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Elder Law

When Aging Issues Lead To Family Conflict



By Arline Kardasis and Rikk Larsen

at family interests beyond those of just your client?

Why would you suggest mediation to your elder client? Why might you consider mediation for a middle-aged client burdened with fears and frustrations concerning her aging parents and her uncooperative siblings?

You have been practicing law for years. You are proud of your experience, your judgment and your ability to help elderly clients manage complicated family decisions. But are you always as effective as you could be when a decision requires you to look



On the surface you may come to a resolution. But is it the best possible resolution for

the entire family?

Lisa M. Cukier, a probate lawyer in Boston, says that family litigation "is particularly rough on all members of the family. Often, the client's goal and desired end is unequivocally the right thing to do, but litigation, as a means to reach the outcome, can fracture family relations far into the future."

The simple fact is that decision-making in the aging process rarely involves just one issue. Whether it's an estate planning issue, an elder health care crisis or the transitioning of financial control to the next generation, simply telling your client the "best" way to handle the matter may not lead to the optimal solution.

Why? Because most major life changes involve the whole family and process may be as important as outcome. Perhaps you spoke with each family member or even convened a full family meeting. Was that meeting as effective as it could be?

Cukier says "a family meeting can expose more pain than resolve key issues when there is no professional present to assist the individual members to find a common ground and shared goal."

Or are there members of the family who think they weren't involved enough, feel they weren't heard properly, or harbor quiet grudges and hurt feelings that you will never know about?

No one is suggesting that mediation of complex family issues should supplant the classic attorney/client relationship. Nor is it suggested that mediation is always necessary. If you look out in the world and study families to see how they handle major elder transitions, they generally fall into the following four categories:

• **Graceful Transitions** — These are families that thoughtfully and effectively manage old age and its intrinsic transitions, through targeted planning and effective communication. They get good legal and financial advice. They make reasoned, timely and harmonious decisions about elder activities and the transfer of power to the next generation. Finally, they manage their elders' physical declines with dignity

and respect.

- Successful Struggles Here we see families that have one or two major issues to work through but manage to come to a positive outcome with the support of friends, family and advisors. Whether they have a parent who is resistant to unwelcome changes or an adult child who resents perceived inequities of care giving commitment, their solutions are successful and family members feel comfortable with the final decisions.
- Quietly Bruised Families Here we see families who may be unable to move forward with important decisions and are living with situations that leave an aging parent in peril and increase emotional, financial and safety risks. We also find others who may have accomplished a generational transition but have a sense of discomfort with choices made. Sometimes disagreements are festering under the surface about care giving, housing or inheritance decisions. Some continued family alienation may exist and relationships within the family may have gotten worse instead of better.
- **Litigious Solutions** Either the threat of litigation or actually going to court seems to be required to get decisions made. Wounds abound even after a guardianship has been awarded or a will contest decided. Often relationships are destroyed forever between some family members.

"Litigation among these families," says Cukier, "can last for years, and can extend beyond the elder's life, leading to litigation over wills, deeds and trusts."

For families in the third and fourth categories, a mediator trained in elder issues can be a significant enhancement to the resolution process. Here the attorney steps away from the center of the decision process and allows a trained neutral who specializes in conflict resolution to help the family navigate the multiple challenges at work in that process.

Most often these challenges include:

- The tensions of dependence versus independence in multiple areas of life physical, cognitive, social, domestic and financial where unwelcome changes make for a period of intense decision-making;
- Multiple parties involved in decisions parents, brothers, sisters, spouses, adult grandchildren, trusted friends and legal, medical and financial advisors often have trouble communicating with each other in trying to identify, plan for and act on key questions;
- Decision difficulty and conflict may arise from misunderstandings, superstitions, prejudices, poor planning, entrenched relationship patterns, disagreement about what is needed, or a lack of information about what services are available:
- Waiting too long can lead to "crisis mode" decision-making. Without "decision deadlines" like court dates, families facing these challenges often wait too long to have the important conversations that are needed in order to move forward. These delays often decrease options, increase costs, and may put health and safety at risk.

Elder mediators help their clients address their own family dynamics and encourage them to seek out key information and professional service options when needed.

"Family members can have their own attorneys to advise them, either inside or outside of the mediation room, of the ramifications of options [that] are under consideration" adds Cukier.

Family dynamics consist of:

Emotions. "I never knew I cared so much about that house."

- Myths. "Talking about money subverts parental authority."
- Superstitions. "Writing a will could hasten my death."
- Closely held prejudices. "My definition of maturity is 10 years older then whatever age you are now."
- Entrenched relationships. "I just can't talk to him about anything."
- Complicated role reversals. Parents become children and children become parents.
- Passivity. Being overwhelmed with multiple issues causes inertia ("deer in the headlights" mentality). Key information and professional service options include:
- Medical workups from a basic physical exam to advanced diagnostics;
- Legal steps wills, trusts, POAs, HCPs;
- Financial planning investment strategies, tax planning, monthly budgets, bill paying services, Medicaid planning, real-estate advice and appraisals;
- Insurance issues life insurance, medical insurance, long-term care insurance;
- Living options range of choices from independent living to nursing homes.

When should you recommend mediation to your clients? Mediation is most likely to be accepted by all parties and is quite likely to achieve a successful outcome when the parties have an ongoing relationship; when they have an interest in resolving their conflict outside of court; and when there is trust between the parties and a willingness to disclose pertinent information.

Why not "do it yourself"? As an advocate, you cannot act as a neutral and it is sometimes difficult to gain the trust of other family members. Only a neutral third party, a mediator, with statutory protection regarding confidentiality, can provide a safe, unbiased setting in which all parties are encouraged to express their needs and work toward a lasting solution.

Describing mediation to your clients means educating them about the benefits of facilitated conversations. Clients need to know that mediation is voluntary and confidential and that the mediator has no interest in the outcome and will not force anyone to agree to anything.

In fact, clients will appreciate knowing that professional ethics require that mediators determine that all parties participate under the principles of informed consent and self determination.

The role of an attorney in mediation is an active one. You will want to prepare your clients to think carefully about their genuine interests and their best alternative to a negotiated solution. You may participate in the mediation sessions as an advocate for your client or you might act as a resource between sessions, and review proposed agreements.

Finally, you might draft interim agreements and/or the final agreements for court filing.

"Attorneys can enhance the progress toward settlement, rather than encumber it, by arming their client with valuable explanations and alternatives so the client can make an informed decision before signing settlement agreements," encourages Cukier.

While elder mediation is a new field that is rapidly emerging as a resource for attorneys and their clients,

mediators are finding that they are adding elder attorneys to their referral lists for clients who have unmet legal needs or who require specific legal advice in order to make informed decisions.

It's a new day for attorneys who want to provide the best possible outcome for clients embroiled in highly emotional family disputes. The goals of preserving family harmony, addressing unresolved elder issues and creating long-lasting resolutions can now be achieved for clients so that lawyers can return to the work of providing legal services unhampered by disruptive family conflict.

Arline Kardasis and Rikk Larsen are founding partners of Elder Decisions, a Lexington-based elder mediation firm. Elder Decisions is an approved mediation provider for the Middlesex, Norfolk and Suffolk divisions of the Probate & Family Court Department.

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