Mediating in the Shadow of Guardianship:
Possibilities and Pitfalls

I. Problems with the current guardianship system
   a. Procedural flaws – lack of due process
   b. All-or-nothing, one-size-fits-all outcomes
   c. Loss of autonomy and voice for elder
   d. Time, expense, and publicity
   e. Destruction of relationships, generation of resentment
   f. Grey tsunami – lack of court resources for large aging population

II. Elder Law Mediation: What is it and how different from other mediation?
   a. Focuses on conflicts about the living situation of an elder that arise in the context of actual or perceived loss of capacity.
   b. Deals with sensitive issues like aging, autonomy, and family relationships.
   c. All parties (should) share an interest in helping the elder preserve as much independence as possible, and in promoting the best interests of the elder.
   d. Deals with physical, cognitive, social, domestic, and financial changes - many issues at once – not just breach of contract or dog barking/neighbor conflict.
   e. Multiple parties are involved in decisions.
   f. Misunderstandings, entrenched relationship patterns/conflict, and lack of information and acceptance of changes due to aging are involved.
   g. Much more emotion involved.
   h. Conflict is less clearly defined.
   i. Ability of the elder to participate fully is always at least potentially an issue.

III. Common questions addressed in elder mediation
   a. What is the reality of the medical diagnosis and what are the treatment decisions?
   b. Who will be the primary caregiver?
   c. How will the elder be supported financially?
   d. Can the elder remain at home or is a facility necessary?
   e. When should the elder stop driving?
   f. Should the primary caregiver, if family, receive payment?
   g. Who should manage the money?
   h. Questions/misconceptions about inheritance.
   i. Disputes among adult siblings/power struggle.
   j. Selling the house or other asset
   k. Elder Abuse v. bad behavior
      ▪ Some forms of abuse can be remedied through mediation and gaining a better understanding of elder issues, needs, vulnerabilities, and protections. Some cannot.
   l. Mediation after guardianship filing
Sometimes filing a guardianship petition is the only way to get parties to agree to mediation. Can agree to strict, court-supervised deadlines for performance of agreement reached.

Mediation after guardianship order is granted
- Order of guardianship does not necessarily end conflict.
- Returning to court over subsequent disputes is expensive and time consuming.
- Post-guardianship mediation can help make the court order function effectively when new challenges arise.

IV. Potential benefits of elder law mediation in lieu of or in connection with guardianship proceedings
- Promotes self-determination and maximum possible autonomy for the elder.
- Encourages and promotes direct communication among family members and an environment where all participants have an opportunity to speak and to have their perspective be heard.
- Consideration of wide range of interests and underlying issues in a holistic way – dealing with physical, cognitive, social, domestic, and financial changes.
- Allows family members to be actively involved in coming up with the best solution for their particular conflict.
- Customized, creative resolutions – more various and flexible than win/lose outcome in court, including apology, recognition, or acknowledgement.
- Parties learn better communication skills for future disputes.
- Greater chance of maintaining family relationships.
- More privacy and confidentiality.
- Don’t have to prove elder’s incapacity – less shaming and embarrassing for the elder.
- Potential savings of time and money.

V. Risks of and barriers to elder law mediation in guardianship
- Ability of elder to participate fully, equally and effectively.
  - Cognitive impairment / incapacity
  - Physical disability / frailty
  - Dependence on caregivers / undue influence
  - Elder abuse / exploitation
  - Culture / age / family role barriers
- Risk of creating unanticipated Medicaid eligibility problems.
- Lack of public awareness of mediation option.
- Difficulty in getting all parties to the table.
- Difficulty in getting all parties to mediate in good faith.
- Lack of trained elder law mediators.
- Resistance by attorneys.
- Expense – who pays?
i. Lack of court oversight of outcomes to protect an incapacitated elder’s interests.

j. Lack of some legal protections offered by guardianship.
   i. Court appointed counsel for elder
   ii. Neutral evaluation by court visitor

n. Too slow to deal with emergencies requiring immediate action to protect the elder.

VI. Preparing for elder law mediation

   a. Mediation is a voluntary process – all necessary parties must agree to participate.
   b. Locate a properly trained elder law mediator (see VIII.a. below).
   c. Determine what parties are critical to resolve the conflict.
   d. Discuss with your client the issues that need to be resolved, what attempts at resolution have occurred so far.
   e. Gather any pertinent medical, financial, estate planning, or other records.
   f. Discuss with your client living options and costs and resources.
   g. Discuss with your client the best case outcome for the mediation – develop alternatives to bring to the table.
   h. Determine if any other professionals should participate in the mediation – adult protection, case managers, care providers, etc.
   i. Brief the mediator in a written pre-mediation summary about background to the dispute, physical and mental challenges to participation, key values and goals of your client, concerns/barriers to resolution, and sense of the position of other parties.
   j. Have mediator contact all parties.
   k. Choose a location that ensures maximum ability of the elder to participate but, if possible, is perceived as neutral by all parties
   l. For resistant participants, attorney can write letter, point out advantages of mediation, disadvantages of court proceeding.
   m. Coach client on how to encourage mediation.
   n. Discuss with client how his/her interests will be presented and what role the attorney will play at the mediation.

VII. Experience from the field

   a. Summaries of outcomes for some pioneer guardianship mediation programs
      i. TCSG study of pilot programs, 1995-2000
         • Results were disappointing, with small numbers of cases mediated. Elder law mediation in guardianship provided more positive experiences and outcomes in cases in which were mediated. Penny Hommel, principal investigator, felt that court support and proper training of mediators are essential to success.
      ii. Maryland Senior Mediation Project, 2004-2009 (approximately)
• The project, while it had had some significant successes, was no longer in operation when Jennifer Wright talked to the founder, Robert Rhudy, in 2011. Of the fairly limited number of guardianship mediations carried out under the project, the large majority reached full or partial agreement, the results were superior to what would have been achieved through a guardianship proceeding, and the participants were less likely to return to court afterward. Lack of sources for payment for mediators, lack of full court support, and lack of support from other key institutional actors all limited the success of the project.

iii. Montgomery County (Pennsylvania) Community Mediation Center’s Elder Mediation Project, approximately 2000-2001
• Winnie Backlund, in 2011, described the Project’s work in guardianship mediation as underutilized, despite a great deal of ongoing outreach. This Project had a different vision of guardianship mediation from most such programs, rejecting calls for specialized training of mediators in Medicaid law, guardianship law, etc., and also rejecting the notion that the mediator had any special responsibility to ensure that the elder’s interests were kept in mind by all participants. This is a volunteer community mediation program, doing entirely transformative mediation.

iv. University of Windsor Elder Mistreatment Mediation Project, 2007-present
• This program focuses on community mediation of conflicts involving elder abuse and exploitation. While not planned or marketed as a guardianship mediation program, the description of the service indicates that it deals with cases that would be likely to end in guardianship proceedings, if the issues were not resolved. The program screens potential elder participants for the ability to participate fully, and offers elders both a citizen advocate and a social work advocate, to ensure that the elder is able to participate freely and fully in the mediation and that the elder has access to information about available resources to meet his/her needs. The greatest challenge to the program was sustaining the high level of training demanded of the community mediators.

v. Alaska Guardianship Mediation Project, 2005-present
• The project was initiated by the state courts and funded by the Alaska Mental Health Trust Authority. The program is voluntary. There is no cost to participants. Cases are screened to determine whether they are appropriate for mediation by the program administrator. Mediations are conducted by a panel of mediators specifically trained for elder law mediation. Mediators are paid by the program
through funding provided by the state. The rate and total number of guardianship elder law mediations significantly exceed those of other guardianship mediation programs. Full or partial settlement was reached in 87% of all cases mediated, with 91% of participants reporting satisfaction with the process. The average cost was $1,380 per referral – substantially less than the cost of even a simple, uncontested guardianship. The program continues to be a success.

b. Summary of survey results
i. In 2011, Jennifer Wright and her law students conducted a survey of mediators, elder law attorneys and judges in Alaska, Florida, Hawaii, Maryland, Minnesota, New York, Oregon, Pennsylvania, and Tennessee.

ii. Participants were invited to complete the survey via emails sent to all members of the elder law sections and the alternative dispute resolution sections of those states.

iii. We received a total of 74 completed surveys in response to our invitation. Approximately a third of the responses came from Oregon, a third from Florida, and a third from the six other states combined.

iv. Two-thirds of the participants reported their primary profession as attorney, with the most of the rest working primarily as mediators.

v. Half of participants reported that, in their experience, agreement was reached in elder guardianship mediations usually or always.

vi. The most common outcomes were an order of guardianship as requested in the guardianship petition, a change in the care arrangements for the elder, or a limited order of guardianship.

vii. The potential barrier to mediation in guardianship item ranked as most significant was the belief that mediation is generally inappropriate in guardianship. Other barriers ranked at higher significance include court hostility to mediation in guardianship proceedings, lack of representation of some parties, attorney hostility to elder guardianship mediation, difficulty in accommodating disabilities of the elder, lack of awareness of the possibility of mediation, and local court procedures which make no provision for mediation in guardianship.

viii. Participants overwhelmingly believed (75% or more) that the mediation process was impartial and fair, that it met respondents' needs, and that follow-through on mediated agreements was likely.

ix. A substantial majority (70% or more) concluded that, in comparison to guardianship outcomes in the courts, mediation in guardianship was more likely to preserve positive relationships among the parties, provided more privacy to the parties, led to less restrictive outcomes for the elder, was less stressful for the parties, and served to maximize elder autonomy.
c. Experiences of panelists in their practices
   i. Lisa B.: Lisa lives at home, has advanced dementia. Daughter 1 has moved in and taken over care. She has prevented all Lisa’s other children from involvement in Lisa’s medical and financial decisions. Daughter 1 has fallen out with Daughter 2 and prevents Daughter 2 from seeing Lisa. Mediation after the filing of a guardianship petition resulted in agreement with many terms – visitation, medical appointments, accounting for finances, breaks for caregiver. Prevented stress on Lisa and prevented trial.
   ii. Doris H.: Doris is 89 years old, owns her home, and has full mental capacity. Doris fell a year ago and has needed 24-hour care since then. Doris uses a line of credit on her home to pay for 24-hour care. The line of credit is quickly running out, and Doris’s two daughters have differing views on how to handle Doris’s care. Daughter 1 thinks that the house should stay in the family and Doris should go to live in a facility. Daughter 2 believes Doris should stay at home until all the money from the house is depleted. Mediation provided family with opportunity to explore all reasonable options and get family on the same page.
   iii. Paul H.: Paul’s elderly wife and her stepchildren (Paul’s children) are fighting over Paul, who suffers from dementia. Children have Paul sign new powers of attorney, appointing them as agents, even though Paul lacks sufficient capacity. Wife prevents children from helping her and Paul, even though she cannot continue to manage Paul on her own due to her own frailty and health issues. Both parties want to file for conservatorship. Mediation resulted in children’s’ resignation as agents under POAs, agreement to Public Guardian as conservator. Discuss options for public benefits programs specific to Paul’s needs. Children are allowed more contact with Paul and provide more assistance.

VIII. Best practices in elder law mediation
   a. Mediator training
      i. Capacity issues
         • There is no legal definition of mediation capacity. However, there are guidelines.
         • Can the respondent understand the subject of the discussion? Understand who the parties are? Understand the role of the mediator?
         • Can the respondent listen and comprehend the story of the other party?
         • Can the respondent generate and assess options for a solution?
         • Can the respondent express consistent opinions
         • Can the respondent make and keep an agreement?
      ii. Medicaid issues
Any resolution that affects an elder’s finances may also affect the elder’s eligibility for Medicaid benefits to pay for long-term care.

The mediator must know enough to know when to counsel vetting of a proposed agreement by an attorney versed in Medicaid law.

iii. Elder maltreatment issues

- Mandated reporting disclosures – the mediator should disclose to all parties if the mediator’s duty of confidentiality may be limited by a duty to report maltreatment of an elder.
- Understanding of what constitutes maltreatment under the relevant statute and what reporting obligations are.

iv. Keeping interests of the elder central to the discussion

v. Knowledge of resources and alternatives

vi. Knowledge of guardianship law and process – what are the likely alternatives to a mediated resolution?

b. Participation of elder

i. Special accommodations may be necessary, including short sessions, hearing devices, etc.

ii. There may be creative ways to include the elder, even if s/he can’t come to the mediation session.

c. Representation of elder.

d. Court oversight, where appropriate.

e. Cases which perhaps should not be mediated.

i. Elder can’t participate equally, either directly or through an agent

ii. Serious non-financial abuse of the elder