

VOLUME 24, NUMBER 3 FALL/WINTER 2015

ABA 2015

EXPERIENCE

SENIOR LAWYERS DIVISION

AMERICAN BAR ASSOCIATION

ADR *and* Elder Law

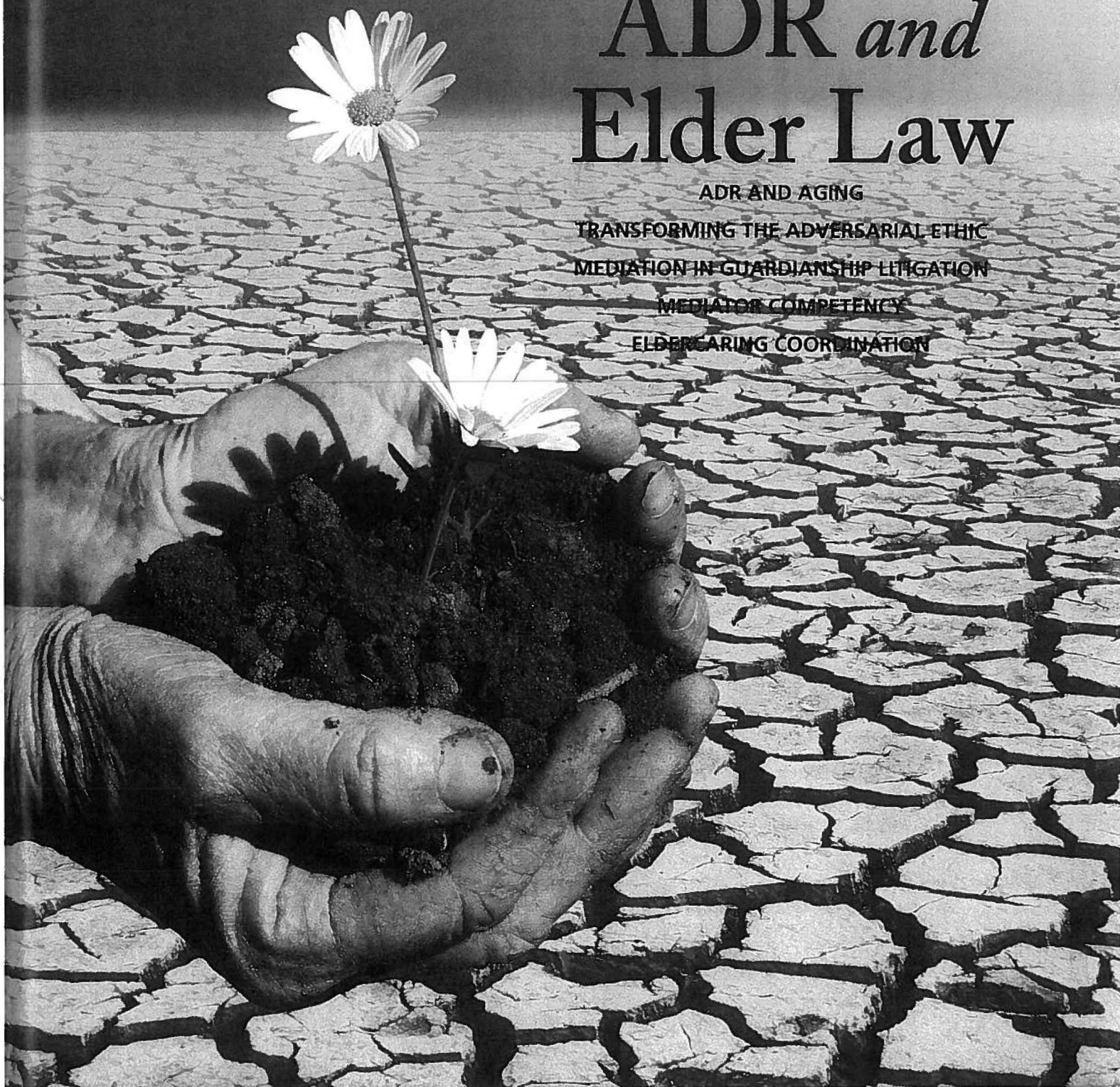
ADR AND AGING

TRANSFORMING THE ADVERSARIAL ETHIC

MEDIATION IN GUARDIANSHIP LITIGATION

MEDIATOR COMPETENCY

ELDERCARE COORDINATION



Editorial Board

Chair

Malinda C. Allen

Members

Jeffrey M. Allen
Patricia Banks
Charles A. Collier Jr.
Charles R. Keeton
Edward W. Madeira Jr.
Bruce A. Mann
Edward J. Schoenbaum
Selma Moidel Smith
Sherman Titens
Michael J. Van Zandt
Kristi Vetri
Dennis J. Wall

Editor Emeritus

Francis J. Larkin

Issue Editor

Charles R. Keeton

ABA Publishing

Director

Bryan Kay

Periodicals Director

Claire L. Parins

Managing Editor

Lisa V. Comforty

Art Director

Jill Tedhams

Advertising

Business/Sales Manager

Anne C. Bitting

312-988-6115

anne.bitting@americanbar.org

Statement of Editorial Purpose

Experience is the magazine of the ABA Senior Lawyers Division. Our audiences are older attorneys specializing in any area of the law, as well as elder law practitioners of any age. Our articles focus on elder law, broadly defined. We also publish articles on other topics of interest, including those related to politics, history, culture, travel, and the arts.

Cover image: iStock

features

Transformative Mediation: Transforming the Adversarial Ethic

By Louise Phipps Senft

Using Mediation in Guardianship Litigation

By Catherine A. Seal and Michael A. Kirtland

First Do No Harm: Why Mediator Competency Matters in Eldercare Cases and What the Mediation Community Is Doing to Develop Qualified Practitioners

By Eleanor Crosby Lanier

From Friction to Fireworks to Focus: Eldercaring Coordination Sheds Light in High-Conflict Cases

By Sue Bronson and Linda Fieldstone

Philadelphia's Senior-LAW Center—A Crossroads for Elder Justice in Pennsylvania:

*An Interview with Executive Director Karen Buck
By Edward W. Madeira Jr. and Joseph A. Sullivan*

Love in a Time of Dementia

By Frederick Smock

departments

Prologue

ADR: A Force for Good in Elder Law

By Charles R. Keeton

The COLA Column

ADR and Aging: What Is the Nexus and Where Do We Stand?

By Erica F. Wood

Experience at Work

The Afghanistan Presidential Election Comes to Final Political Solution

By John Hardin "Jack" Young

Estate Planning

Serving as an Estate Executor

By Jay A. Soled

Making Technology Work

Don't Be a Victim

By Jeffrey M. Allen

Ethics

Staying Active in ADR Proceedings after Retirement Raises Unique Issues

By Thomas E. Spahn



From Friction to Fireworks to Focus

Eldercaring Coordination Sheds Light in High-Conflict Cases

By Sue Bronson and Linda Fieldstone

When there is friction regarding specific issues about an elder's care, mediation is a good option. The results can be transformative, as problem-solving leads to solutions and new insights. Yet, when it comes to dispute resolution, *one size does not fit all*. When the friction leads to fireworks, a new option for elders and their families will soon be available.

Tony and Maria were older adults who were vibrantly health until lately. As they began to face changes, they asked for help, and their families and friends came through when they could make themselves available. At first it was just little tasks around the house, such as climbing a ladder or providing transportation to a doctor's appointment. However, health and behavioral considerations gradually

infringed on Tony's and Maria's independence and ability to care for themselves. Family members started to take on more responsibility for day-to-day care. Tony and Maria were grateful to have help to understand the complex medical decisions that needed to be made and the options for treatment and their consequences. After Maria had several falls, safety was a concern and greater oversight was needed. Maria's role had always been to manage the daily upkeep of their home and preparation of their meals, and Tony was losing weight and the home was deteriorating. Would they need to move or could someone assist them at home? How was the extra help going to be paid for on their limited income?

It is important that everyone be on the same page in determining an eldercare



Sue Bronson



Linda Fieldstone

plan. Tony and Maria discussed their wishes with family members often. They had their legal papers in order, and the family talked through challenging issues around the kitchen table. But not all families fit this collaborative family ideal!

Elder Mediation as an Option for Low-Level or Moderate Disputes

More typically, as differences of opinion surface over the care of an elder or someone feels unappreciated or ignored, strong emotions arise. Those feelings may trigger frictions dating back to childhood grievances. Or the inclusion into the discussion of unwanted family members, blended family members, and new relationships leaves some feeling excluded. Or financial struggles begin an avalanche of new issues. When those around the table are not able to work out differences on their own, help may be available through elder mediation.

An elder mediator may be requested to clarify a parent's wishes before any friction begins. Other families may voluntarily seek out, or be court ordered to participate in, elder mediation to work out ways of resolving disagreements. The elder mediator clarifies the needs and specific concerns of those involved in the elder mediation process, and together, participants explore resources and develop options to meet the needs of the elder. The elder mediator helps people have the necessary conversations and reach a satisfactory resolution.

Eldercaring Coordination: An Option for Higher Levels of Conflict

Some family frictions erupt in fireworks! In those situations, the issues have gone beyond the ability of the mediator or the mediation process itself. Maybe allegations of abuse or financial exploitation are made. Maybe it is the frequency of disputes that becomes intolerable, or the issues are about unmeasurable or unsubstantiated items. Some may have difficulty separating the elder's needs and desires from their own. Personalities with a high degree of rigid thinking or a win/lose mentality can make compromise difficult. The elder may be denied access to family members and/or significant others. The fireworks become an ongoing

spectacle as childhood and family conflicts are relived. At that point, the elder's safety, well-being, or financial resources may be at risk.

Many courts provide high-conflict families with young children an option for parenting coordination to assist parents in working together for their children's sake. A new "coordination" process is now being developed as an option for high-conflict families caring for an elder: "eldercaring coordination."

Eldercaring coordination focuses on improving relationship dynamics so that the elder, family members, and others in supportive roles can better collaborate with professionals able to help them make the onslaught of tough decisions ahead and support each other during times of transition. It is a dispute resolution option specifically designed for high-conflict cases involving issues related to the care and needs of elders in order to complement, not replace, other services such as provision of legal information or legal representation; individual and/or family therapy; and medical, psychological, or psychiatric evaluation or mediation.

More specifically, the process of eldercaring coordination has been developed to help manage high-conflict family dynamics so that the elder, family members, and stakeholders can:

- address their non-legal issues independently from the court;
- work with others in their support network to address the care and needs of the elder, avoiding delays and resulting in better decisions;
- foster the elder's and the family members' capacity for self-determination;
- promote safety by monitoring situations at high risk for abuse or neglect;
- provide a support system for the elder and family members during times of transition; and
- reduce the need for protracted court intervention and free precious judicial time by addressing matters in high-conflict cases involving elders for whom dispute resolution processes have been unavailable or have proven ineffective.

See ASS'N FOR CONFLICT RESOLUTION, GUIDELINES FOR ELDERCARE COORDINATION 6 (OCT. 2014), available at <http://acrelldersection.weebly.com>.

In her role as supervisor for Family Court Services in the Eleventh Judicial Circuit, Miami-Dade County, Florida, Linda Fieldstone, Family Court Services Administrator and former president of the Association of Family and Conciliation Courts (AFCC), brought together representatives from many organizations to find ways of helping high-conflict parents and children throughout the lifecycle of the family through the mechanism of eldercaring coordination. The result was the Task Force on Eldercaring Coordination of the Association for Conflict Resolution (ACR), chaired jointly with Sue Bronson, mediator and former co-chair of the ACR Elder Section. The following national organizations were mobilized in support of the Task Force.

- American Association for Marriage and Family Therapy
- American Bar Association Commission 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 Adult Protective Services Association
- National Association of Area Agencies on Aging
- National Association of Professional Geriatric Care Managers
- 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 Court Judges

- National Guardianship Association
- National Guardianship Network

A task force of the Florida Chapter of the Association of Family and Conciliation Courts (FLAFCC), composed of statewide entities, worked concurrently and collaboratively with the representatives of the national organizations.

The ACR Task Force went on to develop recommendations and procedures to guide the practice of eldercaring coordination and its implementation in court-ordered cases. In the process, the ACR Task Force created ethical guidelines for eldercaring coordinators, training protocols, and an Eldercaring Pilot Project proposal template with a project assessment tool to help circuit courts and programs provide eldercaring coordination as a dispute resolution option for high-conflict cases regarding elders. On October 5, 2014, the *Guidelines for Eldercaring Coordination* were adopted by the ACR and are now posted on its website, <http://acrelldersection.weebly.com>, and the website of the National Center for State Courts, <http://www.eldersandcourts.org/~media/Microsites/Files/cec/ACR%20Guidelines%20for%20Elder%20Caring%20Coordination%202014.ashx>.

Definition of Eldercaring Coordination: A Closer Look

Eldercaring coordination is a dispute resolution process in which an eldercaring coordinator assists elders, legally authorized decision makers, and others who participate by court order or invitation, to resolve high-conflict disputes impacting the elder's autonomy and safety. The goals are to:

- enhance communication, negotiation, and problem-solving skills;
- offer education about eldercare resources;
- facilitate the creation and implementation of an eldercare plan;
- make recommendations for resolutions; and
- make decisions within the scope of a court order or with the parties' prior agreement.

Since the role of the eldercaring coordinator may include decision-making

Sue Bronson (sbronson@wi.rr.com), a licensed clinical social worker, is designated as an advanced practitioner in family mediation by the Association for Conflict Resolution (ACR) and is co-chair of the ACR Task Force on Eldercaring Coordination. She has over 30 years of experience mediating family and workplace disputes, has trained other professionals nationally and internationally in conflict resolution, and is the lead author of the Self-Assessment Tool for Mediators.

Linda Fieldstone (lfieldstone@jud11.flcourts.org) is supervisor of Family Court Services of the Eleventh Judicial Circuit of Florida and co-chair of the ACR Task Force on Eldercaring Coordination. She is a Florida Supreme Court Certified Family Mediator and has served as parenting coordinator since 1990. She is a past president of the Association of Family and Conciliation Courts and its Florida chapter.

authority, it is crucial that the court appoint only those professionals who are qualified. Eldercaring coordinators come from varied professional backgrounds, including jurisprudence, social work, psychology, marriage and family therapy, mediation, parenting coordination, geriatric care management, and medical personnel, but all who are ultimately involved should have extensive experience relating to high-conflict family disputes. These professionals should also have training to maintain best practices, which include ongoing screening for the elder's safety and the possibility of abuse, neglect, coercion, fraud, and exploitation.

Types of Cases Referred for Eldercaring Coordination

According to Judge Michelle Morley, co-chair of the FLAFCC Task Force, some cases need to be determined by a judge. "If every case that is filed has to be tried, I'm here to try them. It's wonderful that all of them do not need to be. But if they are filed with integrity, and not solely for spite, intimidation or vengeance, I don't resent anyone for filing it, or for asking me to decide it." Eldercaring coordination can help with those cases where spite, intimidation, or vengeance comes into play. The following are examples of three types of court proceedings during which certain kinds of high-conflict cases might be referred by courts for eldercaring mediation.

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.

Determination of Incapacity Proceedings When:

- the elder married a person 20 or 30 years younger, and his or her children want to vacate or set aside the marriage;

- the elder's children are split over whether to remove the elder's independence with respect to taking medication, participating in treatment, driving, voting, and marrying, and the elder's fiancé believes capacity is not an issue; or
- the elder made the stepson a medical surrogate and the biological children disagree.

Guardianship Proceedings in which:

- the current wife and her children don't want the former wife and children from a prior marriage to have access to the elder;
- the elder's siblings disapprove of the guardian's decisions and interfere with and frustrate the guardianship process; or
- the guardian has formed an alliance with one of the elder's children and does not give access or information to the others.

How the Eldercaring Coordinator Works

Imagine a scenario of a high-conflict family disrupting court proceedings regarding the decision-making capacity of an elder. These family members are not arguing specifically about issues; their disputes are conflict-driven, involving entrenched hostility from years of discord. A standardized order of referral to an elder coordinator would be issued by the judge, who would specify the definition of eldercaring coordination; the role and limitations of the eldercaring coordinator; the parties required to participate in the process, who would include the elder (by name) and all other legally authorized decision makers; the preferred language; whether elder abuse, neglect, or exploitation has been or is currently an issue; and who holds the responsibility for fee payment for the eldercaring coordinator's services.

The eldercaring coordinator will begin working with the group after a brief intake with each person to ensure that all participants understand the process. As the process continues, others in the elder's support system or experts in the community may be invited into the eldercaring coordination process in order to assist. During the process, the eldercaring coordinator's tasks may include:

- educating the parties on the effects of their conflict on the elder and each other;
- helping the parties identify the sources of their conflict with each other and working individually and/or jointly to minimize conflict and lessen its deleterious effects on the elder;
- helping the parties more effectively communicate and negotiate with each other to ensure focus on the needs and care of the elder;
- contacting the proper authorities when necessary if there is reason to suspect abuse, neglect, or exploitation; and
- assisting the elder and all parties in identifying and utilizing resources that may assist them in resolving issues regarding the care, safety, and well-being of the elder.

Fireworks to Focus

The aim of the eldercaring coordinator is to help the elder and other eldercaring coordination participants work collaboratively in a way that respects the autonomy of the elder so that the elder may live out his or her life free from the threat of being caught in the middle of disputes that jeopardize care, needs, and safety. The eldercaring coordinator may serve for a term of up to two years. The goal is to put out the sparks of conflict that can set off fireworks. Through this process, family members facing the ultimate loss of their loved one may become more supportive of one another and even model for the youngsters in the family skills they may later use to break the cycle of ingrained conflict once and for all. Achieving this goal would amount to the biggest success story of all. It would also certainly create a proud legacy for any person to contemplate in the course of growing older. ■

ABA SENIOR LAWYERS DIVISION 2015 MIDYEAR MEETING

Thursday, February 5–Saturday, February 7

**Hilton Americas-Houston
Houston ★ Texas**

Register at <http://www.americanbar.org/calendar/midyear.html>.

DIVISION MEETINGS

All Members Welcome

Thursday, February 5

6:00 p.m.–8:00 p.m.

Meet & Greet Reception

Friday, February 6

9:00 a.m.–5:00 p.m.

Committee Meetings

Saturday, February 7

8:30 a.m.–11:30 a.m.

Division Council Meeting



Senior Lawyers Division