

Mediate Your Way to Caregiver Peace

Presentation – May 10, 2018



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Introduction

Introduction

Objectives:

- To learn how mediation can be used to resolve family disputes over caregiving issues.
- To learn about relevant laws, and where relevant legal options exist.

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Outline

- 1) Introduction
- 2) Family Conflict over Caregiving
- 3) What is Elder Mediation
- 4) Choosing an Elder Mediator
- 5) Tricky Issues in Elder Conflict:
 - Capacity and Abuse
- 6) Relevant Laws

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Examples of Eldercare Disputes

WHO:

Among Adult Siblings/ Extended Family

Between Mom / Dad & Family Caregivers

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Examples of Eldercare Disputes

WHAT:

- Who should pay the bills
- Where mom/ dad should live
- Admission to long-term care
- Division of caregiving responsibilities among family members
- Is mom/ dad safe
- Health and personal care arrangements
- Etc

Examples of Eldercare Disputes

WHY:

- Personal Identity and Values:

Examples:

- Older Adult - Wants Independence
- Adult Child - Wants Parent to Be Safe

Different family members may have different values about **Safety vs. Autonomy**

Family Conflict and Aging

WHY:

The Interpersonal or relational aspect:

Nancy Solnick: “loss, stress and change in circumstances as we age may be the true axis around which...[these conflicts] mediation turn”.

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Common Dynamics

Individual/ family beliefs

- Sense of duty
- Symbolism
- Family roles

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Scenarios

- Green Family
- MacDougal Family

Possible consequences of not resolving

- Stress on the family
- Family breakdown / estrangement
- Harm to the older adult

Elder Mediation

A New Approach:

Elder mediation provides an opportunity to resolve disputes in an amicable way that maintains relationships.

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Elder Mediation

A Canadian Perspective



In the U.S. elder mediation is common.

- Wide range of disputes mediated with lawyer and non-lawyer mediators.

In Canada, elder mediation is a small field.

- More narrow range of disputes and primarily lawyer mediators.



This practice area has great potential and is under utilized. However, there are practical challenges.

What is Elder Mediation?

What Is Mediation?

Mediation is a process in which a neutral 3rd party acts as a facilitator to help the parties resolve a dispute.

What is Elder Mediation?

Elder mediation refers to mediation where one of the parties is older or the dispute is one that predominately affects older adults

The Mediation Process

1) Mediator Speaks to Participants Alone

- Who Will Participate
- What is the Goal of Mediation
- Support or Substitute Decision Maker for Older Adult?

2) Joint Meeting

- Sometimes followed by caucus
- Identify interests – Brainstorm Options – Choose solutions

3) Make a Plan

Elder Mediation

- The mediator is not involved in the dispute and does not have an interest in the outcome. He/ She is neutral. The agreement is reached among the participants.
- Mediation can be used preventatively, as family planning before conflict arises.
- Some research suggests that elder mediation employed early in conflict can prevent elder abuse (Yvonne Craig, 1997).

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Elder Mediation

EXAMPLES

Court based programs

- Usually if guardianship is one of the issues in dispute

In private practice

- Families hire a mediator to help the family find a solution
- A care home or facility may hire a mediator to resolve conflict at the care home.

What is Elder Mediation?

In BC

- Elder mediation is a new field
- It is available through mediators in private practice
- Choose a mediator with relevant experience

Choosing a Mediator

Research the mediator and his/ her background, experience and training.

In the US, many elder mediator training programs. There are almost none in Canada.

However, there are elder mediators in BC who have obtained relevant experience in other ways: An elder mediator should have training/ knowledge in:

- aging,
- family dynamics,
- elder abuse, and
- relevant elder law issues

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Discussion

Questions?

Comments?

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Eldercare Decisions and Conflict

Adult Family Conflict – Who Decides?

Mom is 87 years old. She falls at home and her children want her to move into assisted living. She wants to stay at home. The other siblings take sides in this dispute and the family is in conflict. Some family members claim that she is becoming forgetful and others argue she has always been this way.

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Eldercare Decisions and Conflict

Adult Family Conflict – Who Decides?

Dad is 91. He lives in an 'in-law suite' at his son's home. He needs some family assistance but is mainly independent (his daughter-in-law shops for him and assists with vacuuming and cleaning). He recently met a young woman (42) who lives in Florida. He is spending large sums of money travelling to Florida to see her. He recently bought her a sports car. His son believes these decisions show dad has "lost his mind", and that he needs help managing his money. Dad and his son are no longer speaking. The only other family member is caught in the middle

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Issues From Scenario

1) Protection from Abuse/ Harm

- When should/ does the government intervene to protect vulnerable adults from harm?

2) Independence/Autonomy

- What if the Older Adult Does Not Want Help?

3) Legal Capacity

Protection from Harm

What about those situations when conflict arises because the family caregiver is worried that abuse or neglect/ self neglect is occurring?

Recent Prevalence Study

Aggregate prevalence 8.2%,

- ▣ 2.2% for physical abuse,
- ▣ 2.7% for psychological abuse,
- ▣ 1.6% for sexual abuse,
- ▣ 2.6% for financial abuse.
- ▣ 1.2% for neglect

Protection from Harm

- **Physical Abuse:** Actions or behaviors that result in bodily injury, pain, impairment or psychological distress.
- **Emotional/Psychological Abuse:** Severe or persistent verbal or non-verbal behavior causing emotional or psychological harm
- **Sexual Abuse:** Direct or indirect involvement in sexual activity without consent.
- **Financial/Material Abuse:** An action or lack of action with respect to material possessions, funds, assets, property, or legal documents, that is unauthorized, or coerced, or a misuse of legal authority.

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Elder Abuse and the Law

Criminal Law

Some cases of elder abuse or neglect may constitute a crime. For example, where the older adult has been physically abused, the crime of physical assault may have occurred.

- If a crime has occurred you can report it to the police.

Elder Abuse under BC's Adult Guardianship Act

Where the abuse fits the definition in S. 44 then you can report it to the "Designated Agency" (the Health Authorities) who are required under law to investigate and they have the legal authority to intervene.

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Elder Abuse and the Law

Adult Guardianship Act S 44

The purpose of this Part is to provide for support and assistance for adults who are abused or neglected and who are unable to seek support and assistance because of

- (a) physical restraint,
- (b) a physical handicap that limits their ability to seek help, or
- (c) an illness, disease, injury or other condition that affects their ability to make decisions about the abuse or neglect

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Elder Abuse and the Law

- If an older adult is being abused and is unable to seek help and assistance on his or her own, then the matter can be reported to the designated agencies, who are required to investigate.
- If the abuse is financial, then the designated agency works closely with the Public Guardian and Trustee who has authority under statute to intervene to protect assets.
- Some, but not all, older adults with dementia are legally incapable. If so, the criteria in s. 44(c) (ie. it affects the older adult's ability to make decisions about the abuse or neglect

Capacity in Older Adults

Dementia

- The prevalence rate is higher in older adults but older adults do not necessarily have dementia
- Dementia (1:5 over 65 and 1:2 over 85) and other capacity issues

This issue will impact society increasingly as population shifts

- 33 Million Population
- 1 in 8 over 65 now
- 1 in 4 by 2041



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Capacity

A person can have cognitive deficits and still be legally capable.

Capacity/ Capability has a very specific legal meaning.

Capacity is a legal definition although medical evidence may be required.

- Degrees of capability
- Fluctuate, increase, decrease
- Focussed on specific decisions or kinds of decisions

Capacity

Capacity is decision specific

When asking the questions “Is he/ she capable?” it is important to consider “capable to do what?”

An older adult participant may be capable to make some decisions in mediation but not others.

A capable person:

- ▣ Understands the context of the particular decision to be made
- ▣ Understands the consequences of the decision.

Capacity

- It is common to have legal capacity to make one type of decision but not another
- Different levels of legal capability are required for different legal decisions (ex. greater capability needed to make Will than to Marry).
- According to the Law:

A capable older adult has the legal right to make his or her own decisions. This includes the right to refuse assistance in situations where the older adult is at risk of harm or is being abused.

Capacity

A capable person is able to:

- Understand the context of the decision to be made
- Appreciate the consequences of the decision

DECISION-SPECIFIC Ability Fluctuates

CAPABILITY CONTINUUM

□ More Capable

Less Capable



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Choosing to Live at Risk?

For the Purpose of s. 44 of the *Adult Guardianship Act*:

Does the older adult understand he/ she is at risk of harm

AND

The consequences of refusing help and assistance?

If so, he/ she has the legal right to continue to live in a risky situation. If not, the designated agencies/ Public Guardian and Trustee can intervene.

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Illustration - Mary's Story

- 75 years old, rural community
- MS, but no cognitive impairments
- Long-time domestic abuse and violence – physical, sexual, gas-lighting
- Son takes advantage – POA – abuse
- Little control, little safety
- Highly vulnerable, but capable



Illustration - Indira's Story

- 80 years old, urban setting, excellent residential care home
- Friends and family – listen to her values, wishes, lifestyle
- Comfortable assets, held safely
- Low capability, low vulnerability

This slide and previous are from:
The *Provincial Strategy Document*



How Does S. 44 Apply?

Based on these facts:

Mary is legally capable and can seek help and assistance on her own - s. 44 does not apply.

Indira is not capable, but she is not at risk of harm – s. 44 does not apply.

Change the scenario:

If Mary had a cognitive disability, s. 44 would apply if that disability rendered her legally incapable.

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Summing it Up

- Where there is family conflict regarding care of an elder, mediation is a good option for resolving it.
- In situations where there is conflict and there may also be abuse, then only mediate if the older adult remains safe.
- In that situation also consider legal options:

If a crime – report to police

If older adult is unable to seek help and assistance on his or her own – report to designated agency.

Discussion

Questions?

Comments?

Contact Information



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Thank you!



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