104</sup> The mediator assists parties in reaching “a mutually acceptable and voluntary agreement.”<sup>105</sup> The mediator helps the parties “in identifying issues, fostering joint problem solving, and exploring

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<sup>99</sup> See FLA. STAT. § 44.402 (providing parties may in writing agree that the Mediation Confidentiality and Privilege Act applies to their mediation proceeding).

<sup>100</sup> FLA. STAT. §§ 44.407(2)(d), (2)(k).

<sup>101</sup> FLA. STAT. § 44.407(2)(c) (2023).

<sup>102</sup> FLA. STAT. § 44.407(2)(d) (2023).

<sup>103</sup> *Id.*

<sup>104</sup> FLA. STAT. § 44.1011(2) (2023).

<sup>105</sup> *Id.*



settlement alternatives.”<sup>106</sup> “Decision-making authority rests squarely with the parties.”<sup>107</sup>

### C. REFERRAL AND APPOINTMENT

The court may appoint an eldercaring coordinator and refer a case to eldercaring coordination with the court’s own motion, parties’ agreement, or a party’s motion.<sup>108</sup> Before referring parties to eldercaring coordination, judges determine if the parties have a history of domestic violence or exploitation that would render the process inappropriate.<sup>109</sup>

The Judge’s “Order of Referral” specifies parties ordered to participate in the process.<sup>110</sup> The eldercaring coordination statute does not permit indigent parties to be ordered to participate unless funds are available to pay for their allocated portion of fees and costs determined in the court order.<sup>111</sup> Fortunately, cost is generally not an obstacle, as some eldercaring coordinators reduce their fees or provide *pro bono* services.<sup>112</sup> Additionally, funds may be available from other sources.<sup>113</sup> For example, Stay Well/Well Care Medicaid/Medicare has recognized that family conflict is a health issue for elders and has provided access to Eldercaring Coordination Scholarships.<sup>114</sup>

Court appointment establishes eldercaring coordinators’ scope of authority,<sup>115</sup> along with their duration of appointment for

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> FLA. STAT. § 44.407(3)(a) (2023).

<sup>109</sup> FLA. STAT. § 44.407(3)(b) (2023); *see also* FLA. STAT. § 44.102(2)(c) (2023) (“Upon motion or request of a party, a court shall not refer any case to mediation if it finds there has been a history of domestic violence that would compromise the mediation process.”).

<sup>110</sup> *See generally* FLA. STAT. § 44.1012 (2023); FLA. STAT. § 44.407(3)(b) (2023).

<sup>111</sup> FLA. STAT. § 44.407(8)(b) (2023); *see* § 44.102 (2023) for court-ordered mediation.

<sup>112</sup> The Nova Southeastern University Shepard Broad College of Law Dispute Resolution Clinic provides eldercaring coordination services at no cost to the parties. The author, Director of the Dispute Resolution Clinic, works with clinic students to provide *pro bono* eldercaring coordination services in Florida’s 15th and 17th judicial circuits. *See generally Dispute Resolution Clinic*, NSU FLORIDA: SHEPARD BROAD COLL. L., <https://www.law.nova.edu/clinics/in-house/dispute-resolution-clinic.html> (last visited Apr. 6, 2024).

<sup>113</sup> *See* FLA. CH. ASS’N FAM. & CONCILIATION CTS., *supra* note 84, at 2.

<sup>114</sup> *Id.*

<sup>115</sup> FLA. STAT. § 44.407 (4)(b) (2023).

up to two years.<sup>116</sup> The eldercaring coordinator's potentially lengthy appointment significantly differs from the much shorter mediator's role helping parties reach agreement or end the mediation without an agreement.<sup>117</sup> Additionally, in eldercaring coordination, the court conducts review hearings to determine whether to conclude or extend the eldercaring coordinator's service.<sup>118</sup> A party may at any time request the court terminate the eldercaring coordinator's appointment and a hearing will be held to determine the propriety of that request.<sup>119</sup>

#### D. ELDERCARING COORDINATOR QUALIFICATION

The court must appoint qualified eldercaring coordinators.<sup>120</sup> By comparison, while judges appoint certified mediators, parties may agree to use a mediator who is not certified by the Florida Supreme Court.<sup>121</sup> Eldercaring coordinators must meet specific licensure, education, and practice requirements.<sup>122</sup> Eldercaring coordinators must have a master's degree or higher level of education, and be a licensed mental health professional, licensed psychologist, licensed physician, licensed nurse, member in good standing of the Florida Bar, or professional guardian.<sup>123</sup> Eldercaring coordinator training includes at least 44 hours in addition to the Florida Supreme Court Family Law Mediation Training.<sup>124</sup>

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<sup>116</sup> FLA. STAT. § 44.407 (4)(a) (2023).

<sup>117</sup> See generally Fla. Stat. § 44.07(4)(1) (2023); § 44.102 (2023).

<sup>118</sup> FLA. STAT. § 44.407 (4)(a) (2023).

<sup>119</sup> FLA. STAT. § 44.407 (4)(c) (2023); see also § 44.407(7) (2023) ("If an eldercaring coordinator resigns, is removed, or suspended, the court shall appoint a successor qualified eldercaring coordinator.").

<sup>120</sup> FLA. STAT. § 44.407(5) (2023).

<sup>121</sup> FLA. STAT. § 44.407.107(c) (2023); see also FLA. R. CERT. & CT.-APPTD. MEDIATORS 10.200. When party-selected mediators are appointed to serve on court cases, they are obligated to follow the Florida Rules for Certified and Court-Appointed Mediators. *Id.*

<sup>122</sup> FLA. STAT. § 44.407(5) (2023).

<sup>123</sup> FLA. STAT. § 44.407(5)(a)(1) (2023); see also § 44.407(5)(a)(2) (2023). Eldercaring coordinators must also have completed three years of post-licensure or post-certification practice. *Id.*

<sup>124</sup> FLA. STAT. § 44.407(5)(a)(2)(c) (2023). Supreme Court Eldercaring Coordination training must include:

[A]dvanced tactics for dispute resolution of issues related to aging, illness, incapacity or other vulnerabilities associated with elders, as well as elder guardianship, and incapacity law and procedures and less restrictive alternatives to guardianship; phases of eldercaring coordination and the role and functions of an eldercaring coordinator; the elder's role with eldercaring coordination; family dynamics related to eldercaring

Eldercaring coordinators must also pass a level two background check unless exempt,<sup>125</sup> and meet any additional requirements the court may establish.<sup>126</sup>

### E. CONFIDENTIALITY AND PRIVILEGE

Given the significant differences between the eldercaring coordination and mediation processes, there are, consequently, significant differences in their confidentiality and privilege statutory provisions. For both, communication is confidential unless a statutory exception provides otherwise.<sup>127</sup> Eldercaring coordination communication means:

[An] oral or written statement or nonverbal conduct intended to make an assertion by, between, or among the parties, participants, or eldercaring coordinator made during the course of eldercaring coordination activity, or before an eldercaring coordination activity if made in furtherance of eldercaring coordination. The term does not include statements made during eldercaring coordination which involve the commission of a crime, the intent to commit a crime, or ongoing abuse, exploitation, or neglect of a child or vulnerable adult.<sup>128</sup>

The definitions of “eldercaring coordination communication” and “mediation communication” include written statements and some nonverbal communication in addition to oral statements.<sup>129</sup> Both also include communication in furtherance of the process and identify exclusions to the definition.<sup>130</sup> Notably, eldercaring coordination communication excludes ongoing abuse, neglect, or exploitation of a child or vulnerable adult.<sup>131</sup> This may

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coordination; eldercaring coordination skills and techniques; multicultural competence and its use in eldercaring coordination; at least 6 hours of the implications of abuse, neglect, and exploitation and other safety issues pertaining to the training; use of technology within eldercaring coordination; and court-specific eldercaring coordination procedures. *Id.*

<sup>125</sup> FLA. STAT. § 44.407(5)(a)(3) (2023).

<sup>126</sup> FLA. STAT. §§ (5)(a)(4)–(5).

<sup>127</sup> See FLA. STAT. § 44.407(9)(a) (2023) for eldercaring coordination confidentiality; see also § 44.405(1) (2023) for mediation confidentiality.

<sup>128</sup> FLA. STAT. § 44.407(2)(e) (2023).

<sup>129</sup> See FLA. STAT. § 44.407(2)(e) (2023) for eldercaring coordination; see also § 44.403(1) (2023) for mediation.

<sup>130</sup> See FLA. STAT. § 44.407(2)(e) (2023); § 44.403(1) (2023).

<sup>131</sup> FLA. STAT. § 44.407(2)(e) (2023).

seem inconsequential as both processes have mandatory reporting for children and vulnerable adults as delineated exceptions to confidentiality and privilege.<sup>132</sup> However, it signifies the difference between preserving confidentiality other than the mandatory report to the identified agency, and not keeping information confidential due to its designation as non-protected communication.<sup>133</sup>

Eldercaring coordination parties, participants, and coordinators may not disclose communications to anyone other than another process party, participant, coordinator, or counsel for a party or participant.<sup>134</sup> Further, “an eldercaring coordination party, participant, or eldercaring coordinator has a privilege to refuse to testify and to prevent any other person from testifying in a subsequent proceeding regarding eldercaring coordination communications.”<sup>135</sup> An eldercaring coordination party or participant who willfully and knowingly discloses a protected eldercaring coordination communication is subject to remedies including equitable relief, compensatory damages, and contribution to the other parties’ attorneys and eldercaring coordinator fees, as well as other process costs.<sup>136</sup> Both mediation and eldercaring coordination processes have comparable privilege language with a notable exception: in mediation, only the parties hold the privilege, while in eldercaring coordination, the parties, participants, and eldercaring coordinator all hold the privilege.<sup>137</sup> Additionally, they have comparable remedies for breaches of the statute.<sup>138</sup>

For signed written agreements reached during eldercaring coordination, no confidentiality or privilege applies.<sup>139</sup> The same holds true for signed written agreements reached during a mediation, unless the parties agree otherwise.<sup>140</sup> Familiar confidentiality

<sup>132</sup> See FLA. STAT. § 44.407(9)(c)(7) (2023) for eldercaring coordination; § 44.405(4)(a)(3) (2023) for mediation.

<sup>133</sup> FLA. STAT. § 44.407(2)(e) (2023) (excluding statements made during eldercaring coordination which involve ongoing abuse, exploitation or neglect of a child, or vulnerable adult from the definition of eldercaring coordination communication so the statements are not confidential)

<sup>134</sup> FLA. STAT. § 44.407(9)(a) (2023).

<sup>135</sup> FLA. STAT. § 44.407(9)(b) (2023).

<sup>136</sup> FLA. STAT. § 44.407(9)(g)(1) (2023).

<sup>137</sup> See FLA. STAT. § 44.405 (2023); § 44.407(9)(g)(1) (2023).

<sup>138</sup> See FLA. STAT. § 44.407(9)(g)(1) (2023) for eldercaring coordination; § 44.406 (2023) for mediation.

<sup>139</sup> FLA. STAT. § 44.407(9)(c) (2023). This signed written agreement is distinguished from the eldercaring plan which is not a legally binding agreement and meant for use by the family in planning for the elder’s care and safety. See generally *supra* Part III discussing eldercaring plans. During eldercaring coordination an agreement on legal issues would be drafted by the attorneys. FLA. STAT. § 44.407(9)(c) (2023).

<sup>140</sup> FLA. STAT. § 44.405(4)(a) (2023).

exceptions from mediation applicable to eldercaring coordination include the mandatory reports of abuse, neglect or exploitation of elderly or disabled adults,<sup>141</sup> and mandatory reports of abuse, neglect or abandonment of children;<sup>142</sup> as well as communication regarding professional misconduct<sup>143</sup> or professional malpractice<sup>144</sup> alleged to have occurred during eldercaring coordination solely for the proceeding or body conducting the investigation, and communication willfully used to plan a crime, commit a crime, conceal ongoing criminal activity, or threaten violence.<sup>145</sup> On the other hand, exceptions specific to eldercaring coordination include communication: regarding a party's compliance with court orders;<sup>146</sup> necessary to identify an issue for court resolution;<sup>147</sup> and necessary to protect someone from domestic violence, child abuse, neglect, or abandonment; and abuse, neglect, or exploitation of elderly or disabled adults.<sup>148</sup> There is also an exception for eldercaring coordinators should they need to contact people outside the eldercaring coordination process to obtain or provide information to further facilitate the process.<sup>149</sup>

#### F. EMERGENCY REPORTING TO THE COURT

The eldercaring coordinator's extended time with the family allows for ongoing screening to protect vulnerable individuals.<sup>150</sup> In addition to the mandatory reporting for vulnerable adults<sup>151</sup> and children,<sup>152</sup> required for mediators, eldercaring coordinators have reporting obligations to the court.<sup>153</sup> They must immediately alert

<sup>141</sup> See FLA. STAT. §§ 44.407(9)(c)(7) (2023) (referencing chapter 415 requiring mandatory reporting of abuse, neglect, and exploitation of vulnerable adults in eldercaring coordination); *see also* § 44.405(4)(a)(3) (2023) (referencing chapter 415 mandatory reporting for mediation).

<sup>142</sup> See FLA. STAT. § 44.407(9)(c)(7) (2023); § 44.405(4)(a)(3) (referencing chapter 39 requiring mandatory reporting of abuse, neglect, and abandonment of children for eldercaring coordination and mediation respectively).

<sup>143</sup> FLA. STAT. § 44.407(9)(c)(9) (2023); *see also* § 44.405(4)(a)(6) (2023) for exceptions in the mediation statute.

<sup>144</sup> FLA. STAT. § 44.407(9)(c)(10) (2023); *see also* § 44.405(4)(a)(4) (2023) for exceptions in the mediation statute.

<sup>145</sup> See FLA. STAT. § 44.407(9)(c)(11) (2023).

<sup>146</sup> See FLA. STAT. § 44.407(9)(c)(3) (2023).

<sup>147</sup> See FLA. STAT. § 44.407 (9)(c)(2) (2023).

<sup>148</sup> See FLA. STAT. § 44.407 (9)(c)(8) (2023).

<sup>149</sup> See FLA. STAT. § 44.407 (9)(c)(6) (2023).

<sup>150</sup> See FLA. STAT. § 415.1034(1)(a) (2023); § 44.407(10) (2023).

<sup>151</sup> See FLA. STAT. § 415.1034(1)(a) (2023).

<sup>152</sup> See FLA. STAT. § 39.201(1)(a) (2023).

<sup>153</sup> FLA. STAT. § 44.407(10) (2023).

the court by affidavit or verified report if they filed, or will file, a mandatory report regarding a vulnerable adult or child.<sup>154</sup> They must also do so if a party plans to kidnap or wrongfully remove an elder from the jurisdiction, or a party is an arrestee for, or is the subject of, an injunction of protection against them for domestic violence or exploitation of the elderly.<sup>155</sup>

### G. ROLE OF THE FLORIDA SUPREME COURT

“The Florida Supreme Court is responsible for establishing minimum standards and procedures for the qualification, ethical standards, discipline, and training and education of eldercaring coordinators.”<sup>156</sup> Linda Fieldstone and this author served on the Elder Subcommittee of Florida’s Alternative Dispute Resolution (ADR) Rules and Policy Committee, drafting proposed Eldercaring Coordinator Guidelines and Training Standards.<sup>157</sup> The Supreme Court of Florida has recently established Certified Eldercaring Coordinator Training Standards setting the minimum standards for certified eldercaring coordinator training programs.<sup>158</sup> To be eligible to qualify as a Florida Supreme Court Certified Eldercaring Coordinator, one must, within a two-year period, have completed 44 total hours of training, which include 16 hours of an elder mediation training course and 28 additional hours of eldercaring coordination training.<sup>159</sup> The Court has not yet approved the Rules for Eldercaring Coordinators. The Proposal to Adopt Rule of Civil Procedure 1.840 (Eldercaring Coordination) and to create a new rule set titled Rules for Qualified and Court-Appointed Eldercaring Coordinators has been released for public comment and is presently pending.<sup>160</sup>

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<sup>154</sup> FLA. STAT. § 44.407(10)(a)(1) (2023).

<sup>155</sup> FLA. STAT. § 44.407(10)(a)(2) (2023); § 44.407(10)(b) (2023).

<sup>156</sup> FLA. STAT. § 44.407(12) (2023).

<sup>157</sup> See Fieldstone & Bronson, *supra* note 24, at 6.

<sup>158</sup> FLA. ADMIN. ORDER No. AOSC24-14 (Mar. 11, 2024), <https://www.flcourts.gov/content/download/2092627/file/AOSC24-14%20EC%20Training%20Standards.pdf>.

<sup>159</sup> *Id.* This requirement is consistent with FLA. STAT. § 44.407(5)(a)2(c) (2023). See *supra* Part V(D).

<sup>160</sup> FLA. R. CIV. P. (proposed rule 1.840), SC2024-0109, available at, <https://acis.flcourts.gov/portal/court/68f021c4-6a44-4735-9a76-5360b2e8af13/case/799DFC8D-A8DA-4BBF-8278-7CB28579E3B2>.

**VI. COMPARISON OF ELDER MEDIATION AND ELDERCARING COORDINATION**

**TABLE 1: GENERAL STATEMENTS COMPARING ELDER MEDIATION AND ELDERCARING COORDINATION<sup>161</sup>**

	<b>ELDER MEDIATION</b>	<b>ELDERCARING COORDINATION</b>
<b>PARTIES</b>	Low, moderate conflict	High level, sustained conflict
	Issue driven	Conflict driven
	Ability to communicate	Ineffective communication
	Ability to focus on elder	Low or no ability to focus on elder
<b>PROCESS</b>	Session(s) to resolve legal issues	Increased duration up to 2 years
	Initial screening Abuse, Neglect, Exploitation (ANE)	Ongoing screening for ANE
	Legal issues	Nonlegal issues
	Mediation training & training regarding elders	Additional training beyond family mediation and elder mediation
	Mediator of dispute	Mediator, educator, referral source
	Limited exceptions to confidentiality	Additional exceptions to confidentiality
	Caucus confidentiality	Transparent process, no caucus confidentiality
	Mediated agreement	Eldercaring Plan
	Mediator is not the decision maker	Eldercaring Coordinator may make some limited non-substantive decisions
	Parties hold the privilege	Parties, participants & eldercaring coordinator hold privilege

<sup>161</sup> *Eldercaring Coordination or Elder Mediation: What's the Difference?*, ELDERCARING COORDINATION, <https://static1.squarespace.com/static/5e7a0fdc29215474d078e3f2/t/5eea cb79c5458540f29e8a50/1592445817657/ELDERCARING+COORDINATION+or+MEDIATION+5-20.pdf> (last visited May 19, 2024).

**VII. GUARDIANSHIP REFORM AND LEGISLATIVE INTENT**

Eldercaring coordination is in harmony with guardianship reform recommendations for people to see the elderly as unique individuals rather than categorize them by pejorative terms, such as “ward” or “alleged incapacitated person.”<sup>162</sup> The process provides the time and place for families and authorized decision makers to focus on the elder’s specific needs and interests, while collaboratively exploring less restrictive alternatives,<sup>163</sup> including supported decision making.<sup>164</sup> Court proceedings’ adversarial nature is not conducive to the open-minded, cooperative communication level necessary to focus on the elder’s voice while considering viable alternatives to guardianship.<sup>165</sup>

**A. UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT**

The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) revises previous uniform laws on guardianship<sup>166</sup> with major objectives that include: ensure individuals subject to guardianship remain at the center of all decisions and considerations;<sup>167</sup> maintain that those individuals have

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<sup>162</sup> *Uniform Guardianship, Conservatorship, & Other Protective Arrangements Act*, UNIF. L. COMM’N Prefatory Note 1–2 (2017), <https://tinyurl.com/5n66f77m> [hereinafter UGCOPAA]; see also Fran Tetunic & Timothy Frizzell, *Eldercaring Coordination: The Law Supporting the Process* 20 ACRESOL. 8, 8–9 (2020).

<sup>163</sup> UGCOPAA § 102(13) (explaining the less restrictive alternative means approach to “meet an individual’s needs . . . restrict[ing] fewer rights of the individual than would the appointment of a guardian or conservator). This approach includes “supported decision making, appropriate technological assistance, appointment of a representative payee, and appointment of an agent by the individual, including appointment under a [power of attorney for health care] or power of attorney for finances.” *Id.*

<sup>164</sup> See *id.* “Supported decision making’ means assistance from one or more persons of an individual’s choosing in understanding the nature and consequences of potential personal and financial decisions, which enables the individual to make the decisions, and in communicating a decision once made if consistent with the individual’s wishes.” *Id.*

<sup>165</sup> See Bronson & Fieldstone, *supra* note 26, at 33.

<sup>166</sup> See *Report 113*, ABA HOUSE DELEGATES 1, n.1 (2017), [http://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2017\\_SDM\\_%20Resolution\\_Final.pdf](http://www.americanbar.org/content/dam/aba/administrative/law_aging/2017_SDM_%20Resolution_Final.pdf). For purposes of this article, the generic term “guardianship” will reference guardians and conservators, as used in the ABA House of Delegates Report 113.

<sup>167</sup> See UGCOPAA, *supra* note 163, at Prefatory Note 1–2, Art. 3 § 301(a).



respect and visits from their family and friends;<sup>168</sup> and require courts to avoid appointing a guardian if less restrictive alternatives exist.<sup>169</sup> These are precisely the issues eldercaring coordinators work with parties to address. The Foundational Ethical Principles of Eldercaring Coordination provide core principles which focus on the unique considerations of working with elders along with the tasks and functions specific to eldercaring coordinators.<sup>170</sup> The first Foundational Ethical Principle of Autonomy, defined as “self-determination, respect for elders’ rights and dignity; the right of elders to be self-governing within their family and social system and cultural framework,” supports the UGCOPAA objective of individuals subject to guardianship remaining at the center of all decisions. Every person has the right to make safe decisions about themselves, even if a court decides the person should not have the ability to make all decisions.<sup>171</sup> Even if the person loses the ability to make decisions, “the adult has the right to be included in the decision-making process to the extent of his or her ability.”<sup>172</sup> The eldercaring coordinator assists the elder in expressing her or his goals, needs and preferences so the eldercaring plan will incorporate them to the extent possible.<sup>173</sup>

By engaging in the process, parties can identify and agree on less restrictive alternatives to guardianship, such as recognizing durable powers of attorney, trusts and trustees, and designating a health care surrogate or proxy for elders.<sup>174</sup> Eldercaring coordination has been successful in obviating the need for guardianships when families are able to recognize and accept the less restrictive alternatives.<sup>175</sup> Parties also can deal with disputes regarding their communication and visiting arrangements.<sup>176</sup>

<sup>168</sup> *See id.* at Prefatory Note 3, Art. 3 § 315(c).

<sup>169</sup> *Id.* at Prefatory Note 2, Art. 3 § 310(A)(1). Consistent with the UGCOPAA, the American Bar Association urges state legislatures to amend guardianship statutes to consider support-based decision-making as a “less restrictive alternative before guardianship is imposed,” and in proceedings restoring rights or terminating guardianships. ABA HOUSE DELEGATES, *supra* note 166, at 13.

<sup>170</sup> ASS’N CONFLICT RESOL., *supra* note 6, at 7. The core values are Autonomy, Beneficence, Collaboration, Professional Competence, Fidelity, Integrity, Justice, Nonmaleficence, and Cultural Competence. *Id.* at 7–12.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* This may require the eldercaring coordinator to balance the elder’s autonomy with his or her need for safety.

<sup>174</sup> FLA. CH. ASS’N FAM. & CONCILIATION Cts, *supra* note 43, at 9.

<sup>175</sup> *Id.* at 1 (noting Eldercaring Coordination Initiative outcome of incapacity determinations safely avoided).

<sup>176</sup> *See* UGCOPAA, *supra* note 163, at Prefatory Note 3, Art. 3 § 315(c).

Recognizing that lack of communication, differences of opinion, or misunderstandings often underlie the family's conflicts, the eldercaring coordinator aims to facilitate productive communication and planning for the elder.<sup>177</sup> The ongoing nature of the process provides the family time to develop its communication skills and devise and revise an eldercaring plan to meet the needs and interests of the elder.<sup>178</sup>

## B. FLORIDA'S GUARDIANSHIP STATUTE

The Florida Guardianship Statute is consistent with the national guardianship recommendations in its legislative findings, recognizing that guardianship may be unnecessary and adjudicating people totally incapacitated deprives them of their civil and legal rights.<sup>179</sup> Additionally, the Statute recognizes that persons who are partially incapable of caring for their needs should have alternatives to guardianship explored, with the availability of less restrictive assistance and the least restrictive form of guardianship, if needed.<sup>180</sup> The Statute's stated purpose is for "incapacitated persons to participate as fully as possible in all decisions affecting them."<sup>181</sup>

Florida's eldercaring coordination Statute's legislative findings align with the purpose of the state's guardianship law and the guardianship recommendations.<sup>182</sup> The Florida Legislature found denying elders a voice in decisions about themselves deprives them of their legal rights and may negatively affect their health and well-being.<sup>183</sup> Florida created the eldercaring coordination process "to protect and preserve the elder's exercisable rights."<sup>184</sup>

Eldercaring coordination serves to effectuate the purpose of Florida's guardianship law along with the guardianship recommendations.<sup>185</sup> The process prioritizes the voice of the elder.<sup>186</sup> The eldercaring coordinators help participants put their issues and needs to the side and make decisions in the best interest of the elder.<sup>187</sup> Additionally, families can avoid guardianship, implement less restrictive alternatives, and arrange supported

<sup>177</sup> See ASS'N CONFLICT RESOL., *supra* note 6, at 10.

<sup>178</sup> *Id.* at 9–10.

<sup>179</sup> FLA. STAT. § 744.1012(1) (2023).

<sup>180</sup> FLA. STAT. § 744.1012(2) (2023).

<sup>181</sup> FLA. STAT. § 744.1012(3) (2023).

<sup>182</sup> FLA. STAT. §§ 744.1012(1)–(3) (2023).

<sup>183</sup> FLA. STAT. § 44.407(1)(a) (2023).

<sup>184</sup> FLA. STAT. § 44.407(1)(b) (2023).

<sup>185</sup> See FLA. STAT. § 744.1012(1) (2023).

<sup>186</sup> King et al., *supra* note 19, at 39.

<sup>187</sup> Tickin & Hudson, *supra* note 3, at 13.

decision-making and other options when family members are sharing information responsibly and availing themselves of professional services and community resources.<sup>188</sup> Created to assist families in high conflict, eldercaring coordination is recognized as “a model for use in probate/guardianship cases when high conflict dynamics interfere with the best interests of the elder, limit their adherence to court orders, impede their court process, and detract from the efficacy of guardianship and other appointments by the court.”<sup>189</sup>

## VIII. RECOMMENDATIONS

### A. ELDERCARING COORDINATION INFORMATION AND TRAINING

Now that the process of eldercaring coordination is effectively in use, the public must become aware of its existence, benefits, and accessibility. Toward this end, this article recommends mandatory training (provided at no-cost) for public guardians, professional guardians, examining committee members, and court-appointed counsel on guardianship cases.<sup>190</sup> Judges, lawyers, and other professionals should also have convenient no-cost continuing education offerings on eldercaring coordination.<sup>191</sup> It will be helpful to employ media resources to reach individuals providing services to elders and their families, including accountants, therapists, doctors, faith-based leaders, nursing home administrators, hospital social workers, financial advisers, and aging life care professionals.<sup>192</sup> The material should include information on eldercaring coordination’s benefit as a complement rather than

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<sup>188</sup> See *Guardianship: Less Restrictive Options*, U.S. DEP’T JUST. (Oct. 31, 2023) <https://www.justice.gov/elderjustice/guardianship-less-restrictive-options>.

<sup>189</sup> FLA. CH. ASS’N FAM. & CONCILIATION CTS., *supra* note 43, at 3.

<sup>190</sup> *Id.* at 4. Mandatory training is required in Florida’s 5th and 15th Judicial Circuits. Florida has Administrative Orders “mandating that professional guardians, public guardians and court appointed lawyers must complete one hour of training on eldercaring coordination within six months of being added to the court’s registry/rotation lists.”

<sup>191</sup> *Id.*

<sup>192</sup> Service providers who frequently come in contact with elders should know that eldercaring coordination helps to reduce conflict, allowing the parties to better focus on the issues and work effectively with them. See, e.g., Sarah J. Gross, *Eldercaring Coordination: A Dispute Resolution Option for High Conflict Elder Disputes in California*, 29 S. CAL. INTERDISC. L.J. 293, 319–20 (2019).

replacement of their services.<sup>193</sup> Information on eldercaring coordination should also be broadly disseminated to reach elders and their families, ensuring it is available in different formats and accessible to individuals with disabilities and non-English speakers.<sup>194</sup>

## B. ACCESS TO TIMELY PLANNING INFORMATION

At a time when people have the legal capacity to make decisions, they should be aware of their right to make decisions regarding care or assistance they may need in the future.<sup>195</sup> Guardianship may not be necessary if people have appropriate advance directives,<sup>196</sup> and family conflict may be reduced if people clearly advise their loved ones of their wishes.<sup>197</sup> While legal advice is recommended and may be needed, people should always have information to learn of their options.<sup>198</sup> For example, the National Institute on Aging (NIA) website provides information on health care directives, emphasizing the importance of early planning to help ensure compliance with the individual's wishes and to ease the burden on family members.<sup>199</sup> The NIA provides a conversation guide to help individuals begin their planning conversation, along with checklists for future preparation.<sup>200</sup> Similar to the need for accessible information about eldercaring coordination, planning

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<sup>193</sup> FLA. CH. ASS'N FAM. & CONCILIATION CTS., *supra* note 43, at 8; *Initiative*, ELDERCARING COORDINATION, <https://www.eldercaringcoordination.com/initiative> (last visited May 29, 2024).

<sup>194</sup> FLA. CH. ASS'N FAM. & CONCILIATION CTS., *supra* note 43, at 8.

<sup>195</sup> *See Advanced Care Planning: Advance Directives for Health Care*, NAT'L INST. ON AGING, <https://www.nia.nih.gov/health/advance-care-planning-advance-directives-health-care> (last visited Apr. 6, 2024).

<sup>196</sup> Advance Directives for Health Care are legal documents providing instruction for medical care, with decisions made now that would go into effect if the person is later unable to communicate his or her wishes. The most common documents are health care proxy, surrogate or representative and living will. Some people may also choose to identify a pre-need guardian. Individuals may also choose to plan for financial as well as health matters, deciding to execute a durable power of attorney to handle their financial affairs. *Id.*; *see, e.g., Getting Your Affairs in Order Checklist: Documents to Prepare for the Future*, NAT'L INST. ON AGING, <https://www.nia.nih.gov/health/advance-care-planning/getting-your-affairs-order-checklist-documents-prepare-future> (last visited May 25, 2024).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

information should be widely available and accessible to individuals with disabilities and in multiple languages so elders' voices are heard and their wishes honored.<sup>201</sup>

### C. COURT AND LEGAL MATTERS

Judges have expressed frustration when judges who are relying on and wisely using eldercaring coordination periodically rotate out of the Probate and Guardianship Division.<sup>202</sup> Unfortunately, the replacement judges may not be familiar with the eldercaring coordination process.<sup>203</sup> To maintain positive momentum, Judge Morley recommends that judges quickly become familiar with the process.<sup>204</sup> Additionally, it would be beneficial if judges remained in the division for a longer time before rotating to another assignment.<sup>205</sup> The presiding judge's appreciation for the process adds to the parties and lawyers understanding of and comfort with eldercaring coordination.<sup>206</sup>

Eldercaring coordination was modeled after parenting coordination to address the needs of vulnerable elders as well as vulnerable children. There are many non-elder vulnerable adults who are subject to guardianship proceedings or who would benefit from supported decision-making or other services. Vulnerable adults should not have to wait until they are sixty years of age to be eligible for eldercaring coordination services. Accordingly, this article recommends expansion of the process (to be renamed) to include individuals with disabilities and those suffering from the infirmities of aging.

### D. FUNDING AND ACCESS TO SERVICES

Eldercaring coordination should be available to elders and families who would benefit from the process, regardless of their financial situation.<sup>207</sup> Now that conflict has been recognized as a

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<sup>201</sup> *Id.*

<sup>202</sup> Jim Ash, 'Eldercaring' Program Serves the Courts and Florida's Aging Citizens, FLA. BAR NEWS (Oct. 15, 2018), <http://www.floridabar.org/the-florida-bar-news/eldercaring-program-serves-the-courts-and-floridas-aging-citizens/>.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> See Resources for Families, ELDERCARING COORDINATION, <https://www.eldercaringcoordination.com/families> (last visited Apr. 6, 2024) ("The family shares the cost of the EC . . . [t]he court determines how the EC's fees are split among the family members and participants. .

health issue for elders, health insurance and related funds should be available for participation in this court-ordered process.<sup>208</sup> Along with the Nova Southeastern University Shepard Broad College of Law Dispute Resolution Clinic providing *pro bono* eldercaring coordination services, other schools should consider providing services, and eldercaring coordinators should, when able, offer no cost or low-cost services.<sup>209</sup>

Continued and expanding use of technology will also benefit families' participation in eldercaring coordination.<sup>210</sup> Online communication is advisable when distance or disability make in person meetings difficult, or discomfort of being in the same physical space makes communication challenging.<sup>211</sup> To facilitate family communication and document sharing for eldercaring coordination parties, the Eldercaring Coordination Initiative<sup>212</sup> is working to develop a platform for older families akin to that available for parenting coordination families.<sup>213</sup> This platform should prove valuable in encouraging family members to better communicate and share information.<sup>214</sup>

### E. TRANSITION TO ELDERCARING COORDINATION

Although the creation and effectuation of eldercaring coordination represents substantial accomplishments, this article recommends setting reasonable expectations for this program.<sup>215</sup> Systemic change does not come easily, and our ability to undo decades of entrenched family conflict is limited.<sup>216</sup> Understandably, elders and other participants may have reservations about the

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. [p]articipants are informed if there are grants or scholarships available to defray part of the EC's fees.”).

<sup>208</sup> FLA. CH. ASS'N FAM. & CONCILIATION CTS., *supra* note 43, at 5.

<sup>209</sup> *See supra* Part V(C) for discussion on these services.

<sup>210</sup> Linda Fieldstone & Sue Bronson, *The Point of Research: Informing the Practice of Eldercaring Coordination and Beyond*, 20 ACRESOL. 42, 43 (2020).

<sup>211</sup> *See generally* Alyson Carrel & Noam Ebner, *Mind the Gap: Bringing Technology to the Mediation Table*, 2019 J. DISP. RESOL. (2019).

<sup>212</sup> The ACR/FLAFCC Eldercaring Coordination Initiative is devoted to helping families, communities and the court reduce conflict about the care and safety of older adults. The Co-chairs are Linda Fieldstone, M.Ed., Sue Bronson, LCSW, and Judge Michelle Morley. *See* ELDERCARING COORDINATION, *supra* note 193.

<sup>213</sup> Fieldstone & Bronson, *supra* note 210, at 43.

<sup>214</sup> *Id.*; *see, e.g.*, OURFAMILYWIZARD, <https://www.ourfamilywizard.com> (last visited May 19, 2024).

<sup>215</sup> Fieldstone & Bronson, *supra* note 210, at 43.

<sup>216</sup> *Id.*

process.<sup>217</sup> All participants, including parties and attorneys, will likely require time to become familiar and comfortable with eldercaring coordination.<sup>218</sup> Eldercaring coordinators should further develop their skills to effectively explain the process and patiently help participants experience its benefits.<sup>219</sup> Eldercaring coordination, while not a panacea, well serves families in high conflict while protecting and giving voice to the elders.<sup>220</sup>

There are encouraging developments in eldercaring coordination. Attorneys who have participated in the process are requesting its use in their other cases.<sup>221</sup> Judges have reported fewer motions filed in their eldercaring coordination cases, with the filed motions for legal rather than non-legal issues.<sup>222</sup> Parties have learned to work together to make decisions based on the elders' needs and interests.<sup>223</sup> With time people will come to recognize eldercaring coordination's strengths, and eldercaring coordinators working with the founding mothers will continue to develop and refine the process in the best interests of the elders.

## IX. CONCLUSION

The successful creation of eldercaring coordination reminds us to never lose sight of our obligation to recognize wrongs and set them right—even if incrementally or in a small way. The creation of the process underscores our power to move forward when we work collaboratively with like-minded others. Although still young, eldercaring coordination has already been recognized as an Action Model for the Welfare of Ageing Persons and an effective intervention for families in high conflict.<sup>224</sup> It is the new and needed dispute resolution process that helps families focus on the care and safety of their aging loved ones.<sup>225</sup>

As aging is a natural process and conflict is common, there are, and will continue to be, many families in high conflict that can benefit from eldercaring coordination.<sup>226</sup> Families should have access to this process created especially for them. With continuing

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *See generally Testimonials*, ELDERCARING COORDINATION, <https://www.eldercaringcoordination.com/testimonials-1> (last visited Apr. 4, 2024).

<sup>222</sup> FLA. CH. ASS'N FAM. & CONCILIATION CTS., *supra* note 43, at 1.

<sup>223</sup> *See supra* Part II.

<sup>224</sup> *See* Fieldstone et al., *supra* note 4, at 5.

<sup>225</sup> *See id.*

<sup>226</sup> *See generally* Gross, *supra* note 27.

support, eldercaring coordination will further develop into the life-changing process it is destined to be so elders are treated with dignity and respect with their voices heard and seriously considered. In 1994, Robert A. Baruch Bush and Joseph P. Folger wrote the *Promise of Mediation* exploring the transformative potential of mediation.<sup>227</sup> We now explore and develop the transformative potential of eldercaring coordination.

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<sup>227</sup> ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* (1994).