

Evaluating Mediation as a Means of Resolving Adult Guardianship Cases



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INTRODUCTION

Adult guardianship mediation - a facilitated, non-adversarial negotiation in guardianship settings that takes place in addition to, or in lieu of, formal legal proceedings - appears to be effective in helping disputing parties reach agreements in three-quarters of the cases in which it is used. Participants are well satisfied with the mediation process and its outcomes. In addition, participants, program administrators, and mediators believe that mediation in adult guardianship cases is effective in finding better or more satisfactory resolutions such as fewer guardianships, less restrictive orders, or limited rather than full guardianships.

Guardianship mediation programs, however, are likely to be small in scope (referrals to mediation are relatively rare), organizationally unstable (the programs are not well coordinated with the probate courts and their guardianship proceedings) and difficult to sustain over time (one of the community-based programs studied no longer exists, and another continues to operate more in theory than reality, with few referrals).

These are the conclusions reached by a study of adult guardianship mediation in Ohio, Florida, Wisconsin, and Oklahoma by The Center for Social Gerontology (TCSG) in Ann Arbor, Michigan. This report describes the study and its results. It begins with a description of the history and background of the study's origins and context, followed by a review of the methods of the study. It continues with a detailed description of the guardianship programs in the four sites followed by a summary of the results of a survey of participants in guardianship mediation in Summit County, Ohio, and Hillsborough County, Florida. The report ends with a discussion of the conclusions reached by the study.

HISTORY AND BACKGROUND

The Guardianship System and Recent Reform Efforts

Guardianship of an adult results from a court determination that a person is legally incapacitated or incompetent and incapable of handling his or her personal or financial affairs or both. The court then gives to another -- the guardian¹ -- decision-making rights of the incapacitated person. Full guardianship constitutes a significant deprivation of the person's independence, with the person typically losing most rights he or she has as an adult citizen. This loss includes such basic personal, contractual and legal rights as choosing where to live, handling one's own finances, making decisions about medical care, and, in some states, voting or choosing to marry. With advances in modern medicine and increased longevity, more people will reach an age where capacities may begin to fail and decision-making abilities may be called into question. Courts are faced with growing numbers of guardianship petitions, and this trend is expected to escalate.

Over the last two decades, the statutory schemes by which guardianship was imposed in the various states came under increasing scrutiny, and this scrutiny led to criticisms that the process was lacking in a variety of ways. Concerns about the process included inadequate notice to the persons alleged to need a guardian (respondents); inadequate due process protections; lack of legal counsel to represent respondents; and inadequate assessments / evaluations of capacities and incapacities, with the result being frequent imposition of full guardianship and minimal use of less restrictive alternatives. Approximately 94% of all guardianship petitions filed are

¹ A number of different terms are used for such persons in the various states. In this Report, we use the term *guardian* as a general term to include guardians of the person, of finances, or both.

granted, and the vast majority of these are for full guardianship.² Concerns further focused on the fact that the person at risk of guardianship -- an older person in over 80% of the cases -- typically has little role in the process and often is not present at the hearing.³

Since the 1970s, The Center for Social Gerontology (TCSG) has been actively involved in studying existing guardianship systems and has joined with numerous others to strengthen the rights and protections of adults, particularly older adults, subject to guardianship petitions. As a result, many state laws now direct courts to find the least restrictive available alternative, to allow the respondent to maintain maximum possible independence, and to respect, if possible, the present or previously expressed wishes of the respondent. Guardianship reform actions have resulted in laws with greater due process protections for respondents -- for example, notice, hearing, and attorney representation⁴ -- pushing guardianship hearings to become more formal and more adversarial proceedings.

Having been among those who worked for these statutory reforms, TCSG remains fully committed to the protections afforded by them and continues to work for their implementation. We also came to believe, however, that for many of these cases, the adversarial model is not without significant flaws -- foremost of which are the economic and emotional costs to the parties and the magnification, rather than resolution, of differences among them. The adversarial model typically results in a "win-

² See Lauren Barritt Lisi et al., *National Study of Guardianship Systems: Findings and Recommendations*, 63-64 (The Center for Social Gerontology, Ann Arbor, MI, 1994).

³ See Lauren Barritt Lisi et al., *National Study of Guardianship Systems: Findings and Recommendations*, 72-73 (The Center for Social Gerontology, Ann Arbor, MI, 1994).

⁴ Hommel, Penelope, *Guardianship Reform in the 1980s: A Decade of Substantive and Procedural Change*, Older Adults' Decision-Making and the Law, Smyer, J; Schaie, K.W., and Kapp M. (Eds.) Springer Publishing Co., New York (1996).

lose" situation and may foreclose the possibilities of dialogue among the parties, who often are family members who must continue to interact and address the difficult issues and problems underlying the guardianship petition.

Guardianship cases often involve disputes among family members or caregivers, or between the person alleged to need a guardian and the person petitioning for the guardianship. For example, parents whose children seek guardianship over them may feel demeaned; or siblings may battle over who should be guardian or what is the best plan for the parent, when the real issue may be long-standing sibling rivalries. An adversarial proceeding resulting in the granting or denial of a guardianship is not equipped to ameliorate these types of situations. Additionally, many older adults and their families may be uncomfortable in the formal court setting, and court hearings can be traumatic for them. Disputes raised after a guardian has been appointed can also take a great emotional and financial toll on families.

Mediation: An Alternative Approach

Recognizing the limitations of the adversarial model, TCSG searched for an alternative approach to address the complex needs and issues underlying many guardianship cases and saw mediation as a potentially valuable alternative.⁵

Mediation -- the entry into a dispute of a third-party neutral facilitator without decision-making or reporting powers, in a confidential and informal setting -- was considered a possible approach to maintaining autonomy of the respondent, by making

⁵ Throughout this Report, when we use the word mediation, we mean "facilitative" mediation, that is, the intervention by an acceptable, impartial, and neutral third party, who has no authoritative decision-making power, to assist parties in voluntarily reaching their own mutually acceptable settlement. Facilitative or non-directive mediation is distinguished from "evaluative" mediation or a settlement conference model where the focus is on resolving or settling a matter. The focus of facilitative mediation is not on settlement, but rather on helping empower parties to reach understandings that benefit and improve

him or her a vital part of the decision-making process. TCSG posited that the use of mediation might help families explore alternatives to guardianship and that by including the older person, family, and other interested parties in the decision-making process, it could potentially encourage consensus building and foster the preservation of relationships among family and friends. It was hoped that this, in turn, would help ensure that older persons and persons with disabilities receive the best and most appropriate support and assistance possible. In addition, TCSG believed that mediation could provide a vehicle for educating all parties as to what can and cannot realistically be achieved by appointing a guardian and what alternatives exist, for example, money management and bill-paying services, home care, durable powers of attorney, advance directives for health care, etc.

On the other hand, families facing difficult decisions about care and intervention may be unable to communicate in a positive manner about difficult choices. Family dynamics may be such that old communication patterns block constructive decision-making, or changing roles of parent and child may cause uncertainty in raising issues. Mediation was seen by TCSG as a potential means of facilitating communication in these difficult situations.

TCSG further hypothesized that when family members find their relationships breaking down, whatever the cause, mediation might help them move beyond the presenting legal issues and assist them in identifying, addressing and resolving underlying family issues and problems. For example, if the respondent and other family members are disputing the need for a guardianship, the nature of the adversarial

communication, to resolve very difficult decisional issues, beyond legal issues, and to address conflict in ways that encourage ongoing relationships.

system in the court setting may lead parties to present their positions in a way that will break down, rather than restore, family relationships. This is because a court's response to a guardianship petition is a statutory solution: appoint a full guardian, appoint a limited guardian, or dismiss the case. The necessary emphasis is on determining legal capacity and naming a guardian. If a guardianship results, the respondent/ward may feel degraded at having her/his decision making rights taken away and resent the decisions then imposed by the guardian. In mediation, the respondent may agree voluntarily to the appointment of a specific guardian which may foster a better long-term relationship between guardian and ward than where a third party decisionmaker (a court) imposes a guardianship on a respondent. In some cases, a voluntary limited financial guardian, which in many states does not involve a finding of legal incapacity, may be agreed upon. Alternatively, the respondent may willingly agree to accept services and assistance without the imposition of a guardianship.

The People and Issues Involved in Guardianship Mediation

Conflicts, disputes, or need for joint decision making may arise at various stages of a guardianship proceeding. Many arise at the time an initial guardianship petition is filed. The petition may be contested by the respondent on the grounds that he or she is able to make his or her own decisions, that no guardian is needed because a less restrictive alternative is available, that the guardian's powers should be limited, or that someone other than the petitioner should be named guardian. Other interested parties may also raise any of these issues. Occasionally, two or more people seeking guardianship powers file counter-petitions for guardianship.

Other disputes arise after a guardian has been appointed. These issues, raised either by the ward or by another interested party, may involve accounting for money spent by the guardian; the need for continuation of the guardianship; a petition to terminate, limit, or expand the guardian's powers; a petition to remove the guardian and substitute another; or a challenge to an action or proposed action of the guardian.

Oftentimes, mediators find that the legal issues presented in the court petition or motion are not the underlying issues causing the family turmoil. The parties in mediation may focus on quite different issues from those that would be argued in a legal case. Sometimes there are no contested legal issues, but there are still family disputes or concerns that need to be addressed.

What issues are likely to be raised in guardianship mediation? They tend to revolve around safety and autonomy, living arrangements, and financial management. When the ward or respondent is one of the disputing parties and objects to the need for a guardian, the primary issue often presents as one of safety versus autonomy. Does this adult have the right to make her or his own choices and decisions if others feel those decisions are unwise and will impact her or his safety? To what extent is an adult allowed to make what others may consider to be "bad" decisions? Are family members attempting to control decisions that should not be theirs to make? For the court, the question is whether there is sufficient evidence to show that the person meets the legal definition of incapacity. In mediation, a legal finding of capacity or incapacity is not the issue. Rather, the issue may be whether there are ways that a person can reduce risks to health and safety within a context of dignified autonomy.

Other issues in dispute may concern the type or level of care and assistance a person might need and should receive, who will provide services/care to the extent they are needed, where a person will live, how money will be spent or invested and who will be involved in decisions about money, or what medical treatment will be given.

The participants in a mediation include one or two mediators, the respondent, family members, and other interested parties such as non-family caregivers, support persons, and attorneys.

Pilot/Demonstration Programs to Test the Use of Mediation

Having recognized the potential of mediation, TCSG undertook to pilot and assess the viability of this alternative approach to adult guardianship. The first pilot effort was undertaken directly by TCSG in Washtenaw County, Michigan in 1991 with support from a National Institute for Dispute Resolution (NIDR) grant. Based on the positive evaluations by the parties to these early mediations and the informal assessment of the Washtenaw County Probate Judge and others that this was a valuable approach to difficult guardianship cases, TCSG pursued additional funding to continue the effort. For while the Washtenaw County project convinced TCSG that mediation was a viable alternative for adult guardianship cases, it also raised many questions about how such a program might work in other settings.

A grant from the Retirement Research Foundation in 1995 helped answer some of those questions. Through this two-year grant, TCSG was able to help establish adult guardianship mediation projects in four sites. Among the four sites was Hillsborough County, Florida, one of the sites included in this study. Working with administrators and mediators in each of the sites, TCSG developed mediator training materials and

administrative forms and procedures. While each of the four sites discovered that many resources had to be dedicated to the service, and that cases were slow to come in, their experience contributed much additional insight into needs of the parties, types of issues that were amenable to mediation, and training needs.

The experience of these sites confirmed that because many – including judges and attorneys – do not thoroughly understand guardianship mediation, much individual and group discussion and education would need to be done to assure that these groups are supportive and will refer cases. For example in one of the pilots, there was a misunderstanding regarding the difference between “settlement conferences” (which the court was already doing) and mediation. This misunderstanding meant that very few cases were referred by the court. Questions were raised in the various sites about the appropriateness of mediation in guardianship cases, which types of cases are and are not appropriate, the issue of voluntary vs. court-mandated mediation, and so forth. As with the Washtenaw County pilot, the support for the concept in these four sites encouraged TCSG to continue demonstrations.

In 1996, with the goal of beginning to move mediation into the mainstream of adult guardianship practice, TCSG sought and received a grant from the William and Flora Hewlett Foundation. This allowed us to work with three states to help establish statewide or multi-county programs. The three states -- selected through an application process -- were Ohio, Oklahoma, and Wisconsin. All three of these sites are included in this State Justice Institute-funded evaluation.

Each of the Hewlett-funded sites developed local coalitions and networks to provide mediator training and to establish the individual adult guardianship mediation

services. The coalitions included judges, magistrates, other court representatives, attorneys, advocacy groups, mediators, agencies serving older persons or persons with disabilities, health care providers, and others. In these projects, the sites had autonomy in determining their facilitative mediation model. Some used private mediators; others used volunteers; some used solo mediators, while others used a co-mediation model. Some were court-administered, while others were independent of the court. Mediation referrals can occur in two ways: pre-petition and post-petition, and some of these programs included cases where a petition had not yet been filed with the court (pre-petition cases), while others handled only court referrals where a petition had already been filed with the court (post-petition).

In all of these pilot and demonstration programs -- from Washtenaw County to the three Hewlett-funded sites -- TCSG efforts were focused primarily on developing this innovative approach: devising methods for adequately addressing the sensitive issues surrounding guardianship mediation (e.g. imbalance of power, case selection criteria); developing program operation guidelines and training materials; training mediators; and helping local and statewide coalitions of courts, mediators, bar associations and attorneys, and public and private advocacy and service agencies to plan and operate programs in their courts.

Informal evaluation of the NIDR⁶ and Retirement Research⁷ pilot projects consisted of party and attorney satisfaction surveys, reports from mediators, and interviews with judges and administrators, as well as anecdotal reports. This

⁶ *Innovative Test of Alternative Dispute Resolution to Address Serious Concerns About Court Imposition of Guardianship Over Adults*. Final Report to the National Institute for Dispute Resolution. The Center for Social Gerontology, Ann Arbor, MI, April 14, 1993.

⁷ *Adult Guardianship Mediation Development & Replication Project*. Final Report to Retirement Research

preliminary review suggested that both courts and parties believe that mediation is an effective mechanism for resolving guardianship-related disputes, and that mediated agreements can maximize the autonomy and independence of alleged incapacitated persons and preserve individual rights. These initial evaluations also indicated that courts gain from mediation not only because parties are better served, but also because non-legal disputes are removed from the court, and disputes may be less likely to return to court. Although the initial review showed little evidence that mediation saved the courts time and money, the benefit seemed to come in providing better solutions and creating more satisfaction with the process by the parties.

The Need for Formal Evaluation of Guardianship Mediation

As we continued to pursue the development and testing of guardianship mediation and saw some evidence of its value both to the parties and to the courts, and as we saw it being utilized in a growing number of locations,⁸ we became increasingly aware of the need for a formal assessment of its value and workability. TCSG therefore applied for and received funding from The State Justice Institute (SJI) to undertake a formal evaluation that would allow us to gather solid data on existing guardianship mediation programs and provide guidance to courts and others that are considering establishment of new programs or improvement of existing programs.

The objectives and methods used to conduct the evaluation are described in the following section. The remaining sections of this report present the evaluation findings.

Foundation. The Center for Social Gerontology, Ann Arbor, MI, January 31, 1997.

⁸ Two states now call for consideration of mediation in their guardianship statutes. A 1999 Washington state provision authorizes the courts -- when requested by the alleged incapacitated person (AIP) or the guardian ad litem (GAL) -- to require any party to participate in mediation, to establish the terms of the mediation and to allocate costs. (RCW 11.88.090) More recent language in Michigan's guardianship statute (effective June 2001) calls on the GAL to inform the court if any disagreement might be resolved through court-ordered mediation. (MCL 700.5305(1))

STUDY METHODS

The Center for Social Gerontology's (TCSG) aim in this study, funded by a grant from the State Justice Institute (SJI),⁹ was to determine the efficiency, effectiveness and replicability of mediation of adult guardianship cases. It sought to answer the following questions: How do mediated guardianship programs work? What are their structures, processes and procedures? Do they work as intended? Are they efficient? Are they effective? The study began in February 1999 and ended in July 2001.

The study design had two major components: (1) a descriptive analysis of the operation of four guardianship mediation programs in Ohio, Florida, Wisconsin and Oklahoma; and, (2) an assessment of their impact. Although these two design components overlapped, the first focused on the *inputs* of the guardianship mediation programs, the resources that the courts and agencies use to produce mediation services in guardianship cases, including human, financial, organizational, physical and material resources. The impact assessment focused on both *outputs* and *outcomes* -- with outputs being the actual services produced (e.g., number of cases referred and mediated) without evaluative inferences, and outcomes being the result or impact of the inputs and outputs (e.g., percent of agreements reached by mediation).

Efficiency measures assess the inputs relative to outputs. For example, a threshold question is whether the number of cases mediated (an output) justifies the mediation program costs including human, financial, organizational, physical, and materials (inputs). Outcome measures assess the actual impact of the inputs and outputs. In the case of the previous example, the threshold question would be informed

⁹ "Evaluating Mediation as a Means of Resolving Adult Guardianship Mediation Cases." Grant Number SJI -99-N-010. State Justice Institute, 1650 King Street, Suite 600, Alexandria, Virginia, 22314.

by an outcome measure suggesting, for example, that even an "inefficient" program (i.e., one that has produced relatively few mediated cases as outputs) has impacts and outcomes of social value that "justify" its further development and replication.

Descriptive Analyses of Four Programs

The following types of questions framed the descriptive analyses: What is the history and structure of the programs? What processes are used to generate cases for mediation, i.e., to get guardianship cases referred to mediation? How is the process of mediation -- from initial referral to mediation to completion of the process -- actually implemented in the sites in Ohio, Florida, Wisconsin, and Oklahoma? How is the mediation process integrated with the rules, processes and procedures of guardianship proceedings? How does case processing of mediated guardianship cases differ from guardianship cases not mediated? Who does the screening of cases? How is it conducted? What qualifications and training do "screeners" and mediators have? What actually occurs in the mediation sessions? Is the alleged incapacitated person or ward included in the mediation sessions and how is the determination made? Are "special" arrangements made to ensure the respondent's meaningful participation and to address potential "imbalance of power" issues among parties? Are attorneys included in mediation sessions? In what capacities? What system or protocols are followed regarding confidentiality of information disclosed in the mediation sessions? Does the mediation actually provide the intended services (outputs)? In what ways could the processes be improved?

To answer these questions, TCSG closely examined four guardianship mediation programs. Project staff visited program sites in Summit County, Ohio, and Hillsborough

County, Florida, and conducted numerous telephone interviews with program principals in Wisconsin and Oklahoma. Information was collected from written materials describing the program, file data drawn from probate court records and interviews and discussions with program principals and professionals of the primary professional groups participating in guardianship mediation. The product of this examination is a detailed description of the organizational structures, processes and procedures of the four guardianship mediation programs.

Outcome Assessment

The assessment of outcomes of the mediation of guardianship drew from three data sources and methods: (1) structured interviews of mediation program participants in the four sites; (2) a survey of mediation participants in Ohio and Florida using a written questionnaire; and, (3) file data on mediation referrals, sessions and agreements reached.

In general, the variables of the outcome assessment were suggested by the questions about outcomes posed during the structured interviews (see below): effectiveness in terms of finding satisfactory resolutions, and participants' satisfaction with the mediation process. Does it reach more satisfactory resolutions, e.g. fewer guardianships or less restrictive orders? Do the participants like it? Does guardianship mediation save time and money?

In structured and group interviews, mediation program participants (judicial officers, investigators, mediators, program administrators) were questioned about the impact or ultimate outcome of guardianship mediation in each of the four sites. Up to ten individuals were interviewed at each site. Each of the interviewees was asked to

categorize their answers to questions one through five as "greatly," "somewhat," or "very little." The sixth question elicited a responsive description of critical factors in successful guardianship mediation.

1. Is mediation of adult guardianship cases effective, relative to non-mediated cases, in terms of finding better or more satisfactory resolutions such as fewer guardianships, less restrictive orders, or limited guardianships?
2. Does mediation lead to better maintenance of the relationships of the parties, and more consensual arrangements?
3. What is the impact of mediation on the resources of the parties and the courts? Does it save time and money?
4. Are the participants in mediated guardianship cases satisfied with the process and outcome of mediation?
5. Do the benefits of mediation in guardianship cases justify the costs, if any?
6. Are there critical factors in mediation of guardianship cases that determine the effectiveness of mediation, such as training or background of the mediator, participation of attorneys, legal framework, timing of referral, or others?

A three-page "Post-Mediation Questionnaire," developed by TCSG, was mailed or distributed to the parties in Summit County, Ohio, and Hillsborough County, Florida, who participated in mediation sessions.

The original design of the study included a component that was eliminated early in the study: a matched sample comparison¹⁰ of mediated and non-mediated guardianship cases in the Ohio, Florida, Wisconsin, and Oklahoma sites. Based on early reports received from program principals in the sites, TCSG believed that together the four sites would have close to 100 mediated guardianship cases. In all four sites, the entire population (as opposed to a sample) of mediated cases was to be included in

¹⁰ Referred to as a non-random assignment, quasi-experimental design, this approach is chosen when there is an inability or it is not feasible to assign cases randomly to the level of the independent variable (mediation). As in any design by which cases are not randomly assigned to groups (i.e., mediation and non-mediation), selection of comparison groups is a threat to the internal validity of the design, that is, the

the "mediation group."¹¹ The two dependent variables to be examined by this matched sample comparison were: (1) case outcome; and (2) time to disposition (generally from filing to case resolution such as case dismissal/withdrawal of the petition or the appointment of a guardian).

TCSG recognized the limits of nonrandom assignment in the matched sample comparison would be tested by the low numbers of mediated guardianship cases in the four sites. Inferring causality from nonrandomized designs is a risky enterprise, in general, and TCSG knew it would have extra obligation to explain any covariates in the evaluation and any plausible rival explanations of the results (i.e., other than the effects of mediation). It anticipated that numbers of mediated cases would be low, but they turned out to be much lower even than expected. In Summit County, Ohio, the site first visited where TCSG expected a proportionately higher number of mediated guardianship cases compared to the other three sites, only twenty-four cases had been referred to mediation and only fourteen included actual mediation. Contrary to expectations, contacts with the other three sites during the spring and summer of 1999 indicated that other sites were unlikely to match even the low numbers of mediated guardianship cases in Summit County.

Despite the fact that the mediated guardianship cases in the study sites were the entire *populations* of mediated cases in the sites, and notwithstanding TCSG's

extent to which conclusions can be drawn about the causal effects of the independent variable (mediation) versus other competing factors (commonly called "confounds" or "covariates").

¹¹ The "non-mediators group" of the same size as the mediation group was to be selected by identifying "matching" guardianship cases otherwise similar to those in the mediation group. Identification of matching criteria that will result in a matched sample of non-mediated guardianship cases is challenging. Matching criteria considered included: whether the alleged incapacitated person (AIP) contests the imposition of guardianship, case type (e.g. person only, estate and person), age and sex of the AIP or ward, referral type (court petition/application, other), time of filing/referral, approximate time in "system,"

cautionary and conservative approach to drawing causal inferences about the impact of mediation, the study's advisory committee – a group of judges, attorneys and scholars who met by teleconference in November 1999 --expressed strong concerns about TCSG's ability to draw meaningful conclusions about the impact or outcome of mediation on guardianship cases. The small number of cases mediated by a handful of mediators did not, several members of the panel said, constitute a reasonably sufficient implementation of guardianship mediation to make a conclusive and compelling case, one way or the other, about the merits of mediated guardianship beyond the "unique" number of cases in the four sites. The panel said that the study promised to make a significant contribution to our understanding of the operation of mediation of guardianship cases in several sites, but would be limited – not necessarily devoid of any value -- in its ability to determine conclusively whether mediation, in general, "works" in guardianship cases. The panel recommended that TCSG eliminate from its study design the matched-sample comparison of mediated and non-mediated guardianship cases and place its major emphasis on the descriptive analyses and the other components of the design.

Selection of Sites

Four sites were selected for study on the basis of reports by site representatives made in a 1999 meeting of program participants, sponsored by TCSG and funded by the Hewlett Foundation, "Adult Guardianship Mediation: Essentials for Success." To be considered for selection, programs had to be sufficiently established to avoid evaluating programs in their development stages. Second, programs had to be of varying

hearing officer, screener, and complexity of case (number of docket entries). The number of matching criteria met by the matched sample of cases was to have been noted.

structures and processes. Two of the sites (Summit County, Ohio, and Hillsborough County, Florida) are court-connected (“court-annexed”) programs. The other two programs, Dane County, Wisconsin and those in Oklahoma, operate independently of the courts and are administered by agencies or community dispute resolution centers located outside the local probate courts.

The Florida program began in 1996 (under a Retirement Research Foundation grant) and continues today. The Ohio program began in 1998 (under a William and Flora Hewlett Foundation grant) and continues today. The Oklahoma and Wisconsin programs began in 1997 (also under the Hewlett grant). The Wisconsin program no longer exists. The Oklahoma program exists in theory; some of the early settlement centers still have trained mediators available to mediate, but the centers have consistently reported low numbers of cases since the inception of the program.

SUMMIT COUNTY, OHIO

History and Structure of Program

The Ohio Legislature encourages all courts, parties to civil actions, and all other persons involved in a civil dispute to consider mediation to resolve the dispute. Ohio law authorizes probate judges to use mediation to facilitate resolution of any civil action within the jurisdiction of the probate court.¹² The guardianship mediation program (hereinafter “program”) of the Summit County Probate Court (hereinafter “probate court”) is authorized by Local Rule 98.1¹³ which reads as follows:

- A. At any time after the service of notice upon the adult incompetent by the court investigator, the Court may refer an adult guardianship case to mediation.
- B. Participation in mediation is voluntary, and the Court may not require that settlement be reached on any particular issue.
- C. Fees for the mediator shall be set by the Court Administrator.
- D. A Court hearing may be continued to allow mediation to be used. Notice of mediation and continuance of Court hearings shall be sent to all parties notified of the original hearing date.
- E. If a dispute involves a matter under the jurisdiction of Probate Court, including a client with mental health, mental retardation and developmental disability, or aging adult issues, but a guardianship case has not been filed, an agency may file a motion with the court to refer the matter to the adult guardianship mediation pilot project. A case shall be referred if mediation is likely to resolve the dispute as a less restrictive alternative to guardianship.

The program is funded by fees assessed on all probate court filings (except applications for marriage licenses) in the Probate Court.¹⁴ If a probate court establishes a mediation program, the Ohio Revised Code Section 2101.163 provides that “a probate judge may charge a reasonable fee that is to be collected on the filing of each action or

¹² OHIO REV. CODE ANN. § 2101.16.3 (Anderson 1998).

¹³ SUP. R.50— SUP. R.99, June 10, 1998.

¹⁴ According to interviewees, additional sources of funding and resources mentioned in promotional and educational documents – grants, community funds (e.g., United Way), law school volunteers – have not materialized.

proceeding and that is to be used to implement the procedures.”¹⁵ In addition to the funding of program costs, payments from this “guardianship expense fund” is available to any indigent ward and provides for legal counsel for the proposed ward, medical and psychological examinations and reports, transcripts and appeal costs, and court filing fees which are \$200 for “person” only applications and \$225 for estate only or person and estate filings. Whether or not intended, the legislation encourages the establishment and maintenance of even very modest guardianship programs by allowing probate courts to expend monies “more than the amount sufficient to satisfy the purpose” of the fee “for other appropriate expenses of the probate court.”¹⁶

The program in Summit County, which includes the Akron, Ohio metropolitan area, is administered by the probate court, under the direction of Chief Magistrate Ann Snyder, who was instrumental in the initiation of the program as a pilot project beginning on March 1, 1998. The design of the program, and many of the processes and forms used, stem from training and consultation provided to Magistrate Snyder and her colleagues by TCSG in Ann Arbor, Michigan.

The first referral of a guardianship case mediation to the program was made on March 29, 1998. A total of thirty-three cases were referred to mediation in the two-year period beginning March 29, 1998, an average referral rate between one and two per month. Referrals have declined steadily since the program began. Twenty cases were referred to mediation in the nine months during which the program was operating in 1998; and eleven cases were referred in all of 1999. In the first three months of 2000, only two cases were referred to mediation; one of these two cases was mediated and reached a partial agreement.¹⁷

¹⁵ OHIO REV. CODE § 2101.16.3 (Anderson1998).

¹⁶ *Id* at (C).

¹⁷ In interviews conducted March 15 –17, 2000, several court investigators speculated that the most recent decline in referrals to the mediation program may be due to the lack of availability of trained mediators. Mediators’ lack of “reliability” and their “scarcity” may be driving decisions as to whether a case

The bulk of the probate court's guardianship cases are heard by four court magistrates. Rare objections to a magistrate's decisions are appealed to the probate judge. In 1998, according to court records, a total of 467 guardianship applications were filed, including requests for guardianship of the person and / or estate. Approximately, one-quarter (151) of these filings were for guardianships of minors; three-quarters (316) were for guardianships of adults.¹⁸

According to the program principals, only adult guardianship cases in which the "person" is at issue are considered for mediation, i.e., guardianships of the person or guardianships of the person *and* the estate. Only these cases — approximately fifty percent of all guardianship cases — are reviewed by court investigators and considered "eligible" for mediation.¹⁹ In the year ending February 26, 1999, a total of 246 guardianship cases (i.e., person or person *and* estate) were investigated. According to estimates by court investigators, two to five percent of the *investigated* cases are recommended for referral to mediation by the investigators. Therefore, according to these estimates, approximately two to twelve guardianship cases per year (two to five percent of 246 eligible guardianship cases) are recommended for referral to mediation.²⁰

A promotional brochure distributed by the probate court, "Mediation in Adult Guardianship," enumerates the aims of the guardianship mediation program:

is referred to mediation, said one investigator. She recalled an instance in which a mediated agreement began to come apart, and the investigator and a magistrate short-circuited the process and handled the problem without sending the case back to mediation.

¹⁸ According to a document, "Guardianship Mediation Project Checklist for Planning Local Program – Summit County, Ohio," distributed in July 1999, as part of an informational packet to individuals interested in the program, approximately 385 adult guardianship cases are filed in one year, including emergency and limited guardianships, and conservatorships.

¹⁹ However, according to case records, at least one mediated case did involve the estate of the respondent only.

²⁰ This rough estimate was confirmed by a sample of court records: in the most recent four months in which court records were available, March - June 1999, a total of sixty-nine guardianship cases were investigated and only three of these (4.3%) – prorated to nine cases per year -- were recommended for mediation.

- A. it gives the participants more responsibility for control over the issues;
- B. allows parties to address and resolve underlying problems rather than just the particular issue that led to litigation;
- C. allows parties to hear and discuss each other's side of the story;
- D. provides a more personal and less intimidating environment than some court hearings;
- E. reduces cost to the parties;
- F. improves the likelihood of compliance, because the result is consensual;
- G. provides options for solutions outside the powers of the court to impose; and,
- H. in successful mediations, legal incompetence may be irrelevant.

According to interviewees familiar with the program, typical issues in mediation include: safety versus autonomy, where a ward will live, decision-making issues, guardianship or conservator care plans (i.e., limited vs. full guardianship, challenges to an existing guardian's powers, the petitioner or another person as guardian or conservator), "payeeship" plans, methods of accounting for finances, medical care, whether to use independent care professionals, less restrictive alternatives, visiting, the nature of the relationships among family members and care providers, and the methods used to resolve disputes. Issues identified in an unpublished document used for educational purposes by program participants, "Multi-Generational Family Mediation: Program Design," include: dignity, trust, and autonomy; need for medical decision making; personal physical safety and supportive services; financial security; and residential options including assisted living, independent living, and nursing home.

At the time of this study, four independent mediators provided mediation on a contractual basis with the probate court. Mediators were paid \$300 for each mediated case; additional sums were paid upon special request and for particularly

time-consuming cases involving multiple mediation sessions. Mediator qualifications included: (a) forty hours of basic mediation training, including advanced training in adult guardianship mediation; (b) life or professional experience and training in guardianship, aging, domestic relations or disability issues; and (c) ability to mediate multi-party disputes. The four mediators included a psychologist and practicing elder law attorney; a psychologist with an independent practice in conflict resolution; a licensed counselor, with a master's degree in public health, who is an assistant director of a family counseling center; and an educator and an attorney who ran a legal assistance program at Akron University and was an appointed domestic relations magistrate.

Program Operation

From the program's inception on March 28, 1998 through September 1999, a period of eighteen months, the probate court referred twenty-five cases to mediation. Of the twenty-five referred cases, fourteen (fifty-six percent) were mediated and three were pending for mediation. In the remaining eight cases, mediation sessions were not held for various reasons including agreements or settlements reached prior to the mediation sessions, decline of mediation by the mediation review committee (see below), lack of family cooperation, decline of recommended mediation by magistrate, withdrawal of guardianship application, and death of the ward prior to mediation.

These numbers yield a referral rate to mediation of approximately ten percent of the eligible guardianship cases (twenty-five referrals to mediation from a total of 246 cases, i.e., guardianship of the person and of the person *and* estate), more than double the operative rate estimated by the court investigators (i.e., two to five percent) and

confirmed by data from four months of court records in 1999.²¹ It may be that the program's initiation caused a surge of referrals that has not been sustained.²²

According to case (docket) records, the fourteen mediated cases all involved incompetent or alleged incompetent, and mostly elderly adults (Table 1).²³ Family members usually were the applicants. One case involved the estate only; the other thirteen were person or person and estate cases. The presenting problems, disputes or issues in the cases were those commonly encountered in guardianship cases including the guardianship itself, family conflict, financial issues, medical issues, decision making, nutrition and the proposed ward's independence.

The elapsed time between the date of referral to mediation and the initial mediation session ranged from as few as eighteen days to as many as 123 days (see below, Table 2, "Elapsed Time of Case Processing of Mediated Guardianship Cases from Filing to Court Hearing, Summit County, Ohio, 1998-1999"). The parties reached agreement or partial agreement in ten cases of the fourteen (seventy-one percent) of the mediated cases (see below, Table 5, "Outcomes of Mediation of Guardianship Cases, Summit County, Ohio, 1998-1999"). Agreements included a change or no change in the appointed guardian, the appointment of an agreed-upon guardian, and the identification of a less restrictive alternative to guardianship.

²¹ Cf. *supra* note 9 and accompanying text.

²² An unpublished document, "Guardianship Mediation Project Checklist for Planning Local Programs, Summit County, Ohio" (no date), listed the following measures to be used to advertise the program to parties, attorneys, and others: brochures given to attorneys and proposed wards, and available at social service agencies and at the counter of the probate court; community education presentations; presentations to agencies, attorneys, professional organization meetings; and ongoing public relations, such as "follow-up articles," mediation training and public speaking.

²³ Case records included only entries for the assessments and payments of mediation fees. They did not routinely include entries for court investigations, filing of investigators' reports, mediation referrals, and mediation sessions.

Table 1
Characteristics of Mediated Guardianship Cases, Summit County, Ohio, 1998-1999

Case	Respondent	Applicant	Problem, Dispute or Issue
1	White male, 42, with mild retardation and cerebral palsy	Mental retardation, developmental disabilities (MR/DD) service provider	Housing and independence of respondent. Motion for mediation filed by MR/DD service provider pursuant to section E of Local Rule 98.1
2	White male, 53, with speech impairment. Guardianship since 1976.	Guardian (brother)	Ward objects to existence and nature of guardianship including housing, payee arrangement, and decision making role
3	White female, 37. Guardianship since 1986.	Ward's mother	Ward's mother, with whom ward lives, objected to current guardian; increased independence of ward
4	White female, 30. Guardianship since 1996.	Guardian (mother)	Ward objects to guardianship
5	White female, 48, with mental disorder	Daughter	Guardianship and financial settlement of costs for remodeling of ward's residence
6	White, male, 72, with dementia	Son and daughter; two separate applications	Conflict over who should be guardian
7	White, female, 76, with dementia	Son and daughter; two separate applications	Conflict over who should be guardian
8	Black female, 93, wheelchair bound	Niece	Guardianship
9	White female, 85, with Alzheimer's Disease	Niece and brother	Financial and health care decision making. Brother and niece filed two competing applications
10	Black, female, 85, with multiple mental and physical disabilities	Half-sister	Guardianship and maintaining good relationships with friends and relatives
11	White, female, 80, with senile dementia	Son	Guardianship and respondent's insistence that she lives in her home
12	Black, female, 77, with dementia	Daughter	Guardianship; medical and financial issues
13	Female, 64, with schizophrenia	Friend	Health, safety, nutrition and finances of respondent
14	Female, 39, with mild retardation	Unknown	Guardianship

Guardianship Caseflow and Mediation

Guardianships are initiated by an application for guardianship filed in the court of the ward's residence by an interested party (family member, attorney, or the Public Guardian), or on the court's own motion. Mediation referrals can occur in two ways: (1) in anticipation of a potential guardianship but absent a formal guardianship application, referred to here as the "pre-application" route (no court case pending), and (2) post-application, when an application already has been filed or a guardian already appointed. Only two of the thirty-three cases referred to mediation in Summit County to date came via the pre-application route.

Post-Application – When Application Already Filed or Guardian Already Appointed

The formal application for an appointment of a guardian of an alleged incompetent person requests information regarding the type of guardianship sought, the time period requested, the applicant's relationship to the alleged incompetent, the reasons for the requested guardianship, information concerning the applicant or proposed guardian, and information concerning the proposed ward. The application must be accompanied by a "Statement of Expert Evaluation" completed by a licensed physician or psychologist who has examined the respondent within ninety days of the filing of the application.

No formal screening or referral to mediation occurs at the time of the application. Unless an "agency" has requested mediation on behalf of one of its clients in accordance with Section E of Local Rule 98.1,²⁴ any screening and potential diversion of the case must be triggered by a formal guardianship application. However, on an informal basis, within days of the application, one of the magistrates reviews all applications for appropriateness for referral to mediation.

²⁴ *Supra* note 2.

Within two days of filing, applications for appointment for guardian of adults are set for initial hearing four weeks from filing (applications for guardian of minors are set for initial hearing ninety days from filing). All applications for the appointment of a guardian of the person, or of the person and the estate, are referred for investigation by one of four court investigators within fourteen days of filing and at least ten days prior to the scheduled hearing. Court investigators meet personally with proposed wards, fulfill the statutory obligation for service and notice to the respondent, and seek information about the prospective ward including age, residence, relationship to the applicant, grounds for application, the prospective ward's understanding of the concept of guardianship, and the mental and physical condition of the prospective ward. The court investigator will make a recommendation of whether guardianship is appropriate and whether less restrictive alternatives are available.

An investigator's report on guardianship includes recommendations regarding the necessity for guardianship, availability of less restrictive alternatives, the need for an appointment of an independent expert evaluator, an attorney, and special emergency needs. When investigators believe that mediation is appropriate, they complete a "Guardianship Mediation Project Screener Checklist." The form includes fourteen items that form the basis for subsequent determinations of the appropriateness for mediation, including the proposed ward's ability to participate in mediation, any special accommodations required, and the individuals who should be involved in mediation if it occurs. As noted earlier, the submission of a "Guardianship Mediation Project Screener Checklist" and recommendation for mediation by investigators occurs in approximately two to ten percent of investigated guardianship cases.

Within several days after the investigator meets with the proposed ward, a magistrate reviews the report of the investigator and the screening checklist for cases recommended for mediation by the investigators. Reportedly, the criteria for

appropriateness of mediation are based upon the “Mediation Participation Flow Chart” prepared by TCSG in April 1996. The initial question of this flow chart is whether the respondent has an opinion or is capable of communicating sufficiently to express an opinion on the issues to be mediated. Conditions or situations amenable to mediation include conflicts among family members, the guardian, care providers, and social service agency representatives; independence or lifestyle of respondent; and less restrictive alternatives to guardianship. Cases inappropriate for mediation include those in which a minor is the respondent, competency is at issue, elder abuse or financial exploitation may be involved, and where physical or emotional danger is likely if the parties confront each other.

When a guardian is already appointed, the post-application referral process allows for the opportunity for mediation at any point in the court process. The parties may request mediation of a case at any time by filing a motion asking the court to refer the matter to mediation. Three cases among the fourteen mediated guardianship cases in Summit County (3/98 –9/99) were referred to mediation in this manner.

Pre-Application – No court case pending

An agency (e.g., the Adult Protective Services, or the Mental Retardation/ Developmental Disabilities Board), may request mediation of a dispute or conflict that may preclude the need for a guardianship. The request is made by filing a motion asking the court to refer the matter to mediation, pursuant to Local Rule 98.1. The motion, attached materials, and a completed “Guardianship Mediation Project Screener Checklist,” if available, are then reviewed by the magistrate and the case is processed as described above for cases originating with a formal guardianship application. Reportedly, informal inquiries made by the investigators may trigger the pre-application referral process, as well as formal guardianship applications.

Review of Mediation Referrals

During the pilot phase of the program, the magistrate administrating the program sought an additional “sounding board” to assure herself of the appropriateness of cases for mediation. As a final check, the magistrate convened a ten-member review committee to assess the appropriateness of mediation. The review committee was notified by fax of any cases needing discussion in a meeting every Wednesday. As a practical matter, the review committee rarely declined to refer a case to mediation that had been earmarked by the magistrate. An elder law attorney, and member of the review committee who questioned the usefulness of the review committee, noted that the committee has always agreed with the magistrate’s recommendations of cases to mediation. She did state, however, that the committee members were potential referral sources for the program and that convening the committee may serve to educate the community about the program and to identify valuable sources for case referral. One of the investigators, who also served on the review committee, expressed the view that the review committee meetings were valuable in terms of identifying the issues for mediation. While this function of the review committee is arguably beneficial, the benefits of the committee’s ratification of the recommendations for mediation made by the magistrate and supported by the committee seem limited.

Cases approved for mediation proceed to mediation and are referred within two days of the committee’s action. The magistrate routinely confers with the assigned mediator regarding the appropriateness of the case for assignment, faxes the investigator’s report and the screener’s checklist, and mails a copy of the case file to the mediator. The practice in Summit County is to continue (postpone) the scheduled

hearing once a guardianship case is assigned to mediation. Parties receive notice of the scheduled mediation and the continuance of the hearing.

Table 2
Elapsed Time of Case Processing of Mediated Guardianship Cases from Filing to Court Hearing, Summit County, Ohio, 1998-1999

Case	Investigation	Mediation Assignment	Mediation Referral	Mediation	Agreement Filed	Court Hearing
1	0	29	29	142	154	N/a
2	0	11	14	57	128	128
3	0	9	10	59	156	None
4	0	12	12	78	103	None
5	0	2	2	12	N/a	None
6	205	214	215	285	N/a	[None]
7	205	214	215	285	N/a	405
8	24	31	31	49	N/a	[Cont.]
9	13	64	64	105	107	32
10	4	13	13	52	61	13
11	17	19	20	54	58	31
12	33	36	164	164	204	36
13	20	27	27	34	52	34
14	20		42		250	

Once assigned to a case, mediators review the case materials sent by the court, including the screener checklists, lists of potential parties, investigator’s report, cover letter to the parties explaining mediation, and other forms in the file. Mediators take responsibility for identifying the issues for mediation, contacting all those who should be involved in the mediation process, and scheduling the initial mediation session.

Investigation and Referral

As the “eyes and ears of the court” in Summit County, court investigators play an integral part in the initial stages of a guardianship proceeding and in the determination of the appropriateness of the case for mediation. Investigators complete the “Guardianship Mediation Project Screener Checklist” only in those cases that they feel

would benefit from mediation. Reportedly, criteria used by the investigators include: the existence of familial conflict about guardianship, unresolved family issues, the existence of mental retardation or developmental disabilities, and the absence of medical issues. At least one court investigator serves on the mediation review committee. As part of the screening of cases that may be appropriate for mediation, investigators identify and often contact the relevant individuals in the case and cover many of the same issues that the mediators need to address upon assignment to a case.

The Mediation Process

Most mediations are concluded in a single one to three-hour session (see Table 5 below, “Outputs and Outcomes of Mediation of Guardianship Cases, Summit County, Ohio, 1998-1999”). The length and number of the mediation sessions vary by mediator and case. Five of the fourteen mediated cases required up to three additional sessions, lasting one to three hours per session.²⁵ If an agreement is reached, all parties, including attorneys present at the mediation session, sign the agreement, and copies of the agreement are provided to the individuals present at the mediation session and the probate court.

The probate court has imposed no deadline or time guidelines for the scheduling and completion of mediation sessions. The number of days between the court referral for mediation and the date of the initial mediation session varies considerably (see Table 2 above). Mediators interviewed stated that the amount of time required to schedule all those involved in the mediation session ranges from two to ten hours, depending upon the case. They reported that because of the large numbers of parties typically involved in guardianship cases, and because agency personnel prefer not to

²⁵ See *infra* Table 5.

meet after regular work hours, scheduling meeting times agreeable to all participants is difficult. Reportedly, these administrative tasks place a large demand on the mediators' time before the mediation takes place. Moreover, because all mediators work on a contractual basis and are otherwise fully employed, the preparation of a case for mediation is fit into their schedule as it permits.

Mediation sessions are held at the offices of the mediators, at the probate court, at nursing homes, or at the residences of the parties in the case. The total number of participants in the mediation sessions in the fourteen mediated cases in Summit County ranged from as few as two in one case to as many as eight in another (Table 3). The respondent participated in all but two of the fourteen cases, and the applicant was present in mediation sessions in all but three of the cases. An advocate for the respondent (an attorney representing respondent or a guardian *ad litem*) was present in nine out of the fourteen cases.

The mediator does not decide the issues or force the parties to reach agreement. Instead, the mediator listens to the parties' concerns, helps the parties develop an agenda, facilitates the identification of possible resolutions of the dispute, and helps the parties focus on solving the problem(s) so that a workable solution may be reached. Unlike a court settlement, consensus of all parties is required for a mediation agreement. The conduct of the mediation session is left to the individual mediators. In a report of completed mediation cases, "Case Reporting Form – Guardianship Mediation Project," mediators were asked to describe, in a short phrase or two, the mediation techniques they used. A general sense of the conduct of the mediation sessions in Summit County can be gleaned from the mediators' written responses to this question in twelve of the fourteen mediated cases (Table 4). Some of the techniques identified by the mediators are arguably ones that should be used in any

mediation session (e.g., identification of issues) and others or may not be seen as specific mediation techniques (e.g., comfort and support).

Table 3
Number and Types of Participants in Mediation of Fourteen Guardianship Cases
Summit County, Ohio, 1998-1999

Participants	Cases													
	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Respondent (Ward)	X	X	X	X	X	X			X	X	X	X	X	X
Applicant		X		X		X	X	X	X	X	X	X	X	X
Guardian (Not Applicant)		X												
Guardian Ad Litem			X											
Respondent's Attorney		X		X	X	X	X					X	X	X
Family Member				X	X	X	X	X	X	X	X	X	X	X
Service Provider	X	X	X											
Other				X					X				X	X
Total Participants	2	6	6	5	5	6	6	2	6	6	4	5	8	7

Note: Service providers include health, mental health, nursing care, foster care and other care providers The "other" category included friends and ministers. The number of total participants exceeds the entries associated with the categories in the body of the table because some categories of participants may include more than one participant.

Table 4
Mediation Techniques Used in Twelve Guardianship Cases,
Summit County, Ohio, 1998-1999

Technique	Frequency
Identification and Clarification of Issues	12
Identification and Exploration of Options	6
Conflict Analysis	3
Airing of Family Issues	2
Implications and Consequences of Agreement	1
Confrontation	1
Recognition of Family Conflicts	1
Comfort and Support	1

Agreements, when reached, ²⁶ are written by the mediator and signed by all those present at the mediation session. As noted above, copies are sent to the parties and the court. Although the program principals have discussed the desirability of a standard form for documenting the mediation agreement; no such form currently exists, and the length and format of the agreement varies by mediator.

Post-Mediation Process

Agreements are filed with the court, and retained by the program in a special program file. Reportedly, they are not part of the official court file and the probate court takes no official recognition of the agreements. That is, no action is taken, except upon motion of the parties. One investigator characterized the agreements as “shadow documents.” Reportedly, investigators may, as part of their oversight of cases, alert the court to inaction in a case and cause a case to be moved forward.²⁷

Outcomes of Mediation

An input-output-outcome model of court performance measurement assumes that a court, court division, or program has measurable physical, financial and human resources (inputs) that allow it to operate more or less as intended (outputs), to produce demonstrable or perceived changes in the well-being of individuals, groups and communities (outcomes).²⁸ For example, the number of mediators employed in a court mediation program and the number of mediation sessions held (see Table 5, below) are not outcomes. They are, respectively, inputs and outputs of a mediation program. Of

²⁶ Agreements were reached in nine of the fourteen mediated cases from 3/98-9/99. See *infra* Table 5 and accompanying text.

²⁷ Interestingly, an unpublished document, “Guardianship Mediation Project Checklist for Planning Local Program, Summit County, Ohio,” discusses the responsibility and procedure for notifications to court including notification of the outcome of mediation, whether child or elder abuse might be involved, if mediation is continued and there is a need to reschedule a court hearing, and if the mediation results warrant further court action.

course, these inputs and outputs may be of great interest to those who “run” the courts but they are of less concern to those who are “served” by the courts – citizens, taxpayers, litigants, legislators, and executive agencies. That is, those who run court programs may be most interested in the resources required to mount a program (inputs) and whether a program has been implemented and is working as intended (outputs). Those served by the program, on the other hand, are far more interested in outcomes, for example, whether the mediation program promotes more fairness, reduces costs, and satisfies the parties in a dispute relative to litigation without mediation.

When we speak of efficiency, we typically are looking at the relationship between inputs and outputs. For example, we may look at the relationship between the physical, financial and human resources, on the one hand, and the number of mediated cases of a mediation program, on the other hand. Effectiveness can be defined by the relationship between inputs and outcomes.

Agreements Reached in Mediated Cases

A relatively straightforward outcome measure of the success (effectiveness) of mediation is the proportion of mediated cases in which agreement among parties is reached. In Summit County, agreements were reached in ten (seventy-one percent) of the fourteen mediated cases (see Table 5). This does not necessarily mean that the Summit County program is a success; agreements reached should not be the sole outcome measure. Independent of other measures, such as whether the agreements “hold” over time, this outcome measure is an insufficient basis upon which to declare the Summit County program a success. An outcome of seventy-one percent agreements reached in guardianship mediation has more meaning and utility, however,

²⁸ I. Keilitz, *Standards and Measures of Court Performance*, in *Measurement and Analysis of Crime and Justice* 559 (Volume 4, Criminal Justice 2000, National Institute of Justice, July 2000).

when combined with other outcome measures and in relation to the same measure taken in the future or by other guardianship mediation programs.

Table 5
Outputs and Outcomes of Mediation of Guardianship Cases,
Summit County, Ohio, 1998-1999

Case	Session Number and Length	Agreement	Outcome Elements
1	1: 1 hour	Yes	No guardianship; assistance provided to respondent
2	3: 2, 1.5, and 1.75 hours	Yes	Continuation of guardianship with maximum opportunities for independence of ward; agreement has stuck
3	3: 1.5, 1.5, and 1 hours	Yes	New guardian and increased independence for ward; agreement has become undone but mediation helpful to parties
4	3: 1.5, 1, and 1 hours	Yes	Guardianship continued; father appointed guardian; sister will be representative payee; agreement stuck
5	3: 2.25, 2.5, 1.5 hours	No	Guardianship application dismissed
6	3: 3, 3, and 3 hours	No	Conflict among family members not resolved
7	3: 3,3, and 3 hours	No	Conflict among family members not resolved. "Settled at court hearing
8	1: 1.5	No	Family, two nieces of respondent, chose to proceed with formal guardianship proceedings
9	1: 3.5	Yes	Co-guardianship by brother and niece; agreement questionable
10	1: 2	Yes	Guardianship of person and estate by half-sister; ward deceased; agreement was not "definite"
11	1: 1.5	Yes	Guardianship. Respondent remains in home unless health requires otherwise; agreement stuck; mediation helpful to parties
12	1	Yes	No guardianship; daughter will assist respondent. Agreement did not hold
13	1: 2	Yes	Conservatorship and assistance with housing and meals. Agreement held
14	1	Yes	Limited guardianship; agreement has held

Did the agreements “stick”? Did the participants ultimately rely on the probate court to settle the dispute? Are the participants communicating with each other, whereas before mediation they were not (a result not necessarily dependent on reaching an agreement)?

In joint interview sessions, the five court investigators gave their impressions about these questions.²⁹ In at least six of the ten cases where agreements were reached, the agreements held, at least for a few months, or the mediation process was deemed helpful to the parties, according to the investigators. All agreed that in most cases in which agreements have not stuck, the mediation might still have been helpful in facilitating family relationships. Other benefits cited by the investigators include the empowerment a respondent feels when he or she is able to express views and be heard (all agreed, however, that this may also happen in a court hearing). Investigators mentioned that representatives of social service agencies and hospitals had expressed concern that taking a case to mediation would postpone the guardianship proceedings. To address that concern, a few mediations have been arranged to take place in hospitals to speed up resolution of care and medical issues. Investigators agreed that these “hospital mediations” appeared to have worked well.

Perceived Success of Mediation

In structured and group interviews, a total of ten individuals — two magistrates, two attorneys, five court investigators (including a court investigator/ administrator) — were questioned about their perceived impact or ultimate outcome of guardianship mediation in Summit County. Each of the interviewees was asked to answer “greatly,” “somewhat,” or “very little” to each of five questions posed:

²⁹ Cf. *supra* Table 5 and accompanying text.

1. Is mediation of adult guardianship cases effective, relative to non-mediated cases, in terms of finding better or more satisfactory resolutions such as fewer guardianships, less restrictive orders, or limited guardianships?
2. Does mediation lead to better maintenance of the relationships of the parties, and more consensual arrangements?
3. What is the impact of mediation on the resources of the parties and the courts? Does it save time and money?
4. Are the participants in mediated guardianship cases satisfied with the process and outcome of mediation?
5. Do the benefits of mediated guardianship justify the costs, if any?

The sixth question invited more expansive answers:

6. Are there critical factors in mediation of guardianships that determine the effectiveness of mediation, such as training or background of the mediator, participation of attorneys, legal framework, timing of referral, or others?

Table 6 is a summary of responses to the first five of these questions. In general, most court participants believed that mediation of guardianship cases leads to at least “somewhat” favorable outcomes including better solutions to the conflicts presented, more consensual arrangements, resource savings, participant satisfaction and overall cost benefits. A magistrate noted that because the court was already well attuned to seeking less restrictive alternatives to guardianship, mediation may have less impact on finding such alternatives in Summit County than in other court environments less hospitable to such alternatives. Court investigators, who were interviewed as a group of six (something that may have contributed to the consistency of their responses to questions), stated that mediation was “a nice tool to have” and that it tends to decrease the acrimony among the parties. Their comments regarding the question of resource savings were more ambivalent than their categorized response to Question 3 in Table 6 suggests. They said that because mediated cases do not come back to court,

the avoidance of pretrial and evidentiary hearings reduces costs. They were less certain about whether mediated cases reduce the time of dispute resolution. Commenting on Question 5, a magistrate contended that a less tangible benefit of mediation includes its contribution to the social value placed on consensual arrangements and resolutions of conflicts.

Table 6
Responses to Questions Regarding the Impact of Guardianship Mediation,
Summit County, Ohio, 1998-1999

Questions	Greatly	Somewhat	Very Little	No Opinion
Is mediation of guardianship effective?		10 (100%)		
Does it lead to better relationships among the parties?	7 (70%)	2 (20%)	1 (10%)	
Does it save time and money?	7 (70%)	1 (10%)	2 (20%)	
Are the participants satisfied with the process of mediation?	7 (70%)	2 (20%)		1 (10%)
Do the benefits justify the costs?	8 (80%)		1 (10%)	1 (10%)

Among the critical factors that determine the effectiveness of mediation (Question 6), respondents noted the skills, experience and general competence of the mediator, the timing of the mediation, the cooperation of family members, and attorneys' understanding of the mediation process.

Generally, conclusions that can be drawn about the success of the mediation program in Summit County reflect the impressions of the program participants. It is somewhat effective, relative to no mediation whatsoever, in finding better or more satisfactory solutions in selected guardianship cases; it leads to more consensual agreements and better relationships among parties; it seems to save some time and money; participants are satisfied with the mediation process and its outcomes; and, again generally, the benefit of mediation in guardianship seems to justify its costs.

HILLSBOROUGH COUNTY, FLORIDA

History and Structure of Program

Florida law defines mediation as “a process whereby a neutral third person called a mediator acts to encourage and facilitate the resolution of a dispute between two or more parties. It is an informal and non-adversarial process with the objective of helping the disputing parties reach a mutually acceptable and voluntary agreement. In mediation, decision making authority rests with the parties. The role of the mediator includes, but is not limited to, assisting the parties in identifying issues, fostering joint problem solving, and exploring settlement alternatives.”³⁰

The guardianship mediation program of the Hillsborough County (Florida) Circuit Court, Probate Division, is locally authorized by an administrative order³¹ that outlines general procedures for the processing of civil cases ordered to mediation, and collection and payment of fees assessed pursuant to the mediation of civil cases. The order defines mediation as “a process whereby a neutral third party acts to encourage and facilitate the resolution of a dispute without prescribing what it should be. Mediation is an informal, non-adversarial process with the objective being to help the parties reach a mutually acceptable agreement.”³²

State and local laws authorize funding for the mediation program. Florida statutes provide for mediation services in appellate court, circuit court, and county court matters, as well as for “family” mediation and “dependency or in need of services

³⁰ FLA. STAT. ANN. CH. 44.1011(2) (Harrison, 1999). See also *id* at 44.102 for court-ordered mediation.

³¹ In re: General Procedures for the Processing of Circuit Civil Cases Court Ordered to Mediation, Collection and Payment of Fees Assessed Pursuant to the Mediation of Circuit Civil Cases, Administrative Order No. S-03-10-28-95-59 (effective 7/95).

³² *Id.*

mediation” in child dependency cases, or for families in need of services due to divorce or other family problems.³³ State law provides for funding of mediation services by allowing for appropriations from county revenues and for levying a service charge of no more than \$5 on any circuit court or any county court proceeding, to be deposited in a court’s mediation-arbitration account fund under the supervision of the chief judge of the circuit.³⁴ Additionally, Hillsborough County Ordinances³⁵ provide for the administration of the county mediation programs and for the financial support of various circuit court programs (including the court mediation programs) through the assessment of court filing fees. The filing fees that fund these expenses come from county and circuit civil court cases and family proceedings (excluding juvenile, probate, guardianship, trust and dissolution of marriage proceedings). In addition, the ordinance provides for the establishment of trust fund accounts to receive the fees levied on court filings and administrative procedures for the maintenance and investment of the monies for the mediation programs.

The guardianship mediation program is administered by the Hillsborough County Circuit Civil Diversion Program, established in 1978 as the Mediation and Diversion Services (hereinafter “MDS”).³⁶ MDS is a court-annexed program for mediation of circuit, criminal (adult misdemeanors), civil, family, juvenile dependency, and adult guardianship matters. A promotional brochure describing MDS notes that it was created “to offer residents and businesses of Hillsborough County an alternative to the traditional court process and to provide assistance to the civil and criminal justice

³³ FLA. STAT. ANN. CH. 44.1011, note 26 at subsections (d) and (e) (Harrison, 1999).

³⁴ FLA. STAT. ANN. CH. 44.108(1) & (2) (Harrison, 1999).

³⁵ Hillsborough County, Fla., Ordinance Nos. 90-43 (Dec. 19, 1990) and 93-2 (Jan. 20, 1993).

³⁶ Administrative Order No. 88-44 (effective 5/88).

systems.”³⁷ Since May 31, 1978, Hillsborough County, the fourth most populous county in Florida with a population of approximately one million people, has been providing mediation services for its residents, initially through citizen dispute settlement programs. In September 1986, Administrative Order 89-66 abolished the Citizens Dispute Settlement Program and re-established it as MDS under the supervision of the Court Administrator of the Thirteenth Judicial Circuit Court. MDS administrative offices and mediation rooms are housed in the Thirteenth Judicial Circuit Court building in Tampa, Florida.

MDS employs twenty-two full-time staff and twenty community/county civil mediators, twelve family mediators, ten dependency, and six guardianship mediators. Mediators are employed as independent contractors. A promotional booklet, provided by the Thirteenth Judicial Circuit on the occasion of the program’s twentieth anniversary in 1998 describes the various matters handled by MDS, and reads in part:

In 1988, the Thirteenth Judicial Circuit had the honor of being the first Circuit Civil Mediation pilot project in the state. The project was a great success and helped establish Circuit Civil Mediation as a viable means of resolving these cases. In 1994, two grants were received from the Dispute Resolution Center in Tallahassee to establish a Juvenile Dependency Mediation Program and a Guardianship Mediation Program. . . . In addition, the Thirteenth Judicial Circuit was selected by the Center for Social Gerontology in Ann Arbor, Michigan as one of four sites in the country to receive additional grant funds for guardianship mediation.³⁸

The director of MDS, Marty Merrell, was instrumental in the initiation of the adult guardianship mediation program in November 1995 as a pilot project sponsored by

³⁷ “Community Mediation Program,” Thirteenth Judicial Circuit of Florida, Mediation and Diversion Services. No informational brochure is available specifically for adult guardianship mediation, although Mediation and Diversion Services does have brochures available on other kinds of mediation, i.e., family and community mediation.

³⁸ “Mediation and Diversion Services, 20 Years of Service” (1998).

TCSG and funded by a Retirement Research Foundation grant. The design and structure of the program, and many of its processes and procedures stem from training and consultation provided to MDS by TCSG during the pilot phase of the program in 1995 and 1996. Since 1997, the primary funding for the adult guardianship mediation program has come from filing fees in circuit, family, and county courts, as noted above. The guardianship mediators continue to be paid from the Retirement Research grant monies.³⁹ Court intake and administration for the program is paid out of the court budget, which comes from the statutory filing fees described above.

The first referral of a guardianship case to the mediation program was made on February 2, 1996. Since then, a total of twenty-seven cases were referred to mediation in the five-year period ending in January 2001. Of the twenty-seven cases referred to mediation, nineteen cases were actually mediated. No cases were referred to mediation in 1998, although 198 incapacity cases were filed with the court that year.⁴⁰ According to the director of MDS, two factors account for the 1998 “dry spell”: (1) more could have been done to publicize the program and to encourage participation, had time and circumstances permitted; and (2) mediation referrals were not a priority at a time in

³⁹ As of January 2001, there remains a balance of \$2,570 in grant funding. Reportedly, when these funds are expended the parties will be required to pay the mediators directly for their services. Currently, the rate for circuit mediators is \$175 per session. It is not clear how Hillsborough County, Fla., Ordinance No. 90-43 (Dec. 19, 1990) and FLA. STAT. ANN. CH. 44.108 (Harrison, 1999), which states that mediation should be accessible to all parties regardless of financial status, will be carried out in cases where the parties are unable to pay a mediator.

⁴⁰ The court maintains separate case files for “incapacity” cases and for guardianship cases. Incapacity cases most often result in adult guardianships, and thus are the cases most likely to be referred to the adult guardianship mediation program. The “guardianship” case files contain guardianship of minors, minor settlement cases, cases that involve voluntary incapacity, medical treatment, or cases where the Veterans Administration declares incapacity, and there are reportedly relatively few cases within this group that would result in a mediation referral. The court’s records clerk stated that “most, if not all” of the adult guardianship cases which would be appropriate for mediation are found in the incapacity case files.

which a full-time general master was hired to assist the judge with the guardianship and probate division caseload, and the division was being restructured.

Contested guardianship cases are heard by a circuit court judge and a special hearing master.⁴¹ The judge decides which bench officer (judge or hearing master) will hear the cases, with approximately fifty percent of the cases being heard by each. While there are no formal criteria to decide what cases are to be heard by the general or special hearing master, typically the hearing master is assigned issues dealing with guardian fees and attorney's fees and initial petitions for incapacity.

Most referrals for mediation have originated with the circuit court judge, the special hearing master, and an elder law attorney who practices in the probate court. No screening instrument is used, nor is there a formal set of criteria for referrals. The judge typically makes the referrals, but most frequently allows the parties to identify the issues and set the agenda for the mediation themselves. One court clerk noted that there are "red flags" that indicate future problems in cases, such as money matters where several siblings are involved, assets in several places, cases where a proposed ward has already been moved several times to different placements, and cases represented by certain attorneys who tend to be more "contentious" than others. Theoretically, any interested party, such as an attorney, service provider, or family member can refer a case to mediation. If an attorney or a party refers a case to mediation, s/he may do it by making a motion or by talking with the judge and bringing the matter to her attention. Some interviewees noted that there is little financial

⁴¹ The special hearing master (or general master) makes recommendations after hearing a case and those recommendations are ordered by the probate judge when the judge is in agreement with the recommendation. Objection to the special hearing master's recommendations, which occur rarely, may

incentive for attorneys to refer cases to mediation, since they are paid considerably less for cases that are resolved through mediation, as opposed to cases that require multiple hearings in court.⁴²

According to interviewees, issues in mediation may include probate/estate or guardianship of the person, and reportedly there is no judicial preference to refer one kind of case over another. A variety of issues have been referred to mediation such as: appointment of a professional or family guardian for person and/or property, appointment of a caregiver, scope of the guardianship,⁴³ selecting a successor trustee, sale of real estate, property, or property division issues, placement, medical treatment, and certain enumerated rights, i.e., the right to travel or marry.⁴⁴

At the beginning of the pilot project in 1996, nine mediators were trained in adult guardianship mediation and employed by the court as independent contractors. Six remain today. One is a Ph.D. psychologist, one is a family counselor, another is a mental health professional, and three are attorneys. Mediators are paid monthly for their services at the rate of \$175 per session. The state and county set out

be made within ten days, requesting a review by the judge. After ten days, the judge may sign the recommendation as an order.

⁴² However, at least one attorney who was interviewed said he regularly refers cases to mediation. He professed to be an avid supporter of guardianship mediation and expressed a willingness to help garner support for the program from other members of the local bar, including the presentation of a CLE course on adult guardianship mediation. One referral to mediation was made by a legal service organization and involved a pre-petition case.

⁴³ Florida has a system of “enumerated rights” for wards, which means that limited guardianships may be created by leaving some rights intact while removing other rights from the ward. If all rights on the list are removed, a full guardianship results. FLA. STAT. ANN. CH. 744.3215 (Harrison, 1999 and Supp. 2000). Removal of specific rights is requested by the petitioner. An examining committee is then appointed to examine the proposed ward in accordance with the standards prescribed under FLA. STAT. ANN. CH. 744.331 (Harrison, 1999 and Supp. 2000). The examining committee determines the ability of the alleged incapacitated person to retain those rights which the petitioner has requested be removed. Within fifteen days after its appointment, the committee issues a report of its assessment to the court, which then decides whether or not to act on part or all of the petition. *Id* at subsection (3)(d).

⁴⁴ *Id.*

qualifications. Adult guardianship mediators are state certified as either circuit court or family mediators.

The state requires that circuit court mediators:

- A. complete a minimum of forty hours in a circuit court mediation training program certified by the supreme court;
- B. be a member in good standing of The Florida Bar with at least five years of Florida practice and be an active member of The Florida Bar within one year of application for certification, or be a retired trial judge from any United States jurisdiction who was a member in good standing of the bar in the state in which the judge presided for at least five years immediately preceding the year certification is sought;
- C. observe two circuit court mediations conducted by a certified circuit mediator and conduct two circuit mediations under the supervision and observation of a certified circuit court mediator; and,
- D. be of good moral character.

Family mediators must:

- A. complete a minimum of forty hours in a family mediation training program certified by the supreme court;
- B. have a master's degree or doctorate in social work, mental health, or behavioral or social sciences; be a physician certified to practice adult or child psychiatry; or be an attorney or a certified public accountant licensed to practice in any United States jurisdiction; and have at least four years practical experience in one of the aforementioned fields or have eight years family mediation experience with a minimum of ten mediations per year;
- C. observe two family mediations conducted by a certified family mediator and conduct two family mediations under the supervision and observation of a certified family mediator; and,
- D. be of good moral character.⁴⁵

⁴⁵ In re: General Procedures for Temporary Relief Mediation Project, Administrative Order No. S-1999-056 (effective July 22, 1999), and In re: General Procedures for Family Law Cases Court Ordered to Mediation; Administrative Order 90-159 Superseded, Administrative Order No. S-06-28-94-178 (effective October 4, 1994) adopting FLA. R. 10.010(b)(c) and FLA. R. Civ. P. 1.760. Local administrative orders

MDS requires its adult guardianship mediators to undergo additional training for adult guardianship mediation. All of the adult guardianship mediators under current contract were trained by TCSG. The director of MDS reported in a questionnaire to TCSG that the training was “certainly adequate” preparation to mediate adult guardianship cases. She noted, however, that the mediators who were certified circuit mediators had commented that they were not prepared for the level of emotion present in some of these cases but that the family trained mediators, on the other hand, seemed able to handle the emotional level with “no problem.”

In February 1999, the director of MDS characterized the guardianship program in Hillsborough County as having met with mixed success. She stated that the program was accepted at the very beginning by the mediators, the court and clerk’s staff, but it was not taken as seriously by other involved parties.

The attorneys, guardians and aging services are comfortable with the way things have been handled through the years and change takes time, and buy-in from the initial stages would have probably helped. What we did was more or less “consult” with everyone else and plug along on our own. If I were to do it over again, I would establish a Guardianship Mediation Committee from the beginning to include Mediation Program representatives, Attorneys, Professional Guardians, Clerk’s Office staff, and Aging Services Representatives. I would have the committee as a whole establish the steps for implementation, lay out the plan for selling the idea to everyone involved in the Guardianship process.⁴⁶

Program Operation

As in Summit County, Ohio, the guardianship program is small in scope relative to the number of guardianship cases filed with the court. Most of the guardianship

adopt the mediator qualifications for circuit court and family mediators found in the Florida Rules for Court Appointed Mediators and the Florida Rules of Civil Procedure.

⁴⁶ Response to TCSG questionnaire (January 22, 1999) by Marty Merrell, prior to Hewlett Foundation Symposium, Adult Guardianship Mediation: Essentials for Success,” held February 4-5, 1999, in Ann Arbor, Michigan for participating programs in adult guardianship mediation.

cases referred to mediation are actually mediated, and three-quarters of the mediated cases reach some type of agreement.

From the program’s inception in February 1996, through December 2000, a period of fifty-eight months, twenty-seven of a total 988 incapacity cases⁴⁷ filed with the court, including requests for guardianship of the person and/or estate, were referred to guardianship mediation, an overall referral rate of 2.7% (Table 7). Of these referrals, twenty-two cases were actually mediated, and sixteen of these (73%) were mediated to agreement. As noted earlier, no cases were referred to mediation in 1998, although 198 incapacity cases were filed with the court that year.

Table 7
Mediated Guardianship Cases, Hillsborough County, Florida, 1996 - 2000

Year	Incapacity Cases	Referrals (Percent)	Mediations/Agreements (Percent)
1996	224	10 (3.9%)	7/3 (43%)
1997	200	5 (2.5%)	5/5 (100%)
1998	198	0	N/A
1999	194	8 (4.1%)	7/5 (71%)
2000	172	4 (2.3%)	3/3 (100%)
Total	988	27 (2.7%)	22/16 (73%)

Mediated cases involved mostly incompetent, or alleged incompetent, and mostly elderly adults. Family members typically were the petitioners (husbands, wives, siblings), but other petitioners included a state agency and a hospital. Disputes involved issues such as the appointment and extent of the guardianship (limited or full), guardianship or conservator care plans (i.e., another person as guardian or conservator

⁴⁷ This total includes only “incapacity” case filings, the most likely category for adult guardianship referrals. The other potential filing category, guardianship cases, pertains largely to minors and voluntary medical treatment cases, which are normally “open and shut” cases and are generally not referred to mediation, according to the records clerk at the probate court. See *supra* note 36.

and who it should be, including appointment of a professional guardian), selecting a successor trustee, emergency co-guardian, the ward's right to choose a guardian, real estate and property sale and division issues, personal property of claimant in home of ward, property disputes, payeeship plans, placement (where a ward will live), various decision-making issues (including alleged poor decision making about money and material needs), methods of accounting for finances, use of funds, medical care, the ward's right to travel and manage affairs, whether to use independent care professionals, less restrictive alternatives for the ward, visitation and issues involving respect among family members and care providers.

Guardianship Caseflow and Mediation

In Hillsborough County, guardianship cases are initiated by the filing of either a "regular" or emergency petition for guardianship by an interested party, i.e., a family member or attorney. A guardianship petition cannot be filed on the court's own motion; however, the court can *sua sponte* (on its own motion) have a ward reevaluated for determination of restoration of capacity.

Mediation referrals are made in two ways: (1) pre-petition referral by an interested party (where no petition has been filed with the court), and (2) by a post-petition referral (when a petition has been filed or a guardian has already been appointed).

In interviews, the judge and hearing master stated that most of the referrals to mediation come from the bench, although case records and interviews reveal that several cases have been referred to DMS by attorneys. The judge stated that she refers probate and guardianship cases to mediation at a fairly equal rate, meaning that she shows no preference as to estate/probate or guardianship cases. She noted that if a guardianship must be litigated, the costs of litigation will come out of the ward's estate

and it is often in the ward's best interest to have another more cost-effective method of settling any problems.

Post-Petition—Petition Already Filed or a Guardian Already Appointed

When a person files a petition seeking appointment of a guardian for an alleged incapacitated person, he or she must file a mental health petition simultaneously. Initially, a petition is filed in the mental health division so that an examining committee may be appointed to determine incapacity. If the examining committee determines that the respondent is incapacitated, the mental health file is then closed and is merged into a guardianship case. The examining committee's report is filed in both the mental health file (which is now closed) and the active guardianship file.

The court may appoint an emergency temporary guardian prior to appointment of a guardian, but only after a petition for determination of incapacity has been filed. This may occur on the court's own motion, or in response to a petition for an emergency temporary guardian.⁴⁸

If an emergency petition is filed for a ward considered to be in imminent danger, seriously impaired, a security or health risk, or one whose assets are in danger, an emergency hearing or status conference is set within twenty-four hours. Once the court has determined whether it is an emergency, interim orders may be put in place. If there are reasonable allegations that without a limited guardianship in place, the respondent is likely to do something harmful to him/herself or wasteful to his/her assets (very little

⁴⁸ FLA. STAT. ANN. CH. 744.3031(1), (2) (Harrison, 1994). Local practice also requires the filing of a mental health petition for an alleged incapacitated person until such time as the case is adjudicated and the person is found to be incapacitated (at which point the mental health case is closed). Therefore, it is not uncommon for three concurrent petitions to be filed at the inception of a case: an emergency petition, a petition for a guardian of an alleged incapacitated person, and a mental health petition. A probate judge stated that if she becomes aware at this early stage that the parties are in conflict, she may set a status conference at this point and refer the case to mediation.

evidence is needed at this juncture), an emergency temporary guardian with very limited enumerated authority is appointed at the initial hearing. The emergency limited guardianship expires in sixty days, but the parties may go to court and ask for a thirty-day extension if more time is needed to settle the issues.⁴⁹

In interviews, the judge stated that this is a point in the proceedings when mediation can be especially helpful. She noted that mediation is most useful in contested cases and emergency hearings are often highly contested, simply because the person who is appointed as temporary guardian is likely to remain the guardian on a permanent basis.⁵⁰ She finds it particularly beneficial in situations where family members are competing for appointment as emergency temporary guardian.

Within the first week after a petition is filed, a hearing date is set and notice is served on the alleged incapacitated person, his or her attorney, and next of kin as identified in the petition.⁵¹ Three examiners and an attorney to represent the alleged incapacitated person are appointed within five days of the filing. The examiners and the attorney are appointed by the court clerk who selects them from a court-approved list. The appointed examiners must include one psychiatrist or other physician, one person who is either a psychologist, gerontologist, another psychiatrist or other physician, a registered nurse, nurse practitioner, or a licensed social worker. The third need not be any of the above. The appointees form a committee whose job it is to be the “eyes and ears” of the court. After their appointment, each member is required to examine the

⁴⁹ *Id* at paragraph (3).

⁵⁰ Florida statutes give preference to a family member to serve as a guardian or to a person who has relevant educational, professional, or business experience. FLA. STAT. ANN. CH. 744.312(2) (Harrison 1994 and Supp. 2000).

⁵¹ FLA. STAT. ANN. CH. 744.311 (Harrison 1994 and Supp 2000).

respondent. The examiners each have fifteen days to fulfill their statutory obligation to meet with the proposed ward and provide a report to the court.

If the examiners' reports are in disagreement, the judge has the discretion to appoint other examiners or to call a hearing.⁵² The examiners' reports must be stipulated to and placed on record by the attorneys after a copy of the report has been served on the petitioner and the attorney for the respondent within three days after filing the report and at least five days before the hearing on the petition.⁵³ An adjudicatory hearing is set within fourteen days after the filing of the report.⁵⁴

The probate judge noted in interviews that contested issues at the adjudicatory hearing most frequently involve the capacity of the ward or the appointment of the guardian and that the adjudicatory hearing is also an opportune time to initiate mediation. She stated that it would be beneficial if court appointed attorneys would aggressively represent the wards in a way that would include "pushing" for mediation at this or any point in the process. She acknowledged that mediation could mean less income from court hearings for an attorney and this could be a disincentive for attorneys to refer cases to mediation. Even if attorneys were paid for the time spent in mediation, a mediated resolution could potentially result in fewer "billable" hearings for the attorneys.

⁵² In interviews, the probate judge noted that this point in the proceeding is another opportunity for referral to mediation.

⁵³ FLA. STAT. ANN. CH. 744.331(3)(3) (HARRISON 1994 AND SUPP. 2000).

⁵⁴ In any adjudicatory hearing, the partial or total incapacity of the respondent must be established by clear and convincing evidence. *Id.* paragraph (5)(c). If, after finding incapacity by clear and convincing evidence with respect to exercise of a particular right, or all rights, the court enters a written order determining such incapacity. *Id.* paragraph (6). A person is determined incapacitated only with respect to those rights specified in the order. In any order declaring a person incapacitated, the court must find that alternatives to guardianship were considered and that no alternative will sufficiently address the ward's problems. *Id.* at subsection (b).

If there is a problem or question concerning the actions or decisions of an appointed guardian (e.g., representatives of a facility or family members do not believe a change in the residence would be in the ward's best interest) a monitor may be appointed by the court.⁵⁵ Issues at this stage usually involve disputes about who will be appointed guardian, who will have control over the person and the purse strings, and related issues about control of money, the social life of the ward, medical issues, and enumerated rights. The probate judge noted that the emergence of issues at this juncture also presents good opportunities for mediation. Although mediation could be beneficial at any stage she said it is most likely to occur post-adjudication in her court.

When the court orders the parties to mediation, a referral order is signed by the bench officer, giving the parties ten days to contact the MDS to schedule mediation. When the parties contact MDS, they are given a list of mediators. They must contact a selected mediator within the ten-day period; the mediator then schedules the mediation. Alternatively, the parties may ask MDS to handle the mediator selection and scheduling. There is no statutory requirement for when the mediation must take place. According to interviewees, mediations are usually scheduled within two to four weeks of the date the parties or attorneys initially contact the mediator. If the parties do not contact MDS within ten days of the order, a mediation conference is automatically scheduled and the parties are notified of the date of the mediation and the name of the appointed mediator. The parties are limited to one rescheduling without the judge's approval. After that, a hearing must be held to reschedule the mediation. Rescheduled dates must be coordinated with the court. Failure to comply with this procedure may constitute a

⁵⁵ FLA. STAT. ANN. CH. 744.107 (Harrison 1994 and Supp. 2000).

nonappearance and subject the parties to sanctions for untimely cancellation which can result in a \$175 fee assessment.

MDS is notified that a case has been referred to mediation when a judge contacts MDS with the case number and forwards a copy of the court order. Alternatively, attorneys or other interested parties notify MDS of a referral, whereupon MDS orders the court file, obtains information on the names and addresses of the parties, and prepares an order for the judge's signature. MDS then reviews the file and schedules the mediation as quickly as possible.

When the judge orders mediation, she typically brings the family members together and explains the mediation process and goals to them. The special hearing master stated that he does not explain the process to the parties but expects the attorneys to do this. He said he does not often send cases to mediation, however, because he prefers to decide the cases himself.

Mediation orders specify⁵⁶ that the mediator shall be at all times in control of the mediation process and the participants should be prepared to spend as much time as is reasonably necessary to settle the case or until the mediator declares an impasse and adjourns the conference. Failure to remain in the mediation session until excused by the mediator will be considered a nonappearance and may be subject to sanctions. All interested parties are required to personally attend all scheduled conferences unless the party is considered too incapacitated to participate. Failure of any party to comply with the terms of the court order for mediation may result in involuntary dismissal,

⁵⁶ FLA. R. CIV. P. 1.720(d).

default judgment, or “other appropriate sanctions as provided by the Florida Rules of Civil Procedure.”⁵⁷

In interviews, the court staff acknowledged that mediation may cause a delay of a few weeks in the guardianship proceedings, but they believed the delay beneficial if the parties are able to resolve some or all of the issues themselves. In the twenty-seven cases referred to mediation, the average elapsed time from referral of a case to MDS to the date of the first scheduled mediation session is thirty-eight days, with a low of eight days and a high of sixty-six days. No discernable trends (e.g., shorter or longer time for scheduling) appear in this period between referral and mediation over time.

After the mediation has taken place, the mediation report (disposition sheet), which is completed by the mediator (indicating whether an agreement was reached), and the cover order with the stipulated agreement, is returned to the judge. The judge then reviews the legal file to see if further action is needed, schedules a hearing or does whatever is necessary depending on the stage and outcome of the mediation, such as signing the stipulated order, making a determination of incapacity and ordering appointment of guardian, or dismissing the petition.

Pre-Petition—No Court Case Pending

An attorney or other party can call MDS and refer a case to mediation without a formal court order. This is a relatively new procedure in Hillsborough County begun at the time of the establishment of the Elder Justice Center⁵⁸ in the fall of 1999. MDS now

⁵⁷ *Id.*

⁵⁸ The Elder Justice Center was created by the probate judge of the Thirteenth Judicial Circuit Court, and others on her staff, to foster better management, docketing control, and monitoring of guardianship cases (i.e., more consideration of less restrictive alternatives for the potential ward). The program serves multiple functions, including a place for elderly people to come with legal questions, a means to track and coordinate cases where re-victimization may occur, a referral source for local social service agencies, and a means for elderly persons to interface with the court system in a more “user friendly” way. In interviews,

accepts cases referred by the Elder Justice Center without court orders. Since the Elder Justice Center opened, however, no cases have been referred to MDS for mediation directly from the center. To date, only one pre-petition case has been referred to mediation; it was referred by a local legal services organization.⁵⁹

Mediation Referral

Except in the rare pre-petition case noted earlier, the court is the only source of referrals to mediation. During most of the pilot phase of the Hillsborough County program, MDS “court program specialists” received a monthly list of incapacity filings and reviewed the court files, ten at a time, to determine if any of the cases involved issues appropriate for mediation. If they found a case they thought could benefit from mediation, they prepared an order of referral and sent it to the court for approval. The parties then were sent a copy of the order informing them to schedule the mediations.

The MDS court specialists ended the practice of reviewing case filings around the end of 1996, reportedly because they found so few cases appropriate for adult guardianship mediation (e.g., contested cases) and thought they could better spend their time and resources in other ways. Another difficult problem was that the parties would request the judge to revise the order so that they did not have to attend the

the probate judge and her staff stated that at the inception of the center they saw mediation as an important service that could be increased by the center’s presence. The center reportedly began hearing “almost immediately” from social service agencies, nursing homes, and other aging network sources about matters that had not been filed with the court. Center staff speculated that these pre-petition cases could provide an additional point of entry for mediation services, and that disputes could be more easily settled at that juncture, before the parties became as “positional” as is often the case after a petition has been filed.

⁵⁹ The dispute involved a daughter who was concerned about her father not following medical advice. The more she attempted to convince her father to get medical treatment, the more resistant he became. Although mediation was scheduled, the father did not come, and the mediator cancelled the mediation. The MDS director noted difficulty in getting all parties to come to mediation without the “force” of a court order.

mediation. According to the MDS director, this occurred early on in the program in two or three cases prompted by attorneys who were not familiar with mediation and who “wanted to do things the old way” instead of by mediation.

No formal screening of guardianship cases for mediation is performed in Hillsborough County and no specific criteria are used for referrals. Under current practice, the judge reviews the file and may then hold a case management conference, which would reveal the facts to indicate whether a referral to mediation would be helpful or appropriate. As noted earlier, usually, these cases involve family and guardian disputes after the formal guardianship has been established. If the judge decides the issues involved would be amenable to mediation, she refers the case to MDS.

MDS court specialists confer with each of the parties to confirm their participation mediation. Reportedly, the parties often mention their concerns at that point and this information is recorded in the MDS file. Referral dates, names, addresses, and telephone numbers of the parties, case type, and disposition code are continually updated by MDS throughout the pendency of the case.

Both the court and MDS may identify issues to be addressed in mediation, in addition to those identified by the parties, although any recommendations of issues for discussion tend to be fairly general because no one wants to inadvertently exclude relevant issues from mediation. More often than not, the bench officer will request that the entire matter that is in dispute be mediated, with the precise issues and agenda to be determined by the parties.

Generally, mediators know little or nothing about a case referred to them for mediation before the mediation session. During the pilot phase of the program, MDS would obtain the court files for the mediators to review prior to the mediation. However, this practice was discontinued reportedly because of difficulties with access to and transporting of guardianship case files. The MDS file, including the data entry form and copy of the court referral (if court ordered), is made available for the mediators to review on the day of the mediation.

The Mediation Process

MDS occupies a suite of several offices and ten to twelve mediation conference rooms in the court. Several kinds of mediation, in addition to guardianship mediation, routinely take place, such as civil and small claims issues, divorce, family, child protection and special services. The MDS waiting room seats a large number of people and is often full. Most of the adult guardianship mediations are held in MDS' conference rooms; a few of the adult guardianship mediations have occurred in attorneys' offices and elsewhere. Most occur during business hours.

As noted above, the parties are ordered to attend the mediation and to cooperate in good faith, unless otherwise stipulated to or excused in advance by the presiding judge.⁶⁰ Deciding upon an agreement is voluntary and consensual by the parties, but the parties are urged to be prepared to spend as much time as is reasonably necessary to settle the case or until the mediator adjourns the conference. A party's failure to remain until excused by the mediator is considered by the court as a nonappearance.

⁶⁰ In re: General Procedures for County Civil Cases Court-Ordered to Mediation, Administrative Order No. S-1999-006 (effective Feb. 1, 1999).

Adjournments are made at the mediator' sole discretion.⁶¹ However, if a resolution is imminent or likely, the mediator may, again at his or her discretion and with the agreement of the parties, schedule another mediation conference.⁶² In accordance with local administrative rule and Florida Rules of Civil Procedure, the mediator is required at all times to be in control of the conference and the procedures to be followed during the conference.⁶³

Usually, guardianship mediations are concluded in a single session. The length of the sessions have averaged two to three hours in recent years, although in earlier years of the program individual mediation sessions lasted from one hour to as long as eight hours. Only a few mediations have involved two sessions. All guardianship mediations to date have been conducted by individual (solo) mediators.

Typically, at the beginning of the mediation session, the parties listen to the mediator's opening statement, explaining the mediation process. They then sign a confidentiality agreement, acknowledging their understanding of the mediation process as one that facilitates the parties' communicating cooperatively in an effort to reach a mutual agreement. The agreement also defines the mediator's role as one who is not a decision maker, but as one who maintains control of the process to facilitate discussion in a constructive manner and who helps the parties develop and agree upon solutions. The confidentiality agreement also states that, pursuant to Florida law "all written or verbal communication in mediation is confidential and is inadmissible as evidence in any subsequent legal proceedings, unless otherwise agreed upon by the parties."⁶⁴ The

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*; FLA. R. CIV. P. 1.720(d).

⁶⁴ FLA. STAT. ANN. CH. 44.102 (Harrison 1999 and Supp. 2000).

exception to this is “any statements made concerning incidents of abuse or neglect” which require reporting to the Children, Disabled or Elderly Persons Abuse Registry. The confidentiality agreement further states that while all interested parties to the mediation are bound by its terms, no one gives up any due process rights under law if a mediated settlement is not reached.

Upon signing a confidentiality agreement, the parties state their concerns and the issues they wish to discuss. The mediators help the parties define and clarify the issues and set the agenda for the session. Different possibilities and solutions are discussed and, if possible and desirable, decided. If the parties reach agreement, the mediator records and everyone reads and approves the written version. When a full or partial agreement is reached, the mediator writes the terms of the agreement on a form, “Stipulation of the Parties,” which is then typed into final form and signed by the parties and their counsel, if any. The mediator and the parties have the responsibility to see that the completed form conforms to the actual agreement reached.⁶⁵ In the event of a partial resolution, the mediator may, with the parties’ consent, fill out a form entitled “Issues Unresolved by Mediation,” which becomes part of MDS’s records, with a copy forwarded to the presiding judge.⁶⁶

The paperwork is then forwarded to the judge with an “Order Ratifying Stipulation and Final Disposition,” which the judge approves and signs as an order of the court, ratifying the agreement of the parties.⁶⁷ A copy of the agreement is filed with MDS, and a copy goes into the court file in the court clerk’s office.

⁶⁵ In re: General Procedures for County Civil Cases Court-Ordered to Mediation, Administrative Order No. S-1999-006 (effective Feb. 1, 1999).

⁶⁶ *Id.*

⁶⁷ *Id.*

Signed agreements reached in mediation are not confidential. However, under the Florida statutory provisions for circuit court mediation and as noted in the MDS confidentiality agreement, the discussions that take place in the mediation sessions remain confidential in that the mediator does not disclose information from the mediation and cannot be subpoenaed to appear in court as a witness. In addition, the attorneys cannot use information that was discovered only through mediation.

Post-Mediation Process

After mediation is completed, MDS staff completes a form, “Disposition of Mediation Conference.” This form provides boxes to check as to whether an agreement was reached, whether the agreement was a partial or full agreement, whether a subsequent conference is to be scheduled, whether the mediation was recessed by the mediators with the agreement of the parties, whether the case was settled or voluntarily dismissed by the plaintiff before the mediation, whether either party did not appear for the conference or was not prepared to mediate, whether the mediation was waived or cancelled by the judge, or whether the mediation was cancelled or rescheduled at the request of a party without forty-eight hour notice to the program. (Any party who cancels a scheduled mediation conference less than twenty-four hours prior to the conference is assessed mediator fees, along with possible attorney fees, per local administrative order.⁶⁸) As noted above, mediation agreements are incorporated into court orders. MDS prepares the cover orders for the judge’s signature (“Order Ratifying Mediation Stipulation”) that incorporate the agreement attached as a stipulation. The stipulated agreement and cover order is then sent to the judge who reads it over,

⁶⁸ *Id.*

consults the legal file, and takes whatever further action is required (e.g., signing the order or scheduling a hearing).

Reportedly, it is rare that a case will be dismissed directly as a result of a mediated agreement. However, mediation may result in a less restrictive alternative than that proposed in the petition originally filed with the court. The court may ratify the agreement as a stipulated order, or if there is no agreement reached in mediation, it may decide the issues itself informed by the agreement. Of course, the court may refuse to ratify the agreement and either modify it or discard it altogether.

Outcomes of Mediation

Agreements Reached in Mediated Cases

As noted earlier in Table 7 and accompanying text, in Hillsborough County agreements were reached in sixteen of the twenty-two cases or seventy-three percent of the mediated guardianship cases. This result is close to the seventy-one percent agreement rate reached in Summit County.⁶⁹

Agreements included proposed resolutions of issues such as sibling assistance and cooperation in the care of a ward, a guardian's willingness to reduce the expenses required to maintain a guardianship, the parties' willingness to research options other than a guardian daughter caring for a ward in her home, granting of power of attorney to a family member of a respondent, and the issuance of a limited, as opposed to a full guardianship.

⁶⁹ Table 5 and accompanying text, *supra*.

Perceived Success of Mediation

As in Summit County, Ohio,⁷⁰ structured individual and group interviews were conducted with a total of ten individuals who were informed about the guardianship mediation program in Hillsborough County, including the probate judge, her staff attorney, a special master, the director of MDS, the first director of the Elder Justice Center, four mediators, and a guardianship attorney.⁷¹ These individuals were questioned about the impact or ultimate outcome of guardianship mediation in Hillsborough County as they experienced or perceived it. Generally, satisfaction with the mediation process, and its benefits to the court and participants was high, particularly when it occurred early in the court proceedings.

Is mediation of adult guardianship cases effective, relative to non-mediated cases, in terms of finding better or more satisfactory resolutions such as less guardianship, less restrictive orders, or limited guardianships? Does mediation lead to better maintenance of the relationships of the parties, and more consensual arrangements? What is the impact of mediation on the resources of the parties and the courts? Does it save time and money? Are the participants in mediated guardianship cases satisfied with the process and outcome of mediation? To each of these questions, the Hillsborough respondents gave similarly positive responses. All but two or three respondents, one of whom did not know the answer and declined to answer, stated that they believed mediation to be “greatly” or “somewhat” effective generally and specifically in leading to more consensual arrangements, reduced costs and time, and

⁷⁰ Table 6 and accompanying text, *supra*.

⁷¹ The judge and her staff attorney answered questions together and their answers were identical. Also interviewed were an attorney and a task force member of the Elder Justice Center who declined to respond to questions because she did not feel qualified.

greater satisfaction among participants. In response to the question of whether the benefits of mediated guardianship justify the costs, all ten believed that they did.

Are there critical factors in mediation of guardianships that determine the effectiveness of mediation in Hillsborough County, such as training or background of the mediator, participation of attorneys, legal framework, timing of referral, or others? As the critical factors that determine the effectiveness of mediation, respondents identified the participation in good faith by attorneys, training and competence of the mediators, and the support of the judiciary. Two interviewees identified as critical the timing and immediacy of the mediation. "It's especially important to do the mediation early, at the time of investigation, survey of homes, etc.," said one, "because the quicker you get it to mediation, the more money and time you save."

DANE COUNTY, WISCONSIN

As a formal program, adult guardianship mediation existed in Wisconsin for only two and a half years, from its organization in the spring of 1997, until its termination in the fall of 1999. According to the best estimates available, approximately twenty-one cases were referred to mediation and approximately fourteen cases were accepted and scheduled in three Wisconsin counties, Dane, Milwaukee, and Winnebago. This report focuses on Dane County, where the most reliable data was found and where seven of eight cases referred were mediated, of which three (forty-three percent) ended in a full, partial, or interim agreement.

History and Structure of Program

Wisconsin statutes direct litigants to attempt alternative dispute resolution. A court order to attempt settlement may require the parties to "participate personally in the settlement alternative."⁷² The statutes define mediation as "a dispute resolution process in which a neutral third person, who has no power to impose a decision if all of the parties do not agree to settle the case, helps the parties reach an agreement by focusing on the key issues in a case, exchanging information between the parties and exploring options for settlement."⁷³ It endorses "candor and cooperation of disputing parties, to the end that disputes may be quickly, fairly and voluntarily settled,"⁷⁴ and supports confidentiality by mandating the inadmissibility of oral or written

⁷² WIS. STAT. ANN. § 802.12(2)(a) (West 1994 and Supp 2000).

⁷³ *Id.* at subsection (1)(e)

⁷⁴ WIS. STAT. ANN. § 904.085(1) (West 2000).

communications presented in mediation.⁷⁵ In addition, the statutes provide that a mediator may not be subpoenaed or otherwise compelled to disclose any oral or written communication relating to a dispute in mediation.⁷⁶ A mediator who was interviewed for this study stated that standards of practice for mediators are not mandated by law; this subject is currently part of an ongoing state-wide discussion about which there is currently little agreement as to whether or what standards should exist.

The Wisconsin adult guardianship mediation project unofficially began in December 1996, when a group of interested persons and organizations, spearheaded by the Elder Law Center of the Coalition of Wisconsin Aging Groups (CWAG),⁷⁷ successfully applied to TCSG to participate in the Adult Guardianship Mediation Project, funded by the William and Flora Hewlett foundation. Additional financial support for the project was obtained by CWAG from the Retirement Research Foundation (RRF) and the Faye McBeath Foundation. CWAG organized, coordinated and administered the program in three counties: Dane, Milwaukee, and Winnebago.

The goal of the project, as noted in the final report to RRF in January 1999⁷⁸ was “to develop mediation as an alternative to the adversary court process for adult care and guardianship-related problems of the elderly.” Stated objectives in the report included:

⁷⁵ WIS. STAT. ANN. § 802.12(3)(a) (West 1994 and Supp 2000) and WIS. STAT. ANN. § 904.085(3)(a) (West 2000).

⁷⁶ WIS. STAT. ANN. § 802.12(3)(b) (West 1994 and Supp 2000), and WIS. STAT. ANN. § 904.085(3)(b) (West 2000).

⁷⁷ CWAG joined forces in December 1996 with the Wisconsin Supreme Court, the Wisconsin Geriatric Education Center, Marquette University Law School's Center for Dispute Resolution Law, the Wisconsin Association of Mediators, the State Bar of Wisconsin's Elder Law Section, the Wisconsin Bureau on Aging, and the Wisconsin Coalition for Advocacy to submit the proposal to be one of the four states chosen by TCSG to pilot the adult guardianship mediation project for two years, under the auspices of the Hewlett Foundation grant.

⁷⁸ Executive Summary of the Final Report to RRF on the Wisconsin Adult Guardianship Mediation Project, January 21, 1999.

1. Organize and participate in the Adult Guardianship Mediation Training approved for Wisconsin by The Center for Social Gerontology;
2. Recruit interested attorneys, mediators, court staff and aging network staff to participate in the training;
3. Serve as both participants and additional trainers for the seminar;
4. Educate the aging network and members of the State Bar of Wisconsin's Elder Law Section about the values of guardianship mediation;
5. Develop appropriate training and procedure manuals for local use; and
6. Identify and develop three county-based pilot adult guardianship projects.

Three counties in Wisconsin--Dane, Milwaukee, and Winnebago--were selected as initial pilot sites for the program. At the beginning of the pilot project, planning or advisory committees, comprised of court personnel in Registers in Probate offices or court commissioners, corporation counsel staff, representatives of disability and aging advocacy groups, protective service agency staff, local attorneys and volunteer mediators, were established in each county. Based on the input of these committees, two sets of training sessions were held. First, a broad-based seminar was held for court representatives, attorneys, social workers, aging network representatives, mediators, and other interested people from each of the three counties; its purpose was to introduce the adult guardianship mediation program, educate the participants as to the potential of mediation in adult guardianship cases, and give local planning committees the tools they needed to begin their own programs. Next, this was followed by a two-day TCSG training seminar for mediators in November 1997. In December 1997, another round of advisory committee meetings was held, with final efforts at developing

protocols and appropriate mediation forms.⁷⁹ The first referral to the program was made in February 1998.

Although the Dane County Probate Court expressed some interest in the program at the beginning and referred a handful of cases to the program through attorneys and the guardianship administrator, referrals from the courts in the other three counties were few.⁸⁰ In interviews conducted as part of this study, no one involved with the program could recall a judge in any county ever referring a case to the project.

It is clear from the RRF Final Report⁸¹ that substantial outreach efforts were made on behalf of the program. The report states that not only were project brochures developed and mailed out (including stacks of brochures sent to all advisory committee members), but two rounds of newsletter articles and letters were sent to social service and court agencies, phone calls were made to all Registers in Probate; letters were mailed to all judges and guardians *ad litem* in the three counties, four articles about the program were printed in the “Wisconsin Guardianship Support Center News” (circulation 3,000), and promotional mailings were sent to aging and disability service providers, long-term care ombudsman, Alzheimer’s associations, and bar associations. In addition, program principals made presentations to the Dane County Mediation Committee, Milwaukee County Estate Planners Group, and the State Bar of Wisconsin’s Summer Convention.

⁷⁹ *Id.*

⁸⁰ Reportedly, the corporate counsel for Winnebago County was extremely hostile to the program and program personnel were never able to convince him to consider mediation or even to persuade him to come to any of the informational meetings or seminars involving the program.

⁸¹ Executive Summary of the Final Report to RRF on the Wisconsin Adult Guardianship Mediation Project, January 21, 1999

Notwithstanding these efforts, the program was unable to generate a sizeable number of cases. One of the project coordinators who was interviewed as part of this study identified the lack of important connections with the courts as the central problem for the program. She stated that it would have been beneficial for the court and the project if program staff had met personally with the judges and court personnel, outlined the program and ways in which it could help the courts, and assisted the judges in identifying the approximately ten percent of their caseload that might be appropriate for mediation. However, she noted that this was never accomplished.

On the other hand, the Guardianship Administrator of the Dane County Probate Court, stated that Dane County judges would not have referred many cases, even if they had had more contact with the program. Judges do not “know” a case until it comes before them for trial, she said. The guardians *ad litem* (GALs) understand the cases far better in their early stages and would therefore have been important referral sources and advocates of the program. She said there was widespread reluctance on the part of the attorneys to use the process, because it involves more scheduling, more time, and more tasks for them to do. Most would rather go to trial than go to mediation, she said. Notwithstanding Wisconsin’s statutory scheme that allow judges to order parties to mediation, she also did not think the probate judges would want to *order* parties to mediation, unless they thought the parties were willing, because of their desire to ensure that mediated agreements are voluntary.

A mediator (who is a lawyer) speculated that Dane County has professionals who work in the courthouse, such the guardianship administrator, who handle the cases before they “get out of hand” and channel them to the appropriate resources. She

believes they may also resolve some of the disputes themselves, and so the need for mediation in some of these cases may not be so great. She was disappointed that adult guardianship mediation did not become a more integral part of the probate court environment, but noted that perhaps some other counties that do not have the kind of “in-house” professionals that Dane County has could use mediation more than Dane County. She stated, however, that if the Wisconsin court system had backed the program and had given the directive to pilot it, the judges would have embraced it far more easily and effectively.

Lack of funding also was an ongoing problem for the program and may have spelled the program’s demise. In Dane County, no filing fees or taxpayer monies fund the court-based mediation programs.⁸² Fees for civil court-based mediation are paid by the parties, with each side paying \$50, which go to the Dane County Mediation Project. Because private mediators usually charge an hourly fee (private mediators were used for the adult guardianship mediation program), and because the project decided not to charge the parties to participate in adult guardianship mediation, the lack of funding sources for adult guardianship mediation became a problem. When the adult guardianship mediation program began, mediators in all three counties were asked to contribute three *pro bono* mediations, with the understanding they would be compensated for future mediations. At the time the project was discontinued, the program staff was still attempting to determine how to resolve the issue of mediator compensation.

⁸² Several Wisconsin counties, including those that were sites for the CWAG adult guardianship program, have court-based mediation programs for other civil cases. For example, the Dane County Mediation Project, which has existed for at least 15 years, came about through an early effort by the local bar to

Finally, limited resources and lack of judicial support meant that there were no court personnel whose duties included assistance to the program, such as identification of possible court cases and “shepherding” case referrals between the court and outside mediation sources (CWAG). The Dane County Guardianship Administrator happened to take an interest in the program, but had no responsibilities for or stake in the program’s success. Similarly, limited resources played a role in CWAG’s participation; CWAG employed a full-time and a part-time director whose many duties included coordination of the mediation project. However, there was no staff person at CWAG who had the time (even minimal part-time) and resources to focus solely on this project, provide consistent oversight from intake to follow-up in all three counties, and work with the courts, attorneys, agencies, and other stakeholders.

Program Operation

Guardianship cases in Wisconsin probate courts are heard by judges and court commissioners.⁸³ In Dane County, uncontested guardianship cases are heard by court commissioners and contested cases are heard by judges. According to the Dane County Probate Court Guardianship Administrator, the types of adult guardianship cases that would be considered by the court for mediation are those that are being contested due to a lack of communication among the parties or lack of understanding as to the reasons the guardianship is being requested.

begin using alternative means of settlement when alternative dispute resolution (ADR) was a relatively new concept.

⁸³ Court commissioners in Wisconsin are similar to magistrates, referees, and special masters in other jurisdictions. Commissioners in probate cases are required to be licensed attorneys. They are sometimes loosely referred to as “junior judges” in Wisconsin.

The *Wisconsin Guardianship Support Center News*⁸⁴ reported that typical issues appropriate for guardianship mediation include those where an individual objects to guardianship at all; where a proposed ward objects to a full (as opposed to a limited) guardianship, or does not want a particular person to serve as guardian; where family members argue over who will be the guardian or the most appropriate placement or services; or where a guardianship is imposed but family members, health care providers, or the ward disagree with the guardian's decisions. One of the project coordinators interviewed stated that issues that should typically exclude cases from mediation are those where physical violence, intimidation, or substance abuse is involved; where the subject individual's participation is crucial but the person cannot participate or be adequately represented; where there exists too much of a power imbalance among the parties; the presence of too much anger or a long-entrenched dispute; the inability to get all the necessary parties to attend the mediation; or where the decision needs to be made more quickly than a mediation can be scheduled and held.

According to court records in Dane County, a total of 518 guardianship cases were filed in the two-year period from January 1998 through December 1999, with relatively equal numbers of filings in each year. Forty-seven of these cases (nine percent) were contested and were possible candidates for referral to mediation. As noted earlier, seven guardianship cases were mediated in Dane County during this time, six of which were post-petition cases.

⁸⁴ Volume 7, Number 3, Winter 1998, produced and published by the Coalition of Wisconsin Aging Groups' Elder Law Center with funding from the Wisconsin Department of Health and Family Services, Betsy Abramson, Editor.

Table 8
Mediated Guardianship Cases, Dane County, Wisconsin, 1998-1999

Year	Contested Guardianship Cases	Post-Petition Referrals (Percent of Contested Cases)	Post-Petition Mediations/ Agreements (Percent)	Pre-Petition Mediations/ Agreements (Percent)
1998	27	5 (18.5%)	4/1 (25%)	1/0 (0%)
1999	20	2 (10%)	2/2 (100%)*	0/0

*Neither was a full agreement (one was a partial agreement; one was an interim agreement until another session could be held, but the program ended before the next session.)

According to the project coordinators, mediators, and other program participants interviewed as part of this study, issues involved in cases referred to mediation in Dane County included a life support decision,⁸⁵ sibling control of a parent's money, a ward wanting to drive when his family thought he should not, access to finances by a wife whose spouse was the financial guardian/conservator, disagreement about a change of guardian, disagreement over dissolving a guardianship, disagreement over who the guardian should be, family members wanting to change the placement of the incapacitated person, disagreement between family members and social services agency over care of ward, money management issues, and disagreement between potential ward and her children over the need for a guardianship. Agreements reached included setting up procedures for communication among family members, a partial/interim agreement on a dissolution of guardianship case, and replacement of a volunteer guardian with a family member.

⁸⁵ This case was reportedly called off before mediation, due to a recognition that the respondent might not live long enough for a mediated decision and because some relatives were from out-of-state and not interested in traveling to Wisconsin. Racial issues between the principal caregiver and family members also made the case more difficult, according to the program director.

One project coordinator stated that out of fourteen cases accepted for mediation in the three counties, there were only one or two “winning” agreements (meaning agreements that held up and did not fall apart after the mediation), and the ratio of agreements to mediated cases was similarly low.⁸⁶ She attributed the low agreement rate, in part, to the fact the program personnel were initially “so gung ho” to get the program off the ground that they accepted cases that were inappropriate for mediation and did not follow their own program guidelines and screening protocol.

A review of the available case summaries supports this theory; in Dane County, of eight cases accepted for mediation, three cases involved wards with chronic alcoholism and alcohol dementia, where respondents arrived at the mediation intoxicated or, in one case, mediations were repeatedly canceled and rescheduled because the respondent was in detoxification programs at each of the scheduled meeting times. Another case involved a ward with chronic schizophrenia and siblings with extreme animosity toward one another. Two cases involved wards or other parties with early Alzheimer’s disease; one involved a ward who was undergoing psychotherapy for compulsive shoplifting and who was alleging physical and emotional abuse by another party (her husband/conservator). In Milwaukee County, one case involved “blindsiding” the respondent, who was incapacitated due to a brain injury, by having the mediator and parties “surprise” the respondent by showing up at her home for a mediation she knew nothing about; another involved an alcoholic respondent who

⁸⁶ As noted earlier, in Dane County, seven of eight cases referred were mediated, one of which resulted in a full agreement, one resulted in a partial agreement and one in an interim agreement until the next session could be held; the program ended before the final session was held and no final data on that case was available. In Milwaukee County, of five mediations referred possibly only one resulted in agreement; it is not known from available information exactly how many were mediated. No data was available on the estimated one case referred in Winnebago County.

arrived at the mediation intoxicated, and, like Dane County, case summaries indicated that serious substance abuse issues arose in other cases.

In addition, a project coordinator made reference to the initial “flurry” of cases that was not sustained during the remainder of the program’s existence, as indicated in Table 8. (Six of the eight Dane County cases were referred and scheduled between February and August of 1998; four of the five Milwaukee County cases were referred between June and December of 1998.⁸⁷ The one Winnebago County case was also referred in 1998). The project coordinator attributes the program’s eventual decline in case referrals to the early willingness of the program staff to accept many of the cases that came along, including those inappropriate for mediation. She believes the poor selection of cases contributed not only to the poor results of the mediation sessions (low ratios of agreement rates and low agreement durability), but possibly to eventual dissatisfaction with the program by many of those who were involved.

Guardianship Caseflow and Mediation

Wisconsin law authorizes guardianships of the person or estate, full guardianships, limited guardianships, and temporary guardianships. Emergency guardianships may be filed as a temporary guardianship at first (sixty days with one possible sixty-day extension),⁸⁸ but temporary petitions are not limited to emergencies; they may be used for short-term disabilities and circumstances from which the ward will recover. A full guardian of the person is responsible for the condition and needs of the

⁸⁷ One Milwaukee County case was referred in late 1998 and mediated in January 1999; another was referred and mediated in 1999.

⁸⁸ WIS. STAT. ANN. § 880.15(1) (West 1991 and Supp. 2000).

ward, including medical and living conditions. Limited guardians have specific listed powers, based on the needs of the individual respondent.

In addition, Wisconsin is the only state with protective placement guardianship, which is preceded by a finding of incompetence in a guardianship hearing.⁸⁹ Protective placement is the only means by which a ward may be placed in a nursing home or similar facility. A ward eligible for protective or any other guardianship placement has a legal right to the least restrictive placement be found consistent with the ward's needs.⁹⁰ According to the project coordinator interviewed as part of this study, many guardianship petitions come through the protective placement route and such cases would not be appropriate for mediation because the respondent is often too incapacitated.

The first step in a Wisconsin guardianship proceeding is the filing of a petition alleging that the respondent is incapable of handling his/her own personal and/or financial affairs and requesting that the petitioner or some other person be appointed as guardian of the person and/or estate. In Wisconsin, any person may petition for guardianship, including the respondent or an agency.⁹¹ The circuit court has jurisdiction over all petitions for guardianship.⁹² Guardianship case files are closed in Wisconsin.

The petitioner often is represented by an attorney, but family members may file *pro se* petitions. A medical evaluation or order for physician's report must also be filed with the petition. When the court assigns a case number, it appoints a GAL for the respondent, and sets a hearing date. All interested parties must receive written notice

⁸⁹ WIS. STAT. ANN. § 880.01 (West 1991 and Supp. 2000).

⁹⁰ WIS. STAT. ANN. § 55.06(9)(a) (West 1991 and Supp. 2000).

⁹¹ WIS. STAT. ANN. § 880.07(1) (West 1991 and Supp. 2000).

⁹² WIS. STAT. ANN. § 880.08(2) (West 1991 and Supp. 2000).

by personal service which includes a description of all potential loss of rights, including specific facts alleging the need for a guardian (as stated in the petition). Notice must be given at least ten days prior to the hearing.⁹³ If a petition for “protective placement” – e.g., a request that the respondent be moved to a nursing home – has been filed, a comprehensive evaluation of the respondent is conducted by the county department of social services and this report is filed with the court and mailed to all parties at least ninety-six hours before the hearing.

In Wisconsin, the GAL, who must be a lawyer,⁹⁴ is the only appointed investigator on the case. The GAL must investigate the case by interviewing the respondent and others and reviewing the records. S/he must file an oral report with the court regarding his or her investigation. It is the GAL's responsibility to determine the respondent's best interests,⁹⁵ which may be in opposition to the respondent's wishes. The respondent may hire, request, or direct the GAL to request the court to appoint adversary or defense counsel with whom the respondent will have a confidential attorney/client relationship under the rules of professional responsibility and who will zealously represent the wishes of the respondent.⁹⁶ For contested hearings in Dane County, the probate court commissioners send the cases back to the circuit court judges for hearing. The director of the Elder Law Center stated that mediation would theoretically be imposed at the beginning of the case when it becomes clear that it is a contested

⁹³ WIS. STAT. ANN. § 880.08(1) (West 1991 and Supp. 2000).

⁹⁴ WIS. STAT. ANN. § 880.331(2) (West 1991 and Supp. 2000).

⁹⁵ WIS. STAT. ANN. § 880.331(3) (West 1991 and Supp. 2000)

⁹⁶ WIS. STAT. ANN. § 880.331, (West 1991 and Supp. 2000), Judicial Council Note, 1990 re: subs. (4)(d), (5)(f).

guardianship. She said it would be necessary to "warn" the GAL if the case were headed for mediation, because GALs alerted to a "problem cases" typically "negotiate" with the parties in the early stages of a case. She stated that in Dane County a lot of work is done by the parties in the early stages of the cases to identify issues and explore options and alternatives. She speculated that this process could be helpful to mediation in some cases and in others it might preclude the need for mediation altogether. She noted that mediation would "de-rail" the guardianship caseflow only if the attorneys agreed to take the case off the docket. If the attorneys stipulate to removal of a case from the court docket, the court will inquire as to how long they are deferring the matter. The attorneys would then notify the court if an agreement is reached within the deferral time, and it would be up to the attorney or GAL to schedule the next hearing and get the case back on the docket. If the court did not hear from the attorneys within the deferral time, it would schedule a case status hearing. If the case is not taken off the docket, and the parties reach a mediated agreement, they may enter a stipulated agreement. Alternatively, the parties may appear on the next scheduled hearing date and put the agreement on the record. The court in turn would determine whether it would ratify the agreement at the hearing. The director estimated that a mediation referral might slow the court process by two to four weeks and cited a worst case example in which no agreement was reached and the parties felt that mediation had been "a waste of time" because it slowed the court process by a few weeks and the case still went to trial.

The court's guardianship administrator stated that the cases were usually referred to mediation between the initial hearing and the following hearing, when it might have become clear that a case was being contested and the parties better understood the problems and issues in the case.

The director of the Elder Law Center noted that a court would not be involved in a pre-petition referral to mediation unless a GAL or an interested party attempted to file a petition and was diverted to mediation at that point in lieu of, or before, filing. She indicated that if a case were on the "brink" of a petition filing, it would be better to go ahead and file the petition, because this would then trigger appointment of a GAL whose services would be funded by the court. She felt the GAL could be a helpful advocate in mediation as well as court.

The project coordinator noted that pre-petition cases theoretically would come from social service organizations, nursing homes, and aging agencies before the dispute had advanced to the courthouse door. For this to happen, however, she said that a more successful outreach effort would have to be directed toward these organizations. It appears from case files and interviews that only one pre-petition case was mediated in Dane County; it did not result in an agreement and the referral source is unknown.⁹⁷

⁹⁷ The pre-petition case involved an allegedly incompetent woman with two daughters, one of whom wanted to have the mother's financial power of attorney taken from her sister and given to her. There was disagreement among all three over control of the mother's affairs and finances and what the mother's needs were. Interim agreements were made on how to handle affairs for the short-term.

Mediation Referral

The RRF Final Report⁹⁸ stated that project staff screened approximately eighty calls per month for potential mediation referrals through the CWAG Elder Law Center's Guardianship Support Center Hotline. One of the project coordinators stated that she answered ten to twenty calls per day about various issues on the hotline and if an issue seemed like it could benefit from mediation, she would screen it further for its appropriateness and would then raise the possibility of mediation with the parties. She said it was often difficult to get all necessary parties to agree to mediate, and how much the staff should "push" the parties to mediation was a topic of debate within the program. She said the ratio of calls in which the caller ("initiator") showed interest in mediation was high compared to the low numbers of actual mediations reflected in the case statistics. The reason for this disparity was either because the initiator lost interest or the intake coordinator was unable to convince the other "respondent" parties to try mediation.

The RRF report, progress reports sent to TCSG, and notes from project meetings indicate that the project staff attempted substantial outreach to the community and to possible referral sources. However, they continued to express frustration at the "disappointingly low number of case referrals."⁹⁹ As noted earlier, because the program was administered from outside the court and lacked judicial support, there were no court personnel responsible to the program for intake or referrals. In Dane County, the

⁹⁸ *Supra* note 74.

⁹⁹ Executive Summary of the Final Report to RRF on the Wisconsin Adult Guardianship Mediation project, January 21, 1999.

guardianship administrator from the probate court became a *de facto* liaison between the court and CWAG, but this was not a formal part of her duties.

Initial Screening and Intake of Mediation Referrals

The RRF Final Report¹⁰⁰ stated the project staff received all inquiries from CWAG Elder Law Center's Guardianship Support Center Hotline and other sources, screened the cases and completed the first portion of the intake. The intake coordinator said these cases were problematic when one or more parties did not want to attend mediation. She said she felt uncomfortable "pressuring" parties to attend because she felt it was important to remain impartial in her role performing intake. She noted that the few times parties were pressured to attend, the mediations were not successful. Several mediations were scheduled where various parties chose not to participate and the mediation was then cancelled.

The guardianship administrator said that the cases that were referred by attorneys presented challenges in getting everyone to the table because the court viewed attendance at the mediation sessions as purely voluntary and imposed no sanction or penalty for non-attendance. A mediator concurred with this assessment adding that because adult guardianship cases involve large groups of participants, getting everyone to be willing to come to the table is difficult. She said that the logistics of scheduling around geographical distances, busy schedules, and other problems endemic to many of these cases (such as substance abuse issues) makes the intake coordinator's job extremely challenging. She stated that having a trained, skilled intake coordinator is a key to a program's success. She felt that flexibility and a willingness to

¹⁰⁰ *Id.*

try different approaches is an important trait for an intake coordinator, especially for referrals that may not fit the ideal case scenario for mediation.¹⁰¹

The intake and screening form used in Dane County was adapted from TCSG forms. Reportedly, once the project staff completed the first portion of intake and determined that the case was appropriate for mediation, a referral was made to a mediator who finished the intake, scheduled a first meeting, and conducted the mediation. The staff reportedly wrote a cover letter or memo to the mediator and included the completed intake form. The intake coordinator stated that she routinely obtained information from only one of the parties and then assigned the case to a mediator who then did the rest of the scheduling and intake with all the relevant parties.

Mediators interviewed as part of this study stated that although they did receive the intake file and phone numbers of the parties for scheduling purposes, after they agreed to mediate a case, they did not do additional intake themselves. One mediator reported that when the parties would begin to discuss the issues with her when she phoned to schedule the mediation, she would politely state that they would discuss the issues later at the mediation. She felt that to maintain neutrality she should not discuss the case with the parties in advance of the mediation.

A project coordinator stated that certain issues should have typically excluded cases from mediation at intake. Those include physical violence, substance abuse, a crucial party who was unable or unwilling to participate or be adequately represented, a power imbalance, intimidation by one party, the presence of too much anger or a long-

¹⁰¹ On the other hand, as noted earlier, one of the coordinators believed there was too much flexibility and willingness to digress from screening guidelines and that this factor continued to the eventual demise of the program.

entrenched dispute, or a decision that needed to be made more quickly than a mediation would permit.¹⁰²

Mediators and the Mediation Process

Nineteen mediators were initially trained and available for adult guardianship mediations in the three participating counties. Mediation for the Dane County program was, for the most part, provided by two or three mediators who agreed to provide three mediations each on a *pro bono* basis.¹⁰³ When Dane County had exhausted the *pro bono* mediation quotas from these mediators, the mediators remained willing to continue providing services at no charge provided the program would eventually be able to compensate them.¹⁰⁴ However, the problem was not resolved by the conclusion of the project.

Several experienced mediators without backgrounds in elder law were initially selected for training for the program. There was a tension at the outset of the program between two different training approaches: some thought elder law attorneys should be trained in mediation skills, while others thought experienced non-attorney mediators, who did not have experience in elder law, should be trained in adult guardianship mediation. Those who thought it more effective to train mediators in adult guardianship law than to teach attorneys mediation skills prevailed. In retrospect, program staff

¹⁰² However, as noted earlier, these screening guidelines were routinely ignored in regard to some issues such as incapacity of the respondent or ward, substance abuse, crucial parties' unwillingness to attend, power imbalance and alleged intimidation by a party, and presence of extreme animosity. It appears that most of the cases were not mediated successfully when these factors were present.

¹⁰³ A July 12, 1999 update memo on the project reveals that while 75 people from the three counties attended the TCSG training by invitation, there were only two or three mediators that the project was "comfortable" using in Dane County.

¹⁰⁴ At least two reasons for paying the mediators were identified in the 7/12/99 update memo: 1) the mediators are professionals who were giving up what would otherwise be paid time to provide the mediation services; 2) the mediators' experience indicated that parties come to the sessions more committed to the process and more inclined to reach agreement when they are paying for the service.

expressed the belief that attorneys and professionals with backgrounds in elder issues would have been the better choice, because elder law attorneys and social workers were reportedly put off by the use of non-lawyers and people without backgrounds in the subject area. As a result, it was reportedly difficult to obtain referrals from these potential sources. Additionally, the mediators without guardianship backgrounds had difficulty relating to indigent people and different cultures and adjusting to the fact that they were usually not dealing with “high stakes money issues” in these cases, as they were accustomed to in other cases. Eventually, new mediators were trained, and those with both elder law backgrounds and significant mediation experience proved to be the better mediators for these cases.

Reportedly, there are no state standards that mandate minimal mediator qualifications for civil cases, but mediators stated that this issue has been part of an ongoing debate in Wisconsin, which apparently has engendered much disagreement among professionals and legislators. Mediators who are members of the Wisconsin Association of Mediators (WAM) are subject to additional guidelines set by that organization.

Mediation sessions were held in a variety of places in Dane County including attorneys' offices, mediators' offices, county human services offices, nursing homes, and the parties' homes. None were held in the courthouse. Most of the mediations were facilitated by solo mediators, although a few used co-mediators.

Post-Mediation Process

The mediators and the project coordinator stated that the mediators did not use a standard form for documenting the agreements, but usually the agreements were

typewritten. In interviews, a project coordinator did not recall where the agreements were filed, although she believed the mediators and parties kept copies, and those that were written as stipulated agreements were filed in the court when there was an open case. One mediator stated that she gave all copies to the parties and attorneys and kept no copies in her files for confidentiality reasons. Another mediator stated that the copies of the agreements were sent back to mediation program at CWAG if the case was a pre-petition case, and if the case was a post-petition case, the attorneys prepared and distributed copies of the agreements themselves. The court guardianship administrator reported that the agreements came back to the court, via the attorneys, on court-referred or post-petition cases and were placed in the court files.

Outcomes in Mediation

Agreements Reached in Mediated Cases

As noted in Table 8 and accompany text, three of the seven cases mediated in Dane County between 1998-1999 resulted in agreement. This represents an agreement rate of approximately forty-three percent of cases mediated, a result which is significantly lower than agreement rates in the Ohio, Florida, and Oklahoma programs. Of the three agreements in Dane County, only one was a full agreement; the other two consisted of a partial agreement (meaning agreement was reached on some issues and not on others) and an interim agreement (meaning an agreement on procedural or short-term issues until another session can be held). At least a couple mediations in Dane County were ended before the parties could reach agreement when it became clear that the parties could not continue the session for various reasons, including substance abuse issues, incapacity of the ward and extreme animosity between siblings. In Milwaukee County, it appears that possibly only two or three of five cases

referred were mediated and only one or two resulted in full or partial agreements. No data was available on the estimated one case referred in Winnebago County.

Table 8 also shows a lower agreement rate in the first year of the program (only one out of four cases reached agreement in 1998) than in the second year (two out of two cases reached agreement in 1999). This and the fact that there were more than twice as many cases mediated in the first year (five), compared to the second year (two), would support the project coordinator's assessment that early enthusiasm to get the program off the ground may have caused too many inappropriate cases to be accepted and mediated at the beginning of the project. In other words, the acceptance of inappropriate cases very likely led to the low agreement rate, which in turn may have had an impact on the subsequent decline in the referral rate. It is not known whether screening criteria for case acceptance changed formally or in practice between 1998 and 1999.

Agreements addressed ways in which family members would communicate with one another and how they could work together to do what was best for their mother (who, according to the mediator, got to say what she wanted in the mediation instead of trying to please her daughters as had been her past practice), dissolution of a conservator and agreement to appoint a daughter as an agent under a durable power of attorney in which family members would oversee the daughter's actions as agent, and the manner in which the respondent's bills would then be paid (by automatic withdrawal from the bank).

As noted earlier, the court may ratify mediated agreements. In such a case, the mediator would write the agreement and the parties would sign it. The attorney then

would draft the agreement as a consent order or a stipulation by the parties; alternatively, the parties could all agree to attend the next scheduled case hearing and the court could ratify or modify the agreement on the record. The probate guardianship administrator recalled a case where the court ratified the mediated agreement, but the parties later petitioned the court, stating that they no longer wanted to abide by the agreement.

Perceived Success of Guardianship Mediation

Although exit survey forms were used in some or all Wisconsin cases, only a few were available to researchers. The forms, from 1999, involved two Dane County mediations and two Milwaukee County mediations and were filled out by attorneys, mediators, and parties. The respondents indicated overall satisfaction with the skills of the mediators and with the process. One mediation, which did not result in agreement, apparently involved a ward with possible dementia who showed up at the mediation intoxicated; one party expressed disappointment that alcohol became “the issue” and suggested that they should have spent more time brainstorming solutions. The same party concluded, however, that the parties benefited from getting together and developing an informal plan to move forward, “which may not have happened so smoothly had the mediation not occurred.” Another mediation that resulted in a partial agreement was evaluated “useful” by a respondent to the questionnaire who felt that all parties had been educated by the process and that the parties and attorneys were able to reassure one another as to their motives in the case. In another case, the mediator felt the case was “questionable” as to its appropriateness for mediation, in that the proposed ward was not able to participate or understand what was happening. Although the surveys indicated that only one full agreement resulted, all eight forms

expressed satisfaction with the mediators; seven of the eight said they would use mediation again to resolve a guardianship/adult care dispute. One party advised that others who attempt mediation should “go into mediation with an open mind.”

In structured interviews conducted as part of this study, a total of seven individuals were questioned about the impact or ultimate outcome of guardianship mediation in the Wisconsin. Interviewees included two former directors of the CWAG mediation project, the CWAG staff attorney and project / intake staff person, three mediators, and the Dane County Probate Court Guardianship Administrator (several were also members of the program advisory panel). Each of the interviewees was asked simply to answer "greatly," "somewhat," or "very little" to each of five questions posed.

Is mediation of adult guardianship cases effective, relative to non-mediated cases, in terms of finding better or more satisfactory resolutions such as fewer guardianships, less restrictive orders, or limited guardianships? Of the six respondents who offered an opinion, four felt that guardianship mediation was “greatly” effective and two believed that it was “somewhat effective.” Positive responses to the second question of whether mediation led to better maintenance of the relationships of the parties, and more consensual arrangements, were almost identical to the first question. On the third question of whether guardianship mediation had a positive impact on the resources of the parties and the courts, only one of the respondents broke ranks with the positive responses of the others and said that it saved few resources.

Are the participants in mediated guardianship cases satisfied with the process and outcome of mediation? Five respondents to this question stated that participants

were somewhat satisfied. One respondent felt that there was “very little” satisfaction with the process, and one respondent offered no opinion. Asked whether the benefits of mediated guardianship justify the costs, if any, respondents were once again in almost full agreement. Five stated that the benefits “greatly” and two that they “somewhat” justify costs.

A final question invited more open-ended responses about critical factors in mediation of guardianships that determine the effectiveness of mediation, such as training or background of the mediator, participation of attorneys, legal framework, timing of referral, or others. Six of the seven interviewees identified the training and competence of the mediator as critical in mediation. One noted, however, that the mediator’s attention to the mediation process is more important than knowledge of law and procedures. Another noted that the point in the guardianship process when the case is referred to mediation is very important with success being more likely in referrals before the case reaches the court. Support of the bar and the bench was mentioned as critical to a mediation program’s success by two of those interviewed. Other factors noted included the support of mediation referral sources, the flexibility of attorneys involved in mediation, and the thoroughness and skill with which the case is handled at intake.

OKLAHOMA'S EARLY SETTLEMENT CENTERS

History and Structure of Statewide Program

In Oklahoma, adult guardianship mediation is provided by eleven non-profit community based (as opposed to court connected or “court annexed”) regional mediation centers, known as Early Settlement Centers.¹⁰⁵ The centers are located throughout the state in the central, south central, east central, north, northeast, northwest, southeast, southwest, and Panhandle regions, and in the cities of Norman and Tulsa. The system of regional early settlement centers, which was authorized in 1983 and funded in 1985 by the state legislature through the Oklahoma Dispute Resolution Act,¹⁰⁶ is administered and supervised by the Administrative Director of the Courts through his designee, the Director of the ADR System in the Administrative Office of the Courts (ADR director), with the ongoing input of the Dispute Resolution Advisory Board. The advisory board, established in 1984, provides oversight for the entire mediation system in Oklahoma. Members of the advisory board are appointed by the Oklahoma Supreme Court and include representatives of law enforcement, the judiciary, the Department of Commerce, social services organizations, consumer organizations, businesses, the state attorney general, district attorney's offices, academia, local and state governmental departments, retired citizens, and three members-at-large (presently consisting of a representative of the local bar, a university staff person, and a president of a private foundation).

The Oklahoma legislature provides for judges to order mediation under Title 12 Chapter 37, Sections 1801-1813 of the Oklahoma Dispute Resolution Act and Title 12,

¹⁰⁵ The Alternative Dispute Resolution System in Oklahoma is currently made up of twelve community-based mediation centers (Early Settlement Centers). Eleven have adult guardianship programs.

¹⁰⁶ 12 OKLA. STAT. SUPP. 1997, Section 1801, *et seq.*

Section 1821, *et seq.* of the District Court Mediation Act of 1998.¹⁰⁷ The Dispute Resolution Act's purpose is to provide all citizens of Oklahoma "convenient access to dispute resolution proceedings which are fair, effective, inexpensive, and expeditious."¹⁰⁸ It seeks to provide less formal proceedings specifically for fair and equitable resolution of "many disputes [that] are of small social or economic magnitude" and which "can be both costly and time consuming if resolved through a formal judicial proceeding."¹⁰⁹ The legislature noted, in creation of the Dispute Resolution Act, that "[s]uch proceedings can also help alleviate the backlog of cases which burden the judicial system in this state."¹¹⁰ The District Court Mediation Act provides for mediation of district court civil cases and states that "[a]ny district court, by agreement of the parties, may refer any civil case, including any domestic relations case, or any portion thereof for mediation. A referral to mediation may be made at any time while a civil case is pending."¹¹¹

The Oklahoma statute defines mediation as "[t]he process of resolving a dispute with the assistance of a mediator outside of a formal court proceeding."¹¹² It further describes the process as one where "an impartial person, the mediator, facilitates communication between disputing parties to promote understanding, reconciliation, and settlement."¹¹³ It allows for the mediator to meet with the parties together or individually

¹⁰⁷ 12 OKLA. STAT. 37.1801-1813 (OSCN 2001), Oklahoma Dispute Resolution Act; 12 OKLA. STAT. 1821, *et seq.* (OSCN 2001), District Court Mediation Act (1998). In the early 1990s, Oklahoma City judges passed a local rule, titled the ADR Rule for Oklahoma, Cleveland and Canadian Counties (1991) (Oklahoma City is situated in these three counties) to authorize court referral to mediation. The local rule was enacted before the Oklahoma Dispute Resolution Act and the District Court Mediation Act, *supra*, came into existence. Now, local courts refer cases to mediation through the state statute and the District Court Act.

¹⁰⁸ 12 OKLA. STAT. 1801 (OSCN 2001), Dispute Resolution Act.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 12 OKLA. STAT. 1823 (OSCN 2001), District Court Mediation Act.

¹¹² 12 OKLA. STAT. Rule 2 (OSCN 2001), Oklahoma Dispute Resolution Act, Appendix.

¹¹³ 12 OKLA. STAT. 1824(1) (OSCN 2001), Oklahoma Dispute Resolution Act.

and specifies that the mediator is "an advocate for settlement," not a judge, and does not have authority to decide the issues; it gives the parties full responsibility for negotiating any resolution to a dispute.¹¹⁴ It requires the parties to participate in good faith.¹¹⁵ The statute mandates privacy and confidentiality; it proscribes the admission of any representation, statement or confidential communication as discovery materials and states that neither the mediator nor any participant in the mediation may be compelled by subpoena or otherwise to disclose any matter covered in the mediation or intake.¹¹⁶

The settlement centers receive some of their funding through the Oklahoma State Supreme Court. The Oklahoma Dispute Resolution Act created a revolving fund for the State Supreme Court, the "Dispute Resolution System Revolving Fund." The fund may not cover more than fifty percent of the approved projected cost of a dispute resolution program, except in municipalities or counties where the population is 100,000 or less and where funding is based on merit.¹¹⁷ Monies in the fund are allocated by the Administrative Director of the Courts to eligible centers for approved dispute resolution programs.¹¹⁸ The statute requires the fund to be a continuing fund, not subject to fiscal year limitations, generated by court costs of \$2 collected on all civil cases, and for fees of \$5 to be assessed by the settlement centers and collected from each party to the mediation. It also mandates that, except for these cost and fee assessments, dispute resolution services shall be provided without further cost to the participants.¹¹⁹ The administrative costs for the adult guardianship mediation program are handled like the other programs, in that the centers apply for approval for program funding through the

¹¹⁴ *Id* at (1) (2) and (3).

¹¹⁵ *Id* at (3).

¹¹⁶ *Id* at (5) (6) and (7).

¹¹⁷ 12 OKLA. STAT. Rule 4 (OSCN 2001), Oklahoma Dispute Resolution Act, Appendix.

¹¹⁸ 12 OKLA. STAT. 1810 (OSCN 2001), Oklahoma Dispute Resolution Act.

¹¹⁹ 12 OKLA. STAT. 1809 (A)(1),(2) (OSCN 2001), Oklahoma Dispute Resolution Act.

ADR director's office. Settlement center mediators in Oklahoma receive no fees for their services.

The Oklahoma Adult Guardianship Mediation Project began in 1997 when Oklahoma received an invitation from TCSG to participate in the adult guardianship mediation project funded by the Hewlett Foundation. The ADR director contacted other potential stakeholders and invited them to a meeting at which the application for the pilot project was discussed and completed. Representatives of the family law section of the state bar, members of the judiciary, representatives from adult protective services of the Department of Human Services (DHS), representatives of the clergy, counselors, and others attended the meeting and gathered letters of support for the project. At that meeting, the group set a date and reserved space at the Oklahoma Bar Association Center for a statewide conference and mediator training in June 1997. The conference drew 105 attendees and included sixteen judges, numerous attorneys, case managers with the Developmental Disabilities Services Division (DDSD) and adult protective services (APS), advocates for the aging and for people with developmental disabilities, as well as advocates for people with traumatic head injuries.¹²⁰

The first case was referred shortly after the training, in July or August 1997, according to the ADR director. However, over the period of three years ending June 30, 2000, a total of only fourteen cases statewide were referred to the adult guardianship mediation program and only nine were actually mediated. One of the two urban centers, in Norman, Oklahoma, had the most referrals and mediated the bulk of the cases (six cases) and three other centers (East Central, Northwest, and Southwest) had

¹²⁰ As noted in responses to questionnaire sent to participating programs before the Hewlett-funded seminar, sponsored by TCSG, titled "Adult Guardianship Mediation: Essentials for Success," which took place in Ann Arbor, Michigan on Feb. 4-5, 1999.

mediated one case each; most of the settlement centers have not mediated any adult guardianship cases since the program began in June 1997. During fiscal year 1998 (7/1/97 - 6/30/98), the first year of the project, four cases were referred to the program, and three were mediated to agreement; in the next year, fiscal year 1999 (7/1/98 - 6/30/99), nine cases were referred, five of which were mediated to agreement (one was a partial agreement); and during fiscal year 2000 (7/1/99 - 6/30/00), only one case was referred, but it reportedly settled before mediation.

Judicial support was sought for the program before the first statewide conference and mediation training in June 1997. Presentations were made to the judges that included videotaped demonstrations on mediation in adult guardianship cases and information on local programs and procedures. A Norman judge who was an early proponent of the program made a presentation on the project at a judicial conference and wrote follow-up articles that appeared in state judicial newsletters. Despite these efforts, however, the state ADR director reported that the program "hit a wall" fairly early on, and the problem persists. She believes there is reluctance among probate judges to "turn loose" guardianship cases because "old habits" and possibly protective instincts toward vulnerable wards makes trying new things difficult. One center director echoed this opinion and stated that the judges in her region take a paternalistic attitude toward the wards; on the other hand, she noted the judges don't mind sending the "fighting children" of the wards to mediation. She said more education of the judges is necessary and that the directors need to keep "pounding on doors" to get cases. In her rural region, if she gets a "good" case, she believes everyone will know about it and the program will quickly get more referrals.

In interviews, the state ADR director reported that each of the early settlement centers have working relationships with the local judges, and the center directors call on

judges from time to time to update them on the various mediation programs they administer (including adult guardianship). However, the center directors who were interviewed reported that they do not often meet with judges to discuss adult guardianship mediation. One director said he may discuss guardianship mediation with judges occasionally but he does not “try to sell it” because mediation of guardianship cases “just does not seem to interest judges much,” and because guardianship mediation takes a backseat to other kinds of mediations, as in child permanency cases that appear to be more “interesting” to the judges.

Program Operation

By any account, mediation of guardianship cases in Oklahoma is a rare event. From the program's inception in July 1997, through June 2000, a period of thirty-six months, only fourteen cases were referred to mediation at the eleven participating settlement centers. Of the fourteen cases referred, nine cases were actually mediated. Of the nine cases mediated, eight cases or eighty-nine percent resulted in agreements, one of which was a partial agreement. In the remaining five cases that were referred but not mediated, mediations did not occur in three cases because of a settlement reached before mediation, death of a ward, and refusal by the respondent to attend the mediation. Of the eleven centers, six had no referrals. Only one center, the center in Norman, succeeded in reaching more than one agreement (six agreements). Two centers each reported only one case mediated to agreement.

Center directors who were interviewed for this study said that only contested adult guardianship cases of the person and/or the estate are considered for mediation by local judges, and usually the cases that involve difficult family relationships are the ones that seem to be referred. The state ADR director stated that there are no statistics

available on probate cases filed in the state court system reportedly due to a changeover in computer systems in which a large amount of data was lost.

Guardianship Caseflow and Mediation

The district courts in Oklahoma are courts of general jurisdiction including matters on the probate case dockets. The state is divided into twenty-six judicial districts. Each district consists of an entire county or several contiguous counties. Both elected district judges and “special district judges” (attorneys hired by the courts to help cover the courts’ caseloads in some districts) hear adult guardianship cases. However, special district judges may not hear matters where the amount of money in question exceeds \$10,000. Adult guardianship cases are handled by the district court of the judicial district where the potential ward resides.¹²¹

The district court has exclusive jurisdiction over guardianship proceedings and has the power to appoint and remove guardians, issue and revoke letters of guardianship, and control the conduct of guardians.¹²² Guardianships are initiated by a petition for guardianship filed in the court of the ward's residence by any interested party. After the filing of the petition, the court may, on its own motion or at the request of any party to the proceeding, order an evaluation of the respondent by a physician, a psychologist, a social worker with a graduate degree and experience, or another expert; the expert’s report must be submitted to the court prior to the hearing.¹²³ After a petition is filed, the court must set a hearing date on the petition within thirty days of the filing of the petition.¹²⁴ For purposes of serving notice of the hearing, the petitioner must identify

¹²¹ 30 OKLA. STAT. 1-115-108 (OSCN 2001), Oklahoma Guardianship and Conservatorship Act.

¹²² *Id* at 1-114.

¹²³ *Id* at 3-108.

¹²⁴ *Id* at 3-109.

the subject of the proceeding, the spouse, the attorney, any adult children or if none, living parents or if none, siblings and adult grandchildren of the subject of the proceeding. If none of these can be identified, the nearest adult relatives must be notified. Any proposed guardian, if not the petitioner, must also be notified, as well as the person or facility having care of custody of the proposed ward, and the DHS, if providing services. Notice must be served personally on the proposed ward at least ten days before the hearing; notice to others must be mailed at least ten days before the hearing.¹²⁵

If, after a hearing on the petition, the court finds by clear and convincing evidence that the subject is incapacitated or partially incapacitated, it shall appoint a guardian or limited guardian of the person or property or both.¹²⁶ If the court finds the respondent to be an incapacitated person, it will appoint a general guardian of the person and, if necessary, a guardian of the property. If the court finds the respondent to be partially incapacitated, it will appoint, as necessary and appropriate, a limited guardian of the person, a general or limited guardian of the property, or a limited guardian of the person and a general or limited guardian of the property.¹²⁷

The court must include its determinations and findings in its order, as well as the authority granted to the guardian and specific limitations imposed on the ward, if the ward is an incapacitated person. If the court determines a review hearing is necessary, the order must also include the date of the review hearing. The court must make

¹²⁵ *Id* at 3-110.

¹²⁶ *Id* at 3-111.

¹²⁷ *Id* at 3-112.

specific determinations regarding whether the ward retains sufficient capacity to vote, serve as a juror, drive a motor vehicle, be licensed or continue to practice in the ward's profession, make personal medical decisions, appoint an agent to act on his behalf, enter into contracts, grant conveyances, or make gifts of property. The guardian must submit a guardianship plan for the court's approval, and the court may make any other orders it deems to be in the best interest of the ward, including ordering the guardian to provide the ward with specified amounts of money from the ward's property.¹²⁸

In addition, the court may appoint a special guardian for a person who is found to be incapacitated or partially incapacitated when the health or safety or financial resources of the ward are in imminent danger, and no other person appears to have authority to act, or the guardian previously appointed is unable. The appointment of the special guardian is not to exceed ten days. A hearing on a special guardian must occur within seventy-two hours of the filing of the petition. The court may also, without notice, appoint a special guardian upon the filing of the petition without a hearing, if the danger is serious and imminent and will foreseeably result from any delay.¹²⁹

Intake on guardianship cases and filings is performed by the court clerk's offices. According to the state ADR director, occasionally some clerks will ask the parties if they have tried mediation before filing. However, a referral after a petition has been filed (post-petition) is only made if the judge or presiding bench officer decides the case should go to mediation. The bench officers are the only referral sources at the courts. The district court bench officers who hear the guardianship cases refer the cases

¹²⁸ *Id* at 3-113.

¹²⁹ *Id* at 115.

directly to their regional settlement centers; there are no court personnel who work directly with the program and no court liaisons for the program.

Mediation referrals can occur in two ways: (1) in anticipation of a potential guardianship, but absent a formal guardianship petition, referred to here as the "pre-petition" route (no court case pending), and (2) post-petition, when a petition has already been filed or a guardian already appointed. Most of the fourteen cases referred in Oklahoma were post-petition cases, with very few pre-petition cases, according to the state ADR director by an informal assessment, confirmed by the center directors interviewed.

Post-Petition – When Petition Already Filed or Guardian Already Appointed

The formal petition for an appointment of a guardian of an alleged incapacitated or incapacitated person requests that the court appoint a general, limited, or special (emergency) guardian. The petition may be accompanied by a psychological or medical evaluation. Because of their emergency nature, petitions for special guardians reportedly are not referred to mediation.

Mediation most often occurs after the petition is filed and before the first hearing. However, the parties and attorneys may request mediation of a case at any time by filing a motion asking the court to refer the matter to mediation. One center director reported that at least one post-petition case had been referred through the court by the Oklahoma Disability Law Center.

The Oklahoma Dispute Resolution Act states that any applicable statute of limitation is tolled (suspended) from the date the parties agree in writing to participate in

mediation until the date the mediation is officially terminated by the mediator.¹³⁰ In other words, the parties will not be penalized for taking a case to mediation, even if mediation causes a case to go beyond the statutory periods allowed under the guardianship laws. However, according to interviews with and reports by the center directors, mediations normally take place within thirty days (the number of days allowed by statute between the filing of the petition and the first hearing). They typically occur within five to thirty days after referral, with most occurring within a ten-day to two-week elapsed time period.

When the court orders a case to mediation, there is no sanction or penalty for failure to attend. However, the parties are ordered to show up at the scheduled time for the mediation. By statute, the parties are not required to stay after they have appeared and made a good faith effort to mediate the settlement dispute. Reaching an agreement, if they do stay, is purely voluntary. One judge, who reportedly is a proponent of mediation, refers cases to mediation and insists that the parties at least try the process, even if they state they do not want to participate. The center directors did not recall any parties exercising their rights to leave after they appeared at the mediation. Reportedly, once they arrived, all parties seem to have made a good faith effort to remain and settle the dispute in mediation.

Pre-Petition – When There Is No Court Case Pending

When there is no court case pending, an agency or facility (such as APS, DDSD/DHS, a hospital, or a nursing home) may request mediation of a dispute or conflict that may preclude the need for a guardianship and avoid court proceedings

¹³⁰ 12 OKLA. STAT. 1806 (OSCN 2001), Oklahoma Dispute Resolution Act.

altogether. The request is made by contacting the settlement centers directly.

According to center directors and the state ADR director, very few of the fourteen cases referred to mediation in Oklahoma came via the pre-petition route, although no verifiable numbers are available. Reportedly, some cases were referred by APS social workers and non-profit agencies, such as the Oklahoma Disability Law Center, but the state ADR director and center directors interviewed were unsure as to how many of these cases were already involved with the courts at the time of referral.

Regarding the voluntary participation of a party in mediation referred by another party in the dispute, center directors stated that it is often difficult to get the second “respondent” party to attend without the authority of a court order. One director stated that in pre-petition cases half of the work is a negotiation just to get the second party to agree to participate. Another concurred, stating that getting the respondent party to the table is by far the most difficult part of the process.

Mediation Referral

Neither the state ADR director nor the center directors interviewed for this study said that they were aware of any formal criteria used by courts to determine what kinds of cases are most amenable to mediation referrals. Judges in the busier urban area courts reportedly have told the state ADR director that they forget to use mediation as a tool when they need it, and in the rural courts judges report that they tend not to rely on mediation, because they have more time and believe that this kind of issue settlement is what they are paid to do.

The ADR director stated that when judges do refer cases it is most likely to be in situations such as those where adult siblings have filed competing petitions for

guardianship; in such cases mediation may be helpful in straightening out complicated family relationships that courts typically have difficulty sorting through. This was echoed by center directors who said judges usually refer cases that involve very small estates where families are having relationship problems over financial matters, and the kinds of cases involving relationships that are frustrating for judges to sort out because of complex family dynamics.

One center director stated that a few attorneys seem to resist referring cases, possibly because there is a financial disincentive for them to have the parties mediate a dispute. She/he said that some of the cases she/he sees referred by attorneys are the cases where they are intimidated by the other side and therefore want to try to settle the cases outside of court. The director also stated that attorneys are more accustomed to using mediation in family matters other than adult guardianship.

Other referral sources for the program include APS case managers and social workers. The ADR director noted that presentations were made to them in conferences on aging, but little response was received in the form of referrals. In response to a question about whether the program is firmly established and accepted by the key groups, the director stated that "more is needed in the way of public awareness and education about the benefits of AGM. We are talking about changing habits. These changes in the way adult guardianship cases are handled will take time and positive experiences that translate to word-of-mouth endorsements from satisfied users of the

service."¹³¹ A center director agreed with this assessment stating that more outreach is needed to hospice organizations, AARP (American Association of Retired Persons), and social service agencies and that the program has “just not broken down important barriers yet.” The Norman center stated that there had been no efforts made by his center to contact agencies or organizations outside the court, largely because the center has only one paid employee and relies on volunteers to do the rest. He stated there is not enough time and resources to do outreach and the center must simply rely on word-of-mouth referrals.

Intake and Screening of Mediation Referrals

Intake on mediation referrals is performed by intake coordinators at each of the early settlement centers. By statute, each mediation program must have formal written criteria for selecting cases referred for mediation and must conduct an initial interview on every dispute referred in order to determine the identity of the parties, if the matter is appropriate for mediation, and if the parties are capable of meaningful participation in the process.¹³² The state ADR director stated that the center directors take a "personal interest" in the adult guardianship cases and follow-up on the initial referral call by calling the parties to discuss the issues, determine who should be present, perform scheduling tasks, etc. The directors reportedly make sure the intake and screening protocol is carefully followed.

Asked about screening cases on referral, the state ADR director and center directors stated that cases not considered appropriate for mediation include those in

¹³¹ As noted in responses to questionnaires sent to participating programs before the Hewlett funded seminar, sponsored by TCSG, titled “Adult Guardianship Mediation: Essentials for Success,” which took place in Ann Arbor, Michigan on February 4-5, 1999.

¹³² 12 OKLA. STAT. Rule 8 (OSCN 2001), Oklahoma Dispute Resolution Act, Appendix.

which there can be no meaningful participation by the ward, the adult children are unwilling or unable to participate, or abuse or financial fraud is found. One center director stated that cases where there is an uneven balance of power among the parties are usually not accepted for mediation by his center so that the mediators do not have to be concerned with trying to “level the playing field.” Another center director stated, on the other hand, that “only something extraordinary” could prevent his center from agreeing to mediate a case.

Reportedly, the center’s intake coordinators or directors take the initial referral information, including names and phone numbers of the parties, and then call the parties to screen the cases and obtain the remaining information regarding the issues for mediation. In addition, the coordinators consult with the parties regarding the most accommodating location for the mediation and who should be involved. The Norman center director reported that one judge regularly calls the center directly and gives the parties’ and attorneys’ names to the center to contact for adult guardianship mediations. The director stated that when an attorney is involved he works through the attorney to schedule the mediation and does not typically contact the parties directly.

The ADR director, five center directors, and a judge attended a 1999 Hewlett - funded conference for guardianship mediation program participants, sponsored by TCSG and titled “Adult Guardianship Mediation: Essentials for Success.” According to the conference transcript, the Oklahoma state ADR director commented on how labor intensive and time consuming the logistics of setting up one case can be for the intake person, and on the need to have better trained intake persons in a volunteer based system. An Oklahoma judge also commented, at the same conference, on the need to

have a social worker in the courthouse who would talk to the parties and make referrals instantly before the problems grow. The judge also expressed a need for the court to obtain more follow-up information from the settlement centers on the cases it refers in order to improve the appropriateness of the referrals. She specifically wondered what the best model for referral selection would be, how to evaluate what cases are appropriate for mediation in a timely way, and what role the court and judges should take in the integration of these program with the court. There is no evidence, however, that these ideas and questions were addressed in a way that caused any significant changes for the program after the conference.

Mediators and the Mediation Process

The center directors report that the mediation sessions typically lasted from two to five hours. Of the nine cases mediated, six required more than one session to complete. The mediations were held at the settlement center offices, courthouses, nursing homes, municipal libraries, churches, and other public and private buildings in rural areas where rooms are available at no charge, including rooms in funeral homes in small towns. Because of the distances mediators travel within the regions, the centers have been creative in finding spaces in various towns in which to conduct mediations. A few of the directors interviewed expressed a preference against mediating in court buildings because “families do not belong in courthouses.”

According to center directors, mediated issues have included family disputes over who will be appointed guardian or conservator (no cases appear to involve the question of *whether* there will be a guardian or conservator), where a parent will live, who will pay for assisted living, and who will be allowed to visit the ward in the nursing

home. At least one center has accepted related cases involving guardianship of a disabled minor (seventeen years of age) and a young adult (twenty years of age) under the adult guardianship mediation program, and these two cases were reported as part of that center's three adult guardianship referrals. However, neither of these cases was actually mediated, because one party refused to mediate, and another was a minor who turned eighteen before the mediation and could then legally refuse the legal guardian that his parents requested.

One director from a center that had mediated only one adult guardianship case, noted that her region is made up of very traditional, small rural "Bible belt" areas, many with Native American populations, in which families typically work together to care for ailing family members before death and only squabble over the assets after the person is deceased. The families tend to "stick to themselves" and not get involved with attorneys or courts until after a parent or relative has died. Therefore, courts in these areas are not likely to see the cases until the estates are probated. The center reportedly receives several referrals to mediate cases where families are arguing over disposition of small estates after the death of a parent. The director noted that while this type of case does not fit the profile of an adult guardianship case, she has been able to build on her adult guardianship training to mediate these cases as she works with family members.

All parties who want to be involved in the decision making process and who have made themselves known to the court are typically invited to the mediation sessions. Families may also invite others who are not part of the court case as parties, but whose presence is desired as support persons. By statute, the presence of non-parties is

subject to the consent of the other parties; in addition, the other parties must have the opportunity to bring an assisting non-party if they choose.¹³³

Also per statute, a consent form is signed by the parties, specifying the method by which the parties will attempt to resolve the issues in dispute, the rights and obligations of the parties pursuant to the Dispute Resolution Act, the confidentiality of the proceedings, and the requirement that a copy of any written agreement will be provided to the parties.¹³⁴

Adult guardianship mediations in Oklahoma may be either mediated by one or two mediators working together. The director of the Norman center, an urban center, reported that all cases are co-mediated at his center and are gender balanced (one male, one female mediator). Co-mediating is more problematic in rural regions where mediators must travel significant distances to mediate cases.

The mediators come from varied backgrounds including law, social work, counseling, hospital administration, and law enforcement. As many as twenty-eight mediators have been available to mediate adult guardianship cases in the eleven settlement centers. Mediators volunteer their time and receive no fees for mediation. Their transportation costs are reimbursed on an "as needed" basis from the ADR system budget when they travel outside their county of residence; some centers in municipal areas provide parking passes for mediators.

¹³³ 12 OKLA. STAT. Rule 12 (OSCN 2001), Oklahoma Dispute Resolution Act, Appendix.

¹³⁴ 12 OKLA. STAT. 1804 (OSCN 2001), Oklahoma Dispute Resolution Act.

Mediator qualification standards are set by Rules 11 and 12 of the Dispute Resolution Act and by Section 1825 of the District Court Mediation Act.¹³⁵ The Dispute Resolution Act proscribes charging the mediators for their state certified training.¹³⁶ It requires twenty hours of “basic” mediation training and a written recommendation by the state certified trainer who trained and observed the candidate in a mock mediation. The basic curriculum must include instruction and practice in introducing mediation to the participants, in “calming” techniques, holding private meetings, listening skills, negotiations, working towards agreements, and other required skills. The Act also requires the candidate to observe one mediation and be observed mediating a minimum of one case (more if recommended), as well as written approval by the program coordinator and approval by the ADR director.¹³⁷

Family mediators are required to complete advanced training (beyond the basic training) of forty hours classroom experience and a minimum of twelve hours conducting three to five family and divorce mediations under supervision. Additional recommendation and re-approval requirements apply to family mediators.¹³⁸ While there are no state statutory requirements specifically for adult guardianship mediation, the ADR state director reported that she requires that adult guardianship mediators to qualify for both basic and family mediations and receive an additional sixteen hours of adult guardianship training. She stated that, in addition to the basic and family training requirements, Oklahoma adult guardianship mediators are required to undergo a

¹³⁵ The Act adopts the requirements of the Dispute Resolution Act and adds additional practicum and training requirements for civil/commercial and divorce/family court mediators, to be approved by the Oklahoma Continuing Education Commission of the state bar association.

¹³⁶ 12 OKLA. STAT. Rule 12 (OSCN 2001), Oklahoma Dispute Resolution Act, Appendix.

¹³⁷ *Id* at Rule 11.

¹³⁸ *Id.*

minimum of seventy-six classroom hours and twenty-five hours of "hands-on" experience.

Only mediators who are certified and approved to assure their competence and impartiality under the Act may mediate for the settlement centers.¹³⁹ The mediators must be re-approved annually by the centers and the state ADR director by a process of observation and review.¹⁴⁰

Mediators are governed by the Code of Professional Conduct for Mediators.¹⁴¹ The Code emphasizes the impartiality and neutrality of the mediator and the autonomy of the parties to reach their own agreements. It allows the parties sole discretion to engage in mediation unless mandated by contract, legislation or court order. The Code sets out conditions for termination of mediation (when it appears that continuation would harm or prejudice a party, or a party is unable or unwilling to make a meaningful effort to participate, or the parties are unwilling to continue, or a party appears to be intoxicated, irrational, or exhibits impaired judgment); it outlines the responsibilities of the mediator to the process (expertise, conflicts, impartiality, and relationship to the law), as well as the mediators' responsibility toward co-mediators, and the mediator's duty of confidentiality toward the general public. Standard statutory procedures for mediation must be complied with in all mediation sessions;¹⁴² for example, confidentiality of the proceedings is mandated by statute.¹⁴³

¹³⁹ 12 OKLA. STAT. 1803 (D)(1) (OSCN 2001), Oklahoma Dispute Resolution Act.

¹⁴⁰ 12 OKLA. STAT. Rule 11 (OSCN 2001), Oklahoma Dispute Resolution Act, Appendix.

¹⁴¹ 12 OKLA. STAT. APPENDIX A (OSCN 2001), Oklahoma Dispute Resolution Act, Appendix.

¹⁴² 12 OKLA. STAT. 1803 (D)(3) (OSCN 2001), Oklahoma Dispute Resolution Act.

¹⁴³ 12 OKLA. STAT. 1805, 1824 (5),(6),(7) and Appendices A and C (OSCN 2001), Oklahoma Dispute Resolution Act. A specific exception to the mediator's responsibility to hold information disclosed in mediation confidential under the general mediation statute, is found under the Protective Services for the Elderly Act of 1977 (Title 43A Section 801 et seq.) which states the mediator is responsible for reporting

Post-Mediation Process

As noted earlier, agreements were reached in eight of the nine mediated cases, a settlement rate of eighty-nine percent. Pre-printed agreement forms are used by all the mediators. Copies are given to the parties and the centers keep a copy in cases where there has been no court involvement. On post-petition, court-ordered mediations, the centers have slightly varying procedures. At one center, the parties, or their attorneys if present, are given their written agreement with an attached “memorandum of understanding” (or their agreement form may have the words “memorandum of understanding” inserted at the top of the form). The attorney then re-writes the memorandum as a decree, signs it and takes the decree to the court. If no attorney is involved with the case (and thus cannot sign the memorandum), the parties write an affidavit that accompanies the memorandum, stating that the memorandum accurately embodies their agreement. One center notes on the memorandum: “This is not a final agreement until the parties have reviewed it with attorneys or the court has ordered it.” Another center types the memorandum, has the parties and attorneys sign it, sends a copy of the memorandum directly to the judge, and gives copies to the parties and attorneys.

The court can either modify or ratify a mediated agreement. Although center directors reported that they generally are not aware of specific court dispositions of mediated agreements, they did not know of a judge ever rejecting a mediated agreement. One director stated that ninety-nine percent of agreements at his center

information to the proper agencies regarding abuse or neglect of an elderly or handicapped person. 12 OKLA. STAT. APPENDIX A (OSCN 2001), Oklahoma Dispute Resolution Act, Appendix.

that involve families are ratified by the judges as written, as long as they are not in violation of any laws.

The procedure for getting a case back on the docket after mediation appears to vary among courts. Typically, a judge waits until the mediation has occurred and the agreement memorandum returned to the court clerk. At that point the clerk usually places the case back on the docket.

Follow-up phone calls reportedly are made by the centers on the mediated cases in which an agreement was reached. Most occur three to nine months after the mediation, depending on what the parties agreed to do and how and in what time frame it was to be accomplished. In the course of the follow-up calls, the centers also obtain feedback by the parties and attorneys on the process and the mediators. Center directors stated that they sometimes used “generic” short evaluation forms, or exit surveys, for the participants to complete after mediations at their centers. (One form is used for all types of mediations.) However, none of the evaluations pertaining to adult guardianship cases were available at the time of this study.

Outcomes of Mediation

Agreements Reached in Mediated Cases

The agreements reached generally were constructed around issues such as whether or not a ward’s brother would be allowed by the ward’s wife to visit, where the visits would take place (nursing home) and how often, who would be conservator or guardian, the details of where a parent would live, which sibling would live with the parent and care for her, and who would pay for the parent’s nursing home care. According to one center director, approximately ninety percent of the agreements

involved detailed stipulations regarding financial control of the ward's money, and the usual resolution assigned one sibling to serve as guardian and another to serve as conservator.

Perceived Success of Mediation

In structured interviews conducted as part of this study, four individuals – the state ADR Director and three settlement center directors of centers with the bulk of the mediated cases – were questioned about the impact or ultimate outcome of guardianship mediation in Oklahoma. Each of the interviewees was asked to answer "greatly," "somewhat," or "very little" to each of five questions.

Is mediation of adult guardianship cases effective, relative to non-mediated cases, in terms of finding better or more satisfactory resolutions such as fewer guardianships, less restrictive orders, or limited guardianships? Of the four respondents, one answered that mediation was "somewhat" effective, while three answered that it was "greatly" effective. To the second question of whether mediation led to better maintenance of the relationships of the parties and more consensual agreements, one respondent stated that s/he did not know the answer to this question, and the other three answered that it "greatly" leads to better relationship maintenance and more consensual relationships.

In response to a third question of whether guardianship mediation had a positive impact on the resources of the parties and the courts, three of the respondents stated savings of time and money had "somewhat" of an impact and one stated it "greatly" made an impact. To the fourth query as to whether the participants in mediated guardianship cases were satisfied with the process and outcome of mediation, one

respondent believed participants were somewhat satisfied, two answered that the participants are greatly satisfied with the outcomes, and one interviewee expressed no opinion. Finally, when asked whether the benefits of mediated guardianship justify the costs, all four respondents answered that the benefits “greatly” justified any costs of mediation.

The sixth question invited more descriptive answers to the issue of whether there are critical factors in mediation of guardianships that determine the effectiveness of mediation, such as training or background of the mediator, participation of attorneys, legal framework, timing of referral, or others. One respondent stated that timing is important. If there is a pending hearing on a petition, “the parties are more divided and in a combative mindset – it is harder to move people off of this kind of positional thinking,” s/he said. How the family perceives whether it is in crisis or not also is a critical related factor. “Mediation is a higher challenge when [the parties] feel they are in dire straits, [and] if there is not so much time pressure, mediation can be more effective,” s/he stated. For example, if a parent is destined to be placed in a nursing home, mediation is harder because the family is in crisis, dealing with anger and grief. But if he or she has been in a nursing home for a while and the dispute is about location, “things are calmer and more logical.” Two other respondents also cited the timing of the referral as a critical factor. “The earlier the better,” said one.

Three respondents stated that education and “buy-in” of the attorneys are important factors. One said that attorneys can be helpful by offering information and options to the parties, rather than encouraging the parties to “fight to the bitter end.” One stated that it is not important for some attorneys to be present for the mediation

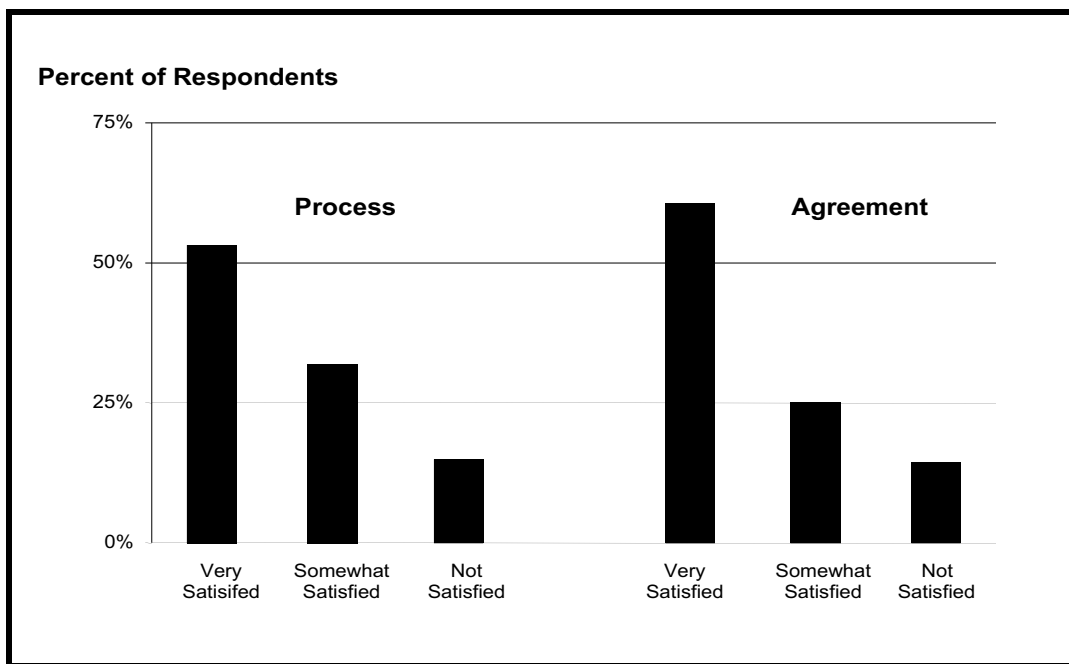
session but that they should be available by telephone if needed as a resource; on the other hand, guardians *ad litem* should always participate in mediation. Another interviewee disagreed stating that participation of counsel can make or break the mediation, depending on how badly they want the issues resolved outside of court. Another said education of attorneys and parties about mediation process is important in an area where word of mouth is important for referrals. Finally, one respondent said that training and experience of mediators is critical. Mediators should have experience with elderly persons and be good family mediators, and they should be willing to spend more time on these cases than with other kinds of domestic mediations because of the large number of parties present at adult guardianship mediations and the difficult family situations involved.

In summary, despite the low numbers of referrals to guardianship mediation in Oklahoma, respondents believed that mediation is a valuable tool for reaching more satisfactory solutions and preserving important relationships through a consensual process, although they seemed less sure about whether the participants themselves were satisfied with the process. They were unanimous in their opinions that the benefits of mediation outweighed its costs.

PARTICIPANT SATISFACTION

Program principals in Ohio and Florida made efforts to survey all participants in guardianship mediation.¹⁴⁴ Most of those who participated in guardianship mediations in these two programs were satisfied both with the process and the outcome of mediation. A total of eighty-five percent (forty of forty-seven) of those surveyed indicated that they were “very satisfied” or “somewhat satisfied” with the mediation process in their cases; and eighty-six percent (twenty-four of twenty-eight) were “very satisfied” or “somewhat satisfied” with the agreements they signed as result of the mediation (Figure 1). Written comments to open-ended survey questions supported these results.

Figure 1
Satisfaction with Process and Agreement



The post-mediation survey used a twenty-three item, fixed-choice questionnaire requiring respondents to select one answer among those provided, and several open-

¹⁴⁴ In Wisconsin and in Oklahoma, program principals were either unsuccessful in their attempts to collect surveys or unable to produce the completed surveys for this study.

ended questions requiring respondents to answer in their own words. The survey was distributed to participants in guardianship mediation in Ohio from October 1998 to October 1999 and in Florida from April to August 1996. Questions asked about the mediation process, the mediator, and the participants' satisfaction with the outcome of the process, including the resolution of the dispute, feelings toward the other party, and agreements reached.¹⁴⁵ Respondents also were asked to make any comments for improving the guardianship programs.

A total of forty-seven respondents returned completed questionnaires.¹⁴⁶ In Ohio, questionnaires were mailed to the seventy-four participants in the fourteen mediated guardianship cases. Twenty-eight individuals responded to the Ohio survey, a response rate of thirty-eight percent. In Florida, a total of nineteen individuals who participated in mediated guardianship responded to the survey,¹⁴⁷ including seven attorneys – four representing petitioners and three representing respondents.¹⁴⁸ Two-thirds of the respondents supplemented their answers to fixed-choice questions with written comments.

¹⁴⁵ Although very similar, the questionnaires used in Ohio and in Florida varied somewhat. The wording of the questionnaire used in Florida included the element of the respondent's *feeling* about the presence or absence of something in some but not all the questions. For example, in Ohio respondents were asked "Did the court pressure you into doing mediation?" whereas the Florida respondents were asked "Did you *feel* that the court pressured you into mediation?" Format and the sequence of the questions also differed somewhat in the two versions.

¹⁴⁶ Not all respondents answered all the questions and some questions did not appear in all versions of the survey used in Florida and Ohio.

¹⁴⁷ Because the number of surveys mailed or distributed in Florida is not known, a response rate was not calculated.

¹⁴⁸ The guardianship mediation in which they participated was the first for all seven Florida attorneys. In contrast, they stated that they had handled a total of 163 other mediation cases in the past, with a range of one to 50 cases per individual attorney.

Survey respondents are not necessarily a representative segment of those participating in guardianship mediation in Ohio and Florida, although, with the exception of mediators, there appears to be no systematic exclusion of types of participants.¹⁴⁹

Level of Satisfaction with the Mediation Process

Most participants were satisfied with the mediation process overall (see Figure 1) and especially appreciative of the mediators. All but one of the respondents (ninety-eight percent) indicated that they understood the mediation process, were given adequate advance information about mediation and adequate time to fully describe their concerns.¹⁵⁰ In his written comments, one Florida attorney noted that the court created “confusion” because of its failure to give notice of the mediation. All but two respondents (five percent) stated that mediation gave them an opportunity to be part of the decision making process.

Eighteen of the twenty-three (seventy-eight percent) respondents who answered the open-ended question, “What advice would you give to others considering mediation?” had either encouraging things to say about the mediation process (e.g., “Do it!” “Even if we had not resolved the dispute, we have come away with a different understanding of all the parties involved and hopefully some empathy.”) or gave sound (not necessarily insightful) advice to others considering mediation (e.g., “Be prepared to discuss your concerns.” “Be open-minded.” “Decide if money or something else is a

¹⁴⁹ Except for surveys sent to Florida attorneys, survey responses were confidential and returned questionnaires bore no identifying marks created by the courts. References in comments identified respondents as family members, wards, social workers, and attorneys. However, the possibility of a biased sample exists because the response rate is not sufficiently high, and no attempt was made to interview nonrespondents to see if their responses differ in systematic ways from the responses of those who did respond to the survey.

¹⁵⁰ Because not all respondents answered all questions, percentages are not all based on the total of 47 respondents to the survey as a whole.

priority.”). Only five respondents, three of whom were Florida attorneys, had something negative to say. One stated that his or her case took too long to be scheduled, a sentiment echoed by two other respondents in written comments about the agreements reached in their cases. Another expressed the belief that family members do not need to be involved in mediation and the wish that the mediator (who was nonetheless praised) had taken more control. As noted above, another Florida attorney noted that the court created confusion because of its failure to give notice of the mediation. Finally, the other two Florida attorneys who expressed negative views suggested that incapacity may have inappropriately been an issue in mediation, or was perceived as being negotiated. They noted:

How can you mediate a guardianship if the ward is incapacitated? Capacity should not be part of mediation.

Not appropriate for guardianship matters. The medical/legal determination as to capacity is not an issue that can be “settled” through mediation. Substantially ignores the rights of the alleged incapacitated.

Asked how much they wanted to reach an agreement, thirty-four respondents (eighty-five percent) indicated that they wanted to reach an agreement “very much.” Three (eight percent) wanted to reach an agreement “somewhat” and three “really didn’t care.” Thirty-seven of forty-six respondents (eighty percent) indicated that they or their clients were not pressured to participate in mediation by the *court*. Four respondents (nine percent) indicated affirmatively that they were pressured and five (eleven percent) that they were “somewhat” pressured to participate in mediation by the court. Asked whether the *mediator* pressured them into an agreement, only one respondent (two

percent) felt pressured and five respondents (eleven percent) indicated that they were “somewhat” pressured.

Nine out ten respondents stated that they understood the other parties’ viewpoint “completely” or “pretty well.” Not surprisingly, fewer (seven out of ten) believed that the other parties understood *their* viewpoint. Half of the respondents said that their feelings toward the other party or parties changed over the course of the mediation. Almost twice as many indicated that their feelings toward the other party or parties “became more positive” (thirteen respondents or thirty-three percent) as opposed to “became more negative” (seven respondents or eighteen percent).

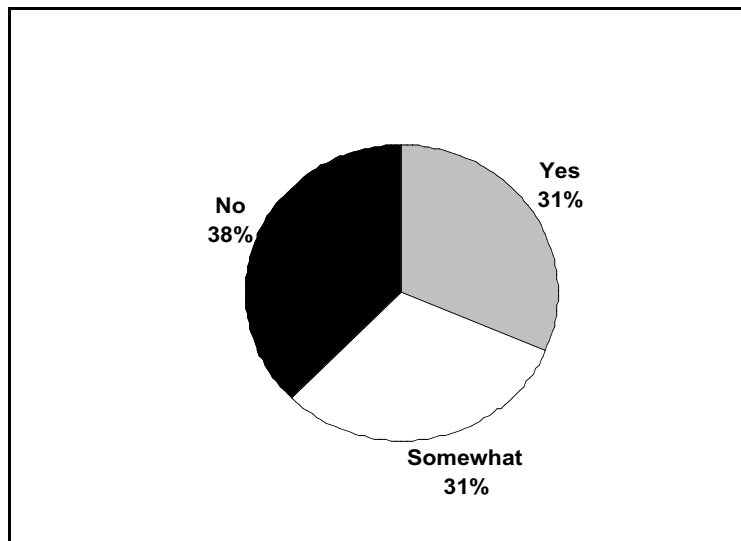
The survey respondents’ response to the mediators was overwhelmingly positive. Ninety-three percent of the survey respondents stated that they would use the same mediator again to resolve a future dispute. With only a single exception, all respondents indicated that their assigned mediator was knowledgeable in the field of guardianship, explained the mediation process thoroughly, was helpful in structuring and guiding the mediation process, and was equally fair to everyone. Praise for the mediators was expressed both in the answers to the multiple-choice and open-ended questions of the survey. Even one of the respondents who made negative comments about the mediation process felt that the mediator did a “wonderful job.” “The only good out of this,” he or she wrote, “was getting to meet the mediator.”

Satisfaction with the Outcome of Mediation

As noted earlier, most of the respondents were “very satisfied” or “somewhat satisfied” with the agreements they signed as result of the mediation (Figure 1). About two-thirds of the respondents (twenty out of thirty-two) indicated that the dispute that

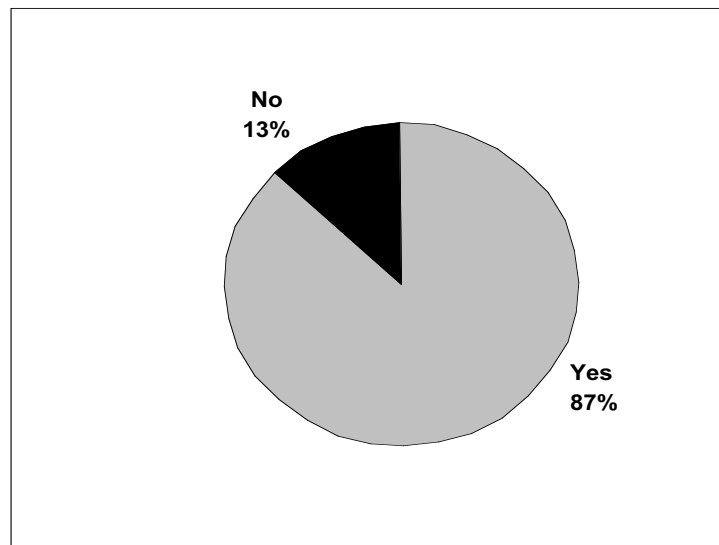
brought them to mediation had been resolved (Figure 2).¹⁵¹ Almost nine out of ten participants surveyed (forty-one out of forty-seven respondents or eighty-seven percent) stated that they would use the mediation process again to resolve a future dispute (Figure 3). In written comments, one respondent (who identified himself or herself as an Ohio attorney) stated that it is “particularly useful to use mediation for high-functioning MR/DD clients being considered for guardianship.”

Figure 2
Has Dispute Been Resolved?



¹⁵¹ Only those who had reached agreement in their cases were asked to respond to this question.

Figure 3
Would You Use Mediation Again?



The six respondents who indicated that they would not use guardianship mediation again did not fit a clear pattern except that three noted either that the disputes that brought them to mediation had not been resolved or that they were not satisfied with the mediation process overall. Their other responses to the multiple-choice questions of the survey, generally, were undistinguishable from other respondents who expressed a willingness to consider mediation in future guardianship cases. Several respondents' written comments, however, identify possible factors for the reluctance of these six respondents to consider mediation again in their cases, at least in Ohio – a lack of timeliness and expedition. “This case took way too long to be scheduled,” stated a respondent. Another respondent who expressed satisfaction with the agreement reached in the case, nonetheless stated that the “decision about guardianship should have been made months ago. It was a straightforward decision. I felt put out because it took so long to get the ball rolling with the process.” Another respondent wrote: “We

met in May and again in June – it's now the very end of October. I think the paper process was much too long.”

In comparison to what they wanted, most (eighty-five percent) stated that the agreement was better or close; four respondents indicated that the agreements they reached were “worse” than what they wanted. Most (eighty-five percent) believed that the agreement they reached would help solve the problem that brought them to mediation, and two-thirds believed that it would help solve “new problems that may arise.” Written comments similarly reflected this generally positive view of the agreements reached by mediation and the outcomes of mediation generally. Stated one respondent:

I was satisfied with the agreement, all parties involved seemed to benefit from it. I feel the agreement will most likely help solve new problems that may arise. I hope this process will continue.

Did the agreements hold? The survey did not address this question directly. Because respondents were surveyed shortly after their last mediation session, they had little experience with their agreement to answer this question. The written responses of two respondents, however, are suggestive of the strengths of the agreements and the causal influence that agreements may have in the continued resolution of the problems that brought the parties to mediation.

I feel the agreement about guardianship was really the only good thing about this mediation process.... Finally, in this case, the mediation results will probably not last. Certain individuals involved do not learn nor do they stick to agreements. So, as soon as they are upset or angry, what was decided will not have any bearing. So when it comes down to it, unfortunately, it was probably a waste of everyone's time. I can only hope this is not the case!

The only problem in this case is not the final agreement but the person's (in need of guardianship) ability to follow the agreement. It has been helpful though as we can use the agreement to remind him of what we all talked about.

CONCLUSIONS AND DISCUSSION

This study of guardianship mediation programs in Ohio, Florida, Wisconsin and Oklahoma suggests the following broad conclusions:

- **Mediation Is Successful When Used**
Mediation of guardianship cases is successful in reaching consensual agreements in about three out of four cases in which it is used, when appropriate screening protocol is observed. Generally, those who administer and participate in guardianship mediation believe that it is effective, compared to cases in which it is not used, in terms of finding better or more satisfactory resolutions such as fewer guardianships, less restrictive orders, or limited rather than full (plenary) guardianships.
- **Satisfaction with Process**
The disputing parties and others who participate in mediated guardianship are well satisfied with the process and its outcomes.
- **Limited Scope of Guardianship Programs**
The occurrences of mediation of guardianship cases were relatively rare events in the locales studied. Because the caseloads of contested guardianship cases -- those most likely to be referred to mediation -- are relatively small, programs focused exclusively on guardianship mediation are likely to be modest in scope in all but the most populous jurisdictions.
- **Structural and Organizational Instability**
Perhaps because of their limited scope, guardianship programs are likely to be organizationally and structurally unstable. The four programs, in varying degrees, were not well integrated and coordinated with the courts' guardianship processes and procedures, and the mediators, in turn, were not well integrated into the guardianship programs.
- **Pre-Petition Cases are Rare**
Mediation is almost always used only after formal guardianship proceedings have been initiated. So-called "pre-petition" cases are rare. Without a court order and additional skills training for intake staff, it is difficult to obtain agreement by all necessary parties to mediate.
- **Lack of Awareness, Education and Training of the Bench, Bar, and Other Referral Sources**
A barrier to successful use of guardianship mediation appears to be lack of education and understanding about mediation by judicial officers, members of the bar, and other referral sources in the community.

These broad conclusions are discussed below under separate topic headings. Recommendations are included under the headings where relevant.

Mediation Is Successful When Used

A relatively straightforward outcome measure of the success (effectiveness) of mediation is the proportion of mediated cases in which agreement among parties is reached. Agreements were reached in ten (seventy-one percent) of the fourteen mediated cases in Summit County, Ohio, and sixteen of twenty-two (seventy-three percent) of the cases in Hillsborough County, Florida. In Dane County, Wisconsin at least three of the seven mediations (forty-three percent) ended in full agreement, partial agreement (meaning agreement was reached on some issues and not on others), or an interim agreement on procedural issues between the parties.¹⁵² In Oklahoma, eight of nine cases (eighty-nine percent) resulted in full or partial agreements. These agreement or “settlement” rates are generally within the range of fifty to seventy-five percent¹⁵³ found in studies of other court-connected family mediation.¹⁵⁴

Independent of other outcome measures, agreement or settlement rates may be an insufficient basis upon which to declare the programs successful. However, an outcome of seventy-one percent agreements reached in guardianship mediation in Ohio, for example, gains more meaning and utility only when supported with other

¹⁵² As noted earlier in the Wisconsin report, there was serious question as to whether the cases were screened appropriately, or at all, for their amenability to mediation, a situation which possibly affected the low agreement rate at that site.

¹⁵³ The average agreement rate for the four sites studied is sixty-nine percent with Wisconsin cases included. The average rate for the three sites, excluding Wisconsin, is seventy-eight percent.

¹⁵⁴ J.A. Pearson, *Family Mediation*, in NATIONAL SYMPOSIUM IN COURT-CONNECTED DISPUTE RESOLUTION RESEARCH 49-89 (S. Keilitz ed. 1994).

outcome measures such as participant satisfaction (see below) and in relation to the same measure taken repeatedly over time.

Satisfaction with Process

The results of the interviews and the participant survey suggests that the disputing parties and others who participate in mediated guardianship are well satisfied with the process and its outcomes. Several interviewees believed that mediation resulted in less restrictive alternatives for the potential ward. However, some in the court-connected programs, including some of the bench officers, believed that the courts are already so aware of the importance of least restrictive alternatives in court decisions, that mediation does not offer significant improvement in this area. Some in the community-based programs said they had no way of knowing how courts usually decide these matters. Although small in scope, the three programs that are administered by courts or state court administrative offices have existed for four to five years and continue to exist, which suggests some degree of institutional satisfaction with the mediation process as a tool for resolution of a limited number of adult guardianship cases.

Limited Scope of Guardianship Programs

The Florida program began in 1996 (under a Retirement Research Foundation grant) and continues today. The Ohio program began in 1998 (under a William and Flora Hewlett Foundation grant) and continues today. The Oklahoma and Wisconsin programs began in 1977 (under the Hewlett Foundation grant). The Oklahoma program continues insofar as the early settlement centers still have trained mediators available to mediate guardianship cases, but the centers have had only one or two referrals since

fiscal year 1999 and have consistently reported low numbers of cases since the inception of the program; the Wisconsin program no longer exists.

Examination of the two programs with the highest numbers of mediated cases suggests that even the more successful adult guardianship mediation programs are likely to be modest in scope by most measures. For example, in Summit County, Ohio, only adult guardianship cases in which the “person” is at issue are considered for mediation, i.e., guardianships of the person or guardianships of the estate *and* the person. Only these cases — approximately fifty percent of all guardianship cases — are reviewed by court investigators and considered “eligible” for mediation. In the year ending February 26, 1999, a total of 246 guardianship cases (i.e., person or person *and* estate) were investigated. According to estimates by court investigators, two to five percent of the *investigated* cases are recommended for referral to mediation by the investigators. Therefore, according to these estimates, approximately two to twelve guardianship cases per year (two to five percent of 246 eligible guardianship cases) are recommended for referral to mediation. Similarly, only twenty-two cases were referred to the Hillsborough County, Florida, program over a period of fifty-eight months, an average of less than one case every two months.

Structural and Organizational Instability

Absent strong traditions or symbolic value associated with them (such as those one might find for insanity or death penalty cases), modest court programs such as guardianship mediation are likely to be vulnerable to organizational or financial changes and challenges. For example, in Ohio, whether or not intended, the legislation currently encourages the establishment and maintenance of even very modest guardianship

programs by allowing probate courts to expend monies “more than the amount sufficient to satisfy the purpose” of the fee “for other appropriate expenses of the probate court.”¹⁵⁵

As noted earlier, two of the sites studied were court-connected and two were administered and coordinated by institutions or agencies outside the local court system. The Hillsborough County (Florida) program is part of the circuit court’s court-annexed diversion program, which is funded by court filing fees and administered by court personnel. The Summit County (Ohio) program is part of the probate court’s mediation services, also funded by filing fees and administered by court personnel. The Oklahoma program is coordinated by non-profit, community-based mediation (“early settlement”) centers which receive funding for operational expenses from the state legislature through a statutory revolving fund for dispute resolution centers; administrative oversight is provided by the state court system’s ADR director. The Wisconsin program was also a community-based program, coordinated and administered by the Elder Law Center of the Coalition of Wisconsin Aging Groups, a non-profit agency that relied solely on grant funding for the mediation program.

Good organizational structure and context is essential to support programs such as these. For example, multiple structural deficiencies contributed to the demise of one program. First, the program lacked accountability to the court system or other stakeholders in the community, as demonstrated by the program staff’s willingness to ignore screening protocol in its acceptance of cases for mediation. As a result, several cases were accepted that were inappropriate and unamenable for mediation, a factor

¹⁵⁵ OHIO REV. CODE ANN. § 2101.16.3(C) (Anderson 1998).

which very likely had a negative effect on the (low) agreement rate. The low agreement rate perhaps caused serious damage to the program in that important stakeholders and program staff may have concluded early on that mediation was simply not a useful process because settlement was not reached. Possibly, inappropriate screening procedures contributed to the fact that that site had the lowest agreement rate of the four programs studied (approximately forty-three percent).

Second, the same program lacked important organization in critical areas such as maintenance of verifiable data and information from which to evaluate the program, define its goals, and develop systems to measure the goals. Another example of its organizational problems is illustrated in the apparent lack of training and understanding by the project and intake coordinators on how to get more respondents to come to the mediation table. There was also apparent confusion as to what role the intake coordinators and the mediators each were performing in the intake process. (See recommendation, *infra*, under Pre-Petition Cases.) Most importantly, despite substantial efforts that were made to contact referral sources in some parts of the community, there was no relationship with the judiciary, the program's key source for post-petition cases. The project director acknowledged on multiple occasions that she should have contacted judges and should have made a concerted effort to educate the bar on how adult guardianship mediation could be helpful on post-petition cases. In spite of a statutory scheme that authorizes courts to order parties to attempt to mediate cases, various participants in the program speculated that the courts would probably not want to order people to take part in a voluntary process. However, no one apparently discussed this with the judges or tried to work with the courts to come up with a system

for case referral. Several counties, including those that were sites for the adult guardianship program in that state, already had court-based mediation programs for other civil cases.¹⁵⁶ In retrospect, this community-based adult guardianship program might have benefited from affiliation with an established court-based civil mediation program.

Recommendation

- *Programs depending on court referrals must find ways to work with the courts through mutual education and cooperation. If program personnel meet with opposition from the courts, they should seek to discover what barriers exist from the court's perspective and try to work with the courts to overcome them. It may be helpful to consult other mediation programs to discover how similar challenges are addressed and what policies could have been developed to overcome these barriers.*

Finally, this particular community-based program suffered from a lack of funding. The largest problem during the short life of the program appeared to be a lack of resources to pay its mediators who were accustomed to being paid for their services in other kinds of cases. The program ended after only two years, in part because of the limited funding. Had the program continued, the weak financial structure would have caused more problems than the mediator payment issue.

Recommendation

- *In order to assure mediator availability, it may be beneficial to a program that is administered from an organization outside the court, to consider a few possibilities: either the need to seek continual grant funding to pay for the mediator fees, or, if the program is located in a state that uses volunteer*

¹⁵⁶ For example, a mediation project in the same county had existed for at least fifteen years; it began as an early effort by the local bar to begin using alternative means of settlement when ADR was a fairly new concept.

- community mediators, to consider collaboration with the local dispute resolution or settlement centers to train the community mediators in adult guardianship mediation and tap into an existing pool of volunteer mediators.*
- *Another possibility would be to contract with the probate court to pay for mediators from the court budget. This proposal could be presented to a reluctant court administrator by offering pro bono mediation for a specific pilot period, and then if the court is satisfied with the program, it would agree to pay a fee for the mediations after the pilot stage. It may be unreasonable in many cases to plan to charge the parties (because of indigency or limited incomes) unless there is a large enough base of cases to work on a sliding scale and use the full-price fees to “cover” the sliding scale cases. Funding will likely be a continual challenge for such programs and it must be a central part of initial and ongoing planning for a viable program.*

In the four programs studied, mediation was at best a minor adjunct of legal guardianship proceedings. The four programs, in varying degrees, were not well integrated and coordinated with the courts’ guardianship processes and procedures, and the mediators, in turn, were not well integrated into the guardianship programs. For example, at one site, mediation agreements are filed with the court, although no record is made on the docket noting agreements. Further actions are usually taken only upon formal motion of the parties.

Most programs were able to schedule mediations within a few weeks, even using professional mediators who worked other jobs in addition to mediation. One site, however, waited weeks, and months in some cases, for mediators to make themselves available. The parties waited and the court proceedings were suspended until the mediators could find time to mediate. Moreover, no real procedure existed and no

person was appointed to shepherd the case back onto the docket after the mediation, so the parties sometimes waited again for a hearing to be scheduled.

Recommendation

- *Because mediation comes into play only if triggered by at least the possibility of formal guardianship proceedings, mediation processes and procedures, as well as program structure and organization, need to be coordinated with guardianship proceedings. Ideally, like other services and aids for case processing and court decision-making, such as expert evaluations and social services, mediation should be well-coordinated with the processing of the guardianship case and related court proceedings in general.*
- *In courts that suspend hearings while waiting considerable periods of time for mediators to be scheduled, the court should consider establishing guidelines for the completion of mediation within statutory time frames for scheduled hearings and cease the routine open-ended continuance of hearings. For example, a probate court might schedule hearings within a statutory time frame of thirty days, with the expectation that most mediations will occur before the hearing; the court could entertain motions for continuances in cases warranting additional time for mediation. Or, a hearing could be automatically scheduled one week after the receipt of a mediator's signed agreement of the parties. An agreement to a less restrictive alternative to guardianship could trigger dismissal of the case without hearing, or agreements to pursue guardianship could cause the court to schedule an expedited hearing as it would an uncontested guardianship case.*
- *Recognizing that a recommendation for more coordinated scheduling procedures would place additional burdens on mediators under some current practices, the recommended change might be accomplished if the court were to delegate specific administrative tasks to a court employee to assign mediators, schedule mediations within two to four weeks from the date of*

referral, follow up on the progress of the mediation, and make sure the agreement is returned to the court in time for the next docketed hearing.

- *For programs handling court referrals, the program personnel, steering committee, and mediators must understand the court's policy on accepting mediated agreements. For example, if the agreement includes an appointment of a guardian, the court must approve the terms of the agreement, the need for the guardian, including the person named, and the powers given. If the agreement stipulates dismissal or adjournment, the program staff must understand whether the court will approve such terms, depending on local statutes or court rules. If the court reviews an agreement, the program staff must understand what evidence is required, if any, or if the court just wants to review the agreement without testimony, or even accept a stipulation that agreement was reached.*

All of the sites used existing personnel to coordinate the programs. Each site was free to set its own criteria, procedures, and policy for determining the appropriateness of a case for mediation, with some considerations and guidelines supplied by the TCSG manual.¹⁵⁷ (As noted earlier, problems resulted when a program did not stick to its guidelines for screening cases.) Procedures for screening and intake varied widely from reliance on a committee for screening cases to an individual intake coordinator or even a bench officer. None of the sites had formalized procedures for case follow-up.

¹⁵⁷ The TCSG manual notes that one of the most important policy decisions a program will make is the criteria and procedures for screening cases and determining their appropriateness for mediation. It lists factors to be considered as: existence of contested issues; ability of respondent to take part in the mediation process; identification, availability, and willingness to mediate of all necessary parties; the need for a fast or emergency decision; and the existence of or allegations of physical or substance abuse.

Recommendation

- *A system for consistent case follow-up is an important evaluative tool. Checking back with the stakeholders after a designated period of time (often six to twelve weeks post-mediation) to discover if the agreement is working, needs to be re-negotiated, has fallen apart, or has ended in court provides valuable assessment for the program and a means of measuring the quality of the agreements, intake, mediators, etc. Information concerning the durability of agreements is useful for the stakeholders as well. In addition, re-contacting the stakeholders to obtain feedback may help generate future referrals.*

All programs, except one, experienced an initial surge of cases at the inception of the programs that was not sustained. The site that was the exception experienced a “surge” of cases in its second year which was not sustained after that point. These discrepancies in case activity levels suggest that evaluative problems exist to some degree in each program. Personnel at the various sites had anecdotal theories as to the possible reasons for the decline in case activity in recent years; however, none of the sites had data or systems to measure the goals, objectives, or needs of the programs, or any reliable means to determine reasons for the decline in case levels.

Two sites were alarmingly deficient in the amount of data and information available for evaluation. Programs need good organizational structure and context. They need to be accountable to their funding sources, the court (if court-based or if handling court referrals), their steering committee and board of directors (if an independent program exists within an organization with a governing board of directors).

Recommendation

- *It is important, in program development, to build an evaluation process in at the earliest stages to help define the goals of the program, as well as to*

- develop systems to measure the goals. This assures that appropriate activities are planned and implemented to achieve the established objectives that support the program's goals, which in turn address the identified needs of the program. Needs assessments should be based on objective data.*
- *Program personnel should be careful not to confuse activities with goals or objectives, but rather to plan activities that effectively address the goals and objectives. This avoids spending resources on activities that do not further the program. Impact, outcome, and process data should be kept, assessed, and measured throughout the program to keep the program on track with its goals and accountable for its results.*

Pre-Petition Cases Are Rare

Adult guardianship mediation referrals can occur in two ways: (1) in anticipation of a potential guardianship but absent a formal guardianship petition or application, referred to here as the “pre-petition” route (no court case pending), and (2) post-petition, when a petition or application already has been filed or a guardian already appointed. Only two of the twenty-five cases referred to mediation in Summit County and only one of twenty-seven referrals in Hillsborough County came via the pre-petition route. Studies of the Wisconsin and Oklahoma programs revealed similarly low ratios of pre-petition cases mediated at those sites.

Recommendation

- *Ideally, the exploration of less restrictive alternatives to formal guardianship proceedings that could be identified by mediation should begin before, or at least during, the time of petition or application for guardianship. Important questions for program staff and courts to consider are whether the petitioner or applicant is informed about the nature and possible outcomes of guardianship and whether the petitioner or applicant would consider mediation as an alternative to the formal filing for guardianship. The courts should give serious consideration to moving the inquiry regarding the merit of*

mediation to an early point in the proceedings to allow possible diversion from formal guardianship proceedings altogether.

While pre-petition cases may come from several referral sources in the community and do not have to rely on courts to refer them to mediation, the fact that they do not have the force and authority of a court order behind them has proven problematic for program staff to convince the multiple necessary parties to come to mediation on their own. Staff from the four sites indicated that the inherent difficulties in convincing several different parties to voluntarily agree to come to mediation has been a significant barrier to developing pre-petition cases.

Recommendation

- *Intake personnel with strong skills and training for this difficult task is a necessity; the manner in which the intake coordinator presents the referral, describes the process, and questions the responding parties can impact the parties' decision to attend mediation. The following techniques may be helpful in setting an intake policy and in persuading the necessary parties to attend the mediation:*
 - *The intake coordinator should call the responding parties, informing them that the case has been referred to mediation. The coordinator should first describe the mediation process thoroughly and its benefits over going to court (time, money, consensual agreement). Sometimes, it may be a matter of simply explaining the process to the respondent and discussing his or her options in a tactful and sensitive manner, rather than taking the first “no” as a final answer. It is helpful to remember that, unlike civil disputes, usually the parties in guardianship cases are family members and therefore have a high level of interdependence and investment in the relationship, which can be a motivating factor to mediate.*
 - *If the respondent seems reluctant, the coordinator might ask some questions that use the parties' relationship as a motivator (i.e., what do you think will happen if you don't resolve this; how will it affect you and the others if this is not resolved; if the parties have had a good relationship until now, would they like it to continue, etc.).*

- *Alternatively, events may be a motivator (i.e., what has changed in this situation that makes you want a guardianship / conservatorship / a move to a nursing home, etc.) It's possible that circumstances have changed for one party that the other party is unaware of. New information (if the coordinator has permission from the other party to share it) may be a motivator.*
- *Ultimately, discussing whether the respondent wants to give it a try, or still prefers litigation, status quo, or whatever other options s/he has in the matter may be a motivator. It is important to explain that mediation does not preclude other options, such as litigation, and that the parties may be assisted by legal counsel in, and outside of, mediation.*

Often the use of the queries and information listed above will serve to remind the parties of the potential ramifications of an unresolved dispute in their own lives and in their relationships with one another and will provide an incentive to try to mediate their differences. However, there are cases and circumstances in which the parties will still refuse to mediate without the force of a court order.

Recommendation

- *It is a good idea to assign the task of obtaining consent of the respondent parties to come to mediation to a skilled intake coordinator, instead of the mediators (as was done at one site). The mediators presumably are not trained in the same skills as the intake coordinator, are already busy and, in some cases, are volunteering their time. Intake can be a lengthy process in guardianship cases where multiple family members are typically involved, in addition to attorneys, medical caregivers, social workers, and other support persons or advocates. Obtaining agreement to attend, discussing the various perspectives of the case, as well as scheduling a mediation date for multiple parties and mediators can be time-consuming.*
- *The TCSG training recommends that after agreement is obtained by the parties to attend mediation and a date has been set by the intake coordinator,*

the mediator(s) may then want to do their own intake about the issues with all the parties before the mediation, in order to facilitate planning and determine how to structure the session and agenda.

- *For pre-petition referrals in court-based programs, it is necessary to develop an administrative process for cases that have not been filed in court, in order to perform the necessary intake, scheduling, monitoring, and data gathering, while remaining aware of confidentiality concerns. If the parties are not involved in the court process, their names and case information must not be released to court personnel. These cases should always be kept separately and “walled” from other court-referred case data.*

Lack of Awareness, Education and Training of the Bench, Bar, and Other Referral Sources

A variable among the sites is the degree of proximity and connection the programs have to the local court system. The two court-based programs enjoy a significantly greater rate of case referrals than the community-based programs. The relationship between the court and the mediation program staff appeared to be the most significant determinant of program success.

The second determinant appeared to be lack of education and understanding about mediation by bench officers and members of the bar. Even within the more successful court-based programs, case referral rates appear to depend significantly on individual bench officers who understand when and how to use mediation and routinely support its use. Although they may employ slightly different criteria for case referral, the bench officers who like the process and who have a program housed in the court tend to use it consistently as a tool for case resolution. Both court-connected programs have some bench officers who like the process and others who are less comfortable with the

idea of the parties resolving their own disputes; not surprisingly, those who like it routinely refer cases, and those who do not feel comfortable with it seldom refer cases. Thus, the success of even the most successful program appears to be fragile, in that it depends on the individual preferences of the bench officers. Those bench officers who do not refer cases (at both court-based and community-based sites) gave a variety of reasons, ranging from a preference to decide all cases involving vulnerable persons themselves, to a lack of familiarity with the process and the kinds of issues for which it can be most useful. At one site, court personnel attributed an unwillingness by the local judges to “order” parties to participate in what should be a voluntary, consensual process.

Recommendation

- *For referrals of post-petition cases, it is critical, as experience has shown here, to include and engage the court and attorneys fully in all stages of a program. It is especially critical for an outside program that does not operate from within the courthouse, but is also important for court-based programs, to have frequent contact with the judge, the court staff, and the attorneys, including soliciting their presence on advisory committees, educating and working with them on the kinds of cases that can benefit from mediation, on procedures, forms, etc.*
- *The court and bar need to be full partners with a program to make sure it is structured in such a way that they and the parties can benefit from its presence. Their involvement with the program will not only provide important oversight, but it will serve to keep it in their minds as a useful tool for case resolution. Showing how other courts have used adult guardianship mediation is helpful to the local courts and attorneys, as well as discussing*

other courts' policies regarding the mandatory/voluntary requirements of a court order for the parties to attend mediation.¹⁵⁸

- *It might be helpful to the judge in referring cases to mediation, as well as to other referral sources, to develop a brochure, explaining the mediation process and the kinds of issues that can be helped by mediation in adult guardianship matters. The parties could read this in preparation for mediation and better understand what to expect from the process. The brochure could also be used to educate other pre- and post-petition referral sources, agencies, attorneys, etc., about the benefits of mediation and could be distributed through the other organizations as well as the court.*
- *It is critical that the program representatives who approach the court establish credibility with the court. They should form good relationships with members of the bar and other referral sources and should understand guardianship and the local guardianship procedures.*
- *In addition, program representatives must understand the goals and procedures of the mediation program, how mediation can benefit the kinds of cases the court is likely to refer, and what concerns the bench officers and attorneys may have. It is important to ask the judges about their concerns, be open to their suggestions and address their concerns. Other probate judges who use adult guardianship mediation and like it may be willing to serve as a reference and answer questions for other judges new to a program.*
- *Program representatives should continue to check in with the court and key referral sources on the progress of the program, obtain their perspectives on the program, and inquire as to whether there are ways in which the program can be improved or adjusted to better serve their needs.*

¹⁵⁸ Many courts (e.g., Summit County Ohio and Hillsborough County Florida) order the parties to attend the mediation in good faith. But remaining there and making agreements is purely voluntary.

- *When a program is established and administered outside the court, it may be beneficial to consider using mediators who have a background in guardianship issues -- attorneys, social service agency workers, etc. -- in order to increase credibility with the court, the attorneys, social service agencies, and other referral sources in the “system.” It may be helpful to provide biographies or brief resumes to referral sources, explaining the background, education, and experience of the program administrative personnel and the mediators.*
- *It is also important to hold trainings and in-service presentations for community organizations or agencies that serve the aging, to seek to understand their questions and concerns, and to work as partners to resolve them. Outreach to referral sources is an ongoing necessity, and personal contact is more effective than advertising or mailing informational letters and brochures.*

Most of the sites attempted to publicize the programs in their communities by holding seminars and meetings, getting on the agendas of various groups in the legal, medical, and aging network fields, and sending brochures and letters to community groups. Publicizing the program was more important and more problematic for the two community-based programs that had neither the perceived credibility and authority of the court behind them, nor an existing referral system within the court.

With the exception of Florida,¹⁵⁹ each of the sites established local advisory panels or steering committees at the beginning of the program. Membership backgrounds varied among the sites and included elder law attorneys, mediators, personnel from aging agencies, citizens, court personnel, law enforcement personnel, academics, medical personnel, psychologists, and social workers. Effort was made by all sites to invite those who could serve as referral sources and support the program in the community to be on the committees. Most of the committees were meeting less frequently in recent years than was the case at the inception of the programs.

Recommendation

- *A steering committee (or task force) that meets at least biannually or quarterly to oversee and advise the mediation program is helpful for feedback and oversight. It would be a good idea to meet on a regular basis to discuss the program's strengths and ways in which it might be improved. Regular meetings would also serve to highlight the program in the minds of important referral sources and could serve to garner important support and "buy-in" from potential referral sources. These people, in turn, could be responsible for educating others in their organizations about the benefits of mediation in adult guardianship cases, or in arranging presentations by the program personnel. Members of the steering committee can also alert program personnel to questions and concerns of their constituencies as the program moves forward.*
- *The membership of the committee should include representatives from the elder law bar, the court, aging network agencies, social service agencies, mediators -- a wide spectrum of referral sources and stakeholders within the community.*

¹⁵⁹ Instead of a steering committee, the Florida site used staff from the mediation program to perform outreach and "sell" the program to the community.