

Elder and Guardianship Mediation

A Report prepared by

The Canadian Centre for Elder Law

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All BCLI staff members contributed to the research, design, management and execution of this report. Executive Director Jim Emmerton provided executive planning and management for the project and he, Laura Watts (former National Director of CCEL) and current National Director Krista James were all involved in the early design and planning of the project. In addition, Laura Watts contributed to early drafts of the report and Krista James contributed to final draft. Senior staff lawyer Greg Blue and staff lawyer Kevin Zakreski conducted a review of the draft report and provided valuable feedback. Kevin Zakreski also contributed to Chapter 6 of the report. Kisa Macdonald (articled student) provided enormous research support to the project and contributed to several sections of the report. Office Manager Elizabeth Pinsent provided tremendous technical support. Emma J. Butt (staff lawyer) and Krista James were the project managers, and Emma J. Butt was the principle writer.

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INTRODUCTORY NOTE FROM THE CHAIR

The Elder and Guardianship Mediation Project arose from a recognition that the reform of adult guardianship and substitute decision-making legislation contained in the *Adult Guardianship and Planning Statutes Amendment Act, 2007* (commonly referred to as “Bill 29”) would impact significantly on mediation practices involving older participants which is already a new and growing area of practice. The time was right to embark on a research initiative. Ethical and practice issues unique to working with older clients, a review of guardianship mediation pilot projects previously explored in other jurisdictions, and collecting the wisdom of experts working in elder and guardianship mediation across North America all needs to be addressed.

The Elder and Guardianship Mediation Report is the culmination of three years of research and consultation on the complex and overlapping areas of elder mediation and guardianship mediation. This comprehensive report brings together material that will support mediation practitioners as well as leaders in elder and guardianship mediation working in policy and education. The report provides expert guidance in support of changes that need to be made in the province of BC when the existing adult guardianship mediation provisions are proclaimed.

Many leaders in elder law, elder mediation and guardianship have contributed their expertise to this project. We are most grateful to everyone who generously donated his or her time, and to the Law Foundation of British Columbia, which generously funded this project. The Law Foundation has been a long time supporter of the work of the BCLI and the CCEL.

The BCLI hopes this report will encourage discussion about these challenging and important issues. Its comprehensiveness should be an outstanding resource.

D. Peter Ramsay, Q.C.
Chair, British Columbia Law Institute
January, 2012

PREFACE

Disputes needing resolution by families or systems are not new, nor indeed is the experience of growing old. However, the complexity of the challenges faced in the context of the exponentially aging Canadian population cannot be overstated and brings these issues together in a new way. As older adults, their families, caregivers, health and legal systems and governments struggle with the new realities of the Canadian populace, new methodologies for discussion and dispute resolution are critical. This project examines the component parts of law, aging, social systems, capacity, ethics and societal pressures which make up the context for mediation specifically addressing elder law issues.

This important project provides the first, and much-needed, Canadian in-depth study into the recent phenomena of elder and guardianship mediation.

Over the course of the development of this project, the field itself moved rapidly from its naissance to that of a gangly youth, looking for its role in the world. At this significant rate of growth, within only a few short years elder and guardianship mediation will rapidly mature. As such, the timing of this exploration is critical to the positive evolution of the field.

The original development of this project was in response to the enquiry of the Canadian Centre for Elder Law (CCEL) into the American experience of elder and guardianship mediation. Various practitioners with a wide variety of backgrounds and competencies in the American market sprang up quickly – and in some cases it appeared that the hasty response to the need for mediation may have preceded crucial sober consideration of both the risks and the benefits of elder and guardianship mediation. In short, there was a worry at the CCEL that unless impartial, independent and critical review of the field was quickly engaged in, Canadians might lose their moment in time to frame their thinking and form reasoned and appropriate recommendations or standards to shape the field at an early stage.

Elder and guardianship mediation is not easy. Indeed, there can be both great risks and great benefits. Difficult legal, social, emotional, strategic and ethical issues are confronted in this field. For example: What is the appropriate level of mental capacity to engage in mediation? Is the capacity needed decisional, or should all participants demonstrate continuous understanding and appreciation of the mediation and potential consequences? Can or should an older adult who has been subject to abuse or neglect be engaged in an elder mediation process with their abuser? Who should be at the table? What expertise is required for a mediation that looks at everyday elder care issues, and how is that different than expertise required for a court-ordered guardianship mediation? Over-archingly, what do we do to reduce or eliminate ageism and ageist assumptions from the mediation process, as well as neutralize ageist negative biases within the mediation itself.

Elder and guardianship mediation, in my view, should consider the “do no harm” principle, while always supporting an older adult’s right to make decisions and live at risk. However, balancing the rightful desire to respect independence with a sometimes valid and emotional worry about the need for protection, is challenging at best, and in some cases might feel deeply imperfect. In short, whether elder and guardianship mediation becomes more of an art than a science is still uncertain. What is certain, however, is that the recommendations made in this report address much needed areas of impartial and independent research and analysis, and will greatly benefit the field generally.

I wish to specifically acknowledge the vision and leadership of the Law Foundation of British Columbia in their consistent support of this project. The Law Foundation quickly understood both the context and the growing need for work in the fields of both elder law and mediation. I commend them enormously for their ongoing support, vision and commitment to the development of this field, as well as for their compassionate understanding of the underlying “hidden issues” of elder abuse and neglect. Their support of this field helps us all.

The research done over the course of this project has created the first ever collection of materials on the subject, spanning a variety of countries, and in a comparative format. The consultation processes of this project seeded numerous groups to form, along with the creation of a multitude of lectures, webinars, presentations and enquiries across the country and quite broadly around the world. The final report stands on its own as the leading study in the field in Canada, and perhaps internationally. But as in many law reform projects, the process itself was at least as valuable. While this project studied the field, by its nature it also helped to shape it as well. I am very pleased to commend this report to you.

Laura Watts, LLB
Principal, *Elder Concepts*
Former National Director, CCEL
January, 2012

EXECUTIVE SUMMARY

Introduction

Elder and guardianship mediation are new and growing fields of practice, and British Columbia now has legislation calling for mandatory mediation in adult guardianship matters. The mandatory mediation provisions were included in the major reform of adult guardianship and substitute decision-making legislation contained in the *Adult Guardianship and Planning Statutes Amendment Act, 2007* (commonly referred to as “Bill 29”). The fields are likely to expand rapidly once those provisions are brought into force.

Elder mediation may be understood as the mediation of disputes arising in the context of aging. One or more of the parties will be an older adult or the issues in dispute will be ones of particular significance to older adults: e.g., estate planning, powers of attorney, caregivers (who, when, where, how much care, respite care, etc.), lifestyle choices, independence and self-determination vs. safety concerns. The issues and parties are often intrafamilial, but can involve third parties such as housing providers. Elder mediation tends to be multipartite and involve family and intergenerational dynamics. It requires a particular degree of sensitivity and skill on the part of mediators.

Guardianship mediation may be understood as the mediation of disputes relating to adult guardianship. While the respondent in a guardianship application is often an elderly person, adult guardianship is not restricted to the elderly and guardianship mediation is not exclusively a subcategory of elder mediation.

The issue of mental capacity itself is generally regarded as not suitable for mediation because it is a legal determination. Numerous other issues arise in connection with an application for adult guardianship, however. For example, there can be a dispute over who among several family members is to be the guardian, or over the extent of the powers the guardian should have. Issues of this kind are amenable to negotiation and agreement among interested parties, and leave room for mediated solutions. These other issues are often closely intertwined with the question of capacity, however. The involvement of a party with diminished cognitive powers or other physical or economic vulnerabilities means that guardianship mediation is often fraught with complex legal and ethical concerns for the mediator.

The *Elder and Guardianship Mediation Project* is aimed at developing informational resources to assist those engaged in elder and guardianship mediation at the level of practice, policy, research or legislation.

The research methodology used during this project had several components:

- (a) Canadian, U.S. and international legal research;
- (b) Review of available literature on best practices and service delivery models in the U.S. and Canada, including conference papers, government reports, study papers, court mediation program policies, and mediation training manuals;

- (c) A survey, interviews, and several roundtable discussions conducted with experts and stakeholders from numerous jurisdictions;
- (d) Information collected from experts and providers of elder and guardianship mediation services.

The *Elder and Guardianship Mediation* report is the first comprehensive study of elder and guardianship mediation in Canada, bringing together various material that should be considered in the determination of how to move forward with the development of elder and guardianship mediation in BC. The report compares the experience with voluntary and mandatory mediation of aging-related and guardianship matters in Canada (with a particular focus on BC) and selected US states where court-connected guardianship mediation programs exist. The practical and ethical issues that confront mediators handling cases involving older persons and persons with diminished mental capacity are analyzed with a view to formulating best practices. Recommendations stated in the report are based on the results of the consultations and research, and represent a high degree of consensus among the many experts and sources consulted in terms of best practice and what is needed to create a viable elder and guardianship mediation program in a jurisdiction.

The report includes several components: an outline of the overarching legal context, clarification of the meaning of the concept of elder and guardianship mediation; background on elder mediation in Canada; a comparative analysis of select US court-annexed guardianship mediation programs; and a discussion of ethical issues that arise in the context of mediating at that place where age and mental capacity intersect.

Structure of Report

The report includes a detailed table of contents and is modular in structure allowing each of the distinct chapters to be read as a self-contained paper so that readers can explore the document in the manner that best suits their learning needs. The report is organized into seven chapters:

Chapter 1 - Background and Project Overview

Chapter 2 – Introduction to Mediation, Elder Law and Elder Mediation

Chapter 3 – Ethical Concerns, Values and Principles

Chapter 4 – Focus on BC

Chapter 5 – Elder & Guardianship Mediation – Training & Standards

Chapter 6 – Selected Court-connected Mediation Programs

Chapter 7 – Conclusions & Recommendations

There are four appendices to the report: a comparative US / Canada table; a summary of the feedback from experts and stakeholders consulted during the course of the project; results of the survey distributed as part of project consultation; and an annotated bibliography.

Recommendations

The report presents recommendations for best practices in elder and guardianship mediation applicable to both voluntary and mandatory mediation related to:

- (a) training and standards for elder and guardianship mediators, including a list of core competencies;
- (b) ethical standards in elder and guardianship mediation;
- (c) mediation models and styles.

In addition, a distinct set of recommendations is presented in relation to the design and development of court-connected adult guardianship mediation, in keeping with the expectation that the implementation of mandatory mediation will require a well-developed mediation program adjunct to the Supreme Court and administered under court auspices.

Among the most important general recommendations made in the report are the following:

- (a) Elder mediation requires specialized skills-based training and practical experience in addition to basic mediation training and experience;
- (b) Guardianship mediation requires further specialized training and practical experience beyond the training and experience required for basic and elder mediation. It also requires familiarity with the law of adult guardianship;
- (c) Mediators must determine whether all the parties to the mediation have the capacity to participate meaningfully, either unassisted or with support;
- (d) Impartiality of the mediator does not mean the mediator must be passive. Mediators must ensure that all parties are able to be heard and communicate their wishes effectively. Mediators must be acutely aware of power imbalances, especially when elderly persons and persons with diminishing cognitive powers are involved, and prevent mediation from becoming a tool for coercion or undue influence;
- (e) Pre-mediation interviews are crucial to successful mediation;
- (f) Co-mediation is generally an ideal model for the multi-party and multi-issue milieu of elder and guardianship mediation if resources permit;
- (g) In mandatory mediation, it is attendance that should be treated as mandatory. Parties to mediation should not be required to agree or settle.

In relation to court-connected guardianship mediation, the key recommendations of the report are:

- (a) A court-connected guardianship program should initially be established as an evaluated pilot project;

- (b) Institutional and policy support for the program from legislation, the courts, and government must be present for the program to succeed;
- (c) A court-connected guardianship program should be designed through a collaborative process involving key stakeholders;
- (d) Program policies should also be developed through a collaborative process;
- (e) The program should have clear policies related to case selection and referral as well as dedicated, specially trained staff charged with screening and case referral;
- (f) The program should utilize a non-evaluative, interest-based mediation model (most experts recommended facilitative style mediation). Pre-mediation meetings are a necessary feature;
- (g) Program mediators should be required to meet specialized training and experience requirements set by the program (including ongoing requirements for professional development);
- (h) A program roster should be established pursuant to legislation similar to the CFCSA Regulation 9 (see Chapter 4) and all program mediators should have to be members of the roster;
- (i) Roster mediators should be required to adhere to an established code of professional conduct;
- (j) The program should establish a process for responding to complaints about roster mediators;
- (k) Program mediators should be private sector mediators hired on a contract basis;
- (l) The administrators of the program should work with the private sector to expand training opportunities for mediators, such as establishing a guardianship mediation practicum similar to the CPP involving supervision by, and co-mediation with, mentors who have substantial experience mediating in the adult guardianship context;
- (m) The program should establish an Orientation to Guardianship Mediation training module (similar to the Orientation to Child Protection Mediation required by the Child Protection Mediation Program) that involves practice learning by means of mentored co-mediation with an experienced guardianship mediator;
- (n) Promotional and educational activities about the program and the mediation concept in guardianship matters should be undertaken;
- (o) The program should adopt a collaborative approach to promoting the program in the province by establishing institutional and government partnerships and obtaining support from Mediate BC and other provincial mediation organizations, the BC Supreme Court, as well as the legal community, including the Bar, CLEBC, and the Law Foundation of BC;
- (p) The program should have full-time administrative support;
- (q) Mandatory mediation should imply mandatory attendance at mediation, but not that parties are required to reach an agreement or settlement;

- (r) Program policies should be developed pursuant to regulations and should address the following matters:
 - (i) individuals authorized to participate in mediation;
 - (ii) cases and issues appropriate and not appropriate for mediation;
 - (iii) rights and duties of participants in mediation;
 - (iv) confidentiality in mediation;
 - (v) matters that may be exempted from mediation;
 - (vi) costs and sanctions related to mediation;
 - (vii) representation for indigent parties, particularly in mandatory mediation where the indigent party is the respondent to a formal guardianship application;
 - (viii) training standards and requirements for program mediators.

Conclusion

As a province we are now at the precipice of creating legislation governing adult guardianship mediation, and so individuals involved in the development of law and regulations require access to comprehensive information on elder and guardianship mediation in order to move forward. Older people in BC who may have capacity issues have a tremendous stake in enriching everyone's knowledge of the complex issues that arise in relation to mediation of elder and guardianship matters. This report is intended to serve different needs for diverse practitioners and participants in mediation processes. We hope this report will act as a foundation for further discussion of the complex challenges that arise in relation to elder and guardianship mediation.

CHAPTER 1 - Background and Project Overview

1. Introduction

Canada's older population is growing at an unprecedented rate. In recognition of this growth, Canadian governments at all levels have been responding by introducing and supporting the development of programs, policies and legislation aimed at addressing the needs of Canada's older population. One example is the Federal Elder Abuse Initiative, a national elder abuse awareness campaign launched in 2009. As a part of this initiative, the federal government launched a nation-wide advertising campaign involving a series of television, Internet and magazine advertisements aimed at raising the general level of understanding and awareness of elder abuse and its many forms.¹

Over the last decade, there has also been a noticeable trend within a wide range of professional and service provider communities across Canada towards the development of practices and providing services targeted at best meeting the needs and demands of older clients. The birth of "elder law" and "elder mediation" is a part of this trend.

The evolution of legal and mediation practices focused on matters and disputes arising in the context of aging has led to the development of specialized practice areas referred to as "elder law" and "elder mediation" – elder mediation may also include mediation of adult guardianship matters involving older adults, which we refer to interchangeably in this report as "elder guardianship mediation" or "guardianship mediation". Recent legislation and private practice experience in Canada indicates that elder and guardianship mediation are important and positive new areas of legal expansion in Canada generally, and in British Columbia (BC) in particular.

As these types of mediation are developing and continuing to expand, there is a critical need for comprehensive research and analysis relating to a number of challenging issues and questions raised by these emerging practices, as well as guidance for practitioners working in this dynamic new area of law and mediation.

This project has led to the first comprehensive report on elder and guardianship mediation in BC and Canada. The report includes an annotated bibliography, Canada-US comparative table of adult guardianship mediation program frameworks and recommendations for best practice in Canada in elder and guardianship mediation. The project also provides recommendations for a court-based adult guardianship mandatory mediation program in BC in response to relevant provisions in recent provincial legislation. The aim of this project is to give practical assistance to those directly engaged in the field of elder and guardianship mediation in BC.

2. What Is This Report About?

This report examines the nexus between elder law, mediation and adult guardianship (Figure 1 – "EGM" refers to adult guardianship mediation involving an older adult). The report brings together research on aging and the law, with particular consideration of certain legal and other issues that commonly arise in the context of aging, which may have a significant

¹ Public Health Agency of Canada, E-Bulletin, "Federal Elder Abuse Initiative" (July 2009) online: <<http://www.phac-aspc.gc.ca/ncfv-cnivf/EB/eb-Jul-2009-eng.php#article>>.

impact on older adults. The report considers how the legal and mediation communities and practices are responding and evolving to address these legal issues and other concerns of older clients. Perhaps most importantly, this report identifies and discusses some of the unique challenges and concerns that arise in the context of these expanding practice areas.

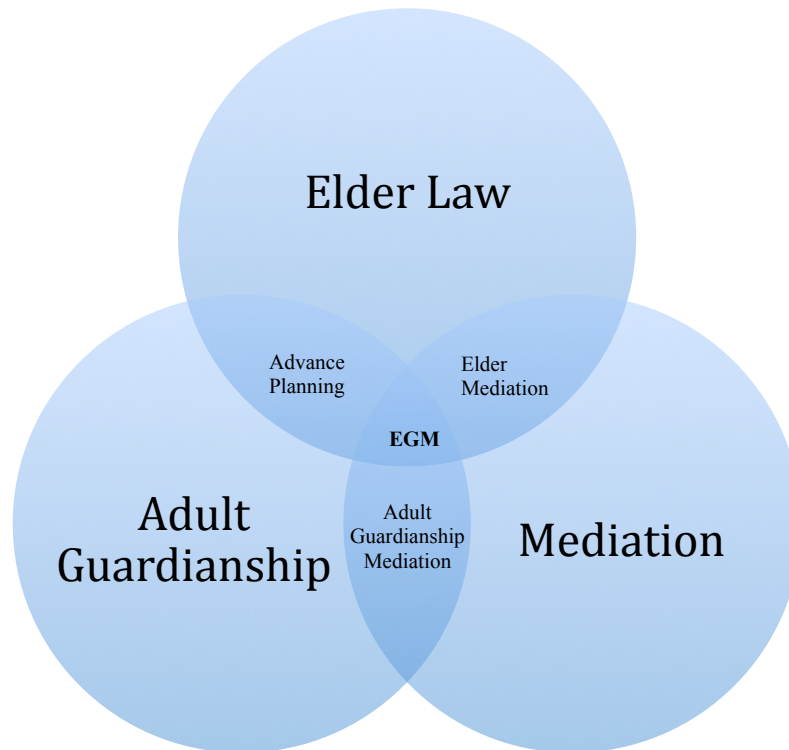


Figure 1

This report is comparative in its approach. It examines the development of elder law, elder mediation and adult guardianship mediation practices in BC, across Canada, and in the United States (“US”) with the goal of providing recommendations for best practice in elder and guardianship mediation and for a court-connected mandatory mediation program in BC. In particular, this report looks at how these new practice areas have and continue to be defined, including the range and diversity of issues that have been identified as specific to such practice areas, the unique challenges that have been identified by practitioners and participants, the mediation models and processes that have been adopted, and the range training and credentialing options and requirements for mediators in BC, other Canadian jurisdictions and the US. The analytical approach also compares several court-connected adult guardianship mediation programs (both mandatory and voluntary), in Ontario and select US jurisdictions. Although elder mediation is in its pioneer phase, much can already be learned from the experiences of other jurisdictions.

This report focuses on BC. However, it compares elder and guardianship mediation practices, programs and processes in BC with other Canadian jurisdictions and the US in order to inform our recommendations for best practice, legislation and court-connected programs in these areas generally. Accordingly, we anticipate that the report’s recommendations will be broadly applicable to elder and guardianship mediation outside BC. Further, while the goal of the report is to provide some guidance to the rapidly developing

fields of elder and guardianship mediation, aspects of this report will apply to elder law and elder mediation more broadly. In addition, adult guardianship mediation will not be limited to older adult participants. Adult guardianship can become an issue anywhere along the life course. For example, incapacity may result from a traumatic brain injury or be linked to the developmental disability of an adult.

3. Why is this Report Needed?

a. Demographics

The world population is aging at an unprecedented rate. With the aging of the Baby Boomer generation (born 1946-1965), the Canadian experience suggests that population aging will notably accelerate in the next 30 years.²

The total number of seniors (adults aged 65 and over) in Canada is estimated to increase from 4.7 million in 2009 to 9.9 million by 2036 and 11.9 million by 2061.³ The demographic population share of seniors is projected to increase from 14% in 2009 to between 24% and 28% in 2061.⁴

Seniors are rapidly outnumbering children. The number of people who are over 65 years old is steadily accelerating, while the number of children under 14 years old is steadily decreasing.⁵ Statistics Canada has predicted that there will be proportionally more seniors than children, between 2015 and 2021.⁶ It is also predicted that there will be 39 seniors (compared with 26 children) per 100 working-age people, by 2036.⁷

From 1981-2005, the “younger old” cohort of seniors aged 65-74 rose from 1.5 million to 2.2 million with a total population share of 6.0 % in 1981 to 6.9 % in 2005. By contrast, the new Baby Boom cohort of age 65-74 year old Canadians is projected to increase from 2.2 million in 2005 to a doubling figure of 4.8 million by 2031, indicating a total population share of 12.4%.⁸

The “older old” cohort of seniors aged 80 and older will have the most significant population increase. This population is projected to more than double, from approximately 1.3 million in 2009 to 3.3 million by 2036 and will nearly quadruple in size to 5.1 million by 2061.⁹ It is projected that 1 out of every 3 seniors will be 80 years or over by 2036 and nearly 2 out of 5 seniors will be 80 years or over by 2061.¹⁰

² Statistics Canada, *A Portrait of Seniors in Canada*, (Ottawa: StatCan, 2006) at 12, online: <<http://www.statcan.gc.ca/pub/89-519-x/2006001/4122092-eng.htm>>.

³ Statistics Canada, *Population Projections for Canada, Provinces and Territories 2009 to 2036*, 2010, (Ottawa: StatCan, June 2010) at 46, online: <<http://www.statcan.gc.ca/bsolc/olc-cel/olc-cel?catno=91-520-XIE&lang=eng#formatdisp>>.

⁴ *Ibid.*, at 16.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Supra* note 2.

⁹ *Supra* note 3 at 53.

¹⁰ *Supra* note 3 at 53.

As with any significant demographic shift, resources and services must be developed to serve the new cohort base. Within the context described above, Canadian services for older adults have historically been limited and there has been inadequate preparation for the “silver tsunami” facing social systems, including the health care, social services and legal systems.

b. Growth of Elder Law & Elder Mediation

One of the ways that the social and legal professions are seeking to more effectively serve the newly aging Canadian client base is to market the “elder law” and “elder mediation” services mentioned above. Indeed specialization builds on a number of current trends. First, it responds to the growing client base of older adults generally in Canada.

Second, it reflects the growing desire for clients to be served in a more personalized manner. Elder law indicates the desire for a lawyer to cater to needs of a particular client, rather than a client having to shop around for individual lawyers to do individual types of work (real estate, estates, commercial law, etc.), and to avoid a fragmentation of legal services.

Third, the development of elder mediation in particular builds on the general trend in Canada for increased use of legislated and court-connected (mandatory or voluntary), private, and community-based mediation. Mediation in Canada is rapidly expanding and research suggests its broad efficacy and value. Mediation is becoming a common stage in conflict resolution and is often integrated directly in civil court rules or into governing statutes. This has certainly been a strong trend in BC, which has a particularly strong mediation community (we will discuss mediation in BC in greater detail in Chapter 4).

Last, the evolution of “guardianship mediation” builds upon a trend in Canada to modernize adult guardianship regimes.

c. Adult Guardianship Legislation and Bill 29

Adult guardianship is a process by which the court appoints a substitute decision maker for an adult who is mentally incapable of making his or her own decisions. Guardianship may involve a range of issues, including health care decisions and consent, housing choices, and financial decisions. In the past, mental incapacity legislation adopted an all-or-nothing approach - adults were either ‘fully capable’ or ‘fully incapable’ of making their own decisions. However, in the past decade, modern guardianship legislation across Canada tends to espouse a ‘most effective, least restrictive’ approach, whereby a court-appointed substitute decision maker has his or her authority limited to the specific area of incapability. The more recent modern guardianship regimes are founded on principles of individual autonomy, a ‘capacity-continuum approach’ and a respect for the allegedly incapable adult's personhood. Mediation, for some aspects of guardianship matters, is a very recent, but arguably logical, outcropping of recent legislative developments in Canada.

On October 22, 2007 the BC Legislature passed Bill 29, *Adult Guardianship and Planning Statutes Amendment Act, 2007*¹¹ (“Bill 29”), which introduces new statutory

¹¹ Bill 29, *Adult Guardianship and Planning Statutes Amendment Act, 2007*, 3rd Sess, 38th Parl, SBC 2007, c. 34. Previous incarnations of Bill 29, known as Bill 32, include the substantially same material, online: <http://www.trustee.bc.ca/news_information/Adult_Guardianship.htm> [Bill 29].

requirements for substitute decision-making¹² and adult guardianship¹³. Bill 29 amends the B.C. *Adult Guardianship Act*¹⁴, repeals the B.C. *Patients Property Act*¹⁵, and includes provisions requiring mandatory mediation for guardianship applications in certain circumstances.¹⁶ With these changes, BC joins Ontario in the vanguard of Canadian legislative change in requiring mediation for certain guardianship matters.

These developments indicate new requirements for mediation in matters that primarily focus on adults with mental capability issues. Building on the decade of work done in the United States, Canadian legislatures are increasingly mandating some form of mediation in the areas traditionally inclusive of guardianship, powers of attorney, caregiving and long-term care (nursing home) issues.

d. Practice and Program Guidelines

Legislated and court-ordered mediation makes up only a small segment of the larger field of elder mediation. Private bar and (non-legal) mediation services in Canada are now directly targeting attention on the expanding market of voluntary elder mediation and “family meetings with elders”, which encompasses issues much broader than those which may be subject to mandatory mediation. The range of areas in which voluntary mediation takes place is continually expanding, and includes but is not limited to:

- Estate planning, administration and succession planning
- Powers of attorney (who will make decisions and how)
- Advance directives and end-of-life care
- Adult guardianship and alternatives to adult guardianship options including increased support services
- Assisted living or long-term care
- Types of medical care and alternative health care options
- Private Care Agreements
- Caregiver issues (who, when, where, how much, respite care, etc.)
- Lifestyle choices (i.e. subsequent marriage, smoking, alcohol use, social activities, vacations)
- Independence and self-determination vs. safety issues
- Mental illness or dementia
- Abuse, neglect or self-neglect
- Employment related disputes

Despite the expanding scope of elder mediation, mediation professionals and participants have little substantive literature or educational materials for guidance, education and information on elder or guardianship mediation per se.

¹² Advance planning for substitute decision-making includes powers of attorney, representation agreements and advance directives.

¹³ Bill 29, *supra* note 11.

¹⁴ *Adult Guardianship Act*, RSBC 1996, c 6 [AGA].

¹⁵ *Patients Property Act*, RSBC 1996, c 349 [PPA].

¹⁶ Bill 29, *supra* note 11, Part 2, s.6. While a number of the sections of Bill 29 came into effect on September 1, 2011, the provisions dealing specifically with mediation for guardianship matters not yet in force. See online:

<<http://www.courthouselibrary.ca/research/BCProclamations/BCProclamationsItem.aspx?Id=101ff90d-8478-4bd7-a3ec-e2fdad71eeee>>.

The American experience to date strongly suggests that there are serious ethical implications to be considered in the area of elder and guardianship mediation. In April 2007, the first National Symposium on Ethical Standards for Elder Mediation was held at Temple University in Pennsylvania, and identified a large number of areas of ethical concern including:¹⁷

- Impartiality of mediations
- Ensuring capability of participants to mediate
- Self-determination
- Risk Management in terms of abuse, neglect and self neglect
- Conflicts of interest
- How to decide if mediation is appropriate
- Funding / Fees
- The necessity of legal advice or representation

There has been significant development in the American context since this symposium, including the adoption of national standards and training objectives for elder mediation and several comprehensive teaching/certification processes.

Elder mediation is growing and there is a need to establish practice guidelines and develop competencies. Experience in other jurisdictions shows that there are some unique aspects to elder and adult guardianship mediation. Relevant practice guidelines and protocols can only emerge from a solid understanding of legislation, the needs of older adults, and ethical issues that commonly arise in elder mediation, such as those surrounding issues of capacity. In Canada as a whole, and in BC in particular, there is a significant need for comprehensive research and analysis relating to this emerging practice area.

Given these trends and developments, the British Columbia Law Institute (“BCLI”) and the Canadian Centre for Elder Law (the “CCEL”) embarked on this project to examine the use of mediation within the “elder” and “guardianship” contexts.

4. How Is This Report Organized?

This report comprises of seven chapters:

- Chapter 2 provides an introduction to mediation, elder law and elder mediation. It reviews mediation models and key ethical, social and legal issues arising in the context of elder mediation. This chapter also provides a more detailed discussion of adult guardianship, identifies the key issues and concerns raised in the mediation of adult guardianship matters, and discusses the relationship between elder mediation and adult guardianship mediation.
- Chapter 3 highlights the key ethical considerations and challenges arising in the context of elder and guardianship.
- Chapter 4 focuses on BC. It provides a history of adult guardianship law in BC and includes a detailed discussion of Bill 29, BC legislation which, once in force, will require mediation for certain guardianship matters. This chapter also provides a

¹⁷ *First National Symposium on Ethical Standards for Elder Mediation* (Temple University, Philadelphia, Pennsylvania, April 2007) [*National Symposium*].

- overview of mediation in BC, including an overview of BC’s mediator rosters and court-connected mediation programs.
- Chapter 5 reviews elder mediation training requirements, credentialing and examples of professional practice standards and ethical codes of conduct for elder mediators across Canada. This chapter also highlights recommendations for elder and guardianship mediation training and qualifications. Further, this chapter reviews professional standards and ethical codes of conduct for mediators in the US and provides an overview of recently published national mediation standards and training objectives in the US.
 - Chapter 6 reviews, summarizes and compares selected court-connected adult guardianship mediation programs in Canada and the US.
 - Chapter 7 presents a summary of recommendations and conclusions.

Although this report is organized by numbered chapters, each of these chapters is a self-contained paper. Readers are invited to explore this document in whatever manner suits their learning needs. We suggest looking through Chapters 1-7 if the entire publication is of interest. However, a reader interested in ethical issues might review Chapters 1, 2, and 3. An academic interested in comparative approaches might wish to read Chapters 4, 5, 6, 7 and Appendices.

At the end of the paper are several appendices, which provide tools, information and resources, including the following:

- Appendix A - Canada and US comparative table of adult guardianship mediation program frameworks
- Appendix B – Summary expert and stakeholder feedback and recommendations
- Appendix C – Survey results
- Appendix D - Annotated Bibliography

5. Description of Research and Methodology

The research on which this report is based was conducted using a combination of methods. Each component was designed to pursue the key research questions from different data sources and perspectives. Research was both qualitative and quantitative in nature. To the greatest extent possible our conclusions and recommendations have been canvassed with experts and stakeholders in the area of elder and guardianship mediation in the course of consultations.

The research components include:

- Legal research in Canada, the US and internationally on elder and guardianship mediation (“Legal Research”)
- Field research including surveys, one-on-one interviews and roundtable discussions with key experts and stakeholders (“Field Research”)
- A review of available literature regarding best practices and service delivery models in the US and Canada, including conference papers, government reports, study papers, court mediation program policies, and mediation teaching and training manuals

(“Literature Review”)

- Data from experts and providers of elder and guardianship mediation services, including their challenges and experiences (“Service Provision Research”)

Research was focused on jurisdictions with legislated or court-connected programs for adult guardianship matters.

a. Legal Research - Canada and US

Researchers gathered and reviewed statutory requirements and caselaw in each jurisdiction selected for comparison.

b. Field Research - Interviews, Surveys and Roundtable Discussions

Field Research was carried out in various regions of BC, Canada, and the United States. Interviews were held with older adults, persons from diverse community organizations, health and government representatives, court services and leaders in the fields of law, mediation and gerontology.

Through the research process a number of individuals in both Canada and the US, were consistently identified as experts in the areas of elder and guardianship mediation. These individuals included lawyers, mediators, educators, legislators, academics, and administrators of court programs. One-on-one interviews were conducted with a majority of these identified experts, subject to their individual availability.

Two written surveys were conducted – one directed at Canadian respondents, the other directed at international comparator jurisdictions. Each written survey was conducted to canvass opinions on various issues related to elder and guardianship mediation. This survey was distributed to individuals in various relevant fields (e.g. law, medicine, gerontology, social work) and was also made available on the CCEL website. The survey questions were based on themes in elder and guardianship mediation emerging from the Literature Review.

The survey focused on:

- Process (format, style, location / setting, decision-making)
- Topics and issues to be mediated
- Participants (who should attend, roles of participants, capability)
- Training & Credentials / experience of mediators
- Mediation in circumstances of suspected or actual abuse or neglect

At the close of the survey, respondents were asked to provide general demographic data (such as age, gender, education, and jurisdiction of practice) and an assessment of local practices. The results of the surveys were pooled and recorded in summary format (see Appendix C).

Several roundtable discussions with key stakeholders were held over the course of the project. In Canada, stakeholder sessions were held in Ontario and BC and addressed a number of issues and themes identified in the research (see Appendix 2).

c. Literature Review

The results of Literature Review were summarized in an annotated bibliography

It is notable that the use of mediation in elder law and adult guardianship matters is a recent and emerging tool in Canada. As a result, there is little Canadian-specific scholarly research and literature available that is specific to Canada.

d. Service Provision Research

Interviews were conducted with experts in the fields of elder law, family and other forms of mediation, elder mediation, substitute decision-making, gerontology, social work and guardianship legislation. Experts who have run elder and/or guardianship court services, regional programming, clinic services, law school elder mediation initiatives, rostering and certification programs were specifically targeted for consultation. Experts provided guidance on best practices, ethical challenges, emerging trends, mediation models and the impact of the contextual and legislative regimes on elder and/or guardianship mediation practice.

e. Themes

At each step of the research, themes emerged that influenced the approach applied to the next section. The project began with a review of literature and legislation, which provided a foundation for a qualitative survey and roundtable discussions. In turn, these discussions and the responses generated by the questionnaires provided an outline for an interview guide.

The following were themes identified in the project research:

- Need for credentialing and specialized training of elder and guardianship mediators
- Need for broad, flexible protocols that meet the unique demands of each elder or guardianship case
- Intertwining of capacity issues with elder and guardianship issues
- Special ethical considerations the mediator and professional or fiduciary participants in elder and guardianship mediation (participants may include lawyers, Public Guardian and Trustees, social workers, case managers, substitute decision makers)
- The multi-party aspect of elder and guardianship mediation - ethical issues that may arise in this context, family and group dynamics, power imbalances, undue influence of a vulnerable adult, challenge of determining who should be included in the mediation
- Mediating in situations where elder abuse or neglect has, or is, occurring and if suspected, who should report abuse or neglect and how
- Concerns that the mediation process could be misused as a tool of abuse or coercion

- A wide variation in understanding of what constitutes elder mediation, leading to confusion or disagreement regarding mediation models or goals
- Concerns about ensuring self-determination and voluntariness of the parties in the context of “mandatory” mediation
- Limitations on resources, including cost barriers, limited availability of necessary expertise in specialized cases, and constraints on implementation of mediation agreements due to limited community resources in the elder care field

6. Older Adult, Older Person, Senior, Elderly or Elder: A Few Thoughts on the Language We Use to Reference Aging

The English language seems to lack appropriate, positive terminology to refer to aging in a way that recognizes the strength, wisdom and often privilege associated with chronological age. “Elderly” connotes frailty. “Senior” is too limited. In Canada, the word “senior” indicates a person is specifically age 65 or older; the term is generally used in a government context, to reference programs, portfolios, and entitlements associated with this benchmark age. In this sense the term has lost its capacity to refer to people outside of institutional referents.

In the legal field we often speak of “elder law” as an area of focus. (We will discuss this field in greater detail in Chapter 2 of this report.) But using the term “elder” to universally reference aging is problematic. “Elder”, while suggesting wisdom, also tends to be associated with spiritual or community leaders or sages in a First Nations context. Indeed, the Oxford English Dictionary provides multiple definitions for the word “elder”, including “a leader or senior figure in a community or tribe.” It is important that these meanings not slide into each other and create uncertainty about comments contained in this report. It is certainly not the case that all individuals of advanced age in Canada are revered or respected for the wisdom they have accumulated with aging, and this report is not a commentary on First Nations communities or practices.

From the initial stages of drafting of this report, we struggled with language. The goal of this project is to provide support for the emerging practice areas of elder and guardianship mediation, and provide some guidance in terms of the development of best practices. Surely, one of the essentials of good practice is to avoid ageism, that is to say, “a systemic way of thinking about aging and older persons that sees aging as a negative process and older adults as separate and different from other members of society, attributing to them a set of negative characteristics.”¹⁸ Language can be a slippery tool, and even with the best of intentions, values can hide behind word choice. In this report we mostly use the terms “older adult”, “older person” and “aging”, while at the same time acknowledging their imperfections.

¹⁸Law Commission of Ontario, *The Law as it Affects Older Adults: Developing an Anti-Ageist Approach – Interim Report* (June 2011) at 3, online: <www.lco-cdo.org>.

CHAPTER 2 – An Introduction to Mediation, Elder Law & Elder Mediation

In Canada, as noted earlier in this report, the dramatic demographic shift (sometimes colloquially referred to as a 'silver tsunami' of the baby boomers), the growing awareness of the specific social and legal needs of older adults, as well as the increasing appreciation of the value of alternative dispute resolution mechanisms, such as mediation, have prompted the development of elder law and elder mediation as specialty practice areas. With the development of these practice areas a number of issues particular to the older adult population has emerged.

1. Mediation Overview

a. What is Mediation?

Mediation is a means of non-adjudicative dispute resolution used in a broad range of settings and by mediators coming from diverse professional fields. As a result, the mediation field contains a wide range of philosophies, styles and models. Mediation itself is hard to define.¹⁹ At this time there is no single model of mediation, nor is there a universally accepted set of core or fundamental features. This is due to very different mediation and alternative dispute resolution processes being included under the “mediation umbrella”. For example, there are significant differences between private mediation and mediation processes within the court system. How the mediator carries out his or her work and the steps that are taken in the mediation process will also vary depending on the context.

Even though there is not agreement on what dispute resolution processes fall inside the mediation umbrella and which fall outside, it is possible to describe mediation in a way that encompasses the vast differences from setting to setting. The term “mediate” is derived from the Latin word “mediare”, which means to be in the middle.²⁰ Mediation can be simply described as a process by which an impartial third party meets with the parties to a dispute in order to help them settle their differences.

For the purposes of its *Adult Guardianship Training Manual* (the “TCSG Manual”), The Center for Social Gerontology (“TCSG”) defines mediation as “the intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party, who has no authoritative decision-making power, to assist disputing parties in voluntarily reaching their own mutually acceptable settlement of issues in dispute.”²¹

For the purpose of her article entitled, “Is the Use of Mediation Appropriate in Adult Guardianship Cases?”, Mary F. Radford defines mediation as follows:

¹⁹ Lawrence Boulle & Kathleen Kelly, *Mediation: Principles, Process and Practice* (Vancouver: Butterworths, 1998) [*Boulle & Kelly*].

²⁰ Kimberly Kovach, *Mediation: Principles and Practice* (St Paul's: West Publishing Co, 1994)[*Kovach*].

²¹ Susan D. Hartman, The Center for Social Gerontology, *Adult Guardianship Training Manual* (Ann Arbor, Michigan: TCSG, 2002), Module One at 52 [*TCSG Manual*]. The TCSG Manual was created “for mediation centers and other programs that want to expand their mediation services to provide mediation in adult guardianship cases.” The TCSG advises that the manual “can be used by court-annexed programs; community dispute resolution programs; private, public, non-profit or for-profit organizations; or individuals.”

A process in which an impartial third party – a mediator – facilitates the resolution of a dispute by promoting voluntary agreement (or “self-determination”) by the parties to the dispute. A mediator facilitates communications, promotes understanding, focuses the parties on their interests, and seeks creative problem-solving to enable the parties to reach their own agreement.²²

Although universal agreement of the definition of mediation does not exist, most would agree on its purpose – to assist people to reach a voluntary resolution of a dispute. The differences in definition largely result from differences in the specifics of how such assistance is provided.²³

b. Mediation Models

As noted above, there is considerable variation with respect to mediation approaches. One aspect of this is the result of the broad range of options of mediation models and structure. A few of these differences will be discussed in this section.

(i) Private vs. Institutionalized

Private mediations are those offered on a “fee for service” basis by mediators in private practice. Private mediators may receive referrals from government agencies but operate independently. A private practice mediator may focus solely on mediation or may provide mediation as a part of a broader range of services, for example a legal practice. Mediation is largely an unregulated field. As such, anyone can provide mediation services regardless of training or background (or lack thereof). However, if a private practice mediator is receiving referrals from a government agency or other similar body, that government or agency may set minimum certification standards and other requirements that must be met before a mediator can receive referrals.

Institutionalized mediation refers to mediation programs that which are organized and administered by a government agency or professional body. A mediator is paid by the agency or organization and must conduct the mediation in accordance with program policies, rules and structure.

(ii) Mandatory vs. Non-Mandatory

Non-mandatory or voluntary mediation refers to mediation processes in which disputants choose to participate voluntarily. Mandatory mediation refers to mediation to which disputants are ordered or required to attend. A requirement to attend mediation might be set out in a contract (for example, where an employment contract states that the employee must attempt to resolve a dispute by attending mediation). Alternatively, the requirement to attend mediation may be set out in a statute, whereby certain disputes in the court system must be referred to mediation.

There are different types of mandatory mediation processes. For example, a court may refer parties to mediation, but the parties may have the right to refuse mediation. Alternatively,

²² Mary Radford, “Is the Use of Mediation Appropriate in Adult Guardianship Cases” (2002) 31 Stetson LR 611 at 617 [*Radford*].

²³ *Kovach*, *supra* note 20.

parties may be required to attend a mediation session, but not necessarily be required to participate once there. Or, in addition to being required to attend mediation, the parties may be required to make a genuine “good faith” attempt to settle.²⁴ As mediation is by definition a voluntary and consensual process, it is understood that courts should never order parties to participate to the extent that participation requires that parties must reach an agreement. Examples of mandatory and non-mandatory mediation programs in Canada and the US are discussed in more detail in Chapter 6.

(iii) Court-connected

Mediation can be carried out in the private sector, or in a program connected to a particular court process. Court-connected mediation may be established by statute or by court or government policy. Boulle and Kelly note the following:

Most court-connected mediation is or will be part of modern case management systems in Canada. Case management refers to attempts by the courts and court personnel to assume tighter administrative control over the litigation system, as opposed to older common law assumptions that the parties were responsible for the progress and timing of proceedings... Since mid-1994 mediation has been added formally in some jurisdictions and informally in others to case management requirements in many contexts.²⁵

There are various categories of court-connected mediation processes in addition to those situations where a court registrar or judge conducts mediation within the court system. These categories are as follows:

- 1) Court referral independent of formal authority. This is a situation where judges and court personnel recommend that parties try mediation to resolve the dispute.
- 2) Referral in court’s discretion with parties’ consent. This is a situation where the court rules or other provisions allow for referral of a case to mediation with the parties’ consent.
- 3) Referral in court’s discretion without parties’ consent. This refers to situations where judges or court personnel have the discretion to refer a case to mediation even over the parties’ objection.
- 4) Routine court referral. This refers to a situation where the court rules or other enactments provide that certain cases should be sent to mediation. In this situation the referral to mediation is not left purely at the discretion of judges or court personnel.²⁶

(iv) Statutory vs. Non-Statutory

As discussed above, court rules or provisions in other enactments may require or authorize mediation to be conducted at different stages of the court process. Non-statutory mediation refers to situations where disputants decide to try to resolve a matter through mediation and where the option or requirement is not set out in statute.

²⁴ *TCSG Manual*, *supra* note 21 at 52.

²⁵ *Boulle & Kelly*, *supra* note 19 at 204.

²⁶ *Boulle & Kelly*, *supra* note 19 at 207

(v) Examples of Statutory or Court-connected Mediation Programs

An example of a statutory mediation program is BC's Child Protection Mediation Program (the "CPMP"). Section 22 of the *Child, Family and Community Services Act* allows for a court proceeding to be adjourned for up to three months so that the parties can try to resolve the dispute through mediation.²⁷ It is within the discretion of the parties whether or not to pursue this option. Child protection mediation in BC is carried out within a structured program that includes a roster of qualified and experienced child protection mediators who have met the program's training and certification requirements. Specific government approved policies are in place to govern matters such as the total number of approved hours for mediation sessions, information that the mediator must provide to the participants, and the contract fee schedule for child protection mediators. The CPMP is discussed in further detail in Chapter 4.

Alaska's Adult Guardianship Mediation Program (the "AGMP") is an example of a court-connected, voluntary mediation program. The Alaska AGMP is described in further detail in Chapter 4.

c. Mediator Styles

Although mediators use different mediation styles, the three most commonly cited in the mediation literature are: 1) facilitative/interest-based; 2) evaluative; and 3) transformative. An evaluative (or directive) mediator will evaluate the strengths and weaknesses of a case and may offer recommendation to the parties. A facilitative/interest-based mediator acts as a facilitator for the mediation in order to help the parties identify their underlying interests and work creatively towards a solution. A facilitative mediator does not try to direct the mediation. In both evaluative and facilitative mediation the goal is to reach a settlement. In transformative mediation the goal of the mediation is to transform the relationships and settlement of the specific dispute may or may not be a result of mediation.

Historically the mediation literature has formed mediator styles into different categories, with strong argument being made by some experts that the interest-based or facilitative model is to be preferred. However, more recent literature has suggested that mediators generally use a range of different styles in their work and that typecasting into rigid categories is not useful - that mediators commonly borrow techniques from different styles.²⁸

d. Mediator Training and Credentials

Mediation is largely an unregulated field in Canada and, therefore, a universal standard of training or qualification for mediators does not exist. Nonetheless, there are readily available training facilities in Canada and the predominant view is that training, especially skills-based training, is necessary.²⁹ Furthermore, certain credentials and training requirements are often required to qualify to be on government or similar rosters and receive roster referrals.

²⁷ *Child, Family and Community Services Act*, RSBC 1996, c 46 [CFCSA].

²⁸ See for example, George Adams, *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Canadian, 2003); Cheryl Picard, "Common language different meaning: What mediators mean when they talk about their work" (2002) 18 *Negotiation Journal* 25.

²⁹ See, for example, *Boulle & Kelly*, *supra* note 19 .

In British Columbia, there are three court mediator rosters: the Civil Roster, Family Roster and Child Protection Roster. Specific training and qualification standards are set for roster mediators and it is necessary to be on a roster in order to receive referrals for certain government or court-connected programs.

In Canada, examples of national organizations that provide certification include Family Mediation Canada and the Institute for Conflict Management. British Columbia lawyers have the option of qualifying to be “Family Law Mediators”, which requires the completion of certain courses and three years of practice experience.³⁰

e. Mediation format and process

Mediation often involves several different stages. This is commonly the case, especially in facilitative mediation. However, within that general rubric there is immense variety, particularly because mediation is unregulated, even when it is delivered pursuant to statute. According to Boulle and Kelly:

The number of stages and other features of the mediation process depend not only on the model of mediation being used but also on: the background, training, and style of the mediator; the nature of the dispute and dispositions of the disputants; the background of the disputants and/or their advisors; the participants at the mediation inclusive of specific needs, the availability of funds and other resources; and external factors such as the existence of a statute regulating the mediation.³¹

It is common when mediating certain types of disputes, such as family or child protection, to meet participants individually in advance of the mediation joint session. These “pre-mediation meetings” are less common in other settings and other types of disputes, although in the absence of a formal pre-mediation meeting it is common to have an intake or screening process during which some of the same goals can be accomplished.

Pre-mediation meetings are particularly valuable for screening for abuse and for family power dynamics so that the mediator can manage some of these issues effectively once the parties are in joint session. Pre-mediation sessions are also useful for informing the parties about the mediation process, determining who should be at the table, establishing if any accommodations need to be made to ensure maximum participation by all parties, answering questions and coaching parties on how to present their issues during the joint session.

Mediation generally begins with a joint session with all parties present (with or without individual meetings held in advance). During a joint session each party has the opportunity to describe mediation goals and the nature of the dispute. This is an opportunity to exchange information, explore interests and generate options with the assistance of the mediator.

A common mediator technique is to hold an individual meeting or “caucus” if the mediation reaches an impasse. Mediators might also hold a caucus prior to moving into exploring different settlement options. The balancing of time spent in joint sessions and caucuses in a

³⁰ The Law Society of BC, online: <<http://www.lawsociety.bc.ca/page.cfm?cid=1476&t=Fa>>; see also Law Society Rule 3-20, online: <<http://www.lawsociety.bc.ca/page.cfm?cid=982&t=Law-Society-Rules-Part-3-Protection-of-the-Public#3-20>> [LSBC].

³¹ *Boulle & Kelly*, *supra* note 19 at 99.

mediation session is a matter of mediator style - some mediators rarely hold caucuses while other mediators spend the majority of the session in individual meetings with parties. Sometimes a mediator will hold a series of separate, individual meetings during a mediation session, with the mediator moving back and forth from individual meetings with one party to individual meetings with the other party and carrying settlement offers back and forth. This caucusing back and forth is often referred to as “shuttle mediation”.

f. Core Ethical Standards in Mediation

(i) Conflicts of Interest

One of the first challenges that comes into play in the process of mediation is the presence or possibility of conflicts of interest. A mediator may have a conflict of interest due to a relationship or connection with a participant or stakeholder in the outcome of the mediation. A participant may be in a position of power and be a stakeholder, such as the holder of a power of attorney in charge of property who will also benefit from that property under a will. Mediators must be aware of their own conflicts of interest and the potential conflicts of participants.

Mediators may also face conflicting ethical obligations, depending on their professional background. A social worker or lawyer may have professional ethics obligations to consider, in addition to his or her obligations as a mediator. Similarly, mediators need to remember that their role is to facilitate, not advocate, which may not accord with their professional instincts.

Mediators are not in a position to judge the individual choices of participants. For example, victims of abuse have a right to live at risk. In a similar vein, conflicts may arise between cultural norms and legal or ethical obligations. The right to self-determination must be respected.

(ii) Voluntariness

The principle of voluntariness requires that all participants must participate voluntarily in mediation discussions and attempts at resolution. Any outcomes or decisions arrived at through mediation must also be voluntary. Mediators, as facilitators, must look for hesitation, pressuring and misunderstanding. The issue of decision-making capacity is linked to voluntariness, as are issues such as abuse and power imbalance. These issues are discussed in more depth below and in Chapter 3.

(iii) Confidentiality

A key feature of mediation is the confidential nature of the discussion that occurs within the mediation context. When mediation is a step in a legal proceeding, this confidentiality may be especially important. Again, conflicts between the duty to preserve confidence and other ethical obligations (such as to report abuse) may exist. Linked to the issue of confidentiality is disclosure. For example, some participants may want to withhold certain information from others. Key stakeholders may not be present at the mediation, which presents further disclosure considerations.

(iv) Impartiality and Neutrality

Arguably, the most important characteristic of a mediator is impartiality. Impartiality forms part of nearly every definition of “mediation”, including definitions in most mediator codes of ethics and professional conduct. According to many such definitions, impartiality means freedom from favouritism, bias or prejudice, or from the appearance of favouritism, bias or prejudice, either in word, action or association.

An important question for elder and guardianship mediators is whether the fact of being a mediator of this type implies a predisposition to hold the interests or opinions of the older adult above the other participants. According to Catherine Morris, there are four concepts embedded in the terms “neutrality” and “impartiality”: non-partisan fairness, the degree of mediator intervention, role limitation and objectivity:³²

If mediators can skillfully and appropriately attend to these concepts, which in essence are the responsibilities of being a mediator, they will promote the image of being ‘neutral and impartial’ and gain respect and enhance their credibility and trustworthiness.³³

A number of ethical issues arise particularly in the context of elder and guardianship mediation. Ethical issues in elder and guardianship mediation are discussed in detail in Chapter 3.

2. Elder Law

A consistent theme emerging from the EGM project research is the need for specialized training for elder mediators, and in particular mediators involved in adult guardianship matters. Two examples of areas that have been identified in the literature and by experienced practitioners as critical areas in which mediators require specialized training, are “elder law” and “elder abuse”. A brief overview of these topics, as well as other important areas and issues arising in elder law and elder mediation is provided in the following sections.

a. What is Elder Law?

The rationale for specialized training in elder law is based on the concern that mediators are not adequately informed about the legal framework in the elder area may not recognize applicable legal rights of older adults and may conduct mediation sessions that undermine or jeopardize the legal position of participants. For example, older adults are legally presumed to be capable of making decisions about their finances. However, due to ageism or cultural norms and stereotypes, as adults get older professionals may increasingly speak to family members about the older person’s financial issues rather than speaking to the older person directly.

Having noted that there is a strong rationale for knowledge-based training, it should also be noted that there is no one specific answer to “what is elder law” or “what is elder mediation”. Indeed, there are a variety of competing theories associated with various points of view and disciplines. Some believe that “elder” issues primarily relate to health care and

³² Hin Hung, “Neutrality and impartiality in mediation” (2002) 5:3 ADR Bulletin [Hung].

³³ *Ibid.* at 45.

capacity; others note the central focus on estate planning, tax, trusts and inter-generational transfers of wealth. Certain groups emphasize the strong narrative of human rights, feminism and ageism. Still other theorists argue that elder law and elder mediation do not exist as a specified field at all.

By contrast, some people analogize elder law and mediation to a lens through which to view the world, similar to Aboriginal law. To these practitioners, any area of law or mediation, which specifically affects the needs of an older person is “elder”, whether it be in the realm of criminal matters, real property, tenancy, constitutional law, etc. In essence, it is elder law or elder mediation if one is representing an older adult and legal issues result in a disproportionate impact to them.

This report does not advocate for one concept of elder law or elder mediation over the other. Further, it is not suggested that the existence of a broad spectrum of opinions and lack of a consistent definition of elder law or elder mediation is an insurmountable obstacle to improving its practice.

Generally speaking, such diversity of thought is a part of the flow of any development in society, and in this case, it indicates the emergence of a new vibrant field of ‘real life’ practice and academic exploration. Elder law and elder mediation are starting to ‘warm up’ notably in Canada, but are still at a very early stage in comparison to some other jurisdictions, such as the US.

As such, it is not required that there be broad agreement on “what is elder law” or “what is elder mediation.” What is important is that citizens actively engage in this critical reflection on the effect that an aging population will have on the needs of the population and the professionals who seek to serve and support them. It is within this broadly inclusive framework that this research project was conducted.

b. Overview of Key Issues in Elder Law

While well established in the US, elder law as a distinct area of legal practice is in its early stages of development in Canada. Elder law typically involves the integration of multiple areas of law with the goal of providing legal services that address some of the specific and complex legal issues affecting older persons. While the following list is not exhaustive, elder law is considered to involve the following:

- Estate law and succession planning (including inter-generational transfers of wealth)
- Substitute decision-making for health care (including advance care planning documents such as “living wills”, advance directives, representation agreements, powers of attorney for health and personal care, etc.)
- Substitute decision-making for financial affairs (powers of attorney)
- Abuse / Neglect / Self-Neglect
- Scams, frauds, financial theft or abuse of a financial instrument (such as a power of attorney)
- Health law (including health care consent)
- Risk management and personal care choices (smoking, drinking, living at risk, etc.)
- Adult guardianship (including least restrictive alternatives to guardianship)
- Family caregiving
- Inter-generational / family disputes

- Real estate law
- Housing and tenancy
- Access to and/or sufficiency of public or private benefits (home care, pensions, disability insurance, long-term care insurance)
- Long-term care / nursing homes
- Administrative law
- Disability law
- Employment law
- Undue influence
- Later life marriage, divorce
- Driving and activities of daily living
- Privacy
- Breach of trust
- Medication use / misuse / over-prescription
- Visitations
- Grandparents' rights and childcare
- Ageism

While the issues noted above can affect any person across the life course, they may disproportionately affect older adults due to specific needs, dependencies, limitations of choices and social vulnerabilities. For example, a retiree on a fixed income who has been subjected to financial abuse may have significantly more limited income-earning options than a younger adult who is still in the workforce. That older adult may consequently lose their home, their ability to pay for medications and food, and ultimately may suffer illness or death. While this may also be true of a younger person, the likely impact of such financial abuse may have a substantively higher impact on the older, more precariously situated adult.

Additionally, health concerns, dependency, fluctuating capacity, and family dynamics are common issues that hinder the effective resolution of elder legal issues. While most older adults live actively within the community, they may have increased physical, mobility or communication challenges.

Again, while most older adults retain capacity throughout their lives or to a very advanced age, there is a strong correlation between age and Alzheimer's disease or other related dementias and cognitive impairment. While the number of older adults generally in Canada who have capacity challenges may be small, of the group of adults who do have capacity challenges, a large percentage of them are older adults. The Alzheimer Society of Canada's 2010 report entitled, *Rising Tide: The Impact of Dementia on Canadian Society*³⁴ calls attention to some significant statistics regarding current and future dementia prevalence in Canada:

- By 2038 the number of Canadians (of all ages) with dementia will increase to 2.3 times the 2008 level, i.e. from 480,618 (1.5% of the Canadian population) to 1.1 million people, representing 2.8% of the Canadian population.
- Canadians with Alzheimer's disease or Vascular Dementia will account for the vast majority of dementia cases in Canada (approximately 83%).
- The proportion of the Canadian population with dementia increases with age.
Percentage of Canadians with dementia:

³⁴ Alzheimer Society of Canada, *Rising Tide: The Impact of Dementia on Canadian Society* 2010, online: <http://www.alzheimer.ca/english/rising_tide/rising_tide.htm> [*Rising Tide*].

- 7% in 2008 → 9% in 2038 of Canadians over age 60 will have dementia;
- 49% in 2008 → 50% in 2038 of Canadians over age 90 will have dementia.
- Prevalence of dementia in Canada will skew toward the older age groups due to general aging of the Canadian population.
 - Percentage of individuals with dementia who are over the age of 80: 2008 → 2038
 - In total: 55% → 68%.³⁵

Particularly, family often has a significant impact on older adults. Elder law often involves children and often the entire family of an older adult client. Family members may provide support to, or be dependent on, the older adult. Rivalries, disputes, and other conflicts can arise among family members; in turn, older adults may be caught in the middle or left out of key decisions. As well, inter-generational differences may lead to misunderstandings. These challenges require unique solutions that respect individual circumstances.

c. Elder Abuse - An Overview

The most common definition of abuse, originally developed by the United Kingdom organization Action on Elder Abuse in 1993, subsequently adopted by the World Health Organization and others, defines elder abuse as “a single or repeated act, or a lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harms or distress to an older person.”³⁶ Experts are not in agreement with respect to the exact prevalence of elder abuse due to differences in methodology used in various studies on the subject.³⁷ However, it is commonly thought to be around 3 to 5%. One well-known Canadian study, in which a random selection of seniors was interviewed, found that that 4% of seniors surveyed had experienced one or more types of abuse.³⁸ Given how common elder abuse is, it is important for elder law practitioners and elder mediators, as well as those considering the design of elder mediation programs, to have a solid knowledge of the issues surrounding elder abuse, including indicators of abuse, practice challenges and available support resources for victims of abuse.

Elder abuse includes actions that cause physical, mental, financial or sexual harm to an older person.³⁹ Neglect includes situations where an individual or organization fails to provide services or necessary care for an older person.⁴⁰ Specific types of elder abuse include the following: 1) physical abuse; 2) financial abuse; 3) psychological or emotional abuse; 4) sexual

³⁵*Ibid.* at 17-18.

³⁶ *Action on Elder Abuse Bulletin*, May-June 1995, No. 11, cited in *Missing Voices: Views of older persons on elder abuse* WHO and INPEA, Geneva: World Health Organization, 2002 at 3; see also Action on Elder Abuse, online: <[http://www.elderabuse.org.uk/About Abuse/What_is_abuse_define.htm](http://www.elderabuse.org.uk/About%20Abuse/What_is_abuse_define.htm)>; see also *Toronto Declaration on the Global Prevention of Elder Abuse*, 2002, online: <http://www.who.int/ageing/projects/elder_abuse/en/> or <<http://www.inpea.net/reportsresources/reports.html>>.

³⁷ For example, definitions of abuse vary, as does the period of time captured and the ages of participants.

³⁸ Elizabeth Podeneiks et al., *A National Survey on Abuse of Elderly in Canada* (Toronto: Ryerson Polytechnical Institute, 1990).

³⁹ Canadian Centre for Elder Law, *A Practical Guide to Elder Abuse and Neglect Law in Canada*, 2011 at 6, online: <<http://www.bcli.org/ccel/projects/practical-guide-elder-abuse-and-neglect-law-canada>> [*Practical Guide*].

⁴⁰ *Ibid.*

abuse; and 5) neglect. Although older adults may experience abuse by strangers or con artists, studies show that the most common perpetrators of abuse are family members, and most often by adult children and spouses.⁴¹ Older adults can also be abused or neglected by friends, caregivers, legal guardians and professionals (including nurses, doctors and lawyers).

Elder abuse can occur anywhere, including but not limited to the home, in hospital, in a care facility, and in the community. Elder abuse can involve a single incident or a pattern of abuse and/or neglect, and be intentional or unintentional.⁴²

A number of factors can contribute to abuse, including social factors and relationship dynamics:

Social isolation can make an adult more vulnerable to abuse or make it harder to access assistance. Older adults are sometimes abused by people they rely on for assistance, support or companionship. Older adults are also abused by younger family members and friends who are financially or emotionally dependent on the older person.⁴³

Financial abuse is of particular relevance in the context of guardianship matters. For example, family members or friends who are financially abusing an older adult may allege that the older adult is incapable of managing his or her finances as a strategy for obtaining access to the older adult's money. It is essential that any mediator providing guardianship mediation services understand the dynamics and forms of financial abuse, as well as relevant aging and elder abuse issues. Strong knowledge and awareness of these issues will help to ensure that mediators practicing in the area do not mistakenly confuse indicators of abuse with signs of dementia or diminished capacity. For example, an older adult's concern about why his or her money is missing is often "covered up" by the perpetrator's claim that "my mother/father is just confused".

Financial abuse refers to the misuse of an older person's funds and assets or to obtaining property and funds without that person's knowledge and full consent. The perpetrator of financial abuse is usually a spouse or partner, family member (often an adult child), caregiver, friend, or a trusted person in the older person's life. Financial abuse is very often accompanied by other forms of abuse, such as emotional abuse, physical abuse, or denial of rights. Some examples of financial abuse include the following:

- Theft of cash, credit cards bank cards, mail
- Cashing in RRSPs without permission
- Using an older person's bank card to withdraw cash from an ATM without permission
- Repeated borrowing
- Withholding an older person's pension
- Forcing an older adult to change his/her will or to give a power of attorney
- Misuse of power of attorney
- Forging an older adult's name or altering documents

⁴¹ M. Lundy & S. Grossman, "Elder Abuse: Spouse and Intimate Partner Abuse and Family Violence Among Elders" (2004) 16 *Journal of Abuse and Neglect* 85.

⁴² *Practical Guide*, *supra* note 39 at 6.

⁴³ *Practical Guide*, *supra* note 39 at 7.

- Establishing a “joint account” and using the older adult’s money without his/her knowledge or permission.

In regard to perpetrators of financial abuse, research shows that a sense of entitlement is commonly a factor. If the perpetrator is an heir to property he or she may justify the behavior as taking an advance from future inheritance or protecting future assets from being spent on care for the older adult. Perpetrators may also believe that they are entitled to reimbursement for caring for an older person. Perpetrator greed, combined with victim loneliness has been suggested as one of the most critical factors motivating financial abuse.⁴⁴

Research shows that there are common reactions to abuse. One is that it is often very difficult for victims to disclose the abuse. If abuse has occurred over a long period of time, the impact on victims can be profound.

d. Overview of Elder Law and Capacity

Central to elder law are the twin issues of capacity and substitute decision-making. The definition of capacity varies among jurisdictions and it is integral to almost every elder law issue. Procedures for assessing capacity also vary. Substitute decision-making is a broad term that includes powers of attorney, health care consent, guardianship and personal care choices. As with capacity, the definition of substitute decision-making and protocols for its components vary by jurisdiction and substitute decision-making legislation is changing.

Capacity may be defined as the ability of an individual to understand information relevant to making a decision and appreciate the consequences of making such a decision. Capacity was originally considered a binary concept: an individual was either entirely capable or entirely incapable. The legal concept of capacity has evolved from its roots in lunacy law. The modern concept of capacity takes into account fluctuating capacity and “shades” of capacity. Thus, the threshold of capacity differs, depending on the decision to be made. For example, the threshold for marital capacity is not equivalent to that for testamentary capacity or for health care consent. An older adult may not be able to make financial decisions, but he or she may be able to make personal care decisions. Modern laws on capacity acknowledge that an individual may be temporarily incapable or alternate between capable and incapable states. A health condition, a lapse in medication, or a chronic addiction can impair capacity for a period of time.

Capacity is integral to substitute decision-making legislation. In order to give rights to a substitute decision-maker (“SDM”), through a power of attorney or other instrument, an individual must be legally capable. In order to take away rights from an individual, as in the case of guardianship, he or she must be found to be legally incapable. Incapability is a legal determination. More recent thinking indicates that linked to capacity and substitute decision-making are the concepts of autonomy and least restrictive alternatives. Every person has the right to make his or her own decisions, until it is determined that he or she is incapable. If the right to self-determination is compromised by incapacity, the incapable individual must retain the maximum rights possible - the least restrictive alternative to complete autonomy.

⁴⁴ D. Rabiner, J O’Keeffe & D. Brown, “A Conceptual Framework of Financial Exploitation of Older People” (2004) 16 *Journal of Elder Abuse and Neglect* 53.

3. Elder Mediation

Elder mediation is well established in American jurisdictions. However, it is in its beginning stages in Canada. As a result, there is very little literature that is specifically Canadian. We can learn from the American experience, however, there are significant differences between the legal frameworks in regard to guardianship and capacity law as well as funding structures in the two countries. Accordingly, while American models and best practices are valuable for informing Canadian best practices, standards and models for elder mediation, a “made in Canada” or “made in BC” model adapted to the Canadian experience is needed.

The information emerging from the field research indicates that some of the debates in the broader mediation literature are starting to appear in the elder mediation field in Canada. These debates include issues such as: “what credentials or training should an elder mediator have?”; “which mediation model is the best?”; “should non-parties participate in elder mediation sessions?”; and “how can vulnerable persons be protected from harm in mediation sessions if there is an imbalance of power?” We have sought opinion and advice on issues such as these during our project consultations and have incorporated the feedback we received into this report.

a. Defining Terms

Elder mediation has developed in a similar way to elder law and, accordingly, shares a number of similar features, such as the multiplicity and complexity of issues involved and the involvement of multiple parties who are often family members. Also similar to elder law, there is no single definition of elder mediation. One common understanding of elder mediation is mediation in which one of the participants is an older adult or mediation where the issues in dispute are issues that are of particular significance to older adults.

Examples of definitions of elder mediation include the following:

Elder Mediation Canada:

Elder Mediation is a cooperative process in which a professionally trained elder mediator helps facilitate discussions that assist people in addressing the myriad of changes and stresses that often occur throughout the family life cycle. Elder mediation typically involves larger numbers of participants including older people, family members, friends and others who are willing to give support. Depending on the situation it is not uncommon to include paid caregivers, hospital staff, nursing home and or community care representatives, physicians and other professionals.⁴⁵

Association for Conflict Resolution, US:

Elder mediation is a specialised field of mediation that focuses on conflicts that arise in the context of aging. It encourages and promotes direct communication among the disputing parties, and seeks to create an environment where all participants have an opportunity to speak and be heard and work together to resolve issues.

⁴⁵ Elder Mediation Canada, online: <<http://www.eldermediation.ca/>> [EMC].

Elder mediation advocates for mutual respect and encourages all participants to understand the other participant's perspective on the issue. Elder mediation may prevent further family tension, division, estrangement, or the need for litigation.⁴⁶

Elder mediation has special aspects beyond this broad definition because of specific characteristics of some, but not all, older adults. Some of these characteristics include physical and mental disabilities and health issues commonly associated with the aging process.

A number of characteristics have been identified by practitioners and in the literature as distinguishing elder mediation from other types of mediation. Nancy Solnick explains that a characteristic of elder mediation is that it is likely to be multi-party, multi-generational and multi-issue mediation, often involving family members and family dynamics.⁴⁷ Solnick also identifies several other features of elder mediation as follows:

- It is often triggered by life events or changes in circumstances of an older person such as: the death of a spouse; a decline in physical, mental or emotional status; financial concerns
- It may require the presence of support or resource persons
- It may involve family conflict, including a history of past emotional issues affecting relationships and individual perceptions of a matter.

Bob Rhudy and Carolyn Rodis note the following with respect to elder mediation:

The primary focus of elder mediation training and practice is the potential need to make appropriate accommodations within the mediation process for possible physical, mental, cognitive or social limitations that may accompany aging so as to promote maximum effective participation of the parties to make informed self determination... In elder mediation the mediator must also be aware of and seek to counter-balance possible age discrimination or "ageism" whether by the mediator, by the participants, or other persons involved in the matter under consideration.⁴⁸

b. Issues Commonly Mediated

Elder mediation practitioners and the literature identify a multitude of issues and types of conflicts that are commonly the subject of elder mediation. Many of the issues and conflicts identified have also been identified above as elder law issues.

A non-exhaustive list of examples of issues generally identified as falling under the umbrella of "elder mediation" include:⁴⁹

- Family caregiving

⁴⁶ ACR Section on Elder Decision-Making and Conflict Resolution, online: <<http://www.acrelder.org/what-is-elder-mediation/>> [ACR].

⁴⁷ Nancy Solnick, Panelist, "Why Elder Mediation", *National Symposium*, *supra* note 17.

⁴⁸ Robert Rhudy & Carolyn Rodis, eds., *Elder Mediation Today: Manual and Resource Guide* (Baltimore: Senior Mediation and Decision Making, 2009) at 1 [Rhudy & Rodis].

⁴⁹ See, for example, *ibid.* at 7; Elizabeth Kelly, "Mediation Disputes Involving Older Adults and People with Disabilities". Colorado Elder Law Handbook (Denver: Colorado Bar Association, 2004); see also *Nancy Solnick*, *supra* note 47; see also *EMC*, *supra* note 45.

- Health and personal care arrangements
- Estate and succession planning
- End-of-life care decisions
- Retirement planning
- Substitute decision making for health and personal care
- Substitute decision-making for financial
- Personal choices about daily living
- Standards of care in a care facility
- Problems with other residents in a care facility
- Inheritance expectations
- Home share and housing arrangements
- Adult guardianship and least restrictive alternatives
- Mental illness and dementia
- Safety vs. independence and self-determination - risk taking autonomy for the older adult
- Conflict with care providers
- Abuse and neglect
- Driving
- Later life marriage and divorce
- Grandparent rights
- Family relationships and intergenerational/family disputes
- Holidays and visitation
- Benefits and insurance
- Long term care
- Employment

c. Relevant Contextual Issues

(i) Ageism

What is frequently referred to as “ageism” in academic literature is a negative attitude towards older persons based on negative beliefs and assumptions about aging and older persons. It involves the stereotyping of older persons and discrimination against older persons because of age. “Ageist assumptions can result in lack of respect for an older adult’s personal values, priorities, goals, lifestyle choices, and inherent dignity as a human being.”⁵⁰ Some examples of ageism include:

- Assuming an older person is incapable of doing something or making decisions
- Preventing a capable older person from making decisions
- Refusing to provide services to an older person
- Treating an older person as weak, frail or disabled
- Devaluing an older person’s choices
- Speaking or behaving in a demeaning way to an older person
- Making demeaning or negative comments about an older person

⁵⁰ *Practical Guide*, *supra* note 39 at 10.

Dr. Paul Solnick points out that “[a]geism itself may be the origin of the dispute.”⁵¹ Solnick notes that part of ageism involves the judgment that an older person who is willing to accept a certain amount of risk might have diminished capacity incapacity, which may cause parties in a mediation, and perhaps even the mediator, to exclude the older adults from decision-making.⁵² Solnick advised mediators that, “[w]hile older clients may need accommodations due to factors associated with normal aging, mediators need to watch out for making assumptions and the unconscious influence of ageism on their own communication and body language,” and instructed mediators “to treat older persons as clients of any age and not become over solicitous or protectionist.”⁵³

As explained in the TCSG Manual:

Many stereotypes about aging may be held by both mediators and parties, and in some instances by the older persons themselves. Recognition of these stereotypes by the mediator can help get beyond assumptions and resolve underlying issues in a way that meets actual needs of the specific older persons.⁵⁴

The American Association of Retired Persons’ tool entitled, *Stop! You’re Both Right: A Guide for Dispute Resolution Programs in Serving Older Americans*, lists eight common myths about older persons (and the possible effects these incorrect assumptions might have on mediation), as follows:⁵⁵

- Chronological age determines physical, mental and emotional status
- All older persons are the same
- Older persons are unproductive
- Older persons are inflexible
- Older persons are senile, forgetful, confused
- Older persons withdraw from life, cannot learn, prefer to live in the past
- Most older persons are disabled
- The “golden years” of old include time and money.

It is important that elder mediators recognize that aging is an individualized process and “never assume that a particular older person has any particular trait without determining the individual characteristics and needs of that person. However, it is helpful to be aware of and recognize some of the problems common to many older persons.”⁵⁶

(ii) Disability Issues

Elder mediation has some commonality with disability mediation in that there is a higher likelihood of physical ailments as a person ages. If an older person (or other party) has diminished capacity or other disabilities, accommodations may need to be made to allow for

⁵¹ Dr. Paul Solnick in Kathryn Mariani, “Developing Ethical Standards for Elder Mediation: Questions Along the Way”, 28:6 *Bifocal* 85 at 86 [*Solnick & Mariani*].

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *TCSG Manual*, *supra* note 21, Module 3 at 43.

⁵⁵ Erica Wood, *Stop! You’re Both Right: A guide for Dispute Resolution Programs in Serving Older Americans* (American Association of Retired Persons, 1995) at 6-13 in *TCSG Manual*, *supra* note 21, Module 3 at 43.

⁵⁶ *TCSG Manual*, *supra* note 21, Module 3 at 44.

maximum participation of the older person in mediation. Judith Cohen recommends that mediators speak to the older person with disabilities to determine what accommodation is needed to enable the person to participate optimally in mediation.⁵⁷ Examples of accommodations include changing the length of session or the time of day (for example, to deal with fatigue), adapting written material so that it is easily readable, making hearing aids available for older adults who have hearing impairments, or including an older adult's support person in the mediation session.

Barbara Foxman emphasizes the importance in elder mediation of personal intake interviews "in order to assess the capacities of everyone to participate in the mediation safely and effectively."⁵⁸

Even if accommodation for the disability has been made, a situation may arise where a mediation participant with a disability is nonetheless finding it difficult to participate in the session. According to Cohen:

The issue is hardest to deal with in the case of cognitive disabilities and psychiatric disabilities – hidden disabilities that may interfere with the person's ability to communicate. A person with an auditory processing disorder...may have difficulty following what people are saying and/ or putting his own thoughts into logical sequence. The mediator can use the caucus to find out what she can do to facilitate more effective communication.⁵⁹

(iii) Capacity and Mediation

As mentioned above, while most older persons do not have diminished capacity or dementia, of the group of adults who do have dementia or other cognitive challenges, a large percentage of them are older adults. Dementia is a serious loss of cognitive ability in a previously unimpaired person, beyond what might be expected from normal aging. As explained in the Alzheimer Society of Canada's *Rising Tide* report:

Dementia refers to a large class of disorders characterized by the progressive deterioration of thinking ability and memory as the brain becomes damaged. Dementias are generally categorized as reversible (dementias secondary to some primary illness such as thyroid disease or kidney disease, which can be successfully treated) or irreversible.⁶⁰

Dementia may be static, the result of a unique global brain injury, or progressive, resulting in long-term decline due to damage or disease in the body.⁶¹ "Alzheimer's disease, the most common form of dementia, is a progressive, degenerative and fatal brain disease, in which cell to cell connections in the brain are lost and brain cells eventually die. It is not a normal part of aging."⁶²

⁵⁷ Judith Cohen, "Making Elder Mediation Accessible to People with Disabilities" in *Rhudy & Rodis*, supra note 48 at 29 [Cohen].

⁵⁸ Barbara Foxman, "Ethical Issues in Elder Mediation – Who Needs to be at the Table", *National Symposium*, supra note 17 at 2.

⁵⁹ *Cohen*, supra note 57 at 32.

⁶⁰ *Rising Tide*, supra note 34 at 10.

⁶¹ Wikipedia, "Dementia", online: <<http://en.wikipedia.org/wiki/Dementia>>.

⁶² *Rising Tide*, supra note 34 at 10.

Capacity is treated generally in law as situation- and decision-specific, rather than global. This means that a legally capable adult may be legally incapable of making certain decisions but not others. For example, an older person with diminished capacity may be legally capable of making personal or health care decisions but not financial decisions. As explained by medical experts “the terms ‘capacity’ and ‘competence’ refer to a categorical status. This does not mean that a categorical judgment about a person’s capacity or competence is global in scope. It simply means that, for a particular decision, the person is or is not competent to make that decision”.⁶³

It is important to note that, although medical evidence may inform a determination of incapability, ultimately it is a legal determination. It is common for older adults with dementia to be able to make some decisions, but not others, or to be able to make decisions in certain situations but not others. As described by the authors of a BC based study, “a capable adult must be able to understand information, evaluate data, and appreciate the consequences of decisions. In this sense capability is about a person’s decision-making process, and it is neutral as to the outcome of that process.”⁶⁴

Elder mediators need to have a strong understanding of how cognitive issues may impact the decision-making ability of an older adult participant. As well, elder mediators need to be aware of the legal implications for an older adult with cognitive challenges if that older adult is not capable of making certain decisions.

Where an older adult is not capable of making a particular decision a legally appointed substitute decision-maker may make the decision instead. The substitute decision-maker may have been appointed by the older adult while he or she was still capable, for example by a power of attorney. Alternatively, a court may have appointed a substitute decision-maker for the older adult. As discussed in Chapter 3, the mediator must ensure that the voice of an older person with diminished capacity is represented in the mediation. Accordingly, where appropriate, a substitute decision-maker for the older adult should be present at the mediation session.

If an older adult is not legally capable and a substitute decision-maker has not been appointed, there may be no one lawfully authorized to make financial and legal decisions on behalf of the older adult.⁶⁵ It may be necessary to suspend the mediation in order to resolve the issue of who should be appointed as substitute decision-maker. In the interim there may be some decisions that can be made in mediation (for example, aspects of the dispute that are between other family members and do not require the older adult to decide or consent or do not impact the rights of the older adult). However, any mediation sessions that proceed

⁶³ Scott Kim, Jason Karlawish & Eric Cain, “Current State of Research on Decision Making Competence of Cognitively Impaired Elderly Persons” (2002) 10 *American Geriatric Psychiatry* 151 at 152.

⁶⁴ The BC Adult Abuse and Neglect Prevention Collaborative, *Vulnerable Adults and Capability Issues in BC: Provincial Strategy Document*, (Vancouver: The BC Abuse and Neglect Prevention Collaborative, 2009) at 17 [BC Collaborative].

⁶⁵ If the decision is a health care decision rather than a legal or financial decision an authorized substitute decision-maker may exist despite the fact that one has not been appointed. The *Health Care (Consent) and Care Facility (Admissions) Act*, RSBC, 1996 c. 181, s 16 enables a temporary substitute decision-maker to make a decision for an incapable adult via the authority of the statute.

will need to be carefully structured to protect the rights and include the voice of the older adult.

According to Erica Wood, mediators should presume capacity and should be very careful not to exclude a party based on lack of capacity.⁶⁶ However mediators must also ensure that the party understands the process and can abide the outcome.⁶⁷ As Wood emphasizes, “The question is not so much ‘does the party have capacity to mediate’ as ‘can the party mediate with support?’ and ‘what can the mediator do to facilitate the understanding of the party?’”⁶⁸ The capacity to mediate is discussed further in Chapter 3.

(iv) Elder Abuse and Vulnerability

Given the prevalence of elder abuse and the dynamics that usually accompany abuse, in which the victim is in a much less powerful position than the perpetrator, it is important to ensure that victims of abuse and those at high risk of abuse are not disadvantaged by participation in mediation.

Historically, those at risk of elder abuse have been referred to as “vulnerable adults”. This terminology has been criticized by some scholars as being paternalistic and problematic in that it implies that vulnerability is a characteristic of some older adults. More recently, however, researchers have argued that vulnerability is a result of social circumstances, such as isolation, or lack of mobility that prevent the older adult from accessing help. This viewpoint has been described in the following words:

The notion of vulnerability captures more than the adult who has been abused or neglected. It highlights a potential, promoting the possibility of prevention rather than simply reacting... (Vulnerability has been defined in the following terms):

1. Vulnerability is relative – a person is more or less vulnerable...
2. Vulnerability is relational. A person is always vulnerable to something.
3. Vulnerability is not reducible to a disability issue. A disability or a medical condition may or may not give rise to vulnerability depending on the circumstances...
4. Vulnerability is a social condition. This social condition may arise out of diverse social factors such as isolation, a lack of education, poverty...
5. Vulnerability is not an inherent quality... it arises out of the relationship between a person’s characteristics and /or circumstances and a potential abuser.
6. Vulnerability is not a static concept. Social circumstances change and people do too.⁶⁹

⁶⁶ Erica Wood, “Addressing Capacity: What is the Role of the Mediator”, in *Rhudy & Rodis, supra* note 48 at 86.

⁶⁷ *Rhudy & Rodis, supra* note 48 at 87.

⁶⁸ *Rhudy & Rodis, supra* note 48 at 87.

⁶⁹ *Collaborative, supra* note 64 at 16.

4. Elder Mediators – Who Are They

An elder mediator is commonly understood as someone who mediates disputes involving older adults. This may be someone who practices elder mediation as one of many areas of practice, or it may be a mediator who only provides services in disputes involving older adults. As noted earlier in this chapter, mediation is a largely unregulated field. As such, anyone may use the title “mediator”. In the same way, anyone can use the title “elder mediator”.

5. Elder Mediation and Guardianship Mediation

a. What is Guardianship?

Guardianship of an adult (or “adult guardianship”) is the result of a court determination that an adult is legally incapable of making decisions about his or her personal or financial affairs. When a legal determination of incapacity is made, another person is given the decision-making rights of the legally incapable adult. As explained by Radford:

Legal incapacity is a concept that in modern jurisprudence is linked to an act – for example, the capacity to make a will or to enter into a contract. When the legal capacity to engage in an act is lacking, the act itself is null and void or at least voidable. When an adult is found to be legally incapacitated and a plenary guardianship is imposed the adult typically will lose such fundamental rights as the right to marry, the right to consent to or refuse medical treatment and the right to enter into contracts.⁷⁰

As described by TCSG in their TCSG Manual:

Full guardianship constitutes one of the greatest deprivations of independence and liberty that a person can experience; the person typically loses 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, [and] making decisions about medical care.⁷¹

Due to the significant impact of a finding of legal incapacity on the rights of an older adult, TCSG emphasizes that “although guardianship may sometimes be necessary to meet the needs of an incapacitated person, it should be considered only when no other less restrictive options are available.”⁷² For example, less restrictive alternatives that may be explored include, but are not limited to: powers of attorney for property or health and personal care; advance directives; representation agreements; crisis intervention techniques (including mediation, counseling, caregiving support services).

In theory, a formal court guardianship procedure is designed to protect the welfare of an allegedly incapable adult. Radford states that since capability is on a continuum and is not black or white, “[t]he court’s conundrum in a guardianship case is determining the point at which an adult’s actual incapacity warrants declaring that adult to be legally incapacitated.”⁷³

⁷⁰ Radford, *supra* note 22 at 627.

⁷¹ TCSG Manual, *supra* note 21 at Module 1 at i.

⁷² TCSG Manual, *supra* note 21 at i.

⁷³ Radford, *supra* note 22 at 628.

b. Guardianship Mediation

Adult guardianship mediation (or “guardianship mediation”) refers to the use of mediation in guardianship proceedings to resolve disputes related to the decision-making capacity of an adult. As noted by TCSG, “[g]iven advances in modern medicine and increased longevity...[a]n increasing percentage of the population can be expected to live beyond their capacity to provide fully for their own personal care or financial management”⁷⁴ Further, given the increased prevalence of dementia with age, capacity concerns may arise in any mediation involving older adults even where the dispute itself is not specifically about guardianship. However, the term “guardianship mediation” refers to mediation where the dispute itself is primarily about guardianship and closely related matters. As such, guardianship mediation is usually connected to a court process.⁷⁵

As noted by the TCSG, “a court is limited to statutory solution: usually to appoint a full guardian, appoint a limited guardian, or dismiss the case. The emphasis is on naming a guardian, not on resolving the problem.”⁷⁶ The TCSG posits that the “use of mediation can help families explore alternatives to guardianship, thus avoiding the loss of rights that accompanies court-imposed guardianship.”⁷⁷ Further, the TCSG emphasizes that:

Mediation can assure the retention of maximum possible independence and autonomous control over basic life decisions for older persons, while still addressing their need for assistance. It includes the older person in the decision-making process. It can avoid the trauma of a court proceeding. It encourages consensus building within the family setting. It fosters the preservation of relationships with family and friends, critical to ensuring that older persons with disabilities receive the best and most appropriate care possible. It can reduce ineffective and inefficient use of court resources. It also lessens demands on family and community caregivers by making maximum use of all appropriate community support services.⁷⁸

In general terms, guardianship mediation can be carried out prior to a court application, or at any point during the application up to the point that the court makes a decision. Since each jurisdiction has its own statutory regime and its own court rules, some regions may have more options for alternative dispute resolution processes such as mediation in guardianship matters than in others. For example, some jurisdictions may have narrower constraints regarding the options available for guardianship mediation once the court process is underway. In such jurisdictions, statute or court rules may affect when mediation is available, how mediation may be structured and what aspects of the guardianship issue may be mediated.

While the use of mediation in guardianship proceedings can be a valuable tool for resolving disputes related to concerns about the decision-making capabilities of older adults, it raises a number of distinct issues, practice challenges and ethical concerns. These issues are discussed in detail in Chapter 3.

⁷⁴ *TCSG Manual*, *supra* note 21 at i.

⁷⁵ Mediation of matters under the proposed mandatory mediation provisions set out in the BC legislature’s Bill 29, which are not yet in force, is an example of guardianship mediation.

⁷⁶ *TCSG Manual*, *supra* note 21 at ii.

⁷⁷ *TCSG Manual*, *supra* note 21 at ii.

⁷⁸ *TCSG Manual*, *supra* note 21 at i-ii.

c. Guardianship Mediation Models

Guardianship mediation is a very new field and therefore discussion in the literature of elder guardianship mediation service delivery models is limited. However, there are key points of agreement among experts regarding elder guardianship mediation service delivery models. Based on interviews with early leaders in the elder guardianship mediation field as well as feedback from BC experts and stakeholders there are at least three issues on which there is fairly universal agreement: 1) Capacity cannot be mediated; 2) pre-mediation meetings should be incorporated into the service delivery model; and 3) mediators should have specific training in order to mediate guardianship issues. Each of these areas of agreement is discussed in further detail below.

(i) Capacity Cannot be Mediated

In an adult guardianship proceeding, the test is whether there is sufficient evidence to establish that a person is incapable according to the legal test of incapacity. This is a legal question. In guardianship mediation, it is generally accepted and sometimes provided in legislation that the question of capacity cannot be mediated. In interviews, mediation experts were asked whether capacity could be mediated and the universal response was negative. This is congruent with the assumptions made by BC's mandatory mediation provisions in Bill 29. The wording of the legislation is clear that the issue of capacity cannot be the subject of mediation.

While the question has been raised regarding how mediation can be successful if the issue that is at the core of the dispute is excluded from mediation, in fact this approach is very similar to operational policies in BC's CPMP mentioned above. In child protection mediation the issue at the core of the dispute is whether or not a child is in need of protection, similar to guardianship mediation, where the question at the core of the dispute is whether or not the adult is legally capable of making decisions.

In child protection mediation, issues such as developing a care and safety plan for the child can be mediated without making a determination on whether or not the child is in need of protection. Similarly, in guardianship mediation a guardianship plan for an allegedly incapable adult can be mediated without making a determination of capacity. The success of BC's CPMP strongly suggests that guardianship mediation could be an effective way to resolve certain guardianship matters. Participants in the EGM Project's BC Stakeholder Strategy Session generally agreed that a court-connected guardianship mediation program in BC could be modeled on BC's CPMP. The CPMP is described in more detail in Chapter 4.

(ii) Pre-mediation Meetings

The strongest point of agreement amongst experienced practitioners and key stakeholders in the field, who were consulted during the EGM Project, is that it is imperative to hold pre-mediation meetings prior to a joint mediation session. Pre-mediation meetings refer to meetings between the mediator and individual potential mediation participants prior to the joint mediation session. Pre-meetings allow the mediator to establish who is a necessary party and who else should participate, screen for abuse and issues of power imbalance, inform participants about the mediation process, coach participants on how to present their

issues, and determine whether or not any party has capacity issues or a disability that may require accommodation.

Further support for the value and efficacy of pre-mediation meetings in guardianship mediation is the inclusion of the practice pre-mediation meeting/conferencing in virtually every elder mediation training program. In addition, pre-mediation meetings are an integral part of the Alaskan Adult Guardianship Mediation Program (“AAGMP”), which has been identified by most US experts interviewed in the course of the EGM Project as the model for court-connected adult guardianship mediation programs in the US.

Karen Largent, the Dispute Resolution Coordinator for the Alaska Court System (previously the Project Manager for the Alaska Court System responsible for the AAGMP), described the rationale for pre-mediation meetings as follows:

The mediator makes contact with mediation participants prior to the joint mediation session, meeting in person and individually with the vulnerable adult and family members whenever feasible. The purposes of these contacts are to explain and prepare the participants for mediation; screen for safety and other concerns that might have bearing on the appropriateness to mediate; provide for needed accommodations; consider strategies to maximize effective and productive participation of all participants; assure that the right people are present for mediation given the issues to be discussed; and to begin to engage the participants in a collaborative decision-making process.⁷⁹

Largent notes that the pre-mediation meetings are of particular use in adult guardianship mediation because of the types of issues, nature of the typical cases, and the dynamics between participants:

Often, the legal issues presented in the court petition or motion are not the underlying issues causing the family or others 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. Issues likely to be raised in guardianship mediation tend to revolve around safety and autonomy, living arrangements, and financial management. When the adult 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 his or her own choices and decisions if others feel those decisions are unwise and will impact his or her 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.⁸⁰

At the BC Stakeholder Strategy Session, participants also stressed the value of pre-mediation meetings, stating:

⁷⁹ Karen Largent, “Purpose and Structure of the Project”, in Teri Cairns, *Alaska’s Adult Guardianship Project Evaluation* (Anchorage: Alaskan Judicial Council, 2009) at 160.

⁸⁰ *Ibid.* at 159.

- Pre-mediation meetings allow for the inclusion of the voice of the allegedly incapacitated older adult
- Any elder mediation model must include pre-mediation interviews. Power and control and capability issues must be identified and addressed prior to a joint mediation session
- The multi-party aspect of guardianship mediation makes pre-mediation meetings or caucusing necessary.
- The purpose of pre-mediation meetings is to identify the issues, identify any concerns of abuse or power imbalance, establish the dynamics involved and determine whether mediation is appropriate.

Pre-mediation meetings are also integral to BC’s CPMP model. It is interesting to note the similarity between the use of pre-mediation meetings in child protection and adult guardianship mediations. A recent study, which examined child protection mediation in BC, found that child protection mediators strategically use the pre-mediation meetings to develop strategies and processes in order to successfully manage difficult issues that might arise in the joint mediation session.⁸¹ According to child protection mediators, goals for the pre-mediation sessions include setting a tone to manage difficult family dynamics and managing power imbalances, education and coaching to help all parties participate effectively in the joint session, and making decisions about who to include in the joint mediation session.⁸²

It is not surprising that both child protection mediators and adult guardianship mediators view pre-mediation sessions as invaluable. Both types of mediation commonly involve disputes with multiple parties. As well, in both cases it is common for participants to have capacity issues or other cognitive challenges that must be managed by the mediator, as well as complicated family dynamics with the possibility that one or more of the participants may have experienced abuse. The pre-mediation session helps the mediators to prepare for the joint mediation session and to develop strategies for how to best handle potential challenges in advance.

(iii) Specialized Training

Another point of agreement among experts interviewed during the EGM Project is that specialized training is needed for mediators wishing to mediate guardianship disputes. More specifically, experts stated that mediators interested in developing an elder mediation practice should have training and experience specifically related to elder issues, such as the different forms of elder abuse. For elder mediators interested in mediating guardianship issues, there was general consensus that additional training and experience beyond “core” elder mediation training is required (including training in substantive guardianship law and alternatives, capacity, dementia, self-determination and autonomy, etc.). Recommended training objectives and competencies for elder and guardianship mediation are discussed in further detail in Chapter 5.

If the mandatory mediation provisions in Bill 29 come into force, one option policy makers might consider when developing a “BC Adult Guardianship Mediation Model” would be to provide specialized training for elder guardianship mediators in the same way as specialized

⁸¹ Joy Anne Braun, *Child Protection Mediation: Mediator Strategies for Managing the Process* (MSW Thesis, University of British Columbia, 2007) [Braun].

⁸² *Ibid.*

training is offered in BC's child protection mediation program. Mediators who wish to mediate child protection disputes must have a certain level of training and experience in order to respond to a "Request For Qualifications". Qualified mediators must then participate in training provided by the Ministry of the Attorney General. This training includes information on child protection legislation, policies and laws, as well as commonly occurring ethical and process issues such as power imbalances and family dynamics.⁸³ Training requirements for BC's Child Protection Mediation Roster are discussed in detail in Chapter 4.

⁸³ For more information on mediator training see Dispute Resolution Office, *Child Protection Mediation Handbook for Mediators* (Victoria: Ministry of the Attorney General, 2008).

CHAPTER 3 – Ethics, Values and Principles

There is no universal code of ethics for mediation. Challenges and principles vary by jurisdiction and even by mediator. Ethical questions that may arise in mediation include the appropriate roles of the mediator and the participants, the nature of the issues to be explored, and the expectations placed on possible outcomes. Our research identified ethical issues that mediators and participants may encounter more frequently in elder mediation and in the context of guardianship mediation involving older adults than in other mediation contexts. Section 1 of this chapter provides a summary and discussion of these ethical issues as identified by experts, stakeholders, as well as the relevant literature. Part 2 discusses the importance of and provides suggestions for incorporating ethical issues and principles into the policy development process for adult guardianship mediation programs.

1. Ethical Issues in Elder and Guardianship Mediation

a. Power Imbalances, Safety and Screening

Mediators must always be aware of power imbalances between disputing parties in mediation. This is particularly true in elder and guardianship mediation. Older adults may have cognitive challenges or may rely on an adult child for care. An older adult who is overtly or covertly dependent on an adult child may find it very difficult, if not impossible, to express interests contrary to the interests expressed by the adult child. It is essential that the older person's rights are protected, that he or she is not pressured to give up his or her legal rights, and that any agreements reached in mediation are ones that the older adult has entered into voluntarily, with a full understanding of the implications of the agreement.

Elizabeth Kelly notes that screening for abuse and power imbalance is an important step that must be taken before mediation with an older adult can proceed. As she explains:

The mediator should always make the final decision on whether a case is appropriate or not... Cases that are generally not appropriate for mediation include when the power differential between parties is great and cannot be overcome or compensated for by the involvement of a proxy or an advocate... Cases involving older adults and people with disabilities where mediation is not appropriate are when there is a history of abuse within the family, elder abuse including financial exploitation, substance abuse or a history of intimidation of any kind.⁸⁴

Other experts have raised similar concerns. For example, Radford identifies several common criticisms of mediation, including the following:

Mediation and other informal forms of dispute resolution may jeopardize the rights of traditional 'outsiders' such as women and racial minorities. Those who have voiced this criticism have 'worried about situations where participants were of unequal power, the issues were volatile or involved 'public rights,' and the decisionmakers were unconstrained by public scrutiny or a formal record.' Potential bias and power misuse by the decisionmakers would not open to public scrutiny and

⁸⁴ Elizabeth Kelly, "Mediation Disputes Involving Older Adults and People with Disabilities", *Colorado Elder Law Handbook* (Denver: Colorado Bar Association, 2004) at 7.3.1.

those of unequal power would not have the advantage of procedural protections offered in adjudication.⁸⁵

At a practice level, people commonly associate power with coercive power or with the ability to force one's wishes on someone else. There has been a longstanding belief in the mediation field that power must be balanced for the results of mediation to be fair. However, even though mediators agree there may be power imbalances between parties participating in the mediation and that it is important that the weaker party not be disadvantaged, experts differ on how to balance power or whether it can be balanced at all. The literature on power in mediation is complex.

Power dynamics are very likely to exist in many elder guardianship mediation cases because there often are multiple parties and participants, some participants may have more power than others, and some participants may be severely affected by cognitive deficits. The multiplicity of interested parties aspect and the complex power dynamics are similar to child protection mediation. As such, a study examining how mediators manage power dynamics in child protection mediation may have some relevance to the elder mediation context.⁸⁶

The evaluation of the BC CPMP pilot project, discussed in more detail in Chapter 4, notes that pre-mediation meetings provide an opportunity for mediators to identify power dynamics between the parties and determine whether there are any safety issues. As noted in Chapter 3, a recent study found that child protection mediators in BC strategically used pre-mediation meetings to assist with the development of a plan or strategy for dealing with power dynamics in the joint mediation session. An example of such a strategy included carefully choosing who would attend the mediation and educating and coaching participants how to present their views in the joint session.⁸⁷ Our field research revealed strong support for the use of pre-mediation meetings as an effective strategy for identifying and managing power imbalance and as an essential feature of any elder or guardianship mediation model.

Although there is literature supporting the need to balance power in mediation there are some experts who do not believe power can be "balanced". These experts base this on an acknowledgement of the complexity of power dynamics, and that power is not an "either - or" proposition. For example, Bernie Mayer writes:

We have many misleading images of power. Perhaps the most prevalent is the idea that power can be balanced. This is a derivative of the view many have that power is a measurable quality. I believe that balance of power is a confusing and possibly meaningless concept. We can look at differences in power, at whether someone has the power to make something happen, at sources of power and at vulnerabilities to other's power. But the idea that power can be balanced so as to produce some equality or even equivalence of power is very misleading. Such a way of viewing power fails to account for the dynamics of power and the interactional context in which power must be understood. Instead of thinking that people need an equivalence or equality of power we might more usefully think that people need an adequate basis of power to participate effectively in conflict.⁸⁸

⁸⁵ Radford, *supra* note 22 at 620.

⁸⁶ See, for example: Braun, *supra* note 81.

⁸⁷ Braun, *supra* note 81.

⁸⁸ Bernie Mayer, *The Dynamics of Conflict Resolution: A Practitioner's Guide* (San Francisco: Jossey-Bass, 2002) at 51 [Mayer].

Ilan G. Gerwurz explains that “power is not a stagnant concept. Nor does it rest absolutely with one party or another. Power ebbs and flows such that it is constantly being reconstructed through the interaction between parties.”⁸⁹

If the views of Gerwurz and Mayer are correct then dealing effectively with power dynamics does not necessarily require balancing the power between the parties or between the mediators and the parties. Other approaches to dealing with power and protecting the vulnerable older adult may be required.

As noted above, most adult guardianship cases are initiated by a court application alleging the incapacity of an adult respondent. For this reason, an imbalance of power is almost inevitably present in adult guardianship mediation. In adult guardianship matters power imbalance frequently arises as a result of the diminishing capacity of the adult, which “allows family members and others to elevate their own interests above that of the adult.”⁹⁰ Further, as noted in the TCSG Manual, “A threat of guardianship may pressure a respondent into an agreement which gives up rights that would otherwise have been preserved.”⁹¹ As noted by Radford:

An adult who is the subject of a guardianship case is most likely suffering from a diminution in his or her physical or mental capabilities. This may lead to feelings of fear, confusion, and anxiety that make the adult particularly vulnerable to outside influences. Thus, an adult guardianship case is replete with opportunities for a variety of individuals to exert power or control over the adult. Foremost among these is the family member who has filed or threatened to file a petition for guardianship. To the degree the adult is aware of the potential for a complete deprivation of his or her rights, this family member is in a unique position to influence the adult to make concessions that the adult would not otherwise be willing to make. Another potential exertion of control may come from a caregiver or family member upon whom the adult has become increasingly dependent due to his or her own diminishing abilities. The mediator of an adult guardianship case must remain alert to such power imbalances and take appropriate measures to neutralize them.⁹²

Examples of strategies for neutralizing power imbalances in mediation may include the following:

- Ensuring that the adult is adequately represented
- Structuring initial presentations so that the adult is allowed to speak first
- Ensuring the neutrality of the site of the mediation
- Inviting experts for the adult who can convey information in an understandable manner
- Intervening and engaging in “reality checks” when necessary to clear up confusion and assuage the adult’s fears

⁸⁹ Ilan G. Gewurz, “(Re)Designing Mediation to Address the Nuances of Power Imbalance” (2001) 19 Conflict Resolution Quarterly 135 at 136.

⁹⁰ Radford, *supra* note 22 at 651.

⁹¹ TCSG Manual, *supra* note 21, Module 3 at 57.

⁹² Radford, *supra* note 22 at 651-52.

- On a broader scale, special emphasis on the potential for and manifestations of power imbalances should be required in the training of mediators for adult guardianship cases.⁹³

Mediators must also be aware of and sensitive to the way in which culture and diversity may impact and influence the expectations of and dynamics between the parties in mediation. For example, “families may have non-verbalized expectations that sons act in one way and daughters in another or that older or younger or married or unmarried siblings should take on certain roles.”⁹⁴

As noted by TCSG, “if a mediator believes that a party’s rights are not being protected, the mediator always has the option of terminating the mediation.”⁹⁵

b. Mediator Impartiality and Neutrality

As noted by Radford above, mediation has been criticized for not providing the procedural protections that exist in formal court adjudicative proceedings. It is for this reason that mediator impartiality is often considered the core ethical consideration in mediation, as stated by Hung:

Unlike litigation, which has developed over many years with precise checks and balances, mediation has no such built in and well developed checks and balances. Therefore, in mediation the principal agent of fairness is a skilled, reasonable and trusted mediator. It is for this reason that the principle of non-partisan fairness is the foundation of the ethics of mediation.⁹⁶

Mediators are expected to conduct mediation in an impartial manner and remain impartial throughout the mediation process. If a mediator becomes aware that he or she is unable to remain impartial in the mediation, most codes of ethics and professional conduct require the mediator to disclose the impartiality to the parties and to withdraw from the mediation or remind the parties of their right to terminate the mediation or both.

However, while a mediator is a neutral and impartial party to the mediation, that does not necessarily mean he or she is a passive party. In fact, some codes of ethics and professional conduct impose the duty on mediators to ensure the interests of all parties are represented in mediation. For example, pursuant to Family Mediation Canada’s *Members Code of Professional Conduct* mediators have a “duty to assist participants to consider how their proposed arrangements realistically meet the needs and best interests of the other affected persons, especially vulnerable persons”;⁹⁷ Elder Mediation Canada’s *Code of Professional Conduct for Mediators Specializing in Issues of Aging* imposes the responsibility on the elder mediator “to ensure that all participants needs and positions are clearly and fairly presented so that participants appreciate the circumstances of those involved express their concern in certain situations”;⁹⁸ and the Ontario Association for Family Mediation’s *Code of Professional Conduct* imposes the duty on mediators “to assist the parties to make informed decisions recognizing

⁹³ Radford, *supra* note 22 at 652.

⁹⁴ TCSG Manual, *supra* note 21, Module 3 at 58.

⁹⁵ TCSG Manual, *supra* note 21, Module 1 at 60.

⁹⁶ Hung, *supra* note 32 at 46.

⁹⁷ Family Mediation Canada, *Members Code of Professional Conduct* at Article 8.

⁹⁸ Elder Mediation Canada, *Code of Professional Conduct for Mediators Specializing in Issues of Aging* at 7.

that client self-determination is a fundamental principle of mediation” and to ensure procedural fairness.⁹⁹ Further, as noted by Radford:

The mediator may play a variety of roles, including facilitator, communicator, educator, resource expander, reality tester and devil’s advocate, guardian of the details, reconciliatory, and translator and interpreter of the positions that each party wants to discuss.¹⁰⁰

c. Self-determination and Capacity

As illustrated by the definition of mediation provided by Radford in Chapter 2:

Self-determination is the pivotal feature of mediation. Both the process and the outcome are the responsibility of the participants. The mediator has no authority to impose a decision or settlement on the parties, but rather is there solely to assist the parties in resolving the dispute in a way that is mutually agreeable.¹⁰¹

“Mediation...is grounded in the principle of self-determination and presumes that the parties are capable of participating in the process and bargaining for their own interests.”¹⁰² The fact that the capacity of an adult is typically the central issue in adult guardianship cases raises the concern about the appropriateness of mediation in guardianship matters. As noted by the TCSG, “[m]ediation assumes an ability of the parties to take part in a negotiation – to express opinions, evaluate options and follow through on decisions. For this reason, many people raise concerns about the appropriateness of mediation in guardianship cases, in which the decision-making ability of a party is often in question.”¹⁰³

Radford examines and responds to the argument against mediation in guardianship matters, “that the self-determination principle that is the hallmark of mediation precludes the use of mediation in an adult guardianship case.”¹⁰⁴ Further, because “self-determination requires that the mediation process rely upon the ability of the parties to reach a voluntary, uncoerced agreement”, some people argue that “issues involving an individual with diminishing capacity are not suited to mediation because mediation presumes participation by individuals who are capable of self-determination.”¹⁰⁵

The requirement that every party must be capable of entering into an agreement voluntarily and without coercion means that mediators in adult guardianship cases must pay particular attention to the adult’s capacity and be aware of any coercion or possibility of coercion of the adult by other parties.¹⁰⁶ In any mediation, the mediator is required to ensure that all parties have the capacity to participate in the mediation throughout the mediation session(s). If a mediator determines at any time during the mediation that any of the parties does not have the capacity to participate in mediation, the mediator may be required to terminate the mediation. “The challenge in the mediation of an adult guardianship case is to determine

⁹⁹ Ontario Association for Family Mediation, *Code of Professional Conduct*.

¹⁰⁰ Radford, *supra* note 22 at 655.

¹⁰¹ Radford, *supra* note 22 at 617.

¹⁰² Radford, *supra* note 22 at 640.

¹⁰³ TCSG Manual, *supra* note 21, Module 1 at 22.

¹⁰⁴ Radford, *supra* note 22 at 617.

¹⁰⁵ Radford, *supra* note 22 at 646-47.

¹⁰⁶ Radford, *supra* note 22 at 648.

whether the adult has the capacity to participate as a party to the mediation, either with or without representation” and/or accommodation.¹⁰⁷

The TCSG Manual provides mediators with a set of guidelines for determining whether an adult has the capacity to participate in mediation. It sets out the following eight questions for the mediator to assess an individual’s capacity to mediate:

1. Can the respondent understand what is being discussed?
2. Does he or she understand who the parties are?
3. Can the respondent understand the role of the mediator?
4. Can the respondent listen to and comprehend the story of the other party?
5. Can he or she generate options for a solution?
6. Can he or she assess options?
7. Is the respondent expressing a consistent opinion or position?
8. Can he or she make and keep an agreement?¹⁰⁸

Radford notes that “a more subtle obstacle to self-determination by an adult in an adult guardianship case is the tendency of family members, attorneys, judges, and perhaps even mediators to want to structure a framework that is protective of the adult but that may not necessarily protect the adult’s fundamental right to autonomy.”¹⁰⁹ Accordingly the mediator must be aware of the potential for other parties in the mediation to assert their own values rather than those of the adult. Further, “the need for the mediator to protect the autonomy of the adult in a guardianship case does not necessarily violate the mediator’s impartiality and neutrality.”¹¹⁰

In the US, in most cases the adult will be represented by an attorney or other advocate to represent the adult’s best interests in an adult guardianship hearing. In addition, many US statutes require or permit the appointment of a guardian ad litem for the adult upon the filing of a petition for guardianship; therefore, the adult may have both an advocate and guardian ad litem in the mediation.¹¹¹ “One of the mediator’s challenges is to ensure that the attorney is speaking for the client rather than instead of the client”.¹¹² In the case of a guardian at litem, the mediator must be aware of the role of the guardian at litem as representing the adult’s best interests rather than an advocate for the adult’s wishes and that the guardian at litem is often required to report his or her findings to the court, which raises issues of confidentiality.¹¹³

While the principle of self-determination remains fundamental even in adult guardianship mediation, its application in that context is fraught with challenges for the mediator.

d. Representation and Accommodation

All experts and key stakeholders interviewed in our Field Research emphasized the necessity in adult guardianship mediation of ensuring that the voice of the adult respondent is

¹⁰⁷ Radford, *supra* note 22 at 649.

¹⁰⁸ TCSG Manual, *supra* note 21, Module 1 at 54.

¹⁰⁹ Radford, *supra* note 22 at 652.

¹¹⁰ Radford, *supra* note 22 at 655.

¹¹¹ Radford, *supra* note 22 at 674-75.

¹¹² Radford, *supra* note 22 at 675.

¹¹³ Radford, *supra* note 22 at 675.

represented, whether or not the adult is capable of participating in the mediation in person. The TCSG Adult Guardianship Mediation Manual (the “TCSG Manual”) states the following regarding the importance of ensuring the opinion of the adult is included in the mediation:

If the respondent is capable of expressing his or her opinion about the issue to be mediated, no matter how “unreasonable” that opinion might seem to other parties, the respondent’s opinion must be represented at the mediation, and no settlement may be reached without the respondent’s agreement. Thus, if the respondent is capable of expressing an opinion, in most cases the respondent should be present at and participate in the mediation.¹¹⁴

The TCSG emphasizes that the overriding question for the mediator when determining an adult’s capacity to participate in mediation is whether the adult has the capacity to participate in mediation *with support* - support may be in the form of a support person or representative such as a lawyer, family member or caregiver, or in the form of physical and/or other accommodations.¹¹⁵ “The mediator should be aware of the need to make accommodations to maximize each individual’s ability to participate in the [mediation] process,” such as accommodating visual and hearing loss and adjusting the schedule and timing of mediation to accommodate medications.¹¹⁶

As stated by Kathleen Blank:

It is a matter of mediator ethics to take whatever steps necessary to help the parties participate in the process most effectively...Mediators should presume that people with physical and mental disabilities, like everyone else, have the capacity to participate in the mediation process with appropriate accommodation. Their obligation, as mediators, to assess the needs of the parties and accommodate those needs to facilitate full and informed participation in the process is the same for people with or without disabilities...If there is no accommodation that will empower the individual to participate competently on his or her own behalf, the mediator should end the process.¹¹⁷

As further noted by Erica Wood, “accommodations might include changing the place or time of the session, including a support person, keeping the sessions short, or using techniques and strategies helpful for communication with persons with memory loss or confusion.”¹¹⁸

However, the TCSG Manual advises that mediation is not appropriate in cases where the respondent, while expressing an opinion, is unable to reasonably participate in the process even with accommodations and representation.¹¹⁹ The TCSG Manual uses the following example to illustrate this caution:

¹¹⁴TCSG Manual, *supra* note 21, Module 3 at 50.

¹¹⁵TCSG Manual, *supra* note 21

¹¹⁶ Radford, *supra* note 22 at 677.

¹¹⁷ Kathleen Blank, “It is Not a Disability Issue”, (June 2003), 21(6) *Alternatives* in Robert J. Rhudy and Carolyn J. Rodis, Eds., *Elder Mediation Today Manual and Resource Guide* (2009) at 61.

¹¹⁸ Erica Wood, “Addressing Capacity: What is the Role of the Mediator” in Robert J. Rhudy and Carolyn J. Rodis, Eds., *Elder Mediation Today Manual and Resource Guide* (2009) at 87.

¹¹⁹ TCSG Manual, *supra* note 21, Module 3 at 50.

A man's children are petitioning for a guardian in order to place him in a nursing home. He insists that he does not need a guardian because his wife is taking good care of him. His wife actually died several years ago. He is unable to understand the issues involved and could not take part in mediation, even with a representative. A court should make such a decision in a case like this one.¹²⁰

e. Confidentiality

Confidentiality of the mediation process has been identified as a key benefit of mediation over litigation, particularly by individuals who value keeping family matters private, a value that is most prevalent among the older adult population.¹²¹ As further noted by Radford, "Confidentiality has been referred to as the attribute of the mediation process which promotes candor and full disclosure. Without the protection of confidentiality, parties would be unwilling to communicate freely, and the discussion necessary to resolve disputes would be seriously curtailed."¹²²

While privacy and confidentiality are important advantages for parties in adult guardianship cases, ethical issues may arise in guardianship mediation that challenge the mediator's guarantee to maintain confidentiality.

An example of a confidentiality issue that arises in multi-party adult guardianship mediation is the requirement of the mediator not to disclose, without a party's consent, information provided to the mediator by one party to another party.¹²³

Mediators must also be aware of family dynamics including tensions, subtle abuse, power imbalance and influences that may arise in the multi-party, multi-family member context typical of guardianship mediation. Radford notes, that "a mediator's commitment to confidentiality may present difficulties in adult guardianship cases."¹²⁴ How the requirement not to disclose information without consent of the parties may compromise the integrity of the process is highlighted in the following example:

In a mediation designed to determine which child should serve as the parent's guardian, the mediator learns from the oldest child that he is undergoing psychiatric treatment stemming from a past history of abuse of his wife. Although the mediator can encourage the party to disclose this information to the other parties, the mediator cannot require the party to do so. What is the mediator to do when the parties reach an agreement that the same child would be the best guardian for the adult and that the adult will live with him?¹²⁵

Another issue that may arise in the context of multi-party mediation is the participation of professionals, such as certain health professionals, who may be required by their governing bodies to report abuse or neglect.

¹²⁰ *TCSG Manual*, *supra* note 21, Module 3 at 50.

¹²¹ *Radford*, *supra* note 22 at 624.

¹²² *Radford*, *supra* note 22 at 624.

¹²³ *Radford*, *supra* note 22 at 625.

¹²⁴ *Radford*, *supra* note 22 at 682.

¹²⁵ *Radford*, *supra* note 22 at 682.

These examples highlight the need for policies and guidelines for handling cases involving actual or suspected abuse including situations where the mediator identifies the potential threat of future abuse. As mentioned above, Canada differs significantly from the US with respect to adult protection legislation and the requirements for mandatory reporting of abuse and neglect. In the US, mediators involved in guardianship mediation commonly deal with the ethical conflict of breaching confidentiality in order to report abuse by requiring all parties to sign a confidentiality agreement prior to the start of the mediation, which includes an express exception to confidentiality permitting the mediator to disclose information from mediation discussions for the purpose of reporting abuse or neglect.

f. Abuse and Neglect

Given the prevalence of elder abuse and the fact that some older adults are particularly vulnerable to abuse or mistreatment, mediators working with older adults must be well informed about elder abuse and able to ensure that an older adult who may be a victim of abuse is safe and will not be disadvantaged by participating in mediation. However, although in principle most would agree that these are obvious ethical requirements, at a practical level little research has been done regarding how to reach these outcomes.

The TCSG Manual provides the following caution against mediation in cases involving serious allegation of abuse:

Mediation is usually not appropriate in a case in which there are allegations of serious physical, emotional, or financial abuse of the respondent by another party. Because of the likelihood of coerced agreement, arising from fear or threat from the abuser, the true voluntariness and fairness of agreements reached in these situations are doubtful.¹²⁶

In order to make a determination of whether mediation is appropriate, a mediator may need to examine the level and type of abuse. For example, our field research indicated that while most experts agreed that mediation was inappropriate in cases involving allegations of serious physical abuse, the majority of the experts interviewed also agreed that mediation might be appropriate in certain cases involving allegations of financial exploitation or abuse.¹²⁷ For example, as noted in the TCSG Manual, mediation might actually help communication and understanding in a situation involving alleged financial abuse or exploitation where “the allegation concerns different judgment or interpretation of the needs of the respondent (e.g., one person feels that an expenditure benefited the respondent and another believes it was wasteful).”¹²⁸ Further, cases involving allegations of self-neglect may be appropriate for mediation because, as noted by TCSG, “the primary reason for excluding abuse cases, inability to reach a true voluntary agreement because of threat from fear of the abuser, is not present in these situations.”¹²⁹ The TCSG Manual states: “Clearly caution suggests proceeding with care in situations of alleged abuse, and probably not handling them.”¹³⁰

¹²⁶ *TCSG Manual*, *supra* note 21, Module 3 at 59.

¹²⁷ See Appendix 2.

¹²⁸ *TCSG Manual*, *supra* note 21, Module 3 at 60.

¹²⁹ *TCSG Manual*, *supra* note 21, Module 3 at 60.

¹³⁰ *TCSG Manual*, *supra* note 21, Module 3 at 61.

One ongoing challenge is that elder abuse can be difficult to identify. Gemma Smyth refers to elder abuse as a “hidden crime”. In her words:

The hidden crime makes it difficult for professionals to spot and manage. The reasons behind under reporting often lie with older adults themselves. They may avoid reporting abuse, wanting to protect the abuser who is statistically likely to be a caregiver. The potential social stigma or shame associated with abuse may serve as a further deterrent.¹³¹

Individuals interviewed in our Field Research for the EGM Project, as well as best practices outlined in the academic literature, recommend screening for abuse as a precursor to elder and guardianship mediation. However, very little research has been done regarding screening for elder abuse in the mediation context. In the absence of empirical research there is the danger that existing screening tools may not be effective or may only be effective in certain limited contexts.

This is not to suggest that it is not necessary for elder mediators to screen for abuse. It is merely a statement on the limitations of screening in a profession that is still in its infancy. One possible implication of the lack of research supporting the efficacy of screening and risk assessment is that mandatory mediation of elder guardianship disputes may put older adults at risk. This concern will exist until such a time as it can be empirically demonstrated that screening accurately identifies elder abuse victims. In the absence of that certainty, imposing mandatory mediation for all elder guardianship disputes may place older adults at risk even if program policies state that all referrals to mediation will be screened for abuse and that elder abuse cases will be screened out. This is because elder abuse victims may be missed in the screening process.

Notwithstanding some of the potential challenges in respect to screening for abuse, some elder mediation pilot projects have attempted to tackle this issue and to create effective screening methods. The University of Windsor Mediation Services, in partnership with two other Windsor based organizations has recently developed a specialized model of mediation for elder mistreatment situations. The “Elder Mistreatment Mediation Project” resulted in the development of an elder abuse mediation intake guide, and an abuse screening tool. These tools were used during the project to determine what services should be provided. In an article, which discusses this project, the project director, Gemma Smyth concludes that:

The strengths-based, “do no harm” model balances participation with safety [...] Several elements supported the potential of older adults to participate meaningfully including: providing multiple chances during intake to tell their story, but the option to tell it only once; the option of using a Social Work Advocate during some or all of the mediation process; extensive preparation of the older adult for mediation; use of a screening tool/Intake Guide; multiple points of follow up; and a voluntary model of mediation...[T]he presence of an advocate ensured the protection of the older adult’s interests, facilitated participation, and allowed for an older adult-centred preparation and follow-up mechanisms. A facilitative mediation approach was also critical to the program. The model encourages participation (essential in a strengths-

¹³¹ Gemma Smyth, “Mediation in Cases of Elder Abuse and Mistreatment: The Case of University of Windsor Mediation Services” (2011) 30 Windsor Review of Legal and Social Issues 121 at 127 [Smyth].

based model) while minimizing the potential pitfalls of an evaluative mediation process.¹³²

The underlying theory of this model is that older adults who are reluctant to report may be able to do so in the context of a dispute resolution program which can connect the older adult with supports and provides a safe environment for disclosure.¹³³

Yvonne Craig researched elder mediation and elder abuse by looking at pilot projects in London England. Based on her research she suggests that, “elder mediation...offers a preventative process because its focus on self-determination may interrupt the passivity and dependency that are often pre-conditions of abuse, neglect and self neglect”.¹³⁴ Craig also notes that violence is non-negotiable and that elder mediation is helpful to prevent abuse but once there was an allegation that abuse had occurred, the case was screened out and did not proceed to mediation.

The underlying ethical issue is that elder mediators need to do due diligence to ensure that no harm comes to any of the participants in mediation and that they are not disadvantaged legally in any way. Abuse situations result in a significant power imbalance and potentially add the threat of further physical or psychological harm to the older adult victim through participation in the mediation (if, for example, the abuser punishes the older adult after the session for something he or she disclosed in the session). Although some research has been done on screening tools for elder mediation it is not clear how effective these are. As such, program policies governing mediation in situations where abuse may have occurred should be cautious about over-reliance on screening tools to protect elder abuse victims from harm.

As noted, in the guardianship context, the issue of suspected abuse is a common ethical concern. However, the statutory framework to address safety issues varies from jurisdiction to jurisdiction. For example, in the US, the presence of adult protective legislation in each state impacts the approach that a mediator or any professional would take to resolve issues of abuse. By contrast, Canada does not have adult protective legislation per se. Rather, elder abuse is both a civil and criminal issue with various laws intersecting at this issue. In BC, the *Adult Guardianship Act* has established a statutory system of support and assistance, which is primarily facilitated by the health care system (i.e. designated health authorities, Community Living BC and the Public Guardian and Trustee).

g. Mediator Competence

Mediators come from different backgrounds and have different strengths and weaknesses. There is no overall body regulating “mediators” so anyone can use the title mediator. However, employers or individuals seeking to hire a mediator may require the mediator have certain credentials.

As noted in previous Chapters, our research indicated a general consensus that specialized training and experience should be required for mediators practicing in the area of elder mediation and additional specialized training and experience for adult guardianship

¹³² *Smyth, ibid.* at 140.

¹³³ *Smyth, ibid.*

¹³⁴ Yvonne Craig “Elder Mediation: Can it Contribute to the Prevention of Elder Abuse and the Protection of the Rights of Elders and Their Carers” (1994) 6 *Journal of Abuse and Neglect* 83 at 86.

mediation. The most common stated rationale for this consensus was the risk of causing harm and risk of loss of rights associated with a lack of understanding of guardianship, the guardianship process and its impact on an individual's decision-making rights, as well as a lack of understanding of capacity and abuse issues necessary to ensure the safety and well-being of participants in the elder and guardianship mediation.

TCSG's adult guardianship mediation training assumes that mediators require additional specialized training in addition to basic mediation training, including the following:

1. The factors that trigger the filing of guardianship petitions
2. Alternatives to guardianship
3. Guardianship law and practice
4. Working with older persons and persons with disabilities, as well as training on the conduct of a guardianship mediation.¹³⁵

In addition, Radford notes that it is crucial that mediators in adult guardianship cases receive training in capacity issues and power imbalance as well as issues of abuse and neglect.¹³⁶

Further, our Field Research revealed a general consensus that mediators should be aware of the limits of their knowledge and understanding in certain areas and know when matters should be referred to professional outside of the mediation. In fact, some mediator professional codes of conduct require the mediator to send the participants for independent legal advice.¹³⁷ Apart from requirements set by certain credentialing organizations to send participants for independent legal advice, many mediators consider doing so best practice.

Senior Mediation and Decision-Making's elder mediation training manual stresses that mediators should consider a number of situations to be red flags that indicate the need to refer parties for independent legal advice. For example, situations involving transfers of and older person's assets into joint ownership, restricting visitors for an older person or agreements that stipulate that the older person will sign any legal documents without independent legal advice (ex. power of attorney).¹³⁸

Recommended training requirements for elder and guardianship mediators are discussed in further detail in Chapter 5.

h. Who Is At the Table?

As adult guardianship mediation typically involves multiple parties, the mediator is presented with the challenge of determining who should participate in the mediation. A mediated agreement may be undermined or become ineffectual if a necessary party is not included. At a minimum the parties to the guardianship application should participate in the mediation. A proposed guardian should also participate. A court order for mediation will also typically name others who are entitled to notice and are permitted to attend and participate in the mediation. The adult and other parties may also have representatives or require support

¹³⁵ Radford, *supra* note 22 at 674.

¹³⁶ Radford, *supra* note 22 at 674.

¹³⁷ The Law Society of BC, *Professional Conduct Handbook*, Appendix 2 at 4, online: <<http://www.lawsociety.bc.ca/page.cfm?cid=1047&t=Professional-Conduct-Handbook-Appendix-2-Family-Law-Mediation>>.

¹³⁸ Rhudy & Rodis, *supra* note 48 at 134.

persons who should be present.

Experts and stakeholders consulted in the course of our research, as well as the literature, highlighted the issue of whether the older adult respondent in adult guardianship proceedings should always be present in the mediation. The majority of the experts and stakeholders emphasized the necessity of ensuring the voice of the older person is represented in mediation whether or not the older person is capable of participating in person.

Several individuals states opinions that coincide with that of Mariani on the importance of in person participation in mediation:

[T]he power of a person’s physical presence at a mediation session even if he or she has limited ability to engage in discussion. On the capacity continuum, expressions of pain, sadness, joy, and desire are very much alive even when reasoning is impaired. Family members and healthcare personnel are more likely to make decisions that consider the wishes and values of a person who is directly involved.¹³⁹

However, others have identified that there may be risks associated with including an older person with diminished capacity in mediation in some cases; for example, “the risk of causing further trauma and loss of dignity for the older person...[or] the risk of other participants posturing to a vulnerable person in order to influence him or her.”¹⁴⁰

The mediator should determine whether there are any others who may provide relevant information and input to the mediation and whose “participation will not only enrich the mediation process, but may also contribute to its ultimate success.”¹⁴¹ These individuals might include caregivers, close relatives or friends, medical or psychological experts. In addition to determining who should participate in the mediation, the mediator will also have to identify the roles of the participants, in particular clarifying whether the participants are attending for the purpose of providing information or will be taking part in the decision-making.

2. Ethics and Mediation Program Policies

The experiences associated with adult guardianship mediation programs in jurisdictions outside of BC, discussed in detail in Chapter 6, indicate that ethical and operational issues that commonly arise in the context of adult guardianship mediation and programs must be considered and addressed in the development of and incorporated into program policies and guidelines. Examples of issues to consider in policy development are how to protect the rights of alleged incapacitated persons in mediation and how to screen for appropriate and inappropriate cases for mediation. Other ethical and operational issues that should be considered and addressed by program policies are discussed in the following sections.

a. Voluntariness and Mandatory Mediation

As mediation is by definition a voluntary process and mediated agreements are by definition

¹³⁹ *Solnick & Mariani, supra* note 51 at 88.

¹⁴⁰ *Solnick & Mariani, supra* note 51.

¹⁴¹ *Radford, supra* note 22 at 680.

voluntary and consensual, the question that arises in the case of mandatory mediation (court-ordered or legislated) is: What does mandatory mediation mean? What mandatory mediation requires varies between jurisdictions. Some jurisdictions do not require parties to mediate at all. Rather a court may suggest that parties try to resolve their dispute via mediation and the parties may refuse. Most commonly, parties will be ordered to mediation and are then required to attend the mediation session. In such cases parties are not necessarily required to participate or negotiate in good faith; rather, they will typically satisfy the requirement by attending and remaining as long as required pursuant to legislation or a court order. Even in the less common situation where parties are required to attend and participate by negotiating in good faith and attempting to reach a settlement, there is general consensus that parties should never be required to reach an agreement. It is important that mandatory mediation programs are supported by clear policy regarding the scope of mandatory mediation requirements.

b. Case selection

The development of policies regarding which types of cases are appropriate or inappropriate for mediation is essential for any adult guardianship mediation program. This is particularly important with respect to providing guidance to the individual(s) in the program who are responsible for screening cases for referral to mediation. The TCSG Manual sets out several factors that should be considered in developing policy on appropriate and inappropriate cases for mediation, as follows:

- the existence of contested issues or decisions that need to be made;
- the ability of the respondent to take part in the mediation process;
- the need for a fast or emergency decision;
- the existence of or allegations of abuse (including domestic violence and intimidation).¹⁴²

As explained above, the determination of incapacity is a legal determination that must be made by a court, and is not appropriate for mediation. Nor is mediation the appropriate process for legal determinations of fact, such as whether or not abuse has occurred.

However, the TCSG Manual explains:

[T]he fact that the determination of legal incompetence will not be mediated does not make such cases inappropriate for mediation. Related issues of the *need* for a guardian are certainly appropriate. If the parties agree in mediation that a guardian is necessary to meet the respondent's needs, the judge must still make a legal finding of incapacity in order to effect the agreement. If the court were to determine that the respondent is not legally incapacitated, the parties could then go back to mediation to consider other options.¹⁴³

(i) Participation of the Respondent in Guardianship Mediation

As discussed above, because adult guardianship cases typically involve concerns about an individual's decision-making capabilities, the question often arises regarding the person's ability to participate in mediation. TCSG states that the primary consideration regarding

¹⁴² TCSG Manual, *supra* note 21, Module 1 at 53.

¹⁴³ TCSG Manual, *supra* note 21, Module 1 at 53.

whether mediation requires the participation of the respondent in an adult guardianship application is whether the respondent is a “necessary party” to the mediation.¹⁴⁴ The TCSG Manual describes “necessary parties” as “those who have a stake in the outcome and are necessary to agree on a resolution of the issues (parties cannot make agreements for other absent parties, since all agreements must be made with full knowledge and consent)”¹⁴⁵ Our research indicated the broad opinion that final determinations regarding the capacity of parties to participate in the mediation and whether mediation should proceed should rest with the mediator.

TCSG emphasizes that allegations of legal incapacity “should not automatically be construed as lack of capacity to mediate.”¹⁴⁶ In addition, as noted above, “the issue is not simply whether the respondent has capacity to mediate, but whether the person has the capacity to mediate *with support*.”¹⁴⁷ Further, TCSG notes that even in certain cases where the respondent is not able to participate, “having the ‘subject’ in the room can often help focus on the person’s needs and remind the parties to continue to discuss those needs in a respectful manner.”¹⁴⁸

(ii) Emergency Cases

Adult guardianship mediation program policies clearly state whether or not the adult guardianship program handles emergency guardianship decisions. If a program is unable to handle such cases, policy should clearly indicate that such cases are excluded from mediation.

(iii) Abuse, Neglect and Exploitation cases

As discussed above, there are significant ethical and safety concerns associated with mediating cases involving actual or suspected abuse, neglect and/or exploitation. The TCSG Manual advises the following when developing policy to deal with mediation in situations involving findings or allegations of serious physical, emotional, or financial abuse:

You will want to proceed with extreme care and consult with experts in developing this policy and be certain your mediators, screeners and referral resources understand and follow it...Every program needs to establish a policy for determining how to identify abuse cases; whether such cases are ever accepted for mediation; if so, under what conditions they are handled...[C]onsider the level and type of “abuse” as you develop your policy regarding acceptance of these cases...If the alleged abuse is life threatening or ongoing, it is highly unlikely that mediation is appropriate...On the other hand, if someone alleges a one-time striking out in frustration in a stressful situation, perhaps mediation can be tried.¹⁴⁹

Further, as discussed above, there may be cases of financial abuse or exploitation that may not necessarily be excluded from mediation.

TCSG cautions that little research has been done on the effect of abuse on mediation, noting

¹⁴⁴ TCSG Manual, *supra* note 21, Module 1 at 54.

¹⁴⁵ TCSG Manual, *supra* note 21, Module 1 at 54.

¹⁴⁶ TCSG Manual, *supra* note 21, Module 1 at 54.

¹⁴⁷ TCSG Manual, *supra* note 21, Module 1 at 54 [emphasis added].

¹⁴⁸ TCSG Manual, *supra* note 21, Module 1 at 54-55.

¹⁴⁹ TCSG Manual, *supra* note 21, Module 1 at 55.

that there is some literature that suggests that in the case of mandatory mediation, “it may be most prudent to make participation voluntary when abuse is a factor.”¹⁵⁰ The same literature, however, notes that “there is some indication that at least some of the concern may be misplaced.”¹⁵¹

c. Ensuring Protection for Participants in Mediation

The TCSG Manual notes that an important area for policy development is the protection of respondents and their rights in the mediation process.¹⁵² As discussed above, issues of capacity to mediate and power imbalance arise in the context of adult guardianship mediation. The TCSG Manual states that in developing policies, the following two issues must be addressed:

1. Providing necessary support and accommodation for meaningful participation of the adult respondent so that he or she truly has a voice in the process.
2. Providing the assistance necessary to protect against imbalance of power, undue pressure, and manipulation in the mediation and to assure that adult respondents understand the meaning and consequences of any agreement they enter into.¹⁵³

As explained by TCSG, “essentially your policies need to ensure that mediation will not be used as a means to reduce the rights otherwise available to any party but particularly the [adult respondent], without the party’s full understanding, knowledge, and consent.”¹⁵⁴

d. Confidentiality

Another area that should be considered when developing policies for an adult guardianship program is confidentiality and disclosure. For court-connected programs, consideration should be given to what rules of confidentiality apply, as well as what information can be shared, by whom and in what circumstances.¹⁵⁵ TCSG recommends that “the policy development process should include consideration of what you will do to assure that those affected by the policies, including parties, attorneys...and social service workers are made familiar with them before they take part in any mediation session.”¹⁵⁶ The TCSG Manual provides the following list of examples of the issues that should be addressed:

- To what extent and under what authority is information gained by the mediator or intake staff confidential?
- To what extent and under what authority is information from the mediation protected in any subsequent court hearing on the guardianship or other litigation involving the subject matter of the mediation?
- To what extent are mediated agreements and related documents confidential and will agreements be filed with the court?

¹⁵⁰ *TCSG Manual*, *supra* note 21, Module 1 at 56.

¹⁵¹ *TCSG Manual*, *supra* note 21, Module 1 at 56.

¹⁵² *TCSG Manual*, *supra* note 21, Module 1 at 57.

¹⁵³ *TCSG Manual*, *supra* note 21, Module 1 at 57.

¹⁵⁴ *TCSG Manual*, *supra* note 21, Module 1 at 57.

¹⁵⁵ *TCSG Manual*, *supra* note 21, Module 1 at 65.

¹⁵⁶ *TCSG Manual*, *supra* note 21, Module 1 at 65.

- What level of confidentiality will be required of the lawyers, parties, etc?¹⁵⁷

With respect to issues of implementation, the TCSG recommends policy that calls for the use of a written “consent-to-mediate” form that includes specific confidentiality agreement provisions.¹⁵⁸

Confidentiality policies should also address exceptions to confidentiality. In the US, where adult protection legislation often mandates the reporting of abuse and neglect, the accepted best practice is for confidentiality agreements to include express provisions authorizing the mediator to disclose information about abuse and neglect as required by legislation.

e. Mandatory mediation and indigent parties

Mandatory adult guardianship mediation programs raise the ethical issue of how to ensure the respondent’s voice is represented in the mediation if that individual lacks the resources to engage representation. Susan Hartman suggests that “if cases are mandated to mediation, the court should provide a program for ensuring that mediation is available to indigent litigants, through either provision of pro bono services by mediators or payment of fees by the court.”¹⁵⁹ In Ontario, pursuant to section 3 of the *Substitute Decisions Act*, the court may direct that counsel be appointed counsel to represent individuals who qualify for legal in guardianship mediation or a guardianship hearing.¹⁶⁰

3. Conclusion

In summary, what emerges from our research is that there is a legitimate need to clearly identify ethical values and principles. Experts and stakeholders have provided timely and candid comments on what works and what remains an ongoing challenge in the elder and guardianship mediation systems. The ethical issues faced by mediators are consistent throughout the Canadian and US jurisdictions, despite any variances in legislation. There are common themes such as needing to have practical tools to address power imbalances, as well as identify risks to safety and screen-out cases that are not appropriate for mediation. Other common themes involve the need to have adequate representation and accommodation, the cultural and linguistic needs of participants, as well as clear guidelines for what mediation is able to achieve. Confidentiality and the need to appropriately respond to issues of abuse and neglect are also consistent themes throughout the US and Canada.

¹⁵⁷ TCSG Manual, *supra* note 21, Module 1 at 65.

¹⁵⁸ TCSG Manual, *supra* note 21, Module 1 at 65.

¹⁵⁹ Susan D. Hartman, “Adult Guardianship Mediation” in the *ADR Handbook for Judges* at 156.

¹⁶⁰ *Substitute Decisions Act*, 1992 SO 1992, c 30 [SDA].

CHAPTER 4 – Focus on BC

1. Brief history of Guardianship Law in BC

Guardianship law and mediation as a profession have been developing and changing in tandem over the past decade. Mediation is an increasingly common method of dispute resolution used regularly in legal practice. As well, legislation and court systems in many jurisdictions require mediation prior to the commencement of a hearing and sometimes as a precondition to commencing court proceedings. This Chapter provides an overview of guardianship law and mediation in BC.

a. The *Patients Property Act*

“British Columbians have constitutional, common law and statutory rights to make their own decisions.”¹⁶¹ In BC, adults are presumed to have capacity and to be capable of making their own decisions respecting their person and their property.

As mentioned earlier, BC’s current guardianship legislation is founded on English lunacy laws. In fact, the *Patients Property Act*,¹⁶² a statutory scheme providing for the appointment of substitute decision-makers, is derived directly from *Imperial Lunacy Act*¹⁶³ of 1890, “and predominately parallels its predecessor’s archaic method of estates administration.”¹⁶⁴

Contrary to the approach of the more recent and proposed adult guardianship legislation, the focus of the *Patients Property Act*, as indicated by its title, is estate administration rather than the guardianship of the “patient”.¹⁶⁵

Section 1 the *Patients Property Act* defines a “patient” as:

- a) a person who is described as one who is, because of mental infirmity arising from disease, age or otherwise, incapable of managing his or her affairs, in a certificate signed by the director of a Provincial mental health care facility or psychiatric unit as defined in the *Mental Health Act*, or
- b) a person who is declared under this Act by a judge to be
 - (i) incapable of managing his or her affairs,
 - (ii) incapable of managing himself or herself, or
 - (iii) incapable of managing himself or herself or his or her affairs.

Subject to this Act, incapability is a legal determination made on the basis of medical evidence. An adult declared to be legally incapable under the *Patients Property Act* is deemed incapable of making decisions with respect to their person (including health and personal

¹⁶¹ Public Guardian and Trustee of British Columbia, *Court and Statutory Guardianship: The Patients Property Act and The Adult Guardianship Act (Part 2): A Discussion Paper on Modernizing the Legal Framework*, (British Columbia: PGTBC, February 2004) at 5, online: <http://www.trustee.bc.ca/news_information/Adult_Guardianship.htm>.

¹⁶² *PPA*, *supra* note 15.

¹⁶³ 53 & 54 Vict., c. 5

¹⁶⁴ *BC Collaborative*, *supra* note 64 at 38.

¹⁶⁵ *BC Collaborative*, *supra* note 64 at 39.

care), their property (including legal and financial affairs), or both. The Act does not define capability or incapability.¹⁶⁶

If an adult is deemed by the court to be incapable under the Act, the Act provides the court with the discretion to appoint any person as either: Committee of Estate, with the power to make decisions regarding the adult's property; Committee of Person with the power to make decisions about the adult's health and personal care; or both.¹⁶⁷ As guardianship pursuant to the *Patients Property Act* is all-inclusive, the result of committeeship may involve a loss of all decision-making authority.¹⁶⁸

b. Adult Guardianship Legislative Reform

Adult guardianship law in BC is in a state of transition. A number of reports have been issued over the last decade recommending reform of BC's adult guardianship legislation and a number of bills, with the potential to effect a major revision of BC's guardianship system, have been proposed but never passed or proclaimed.¹⁶⁹ Consequently, as noted above, BC's *Patients Property Act* remains in effect.

As mentioned in Chapter 1 and discussed in further detail below, finally in 2007 the BC Legislature passed Bill 29, *The Adult Guardianship and Planning Statutes Amendment Act, 2007*,¹⁷⁰ which introduced new statutory requirements for advance planning for substitute decision-making¹⁷¹ and adult guardianship.¹⁷² When the Bill 29 amendments to the *Adult Guardianship Act*¹⁷³ come into force, Bill 29 will, among other things, repeal the *Patients Property Act*, and require mandatory mediation for adult guardianship matters in certain circumstances.¹⁷⁴

On September 1, 2011, the new provisions dealing with advance planning for substitute decision-making, as set out in the 2007 amendments, were proclaimed in force. These changes provide options for incapacity planning, including personal, health and financial planning, by introducing new requirements for enduring powers of attorney, representation agreements and advance directives.¹⁷⁵ The provisions related to court and statutory adult

¹⁶⁶ *BC Collaborative*, *supra* note 64.

¹⁶⁷ *PPA*, *supra* note 15 at s. 6(1).

¹⁶⁸ *BC Collaborative*, *supra* note 64 at 39.

¹⁶⁹ *BC Collaborative*, *supra* note 64 at 38; See also "McClellan Report" (2002), "Discussion Paper" (2004 by then Public Guardian and Trustee, Jay Chalke, QC), "McCallum Report" (2000), online: <http://www.trustee.bc.ca/news_information/Adult_Guardianship.htm>.

¹⁷⁰ Bill 29, *supra* note 11.

¹⁷¹ Advance planning for substitute decision-making includes powers of attorney, representation agreements and advance directives.

¹⁷² Part 2 of the *Adult Guardianship Act*. Adult guardianship includes statutory property guardians and court-appointed personal or property guardians. Mandatory mediation will only apply to applications for court-appointed personal and property guardians.

¹⁷³ *AGA*, *supra* note 14.

¹⁷⁴ Bill 29, *supra* note 11, Part 1, s.4 (repealing Part 2 of the *AGA* and substituting with amended Part 2), amended Part 2, s.6. While a number of the sections of the *AGA* Amendment came into effect on September 1, 2011, the provisions dealing specifically with mediation for guardianship matters are not yet in force. See online:

<<http://www.courthouselibrary.ca/research/BCProclamations/BCProclamationsItem.aspx?Id=101ff90d-8478-4bd7-a3ec-e2fdad71eeee>>.

¹⁷⁵ Public Guardian and Trustee of British Columbia, online:

<http://www.trustee.bc.ca/services/adult/personal_planning_tools.html>.

guardianship, including the mandatory mediation provisions, have not yet been proclaimed in force. As a result, the statutory adult guardianship scheme under the *Patients Property Act* remains in force and “BC possesses a new set of adult guardianship laws yet to be interpreted and applied by the courts.”¹⁷⁶

2. Bill 29

a. Introduction and Overview of Bill 29

Bill 29 replaces the committeeship system of the *Patients Property Act* and creates three distinct types of guardians: property guardians, personal guardians and statutory guardians. Under this new statutory scheme, statutory guardians and property and personal guardians will be appointed through two separate processes. Property and personal guardians are appointed by the court upon the court’s determination that an adult is incapable of making decisions related to his or her financial affairs, personal care or health care. “Personal guardian” refers to a person appointed by the court under the Act to make decisions regarding an adult’s personal care or health care. The decision-making authority of a “property guardian” appointed by the court under the Act is limited to making decisions regarding an adult’s financial affairs.

“Bill 29 goes a long way toward creating a modern guardianship regime for BC. It redresses the paternalism of the *Patients Property Act* by repealing that statute and replacing it with more nuanced law.”¹⁷⁷ In Bill 29, adults are referred to as “adults” rather than “patients”, and the focus of Bill 29 is on support and decision-making rather than on the protection of the adult’s estate.¹⁷⁸

Bill 29 introduces the concept of a statutory guardian under the new Part 2.1 of the *Adult Guardianship Act*. Unlike personal and property guardians, statutory guardians will not be appointed by the court. Rather, the Public Guardian and Trustee, upon the recommendations from health care providers, may determine whether a statutory guardian must be appointed to help manage an adult’s financial affairs. A statutory guardian cannot be appointed if a property guardian is already in place.

The appointment of a statutory guardian requires an assessment of incapability. Pursuant to Part 2.1, section 32(1), if a health care provider has reason to believe that an adult that an adult may be incapable of managing his or her own financial affairs, the health care provider may request that a qualified health care provider assess the adult’s incapability. A “qualified health care provider” is defined in Part 1 as “a medical practitioner or a member of a prescribed class of health care providers”.

If after assessing the adult the qualified health care provider determines that the adult is incapable of managing his or her financial affairs, the qualified health care provider may report the adult's incapability to a health authority designate (s.32(2)). Upon receipt of a report of an adult’s incapability, the health authority designate may issue a certificate of incapability in respect of the adult, a copy of which must be forwarded to the Public Guardian and Trustee who may accept or reject the certificate (s.32(3)-(5)). If the certificate

¹⁷⁶ *BC Collaborative, supra* note 64 at 38.

¹⁷⁷ *BC Collaborative, supra* note 64 at 39.

¹⁷⁸ *BC Collaborative, supra* note 64 at 40.

is accepted, the Public Guardian and Trustee becomes the adult's statutory guardian (s.32(5)). Pursuant to section 33(1), on becoming an adult's statutory property guardian, the Public Guardian and Trustee has all the powers of a property guardian under the *Adult Guardianship Act*.

The following section provides a description of the process for application for appointment of a guardian and the mandatory mediation provisions for adult guardianship applications under Part 2 of the *Adult Guardianship Act* as amended by Bill 29. The following section also attempts to identify some of the procedural and legal issues that may need to be addressed in contemplation of the drafting of regulations in support of the new provisions when they come into force.

b. Application for Guardianship

Pursuant to the proposed amendments in Bill 29 to Part 2 of the *Adult Guardianship Act*, section 5 provides that, “[a]ny person may apply to the court for the appointment of a personal guardian, property guardian or both, for an adult.”¹⁷⁹ As part of the guardianship application, the applicant must provide the court with medical reports, showing that the adult who is allegedly in need of a guardian lacks the capacity to make certain types of decisions. The applicant must submit two assessment reports provided by qualified health care providers, who use prescribed capability assessment procedures, which describe the extent to which a person is incapable of making decisions about personal care, health care or financial affairs.¹⁸⁰

In addition to the assessments reports, the applicant must provide the court with a guardianship plan.¹⁸¹ A guardianship plan outlines how the proposed guardian will be responsible for certain types of decisions, as well as any specific tasks to be done on behalf of the allegedly incapable adult. The applicant must also provide a copy of any representation agreement, power of attorney, enduring power of attorney, or advance directive, made by the adult, that is known to the applicant.¹⁸²

A copy of the capacity reports, guardianship plan and substitute decision-making documents must be served on the prescribed parties. According to the Bill 29 amendments to Part 2 of the *Adult Guardianship Act* the applicant must provide a copy of the application, the accompanying documents, and any other prescribed material at least 30 days before the date set for hearing to the following parties:

- a) the adult who is subject to the application;
- b) the spouse, unless the marriage or marriage-like relationship has ended, and adult children, if any;¹⁸³
- c) if the adult has no spouse or adult children, another near relative of the adult;

¹⁷⁹ Bill 29, *supra* note 174.

¹⁸⁰ Bill 29, *supra* note 174 at Part 2, s.5(2)(a).

¹⁸¹ Bill 29, *supra* note 174 at Part 2, s.5(2)(b).

¹⁸² Bill 29, *supra* note 174 at Part 2, s.5(2)(c) and (d).

¹⁸³ Unless the adult's marriage or marriage-like relationship has ended: defined in s. 5(4) “A marriage ends for the purposes of this section when an agreement, judgment or order referred to in section 56 of the *Family Relations Act* is first made in respect of the marriage”; 5(5) “A marriage-like relationship ends for the purposes of this section when the parties to the marriage-like relationship stop cohabiting with each other with the intention of ending the relationship.”

- d) the adult’s guardian, if any;
- e) the adult’s proposed guardian, if not the applicant;
- f) the Public Guardian and Trustee, if not the applicant;
- g) any person known to the applicant to be the adult’s attorney or representative;
- h) any other person that the court may direct.¹⁸⁴

Under the proposed scheme, the Public Guardian and Trustee will have notice of every application for guardianship. Further, the court has the authority to direct that an applicant notify any other parties who may have an interest in the application.¹⁸⁵

Once the relevant provisions of Bill 29 are in force, it is anticipated that in cases where there are disputes concerning a guardianship application (i.e. disagreement over whether a guardian is needed, concerns about who should be a guardian, or conflicts over what types of decisions need to be made for the allegedly incompetent adult), the parties will be required to attend mediation before the matter can proceed to hearing.¹⁸⁶

c. Mandatory Mediation Provisions

Under the proposed mandatory mediation provisions in Bill 29, adult guardianship mediation may be required in the context of contested guardianship applications in many common circumstances.¹⁸⁷ In Bill 29, the proposed amendments to Part 2 of the *Adult Guardianship Act* require mediation in guardianship matters, as follows:

Mediation

6(1) If a guardianship application is made under section 5 and there is a dispute about:

- (a) whether or not the adult who is the subject of the application needs a guardian;
- (b) who the proposed guardian should be; or
- (c) the adequacy of the plan for guardianship,

a hearing under section 7 must not proceed unless mediation is conducted in accordance with the regulations, or unless the regulations permit otherwise.¹⁸⁸

A “hearing” under section 7 refers to the court hearing of a guardianship application made under section 5. A hearing may be attended by any person served with a copy of the adult guardianship application or any other person who files an appearance and whom the court agrees to hear.¹⁸⁹ In a guardianship application hearing, the court must consider the application documents submitted under section 5(2), any agreement reached in mediation under section 6 and any written or oral comments made by the Public Guardian and Trustee.¹⁹⁰

¹⁸⁴ Bill 29, *supra* note 174 at Part 2, s.5(3).

¹⁸⁵ Bill 29, *supra* note 174 at Part 2, s.5(3)(h).

¹⁸⁶ Bill 29, *supra* note 174 at Part 2, s.6.

¹⁸⁷ Bill 29, *supra* note 174 at Part 2, s.6.

¹⁸⁸ Bill 29, *supra* note 174 at Part 2, s.6(1).

¹⁸⁹ Bill 29, *supra* note 174 at Part 2, s.7(1).

¹⁹⁰ Bill 29, *supra* note 174 at Part 2, s.7(2).

Section 6(2) provides that certain disputes must not be mediated:

- (2) The following must not be the subject of mediation under this section:
 - (a) whether or not an adult is incapable;
 - (b) the content of any written or oral comments submitted to the court by the Public Guardian and Trustee under section 7(2)(c);
 - (c) any prescribed matter.¹⁹¹

“Any prescribed matter” refers to any matter that is expressly excluded from mediation by the regulations.¹⁹²

d. *Adult Guardianship Act* Regulations

Under Part 2 of the *Adult Guardianship Act* as amended by Bill 29, section 63(4) provides:

- (4) The Lieutenant Governor in Council may make regulations respecting mediation under section 6, including regulations:
 - (a) respecting the circumstances in which a person must participate in mediation and the nature or extent of that participation,
 - (b) respecting matters that must not be the subject of mediation,
 - (c) setting out the rights and duties that accrue to the persons involved in mediation, the court and the mediator,
 - (d) respecting the forms and procedures that must or may be used or followed before, during and after the mediation process, including specifying a period of time after which a person may proceed to court under section 7 after completing mediation,
 - (e) respecting the confidentiality of information disclosed for the purposes of mediation,
 - (f) respecting the circumstances, if any, and manner in which a person involved in mediation may opt out of or be exempted from mediation,
 - (g) respecting the costs and other sanctions that may be imposed in relation to mediation, including, without limitation, in relation to any failure to participate in mediation when and as required or otherwise to comply with the regulations,
 - (h) respecting the qualifications required for, and the selection and identification of, individuals who may act as mediators in the mediation process contemplated by the regulations, and

¹⁹¹ Bill 29, *supra* note 174 at Part 2, s.6.

¹⁹² Regulations have not yet been drafted.

- (i) respecting the circumstances, if any, in which a hearing may proceed under section 7 without mediation, before mediation has been completed, or before any period of time prescribed under paragraph (d) of this subsection has elapsed.¹⁹³

As regulations have yet to be drafted, there remains uncertainty with respect to the “nuts and bolts” of how the mandatory mediation provisions proposed in Bill 29 will apply to contested guardianship applications, including but not limited to the structure of the mediation referral program/process in guardianship applications, applicable processes and procedures (legal and mediation), practice and training standards for mediators, etc. Once drafted, it is anticipated that the regulations will provide necessary guidance with respect to a number of issues that may arise in the guardianship mediation context, such as: what types of cases will be exempt from mediation, who must participate (and the nature or extent of this participation), the rights and duties of the parties, the court and the mediator, confidentiality of information; time limitations and procedural issues, costs and appropriate sanctions, qualifications of mediators, and when a matter may proceed to a hearing without mediation.

Chapter 6 provides a detailed overview of several court-connected guardianship mediation programs in Ontario and select US jurisdictions. The experiences of each of these programs, including the lessons learned from program successes and challenges, may help inform the drafting of Bill 29 regulations related to adult guardianship mediation. For a summary of the court-connected guardianship mediation programs and frameworks discussed in Chapter 6, refer to the comparative table in Appendix A.

e. Issues for Consideration in Drafting of Regulations

There are a number of issues, which likely require consideration in the drafting of the new adult guardianship regulations, including but not limited to the following:

- 1) How a case is selected for mandatory mediation (i.e. how parties and the court identify the need for mediation, procedure for notifying all interested parties, timeliness/efficiency in the court process);
- 2) Who must attend and participate (i.e. to what extent an interested party is required or able to participate, participation of the allegedly incapable, representation for an incapable adult, role of an attorney or advocate);
- 3) Statutory exceptions to mediation (i.e. the types of cases that must be included/excluded from mediation, efficient procedures and criteria for obtaining an exception, where mediation is required, policies and guidelines for case selection and referral);
- 4) Certification and training of mediators (i.e. specification of the skills and experience a mediator must have to facilitate adult guardianship mediation, especially with older adults, establishment of a specialized guardianship mediator roster, policies and procedures for selecting mediators);

¹⁹³ Bill 29, *supra* note 174 at Part 2, s.64(3)

- 5) Best practices and quality control (i.e. preferred model and style of mediation, mediation process, practical guidance and standards for mediators, participants and the public, efficient complaints procedure and monitoring system);
- 6) Screening tools to identify inappropriate cases (i.e. policies and procedures for identifying what cases are inappropriate for mediation, how to identify contexts of abuse or neglect, how to respond to situations that are inappropriate for mediation);
- 7) Responses to abuse or neglect (i.e. whether mediation may proceed where there has been an incident or significant risk of abuse or neglect, to what extent a mediator and participants have a duty to respond to incidents of abuse, neglect or self-neglect);
- 8) Power to terminate mediation (i.e. under what circumstances any participant or the mediator are able to end mediation; requirement for all parties to consent to an agreement);
- 9) How to ensure the rights of an incapable person are to be protected (i.e. how values, wishes and beliefs may be communicated, whether an incapable person is required to attend, how to ensure maximum participation with accommodation; adequate legal representation or advocacy support, requirement for all participants and the mediator to recognize the values, wishes and beliefs of an incapable person);
- 10) Confidentiality (i.e. how the privacy of participants is protected, admissibility of mediation notes as evidence in court);
- 11) Court-reporting requirements (i.e. to what extent a mediator must report the circumstances for termination of mediation or the content of an agreement to the court); and;
- 12) Fees/costs (i.e. how the mediation fees and costs are paid, how the judicial system pays for additional administrative costs).

3. Mediation in BC

a. Summary of Mediation in BC

Over the past couple of decades, mediation has been increasingly recognized as a valuable method of dispute resolution. Correspondingly, there has been a rapid growth of mediation in diverse fields, including commercial disputes, family and divorce, civil disputes, child protection and, more recently, other emerging areas such as elder law mediation. In BC, the growing use and popularity of mediation is evidenced by the increase in mediation service providers (including private mediators and lawyers offering mediation services), specialized mediation training opportunities, and significantly, the incorporation of mediation programs into court processes.

British Columbia has a rich, long-standing mediation community, as well as a number of well-established organizations that provide a broad range of mediation training and certification opportunities, including membership standards and benefits, for mediators in the province. Mediation is not regulated in BC and, accordingly, any person may call himself or herself a mediator. However, to be on one of the three court rosters in BC, and to

maintain membership in certain mediation organizations, mediators must meet specific training and experience requirements, as well as commit to professional standards and codes of conduct. Further, mediation is a market-driven profession and, consequently, in order to remain competitive most mediators in BC have a minimum of basic mediation training.

As mentioned previously, there are several mediation organizations that offer a range of training and credentialing opportunities for mediators in BC. Among the most prominent mediation organizations in BC are: MediateBC, the Justice Institute of BC (JIBC), Family Mediation Canada, and Continuing Legal Education BC.

b. Overview of Existing Training & Certification Options

Justice Institute of BC

The Justice Institute of BC (the “JIBC”) has a great influence on the local mediation community, particularly for those who have been practising in the field in BC for some time. The JIBC was first established in 1978 and currently delivers “leading edge public safety and justice education and training in BC, Canada and internationally.”¹⁹⁴ The JIBC established a conflict resolution certificate program in the early 1980’s. Initially, the JIBC had only the conflict resolution certificate program but now offers several certificate programs, including:

- Associate Certificate in Conflict Coaching
- Associate Certificate in Leadership & Conflict Resolution
- Associate Certificate in Workplace Conflict
- Certificate in Conflict Resolution: Specialization in Negotiation
- Certificate in Conflict Resolution: Specialization in Mediation/Third-Party Intervention
- Family Mediation Certificate
- Graduate Certificate in Dynamics of Conflict¹⁹⁵

The focus of training is on process skills with role-plays, as well as substantive content. JIBC courses range in length from one to three days and are developed using an applied, experiential learning model so that individuals learn practical, hands-on skills and perspectives that can be used immediately.¹⁹⁶

Mediate BC

The Mediate BC Society (“Mediate BC”) is BC’s largest and most influential mediation organization. It is a recently amalgamated organization combining the Dispute Resolution Innovation Society (the “DRI”) and the BC Mediator Roster Society (the “MRS”). The newly integrated organization was incorporated in April 2010 and “provides a range of training, service, development and quality monitoring programs to support and develop capacity in dispute resolution services in B.C.”¹⁹⁷

¹⁹⁴ Justice Institute of British Columbia, online: <<http://www.jibc.ca/about-jibc>>[JIBC].

¹⁹⁵ *Ibid.*, online: <<http://www.jibc.ca/programs-courses/schools-departments/school-community-social-justice/centre-conflict-resolution/programs>>.

¹⁹⁶ *Ibid.*, online: <<http://www.jibc.ca/programs-courses/schools-departments/school-community-social-justice/centre-conflict-resolution/courses>>.

¹⁹⁷ Mediate BC, online: <<http://mediatebc.com/About-Us.aspx>> [Mediate BC]; Mediate BC has three main sources of funding: grant funding from the Ministry of Attorney General, The Law Foundation

Mediate BC continues to operate the programs and services formerly offered by the DRI and the MRS, including the mediation practicum programs established by the DRI in the areas of Small Claims, Family and Child Protection mediation and the free mediation services provided as part of the Court Mediation Program pursuant to Rule 7.2 in designated Registries and the Small Claims Pilot Program in Robson Square.¹⁹⁸ Mediate BC's range of services include:

- Civil and Family Mediator Rosters;
- Practicum Programs for civil, family and child protection mediators;
- Civil and family mediation services to the public;
- Ongoing professional development opportunities and other support for mediators;
- Collaboration with government in the operation of the Child Protection Mediation Program;
- Specialized dispute resolution design services, research and advice;
- Dispute resolution information and education for the public; and,
- Contributing to the justice reform dialogue in the province.

Mediate BC maintains and provides access to a list of qualified civil and family mediators consisting of the Civil Roster and the Family Roster.¹⁹⁹ Mediate BC sets minimum basic training and experience standards required for admission to the Rosters, as well as administers Standards of Conduct, which mediators must agree to in order to maintain membership on the Rosters.²⁰⁰ In addition, Mediate BC sets ongoing education requirements for maintaining membership on the Rosters. Further, Mediate BC provides a Complaint Process to manage complaints and allegations of misconduct or breach of the Standards of Conduct by Roster mediators, as well as an informal Practice Advisory Process for responding to ethical and competency concerns regarding Roster members.²⁰¹ “By defining this basic level, the Mediate BC's Civil and Family Rosters provide a measure of protection to the public.”²⁰²

Mediate BC is also affiliated with the BC Child Protection Mediation Program (the “CPMP”) by way of administering the CPMP Roster and the CPMP Practicum. The CPMP is a program of the Ministry of Attorney General, which in collaboration with the Ministry of Children and Family Development sets the qualification standards that must be met by mediators on the CPMP Roster and manages admission to the roster. The CPMP contracts for mediation services with private sector mediators who meet the special qualifications set for CPMP Roster mediators and participate successfully in the selection process.

of BC, and the Ministry of Children & Family Development; fees for participation in the Society's practicum programs; annual administration fees paid by mediator on the Civil and Family Rosters.

¹⁹⁸ *Ibid.*, online: <<http://mediatebc.com/Mediation-Services/Small-Claims-Court-Mediation-Services.aspx>>.

¹⁹⁹ *Ibid.*, online: <<http://mediatebc.com/Resources-for-Mediators/About-the-Rosters.aspx>>.

²⁰⁰ *Ibid.*, online: <<http://mediatebc.com/Resources-for-Mediators/About-the-Rosters/Standards-of-Conduct.aspx>>.

²⁰¹ *Ibid.*, online: <<http://mediatebc.com/Resources-for-Mediators/About-the-Rosters/Civil-Roster-Admission.aspx>>.

²⁰² *Ibid.*, online: <<http://www.mediatebc.com/About-Us/What-We-Do.aspx>>.

Family Mediation Canada

Family Mediation Canada (“FMC”) is a national organization that provides membership, certification, and standards for family mediators.²⁰³ Certification under FMC’s Family Mediation Certification Program (the “FMCP”) is acceptable to meet the experience requirements of the Family Roster. Also, all BC Family Justice Counsellors must obtain FMC certification. Details of the FMCP requirements are provided below in the discussion of the Family Roster.

Continuing Legal Education Society

Since mediation has gained a higher profile in the legal world the Continuing Legal Education Society of British Columbia (“CLEBC”) has started offering mediation courses. Some lawyers choose to proceed with this route rather than through the JIBC. Further, the Law Society of BC has a designation of “Family Law Mediator”. To obtain this designation a lawyer must have taken a certain number of mediation courses including one course through CLE, three years practice experience, and approval by a committee.

Other

A number of other mediation training and certification opportunities are offered throughout BC through academic and other institutions, including but not exclusively: the University of British Columbia, University of Northern BC, Trinity Western University, Simon Fraser University, University of Victoria, Kwantlen University College, Thompson Rivers University, British Columbia Institute of Technology (BCIT), UBC Faculty of Law, Program on Dispute Resolution, Mediation course and practicum and Dispute Resolution Courses.²⁰⁴

c. BC Court Rosters & Practicums – Training, Qualification & Standards

As mentioned above, Mediate BC administers Standards of Conduct for Roster mediators which Roster mediators are required to adhere to in order to maintain membership on the Rosters.

Civil Roster & Court Mediation Program Practicum

Civil Roster

Civil Roster mediators mediate a wide range of disputes, including: civil/non-family, commercial and construction, employment and human rights, environment, housing, land use, negligence and personal injury, police complaints, small business, and, wills and estates.²⁰⁵

In order to be admitted to the Civil Roster, mediators must have met the following requirements:

²⁰³ Family Mediation Canada, online: <<http://www.fmc.ca/index.php?page=1>>.

²⁰⁴ *Mediate BC*, *supra* note 197, online: <<http://www.mediatebc.com/Education---Training/Education-Resources.aspx>>; See also “Professional Dispute Resolution Associations”, online: <<http://www.mediatebc.com/Resources-for-Mediators/Links.aspx>>.

²⁰⁵ *Mediate BC*, *supra* note 197 online: <<http://www.mediatebc.com/Education---Training/Court-Mediation-Program---Mediation-Services-for-P/About-the-Small-Claims-Practicum.aspx>>.

- A minimum of 80 hours of core education in conflict resolution and mediation theory and skills training (including at least 40 hours focused specifically on mediation including 10 hours of mediation skills practice (simulated, or role play, mediation under direct supervision))²⁰⁶;
- A minimum of 100 additional hours of training in dispute resolution or in a related field (such as such as law, social work, psychology, or any other discipline involving a significant element of negotiation, communication, conflict management skills);
- For non-lawyers, a minimum of two days of instruction in Supreme Court procedures;
- Completed a minimum of 10 civil mediations as the only (or primary) mediator;
- Two letters of reference;
- Insurance coverage; and
- Agreement to adhere to the Society’s Standards of Conduct for Mediators.²⁰⁷

After admission, Civil Roster mediators are required to complete 20 hours per year of ongoing professional development or continuing education. Additional detailed information about the qualifications for admission to the Civil Roster can be found in Mediate BC’s document entitled “Summary of Qualifications for Admission: Civil Roster”.²⁰⁸

Court Mediation Program – Small Claims Practicum

As described briefly above, the Court Mediation Program provides mediation services to resolve claims filed in designated Provincial Court Small Claims registries in BC. The Court Mediation Program – Small Claims Practicum (the “CMP”) is designed for individuals with basic mediation training and “provides new mediators with experience in resolving actual court cases while collaborating with supportive and highly-skilled mentors.”²⁰⁹

In order to be accepted into CMP, applicants must have completed a minimum of 40 hours of interest-based mediation training (including two or more courses of successive levels of training), including at least 10 hours of role-play mediation experience.²¹⁰ Once accepted into the practicum, the mediator must participate in 10 mediation sessions. The mediator will be paired with an experienced mediator as a mentor who will co-mediate each session with the practicum mediator.²¹¹

²⁰⁶ *Mediate BC*, *supra* note 197. See “Summary of Qualifications for Admission: Civil Roster” for detailed information about the qualifications for admission to the Civil Roster, online: <<http://mediatebc.com/Resources-for-Mediators/About-the-Rosters/Civil-Roster-Admission.aspx>>; see also “Assessment of Courses in Mediation & Conflict Resolution”, “Core Training in Mediation, Conflict Resolution & Family Dynamics” which includes some of the courses that successful applicants have taken, and “Interpretation of Criteria for Admission”.

²⁰⁷ *Mediate BC*, *supra* note 197.

²⁰⁸ *Mediate BC*, *supra* note 197.

²⁰⁹ *Mediate BC*, *supra* note 197, “Court Mediation Program - Practicum”, online: <<http://www.mediatebc.com/Education---Training/Court-Mediation-Program---Mediation-Services-for-P/About-the-Small-Claims-Practicum.aspx>>.

²¹⁰ *Mediate BC*, *supra* note 197, online: <<http://www.mediatebc.com/Education---Training/Court-Mediation-Program---Mediation-Services-for-P/Apply-to-the-Small-Claims-Practicum.aspx>>.

²¹¹ *Mediate BC*, *supra* note 197, online: <<http://www.mediatebc.com/Education---Training/Court-Mediation-Program---Mediation-Services-for-P/About-the-Small-Claims-Practicum.aspx>>.

Mediators who participate in the CMP have the opportunity to gain practical mediation experience and enhanced mediation skills that they can apply both inside and outside the court setting. In addition, the practical experience gained through the 10 practicum mediations count towards the experience criteria for admission to the Civil Roster.²¹²

Family Roster & Family Mediation Practicum

Family Roster mediators mediate a range of family matters, including: reorganization of the family after separation or divorce; parenting arrangements; financial support and property matters related to separation or divorce; child protection; family business; family property or finances; estates and family inheritance; care of elderly parents; adoption; pre-nuptial issues; and intra-family conflicts.²¹³

In order to be admitted to the Family Roster, mediators must have met the following requirements:²¹⁴

Either:

- Certification by Family Mediation Canada
- For non-lawyers, a minimum of 40 hours of training in family law and procedures;
- insurance coverage; and
- Agreement to adhere to the Society's Standards of Conduct for Mediators.

Or:

- A minimum of 80 hours of core education in conflict resolution and mediation theory and skills training;
- At least 24 hours of structured learning experience focused on issues related to family dynamics in separation and divorce (including power imbalances, substance abuse and psychological issues);
- A university or college degree in law, social sciences or related field;
- For non-lawyers, a minimum of 40 hours of training in family law and procedures;
- Completion of a minimum of 200 hours of mediation work over the course of a minimum of 20 family mediations over the past 5 years, as sole mediator or as co-mediator in an accepted practicum;
- Letters of reference;
- Insurance coverage; and
- Agreement to adhere to the Society's Standards of Conduct for Mediators.

In the document "Learning Objectives for Training in Family Dynamics", Mediate BC sets out the learning objectives and types of learning experiences which applicants for admission to the Family Roster should complete in order to fulfill the 24-hour training requirement in family dynamics, including:

²¹² *Mediate BC*, *supra* note 197, online: <<http://www.mediatebc.com/Education---Training/Court-Mediation-Program---Mediation-Services-for-P/About-the-Small-Claims-Practicum.aspx>>.

²¹³ *Mediate BC*, *supra* note 197, "Family Roster Admission", online: <<http://mediatebc.com/Resources-for-Mediators/About-the-Rosters/Family-Roster-Admission.aspx>>.

²¹⁴ *Mediate BC*, *supra* note 197.

I. Applicants should be able to define, discuss and demonstrate the appropriate and timely use of the following knowledge in working with a family in a mediation:

1. The dynamics of separation and divorce
2. Abuse and control issues, including
3. Mental health, addictions and other issues which may compromise a person's ability to participate in mediation and capacity to consent

II. Applicants should be able to demonstrate the following in an appropriate and timely manner:

1. The competent use of assessment tools and techniques to either screen inappropriate family abuse cases from mediation, or to detect and assess family abuse during the mediation.
2. Safe referral techniques.
3. Safe termination techniques including use of information about sources of help for abused family members in communities.²¹⁵

After admission to the Roster, Family Roster mediators are required to complete 20 hours per year of ongoing professional development or continuing education. In addition, Mediate BC “strongly encourages all Family Roster applicants to review its discussion paper, ‘Safety Screening in Family Mediation’”, which provides an overview of the purpose, background and context of screening for safety, an outline of the screening process, how and when to decline or end mediation, how adapt the mediation environment and process, and closing the mediation.²¹⁶ Additional detailed information about the qualifications for admission to the Civil Roster can be found in Mediate BC’s document entitled “Summary of Qualifications for Admission: Family Roster”.²¹⁷

Family Mediation Practicum Program

The Family Mediation Practicum Program (the “FMPP”) was established in 2004 “to provide an opportunity for trained but inexperienced family mediators to practice mediation skills in a high quality practicum environment.”²¹⁸ The FMPP is administered by Mediate BC and is funded by the Law Foundation of British Columbia.

²¹⁵ Mediate BC, *supra* note 197 “Learning Objectives for Training in Family Dynamics”.

²¹⁶ Mediate BC, *supra* note 197, online: <<http://mediatebc.com/Resources-for-Mediators/About-the-Rosters/Family-Roster-Admission.aspx>>.

²¹⁷ Mediate BC, *supra* note 197, “Family Roster Admission”, online: <<http://mediatebc.com/Resources-for-Mediators/About-the-Rosters/Family-Roster-Admission.aspx>>; see also “Assessment of Courses in Mediation & Conflict Resolution”, “Core Training in Mediation, Conflict Resolution & Family Dynamics” which includes some of the courses that successful applicants have taken, and “Interpretation of Criteria for Admission”.

²¹⁸ Mediate BC, *supra* note 197, “Family Mediation Practicum”, online: <<http://www.mediatebc.com/Education---Training/Family-Mediation-Practicum.aspx>>.

As part of the FMPP, successful applicants can participate in two different practicum opportunities: the Parenting Responsibilities Practicum (the “PRP”) and the Property Division Practicum (the “PDP”).²¹⁹

The focus of the PRP is on family matters such as custody, guardianship, access or parenting plans, child support and special expenses, as well as spousal support.²²⁰ This practicum includes 20 hours of supervised family mediation in addition to 10 hours of feedback with a highly trained and experienced mentor.

The focus of the PDP is on property and asset division, and spousal support. The PDP includes a 12-hour “Family Module” as well as preparation and debriefing sessions with an experienced mentor.²²¹

Applicants to the PRP must have a minimum of 40 hours of interest-based mediation training, including at least 10 hours of simulated, including role-play, mediation.²²² In addition, applicants must have completed a minimum 24 hours of additional training in family dynamics and family violence, as well as training in the fundamentals of family law.²²³ There is an additional prerequisite of 42 hours training in property and asset division for the PDP.

Child Protection Roster & Child Protection Mediation Practicum

Child Protection Roster

Members of British Columbia’s Child Protection Mediation Program (the “CPMP”) Roster are involved in the mediation of disputes relating to a child or plan of care for a child pursuant to section 22 of the *Child, Family and Community Services Act* (the “CFSA”).²²⁴

While the CPMP Roster is affiliated with Mediate BC through the administration of the Roster and the CPMP Practicum, as mentioned above, in collaboration with the Ministry of Children and Family Development (“MCFD”), the Ministry of Attorney General (“MAG”) manages the Roster and sets the qualification standards for admission to the Roster.²²⁵ Admission to the Roster is managed by the CPMP, Justice Services Branch, MAG.²²⁶

²¹⁹ *Mediate BC*, *supra* note 197, “About the Family Mediation Program, online: <<http://www.mediatebc.com/Education---Training/Family-Mediation-Practicum/About-the-Family-Mediation-Program.aspx>>.

²²⁰ *Mediate BC*, *supra* note 197.

²²¹ *Mediate BC*, *supra* note 197.

²²² *Mediate BC*, *supra* note 197, “Apply to the Family Mediation Practicum”, online: <<http://www.mediatebc.com/Education---Training/Family-Mediation-Practicum/Apply-to-the-Family-Mediation-Practicum-Program.aspx>>.

²²³ *Mediate BC*, *supra* note 197.

²²⁴ *Mediate BC*, *supra* note 197, “Child Protection Roster Admission”, online: <<http://www.mediatebc.com/Resources-for-Mediators/About-the-Rosters/Child-Protection-Roster-Admission.aspx>>.

²²⁵ *Mediate BC*, *supra* note 197.

²²⁶ *Mediate BC*, *supra* note 197, Child Protection Mediation Practicum, “Post Practicum”, online: <<http://www.mediatebc.com/Education---Training/Child-Protection-Mediation-Practicum/Post-Practicum.aspx>>.

Applicants to the CPMP Roster must participate in a selection process and requirements set by the Ministry of Attorney General.²²⁷ Mediators who meet the qualifications to be on the Roster and are successful in the selection process are hired on a contract basis (in order to better safeguard mediator neutrality).

The basic qualification for mediators on the CPMP Roster are as follows:

- 80 hours of core education in conflict resolution and mediation theory and skills training (40 hours specifically on mediation, including 10 hours of simulated, or role play, mediation under direct supervision);
- 100 additional hours of related training in dispute resolution or in a “related” field (including law, social work and psychology or any other discipline involving a significant element of negotiation, communication, conflict management skills or similar training);
- 20 hours per year of ongoing professional development and continuing education, defined to include courses, conferences, workshops, coaching, mentoring or supervising mediation trainees;
- Completion of a minimum number of mediation as a primary mediator or sole mediator, being:
 - 10 fee-paid private mediations; or
 - 10 mediations in a structured setting under the auspices of an accepted mediation organization; or
 - 10 mediations in a fully supervised and accepted practicum; or
 - a combination of the above; and
- Two positive letters of reference from peers or supervisors familiar with the applicants work.²²⁸

Mediators who are members of the Civil Roster, Family Roster or accredited by FMC, have demonstrated that they meet the above-noted training requirements and experience pre-requisites for the Child Protection Roster.²²⁹

The selection process for the CPMP involves the issuance of a request for qualifications (“RFQ”) issued by the MCFD and MAG, CPMP “to recruit qualified mediators to provide child protection mediation services in specified communities and areas of the province.”²³⁰

Upon review of the responses to the RFQ, MAG will establish a list of qualified child protection mediators who may be asked to participate in a selection process.

The CPMP selection process involves a MAG Family Justice Services Division (“FJSD”) chaired Qualification Review Panel, “which conducts an in depth assessment of the stated qualifications, reference checks, an interview, a written exam and participation in an

²²⁷ Ministry of Attorney General, “Child Protection Mediation Program”, online: <<http://www.ag.gov.bc.ca/child-protection-mediation/index.htm>> [MAG CPMP].

²²⁸ MAG CPMP, *ibid.*, “Mediator Qualifications and Selection”, online: <<http://www.ag.gov.bc.ca/child-protection-mediation/documents/qualifications-selection.pdf>>.

²²⁹ M. Jerry McHale, QC and Irene Robertson, “Child Protection Mediation in BC”, Restructuring Justice Conference (Continuing Legal Education Society of BC: June 2005) at 8.1.8 [McHale *et al* 2005].

²³⁰ MAG CPMP, *supra* note 227.

Orientation”.²³¹ The Orientation to Child Protection Mediation includes a three-day training session followed by practice learning by means of “mentored co-mediation with a senior child protection mediator.”²³² If qualified mediators are successful in the selection process, they may be offered a contract with MAG to provide child protection mediation services as part of the CPMP Roster.²³³

Child Protection Mediation Practicum Program

The Child Protection Mediation Practicum (the “CPP”) was initiated in 2006, “after consultation with various stakeholders in the dispute resolution and child welfare fields” with funding by the MCFD, MAG and the Law Foundation of BC.²³⁴ The CPP was “designed and implemented to increase the number of qualified mediators in Aboriginal communities and in more remote areas”²³⁵ with the goal of supporting “the development of child protection mediation in Aboriginal and geographically remote communities throughout British Columbia.”²³⁶

One of the primary aims of the CPP is to increase the number of trained Aboriginal mediators and the number of trained mediators in geographically remote communities throughout BC.²³⁷ Consequently, the CPP is limited to Aboriginal applicants and applicants residing in “under-served communities” in BC.²³⁸

CPP participants have the option of completing one of two streams: the Standard Stream and the Equivalency Stream.²³⁹

The Standard Stream is designed for applicants who have completed at least five days of mediation training at an approved institute. Standard Stream applicants must participate in a one-day orientation, a two-day child protection training workshop, and must complete 10 mediations supervised by and co-mediated with mentors who have substantial experience

²³¹ Ministry of Attorney General of BC, Justice Services Branch, Family Justice Services Division, “Child Protection Mediation in British Columbia” (February 2011) at 2 [*MAG 2011*].

²³² *MAG 2011*, *supra* note 231 at 2.

²³³ *MAG CPMP*, *supra* note.

²³⁴ *Mediate BC*, *supra* note 197, “Child Protection Mediation Practicum”, online:<<http://www.mediatebc.com/Education---Training/Child-Protection-Mediation-Practicum.aspx>>.

²³⁵ *MAG 2011*, *supra* note 231 at 9.

²³⁶ *Mediate BC*, *supra* note 197, “Child Protection Mediation Practicum”, online:<<http://www.mediatebc.com/Education---Training/Child-Protection-Mediation-Practicum.aspx>>.

²³⁷ *Mediate BC*, *supra* note 197, “Apply to the Child Protection Practicum”, online:<<http://www.mediatebc.com/Education---Training/Child-Protection-Mediation-Practicum/Apply-to-the-Child-Protection-Practicum.aspx>>.

²³⁸ *Mediate BC*, *supra* note 197, “Apply to the Child Protection Practicum”, online:<<http://www.mediatebc.com/Education---Training/Child-Protection-Mediation-Practicum/Apply-to-the-Child-Protection-Practicum.aspx>>.

²³⁹ *Mediate BC*, *supra* note 197, “About the Child Protection Practicum Program”, online:<<http://www.mediatebc.com/Education---Training/Child-Protection-Mediation-Practicum/About-the-Child-Protection-Mediation-Practicum-Pro.aspx>>.

mediating in the Child Protection context (including four Small Claims mediations and six Child Protection mediations).²⁴⁰

Applicants who satisfy the required mediation training and have some mediation experience may seek an equivalency designation for the CPP. If accepted, the applicant completes the CPP through the Equivalency Stream, which requires the applicant to participate in a two-day child protection training workshop and six Child Protection mediations supervised by and co-mediated with mentors who have substantial experience mediating in the Child Protection context.²⁴¹

Following their fifth and sixth required Child Protection mediations, practicum participants as subject to a final skills assessment, in which the mentor/assessor determines whether or not the mediator has successfully developed the requisite practical skills for Child Protection mediation and to meet CPP program criteria.²⁴²

Upon successful completion of the CPP and final assessment, participants receive certificate recognizing their completion of the CPP, and, upon request, the CPP will provide a letter of recommendation to the CPMP on the participant's behalf.²⁴³ Admission to the CPMP Roster is necessary in order to practice as a Child Protection mediator in BC, however, successful completion of the CPP does not automatically qualify a mediator for or guarantee admission to the Roster.²⁴⁴

d. BC Child Protection Mediation Program - A Model Comparative Program

Throughout our field research for the EGM Project, a number of stakeholders and experts in BC identified the BC CPMP as a possible model for a court-connected guardianship mediation program in BC. Individuals pointed to similarities between the adult guardianship and child protection in pointing to the CPMP model. Some of the key similarities identified included:

- Vulnerable parties;
- Capacity issues and concerns;
- Multiple parties;
- Concerns about abuse and power imbalances; and
- Family dynamics.

²⁴⁰ *Mediate BC*, *supra* note 197, "About the Child Protection Practicum Program", online: <<http://www.mediatebc.com/Education---Training/Child-Protection-Mediation-Practicum/About-the-Child-Protection-Mediation-Practicum-Pro.aspx>>.

²⁴¹ *Mediate BC*, *supra* note 197, "About the Child Protection Practicum Program", online: <<http://www.mediatebc.com/Education---Training/Child-Protection-Mediation-Practicum/About-the-Child-Protection-Mediation-Practicum-Pro.aspx>>.

²⁴² *Mediate BC*, *supra* note 197, "Evaluation and Assessment", online: <<http://www.mediatebc.com/Education---Training/Child-Protection-Mediation-Practicum/About-the-Child-Protection-Mediation-Practicum-Pro/Evaluation-and-Assessment.aspx>>.

²⁴³ *Mediate BC*, *supra* note 197, "Evaluation and Assessment", online: <<http://www.mediatebc.com/Education---Training/Child-Protection-Mediation-Practicum/About-the-Child-Protection-Mediation-Practicum-Pro/Evaluation-and-Assessment.aspx>>.

²⁴⁴ *Mediate BC*, *supra* note 197, "Post Practicum", online: <<http://www.mediatebc.com/Education---Training/Child-Protection-Mediation-Practicum/Post-Practicum.aspx>>.

The following section provides an overview of the BC CPMP in order to illuminate the possible consideration of a similar court-connected program for adult guardianship matters in BC. It describes the history, development and implementation of the program; highlights the challenges and successes of the program as identified by program administrators and staff; and describes how the program has addressed ethical, due process and other concerns.

(i) Background

The BC CPMP was established in 1997 by Dispute Resolution Office of the Ministry of the Attorney General and MCFD who continue to jointly promote and administer the program.²⁴⁵ As part of the CPMP, a provincial Child Protection Mediator Roster was created. “Participation in the CPMP is voluntary and parties to a dispute must agree upon the choice of mediator from the Roster.”²⁴⁶ As noted above, MAG is responsible for providing mediation services and manages the CPMP Roster, including setting qualifications for roster mediators, roster admission, and contracting for mediation services with qualified private sector mediators.²⁴⁷ Mediator neutrality is seen to be “critical to the integrity and viability of the program.”²⁴⁸ Therefore, “based on evaluation of the pilot project and experience in BC and other jurisdictions, it was determined that neutrality could best be safeguarded by having the DRO contract for mediator services” from the private sector.²⁴⁹

In response to the needs identified in the context of family disputes for enhanced access to justice, more efficient justice systems, implementation of “alternative dispute resolution processes that emphasize substantive communication and are structured to reduce antagonism between parties”, and “to support a fundamental shift in justice system culture to accommodate new values and new ways of thinking about conflict management”, a number of jurisdictions over the last couple of decades have developed interest-based dispute resolution models for child welfare disputes.²⁵⁰

As noted in MAG’s 2011 publication entitled, “Child Protection Mediation in British Columbia”:

[T]he use of mediation is often promoted in circumstances where the opposing parties must necessarily continue in a relationship with one another after the initial dispute is resolved, as is often the case in child protection matters. The mediation process is particularly appropriate where there is a need to preserve a relationship between the parties because it is designed to minimize the tendency of disputing parties to polarize. “Mediation can help everyone involved look at highly polarized situations in a new light”.²⁵¹

²⁴⁵ *McHale et al. 2005, supra* note 229 at 8.1.7.

²⁴⁶ *MAG 2011, supra* note 231 at 2.

²⁴⁷ *MAG 2011, supra* note 231 at 1.

²⁴⁸ *MAG 2011, supra* note 231 at 1.

²⁴⁹ *MAG 2011, supra* note 231 at 1.

²⁵⁰ M. Jerry McHale, Q.C., Irene Robertson and Andrea Clarke, “Building a Child Protection Mediation Program in British Columbia” (2009) *Family Court Review* 47(1) at 86 [*McHale et al. 2009*].

²⁵¹ *MAG 2011, supra* note 231 at 4.

BC decided to test the use of mediation in child protection cases in BC in the early 1990's, following the initiation of child protection mediation programs in the US in the 1980's that established mediation as a viable option for resolving child protection disputes.²⁵²

Mediation in child protection cases in BC was first tested in Victoria as a one-year pilot program, with 20 families referred to mediation.²⁵³ The stated parameters of the pilot project were:

- The goal of mediation would be to reach an agreement regarding the future care of the child in a manner that protected the child and served the child's best interests;
- Facts such as the existence or nonexistence of neglect or abuse could not be mediated. A decision that the child is in need of protection could not be mediated;
- However, the nature, form, and extent of the Ministry's involvement with the family could be mediated;
- Participation would be voluntary and a child could not be in immediate danger while the mediation proceeds;
- Parents must be competent to negotiate or alternatively have counsel to negotiate for them;
- Mediation would be available at all stages of the process—from before removal to before trial—but as a rule, the earlier it is used the better; and
- A range of persons would be able to participate in the mediation, including friends, allies, or other persons with an interest in the outcome.²⁵⁴

The results of the evaluation of the pilot project indicated that:

- Most cases mediated resulted in agreements;
- Families who tried the process liked it. More than 85% of the families preferred mediation to meeting with a social worker alone, and 100% of single mothers preferred mediation. Seventy-nine percent of the families felt they “had a real say in working out the agreement”;
- Most often, social workers were satisfied with the agreement made, were favourably impressed by the mediator and regarded mediation as an effective use of their time.
- Sixty-five percent thought that the agreement reached was different from what would have been arrived at without mediation;
- Mediation improves or helps sustain the working relationship between the social worker and the family in a significant proportion of the cases.²⁵⁵

As a result of the positive results of the Victoria Pilot Project, MAG and MCFD were encouraged to work together to further develop and expand the use of mediation in child protection disputes.²⁵⁶

(ii) Statutory Framework & Program Development

The *Child, Family and Community Services Act*²⁵⁷ (the “CFCSA”), which came into force in 1996, provided institutional support for child protection mediation in the province and the

²⁵² *McHale et al. 2009, ibid.* at 87.

²⁵³ *McHale et al. 2009, ibid.* 250 at 87; *CPMBC, supra* note 247 at 6.

²⁵⁴ *McHale et al. 2009, ibid.* 250 at 87-88.

²⁵⁵ *MAG 2011, supra* note 231 at 6-7.

²⁵⁶ *McHale et al. 2009, supra* note 250 at 88.

legislative foundation for the BC CPMP.²⁵⁸ The CFCSA includes specific provisions “designed to encourage early, cooperative resolution of child protection disputes outside of the court process”²⁵⁹, as set out in sections 22-24 as follows:

- 22 If a director and any person are unable to resolve an issue relating to the child or a plan of care, the director and the person may agree to mediation or other alternative dispute resolution mechanisms as a means of resolving the issue.
- 23 (1) On application the court may adjourn a proceeding under this Part one or more times, for a total period of up to 3 months, so that a family conference, mediation or other alternative dispute resolution mechanism can proceed.

(2) If the proceeding is adjourned, any time limit applicable to the proceeding is suspended.

(3) If, as a result of a family conference, mediation or other alternative dispute resolution mechanism, a written agreement is made after a proceeding is commenced to determine if the child needs protection, the director may file the agreement with the court.
- 24 (1) A person must not disclose, or be compelled to disclose, information obtained in a family conference, mediation or other alternative dispute resolution mechanism, except
 - (a) with the consent of everyone who participated in the family conference or mediation,
 - (b) to the extent necessary to make or implement an agreement about the child,
 - (c) if the information is disclosed in an agreement filed under section 23, or
 - (d) if the disclosure is necessary for a child's safety or for the safety of a person other than a child, or is required under section 14.
- (2) This section applies despite ss. 76, 78 and 79.

The success of the Victoria pilot project and the enactment of the *CFCSA* and *CFCSA Regulation* led to the establishment in 1997 of the BC CPMP and Child Protection Roster to provide mediation services throughout the province. Section 9 of the *CFCSA Regulation* provides:

- 9 (1) For the purposes of section 22 of the Act, a director must establish a roster of mediators.
- (2) If a director and another person agree to mediation as a means of resolving an issue relating to a child or a plan of care, the director must choose from the roster a mediator acceptable to the other person.

McHale *et al.* in *Building a Child Protection Mediation Program in British Columbia*²⁶⁰, noted that “This regulation gave government a mechanism to address critical mediation service delivery

²⁵⁷ *CFCSA*, *supra* note 27.

²⁵⁸ *McHale et al. 2009*, *supra* note 250 at 88.

²⁵⁹ *McHale et al. 2009*, *supra* note 250 at 88.

issues such as establishing mediator qualifications, promulgating a code of conduct, fixing mediator remuneration, and ensuring the quality of mediator services.”²⁶¹

The provincial government also worked with the private sector to expand practical training opportunities for less experienced mediators, which led to the development of the CPP described above. All roster mediators must participate in an orientation training and ongoing professional development, as described above.

In addition, as part of a collaborative approach to promoting child protection mediation, the provincial government established strategic institutional and government partnerships and alliances: the core partnership between MAG and MCFD; support from Mediate BC; support from the BC Provincial Court; and support from the Law Foundation of BC and Legal Services Society of BC.²⁶² McHale *et al.* highlighted that the support from the court was especially valuable with respect to establishing the CPMP in new communities.²⁶³ McHale *et al.* also emphasized that the CPMP “is on a broader and more stable foundation because of the emphasis on an integrated approach to program design and implementation.”²⁶⁴

(iii) The Surrey Court Project and Evaluation

Despite the demonstrated safety and efficacy of child protection mediation in the Victoria Pilot Project, legislative and government policy support, as well as the availability of skilled child protection mediators, the CPMP did not expand as quickly as anticipated.²⁶⁵ Mediators advised that while mediation in the child protection context was a valuable tool, the concept required promotion and education.²⁶⁶

Accordingly, in 2001, in an effort to further promote and develop the CPMP, a second child protection mediation pilot project was initiated in Surrey, BC. MAG, MCFD and the Office of the Chief Judge of the Provincial Court were all involved in the design of the Surrey Court Project, which introduced a new child protection mediation model called the Facilitated Planning Meeting (the “FPM”).²⁶⁷ The FPM, while also being “mediation” pursuant to section 22 of the *CFCSA*, included additional features unique to child protection mediation:²⁶⁸

- Mediation is supported “on the ground” by a senior, experienced social worker (the Court Work Supervisor) who actively reviews and refers cases to mediation. The Court Work Supervisor also supports social workers during the mediation process, and attends all planning meetings with authority to agree to a settlement.
- Prior to a planning meeting being scheduled, the mediator conducts orientation sessions separately with each of the parties. The purpose of the Orientation Session

²⁶⁰ McHale *et al.* 2009, *supra* note 250 at 89.

²⁶¹ McHale *et al.* 2009, *supra* note 250 at 89.

²⁶² McHale *et al.* 2009, *supra* note 250 at 90.

²⁶³ McHale *et al.* 2009, *supra* note 250 at 90.

²⁶⁴ McHale *et al.* 2009, *supra* note 250 at 90.

²⁶⁵ McHale *et al.* 2009, *supra* note 250 at 90.

²⁶⁶ McHale *et al.* 2009, *supra* note 250 at 90.

²⁶⁷ McHale *et al.* 2009, *supra* note 250 at 90; MAG 2011, *supra* note 231 at 7.

²⁶⁸ MAG 2011, *supra* note 231 at 7; McHale *et al.* 2009, *supra* note 250 at 90-91.

is to understand the process, allow the parties to tell their story, review the case, identify issues/interests, focus on next steps and consider options for resolving the dispute. Cultural and other important factors that need to be brought into the mediation process are brought forward. Procedural issues, determining who will attend and what their roles should be, making decisions about capacity, power dynamics, safety and other important considerations are discussed.

At the end of the orientation sessions, the mediator is familiar with the parties and their interests, and has a list of issues the parties will negotiate at the planning meeting. Parties understand what can and what cannot be negotiated and have options in mind to facilitate negotiations.

As a result of the orientation sessions, the planning meeting should be a focused, one-time event for resolving issues.

The strategy for the FPM pilot project design process was to work collaboratively with, educate, and engage stakeholders in the pilot project design from the initial stages through to implementation of the project.²⁶⁹ The goal of the strategy was:

[...]to build the pilot *with*, not *for*, all stakeholders in the hope that the ultimate product would be stronger by virtue of their input and that there would ultimately be broader ownership of the project...the assumption that meaningful participation in the development of the pilot would ultimately translate into acceptance proved accurate.²⁷⁰

Results of evaluation of the Surrey Court Project and other research conducted independently of the formal evaluation indicated the following:

- 89% of cases that proceeded to mediation were completed in one planning meeting;
- 69% of cases were completed in less than 40 days from referral;
- 92% of all issues referred to mediation were resolved; the highest resolution rate (97%) was for issues concerning services and resources, and the lowest resolution rate (83%) concerned behaviour and parenting issues;
- Overall, 83% of cases had all issues resolved, 12% has some issues resolved and only 5% had no issues resolved;
- Overall satisfaction with the planning meeting process was rated at 6.2 out of 7 by parents, social workers, lawyers and judges interviewed for the evaluation;
- The orientation sessions are critical to the success of the Facilitated Planning Meetings, allowing the parties to reframe their issues and arrive at the meeting more prepared and less defensive;
- The Court Work Supervisor role was critical to the project, particularly in promoting a collaborative approach to resolving disputes;
- The 34 cases referred to a planning meeting over a six month period saved 82 scheduled trial days;
- Analysis by MCFD suggests that issue resolution achieved through Facilitated Planning Meetings during the pilot project reduced by 30%, on average, child days in care; and

²⁶⁹ *McHale et al. 2009, supra* note 250 at 91.

²⁷⁰ *McHale et al. 2009, supra* note 250 at 91.

- Full-time administrative support to the program was important because it entails that mediations could be scheduled efficiently and that parties to the mediation had a neutral and accessible contact for information.²⁷¹

Further, social workers involved in the Surrey Court Project made the following observations:²⁷²

- mediation de-emphasizes the tone of blame;
- mediation improves the relationship between the family and the social worker;
- mediated agreements are empowering for clients;
- mediation is a good forum for involving extended family in the planning;
- children are returned to their families earlier when issues are resolved by mediation;
- mediation improves the planning for the child and family;
- mediated agreements take and save time;
- parents are helped by the mediator's very sensitive approach; and
- mediation settings are more client- and worker-friendly and allow parties more control over the proceedings.

While the Surrey Court pilot project was completed in 2003, it has subsequently formed the basis for expansion of the program in other areas of the province, and “fundamental elements of the model, such as the Orientation process, have been incorporated into the program.”²⁷³

(iv) Case selection, Screening and Referral

In the CPMP, the selection of cases for mediation is made by the social worker or “team leader”/supervisor.²⁷⁴ Referral to a mediator on the Child Protection Roster is made either directly by the social worker, or by one of the parties, parties’ counsel, the court, professionals in the community, or the parents.²⁷⁵ All parties must agree on the choice of a mediator from the Roster.

There are a multitude of issues related to the care and welfare of a child that may be referred to and resolved in mediation. Establishing a plan of care for a child is one example.²⁷⁶ Whether or not a child is in need of protection or whether or not there has been abuse or neglect, cannot be mediated, as these are facts that must be determined by a court.²⁷⁷ The plan of action pursuant to legal determinations of such facts may be mediated, however.

Some child protection cases are considered inappropriate for mediation, and mediators are required to assess each case referred to determine its suitability for the mediation process.²⁷⁸ The opportunity for the mediator to screen for appropriateness and safety is one of the

²⁷¹ *MAG 2011*, *supra* note 231 at 7-8; *McHale et al. 2009*, *supra* note 250 at 93; see also Surrey Court Project evaluation reports, online: <<http://www.ag.gov.bc.ca/dro/publications/index.htm#evaluation-reports>>.

²⁷² *McHale et al. 2009*, *supra* note 250 at 93.

²⁷³ *MAG 2011*, *supra* note 231 at 8.

²⁷⁴ *McHale et al. 2005*, *supra* note 229 at 8.1.8-9.

²⁷⁵ *McHale et al. 2005*, *supra* note 229 at 8.1.8-9 & 11.

²⁷⁶ *McHale et al. 2005*, *supra* note 229 at 8.1.8-10.

²⁷⁷ *McHale et al. 2005*, *supra* note 229 at 8.1.8-12.

²⁷⁸ *McHale et al. 2005*, *supra* note 229 at 8.1.8-12.

valuable features of the pre-mediation meetings; for example, mediators can utilize the pre-mediation orientation session to identify power imbalances or safety issues.²⁷⁹ Examples of child protection disputes that have been identified as unsuitable for mediation, which may also be relevant in the context of adult guardianship, include the following:

- the safety of the child may be at risk during the mediation process (i.e., the safety of the child cannot be left pending while the mediation proceeds);
- the power imbalance between the parties is significant to the extent that the interests of all the parties cannot be fully articulated and acknowledged, and respectfully and efficiently dealt with;
- disputes where any of the parties is not competent to negotiate and does not have counsel to negotiate for them;
- when participating in mediation would cause delay in the decision making process about the care of a child; and
- not all the parties volunteer to participate.²⁸⁰

(v) Model & Style of Mediation

Currently, all child protection mediation in BC, including the FPMM, is offered pursuant to s.22 of the *CFCSA*, and is supported by mediation services from the single Child Protection Roster, whether the services are offered through a FPMM or the CPMP.²⁸¹ Both the FPMM and the CPMP processes follow interest-based mediation practice.

In practice, as the program has developed, and as the Dispute Resolution Office has emphasized in training the importance of pre-mediation orientation sessions, “mediators have incorporated the orientation session into the child protection work regardless of whether or not the mediation is scheduled to be conducted within the FPM structure. The provision of an orientation and single mediation session is now an expectation set out in the contract for mediation services.”²⁸² The main difference between the two models is the presence of the Court Work Supervisor in the FPM and his or her authority to approve agreements.

(vi) Attendance and Participation

Participation in child protection mediation is voluntary. Accordingly, it is essential that all parties are committed to mediation and sign an “Agreement to Mediate” prior to the commencement of mediation.²⁸³

Who attends a mediation session is determined in advance by the mediator. Certain individuals, such as advocates, are specifically authorized to participate in mediation pursuant to the *CFCSA*.²⁸⁴ A case cannot be referred to mediation unless all parties who are required to be present in order for a court order to be made agree to participating in mediation.²⁸⁵

The following individuals will/may also attend:

²⁷⁹ *McHale et al. 2005, supra* note 229 at 8.1.8-12.

²⁸⁰ *McHale et al. 2005, supra* note 229 at 8.1.8-12.

²⁸¹ *McHale et al. 2005, supra* note 229 at 8.1.8-9.

²⁸² *Braun supra* note 81 at 9.

²⁸³ *McHale et al. 2005, supra* note 229 at 8.1.8-12.

²⁸⁴ *McHale et al. 2005, supra* note 229 at 8.1.8-12.

²⁸⁵ *McHale et al. 2005, supra* note 229 at 8.1.8-12.

- the director/social worker or Court Work Supervisor will always attend
- a social worker's supervisor may attend
- parents or guardians will always attend
- an older child may attend
- counsel for the parents may attend
- counsel for the director does not generally attend
- advocates, support people, or other family members may attend
- other individuals listed in s.34 of the *CFCSA*
- representatives of Aboriginal communities or First Nations may attend
- language interpreters may be used²⁸⁶

(vii) Termination of Mediation

Mediation terminates when parties reach an agreement. However, mediation may also be terminated by the mediator in the following circumstances:

- a full disclosure of all relevant facts has not been made or a party is not mediating in good faith,
- an uncorrectable power advantage is being exploited to the prejudice of one of the parties,
- there is no reasonable prospect of an agreement within a reasonable time,
- circumstances have changed so that the referral criteria for mediation are no longer satisfied (e.g., the child cannot be made safe while the parties attempt mediation; a person does not have the capacity to negotiate).

(viii) Challenges for Child Protection Mediation

While the CPMP has demonstrated the value and efficacy of mediation in child protection matters, research and practice has led to the identification of a number of challenges to successful child protection mediation services, such as:

- despite high satisfaction with mediation services, voluntary programs have low uptake rates
- mediation programs need to be promoted
- with the expansion of programs into new communities and cultures, unique challenges may be encountered in each new community

e. Chapter conclusions

This chapter provided an overview of the adult guardianship framework and the mediation field in BC in order to provide the necessary context for the report's discussions, recommendations and conclusions regarding the development of best practices and programs for elder and guardianship mediation in the province and more broadly.

As noted in this chapter, adult guardianship law in BC is in a period of transition. Bill 29 introduced new statutory requirements for advance planning for substitute decision-making, which are now in force, and adult guardianship, which has yet to be proclaimed. When the proposed guardianship sections come into force, the revised *Adult Guardianship Act* will

²⁸⁶ *McHale et al. 2005, supra* note 229 at 8.1.8-12-13.

require mediation for most contested guardianship matters, subject to exceptions set out in regulations. This chapter identifies several issues for consideration in the drafting of adult guardianship regulations.

Mediation is well established in BC, both independent of and annexed to court processes, and the field is supported by an experienced cadre of mediators. A number of organizations have established effective mediation training and certificate opportunities and have set standards for professional conduct for member mediators. This has helped to establish a competitive market of excellent mediation services in the province. Further, with respect to elder and guardianship mediation, some extent of specialization has already developed in the province and a fertile groundwork has been laid for the new fields of elder and guardianship mediation in BC.

CHAPTER 5 – Elder and Guardianship Mediation Training & Standards

As noted earlier in this report, our research indicates a strong consensus that specialized training should be required for mediators practicing in the areas of elder and guardianship mediation. Specifically, experts and stakeholders interviewed in our Field Research agreed that all “elder mediators” should have a minimum of basic mediation training and experience plus specialized training and experience in elder mediation. Further, experts and stakeholders stressed that additional information and skills are necessary for mediators with basic and elder mediation training to handle guardianship cases. Subject to one or two exceptions, there was broad agreement among experts and stakeholders that a formal degree was not a necessary prerequisite for mediators practicing in the areas of elder and guardianship mediation.

Specific training for those wishing to mediate “elder disputes” has existed in the US for some time. Elder mediation practice in Canada has lagged behind the US, both in regard to the growth of elder mediation as a distinct practice area, as well as in the development of training standards and certification. As discussed above, however, interest in this area of practice is growing significantly in Canada. As the elder mediation field has grown, so has the effort to develop competencies and training standards. There have also been recent efforts in Canada and the US to develop ethical codes or codes of professional conduct for mediators practicing in the areas of elder and guardianship mediation.

1. Canada Elder Mediation Training Programs - Examples

The development of training opportunities, certification and standards in elder mediation has in Canada has begun. For example, the national organization Elder Mediation Canada (“EMC”) has pioneered elder mediation training in Canada and has developed a certification process and roster for elder mediators.²⁸⁷ Marathon Mediation based in Toronto, Ontario has also developed a specialized Elder Mediation Training Program.²⁸⁸

a. EMC Elder Mediation Training

EMC has initiated and developed an Elder Mediation Certification Program as a pilot project with the goal “to have informed mediators from every province and territory in Canada, as well as any other interested states and countries, certified with an elder mediation standard.”²⁸⁹ Mediators who meet EMC’s program training requirements (as set out in their certification application) and commit to adhering to EMC’s Code of Professional Conduct may apply for certification as an EMC Certified Elder Mediator. EMC certified mediators are listed on the EMC Mediator Roster.²⁹⁰

²⁸⁷ For more information on Elder Mediation Canada’s Elder Mediator Certification program contact see online: <<http://www.eldermediation.ca/>; Information about EMC Elder Mediation training opportunities for credit towards EM certification contact Family Mediation Canada.

²⁸⁸ For more information on Marathon Mediation’s training program see online: <<http://www.marathonmediation.ca/>> [*Marathon Mediation*].

²⁸⁹ EMC, *supra* note 45, online: <<http://www.eldermediation.ca/page6/page6.html>>.

²⁹⁰ EMC, *supra* note 45, online: <<http://www.eldermediation.ca/page7/page7.html>>.

EMC's Elder Mediator Certification application requires applicants to satisfy the following training requirements:²⁹¹

- A formal degree in a related discipline is required as a prerequisite to elder mediation training plus specialized training and experience in issues of aging
- A minimum of 100 hours of basic mediation training including at least 10 hours of training on the cultural dynamics of conflict and conflict resolution processes (individuals who are provincially certified or FMC certified are considered to have met this requirement)
- A minimum of 100 hours additional age related elder family mediation training, including the following:
 - At least 14 hours of elder abuse training
 - At least 7 hours of training in power imbalance
 - At least 7 hours of family and elder law training
 - At least 7 hours training in drafting memoranda of understanding
 - Dynamics of normal aging, family relationships and intergenerational dynamics
 - Dynamics of grief and loss
 - Ageism
 - Community support services for older adults and their families
 - Guardianship
 - Alzheimer's disease and other progressive dementias and chronic diseases
 - Legal issues related to health decision making and powers of attorney
 - Ethical issues relating to the mediation process
 - Culture and aging
 - Additional training in cultural understanding that promotes awareness, acceptance of and respect for cultural values and beliefs
 - Annual continuing education to ensure that mediation skills are current and effective.

With respect to training requirements and competence, EMC's Code of Professional Conduct (the "EMC Code") requires the following of its members:²⁹²

- An elder mediator should demonstrate knowledge of the literature, research, skills and techniques associated with the following:
 - elder mediation theory and philosophy
 - negotiation, conciliation and conflict management
 - mediation theory and methodology
- Further, an elder mediator should have a good working knowledge of:
 - issues of aging and family dynamics;
 - legal information pertaining to the issues being mediated;
 - the dynamics and effects of abuse, coercion and control in families and institutions;
 - multicultural issues;

²⁹¹ EMC, *supra* note 45, *Code of Professional Conduct for Mediators Specializing in Issues of Aging* at 14, online: <<http://www.eldermediation.ca/page5/page5.html>>; see also EMC Elder Mediator Certification application.

²⁹² EMC, *supra* note 45, *Code of Professional Conduct for Mediators Specializing in Issues of Aging* at 16, online: <<http://www.eldermediation.ca/page5/page5.html>>.

- professional, academic, community and educational resources for referral or use within the mediation process.
- participant negotiating styles and mediator/participant interaction;
- the implications and meaning of culture for the mediation participants
- public concerns regarding mediation practice;
- other conflict resolution options;
- ethical and moral issues that may arise during mediation; and
- ethical responsibility to refer to appropriate providers.

With respect to training boundaries and options for elder mediators, the EMC Code states the following:²⁹³

- While elder mediators may have a diversity of education and training, they must refer to other professionals for services they are competent to provide while acting in the capacity of an elder mediator.
- All potential elder mediators should obtain training in elder mediation from programs that are taught by people clearly knowledgeable in the field and have learning objectives that have received positive and high evaluations from participants.
- Elder mediators may include courses specific to elder mediation taken as part of their professional degree or elder mediation related courses offered by community colleges and universities.
- Elder mediators may consider participation in workshops, training institutes, and conferences that deal specifically with mediation and elder mediation and issues relevant to the practice of mediation.

b. Marathon Mediation Elder Mediation Training Program

Marathon Mediation in Ontario has developed an Elder Mediation Training Program (the “EMTP”) for mediators and other professionals who wish to specialize in elder mediation or provide elder mediation services as a part of their practice. The EMTP is intended to “provide participants with the knowledge and skills essentials to build this expertise, expand their professional practices, and meet the ever-increasing needs of our aging population.”²⁹⁴ The EMTP includes a two-day introductory, core training program with the option of completing a subsequent optional advanced three-day applied training program. These courses were designed to fulfill the training standards and objectives recommended by the US ACR Section on Elder Decision-Making and Conflict Resolution Committee of Training Standards and the EMC Code.

The two-day core training program provides an introduction to the issues that may arise when working with older persons, their families and caregivers. Topics included in the introductory course include the following:²⁹⁵

- The demographic, interpersonal, systemic and ethical need for Elder Mediation

²⁹³ EMC, *supra* note 45, *Code of Professional Conduct for Mediators Specializing in Issues of Aging* at 16, online: <<http://www.eldermediation.ca/page5/page5.html>>.

²⁹⁴ *Marathon Mediation*, *supra* note 288.

²⁹⁵ *Marathon Mediation*, *supra* note 288, online: <<http://www.marathonmediation.ca/training/emp-core-program-2/>>. For more information on Marathon Mediation’s PPREP model for elder mediation see online: <http://www.marathonmediation.ca/mediation/our-process/>.

- Elder Mediation and Elder Family Conferencing as unique processes within the ADR field
- Understanding problems and issues faced by elders and families
- The 4D's – Dementia, Depression, Delirium and Drugs: Impact on the person and the process
- Capacity and substitute decision-making
- Factors affecting capacity to mediate
- Critical legal issues
- Ageism in our society
- Exploring Diversity
- Elder Abuse
- Ethical considerations
- PRREP (elder mediation process model)
- The Importance of Intake and Screening
- Interviewing the Older Person
- Accommodating cognitive impairment and other challenging disabilities
- Dealing with high emotions and difficult behaviour
- Use of support persons and community resources, and
- Building an Elder Mediation practice.

The advanced three-day training program in Elder Mediation is designed for practicing mediators accredited with Family Mediation Canada and/or the Ontario Association of Family Mediation, or equivalent, and individuals in the accreditation process. This course is intended to build on the knowledge and skills learned in the introductory core training course and to “immerse participants in the practice of elder mediation.”²⁹⁶ This course assumes that participants have had previous mediation training and experience, and will be able to apply and integrate that knowledge to this specialized practice area. The advanced course includes interactive learning such as group discussions, demonstrations, simulations and role-playing. Topics included in the advanced course include the following:²⁹⁷

- PRREP
- Role of the Mediator
- Stages in the Mediation Process
- Strategic determination of “next steps” in the process
- Intake and Screening procedures
- The Elder Abuse Screening protocol
- The Initial Interview
- Advanced interview techniques, with particular attention to cognitive impairment
- Strategies and accommodations to enhance the older person’s capacity to participate in the process
- Legal Red Flags (situations that indicate the need for independent legal advice - ex. transfer of assets into joint ownership)
- Diffusing difficult situations
- Dealing with power issues
- Using caucuses effectively

²⁹⁶ *Marathon Mediation*, *supra* note 288, online: <<http://www.marathonmediation.ca/training/emp-advanced-elder-mediation-program-3/>>.

²⁹⁷ *Marathon Mediation*, *supra* note 288, online: <<http://www.marathonmediation.ca/training/emp-advanced-elder-mediation-program-3/>>.

- Reaching agreement and the Memorandum of Understanding (MOU)
- Checklists and MOU documents
- Marketing your practice

Marathon Mediation has also introduces an internship program as part of its EMTP.²⁹⁸

2. US Elder Mediation Training Programs - Examples

As mentioned above, specialized training in elder and guardianship mediation has existed in the US for some time. A number of organizations offer elder mediation and guardianship mediation training programs and opportunities. In addition, some court-connected adult guardianship programs provide training for program mediators (for example, the Alaska Adult Guardianship Mediation Program discussed in Chapter 6). Several well-established providers of elder and guardianship mediation training referred to in our Field Research and Literature Review include the following: The Centre for Social Gerontology (TCSG's Adult Guardianship Mediation Training is discussed and referenced throughout this report),²⁹⁹ Senior Mediation and Decision-Making,³⁰⁰ Elder Decisions,³⁰¹ Zena Zumeta Mediation Services.³⁰² Others, such as the ACR Section on Elder Decision-Making and Conflict Resolution have developed national elder mediation training objectives and standards, as described below.

While the training courses and programs offered by organizations in the US vary to some extent, the majority of the contents of the elder mediation training courses and programs referenced in our research indicate a general consensus regarding the topics that should be included in elder mediation training, as illustrated by the following examples.

a. Senior Mediation and Decision-Making

Senior Mediation and Decision-Making ("SMDM") offers a two-day or three-day introductory course in elder mediation. The interactive, skills-based course is designed for experienced mediators and professionals in elder mediation and includes the following topics:³⁰³

- Defining elder mediation
- Ways in which elder mediation differs from other mediations
- Importance of intake
- Ageism and bias
- Aging process and its possible impact on mediation
- Capacity issues
- Accommodating cognitive impairment or other challenges
- Use of support persons
- Family dynamics
- Recognizing and responding to elder abuse

²⁹⁸ *Marathon Mediation*, *supra* note 288.

²⁹⁹ *TCSG Manual*, *supra* note 21, online: <<http://www.tcsg.org/med.htm>>.

³⁰⁰ Senior Mediation and Decision-Making, Inc., online: <<http://www.senior-mediation.org/training.html>> [SMDM].

³⁰¹ Elder Decisions, online: <<http://www.elderdecisions.com/pg19.cfm>>.

³⁰² Zena Zumeta Mediation Services, online: <<http://learn2mediate.com/elder/>> [ZZMA].

³⁰³ *SMDM*, *supra* note 300.

- Ethical considerations including self-determination, necessary participants, ensuring the older person’s voice is heard, role of advocates, and mediator competence
- Legal and financial issues including guardianship, health care, end-of-life issues and financial planning.

SMDM has also developed an elder mediation training manual.³⁰⁴

b. Elder Decisions

Elder Decisions offers conflict resolution skills training programs designed for professionals in the “eldercare field to deal with conflict issues that arise in their work.”³⁰⁵ Elder Decisions’ Elder/Adult Family Mediation Training is a program designed for mediators interested in providing mediation services to “elders/adult families”.³⁰⁶ Topics included in this training program include the following:³⁰⁷

- Elder Mediation
 - Presenting Issues
 - Neutrality vs. Mediator Advocacy
 - Common Hurdles
 - New Strategies for Intake
 - Working with Large, Dispersed Family Groups
 - Ethical Concerns
- Challenges of Aging
 - Mental and Physical Effects of Aging
 - Maintaining Independence
 - Coping with Loss
 - Caregiving and Aging Families
 - Long Term Care Options for Elders
- Legal Planning
 - Planning for Financial Management
 - MassHealth Eligibility
 - Medical Decision Making
 - Asset Protection
 - Guardianship
- Multi-Party Role Plays
- Marketing your Elder Mediation Practice.

c. Zena Zumeta Mediation Services

Zena Zumeta Mediation Services (“ZZMS”) offers a range of mediation training opportunities including a two and a half day “Training in Elder Mediation” and a five-day “Basic/Advanced Training in Elder Mediation”. The shorter course is designed as an advanced course for individuals with basic mediation training and as an introduction to elder

³⁰⁴ *Rhody & Rhodis, supra* note 48.

³⁰⁵ Elder Decisions, *supra* note 301, online: <<http://www.elderdecisions.com/pg1.cfm>>.

³⁰⁶ Elder Decisions, *supra* note 301, online: <<http://www.elderdecisions.com/pg19.cfm>>.

³⁰⁷ Elder Decisions, *supra* note 301, online: <<http://www.elderdecisions.com/pg19.cfm>>.

mediation for those without basic mediation training. The focus of the shorter course is on adult guardianship and family caregiver mediation, and includes the following topics:³⁰⁸

- Differences between elder mediation and other types of mediation
- Guardianship/conservatorship law and practice
- Capacity and disability issues
- Legal red flags
- Elder abuse
- Confidentiality issues
- Multiparty mediation and family dynamics
- Deciding who should be present at the mediation
- Working with attorneys, court representatives, guardians ad litem and institutional representatives
- Role of community resources, support persons, advocates, and surrogates in mediation
- Ethical standards for elder mediators
- Mental and physical effects of aging, disabilities, and accommodation in mediation
- Societal and participant bias, family and cultural attitudes, and their impact on the mediation process
- Pre-mediation interviews and screening for appropriateness of mediation
- Marketing an elder mediation practice
- Demonstration, video and practice.

The five-day course offers training in basic mediation and elder mediation skills and provides participants with the opportunity to practice “pre-mediation meetings, listening skills, identifying and framing issues, negotiation strategies, and agreement writing within the context of elder mediation.” The topics in the five-day training include the following:³⁰⁹

- Mediation and conflict resolution theory and skills
- Differences between elder mediation and other types of mediation
- Guardianship/conservatorship law and practice
- Capacity and disability issues
- Legal red flags
- Elder abuse
- Confidentiality issues
- Multiparty mediation and family dynamics
- Deciding who should be present at the mediation
- Working with attorneys, court representatives, GALs and institutional representatives
- Role of community resources, support persons, advocates, and surrogates in mediation
- Ethical standards for elder mediators
- Mental and physical effects of aging, disabilities, and accommodation in mediation
- Societal and participant bias, family and cultural attitudes, and their impact on the mediation process
- Pre-mediation interviews and screening for appropriateness of mediation
- Marketing an elder mediation practice

³⁰⁸ ZZMS, *supra* note 302, online: <<http://learn2mediate.com/elder/adultguardianship.php>>.

³⁰⁹ ZZMS, *supra* note 302, online: <http://learn2mediate.com/elder/5daybasic_advanced.php>.

- Demonstration, video and practice.

d. U.S. Association for Conflict Resolution Training Standards and Objectives

In 2009, the Association for Conflict Resolution Section on Elder Decision-Making and Conflict Resolution (the “Section”) was established as a special interest section of the Association for Conflict Resolution (the “ACR”), with the mission “to advance the development, provision, and use of high-quality, facilitated conflict resolution and decision-making services by older persons, their families, public and private service providers, and others.”³¹⁰

The Training Standards Committee (the “Committee”) of the Section is responsible for developing and promoting “professional standards of elder mediation training in order to advance quality practice, and to provide resources and information to assist trainers to meet these standards.”³¹¹ In 2010, the Committee developed a first draft of elder mediation training objectives and in September 2011 published the final draft of the elder mediation training objectives in the form of two guides: *Elder Care and Elder Family Decision-Making Mediation: Training Objectives and Commentary* (which includes Adult Guardianship) (the “Training Objectives”); and *Working with Older Persons in Mediation: Diversity Training Objectives and Commentary* (the “Diversity Training Objectives”).³¹²

These training objectives and standards initially arose out of a mini-summit convened by TCSG in February 2006, and are the result of more than four years of work by trainers and practitioners with vast experience in elder and guardianship mediation and training and program development.³¹³

Training Objectives

The Training Objectives are designed “to orient mediators to the issues and skills necessary to enter the practice of elder care and elder family decision-making mediation (“elder mediation”).”³¹⁴ Further, the Training Objectives are intended for training mediators who have at least 40 hours of basic mediation training and experience and who wish to specialize in elder mediation. The first part of the Training Objectives deals with elder mediation cases unconnected to court proceedings. The second part of the Training Objectives sets out additional training objectives for mediators who wish to mediate adult guardianship disputes. The Training Objectives are grounded in the central value of self-determination:

A central value infused throughout elder mediation training is the importance of supporting the self-determination of the older person in the mediation process to the greatest extent. This value may be accomplished by the older person’s physical presence and/or by the inclusion of the older person’s expressed wishes and long-standing values when mediation discussion, action or decisions may impact the older

³¹⁰ ACR Section on Elder Decision-Making and Conflict Resolution, online: <<http://www.acrelder.org/about-us/>> [*ACR Section*].

³¹¹ *Ibid*, Training Standards Committee, online: <<http://www.acrelder.org/our-committees/training-standards/>>.

³¹² *Ibid*.

³¹³ *Ibid*, Training Standards Committee, Letter to ACR Section members dated February 2011.

³¹⁴ *Ibid*, Training Standards Committee, online: <<http://www.acrelder.org/our-committees/training-standards/>>.

person. While elder mediation upholds the self-determination of all participants, training should address the forces that exclude older persons from decision-making, such as ageism, potential frailty, cognitive concerns and cultural norms.³¹⁵

Part 1 of the Training Objectives sets out the following objectives:³¹⁶

- Understand problems and issues faces by older persons and their families, including the family dynamics involved.
- Have knowledge of the psychosocial and physical effects of aging and how to accommodate those changes so as to maximize participation in the mediation process for an older person and all other participants.
- Be aware of societal and participant biases as well as family, generational and cultural attitudes regarding aging and their effect on the mediation process.
- Engage in a self-assessment of any aging or disability-related biases/perceptions that might impact mediator competency.
- Understand and be alert to factors affecting capacity to mediate and their effect on a safe and fair mediation process.
- Understand the accommodations that may be needed for persons with cognitive or other disabilities.
- Deepen understanding of issues of elder abuse as they affect the mediator’s responsibility to provide a safe and effective process including:
 - definitions of, and how to recognize, elder abuse
 - the dynamics within the family or caregiver relationship
 - how to screen for abuse prior to and throughout the mediation process
 - when to rule out mediation
 - when to continue mediation
 - the relationship of mediation to adult protective services
 - confidentiality and mandated reporters
- Understand the need for appropriate intake and pre-conference procedures and the factors that make thorough screening essential in elder mediation.
- Deepen understanding of ethical issues and the unique challenges of elder mediation.
- Develop and practice skills related to elder mediation.
- Have knowledge of community resources related to older persons and ways to utilize resources in the mediation process.
- Understand the role and use of support persons, advocates, surrogates, medical professionals and other resource persons in the mediation process.
- Be alert to situations that may place an older person at risk for loss of rights or benefits and recognize when participants may benefit from or need to consult an advocate or expert. Be aware of legal issues that may arise during elder mediation and understand that additional training may be necessary to competently mediate certain cases, such as adult guardianship.
- Understand the unique issues presented in identifying and writing down matters agreed upon by participants in elder mediation.
- Explore ideas for program development, policy development, marketing a practice, generating cases, and building and evaluating an elder mediation practice.

The goal of Part 2 of the Training Objectives, “is to orient mediators to a wide variety of

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

issues related to adult guardianship mediation...as well as to teach the skills and knowledge necessary to mediate guardianship issues competently.”³¹⁷ Part 2 of the Training Objectives include the following additional objectives for adult guardianship cases:³¹⁸

- Grasp the basics of the adult guardianship process and the options available under guardianship, and understand the range of alternatives to court-ordered guardianship.
- Understand the importance of inclusion of the vulnerable adult’s voice, even if she or he is not able to participate fully in mediation.
- Develop a deeper understanding of ethical issues related to adult guardianship
- Understand the value and uses of mediation during the pre-filing, adjudication and post-adjudication phases of guardianship.
- Obtain information and referrals regarding the specific laws and relevant roles, processes, terminology, and timelines for the jurisdictions represented within the training.
- Understand the importance of weighing the effect of including or excluding in mediation those persons who may be involved with the adult guardianship decision-making process.
- Understand the procedures, agencies, and resources relevant to those with no discernible support system (e.g. guardian of last resort).
- Develop and practice skills specifically related to adult guardianship mediation
- Understand the unique issues presented in drafting agreements in adult guardianship cases.

Diversity Training Objectives

The Diversity Training Objectives are intended for mediators who wish “to enhance their ability to work with older persons in mediation” and to provide “training in working with older people in mediation areas in which the mediator is already practicing.”³¹⁹ The Diversity Training Objectives set out the following objectives:³²⁰

- Have knowledge of the normal mental and physical effects of aging, as well as strengths and losses that may come with aging, and how to accommodate those changes so as to maximize participation in the mediation process for an older person and all other participants
- Be aware of societal and participant biases as well as family, generational and cultural attitudes regarding aging and their effect on the mediation process
- Engage in a self-assessment of any aging or disability-related biases/perceptions that might impact mediator competency
- Understand the need for appropriate intake procedures
- Develop and practice skills related to working with elders in mediation
- Deepen understanding of ethical issues in mediation involving elders

As illustrated by the examples above, the elder mediation training courses, programs and training standards in both the US and Canada include a majority of same topics and issues.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

³¹⁹ *Ibid.*

³²⁰ *Ibid.*

Some organizations, such as EMC, have incorporated training standards into ethical codes and codes of professional conduct.

3. Codes of Professional Conduct and Standards of Practice

Most professional codes of conduct established by mediation organizations include ethical standards and best practice standards. An example of a best practice standard would be a requirement of the mediator to enter into an “Agreement to Mediate” with the parties prior to beginning mediation. Ethical standards often refer to concepts of mediator “neutrality” or “impartiality”, as well as principles of confidentiality and voluntariness in mediation.

There have been attempts in some countries to develop uniform standards or codes for mediators or, at least, for court-connected mediation programs. An example of mediator standards in the US is the American Bar Association *Model Standards of Conduct for Mediators*, prepared and adopted by the American Bar Association (the “ABA”), the American Arbitration Association (the “AAA”) and the Association for Conflict Resolution (the “ACR”).³²¹ In Canada, examples of national mediator standards have been developed Family Mediation Canada (“FMC”), EMC and the ADR Institute of Canada (“ADRIC”). These examples are discussed further below.

a. Canada

In Canada, the Canadian Bar Association has not set uniform standards and there is no other nationwide professional body with the authority to compel mediators (or its members) to follow nationwide standards. Several national groups have established mediator standards, such as FMC and EMC.³²² Membership in FMC and EMC is optional. However, organizations such as FMC can require its members to adhere to the organizations’ professional standards and codes of ethical and professional conduct. Other examples of BC and Canadian organizations with mediator codes of ethics and professional conduct to which members must adhere, include but are not limited to the following: Mediate BC, ADRIC, CBA Ontario (“CBAO”), the Ontario Association for Family Mediation (“OAFM”), Alberta Arbitration and Mediation Society (“AAMS”).³²³ The codes of ethical and professional conduct associated with these organizations include references to most or all of the following duties:

³²¹ American Bar Association *Model Standards of Conduct for Mediators*, prepared in 1994 and revised in 2005, online: ABA

<http://www.americanbar.org/groups/dispute_resolution/policy_standards.html>. “These standards are designed to serve as fundamental ethical guidelines for persons mediating in all practice contexts. They serve three goals: to guide the conduct of mediators, to inform the mediating parties, and to promote public confidence in mediation.”

³²² See FMC, *supra* note 203; see also EMC, *supra* note 45.

³²³ *Mediate BC*, *supra* note 197, *Standards of Conduct*, online: <<http://www.mediatebc.com/Resources-for-Mediators/About-the-Rosters/Standards-of-Conduct.aspx>>; ADR Institute of Canada, *National Mediation Rules* including *Code of Conduct*, online: <<http://www.adrcanada.ca/rules/mediation.cfm>>; CBA Ontario, *CBAO Model Code of Conduct*, online <<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/codeofconduct.asp>>; Ontario Association for Family Mediation, *Code of Professional Conduct*, online<http://www.oafm.on.ca/mediators/Standards_Of_Practice.html>; Alberta Arbitration and Mediation Society, *Code of Ethical Conduct for Mediators*, online<<http://www.aams.ab.ca/>>.

- Goals and quality of the mediation process
- Principle of self-determination
- Impartiality (and the duty to avoid conflict of interest)
- Integrity
- Confidentiality
- Competence and quality
- Ability to participate
- Information and advice
- Ensure fair negotiations
- Safety and appropriateness of mediation
- Independent advice
- Agreement to mediate
- Termination of mediation
- Multi-party mediation
- Inter-professional relations
- Advertising
- Mediation fees

b. US

Examples of national mediator standards in the US include the American Bar Association *Model Standards of Conduct for Mediators* and the ACR Ethics Committee *Ethical Principles for ACR mediators*.

Both the ABA *Model Standards of Conduct for Mediators* and the final draft of the ACR Ethics Committee's *Ethical Standards* include the following standards and principles:

- Integrity
- Impartiality
- Professional competence
- Fairness and quality of the mediation process
- Self-determination of participants
- Person-centered process
- Confidentiality
- Termination of mediation
- Advertising and solicitation
- Fees and other charges (ABA)
- Advancement of mediation practice (ABA)

4. Expert and Stakeholder Recommendations - Training and Professional Standards

Given the consensus noted earlier that specialized training is required for elder mediators and additional specialized training is required to effectively mediate adult guardianship disputes, experts and stakeholders were also asked their opinion on what the minimum training requirements and competencies should be for elder mediators, and what additional competencies should be required to mediate adult guardianship disputes.

Stakeholder roundtable discussions held in the course of the Field Research and interviews with elder and guardianship mediation experts in Canada and the US led to the identification of the following list of training requirements for elder mediators:

- Minimum basic mediation training and experience
- Family dynamics and intergenerational issues
- Normal aging process (mental and physical aspects of aging plus myths of aging)
- End of life care
- Understanding the dynamics of grief and loss
- Ethics (self-determination, quality of process, capacity to mediate, power imbalance, ageism)
- Pre-mediation interviews and non-evaluative mediation
- Multi-party and complex mediation and who should participate
- Knowledge of relevant legal processes, legislative frameworks, agreement writing
- Self-determination and maximum participation (ensuring voice of older person in mediation, accommodation)
- Abuse and neglect
- Understanding capacity
- Cultural diversity and values – cultural awareness
- Health care issues
- Knowing community resources
- Recognizing legal and other issues outside one's competence as mediator – when to refer to other professionals/resources
- Legal red flags
- Role-playing
- Practice experience, ideally co-mediation and/or mentorship with an experienced mediator.

For mediators wishing to mediate adult guardianship cases, the following additional training competency requirements were identified (noting that most US experts recommended TCSG's adult guardianship training):

- Guardianship law and process
- Ethics in guardianship mediation
- Dynamics of aging
- Importance of participation in mediation of respondent in guardianship case
- Understanding capacity
- Diversity of culture and values - potential influence/impact on dynamics in mediation
- Capacity to participate in mediation
- Self-determination, participation and accommodation
- Substitute decision-making
- Financial and non-financial alternatives to guardianship and least restrictive alternatives
- Power imbalance
- Role playing
- Practice experience - Co-mediation and or mentorship

5. Conclusion

The development of elder mediation training and standards in Canada is in its early stages. However, as service providers are increasingly expanding their practices and moving into this area, there is a growing need for ongoing development of training and professional standards

for mediators practicing in the areas of elder and guardianship mediation. To meet this need, and as interest in these areas of practice are growing, national organizations, as well as organizations in the private sector are starting to develop elder mediation training programs and standards.

This chapter provided a review of selected elder and guardianship training and certification programs in Canada and the US. This review highlighted the topics and competencies covered in these programs, as well as the, training competencies and standards for elder and guardianship mediation recommended by experts and stakeholders consulted throughout the project. As illustrated in this chapter, there is general agreement around the basic or “core” competencies for elder mediation and the additional knowledge and training required to effectively mediate guardianship disputes. The content of training programs described above, also highlight the consensus of mediators experienced in these areas of practice, that elder and guardianship mediation training programs should be skills-based and include simulated, role-play mediation.

There is no uniform ethical code or code of professional conduct for mediators in Canada or the US. However, as discussed above, a number of organizations have developed mediator codes and standards to which their members must adhere. Most of these codes and standards common ethical duties and responsibilities for mediators.

CHAPTER 6 – Selected Court-connected Adult Guardianship Mediation Program

While the focus of this report is BC, this report compares elder and guardianship mediation practices, programs and processes in BC with other Canadian and US jurisdictions in order to inform our recommendations for best practice, legislation and court-connected guardianship mediation programs in these areas generally.

This Chapter reviews court-connected guardianship mediation programs in Ontario and selected U.S. jurisdictions with a view to identifying program elements and practices that should be incorporated into an adult guardianship mediation program that would operate under the BC mandatory mediation provisions in Bill 29. Ontario’s Mandatory Mediation Program is reviewed here because it is the only court-connected mandatory mediation program in Canada that includes adult guardianship matters. Each of the U.S. jurisdictions selected for comparison currently have or have had evaluated pilot projects or permanent court-connected adult guardianship mediation programs. This Chapter also summarizes the lessons learned and recommendations from the evaluations and experiences in each of the jurisdictions reviewed.

1. Ontario Mandatory Mediation Program

The Ontario Mandatory Mediation Program (the “OMMP”) applies to most civil, case-managed actions, including adult guardianship applications (excluding family law matters) filed at the Superior Court of Justice in Toronto, Ottawa and Windsor.³²⁴ Under this program, parties to most civil case-managed actions are required to attend mediation, prior to setting the matter for hearing or trial. In a contested adult guardianship application, parties must file a notice of motion with the court to receive directions on how to mediate.³²⁵ The following section provides a description the adult guardianship mediation process in Ontario.

a. Statutory Framework

Rules 24.1 and 75.1 of the Ontario *Rules of Civil Procedure*³²⁶ establish the statutory framework for court-connected mandatory mediation. Rule 24.1 establishes mandatory mediation for most civil, non-family law actions commenced in Toronto, Ottawa and Essex.³²⁷ Rule 75.1 established mandatory mediation in contested estates, trusts and substitute decision-making, including applications for adult guardianship.³²⁸

While Rule 24.1 does not apply directly to adult guardianship applications, in practice two key administrative roles defined in Rule 24.1 are essential to adult guardianship mediation: a designated Mediation Coordinator (MC) and an appointed Local Mediation Committee (LMC).³²⁹ The MC is responsible for the administration of mediation in each county. The LMCs are responsible for the selection and monitoring of mediators on the OMMP list of

³²⁴ *Rules of Civil Procedure*, RRO 1990, Reg 194 at Rule 24.1.04 and Rule 75.1.02 [*Rules*]; see also “Fact Sheet – Rules 24.1 and 75.1”, online: <<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/factsheet.asp>>.

³²⁵ *Ibid.* Rule 75.1.05

³²⁶ *Ibid.*

³²⁷ *Rules*, *supra* note 324 at Rule 24.1.04

³²⁸ *Rules*, *supra* note 324 at Rule 75.1.02

³²⁹ *Rules*, *supra* note 324 at Rule 24.1.04(2)(a), Rule 24.1.06, Rule 24.1.07

mediators in accordance with the guidelines approved by the Ministry of the Attorney General and for responding to complaints about mediators on the list. These roles of the MCs and LMCs are explained in further detail below.

Under Rule 75.1, proceedings relating to estates, trusts and substitute decisions, including all applications made under the *Substitute Decisions Act, 1992* (“*Substitute Decisions Act*”),³³⁰ are referred to mediation unless exempted pursuant to a court order. The *Substitute Decisions Act* permits any person to make an application to the court to request appointment of a guardian and authorizes the Public Guardian and Trustee or person under guardianship to move to terminate a guardianship.³³¹ The *Substitute Decisions Act* also allows a party to apply to the court for directions regarding the appointment or removal of an attorney appointed under a power of attorney.³³²

Two types of guardians may be appointed by the court: a guardian of property, who may be appointed to make financial decisions on behalf of an adult who lacks the capacity to manage property;³³³ or, a guardian of the person, who may be appointed to make personal and health care decisions on behalf of a person who is incapable of personal care.³³⁴ The court may grant or deny guardianship for property or person, or both.³³⁵ The court may also limit the scope of powers held by an appointed guardian, allowing either full or partial guardianship.³³⁶ Further, the court may also appoint more than one person as joint guardians with their consent.³³⁷

If there is a dispute regarding an adult guardianship application, the parties must file a motion with the court, seeking directions for the conduct of the mediation.³³⁸ Alternatively, subject to the discretion of the court, a judge may issue an order exempting a matter from mediation.³³⁹ The following section describes the history of the OMMP and explains how a contested adult guardianship application currently proceeds through the mandatory mediation process.

³³⁰ *Rules*, *supra* note 324 at Rule 75.1.02(1)(b)(iv); *SDA*, *supra* note 160.

³³¹ *SDA*, *supra* note 160, ss.55(1) and 62(11).

³³² *SDA*, *supra* note 160, s.68(1).

³³³ The standard for determining whether a person is incapable of managing property is set out in s.25 of the *SDA*, as follows: “25. (1) An order appointing a guardian of property for a person shall include a finding that the person is incapable of managing property and that, as a result, it is necessary for decisions to be made on his or her behalf by a person who is authorized to do so.”

³³⁴ The standard for determining whether a person is incapable of personal care is set out in s.45 of the *SDA*, as follows: “45. A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.”

³³⁵ *SDA*, *supra* note 160 at ss. 22(1), 27(9.1), 55(1), 62(11)

³³⁶ *SDA*, *supra* note 160 at s.58(3).

³³⁷ *SDA*, *supra* note 160 at s. 57(4)

³³⁸ Robert Hamm & Associates Ltd., *Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months*, (Queen’s Printer, 2001) at 1 [OMMP Evaluation]; see also *Rules*, *supra* note 324 at Rule 75.1.05.

³³⁹ *OMMP Evaluation*, *ibid.*; *Rules*, *supra* note 324 at Rule 75.1.04.

b. Pilot Project and Evaluation

Ontario's Mandatory Mediation Program was introduced as a pilot project in Toronto and Ottawa on January 4, 1999, pursuant to Rule 24.1.³⁴⁰ The continuation of Rule 24.1 beyond July 4, 2001, was dependent on the results of an independent 23-month evaluation supervised by the Evaluation Committee of the Ontario Civil Rules Committee (the "CRC").³⁴¹ At the CRC's request, the Ontario Ministry of the Attorney General selected an independent evaluator to conduct "an intensive and broad-ranging evaluation covering the first 23 months of the Rule."³⁴²

Following a positive evaluation of the program, the OMMP was made permanent in Toronto and Ottawa on July 3, 2001.³⁴³ On December 31, 2002, the mandatory mediation program was extended to Windsor.³⁴⁴ Rule 75.1 became permanent in Toronto and Ottawa on July 1, 2004, and was expanded to Windsor on January 1, 2005.³⁴⁵

On January 1, 2010, some further revisions were made to Rule 24.1.³⁴⁶ These changes allow the parties to postpone mediation, provided that either the parties or a mediation coordinator has selected a mediator and mediation is conducted within two years of filing the action and before setting the matter for trial.³⁴⁷ Parties may also agree upon the extension of a mediation session.³⁴⁸

The recent revisions to Rule 24.1 were in response to the Civil Justice Reform Project³⁴⁹, which recommended that the time and expense involved in mediation be in proportion to the importance of the issues to be mediated. Legal counsel, working directly within the mandatory mediation system, commented that these changes give parties more decision-making power with respect to the timing, duration and cost of the mediation session.

The pilot project evaluation focused on the time, cost, quality and operation of mediation, as summarized by the following questions:

- Does mandatory mediation improve the pace of litigation?
- Does mandatory mediation reduce the costs to the participants in the litigation process?

³⁴⁰ *OMMP Evaluation, ibid.*

³⁴¹ *OMMP Evaluation, ibid.*

³⁴² *OMMP Evaluation, ibid.*

³⁴³ Ontario Ministry of the Attorney General, Mandatory Mediation, "Fact Sheet – Rules 24.1 and 75.1" (Toronto: Queen's Printer, 2010), online:

<<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/factsheet.asp>> [*ManMed Fact Sheet*].

³⁴⁴ *Ibid.*

³⁴⁵ *Ibid.*

³⁴⁶ Ontario Ministry of the Attorney General, "Fact Sheet: Mandatory Mediation under rules 24.1 and 75.1 of the *Rules of Civil Procedure*" (Effective January 1, 2010), online:

<http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/fact_sheet_mandatory_mediation.pdf> [*ManMed Fact Sheet 2010*]; Brandon Parlette notes.

³⁴⁷ *Ibid.*

³⁴⁸ *Ibid.*

³⁴⁹ Honourable Justice Coulter Osborne, *Summary of Findings and Recommendations of the Civil Justice Reform Project* (2007), online:

<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf>.

- Does mandatory mediation improve the quality of disposition outcomes?
- Does mandatory mediation improve the operation of the mediation and litigation process?³⁵⁰

The overall findings in the pilot project evaluation were that mandatory mediation was generally successful and there was strong evidence of the following benefits of the program:

- significant reductions in the time taken to dispose of cases;
- decreased costs to the litigants;
- high proportion of cases (approximately 40%) settled earlier in the litigation process, with other benefits being noted in cases where the matter did not settle at mediation;
- litigants and lawyers expressed satisfaction with the mandatory mediation process;
- positive findings applied generally to all case types and in all locations of the pilot project.³⁵¹

The pilot project evaluation recommended that the program be made permanent and extend to other civil cases and across the province.³⁵² The evaluation also made various recommendations for improving the rules and procedures of mediation, including:

- the program continue to monitor the use of non-listed (“non-roster”) mediators and the considerable difference between Ottawa and Toronto regarding the likelihood of parties selecting their own mediator;
- time standards not be lengthened, but the program should conduct further analysis of the negative views of the timing provisions;
- better inform mediators, litigators and lawyers about the positive impact of mediation;
- improve awareness among lawyers and litigants of the time extension rules and continue to develop clear policies and guidelines concerning the extension of time needed;
- broadly communicate the positive outcome of mediations: resolution in roughly six out of every ten cases;
- broaden the indicators of the impact of mediation on litigation outcomes to capture benefits such as settlement of certain types of issues;
- conduct further research to identify the factors associated with incomplete or partial settlement;
- conduct further research to identify why a minority of lawyers and litigants have negative views regarding the impact of mediation;
- revisit the criteria for accepting mediators on the list (“roster”) and the various forms of mediator training;
- clarify and provide education regarding the types of issues that should be included in the Statement of Issues;
- address the cause and possible situation to the problem of parties at mediation who do not have authority to settle;
- advise lawyers and mediators that litigants would like more information about the costs and benefits of proceeding further in the court process;
- provide means for lawyers and mediators to become better acquainted;
- distribute public information brochures in all cases;

³⁵⁰ *OMMP Evaluation, supra* note 338.

³⁵¹ *OMMP Evaluation, supra* note 338.

³⁵² *OMMP Evaluation, supra* note 338.

- conduct a review of the resources for the Local Mediation Coordinator’s offices;
- monitor the amount of pending mediation cases (and the potential causes of any continued significant growth) on an ongoing basis to ensure effectiveness;
- establish “best practices” for the Local Mediation Committees and program staff, including issues related to selection, training, professional development opportunities, monitoring of mediators and other key issues concerning the appropriate quality of mediators;
- ensure that mechanisms are in place to monitor, analyze and improve the mediation process.³⁵³

c. Adult Guardianship Mediation - Rule 75.1

Pursuant to the *Substitute Decisions Act*, a person may submit an application to the court to be appointed as a guardian of property, guardian of person, or both.³⁵⁴ Where any adult guardianship application is contested, the parties must file a motion with the court, seeking directions to mediate.³⁵⁵ The court may order certain terms for mediation (e.g. what issues must be resolved, who must attend, etc.). Alternatively, the court may order that the matter is exempt from mediation.³⁵⁶

The process of adult guardianship mediation can be summarized in five stages, as follows:

1. **Case selection or exemption:** This step requires that parties file a motion seeking directions to mediate. The judge makes an assessment as to whether the case is appropriate for mediation, or exempt. In most cases, the order for mediation is issued, with instructions as to how mediation is to be conducted (e.g. what issues must be mediated, when must occur, how a mediator is to be selected, etc.).
2. **Mediator selection:** The parties may select a mediator who is listed on the LMC’s list of qualified and monitored mediators. Alternatively, the parties may agree to select a mediator who is not on this list. Where it has been 180 days since or prior to the matter being set for hearing, if the parties do not select a mediator, then an MC may select a mediator.
3. **Pre-mediation consultation:** The mediator will meet with each person who is required to attend mediation and determine whether the mediation is appropriate, provide information about the mediation process and enquire about accommodation needs. Each party is required to provide a Statement of Issues, which must be circulated to the mediator and all other parties at least seven days prior to mediation.
4. **Mediation session:** The parties are required to attend by court order. If a party fails to attend or fails to provide a Statement of Issues, then the mediator must cancel the session and file a non-compliance certificate with the court. The court is able to impose sanctions or penal remedies against non-compliant parties. Rule 75.1 establishes that a standard mediation session is a maximum of three hours. Parties may agree to extend the duration of a mediation session, provided that all parties give consent. Any

³⁵³ *OMMP Evaluation*, *supra* note 338.

³⁵⁴ *SDA*, *supra* note 160 at s.22 and s. 55.

³⁵⁵ *Rules*, *supra* note 324 at Rule 75.1.05.

³⁵⁶ *Rules*, *supra* note 324 at Rule 75.1.04.

agreement concerning adult guardianship must be agreed to and signed by all parties. Mediation communication is confidential.

5. **Post-mediation:** the mediator is required to file a report to the court, which specifies whether an agreement has been reached or that the application will proceed to a hearing. If an agreement is reached, but parties fail to follow the terms of the agreement, then a party is able to apply to the court to enforce the agreement. Costs are normally split between parties, but the court may order otherwise.

The following sections provide a more in-depth description of the adult guardianship mediation process pursuant to Rule 75.1, including: exemption from mediation; what is required from parties who must attend mediation; rights, duties and procedures for individuals involved in the mediation process; professional qualifications for mediators; confidentiality requirements; and fees, costs and sanctions. Where appropriate, this description also includes comments from interviews with legal counsel, mediators and other professionals with experience working within the adult guardianship mediation system.

(i) Case Selection or Exemption

As mentioned above, in a contested adult guardianship application, the applicant must bring a motion seeking directions for the conduct of the mediation.³⁵⁷ Unless an application is exempted by an order of the court, the court will issue a mediation order. Rule 75.1.05(4) sets out the contents of directions to conduct mediation as follows:

- “(4) On the hearing of the motion under this rule, the court may direct,
- (a) the issues to be mediated;
 - (b) who has carriage of the mediation and who shall respond;
 - (c) within what times the mediation session shall take place;
 - (d) which parties are required to attend the mediation session in person, and how they are to be served;
 - (e) whether notice is to be given to parties submitting their rights to the court under rule 75.07.1;
 - (f) how the cost of the mediation is to be apportioned among the designated parties; and
 - (g) any other matter that may be desirable to facilitate the mediation.”³⁵⁸

Rule 75.1.04 establishes that the court may exempt a matter from mediation, as follows:

“The court may make an order, on a party’s motion or of its own motion, exempting the proceeding from this rule.”³⁵⁹

Rule 75.1 does not, however, provide criteria for determining when a matter should be exempt from mediation. As such, Rule 75.1 does not strictly exempt any particular type of adult guardianship application; rather, exemption from mandatory mediation is a matter within the discretion of the court. The court does not gather specific statistics regarding the number of adult guardianship applications that go to mediation. As such, it is not currently

³⁵⁷ *Rules, supra* note 324 at Rule 75.1.05

³⁵⁸ *Rules, supra* note 324 at Rule 75.1.05(4).

³⁵⁹ *Rules, supra* note 324 at Rule 75.1.04

possible to measure the volume of contested adult guardianship applications that are selected for or exempt from mediation.

(ii) Attendance and Participation

Designated parties include any party who is required to attend a mediation session in person pursuant to a court order under Rule 75.1.05.³⁶⁰ In practice, a designated party could be anyone that the court recognizes as being involved or interested in the application for guardianship, including: the applicant, the allegedly incapable person, other respondent parties (e.g. other family members), and other interested persons (e.g. advocates).

Designated parties and their lawyers, if represented, must attend the adult guardianship mediation session.³⁶¹ Each party must also provide the mediator and all other parties with a Statement of Issues, at least seven days prior to the mediation session.³⁶² The Statement of Issues must identify the facts and legal issues in dispute, set out the position and interests of the party making the statement, and include any documents that the party considers important in the proceeding.³⁶³

If a party fails to attend mediation within 30 minutes of the scheduled session, the mediator must terminate the session and file a non-compliance certificate with the court.³⁶⁴ Likewise, where a designated party fails to provide an adequate Statement of Issues, the mediator must terminate the mediation session and file a non-compliance certificate with the court.³⁶⁵

The pilot project evaluation report for the OMMP noted the fact that parties often do not know what issues should be included in the Statement of Issues. As such, the evaluation report recommends enhanced education about what issues should be included.³⁶⁶

(iii) Rights, Duties and Procedures

There are several defined roles in the OMMP. The mandatory mediation process may include an applicant, respondent, other designated parties, legal counsel, judiciary, case manager, mediation coordinator, the local mediation committee and mediator. Rule 75.1 establishes specific responsibilities and procedures for each of these roles, which are explained below.

Designated Parties

Designated parties must attend the mediation session. A designated party is a person who is required by the court order giving directions to attend mediation in person.³⁶⁷ Mediators in Ontario commented that designated parties normally include the applicant, the respondent and any other persons who made themselves known to the court as being directly involved in the dispute or having an interest in the guardianship application.

³⁶⁰ *Rules, supra* note 324 at Rule 75.1.03

³⁶¹ *Rules, supra* note 324 at Rule 75.1.09

³⁶² *Rules, supra* note 324 at Rule 75.1.08

³⁶³ *Rules, supra* note 324 at Rule 75.1.08(2) and (3)

³⁶⁴ *Rules, supra* note 324 at Rule 75.1.09(3).

³⁶⁵ *Rules, supra* note 324 at Rule 75.1.08(4)

³⁶⁶ *OMMP Evaluation, supra* note 338; Recommendation 20.

³⁶⁷ *Rules, supra* note 324 at Rule 75.1.03

Designated parties are also required to provide a Statement of Issues to the mediator and all other parties.³⁶⁸ The Statement of Issues must identify the factual and legal issues in dispute, briefly set out the position and interests of the party, and include any important documents.³⁶⁹

Where all parties are in agreement, the designated parties have the authority to make a number of administrative choices, such as who to select as a mediator and whether to extend the time limit or duration of a mediation session. The designated parties may also draft and agree to terms set out in a mediation agreement, provided that all parties with capacity and authority to consent sign the agreement.³⁷⁰ If the mediation resolves some or all of the disputed issues, all parties or their lawyers must sign an agreement.³⁷¹ Where the mediation agreement resolves all the issues in dispute, the party who has carriage of the mediation must file a notice with the court, within ten days.³⁷² If a party fails to comply with the terms of an agreement, any other party to the agreement may file a motion for judgment with the court.³⁷³ Alternatively, another party may continue the proceeding as if there had been no agreement.³⁷⁴

Rule 75.1 does not define any statutory rights for the designated parties who are involved in mediation. In particular, the rule does not specify to what extent a person who allegedly lacks capacity has autonomous rights, is able to provide consent for certain decisions, or must attend or participate.

Legal Counsel

Legal representatives of the designated parties are required to attend mediation.³⁷⁵ Counsel for the Ministry of the Attorney General in Toronto commented that one of the benefits of implementing the mandatory mediation system is that legal professionals are more aware of the benefits of alternative dispute resolution, including the reduced cost and time involved in settling a matter.

In Ontario, pursuant to s.3 of the *Substitute Decisions Act*, if an allegedly incapable person qualifies for legal aid services the court may direct the Public Guardian and Trustee to arrange for legal representation for the person in mediation and/or guardianship proceedings, and the person is deemed to have the capacity to retain and instruct counsel.³⁷⁶ If the allegedly incapable person does not qualify for legal aid, the person will be responsible for legal fees (which are usually paid out of the person's estate).³⁷⁷

³⁶⁸ *Rules, supra* note 324 at Rule 75.1.08(1).

³⁶⁹ *Rules, supra* note 324 at Rule 75.1.08(2) and (3).

³⁷⁰ *Rules, supra* note 324 at Rule 75.1.12(3).

³⁷¹ *Rules, supra* note 324 at Rule 75.1.12(3).

³⁷² *Rules, supra* note 324 at Rule 75.1.12(4).

³⁷³ *Rules, supra* note 324 at Rule 75.1.12(6)(a).

³⁷⁴ *Rules, supra* note 324 at Rule 75.1.12(6)(b).

³⁷⁵ *Rules, supra* note 324 at Rule 75.1.09 (1).

³⁷⁶ *SDA, supra* note 160 at s.3.

³⁷⁷ *SDA, supra* note 160 at s.3.

Mediation Coordinator

A mediation coordinator (“MC”) must ensure that a mediator is selected, either by the parties or by the court, and that a mediation session occurs prior to setting a date for hearing.³⁷⁸ If the parties do not select a mediator and it has been 30 days since the court issues an order giving directions to conduct mediation, the party with carriage of the mediation must file with the mediation co-ordinator for the county a request for the assignment of a mediator from the local roster of mediators.³⁷⁹

Local Mediation Committees

Rule 24.1.07 establishes a Local Mediation Committee (“LMC”) for each county named in subrule 24.1.04 (1) to represent the legal profession, mediators, the judiciary, court staff and the general public with respect to the mandatory mediation program.³⁸⁰ LMCs have been appointed in Toronto, Ottawa and Windsor “to supervise a consistent system of mandatory referral to mediation in their respective communities.”³⁸¹ Pursuant to subrule 24.1.07(4), the functions of an LMC are as follows:

- (4) Each committee shall,
 - (a) compile and keep current a list of mediators for the purposes of subrule 24.1.08 (1), in accordance with guidelines approved by the Attorney General;
 - (b) monitor the performance of the mediators named in the list;
 - (c) receive and respond to complaints about mediators named in the list.
- (5) In carrying out their functions under subrule (4), committees may add mediators to the list and remove mediators from the list.

Mediator

Listed and non-listed mediators must follow the rules and procedures established under Rule 75.1. A selected mediator must schedule the date of mediation and notify all parties at least 20 days before the mediation session.³⁸² If a designated party fails to attend or provide a Statement of Issues, the mediator is responsible for filing a non-compliance certificate with the court.³⁸³ Alternatively, the mediator must file a mediation report with the mediation coordinator, within ten days after the mediation.³⁸⁴

Judge or Case Manager

A judge is responsible for issuing the order giving directions for the conduct of the mediation.³⁸⁵ Alternatively, a judge may exempt a matter from adult guardianship

³⁷⁸ *Rules, supra* note 324 at Rule 24.1.06

³⁷⁹ *Rules, supra* note 324 at Rule 75.1.07

³⁸⁰ *Rules, supra* note 324 at Rule 24.1.07

³⁸¹ Ontario Ministry for the Attorney General, Mandatory Mediation Program, “Local Mediation Committee Guidelines for Selecting Mediators - Ontario Mandatory Mediation Program”, online: <<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/guidelines.asp>> [*LMC Guidelines*].

³⁸² *Rules, supra* note 324 at Rule 75.1.07(7); Form 75.1B

³⁸³ *Rules, supra* note 324 at Rule 75.1.08(4); Rule 75.1.09(3); Form 75.1B

³⁸⁴ *Rules, supra* note 324 at Rule 75.1.12(1)

³⁸⁵ *Rules, supra* note 324 at Rule 75.1.05

mediation.³⁸⁶ A judge or case manager may also exercise discretion about whether or not to apply sanctions or grant remedies after a non-compliance certificate is filed.³⁸⁷ The court may also require each party to pay equal shares of the mediator's fees for the mandatory mediation session.³⁸⁸ Finally, a judge may grant judgment where a party fails to comply with the terms of a signed agreement.³⁸⁹

(iv) Mediator Credentials, Training and Quality Control

There are established rosters of private-sector mediators in Toronto, Ottawa and Windsor. Mediators are selected for the rosters by the LMC based on guidelines established by the Ministry of the Attorney General relating to experience, training, educational background and familiarity with the civil justice system. "Roster mediators must comply with Rule 24.1, Rule 75.1 and the fee regulations, maintain a minimum of \$1 million liability insurance, and attend an orientation session. They must also abide by the program administrative policies and code of conduct."³⁹⁰

The LMC list of qualified mediators is published on the Ministry of the Attorney General web site.³⁹¹ Mediators must make the following commitments as a condition of being on the mandatory mediation roster:

- providing mediation services at a fee stipulated by regulation;
- attending an orientation session and any other training that may be required;
- abiding by the mandatory mediation policies and procedures, including the applicable complaints procedure and code of conduct;
- maintaining professional insurance with a minimum coverage of one million dollars;
- conducting up to 12 hours of pro bono mediations per year;
- acting as a mentor, if requested;
- participating in program evaluations, as required; and
- paying any required fees.³⁹²

When considering whether a mediator qualifies to be on the list, the LMC will consider the person's experience as a mediator, training in mediation and educational background.³⁹³ To qualify, a mediator must have conducted at least five mediations (either as a sole mediator or co-mediator) and completed at least 40 hours of mediation training.³⁹⁴ The LMC will also consider the person's familiarity with the civil justice system, the role taken in previous mediations and references.³⁹⁵

³⁸⁶ *Rules*, *supra* note 324 at Rule 75.1.04

³⁸⁷ *Rules*, *supra* note 324 at Rule 75.1.10

³⁸⁸ *Mediators' Fees (Rule 75.1, Rules of Civil Procedure)*, O.Reg. 43/5, at s.4(2) [*Mediators' Fees*].

³⁸⁹ *Rules*, *supra* note 324 at Rule 75.1.12(6)(a)

³⁹⁰ *LMC Guidelines*, *supra* note 381.

³⁹¹ Ontario Ministry of the Attorney General, online at:

<<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed>>.

³⁹² *LMC Guidelines*, *supra* note 381.

³⁹³ *LMC Guidelines*, *supra* note 381.

³⁹⁴ *LMC Guidelines*, *supra* note 381.

³⁹⁵ *LMC Guidelines*, *supra* note 381.

All listed and non-listed mediators must also follow the *CBAO Model Code of Conduct*³⁹⁶ and comply with the responsibilities set out in Rules 24.1 and 75.1, which require the mediator to schedule mediation.³⁹⁷

Ontario legal professionals and mediators interviewed, who are involved with adult guardianship mediation in Ontario, emphasized that mediators need specialized training in a number of issues related to adult guardianship, specifically how to identify and respond to issues of elder abuse or neglect, the need for recognition of an older adult's autonomous rights and capacity issues (for example, to what extent a lack of capacity may or may not impair decision-making).³⁹⁸

(v) Confidentiality and Reporting

All communications at mediation, as well as the notes and records of the mediator, are considered to be without prejudice settlement discussions.³⁹⁹ As explained above, the mediator must provide a report to the court, within ten days after concluding the mediation.⁴⁰⁰ This report is filed with the mediation coordinator and the parties.⁴⁰¹

Ontario does not have adult protection legislation concerning older adults who live in the community. However, a person may be required to report abuse, neglect or self-neglect of an older adult who lives in a long-term care facility.⁴⁰²

(vi) Fees, Costs and Sanctions

When a mediator is selected from the mediator list, the mediator fees cover one half-hour of preparation time for each party and up to three hours of actual mediation.⁴⁰³ The maximum rates for mediator fees in adult guardianship mediation are set out in s. 4 of the *Mediators' Fees (Rule 75.1, Rules of Civil Procedure, as follows:*⁴⁰⁴

Number of Parties	Maximum Fees
2	\$600 plus GST
3	\$675 plus GST
4	\$750 plus GST
5 or more	\$825 plus GST

Each party must pay an equal share of the mediator's fees for the session, unless otherwise ordered by the court.⁴⁰⁵ A mediation session may continue past three hours, if the parties and the mediator agree on the mediator's fees and hourly rate for the additional time.⁴⁰⁶

³⁹⁶ Ontario Ministry of the Attorney General, *CBAO Model Code of Conduct*, online <<http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/codeofconduct.asp>>.

³⁹⁷ *LMC Guidelines*, *supra* note 381.

³⁹⁸ All interviews confirmed the need for specialized training.

³⁹⁹ *Rules*, *supra* note 324 at Rule 75.1.11

⁴⁰⁰ *Rules*, *supra* note 324 at Rule 75.1.12

⁴⁰¹ *Ibid.*

⁴⁰² *Long-Term Care Homes Act*, SO 2007, c 8, s. 24(5)

⁴⁰³ *Mediators' Fees*, *supra* note 388 at s.3(1).

⁴⁰⁴ *Mediators' Fees*, *supra* note 388 at s.4(1).

⁴⁰⁵ *Mediators' Fees*, *supra* note 388 at s.4(2).

⁴⁰⁶ *Mediators' Fees*, *supra* note 388 at s.4(3).

If mediation is cancelled because a party fails to attend within the first 30 minutes of the session or provide a Statement of Issues, that party will pay the cancellation fees.⁴⁰⁷

2. An Evaluation of Four U.S. Adult Guardianship Mediation Pilot Programs

a. Background

The Center for Social Gerontology (“TCSG”), a Michigan-based, not-for-profit organization, is considered a pioneer of US guardianship law reform and adult guardianship mediation. Since the 1970s, TCSG has been committed to studying guardianship systems in the US and promoting reform of American adult-guardianship law, in order to “strengthen the rights and protections of adults, particularly older adults, subject to guardianship petitions.”⁴⁰⁸ Adult guardianship mediation was initiated in the US by the TCSG in the early 1990s.

The court-based adult-guardianship system that prevails in the United States has been criticized for failing to afford the allegedly incompetent adult a meaningful role in the proceedings, for lacking adequate procedural protections, and for being too adversarial in character. Critics charge that this system frequently results in the imposition of full guardianship when less restrictive means are available and more appropriate in the circumstances.

As a result of the collaborative guardianship reform efforts of TCSG and numerous others, “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” in guardianship hearings.⁴⁰⁹ Despite its continued commitment to statutory reforms in guardianship law and their implementation, TCSG came to believe that for many adult guardianship cases, the adversarial model has significant flaws and limits:

[F]oremost of which are the economic costs to the parties and the magnification, rather than resolution, of differences among them. The adversarial model...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.⁴¹⁰

TCSG recognized mediation as a valuable alternative to the adversarial model:

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.⁴¹¹

⁴⁰⁷ *Mediators’ Fees*, *supra* note 388 at s.5.

⁴⁰⁸ See Susan J. Butterwick, Penelope A Hommel & Ingo Keilitz, *Evaluating Mediation as a Means of Resolving Adult Guardianship Cases* by (Ann Arbor, Michigan: TCSG, 2001) at 2–3 [*TCSG Evaluation*].

⁴⁰⁹ *Ibid.* at 3.

⁴¹⁰ *Ibid.* at 3–4.

⁴¹¹ *Ibid.* at 5.

Reformers hoped that the incorporation of mediation into adult-guardianship proceedings would go a long way toward alleviating these concerns.⁴¹²

In order to assess the viability of mediation in adult guardianship cases, in 1991, with the support of the National Institute for Dispute Resolution, TCSG undertook an initial pilot in Washtenaw County, Michigan.⁴¹³ The Washtenaw Country pilot project received positive evaluations by mediation parties and informal assessment from the county's Probate Judge and others that the mediation was a valuable model for dealing with challenging guardianship cases.

As a result of the Washtenaw County project's informal evaluation, TCSG sought and received additional funding to set up adult guardianship projects at four sites in order to assess how guardianship mediation programs might work in other states.⁴¹⁴ TCSG developed training materials, forms and procedures for the four sites. These projects discovered that significant resources needed to be dedicated to providing mediation services and that discussion and education about guardianship mediation with judges, lawyers and agencies would be necessary to assure support for the concept and case referral.⁴¹⁵ Further, a number of issues arose in the project sites related to, "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."⁴¹⁶ General support for the guardianship mediation concept in the four sites encouraged TCSG to pursue additional pilots with the goal of moving guardianship into the mainstream.

In 1996 TCSG received funding to establish statewide or multi-county guardianship mediation programs in Ohio, Oklahoma and Wisconsin.⁴¹⁷ Informal evaluation of these and the pilot projects in the other four pilot project sites (one of which was Hillsborough County, Florida) involved satisfaction surveys, mediator reports, interviews with judges and program administrators, and anecdotal reports.⁴¹⁸ This initial review suggested:

[T]hat 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.⁴¹⁹

As TCSG continued the testing and development of the guardianship mediation concept, saw evidence of its value to the parties and courts, and saw it increasingly being used in other locations, TCSG recognized the need for formal assessment of the value and workability of

⁴¹² *Ibid.* at 3.

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.* at 8.

⁴¹⁵ *Ibid.* at 9.

⁴¹⁶ *Ibid.* at 9.

⁴¹⁷ *Ibid.* at 9.

⁴¹⁸ *Ibid.* at 10.

⁴¹⁹ *Ibid.* at 11.

guardianship mediation.⁴²⁰ Accordingly, with funding from the State Justice Institute, from February 1999 to July 2001 TCSG subjected the pilot projects in Ohio, Oklahoma, Wisconsin and Florida to a formal evaluation in order 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.”⁴²¹ TCSG’s aim in the study was to “determine the efficiency, effectiveness and replicability of mediation of adult guardianship cases.”⁴²² The evaluation involved, first, objective description and analysis of the four programs and, second, evaluation of their impact.⁴²³ The results of the study were set out in a report published in 2001.

This section examines the results of TCSG’s evaluation study as presented in its report. Its focus is on the following nine topics: (1) statutory framework for the pilot projects; (2) the projects’ administrative structure; (3) process; (4) parties’ attendance at mediation; (5) case selection; (6) selection of mediators; (7) funding; (8) evaluation; and (9) lessons learned.

b. Statutory Framework

None of the four states hosting pilot projects had legislation directly addressing the mediation of adult-guardianship disputes.⁴²⁴ In each case, the pilot programs were authorized by legislation encouraging the use of mediation in civil litigation generally.

Ohio’s legislation comes closest to the mark. It directs probate-court judges, who (among their other duties) are responsible for hearing adult-guardianship cases, to consider referring cases to mediation.⁴²⁵

Wisconsin and Oklahoma have general legislative provisions directing courts hearing civil proceedings to consider using mediation as part of the process.⁴²⁶ Wisconsin’s provision simply directs civil litigants to consider mediation.⁴²⁷ Oklahoma’s goes further, creating a state-wide system of early settlement centres.⁴²⁸

Florida’s program was not authorized by legislation but by an administrative order dealing with mediation in civil litigation.⁴²⁹

c. Administrative Structure

The four programs differed considerably in their administrative structure. Ohio and Florida created court-annexed programs; Wisconsin and Oklahoma relied on organizations from outside the courts to deliver their programs.⁴³⁰

⁴²⁰ *Ibid.* at 11.

⁴²¹ *Ibid.* at 11.

⁴²² *Ibid.* at 12.

⁴²³ *Ibid.*

⁴²⁴ As of 2001, only two states had such legislation. See Washington: Wash. Rev. Code § 11.88.090; Michigan: Mich. Comp. Laws § 700.5305 (1). See also *TCSG Evaluation*, *supra* note 408 at 11, n. 8.

⁴²⁵ *Ibid.* at 19 (citing Ohio Rev. Code § 2101.16.3).

⁴²⁶ *Ibid.* at 65, 90.

⁴²⁷ See Wis. Stat. § 802.12 (2) (a).

⁴²⁸ See *Oklahoma Dispute Resolution Act*, 12 Okla. Stat. 1821 *et seq.*

⁴²⁹ *TCSG Evaluation*, *supra* note 408 at 40.

⁴³⁰ *TCSG Evaluation*, *supra* note 408 at 18.

Florida's pilot project was administered from within an established program encouraging diversion of civil cases from courts.⁴³¹ This program had the support of Florida's courts.

A not-for-profit advocacy group administered Wisconsin's pilot project. This group did not enjoy the support of Wisconsin's courts and had no official liaison with the courts.⁴³²

In Oklahoma, the pilot project was integrated into a state government-supported system of early settlement centres. A government dispute resolution office provides the administrative backbone of this system.⁴³³ No court personnel worked with the program, which also had no official liaison with the courts.⁴³⁴

d. Process

Referrals to mediation proceed by one of two routes: they are either made post-application or pre-application. This distinction applies to each of the four pilot projects.

The post-application route involves a referral that is made after an application for guardianship has been made with the court. The referral may occur at any point during the ongoing guardianship proceedings.

In Ohio, referrals were typically made after a medical investigation report was prepared. If the investigator viewed mediation as appropriate, he or she would prepare a standard-form "guardian mediation project screener checklist."⁴³⁵ This checklist would be incorporated in the investigation report submitted to the magistrate hearing the guardianship application. The magistrate would review it, applying criteria based on TCSG's "mediation participation flow chart."⁴³⁶ If the screening criteria were met, the magistrate would refer the case to mediation.

Florida and Oklahoma did not appear to rely on formal screening criteria. In Florida, the court typically made referrals after a temporary emergency guardian had been appointed⁴³⁷ or after a regular guardian had been appointed.⁴³⁸ In Oklahoma, in contrast, the parties would typically make a motion for referral to mediation before the first court hearing of the guardianship proceeding.⁴³⁹

If the parties reached an agreement in a mediation that had proceeded through the post-application route, then two states provided for the agreement to be incorporated into a court order.⁴⁴⁰ In Ohio, any agreement reached is filed with the court, but kept in a special file that

⁴³¹ *TCSG Evaluation, supra* note 408 at 41.

⁴³² *TCSG Evaluation, supra* note 408 at 80.

⁴³³ *TCSG Evaluation, supra* note 408 at 90.

⁴³⁴ *TCSG Evaluation, supra* note 408 at 99.

⁴³⁵ *TCSG Evaluation, supra* note 408 27.

⁴³⁶ *TCSG Evaluation, supra* note 408 at 27-28; see also *TCSG Manual, supra* note 21 at Module 1, Appendix 8.

⁴³⁷ *TCSG Evaluation, supra* note 408 at 51.

⁴³⁸ *TCSG Evaluation, supra* note 408 at 53.

⁴³⁹ *TCSG Evaluation, supra* note 408 at 99.

⁴⁴⁰ *TCSG Evaluation, supra* note 408 at 61 (Florida), 110 (Oklahoma: court having power to ratify or modify agreements).

is not part of the formal court file. There is no “official recognition” of the agreement by the court.⁴⁴¹

It was far less common for mediation to go the pre-application route. In these cases, no guardianship proceeding had been commenced in the court. Instead, an older adult, family member, attorney or care facility would ask the program directly⁴⁴² to consider mediation of an outstanding dispute or file a request for a referral to mediation with the court.⁴⁴³

Mediations were typically conducted in a single one- to three-hour session,⁴⁴⁴ held with one mediator.⁴⁴⁵ The mediation sessions were characterized as “a facilitated, non-adversarial negotiation.”⁴⁴⁶

e. Attendance

The states took different approaches to the issue of requiring attendance at mediation.

Florida came the closest to treating mediation as mandatory. After a referral order was made by the court, the parties had 10 days to schedule a mediation session. A failure to comply with a referral order left the parties liable to sanctions in the guardianship proceedings.⁴⁴⁷

In Oklahoma, the court can order parties to attend mediation, but it has no power to issue sanctions for failure to attend.⁴⁴⁸ Under Oklahoma’s program, the only real obligation on the parties was to attend the mediation (mandatory attendance). After merely showing up, the parties were under no obligation to negotiate in good faith, or even to stay in the room.⁴⁴⁹

Wisconsin’s courts viewed the pilot project as purely voluntary. Parties faced no sanctions for failing to attend a mediation session.⁴⁵⁰

f. Case Selection

As noted above, Ohio used formal criteria for screening cases for mediation. The other state programs did not rely on such criteria.⁴⁵¹ Nevertheless, some patterns did emerge in the types of disputes that were—and were not—referred to mediation.

Some questions that were mediated included determination of the person who would be guardian in the face of competing petitions for guardianship, and the scope of the

⁴⁴¹ *TCSG Evaluation, ibid.* at 34.

⁴⁴² *TCSG Evaluation, ibid.* at 55 (Florida).

⁴⁴³ *TCSG Evaluation, ibid.* at 28 (Ohio).

⁴⁴⁴ *TCSG Evaluation, ibid.* at 31 (Ohio), 59 (Florida), 105 (Oklahoma).

⁴⁴⁵ But see *TCSG Evaluation, ibid.* at 107 (Oklahoma’s program occasionally employing two mediators for a session).

⁴⁴⁶ *TCSG Evaluation, ibid.* at 1.

⁴⁴⁷ See *TCSG Evaluation, ibid.* at 53–54 (“Failure to comply with this procedure may constitute a nonappearance and subject the parties to sanctions for untimely cancellation which can result in a \$175 fee assessment.”).

⁴⁴⁸ *TCSG Evaluation, ibid.* at 100.

⁴⁴⁹ *TCSG Evaluation, ibid.*

⁴⁵⁰ *TCSG Evaluation, ibid.* at 81.

⁴⁵¹ *TCSG Evaluation, ibid.* 44, 101.

guardianship order (that is, whether it should be full or limited guardianship).⁴⁵² Property disputes, management of assets, and the contents of a health-care plan were also the subjects of mediations.⁴⁵³

Cases that had elements of violence, abuse and substance abuse were not referred to mediation.⁴⁵⁴ Other cases that were considered inappropriate for mediation were those where there could be no meaningful participation by the older adult, those involving adult children who were unable or unwilling to participate and those involving financial fraud.⁴⁵⁵

Under Florida's pilot program, parties to a mediation session were required to sign a confidentiality agreement.⁴⁵⁶ The one exception to this confidentiality agreement was any information relating to elder abuse or neglect, which required reporting to a public official under Florida law.⁴⁵⁷

g. Selection of Mediators and Mediator Training

The states each took markedly different approaches to selecting the mediators under their pilot projects.

In Ohio, the probate court contracted with four independent mediators to provide mediation services for the pilot program.⁴⁵⁸ These mediators had backgrounds in psychology, public health, counselling, and elder law.⁴⁵⁹ The program required the following qualifications of its mediators: “(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.”⁴⁶⁰

At the time its pilot project was being carried out, Wisconsin had no legislated standards for mediators in civil disputes generally.⁴⁶¹ As a result, mediators in its program were not required to hold any specific qualifications, though a voluntary trade organization did recommend that certain of its qualifications be met by adult-guardianship mediators.⁴⁶²

Florida required its mediators first to be state certified as either circuit-court or family mediators.⁴⁶³ Then, mediators participating in the pilot project had to undergo additional training in issues specific to adult guardianship.⁴⁶⁴

⁴⁵² *TCSG Evaluation, supra* note 408 at 48-49, 72.

⁴⁵³ *TCSG Evaluation, supra* note 408 at 48-49.

⁴⁵⁴ *TCSG Evaluation, supra* note 408 at 77; see also *TCSG Evaluation, supra* note 408 at 83, n. 102 (noting that sometimes these elements were ignored by screeners, who would recommend the case for mediation in spite of informal list of criteria).

⁴⁵⁵ *TCSG Evaluation, supra* note 408 at 104.

⁴⁵⁶ *TCSG Evaluation, supra* note 408 at 59.

⁴⁵⁷ *TCSG Evaluation, supra* note 408 at 60.

⁴⁵⁸ *TCSG Evaluation, supra* note 408 at 22.

⁴⁵⁹ *TCSG Evaluation, supra* note 408 at 23.

⁴⁶⁰ *TCSG Evaluation, supra* note 408.

⁴⁶¹ *TCSG Evaluation, supra* note 408 at 66.

⁴⁶² *TCSG Evaluation, supra* note 408 at 84.

⁴⁶³ *TCSG Evaluation, supra* note 408 at 46.

⁴⁶⁴ *TCSG Evaluation, supra* note 408 at 47.

Oklahoma had no specific statutory requirements for adult-guardianship mediators to attain.⁴⁶⁵ However, the Oklahoma court administrative office required guardianship mediators to meet both general and family mediation statutory standards and to take additional training in adult guardianship.⁴⁶⁶ Mediators in Oklahoma were also bound by a code of professional conduct.⁴⁶⁷

h. Funding

Funding for the pilot projects came from a number of sources. In Florida, state and local laws authorized funding for the pilot project primarily through a level on court filing fees.⁴⁶⁸ Oklahoma's pilot project was part of its early settlement centre system. This system received funding directly from the state government, from a levy on court fees, and from a levy imposed on the parties to a mediation.⁴⁶⁹ Wisconsin's program was funded partly through grants from private foundations⁴⁷⁰ and partly through fees paid by the parties to the mediation; no public money was put into the program.⁴⁷¹

i. Evaluation

TCSG carried out a two-pronged evaluation of the pilot projects. First, staff from TCSG studied the history of each of the programs and conducted site visits with the goal of working up a descriptive analysis of the programs.⁴⁷² Second, an attempt was made to measure the outcomes of the pilot projects. This outcome measurement drew on three sources of information: (1) structured interviews with program participants; (2) surveys of mediation participants; and (3) analysis of file data on referrals, sessions, and agreements.⁴⁷³

TCSG found low levels of cases being diverted to mediation. Among those cases that made it to mediation, most ended with an agreement between the parties.⁴⁷⁴ However, it was not possible to determine whether these agreements stood the test of time or merely forestalled further litigation for a short period.⁴⁷⁵

Interview subjects reported high levels of satisfaction with the project.⁴⁷⁶ The only real persistent complaint was that lawyers and courts did not give adequate support to the pilot projects.⁴⁷⁷

⁴⁶⁵ *TCSG Evaluation, supra* note 408 at 108.

⁴⁶⁶ *TCSG Evaluation, supra* note 408; See 12 Okla. Stat. Rules 11–12, § 1825 (general mediation standards).

⁴⁶⁷ *TCSG Evaluation, supra* note 408 at 109.

⁴⁶⁸ *TCSG Evaluation, supra* note 408 at 40–41, 43.

⁴⁶⁹ *TCSG Evaluation, supra* note 408 at 90, 92.

⁴⁷⁰ *TCSG Evaluation, supra* note 408 at 66.

⁴⁷¹ *TCSG Evaluation, supra* note 408 at 70.

⁴⁷² *TCSG Evaluation, supra* note 408 at 13–14.

⁴⁷³ *TCSG Evaluation, supra* note 408 at 14.

⁴⁷⁴ *TCSG Evaluation, supra* note 408 at 35 (reporting 10 agreements reached in 14 mediated cases in Ohio), 62 (reporting 16 agreements reached in 22 mediated cases in Florida), 85 (reporting three agreements reached in seven mediated cases in Wisconsin), 110 (reporting eight agreements reached in nine mediated cases in Oklahoma).

⁴⁷⁵ *TCSG Evaluation, supra* note 408 at 37, 122.

⁴⁷⁶ *TCSG Evaluation, supra* note 408 at 39, 63, 88–89, 114.

⁴⁷⁷ *TCSG Evaluation, supra* note 408 at 94

At the conclusion of the evaluation, only the Florida and Ohio programs remained in existence.⁴⁷⁸ The Wisconsin program was wound up,⁴⁷⁹ and Oklahoma’s program continued to exist only on paper, providing no services in practice.⁴⁸⁰

j. Lessons Learned

The report drew the following six conclusions from the evaluation study:

- mediation is successful when it is used in reaching consensual agreements and resolving disputes without the appointment of a guardian or by the appointment of a limited guardian;
- the parties were satisfied with the mediation process;
- the programs only had a limited reach, and this was due in part to the small overall guardianship caseloads in the areas that hosted the pilot projects;
- the pilot projects tended to be plagued by structural and organizational instability, and “were not well integrated with the courts’ guardianship processes and procedures”;
- pre-petition cases were rare, as the parties appeared to require the motivation provided by a court order to take a case to mediation;
- there was a lack of awareness, education, and training of lawyers, judges, and other referral sources, and as a result the programs were less successful than they possibly could have been.⁴⁸¹

In response to these conclusions, the report made a number of recommendations, including but not limited to the following:

- Programs reliant on court referrals must find ways to work with the courts through mutual education and cooperation;
- Mediation processes and procedures, program structure and organization, need to be coordinated with guardianship case and related court proceedings;
- The court should consider establishing guidelines for completion of mediation within statutory time frames for scheduled court hearings. For example, a court might schedule hearings within 30 days, with the expectation that most mediation will occur before the hearing. Or, a hearing could be automatically scheduled for one week after receipt if a signed agreement by parties to the mediation;
- Courts could delegate administrative tasks to a designated court employee to assign mediators, schedule mediations within two to four weeks from the date of referral, follow up on mediation progress, and ensure any agreement is returned to the court in time for the next hearing
- Mediators must understand the court’s policy on accepting mediated agreements.

⁴⁷⁸ *TCSG Evaluation, supra* note 408 at 18.

⁴⁷⁹ *TCSG Evaluation, supra* note 408.

⁴⁸⁰ *TCSG Evaluation, supra* note 408.

⁴⁸¹ *TCSG Evaluation, supra* note 408 at 123.

- A system for consistent case follow-up is an important evaluative tool. For example, following up with mediation stakeholders after a set period of time (often 6-12 weeks) to find out if an agreement is working, needs to be re-negotiated, has fallen apart or has ended up in court, provides valuable assessment for the mediation program and a means of measuring the quality of the agreements, intake, and mediators.
- It is important to build in an evaluation process at the earliest stages to help define the goals of the program, as well as to develop systems to measure the goals.
- 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.
- 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.
- Intake personnel with strong skills and training for this challenging task is a necessity.
- 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.
- 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.
- It is critical to include and engage the court and lawyers fully in all stages of a program.
- 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. Showing how other courts have used adult guardianship mediation is helpful to the courts and lawyers, as well as discussing other courts' policies regarding mandatory/voluntary requirements of a court order for parties to attend mediation.
- It may be helpful to a 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.
- Program representatives must establish credibility with the court and form good relationships with members of the bar and other referral sources and should understand guardianship and guardianship procedures.
- Program representatives must understand the goals and procedures of the mediation program, how mediation can benefit the cases likely to be referred, and what concerns judicial officers and lawyers might have.
- Program representatives should continue to check in with the court and key referral sources on the progress of the program.

- It is 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 work as partners to resolve them.
- 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.
- Members of a steering committee should include representatives from the elder law community, the court, aging network agencies, social service agencies, mediators and other stakeholders within the community.⁴⁸²

3. Alaska – A Model Program

In 2005, the Alaska Court System initiated a court-connected adult guardianship mediation program to provide mediation in appropriate adult guardianship and conservatorship cases.⁴⁸³ The Alaska Court System Adult Guardianship Mediation Pilot Project (the “AGMP”) was established as a five-year evaluated pilot project funded by the Alaska Mental Health Trust Authority.⁴⁸⁴ The initial two years of the AGMP was piloted in Anchorage, Homer and Kenai in court cases in which guardianship or conservatorship petitions had been filed.⁴⁸⁵ Based on the positive results of the initial two-years of the pilot, the program was expanded to serve court cases in Fairbanks, Bethel, Palmer, Kodiak, Dillingham, Valdez and Kotzebue.⁴⁸⁶

Following a successful evaluation of the project by the Alaska Judicial Council in 2009, the Alaska legislature approved sustaining the guardianship mediation program as part of the Alaska Court system budget: The Adult Guardianship and Conservatorship Mediation Program (the “Program”) is now a permanent program of the Alaska Court System.⁴⁸⁷ The Program is considered by many to be “the model” for adult guardianship mediation programs in the US.

The following section provides an overview of the AGMP pilot project and project evaluation by the Alaska Judicial council.

a. Pilot Project

The AGMP was “inspired and informed by the groundbreaking work of The Center for Social Gerontology Inc. (TCSG)...and their 2001 report evaluating mediation as a means of resolving adult guardianship cases.”⁴⁸⁸ The AGMP was developed in collaboration with the Alaska courts, organizations, agencies and individuals involved in areas related to

⁴⁸² *TCSG Evaluation*, *supra* note 408 at 129-141.

⁴⁸³ Alaska Judicial Council, *Alaska Adult Guardianship Mediation Project Evaluation*, March 2009 at 4 [*AGMP Evaluation*].

⁴⁸⁴ *Ibid.* at 1.

⁴⁸⁵ *Alaska Court System Adult Guardianship/Conservatorship Mediation Pilot Project Policies and Procedures Manual*, August 2005 (Revised July 2007 and April 2010) at 2 [*Policies & Procedures Manual*].

⁴⁸⁶ *AGMP Evaluation*, *supra* note 483 at 14.

⁴⁸⁷ *Policies & Procedures Manual*, *supra* note 485. The Program’s services are offered by the Alaska Court System through court’s in Anchorage, Bethel, Dillingham, Fairbanks, Homer, Juneau, Kenai, Kodiak, Palmer, Sitka and Valdez, see “*Guardianship and Conservatorship Mediation Program*”, online: <<http://www.courts.alaska.gov/mediation.htm#b>>.

⁴⁸⁸ *AGMP Evaluation*, *supra* note 483 at 14.

guardianship, and with technical input and guidance from TCSG, which continues to be a resource to the project.⁴⁸⁹

Like the programs established by TCSG, Alaska's adult guardianship mediation program focuses on "finding ways to protect vulnerable adults whose cases have reached the courts, but for whom the difficulties and cost of a contested hearing might be avoided."⁴⁹⁰ The overall aim of the AGMP is described as follows:

[T]o develop an approach to guardianship and conservatorship concerns using mediation to preserve the autonomy and dignity of these adults, while assisting and enabling family to resolve problems, which if left unresolved, could destroy the family and caregiver support system and result in the affected adult's loss of independence and rights, institutionalization, or in financial exploitation, neglect or abuse.⁴⁹¹

The goals of the AGMP are to develop an approach to guardianship, which will:

- Engage the adult, his or her family and others closely involved, in a productive, creative, problem-solving process addressing care, safety and capacity concerns
- Protect the adult's autonomy
- Seek creative and least restrictive options by exploring alternatives to guardianship or conservatorship for meeting the needs of the adult
- Increase communication and understanding among family members and others involved
- Encourage consensus building among family and others closely involved
- Maintain supportive family relationships
- Prevent victimization of vulnerable adults
- Create plans that reflect the real needs of the adult
- Provide the adult, family and others a satisfactory decision-making process
- Avoid the trauma and adversarial nature of a contested court proceeding
- Eliminate unnecessary appointments of guardians or conservators
- Conserve judicial resources.⁴⁹²

b. Statutory Framework

Court-ordered mediation is set out in Rule 100 of Alaska's *Rules of Civil Procedure*⁴⁹³ and Rule 4.5 of Alaska's *Rules of Probate Procedure*.⁴⁹⁴ Rule 100 applies to any civil law action. Rule 4.5 applies more specifically to actions related to estates, guardianship, transfers and trusts.⁴⁹⁵

c. Mediation Model & Style

The AGMP employs a confidential, voluntary, facilitative style mediation model:

[The] project offers a facilitative, non-evaluative, collaborative problem-solving model

⁴⁸⁹ *Policies & Procedures Manual*, *supra* note 485.

⁴⁹⁰ *AGMP Evaluation*, *supra* note 483 at 4.

⁴⁹¹ *Policies & Procedures Manual*, *supra* note 485 at 2; *AGMP Evaluation*, *supra* note 483 at 13-14.

⁴⁹² *Policies & Procedures Manual*, *supra* note 485 at 2; *AGMP Evaluation*, *supra* note 483 at 13-14.

⁴⁹³ Alaska R. Civ. P. 100 [*CP Rules*].

⁴⁹⁴ Alaska R. Prob. 4.5 [*Probate Rules*].

⁴⁹⁵ *Id.* citing as AS 13.06.050 (24) [*Alaska Statutes*].

of mediation that is voluntary and confidential. The emphasis of this form of mediation is on helping empower participants to reach understandings that benefit and improve communication, resolve difficult issues - beyond the legal issues - and to address conflict in ways that encourage ongoing relationships. It seeks to create understanding and consideration of the participants' needs and concerns, building a foundation for consensus, and expanding the options for possible solutions. Mediators are not decision-makers and do not take sides, nor do they give advice or make recommendations. Decision-making rests with the participants. The mediator offers them a structure and process for discussion and decision-making.⁴⁹⁶

All mediators in the program are required to complete training in facilitative mediation and to practice facilitative style mediation in their work with the program.⁴⁹⁷

d. Program Administration

The AGMP staff includes a Dispute Resolution Coordinator (“DRC”) and a part-time Administrative Assistant.⁴⁹⁸ The DRC and court staff are involved in monitoring court referral orders to ensure timely scheduling and to assist the court with tracking where cases are in the mediation process.⁴⁹⁹ Staff also assist with managing information so mediators know court timelines and have copies of referral orders, and contact information for the parties.⁵⁰⁰ The DRC is also responsible for publicizing the program and works to ensure parties, judges, attorneys and families are aware of the option mediate in guardianship cases.⁵⁰¹

The AGMP also “strives to incorporate into its policies, procedures, practice, and philosophy, a knowledge and understanding of, sensitivity to, and appreciation for the culture and diversity of the community it serves.”⁵⁰²

e. Parties and Participants

In addition to legal parties in a court case (i.e. applicant and respondent), Alaska’s AGMP policies provide for the inclusion of “necessary” and “potential” participants in guardianship mediation.⁵⁰³ The Alaska Court System’s recently revised *Adult Guardianship/ Conservatorship Mediation Pilot Project Policies and Procedures Manual* (the “Policies & Procedures Manual”) defines a necessary participant as someone who had:

- an opinion about the issues being discussed,
- a stake in the outcome, and who
- is necessary to agree on a resolution of the issues.⁵⁰⁴

⁴⁹⁶ *AGMP Evaluation*, *supra* note 483 at 14-15; see also *Probate Rules*, *supra* note 494 Rule 4.5(h) re: Confidentiality.

⁴⁹⁷ *Policies & Procedures Manual*, *supra* note 485 at 18.

⁴⁹⁸ *Policies & Procedures Manual*, *supra* note 485 at 43.

⁴⁹⁹ *Policies & Procedures Manual*, *supra* note 485 at 43.

⁵⁰⁰ *Policies & Procedures Manual*, *supra* note 485 at 43.

⁵⁰¹ *Policies & Procedures Manual*, *supra* note 485 at 44.

⁵⁰² *Policies & Procedures Manual*, *supra* note 485 at 46.

⁵⁰³ *Policies & Procedures Manual*, *supra* note 485 at 24.

⁵⁰⁴ *Policies & Procedures Manual*, *supra* note 485 at 24.

Policy #8 notes the requirement that every participant must have the necessary capacity to participate, with accommodation.⁵⁰⁵ The factors to be considered in determining the capacity to mediate as a participant are identified in Policy #8 as follows:

- Can he or she tell his or her own story and understand what is being discussed?
- Can he or she listen to and understand the story of the other party?
- Does he or she understand who the parties are?
- Does he or she understand the role of the mediator?
- Does he or she understand the idea of mediation and how it will proceed?
- Can he or she generate options for a solution?
- Can he or she assess options?
- Is he or she expressing a consistent and clear opinion or position?
- Can he or she make and keep an agreement?⁵⁰⁶

Further, a number of “potential participants” are identified in the Policies & Procedures Manual, including: the respondent; attorney for the respondent; family of the respondent; guardian ad litem; Adult Protective Services (APS) worker; Assistant Attorney General; court visitor; guardian or conservator; and others who may be central to the issues being mediated (e.g. Care facility staff, caregivers, treatment or health providers, support persons, landlords, other service providers, etc.).⁵⁰⁷

With respect to participation of the respondent, Policy #8 of the Policies & Procedures Manual provides as follows:

The aim of this program is for the respondent or ward to have the option to participate in mediation to the highest level possible and desired by the adult, and to the extent possible, to truly have a voice in the process; to articulate his or her needs, concerns and wishes; and to participate in the negotiation of a resolution agreeable to the adult. As a rule, mediation does not take place without the opportunity being created for the adult whose needs are being discussed to participate or be present. The role the adult takes in mediation is determined by several factors: his or her desire to participate in any or all of the process; whether or not he or she is a necessary participant given the topics for mediation; and his or her capacity to actively mediate as a necessary participant.⁵⁰⁸

The Policy and Procedures Manual also instructs that in any case where a formal allegation of incapacity of a person has been made, and the allegedly incapable person is identified as a necessary participant in mediation, mediation should not go forward unless the person has access to legal representation.⁵⁰⁹ Policy #8 emphasizes that if an allegedly incapable adult is not going to participate in mediation, “mediation should not take place unless his or her interests are adequately represented in mediation, usually through an attorney.”⁵¹⁰

Mediators are required to prepare adequately for the mediation “to be able to assess for safety, protection of the adult’s rights, and balance of power issues”, including assessing for

⁵⁰⁵ *Policies & Procedures Manual, supra* note 485 at 24.

⁵⁰⁶ *Policies & Procedures Manual, supra* note 485 at 24.

⁵⁰⁷ *Policies & Procedures Manual, supra* note 485 at 25-29.

⁵⁰⁸ *Policies & Procedures Manual, supra* note 485 at 25 & 31-32.

⁵⁰⁹ *Policies & Procedures Manual, supra* note 485 at 25.

⁵¹⁰ *Policies & Procedures Manual, supra* note 485 at 25.

“family violence, abuse, neglect and exploitation issues that might create an environment that is unsafe or would render mediation inappropriate.”⁵¹¹ The Policies & Procedures Manual notes that “in most cases the mediator is capable of creating a safe, supportive environment in which power can be balanced, the respondent or ward’s adults rights protected, and non-coercive agreements formed.”⁵¹² Specific actions and strategies that may be used by the mediator to balance the power in mediation include:

- providing information and an orientation to the mediation process
- facilitating information sharing
- reframing issues
- clarifying interests
- acknowledging feelings
- seating of participants
- assuring the respondent has legal representation before proceeding with mediation
- providing for the participation of other advocates and support persons
- utilizing caucuses
- de-jargonizing the talk at mediation using language that makes it easier for all involved to understand the process
- raising unrepresented interests
- taking a topic off the table
- reality-testing agreements
- showing equal respect to all parties through use of names, titles, etc.
- exposing imbalances.⁵¹³

The mediator is expected to assess for safety from the beginning preparation stage and throughout the mediation, “screening for coercion, control, intimidation, threats, and other signs of emotional and physical abuse as well as potential for violence.”⁵¹⁴

f. Procedure

After an adult guardianship petition is filed, the *Alaska Statutes* (“AS”) require that an incapacity hearing to be scheduled within 120 days of the petition being filed.⁵¹⁵ If the respondent cannot afford legal representation, the court will appoint an attorney from the Office of Public Advocacy to represent the respondent in the proceeding.⁵¹⁶ The court appoints a court visitor, who meets with the parties and files a report with the court.⁵¹⁷ The court visitor provides a copy of the petition and a written statement of the respondent’s rights to the allegedly incapable respondent.⁵¹⁸ After the respondent’s rights have been explained, the court visitor will meet with the applicant (“petitioner”) and any other person

⁵¹¹ *Policies & Procedures Manual*, *supra* note 485 at 30.

⁵¹² *Policies & Procedures Manual*, *supra* note 485 at 30.

⁵¹³ *Policies & Procedures Manual*, *supra* note 485 at 30-31.

⁵¹⁴ *Policies & Procedures Manual*, *supra* note 485 at 31.

⁵¹⁵ *Alaska Statutes*, *supra* note 495 at AS 13.26.106(a), in Disability Law Center of Alaska, *Guardianship in Alaska: A Guide to Understanding and Petitioning for Guardianship of Adults with Disabilities* (September 2008) at 7 [*Guardianship in Alaska*].

⁵¹⁶ *Alaska Statutes*, *supra* note 495 at AS 13.26.106(c), in *Guardianship in Alaska*, *ibid*.

⁵¹⁷ *Alaska Statutes*, *supra* note 495 at AS 13.26, s. 106(c), in *Guardianship in Alaska*, *ibid*.

⁵¹⁸ *Alaska Statutes*, *supra* note 495 at AS 13.26. 107.

who has knowledge of the respondent's capacity.⁵¹⁹ The court visitor then files a report, which may be used to help determine whether a matter should be mediated. An expert, usually a physician with expert knowledge of the respondent's condition, is also appointed by the court pursuant to AS 13.26.107.⁵²⁰

Guardianship cases are referred to the AGMP by a judge, master or magistrate in response to a request from respondent, a family member, the plaintiff or petitioner, the court visitor, a guardian, attorneys for the plaintiff or respondent and other interested persons.⁵²¹ Parties or the court may request or initiate mediation, at any time during an application for guardianship.⁵²² Alaska's Superior Court has the authority to order parties in a contested adult guardianship application to attend mediation.⁵²³

A court order for mediation includes the following:

- The date(s) by which mediation must be completed, if applicable
- How the sessions will be conducted
- Appointment of the mediator or statement of how the mediator is to be appointed
- Authorization for the assigned mediator to access confidential information, including the court file.
- Statement that mediation is confidential.
- Statement that mediation is voluntary and an explanation of the responsibilities of the parties to meet the requirement of the court order.⁵²⁴

The party who requests mediation may choose a mediator, without the consent of other parties. However, each party is able to challenge the appointment of a mediator.⁵²⁵

The Alaska Court System maintains a court-approved list of qualified mediators.⁵²⁶ A dispute resolution coordinator monitors the performance, scheduling and payment of mediators.⁵²⁷ Mediators are required to conduct mediation pursuant to the guidelines of the mediation program, at a reasonable cost, and to report the outcome of the mediation process to the court.⁵²⁸

⁵¹⁹ *Alaska Statutes*, *supra* note 495 at AS 13.26, 107.

⁵²⁰ *Guardianship in Alaska*, *supra* note 515 at 8.

⁵²¹ *AGMP Evaluation*, *supra* note 483 at 16; *Policies & Procedures Manual*, *supra* note 487 at 7.

⁵²² *Policies & Procedures Manual*, *supra* note 487 at 6. The AGMP emphasizes the importance of early referrals. The AGMP evaluation noted that about half of the adult guardianship matters that went to mediation filed a request for mediation at the outset of the petition. The other half of the adult guardianship matters requested mediation later in the process, after a guardian had been appointed for some period of time, see *AGMP Evaluation*, *supra* note 483 at 4.

⁵²³ *Probate Rules*, *supra* note 494 at Rule 4.5(a) and (b); *CP Rules*, *supra* note 493 at Rule 100 (a) and (b).

⁵²⁴ *Policies & Procedures Manual*, *supra* note 485 at 6; *CP Rules*, *supra* note 493 at Rule 100(b); *Probate Rules*, *supra* note 494 Rule 4.5(b).

⁵²⁵ *Policies & Procedures Manual*, *supra* note 485 at 40; *CP Rules*, *supra* note 493 at Rule 100(c) "Notice of Challenge of Mediator".

⁵²⁶ *Policies & Procedures Manual*, *supra* note 485 at 40.

⁵²⁷ *Policies & Procedures Manual*, *supra* note 485 at 48.

⁵²⁸ *Policies & Procedures Manual*, *supra* note 485 at 40-41.

g. Case selection and exemption

The AGMP Policies & Procedures Manual identifies the types of cases that are appropriate and not appropriate for referral to mediation. Policy #2 states that “Court cases in which there are contested issues, or a plan or decision that needs to be made are appropriate for referral.”⁵²⁹ Cases that are identified as not appropriate for referral include the following:

- Where the mediator determines that any necessary participant is not able to understand the nature of the mediation process and how it proceeds, the role of the mediator and the parties’ relationship to the mediator
- When a quick emergency decision is required
- Certain cases in which there are allegations or findings of abuse, neglect or exploitation of the adult (which may include physical, emotional, or financial abuse by a family member, spouse/partner or caregiver), where the true voluntariness and fairness of mediated agreements may be in doubt because of the likelihood of coerced agreement arising from fear of or threat from the abuser, if they are a party to the mediation
- Cases in which there is an active domestic violence protective order between individuals who would be necessary participants in mediation.⁵³⁰

Policy #2 also identifies the *issues* that are appropriate and not appropriate for mediation. Issues identified as appropriate for mediation include:

- Personal and financial issues
- Whether a guardian is needed (safety concerns, whether the level of risk is understood and acceptable, whether autonomy and self-determination should be limited)
- The type or level of care or assistance that may be needed and alternatives
- Who should provide services or care or be the guardian
- Communication
- Decision-making
- Family disputes and obstacles to decision-making
- Financial decisions
- Living arrangements
- Health/medical decisions
- Needs of other family members and caregivers
- Post-appointment issues.⁵³¹

Issues identified as not appropriate for mediation include:

- Legal findings of fact or law
- Legal capacity or incapacity
- Whether or not abuse, neglect or exploitation is occurring, or occurred

The court may order mediation where it determines that mediation may result in an equitable settlement.⁵³² The court must consider whether there is a history of domestic violence

⁵²⁹ *Policies & Procedures Manual*, *supra* note 485 at 7.

⁵³⁰ *Policies & Procedures Manual*, *supra* note 485 at 7.

⁵³¹ *Policies & Procedures Manual*, *supra* note 485 at 8-9.

⁵³² *Probate Rules*, *supra* note 494 at Rule 4.5(a); *CP Rules*, *supra* note 493 at Rule 100 (a).

between the parties, which could affect the fairness of the mediation process or the physical safety of the victim.⁵³³ If so, the case should not be referred to mediation.

The 2008 publication entitled *Guardianship in Alaska: A Guide to Understanding and Petitioning for Guardianship of Adults with Disabilities*, published by the Disability Law Center of Alaska, states that any issues that arise in caring for an individual subject to guardianship may be mediated, including:

- Health, medical and care decisions;
- Financial decisions;
- Independence: balance between safety and self-determination;
- Living arrangements;
- Decision-making: Who should be involved? Who has authority?;
- Respite and support for caregivers;
- Safety concerns;
- Who should be guardian, if needed?; or
- Least restrictive alternatives.⁵³⁴

h. Attendance and Participation

In order to fulfil their obligations under a court order, parties referred to mediation must attend the “Orientation Meeting” (pre-meeting) with the mediator and the Initial Joint Mediation Session.⁵³⁵ Parties are not required to make a “good faith effort” to mediate; they are only required to attend. If any party declines to continue with the mediation after satisfying the required attendance at the initial session, the mediator must accept the party’s decision to do so; a party may withdraw from mediation at any time after attending the Initial Joint Mediation Session.⁵³⁶

If a party who is essential to the resolution of issues being mediated withdraws from the mediation, the mediator must terminate the mediation and report the termination without disclosing details of the negotiation or the reason(s) for terminating the mediation.⁵³⁷ However, the mediator may continue the mediation without the unwilling party if the mediator, in consultation with other willing parties, determines that the withdrawing party is not necessary to resolution of the issues being mediated.⁵³⁸

Any party may voluntarily submit a confidential brief to the mediator explaining his or her view of the dispute.⁵³⁹ A brief is limited to a maximum of five pages and should be provided

⁵³³ *Probate Rules*, *supra* note 494 at Rule 4.5(a); *CP Rules*, *supra* note 493 at Rule 100(a). Mediation normally will not be allowed where domestic violence has occurred in family law applications (i.e. marital and domestic relations applications, made under A.S. 25 or in cases involving safety protection orders).

⁵³⁴ *Guardianship in Alaska*, *supra* note 515 at 16-17.

⁵³⁵ *Policies & Procedures Manual*, *supra* note 485 at 10.

⁵³⁶ *Policies & Procedures Manual*, *supra* note 485 at 10; *Probate Rules*, *supra* note 494 at Rule 4.5(g); *CP Rules*, *supra* note 493 at Rule 100 (f).

⁵³⁷ *Policies & Procedures Manual*, *supra* note 485 at 10.

⁵³⁸ *Policies & Procedures Manual*, *supra* note 487 at 10.

⁵³⁹ *Probate Rules*, *supra* note 494 at Rule 4.5(d); *CP Rules*, *supra* note 493 at Rule 100 (d).

to the mediator not less than three days before the mediation.⁵⁴⁰ The brief is optional and confidential, and may not be disclosed to anyone without the party's consent.⁵⁴¹

As mentioned above, in any formal petition for guardianship of a person, the allegedly incapable respondent must have legal counsel. If the person who allegedly lacks capacity cannot afford legal counsel, the court will appoint counsel from the Office of Public Advocacy to represent the respondent.⁵⁴²

i. Mediator Credentials, Training and Standards

As mentioned above, the Alaska Court System maintains a court-approved list of qualified mediators, who are typically hired on contract to provide mediation services in the AGMP.⁵⁴³ According to the *Alaska Court System Mediation Programs - Mentoring Program for Mediators Protocol*:

It is the goal of the Alaska Court System to provide high quality mediation services and the Alaska Court System seeks to do this in several ways:

- By recruiting prospective candidates who have the experience, background, and personal capacities to become effective mediators
- By providing high quality training and ongoing education
- By providing ongoing case consultation
- By regularly reviewing the performance of mediators⁵⁴⁴

The Policies and Procedures Manual emphasizes that adult guardianship mediation “is highly specialized and require a variety of competencies and specific skills to be effective.”⁵⁴⁵ Policy #13 further emphasizes:

While basic mediation skills are essential, it is not sufficient to understand the principles and process and demonstrate a capacity to apply those concepts. Mediators in this arena must also have extensive knowledge of the adult guardianship/conservatorship system; the special issues affecting these adults, their families and caregiver and support networks; and of family functioning. They must understand the substantive law relevant to these cases and have a good grasp of available community resources. Mediators must also understand and respond appropriately to the context of culture and diversity within which they practice.⁵⁴⁶

The Policy & Procedure Manual sets out the qualifications and competencies sought for mediators in the AGMP as follows:

- 1) A degree in a relevant area of study (such as social work, law, psychology).

⁵⁴⁰ *Probate Rules*, *supra* note 494 at Rule 4.5(d); *CP Rules*, *supra* note 493 at Rule 100 (d).

⁵⁴¹ *Probate Rules*, *supra* note 494 at Rule 4.5(d); *CP Rules*, *supra* note 493 at Rule 100 (d).

⁵⁴² AS 13.26. 106(b)

⁵⁴³ *AGMP Evaluation*, *supra* note 483 at 15; *Policies & Procedures Manual*, *supra* note 487 at 40; see also online: <<http://www.courts.alaska.gov/mediation.htm#8>>.

⁵⁴⁴ Alaska Court System, *Alaska Court System Mediation Programs - Mentoring Program for Mediators Protocol* (updated August 2008) at 1 [*Mentorship Protocol*].

⁵⁴⁵ *Policies & Procedures Manual*, *supra* note 485 at 47.

⁵⁴⁶ *Policies & Procedures Manual*, *supra* note 485 at 47.

- 2) Experience related to issues and concerns associated with adult guardianship cases.
- 3) Empathy and compassion for adults and those involved with them who face concerns about capacity and care-giving needs.
- 4) Communication skills that foster rapport and trust building.
- 5) Training and experience in the mediation of family issues.
- 6) Knowledge in the following areas:
 - Adult guardianship and conservatorship proceedings
 - State statutes and court rules relevant to adult guardianship cases
 - Family functioning and dynamics
 - Abuse and exploitation of vulnerable adults
 - Understanding of the following as they may affect capacity, care-giving needs, and the support and service resources related to them:
 - Mental illness
 - Developmental disabilities
 - Substance abuse and addictions
 - Dementias and related disorders, including Alzheimer's Disease
 - Impacts of aging
 - Traumatic brain injury
 - Other physical trauma or illness
- 7) Cultural awareness and understanding of issues of diversity, with an emphasis on Alaska Native issues;
- 8) Availability to provide mediation services.⁵⁴⁷

As in Ontario, a mediator must complete a certain standard of training to be on the mediator list. Mediators are required to complete a week-long, 40 hour, multi-party mediator training course and orientation in the facilitative mediation model within the context of adult guardianship issues.⁵⁴⁸

New mediators must also participate in the Alaska Court System mentorship program.⁵⁴⁹ Mentors are selected using the following criteria:

- Experience and effectiveness as mediators
- Capacity to act as guide, teacher and advisor
- Capacity to engage in and promote reflective practice
- Knowledge of and adherence to program policies and procedures
- Availability to mentor and interest in mentoring program
- Knowledge, familiarity and comfort with the diverse communities (e.g., ethnically, geographically, linguistically, culturally and with regard to family structure) the mediation programs serve
- Needs of the program for diversity, capacity and optimal mentor to mediator ratio
- Participation in specific training for mentors.⁵⁵⁰

⁵⁴⁷ *Policies & Procedures Manual*, *supra* note 485 at 47-48.

⁵⁴⁸ *Policies & Procedures Manual*, *supra* note 485 at 48.

⁵⁴⁹ *Mentorship Protocol*, *supra* note 544.

⁵⁵⁰ *Mentorship Protocol*, *supra* note 544.

An individualized mentoring contract is worked out between the assigned mentor and each new or transitioning mediator to reflect his or her particular circumstances, however the standard mentorship process involves the following activities:

- New mediator observation of mediations conducted by mentor or other experienced mediators followed by discussion
- Co-mediation with the mentor (typically about three mediations)⁵⁵¹
- Mentor observes a number of cases in which the new mediator is the primary mediator
- Following the co-mediation and observation activities, the mentor will consult in person or by phone and email about subsequent cases and discuss cases with the mediator prior to and following each mediation session. Mentor will also review all written agreements, summaries and related documents prepared by the mediator
- Mentor and mediator will discuss progress and approach throughout mentorship process and will have periodic formal performance reviews
- Indicators of readiness for independent practice will be discussed and identified in the contract
- After intensive mentoring phase, mentor continues to be available for consultation
- Other activities which may be considered useful, include: Guided reading of relevant literature; Meeting in a group format with other mediators and mentors; Attending additional training or conferences; Establishing or participating in an ongoing on-line dialogue; Devising ways to fill in particular knowledge gaps (e.g. ICWA procedures or the special needs of adults with significant cognitive impairment)

Pursuant to the AGMP Policies and Procedures Manual, mediators with the project are required to comply with professional standards of practice and to strive for impartiality and neutrality in the performance of their duties.⁵⁵² AGMP mediators are required “to practice in accordance with the Model Standards of Conduct for Mediators, prepared in 1994 and revised and approved August 2005 by the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution.”⁵⁵³

Mediator conduct is monitored on an ongoing basis, through mentoring, case consultation, record reviews, observation, interviews and mediator-self-evaluations.⁵⁵⁴ The Dispute Resolution Coordinator monitors that the quality of mediation practice, timely scheduling and reasonable payment.⁵⁵⁵

j. Confidentiality and Reporting

Mediation communications are confidential.⁵⁵⁶ Mediators and participants cannot testify about the mediation proceedings, unless the court orders otherwise or there is a duty to disclose imposed by law.⁵⁵⁷

⁵⁵¹ *AGMP Evaluation, supra* note 483 at 17.

⁵⁵² *Policies & Procedures Manual, supra* note 485 at 11.

⁵⁵³ *Policies & Procedures Manual, supra* note 485 at 11.

⁵⁵⁴ *Policies & Procedures Manual, supra* note 485 at 47.

⁵⁵⁵ *Policies & Procedures Manual, supra* note 485 at 47.

⁵⁵⁶ *Probate Rules, supra* note 494 at Rule 4.5(h).

⁵⁵⁷ *Probate Rules, supra* note 494 at Rule 4.5(h).

Prior to mediation, parties are required to review and agree to a “Confidentiality and Mediation Agreement”, which sets out fourteen points about the mediation process and protection of each party’s privacy.⁵⁵⁸

As mentioned above, if a party withdraws and/or the mediation is terminated, the mediator must report the termination without disclosing details of the negotiation or the reason(s) for terminating the mediation.⁵⁵⁹

There are statutory limits on confidentiality. Therefore, in certain circumstances the mediator and other participants may have to break confidentiality, possibly including the following:

- reporting allegations of threat or harm to a frail or vulnerable adult to the adult and to the appropriate social welfare and/or law enforcement agency;
- reporting allegations of abuse or neglect of a child and to the appropriate social welfare and/or law enforcement agency;
- reporting specific threats of harm to oneself or to an identified third party to the third party, to law enforcement and/or to a social welfare agency.⁵⁶⁰

Further, mediators or other participants may have other professional roles in which they are mandatory reporters – the AGMP considers all mediators to be mandated by program policy to report when they have “reasonable cause to believe that a vulnerable adult suffers from abandonment, exploitation, abuse, neglect, or self-neglect” pursuant to Alaska Statute 47.24.⁵⁶¹ In addition, any person may anonymously report an incident to Adult Protection Services, if a vulnerable adult suffers harm from abuse, exploitation, abandonment, neglect or self-neglect.⁵⁶²

k. Fees, Costs and Sanctions

Mediation services are available at no cost to when referred by court order; however, participation costs (such as transportation, counsel, etc.) are borne by the participants.⁵⁶³ As of March 2009, the average cost per referral to mediation in the AGMP was calculated to be \$1,380, which included: mediator and mentor time in preparation, joint session(s), agreement writing, program paperwork; mediator travel, interpreter, teleconference, and room rental costs (in locations where the court is not able to provide).⁵⁶⁴ AGMP mediators are compensated for cases preparation, pre-mediation and mediation conferences by the Alaska Court System at a rate set by the Alaska Court system.⁵⁶⁵ The set rate increases once a mediator has mediated 10 cases post-mentorship.⁵⁶⁶

⁵⁵⁸ *Policies & Procedures Manual*, *supra* note 485 at 12; see also Alaska Court System, Self-Help Center: Family Law, Guardianship and Conservatorship, Adult Guardianship and Conservatorship Mediation Program, “Confidentiality and Mediation Agreement - Adult Guardianship and Conservatorship”, online: <<http://www.courts.alaska.gov/guardianship.htm#mediation>>.

⁵⁵⁹ *Probate Rules*, *supra* note 494 at Rule 4.5(g); *Policies & Procedures Manual*, *supra* note 487 at 10.

⁵⁶⁰ *Policies & Procedures Manual*, *supra* note 485 at 14.

⁵⁶¹ *Policies & Procedures Manual*, *supra* note 485 at 14.

⁵⁶² *Alaska Statutes*, *supra* note 495 at AS 47.24; *Policies & Procedures Manual*, *supra* note 487 at 14.

⁵⁶³ *Policies & Procedures Manual*, *supra* note 485 at 44.

⁵⁶⁴ *AGMP Evaluation*, *supra* note 483 at 17.

⁵⁶⁵ *Policies & Procedures Manual*, *supra* note 485 at 44.

⁵⁶⁶ *Policies & Procedures Manual*, *supra* note 485 at 44.

Where parties choose to use independent mediation services, the parties are responsible for the costs of mediation. Costs are normally split equally between the parties, unless the court orders otherwise.⁵⁶⁷ If a petition for adult guardianship is found to be malicious, frivolous or without just cause, the court can order that the applicant party (“petitioner”) pay all or part of the costs.⁵⁶⁸

1. AGMP Evaluation

As mentioned above, Alaska’s AGMP originated as an evaluated pilot project, in Anchorage, Fairbanks and South central Alaska.⁵⁶⁹ The court asked the Alaska Judicial Council to evaluate the success of the AGMP based on the following criteria:

1. Did participants reach agreements on some or all of the issues?
2. Did the mediations result in plans that enhanced the care and safety of high-risk adults?
3. Did the use of mediation avoid a contested court proceeding in the case?
4. Did participants experience mediation as a satisfactory process?⁵⁷⁰

This evaluation differed from the Ontario evaluation in that it included an assessment of the care and safety of older adults considered “at high-risk”. The measure used to assess this element was based on whether Adult Protection Services (APS) were involved in the matter.⁵⁷¹

It was noted that mediation could occur either at the point that a petition for adult guardianship was filed, or following appointment of a guardian.⁵⁷² Professionals interviewed as part of the program evaluation observed that families, service agencies and communities were able through mediation to work out ways to care for adults without going to court.⁵⁷³

The Alaska Judicial Council evaluation outcome measures and findings included the following:

- Agreements were reached on some or all issues in 87% of the cases mediated.⁵⁷⁴
- If Adult Protective Services was involved in the case, agreements were reached 95% of the time - plans were created that enhanced the care and safety of high-risk adults.⁵⁷⁵
- Interviews suggested that if agreements were reached in mediation, contested court hearings were avoided.⁵⁷⁶
- Participants were satisfied with the agreements reached most (91%) of the time.⁵⁷⁷

⁵⁶⁷ *Probate Rules*, *supra* note 494 at Rule 4.5(b)(3)

⁵⁶⁸ *Alaska Statutes*, *supra* note 515 at AS 13.26.131.

⁵⁶⁹ *AGMP Evaluation*, *supra* note 483 at 14.

⁵⁷⁰ *AGMP Evaluation*, *supra* note 483 at 3.

⁵⁷¹ *AGMP Evaluation*, *supra* note 483 at 7.

⁵⁷² *AGMP Evaluation*, *supra* note 483 at 4-5.

⁵⁷³ *AGMP Evaluation*, *supra* note 483 at 5.

⁵⁷⁴ *AGMP Evaluation*, *supra* note 483 at 6.

⁵⁷⁵ *AGMP Evaluation*, *supra* note 483 at 7.

⁵⁷⁶ *AGMP Evaluation*, *supra* note 483 at 8.

⁵⁷⁷ *AGMP Evaluation*, *supra* note 483 at 8.

- Participants believed that they were listened to and that their concerns were understood most of the time. Almost all would recommend mediation to others.
- The evaluation included 103 mediations conducted during the first three years of the project. The judge or professionals referred tough cases that they thought would need costly court hearings to resolve. Mediators and project staff believed that the referral for mediation avoided contested court hearings in all but a handful of cases.
- The mediators served much of the state, from Kotzebue to Kenai, all of Southcentral, and Fairbanks and the Fourth District. Mediators also worked with parties by telephone.
- In most of the cases mediated, questions about whether there were alternatives to guardianship were discussed and resolved. Other common issues mediated included the finances of the protected adult, the level of care needed, and decision-making and communication among family members and those responsible for the adult.⁵⁷⁸

4 Maryland - Appellate Guardianship Mediation Program

a. Program Overview and Administration

The Maryland Court of Special Appeals (the “Court”), Maryland’s intermediate appellate court, recently established a Civil Mediation Pilot Program (the “CMPP”) within the Court’s existing pre-hearing conference program.⁵⁷⁹ The two-year pilot program project was initiated in February 2010, supported by a grant from the Maryland Mediation and Conflict Resolution Office (MACRO).⁵⁸⁰ A Director of Mediation was employed to manage and administer the CMPP and report directly to the Chief Judge of the Court or his designate.⁵⁸¹ The program will operate as pilot program for the initial two years and is anticipated to become permanent, pending the outcome of a program evaluation.⁵⁸²

Maryland’s appellate level CMPP is described in further detail below, including the following aspects of the program: statutory framework, case selection and exemption; attendance and participation, qualifications of the mediator, confidentiality and reporting; and fees, costs and sanctions.

b. Statutory framework

The Civil Mediation Pilot Program was established pursuant to an administrative order adopted by the Court of Appeals and Court of Special Appeals, and provides “‘Pre-hearing Conference for Mediation’ as an extension of the existing pre-hearing conference program in the Court of Special Appeals created by Maryland Rules 8-205 and 8-206.”⁵⁸³ The

⁵⁷⁸ *AGMP Evaluation, supra* note 483 at 4. For a more detailed review and analysis of the data compiled by the AGMP, see *AGMP Evaluation, supra* note 483 at Appendix C.

⁵⁷⁹ Office of Mediation, Maryland Court of Special Appeals, online: <<http://www.courts.state.md.us/cosappeals/mediation/index.html>>.

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid.*, “Administrative Order on Civil Mediation Pilot Program” and “Guidelines”. The current Director of Mediation is Robert J. Rhudy, Esq. “Bob Rhudy was selected by Chief Judge Peter Krauser in October 2009 as Director of Mediation for the Maryland Court of Special Appeals to establish and manage the new civil appellate program,” online: www.courts.state.md.us/cosappeals/mediation/pdfs/rhudybio.pdf

⁵⁸² See “Administrative Order on Civil Mediation Pilot Program” at 4, *supra* note 579 [*Administrative Order*].

⁵⁸³ “COSA Mediation Brochure”, *supra* note 579.

administrative order establishes how the mediation pilot program functions, including the program procedures, term and evaluation.⁵⁸⁴

The Court has created and published guidelines for the pilot program, which are not legally binding but set out the objectives and procedures of the pilot program.⁵⁸⁵

c. Case Selection and Exemption

Pursuant to the Administrative Order, the Director of Mediation is responsible for reviewing information and supplemental information reports, as well as other information, including confidential requests for mediation submitted by parties, and based on the reports and other factors, recommending cases to be ordered to a prehearing conference for mediation.⁵⁸⁶

The Court may then order parties to attend prehearing conference mediation before a judge from the Court's mediation roster. The Director of Mediation or designate may co-mediate the pre-hearing conference with the assigned roster judge.⁵⁸⁷

The Director of Mediation for the CMPP has commented that cases that would likely be exempt from mediation include situations of domestic abuse. The Director of Mediation also expressed the view, however, that there may be certain cases involving financial exploitation that may be appropriate for mediation.

d. Attendance and Participation

Based on the recommendations of the Director of Mediation, the Court will normally order parties to attend a prehearing conference for mediation. Parties ordered to prehearing conference for mediation have the option of making a motion to “opt out” of mediation for “good cause”.⁵⁸⁸ The Court then has the discretion to grant or deny the motion. Mediation may still continue where a party has opted out.

According to the Director of Mediation, where parties are ordered to attend, without an opt-out being granted, there is an estimated 60% settlement rate.⁵⁸⁹

e. Qualifications of the Mediator

The mediators selected for this pilot project include retired Circuit Court Judges and Court of Appeals judges who are listed on a court mediation roster.⁵⁹⁰

The Director of Mediation noted that training for mediators on the mediation roster involves a minimum of 40 hours of “basic” mediation training, 20 hours of elder mediation and guardianship mediation training.⁵⁹¹ This training program relies on the information and expertise provided by TCSG. Most cases will also involve co-mediation with the designated judge from the Court mediation roster and the Director of Mediation or his designee.⁵⁹²

⁵⁸⁴ “Administrative Order on Civil Mediation Pilot Program”, *supra* note 579.

⁵⁸⁵ “Guidelines”, *supra* note 579 [*Guidelines*].

⁵⁸⁶ *Administrative Order*, *supra* note 582 at clause 3.

⁵⁸⁷ *Administrative Order*, *supra* note 582 at clause 3.

⁵⁸⁸ *Administrative Order*, *supra* note 582 at clause 3.

⁵⁸⁹ Interview with the Director of Mediation by Emma J. Butt (July 5, 2010) [*DM Interview*].

⁵⁹⁰ *Guidelines*, *supra* note 585 at 4.

⁵⁹¹ *DM Interview*, *supra* note 589.

⁵⁹² *Guidelines*, *supra* note 585 at 2, 3 and 4.

The standards for mediator conduct are established in the Maryland Program for Mediator Excellence, which includes: self-determination, impartiality, conflicts of interest, competence, confidentiality, quality of the process, advertising and solicitation, fees and other charges.⁵⁹³

f. Confidentiality and Reporting

Mediation communications are confidential, except where parties are required to disclose information by law.⁵⁹⁴ Parties are required by law to notify the appropriate authorities where it is necessary to prevent serious bodily harm or death.⁵⁹⁵ Other disclosures may occur where there are allegations of mediator misconduct or negligence, or a claim of fraud, duress, or misrepresentation.⁵⁹⁶

The Director of Mediation may communicate to the Court that a mediation has occurred or has terminated, whether parties attended, participated or provided information. The Director of Mediation may also inform the court whether an agreement was reached and whether further mediation is recommended or should be terminated.⁵⁹⁷

A written and signed agreement is not confidential, unless the parties agree in writing to exclude all or part of the agreement from disclosure.⁵⁹⁸

g. Fees, Costs and Sanctions

The MACRO project funding covers all fees and costs of the CMPP. Therefore, the Court will provide mediation services to participants at no cost during the pilot program. Recalled judges providing mediation services as part of the CMPP will be compensated in the same way as all recalled judges.⁵⁹⁹ The Director of Mediation provides pre-mediation, mediation, management and other services. The issue of costs may be revisited at the end of the pilot project.

6. Summary of challenges and recommendations from comparator programs

The evaluations of adult guardianship mediation programs, as well as feedback from experts and stakeholders involved in the development of these programs, have allowed the identification of a number of challenges to program success. Some of these challenges include:

- Lack of referrals of cases to mediation despite successful evaluations and participant satisfaction with the mediation process
- Lack of engagement with and support for the concept of mediation in guardianship
- Lack of awareness, education, and training of referral sources, such as judges and lawyers
- Lack of clear policy around screening appropriate cases for referral

⁵⁹³ *Guidelines, supra* note 585, online:

<www.courts.state.md.us/cosappeals/mediation/guidelines.pdf>.

⁵⁹⁴ *Guidelines, supra* note 585 at 4-5.

⁵⁹⁵ *Guidelines, supra* note 585 at 4-5.

⁵⁹⁶ *Guidelines, supra* note 585 at 4-5.

⁵⁹⁷ *Guidelines, supra* note 585 at 5.

⁵⁹⁸ *Guidelines, supra* note 585 at 4.

⁵⁹⁹ *Guidelines, supra* note 585 at 5.

From the lessons, experiences and challenges of the guardianship programs discussed above, a number of recommendations and strategies for a successful guardianship mediation program have emerged:

- Collaborative program/project design involving key stakeholders
- Collaborative development of program policies involving consultation with key stakeholders
- Institutional support for the program (court and bar, government, private sector)
- Pilot program and formal evaluation of pilot program
- Trained program staff charged with screening and case referral
- Training and certification standards for program mediators, including:
 - Minimum hours of pro bono mediation
 - Professional development requirements
- Roster/list of qualified private sector mediators that have met program training standards (hired on contract)
- Process for monitoring mediator performance
- Code of conduct for program mediators and complaints procedure
- Practicum program for roster mediators
- Mentorship program for program mediators
- Use of a non-evaluative mediation model (e.g. facilitative style mediation)
- Pre-mediation meetings with each participant
- Co-mediation model where resources allow
- Clear program policies regarding case selection and referral, case exemption, mediation participation (who are necessary parties, mandatory vs. voluntary participation, capacity to mediate), self-determination and autonomy of parties, confidentiality and reporting, mediated agreements, fees, costs and sanctions
- Legal counsel appointed for allegedly incapable adult in formal guardianship application
- Representation appointed for indigent parties
- Program education and promotion

7. Conclusion

The development of adult guardianship mediation was initiated in the US in the early 1990s and more recently in Canada. The models throughout the US and in Canada may differ with respect to some program features, such as the nature of program participation (mandatory or voluntary), administrative structure, the program policies and processes. However, there now exists a body of research, knowledge and experience that may inform and support the development of adult guardianship mediation programs throughout Canada, and more particularly in BC.

For a comparative overview of the Ontario and US court-connected adult guardianship mediation program frameworks described in this Chapter, refer to the summary comparative table in Appendix A .

CHAPTER 7 – Conclusions and Recommendations

Recent legislation and private practice experience indicates that elder and guardianship mediation are important and positive new areas of legal expansion in Canada, and in BC in particular. The Elder and Guardianship Mediation Project was born out of a need to establish practice guidelines and develop competencies and standards for mediators practicing in these emerging and overlapping areas. This report also responds to the need for comprehensive research and analysis related to the challenges and issues raised in the context of elder and guardianship mediation, in recognition that these specialized practice areas are developing and continuing to expand. Our review of the experiences and lessons learned in other jurisdictions, related to the development of court-connected adult guardianship programs, reveals challenges that may arise in the design and development of guardianship mediation programs and points to policies and strategies that may be recommended for developing successful programs.

The recommendations in this report for best practices in elder and guardianship mediation and for the development of court-connected adult guardianship mediation programs, are primarily derived from direct feedback from leading experts and stakeholders in BC, Ontario and the US. As noted in Chapter 1, in the Canadian context there is little Canadian-specific scholarly research and literature available because mediation is a recent and emerging tool for addressing elder and guardianship disputes. As a result, the body of research and knowledge established over nearly two decades of experience with adult guardianship mediation in the US was particularly helpful in developing recommendations for the development of guardianship mediation programs and policies in Canada.

The goal of this final chapter is to provide a summary of the recommendations for best practices in elder and guardianship mediation. This chapter also highlights recommendations, considerations and strategies for the development of court-connected guardianship mediation programs, which would be applicable to a court-connected guardianship mediation program established pursuant to the mandatory mediation provisions contained in the Bill 29 amendments to the *Adult Guardianship Act*.

1. Best practices in elder and guardianship mediation

For the purposes of this report, the recommendations for best practices in elder mediation arising from the EGM Project can be broken down into the following categories:

- Training and standards for mediators
- Ethics in elder and guardianship mediation (e.g. issues concerning abuse, self-determination and mandatory mediation, mandatory mediation, ‘who is at the table’, capacity to participate)
- Mediation models and styles

a. Training: Competencies and standards

As indicated in Chapter 5, there is general agreement around the basic or “core” competencies for elder mediation and the additional knowledge and training required to effectively mediate guardianship disputes. The ethical codes and standards of conduct for mediators reviewed in Chapter 5 tend to converge to reflect a common understanding of the

fundamental ethical responsibilities of mediators wishing to practice in the areas of elder and guardianship mediation.

At a general level, our research indicated a strong consensus that mediators practicing in the area of elder mediation (“elder mediators”) should have a minimum of basic mediation training and experience plus specialized training and experience in elder mediation. Further, experts and stakeholders stressed that additional information and skills are necessary to effectively mediate guardianship cases. Recommended training objectives and standards of professional conduct for mediators discussed in Chapter 5 are summarized below.

(i) Competencies

Elder Mediation

Elder mediation training programs should be skills-based and be designed to develop the following list of requisite competencies:

- Knowledge of family dynamics and intergenerational issues
- Knowledge and understanding of power imbalance in mediation and strategies for identifying and neutralizing power imbalance
- Understanding the aging process (mental and physical aspects of aging plus myths of aging)
- Knowledge related to end of life care options
- Understanding the dynamics of grief and loss
- Understanding and awareness of ethics, values and principles (impartiality, self-determination, quality of process, power imbalances, ageism, mediator competence, mediating in cases of abuse and neglect, confidentiality)
- Awareness of ethical issues that may arise in elder and guardianship mediation and strategies for addressing them
- Knowledge and understanding of the pre-mediation interview process and skills and experience in non-evaluative mediation practice
- Knowledge and skills for multi-party, complex mediation (including how to assess who should participate in mediation)
- Knowledge and understanding of the roles of participants in mediation, including the role of the mediator
- Knowledge and understanding of relevant legal processes and procedures, legislative frameworks, and agreement writing
- Knowledge and understanding of the importance of self-determination and maximum participation of parties in mediation – in particular, how to ensure the voice of the older person is included in mediation
- Knowledge of accommodation strategies – how to accommodate the particular needs of parties in mediation in order to ensure maximum participation
- Solid understanding of elder abuse and neglect – including the dynamics of abuse and how to detect abuse
- Understanding capacity issues and strategies for assessing the capacity of parties to mediate
- Knowledge and skills for multi-party, complex mediation (including how to assess who should participate in mediation)
- Cultural diversity and values – including an awareness of language, family values and social norms, gender roles, and who makes decisions and how decisions are made

- Knowledge and understanding of relevant health care issues
- Knowledge of community resources
- Recognizing legal and other issues outside one's competence as mediator – when to refer to other professionals or resources
- Knowledge of strategies for determining whether or not a matter is appropriate for mediation and when to terminate mediation
- Understanding of the role of the mediator in guardianship mediation
- Simulated and role-playing mediation

Guardianship Mediation

For mediators who intend to mediate adult guardianship cases, the following (additional) competencies and training requirements were identified and are recommended:

- Solid understanding of guardianship law and process
- Knowledge of least restrictive alternatives to guardianship, including financial and non-financial options for substitute decision-making
- Understanding of the dynamics of aging and the aging process
- Knowledge of Alzheimer's disease and other related dementias
- Knowledge of the importance of ensuring the participation in mediation of the allegedly incapable adult respondent in guardianship cases and strategies for ensuring the voice of the respondent is represented in mediation (whether or not the adult is capable of participating in the mediation in person)
- Knowledge of the importance of ensuring the self-determination and autonomy of the respondent in guardianship cases
- Knowledge of accommodation strategies – how to accommodate the particular needs of parties in mediation in order to ensure maximum participation
- Knowledge of the law of capacity and legislation related capacity in relevant jurisdiction
- Understanding capacity issues and strategies for assessing the capacity of parties to participate in mediation *with support*
- Awareness of power imbalances in guardianship mediation and ability to employ strategies for identifying and neutralizing power imbalances, including awareness of the potential impact and influence of family relationships and culture on power imbalance in guardianship mediation)
- Knowledge of strategies for determining whether or not a guardianship case is appropriate for mediation and when to terminate mediation
- Simulated and role-playing mediation
- Practice experience, ideally co-mediation and or mentorship with a mediator experienced in the areas of guardianship mediation

Elder and guardianship mediation training should include practice experience ideally in a setting of co-mediation and/or mentorship with a mediator experienced in the particular field.

(ii) Standards

The review indicated that adherence to the following standards and values is considered central to best practice in elder and guardianship mediation:

Impartiality: Mediators has a duty to be impartial in his or her conduct towards all parties and to remain impartial throughout the course of the mediation process. Implicit in this is the duty to avoid conflict of interest.

Integrity: Duty of the mediator to act with integrity. Mediators must be honest, diligent, and act in good faith. Mediators should put the interests of participants and the public above their own.

Self-determination: Self-determination refers to the right of parties in mediation to make their own decisions respecting resolution of the issue(s) in dispute, voluntarily and free from coercion. The mediator has a duty to respect and encourage the fundamental principle of self-determination in mediation.

Confidentiality: Duty of mediator not to disclose to anyone not a participant in mediation any information obtained through the mediation process unless required by law (some other exceptions may be included, such as disclosure with consent of parties).

Competence: The mediator has a duty to be competent – to acquire and maintain the professional skills and abilities necessary to deal with the issues involved in the mediation and uphold the quality of the mediation process.

Quality of the mediation process: The mediator has a duty, prior to or at the start of the mediation, to ensure that all parties understand the mediation process. The mediator has a duty to ensure procedural fairness in the mediation process. The mediator must conduct mediation in a manner that allows all participants to fully and effectively participate in the process, as well as encourage respect among the participants.

Safety and appropriateness of mediation: The mediator has a duty to make every reasonable effort to identify threats to the safety of the parties in mediation, and to either establish a safe process or terminate the mediation.

Independent advice: A mediator has a duty not to give legal advice to parties in mediation unless the mediator is licensed to practice law. A mediator must still have enough familiarity with the law to be aware of issues in mediation that necessitate referring parties for independent legal advice. The obligation to advise parties of the availability of independent legal advice is constantly present.

Agreement to mediate: The mediator has a duty to ensure prior to the commencement of mediation that the parties understand the terms and conditions of the mediation (as often set out in a written agreement), including but not limited to the following: the confidentiality of oral and written communication in the mediation process, the right of the mediator to terminate mediation, the particulars of any fees, expenses and methods of payment, and the fact that the mediator is not a compellable witness in any legal proceedings by any parties in to the mediation.

Termination of mediation: The mediator has a duty to ensure that all parties are aware of their rights regarding withdrawal from mediation. The mediator must suspend or terminate mediation whenever the process is likely to harm or prejudice one or more of the, if a participant is unable to participate effectively, if one or more of the participants is acting in bad faith, if the mediator believes that any agreement proposed by the parties is

unconscionable, or when the usefulness of mediation is exhausted. The mediator has a duty not to withdraw mediation services without good cause and upon reasonable notice to the participants. Where appropriate, the mediator should refer participants for independent legal advice or other appropriate professional services.

Multi-party mediation: The mediator has a responsibility to ensure that persons with an interest in the mediation, including persons interested in providing support to a dependent person, are invited to participate in the mediation process.⁶⁰⁰

Ability to participate: The mediator has a duty to ensure that all parties have the capacity to participate in mediation. If a party is incapable of participating in mediation, the mediator has a duty to explore whether there is someone appropriate who can represent the wishes of the incapable person in mediation. Where the mediator believes that a party is unable to participate meaningfully in the mediation process, and there is neither a representative nor another appropriate person to represent the incapable person's wishes, the mediator should suspend or terminate the mediation and where appropriate, refer parties to relevant community and other professional resources for assistance.⁶⁰¹

Advertising: Mediators have a duty not to make false, misleading, or exaggerated claims about the mediation process or about the mediator's skills and/or qualifications. Mediators shall refrain from guaranteeing or promising specific results.

Mediation fees: The mediator must provide the parties with a written statement explaining the fee structure for the mediation, including likely expenses, as well as obtain agreement from the parties respecting how the payment will be shared. Mediator's fees should not be based on the outcome of the mediation.

b. Ethics

Our research identified a number of ethical issues that mediators and mediation participants may encounter more frequently in the contexts of elder mediation and guardianship mediation involving older adults than in other mediation contexts. It is important that mediators have a solid understanding of these issues, and have strategies to handle them. These ethical issues are discussed in detail in Chapter 3 and are summarized below.

Mediator impartiality

Mediator impartiality is often considered the core ethical consideration in mediation. Mediators are expected to conduct the mediation impartially and to remain impartial throughout the mediation process. If a mediator becomes aware that he or she is unable to remain impartial in mediation, the mediator may be required to notify the parties of the fact and to withdraw from mediation. While a mediator is a neutral figure in the mediation, that does not necessarily mean he or she is a passive party. Mediators may be required by codes of professional conduct to ensure that the interests of all parties are adequately represented in mediation.

⁶⁰⁰ This standard is specific to EMC's code, *EMC, supra* note 45, *Code of Professional Conduct for Mediators Specializing in Issues of Aging* at 9.

⁶⁰¹ This standard is specific to EMC's code, *EMC, supra* note 45, *Code of Professional Conduct for Mediators Specializing in Issues of Aging* at 7.

Abuse

Given the prevalence of elder abuse, mediators working with older adults must be well informed about elder abuse and be able to ensure that an older adult who may be a victim of abuse is safe and will not be disadvantaged by participating in mediation.

Best practices identified in the academic literature and by experts in the field recommend that screening for abuse and power imbalance is an important step that must be taken prior to mediation.

Elder and guardianship mediators must understand elder abuse and neglect and must be trained to screen for abuse.

Age Discrimination (“Ageism”)

Mediators must be conscious of and seek to address age discrimination that may arise in mediation on the part of the mediator, the participants, or other persons involved in the mediation process.

Power imbalance, Cultural Diversity and Values

Mediators must always be aware of power imbalances between parties in mediation. This is particularly important in elder and guardianship mediation involving, for example, an older person with cognitive challenges or an older adult dependent on another party for care. The research revealed that in the case of adult guardianship, the threat of guardianship may cause a respondent to feel pressured into an agreement that gives up rights.

Mediators must also be sensitive to the way in which culture and diversity of values may influence the expectations of the parties and the dynamics between them in mediation.

Mediators must have a solid skills for addressing power imbalances in mediation.

Self-determination, Capacity and Participation

Self-determination is a fundamental principle of mediation. The principle of self-determination presumes that every party must be capable of participating in mediation and entering into an agreement voluntarily and without coercion. In any mediation, the mediator has an ongoing responsibility to ensure that all parties have the capacity to participate in the mediation. The fact that the capacity of an adult is typically the central issue in an adult guardianship case raises the concern about the appropriateness of mediation in guardianship matters.

The requirement that every party must be capable of participating in the mediation process and making voluntary agreements free from coercion means that mediators in adult guardianship cases must pay particular attention to the adult’s capacity and be aware of any coercion or possibility of coercion by other parties. If at any point in the process a mediator determines that any party does not have the capacity to mediate, the mediator should be required to suspend or terminate the mediation.

Mediators should always assume as a starting point that an adult has the capacity to participate in mediation. Diminished capacity does not preclude capacity to participate in mediation. Mediators in adult guardianship matters should ask the question: “Does the adult have the capacity to participate in the mediation *with support*?” Support may mean that the adult requires the assistance of a support person, advocate, legal representative, family member or caregiver, or that another form of accommodation may be required to maximize the adult’s ability to participate in the mediation. The mediator should be aware of the need to make necessary accommodations. However, mediators must be aware that mediation is usually inappropriate in cases where the adult is unable to reasonably participate in the process even with accommodations and representation.

The mediator must also be aware of the potential for other parties in the mediation to assert their own values rather than those of the adult. The mediator must ensure that the voice of the adult is represented in mediation, whether or not the adult is able to participate in person.

Who Should Participate in the Mediation

As elder and guardianship mediation often involves multiple parties, the mediator is usually faced with the challenge of determining who should participate. Most experts were of the opinion that participation in elder and guardianship mediation should be as inclusive as possible, as long as the roles of all the participants are clearly identified, and that all participants have an interest in the case or information that adds value to the mediation.

Particularly in adult guardianship cases, experts and stakeholders emphasized the need to ensure the maximum participation of the older adult. In circumstances where the adult is incapable of participating in the mediation, experts and stakeholders stressed the necessity of ensuring the voice of the adult is represented in the mediation either through an advocate, legal counsel or other individual charged with representing the adult’s wishes.

The perspective of the older person must be represented at the mediation. In circumstances where the adult is unable to participate, the voice of the adult should be represented in the mediation either through an advocate, legal, counsel or other individual charged with representing the adult’s wishes.

Mandatory Mediation

With respect to mandatory mediation, our research indicated unanimous agreement that mandatory mediation should be restricted to mandatory attendance but not mandatory participation. Experts and stakeholders stressed that mediation is by definition a voluntary process in which any mediated settlement between the parties must be reached voluntarily and without coercion. As such, all experts further agreed that parties can never be required to reach a settlement. However, several experts noted that in their experience, court ordered/mandatory mediation (in reference to mandatory attendance) was very effective and that without it, parties were much less likely to choose to try to resolve disputes through mediation. Further, experts noted that it is common that parties who are required to attend mediation often choose to participate once the process is explained to them prior to and/or at start of the mediation.

A number of experts recommended that indigent parties who are required to attend mediation pursuant to a mandatory mediation program should be assigned an advocate or counsel to represent them, particularly in the case of indigent parties with capacity issues.

What Issues Cannot be Mediated

Our research revealed strong consensus amongst experts and stakeholders that whether or not an adult is incapable is legal question that must be determined by a court. It cannot be mediated.

Similarly, the fact of whether or not there is abuse cannot be mediated. Most experts agreed that cases involving serious allegations of abuse should not be mediated. However, a number of experts were of the opinion that certain cases involving financial exploitation may be appropriate for mediation.

Confidentiality

Mediators are required not to disclose to anyone not a party to mediation any oral and written communication obtained throughout the mediation. An issue that may arise in the context of multi-party mediation (common in the context of elder and guardianship mediation) is the participation of professionals, such as certain health professionals, who may be required by their governing bodies to report abuse or neglect. Another example of a confidentiality issue that arises in adult guardianship mediation as a result of mediating in the multiparty context is the requirement for the mediator not to disclose information provided to the mediator by one party to another party without the first party's consent.

Mediator Competence

Our research revealed strong consensus that specialized training and experience should be required for mediators practicing in the area of elder mediation and additional specialized training and experience for adult guardianship mediation. Chapter 5 highlights the recommended training standards for elder and guardianship mediation. Experts and stakeholders emphasized, as does the literature, that it is crucial in the guardianship context, for mediators to have a solid understanding of guardianship law as well as training in capacity issues, power imbalance and abuse and neglect.

Further, our research indicated a general consensus that mediators should be aware of the limits of their knowledge and understanding in certain areas and know when matters should be referred to professionals outside of the mediation, including when to refer parties for independent legal advice.

c. Mediation models and styles

The majority of experts and stakeholders consulted in this project agreed that a non-evaluative style of mediation is most appropriate for elder and guardianship mediation and that the preferred styles are facilitative and transformative. In addition, most experts and stakeholders agreed that co-mediation is an ideal model in the often multi-party, multi-issue context of elder and guardianship mediation. They noted, however, that accessing adequate resources to support a co-mediation model may be a challenge.

One of the strongest consensuses amongst experts and stakeholders was the need for pre-mediation meetings with each mediation participant as part of any elder or guardianship mediation model. Accordingly, pre-mediation meetings should be included in any elder or guardianship mediation model. Experts and stakeholders identified a number of reasons why pre-mediation meetings are necessary:

- Pre-mediation meetings help to ensure that the voice of the older adult is included in the mediation.
- They enable the mediator to identify and better understand family and relationship dynamics.
- They provide the mediator with the opportunity to identify any potential power imbalances in advance of the mediation session, as well as screen for abuse.
- They provide the mediator with the opportunity to explain the process to the parties, including roles, rights and responsibilities, as well as establish a relationship of trust prior to the joint mediation session.
- The mediator can help parties identify issues for mediation in advance of the mediation.
- They provide the mediator with the opportunity to identify potential non-party participants who may be valuable or necessary to the success of the mediation.
- They provide the mediator with the opportunity to assess the capacity of each party to participate in the mediation (with support) and to identify any accommodations that may need to be made to ensure maximum participation of the parties in the mediation.

2. Court-connected Adult Guardianship Mediation Program – Recommendations, Considerations and Strategies

Based on the review in Chapters 4 and 6 of the experience with court-connected guardianship mediation programs in BC, Ontario, and select jurisdictions in the US, as well as consultation with experts and stakeholders in the area of guardianship mediation, the following recommendations are made regarding the developments of a court-connected adult guardianship mediation program in BC:

- A court-connected guardianship program should initially be established as an evaluated pilot project.
- A court-connected guardianship program should be designed through a collaborative process involving key stakeholders.
- Program policies should be developed through a collaborative process.
- The program should have clear policies related to case selection and referral as well as dedicated, specially trained staff charged with screening and case referral.

- The program should utilize a non-evaluative, interest-based mediation model (most experts recommended facilitative style mediation). Pre-mediation meetings are a necessary feature of a program mediation model.
- Program mediators should be required to meet specialized training and experience requirements set by the program (including ongoing requirements for professional development).
- A program roster should be established pursuant to legislation similar to the CFCSA Regulation 9 (see Chapter 4) and all program mediators must be members of the roster.
- Roster mediators should be required to adhere to an established code of professional conduct.
- The program should establish a process for responding to complaints about roster mediators.
- Program mediators should be private sector mediators hired on a contract basis.
- The program should work with the private sector to expand training opportunities for mediators, such as establishing a guardianship mediation practicum similar to the CPP involving supervision by and co-mediated with mentors who have substantial experience mediating in the adult guardianship context.
- The program should establish an Orientation to Guardianship Mediation training (similar to the Orientation to Child Protection Mediation required by the CPMP) that involves practice learning by means of mentored co-mediation with an experienced guardianship mediator.
- The program should adopt a collaborative approach for promoting the program in the province by establishing institutional and government partnerships, support from Mediate BC and other provincial mediation organizations, support from the BC Supreme Court, as well as the legal community, such as, the BC Bar, CLEBC, and the Law Foundation of BC.
- Promotion and education about the program and the mediation concept in guardianship matters is necessary.
- The program should have full-time administrative support.
- Mandatory mediation should refer to mandatory attendance in mediation, not participation. Participation once in attendance should be voluntary.
- Program policies should be developed pursuant to regulations and should address the following:
 - Whether or not there are individuals specifically authorized to participate in mediation
 - Cases and issues appropriate and not appropriate for mediation
 - Rights and duties of participants in mediation
 - Confidentiality in mediation
 - Matters that may be exempted from mediation
 - Costs and sanctions related to mediation
 - Representation for indigent parties
 - Training standards and requirements for program mediators

Experts and stakeholders emphasized that the success of an adult guardianship mediation program depends upon institutional and policy support for the program (legislation, courts, government).

In BC, a number of experts suggested that the BC CPMP could serve as model for a potential court-connected guardianship mediation program. These experts highlighted the

CPMP's collaborative approach to program design and policy development, the mediation model used in the CPMP, the CPMP mediator roster structure and administration, and the CPMP practicum (see discussions in Chapters 2 and 4).

3. Where do we go from here?

This project aims to substantively address legal, ethical, social and practice issues raised by mandatory and voluntary elder and guardianship mediation. We approach this challenge by bringing together, in a single volume, and for the first time, various material that should be considered before we further explore the difficult question of where we should go from here in supporting the development of elder and guardianship mediation in BC.

This report includes many components: an outline of the overarching legal context, clarification of the meaning of the concept of elder and guardianship mediation, background on elder mediation in Canada, a comparative analysis of select US court-annexed guardianship mediation programs, and a discussion of ethical issues that arise in the context of mediating at that place where age and mental capacity intersect. The findings of this study were gleaned through a mix of conventional legal research strategies and surveys, consultations and interviews.

One of the challenges in creating this report is that discussion of elder and guardianship mediation potentially impacts such a broad community of practitioners. Different practitioners require access to different information and resources in order to participate in elder and guardianship mediation at the level of practice or policy. This is partly due to the reality that mediators enter the practice from diverse educational backgrounds, such as law, social work, justice, and health. Also, a broad spectrum of people may participate in mediation and related legal processes, including private lawyers, family, friends and supporters, judges, capacity assessors, health care providers, physicians, gerontologists, family caregivers, social workers, educators, advocacy workers, victim assistance workers, long-term care regulators and employees, and the Public Guardian and Trustee. As a province we are now at the precipice of creating legislation governing adult guardianship mediation, and so individuals involved in the development of law and regulations require access to comprehensive information on elder and guardianship mediation in order to move forward. Older people in BC who may have capacity issues have a tremendous stake in enriching everyone's knowledge of the complex issues that arise in relation to mediation of guardianship matters. This report serves different needs for diverse practitioners and participants in mediation processes.

We hope the project will:

1. Increase the understanding and awareness amongst the legal and mediation communities of the issues raised in elder or guardianship mediation.
2. Encourage rigorous discussion amongst the legal and mediation communities of standards of professional conduct, training expectations, and educational competencies in the context of elder and guardianship mediation.
3. Spark further conversations and debate about elder and guardianship mediation within advocacy groups, the Canadian Bar Association, online and through various media.

4. Create a framework, in partnership with leaders in the mediation community, to address key issues such as training and rosters for elder and guardianship mediators in BC.
5. Lay a foundation for the development of adult guardianship mediation regulations in BC.
6. Supply researchers and policy analysts with a rich source of information on elder and guardianship mediation.
7. Provide practitioners from diverse disciplines with an overview of the legal context framing elder and guardianship mediation in BC.
8. Inform the development of a pilot adult guardianship mediation program in BC, through comparative analysis of other regimes.

The focus of the EGM Project is BC. However, as elder mediation is in its infancy in Canada, the Report's recommendations will apply more broadly to elder mediation and EGM outside BC. Also, while this report focuses on the nexus point between elder mediation, elder law, and guardianship, many of the themes we address in this report will apply to guardianship mediation, elder mediation and elder law more broadly. We invite you to use the information contained in this report in whatever manner serves your practice. Although elder mediation is growing in BC, this lengthy report remains but a first step in framing the complex issues that arise in relation to the development of EGM in BC.

APPENDIX A – Comparative Table: Court-connected Guardianship Program Frameworks (Canada & US)

Jurisdiction	Selection of Cases	Attendance	Mediator Credentials	Training & Quality Control	Privacy & Reporting	Fees/Costs	Notes
<p>Ontario</p> <p><i>Rules of Civil Procedure</i>, Rule 24.1 and Rule 75.1</p> <p><i>Substitute Decisions Act</i></p>	<p>Proceedings under the <i>Substitute Decisions Act</i>, including contested applications for guardian of person, guardian of property, or both.</p> <p>Court may direct the issues to be mediated.</p> <p>Parties may apply to the court for an exemption.</p>	<p>Court orders determine who must attend.</p> <p>Designated parties must circulate a Statement of Issues (7 days prior to mediation) and must also attend in person.</p> <p>Mediator can issue a report of non-compliance if a designated party does not issue a Statement of Issues or attend.</p>	<p>Local Mediation Committee compiles a list of mediators, sets training standards, and monitors mediator practice.</p> <p>Parties may agree to select mediator from the list, or not from list.</p> <p>If mediator not selected by parties, court will assign a mediator from the list.</p>	<p>Mediators who are on the list are subject to training standards.</p> <p>No additional training for elder guardianship mediation.</p> <p>Local Mediation Committee responds to complaints about mediators and has authority to remove mediator from list.</p>	<p>Notes/records of the mediator are deemed to be without prejudice settlement discussions.</p> <p>Mediator must file a report on the mediation with the court (standard form).</p> <p>All designated parties (or their lawyers) must sign any agreement.</p>	<p>Normally, costs are equally split between parties.</p> <p>Court may also order payment of costs.</p> <p>Court may impose remedies for non-compliance.</p> <p>Indigent persons can apply for mediator’s fees to be waived.</p>	<p>Any party may apply to court for judgment where a party to a signed agreement fails to comply with the terms of an agreement.</p> <p>Parties are expected to schedule mediation within 180 days from first defense filing, or prior to setting matter for trial.</p>

Jurisdiction	Selection of Cases	Attendance	Mediator Credentials	Training & Quality Control	Privacy & Reporting	Fees/Costs	Notes
Alaska <i>Probate Rule</i> 4.5 <i>Civil Rule</i> 100	<p>Court decides whether appropriate for mediation.</p> <p>Mediation may apply to any civil, non-family law matters, including adult guardianship applications.</p> <p>Court cannot order mediation where there is a history of domestic violence or an application for protection order.</p>	<p>All interested persons shall attend in person.</p> <p>If mediator believes a third party is critical to resolution of a case, may request them to attend.</p> <p>Parties may provide an (optional) mediation brief, which may not exceed 5 pages and must be provided 3 days prior to mediation.</p>	<p>Mediator must have completed training and successful mentorship.</p>	<p>Mediator prepares participants prior to joint mediation session.</p>	<p>Participants must sign a confidentiality agreement.</p> <p>Mediation brief may not be disclosed (without consent) and is not admissible in evidence.</p> <p>Mediator may not testify to court, but must notify the court if session is terminated.</p> <p>If agreement, the parties provide terms of agreement and request for dismissal to the court.</p>	<p>Costs are normally split equally between the parties, unless the court orders differently.</p> <p>Pilot project costs covered by special project funding.</p>	<p>A party may withdraw from mediation or mediator may terminate if determines that efforts are likely to be unsuccessful.</p> <p>Mediators shall not issue decisions or make procedural or substantive recommendations to the court.</p>

Jurisdiction	Selection of Cases	Attendance	Mediator Credentials	Training & Quality Control	Privacy & Reporting	Fees/Costs	Notes
Florida <i>Fla. Stat. Ann. Ch.</i> 44.1011(2); 44.102; 44.401-44.406	<p>Court decides whether appropriate for mediation; may apply to cases in appellate court, circuit court (civil matters), county court (small claims), family mediation, and dependency or in need of services.</p> <p>No mediation where there has been a history of domestic violence.</p>	<p>Court will order mediation, but parties may terminate participation at any time by giving written notice.</p> <p>Termination is only effective for withdrawing party.</p>	<p>Supreme Court establishes standards and qualifications, certification, professional conduct, discipline, and training.</p> <p>Chief judge maintains a list of mediators, who are certified and registered.</p>	<p>Supreme Court sets fees for mediators to be certified and for renewal of certification.</p> <p>Mediators are required to have a minimum of 40 hours in training program (certified by the supreme court), appropriate education and practical experience, observation and supervised conduct of two mediations and good moral character.</p>	<p>Mediation communication is confidential, unless exceptions apply.</p> <p>A party to can refuse to testify regarding mediation.</p> <p>Mediator must report to the court where no agreement has been reached.</p>	<p>Certification fees charged to mediators and filing fees for court proceedings are used to offset costs.</p> <p>Qualified volunteer mediators may be appointed.</p> <p>A person may be sanctioned for payment of costs, fees, etc.</p>	<p>Citizen Dispute Settlement Centers authorized to facilitate mediation programs.</p>

Jurisdiction	Selection of Cases	Attendance	Mediator Credentials	Training & Quality Control	Privacy & Reporting	Fees/Costs	Notes
<p>Ohio</p> <p><i>Ohio Rev. Code Ann.</i> 2101.16.3</p> <p><i>Local Rule</i> 98.1</p> <p><i>Local Rule</i> 16.1</p>	<p>Court decides whether application for guardian of person or guardian of ther person and the estate is appropriate for mediation.</p> <p>No mediation where there has been domestic violence or a protection order.</p> <p>“Guardianship Mediation Project Screener Checklist” developed</p>	<p>Court may not require that settlement be reached on any particular issue.</p> <p>Mediator must contact the parties, ensure that parties are allowed to participate in mediation and schedule mediation.</p> <p>Parties may invite attorneys and other individuals to attend and participate in mediation.</p>	<p>Mediator must have: 40 hours of basic mediation training, including advanced training in adult guardianship mediation; life or professional experience and training in guardianship, aging, domestic relations or disability issues; and an ability to mediate multi-party disputes.</p>	<p>Dispute Resolution Section provides information on standards of practice and best practices for mediators and court staff.</p>	<p>Agreement must be signed by all parties and filed with the court, but the court takes no official recognition of the agreement.</p> <p>Mediator must inform the court of the status of mediation, whether terminated, agreement reached, further mediation needed or further action required by the court.</p>	<p>Court Administrator sets the fees.</p> <p>Exceptions can be made for indigent persons.</p>	<p>Ohio has developed a “Guardianship Mediation Project Checklist” .</p>

Jurisdiction	Selection of Cases	Attendance	Mediator Credentials	Training & Quality Control	Privacy & Reporting	Fees/Costs	Notes
<p>Oklahoma</p> <p><i>Okla. Dispute Resolution Act.</i> 12. C. 37.</p> <p><i>Okla. Stat. Supp.</i> 1997. S. 1801- 1813.</p>	<p>Any civil case, filed in the district court.</p>	<p>Parties and their representatives are required to attend.</p> <p>Interested non-parties may attend, subject to consent of all other parties.</p> <p>Parties must participate in good faith.</p> <p>No sanction or penalty for failure to attend.</p>	<p>District court maintains a list of qualified mediators.</p> <p>Mediator must complete: a) at least 24 hours of mediation training; b) observe a minimum of two mediation proceedings ; and, 3) complete at least 6 hours of continuing professional education in mediation.</p>	<p>Mediators must follow model standards and the <i>Code of Professional Conduct for Mediators</i>.</p>	<p>No admission, representation, statement, or other confidential communication made in setting up or in conducting the mediation shall be admissible as evidence or subject to discovery.</p> <p>No recordings of the mediation process, unless agreed upon by parties and not prohibited by law.</p>	<p>Fees/costs not mentioned in the legislation.</p> <p>Mediators volunteer their time and receive no fee for mediation.</p>	

Jurisdiction	Selection of Cases	Attendance	Mediator Credentials	Training & Quality Control	Privacy & Reporting	Fees/Costs	Notes
Wisconsin <i>Wis. Stat. Ann.</i> 802.12 (2)(a)	Court orders that a case go to mediation. Mediation may occur where guardianship cases are contested, unless there is physical violence, intimidation or substance abuse, too much of a power imbalance, party is unable to participate or be represented, or context is emergency situation.	Parties required to attend may apply for a hearing to show cause why mediation should not occur or be modified.	Parties may agree upon a mediator, or the court may appoint “any person who the judge believes may have the ability and skills necessary to bring the parties together in settlement.”	Extensive education program, including: seminar, promotional materials and training.	Oral and written communication in mediation is inadmissible as evidence. Mediator may not be subpoenaed or otherwise compelled to disclose any oral or written communication relating to a dispute in mediation.	Parties agree on the payment of a mediator, or the court directs parties to pay “the reasonable fees and expenses” of the mediation. Court may order parties to pay into an escrow account an amount estimated to be sufficient to pay for mediation.	

Jurisdiction	Selection of Cases	Attendance	Mediator Credentials	Training & Quality Control	Privacy & Reporting	Fees/Costs	Notes
<p>Maryland, M.D.</p> <p><i>Maryland Rules 8-205 and 8-206</i></p>	<p>Any civil action in the Court of Special Appeals may be referred to mediation.</p>	<p>Parties, legal counsel and representatives must attend and participate in mediation sessions.</p> <p>Parties that do not comply with orders for mediation may be subject to sanctions.</p> <p>Parties may be required to submit a confidential pre-mediation information statement to the Director of Mediation.</p>	<p>Mediators are recalled judges or incumbent judges.</p>	<p>Special training in appellate mediation.</p> <p>Director of Mediation or designee will often serve as co-mediator.</p>	<p>All mediation communication confidential, unless party consents to disclose or required by law.</p> <p>Director may communicate to the Court that mediation has occurred, terminated, agreement reached, parties attended, further sessions needed.</p> <p>Agreement is not usually confidential.</p>	<p>During pilot project, mediation was free to participants.</p>	<p>Facilitative approach: mediators will serve as neutral facilitators in all phases of the mediation.</p> <p>Duration of mediation is 4 hours, unless agreement reached earlier or parties agree no value in continuing with mediation.</p>

APPENDIX B – Summary of Expert and Stakeholder Feedback

1. Overview

The EGM Project's recommendations are to a large extent based on feedback from leading experts and stakeholders in BC, Ontario and the US. This feedback was particularly necessary in the Canadian context where mediation is a recent and emerging tool for elder and guardianship disputes, and there is little Canadian-specific scholarly research and literature available.

Expert and stakeholder feedback was gathered via comprehensive one-on-one telephone and in-person interviews and roundtable stakeholder discussions held over the course of the project. Experts and stakeholders who participated in interviews and stakeholder roundtable discussions were asked to respond to select questions based on common themes that emerged throughout the project research. These themes included:

- Training and standards for mediators practicing elder and guardianship mediation
- Ethical issues in elder and guardianship mediation
- Mediation models and quality of process (pre-mediation, co-mediation)
- Mediation in situations of actual, suspected or alleged abuse
- Capacity of individuals to participate in mediation
- Who should participate in the mediation
- Mediating capacity
- Mandatory vs. voluntary mediation
- Guardianship and least restrictive alternatives
- Challenges in other types of mediation that are more prevalent/pronounced in elder and guardianship mediation
- Models for court-connected adult guardianship mediation programs

2. Results

a. Training, Certification and Standards

Our Field Research revealed strong, unanimous agreement among leading experts and stakeholders in Canada and the US that specialized training is required for elder mediators and that additional specialized training is required to effectively mediate adult guardianship disputes. Accordingly, experts and stakeholders were asked what, in their opinion, the minimum training requirements and competencies should be for elder mediators, and what additional competencies should be required to mediate adult guardianship disputes.

In addition to basic mediation training and experience, expert and stakeholder feedback emphasized that all elder mediators should have specialized elder mediation training delivered by experienced elder mediators. With respect to the recommended minimum hours of elder mediation training, experts and stakeholders identified a range of 2-5 days, including simulation and role-playing. A majority of experts and stakeholders also recommended that elder mediation training should include practical experience via mentorship or co-mediation with an experienced elder mediator.

In order to mediate adult guardianship cases, experts and stakeholders emphasized the need for additional specialized training, either as a dedicated part of an elder mediation training

program or as part of an independent adult guardianship training course or program. As in the case of elder mediation training, experts and stakeholders recommended that guardianship mediation training should incorporate practice experience through mentorship or co-mediation with an experienced mediator.

Figure 2 below provides a representation of the (accumulative) levels of training recommended by experts and stakeholders for mediators wishing to practice in the areas of elder and guardianship mediation:

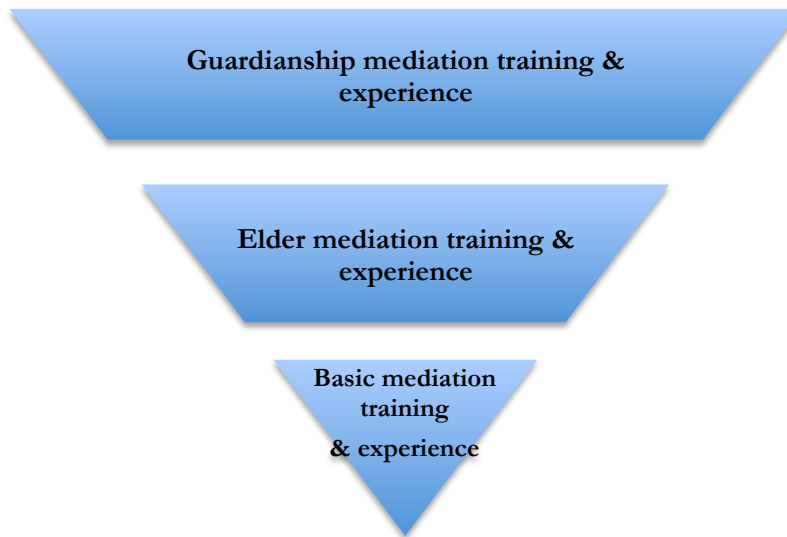


Figure 2

Stakeholders and experts identified the following list of competencies and experience for elder mediators:

- Minimum basic mediation training and experience
- Family dynamics and intergenerational issues
- Aging process (mental and physical aspects of aging plus myths of aging)
- End of life care
- Dynamics of grief and loss
- Ethics (impartiality, self-determination, quality of process, power imbalances, age discrimination, mediator competence, mediating in cases of abuse and neglect, confidentiality)
- Pre-mediation interviews and non-evaluative mediation
- Multi-party, complex mediation and who should participate
- Relevant legal processes and procedures, legislative frameworks, agreement writing
- Self-determination and maximum participation (ensuring voice of older person in mediation, accommodation)
- Abuse and neglect
- Understanding capacity issues and capacity to mediate
- Cultural diversity and values – (awareness of language, family values and social norms, gender roles, who makes decisions and how decisions are made)
- Health care issues
- Knowing community resources
- Recognizing legal and other issues outside one’s competence as mediator – when to refer to other professionals/resources

- Role-playing
- Practice experience, ideally co-mediation and/or mentorship with an experienced mediator.

For mediators who intend to mediate adult guardianship cases, the following (additional) competencies and training requirements were identified:

- Guardianship law and process
- Dynamics of aging
- Importance of participation in mediation of respondent in guardianship case
- Understanding capacity
- Capacity to participate in mediation
- Self-determination, maximum participation and accommodation
- Substitute decision-making
- Financial and non-financial alternatives to guardianship and least restrictive alternatives
- Power imbalance (including the impact and influence of family relationships and culture on power imbalance)
- Role-playing
- Practice experience, ideally co-mediation and or mentorship with an experienced mediator.

b. Ethical Issues

Experts and stakeholders identified a number of ethical issues that arise in the context of elder and guardianship mediation including the following:

- Ageism – making stereotypical assumptions about older persons; failing to recognize relevant differences and needs
- Potential impact and influence of culture and family dynamics in mediation
- Ensuring self-determination of participants (including least restrictive alternatives to guardianship)
- How to ensure representation of the voice/wishes of the older person in mediation
- Managing power imbalances
- Mediator and participant values and biases
- Mediator impartiality
- What issues can/cannot be mediated (e.g. capacity, serious physical abuse, emergency guardianship)
- Mediator reporting requirements
- Who should participate in mediation and necessary participants
- Confidentiality
- How to ensure quality of process and due process protections in mediation
- Mediator competence and knowing when to refer issues outside mediator's knowledge (e.g. independent legal advice)

c. Mediation Models and Styles

The majority of experts and stakeholders agreed that a non-evaluative style of mediation is most appropriate for elder and guardianship mediation and that the preferred styles are facilitative and transformative.

All experts and stakeholders emphasized the need for pre-mediation meetings with each mediation participant as part of any elder or guardianship mediation model. Experts and stakeholders noted the following rationales for the necessary inclusion of pre-mediation meetings:

- Helps ensure the voice of the older adult is included in the mediation
- Enables the mediator to identify and better understand family and relationship dynamics
- Provides the mediator with the opportunity to identify in advance of the mediation session, any potential power imbalances, as well as screen for abuse
- Provides the mediator with the opportunity to explain the process to the parties, including roles, rights and responsibilities, as well as establish a relationship of trust
- Mediator can help parties identify issues
- Provides the mediator with the opportunity to identify potential non-party participants who may be valuable or necessary to the success of the mediation
- Provides the mediator with the opportunity to assess the capacity of each party to participate in the mediation (with support) and to identify any accommodations that may need to be made to ensure maximum participation of the parties in the mediation.

Most experts and stakeholders agreed that co-mediation is an ideal model in the often multi-party, multi-issue context of elder and guardianship mediation; however, they noted that adequate resources to support a co-mediation model may be a challenge.

d. Mandatory Mediation

Mediator qualifications

BC experts and stakeholders who participated in our BC stakeholder roundtable discussion were asked specifically to consider the following:

- Whether or not mediators carrying out mediation under a possible mandatory adult guardianship mediation program pursuant to Bill 29 should be required to have attained certain standards or certification?
- If so, what system should be used (e.g. rosters, certification, etc.) and why?
- Who should be responsible for ensuring that mediators have met these requirements?

All participants in the BC stakeholder session emphasized the need for rosters of qualified mediators, particularly in the context of mandatory adult guardianship mediation, in order to ensure ongoing quality control. Participants recommended that adult guardianship roster mediators should be required to meet specific training and experience requirements to be admitted to such a roster. In addition, participants recommended that training and certification requirements for an adult guardianship mediation roster should be developed in

collaboration with stakeholders, such as private-sector elder mediators, EMC and Mediate BC. Further, participants emphasized the necessity of a collaborative approach to program design and policy development for a potential BC adult guardianship mediation program. Participants also suggested that the BC Child Protection Mediation Program as a model for developing and administering an adult guardianship mediation roster.

BC experts also emphasized that if a BC adult guardianship mediation program is established through the Ministry of the Attorney General, similar to the BC CPMP, adult guardianship mediation roster mediators should be private-sector mediators hired on contract through an RFQ process, similar to the BC CPMP process, in order to ensure an arm's length relationship between the mediators and the BC government.

Attendance or participation?

Experts and stakeholders were unanimous that mandatory mediation should be restricted to mandatory attendance but not mandatory participation, as mediation by definition is a voluntary process in which any mediated settlement between the parties must be reached voluntarily and without coercion. As such, all experts agreed that parties can never be required to reach a settlement. However, several experts noted that in their experience, court ordered/mandatory mediation (in reference to mandatory attendance) was very effective and that without it, parties were much less likely to elect to try and resolve issues through mediation. Further, experts noted that it is common that parties who are required to attend mediation often choose to participate once the process is explained to them prior to and/or at start of the mediation.

Indigent parties

Ontario experts highlighted the ability, pursuant to s.3 of the Ontario *Substitute Decisions Act*, of the court to appoint counsel to represent individuals who qualify for legal aid in mediation and/or adult guardianship proceedings.

Several US experts raised the issue of ensuring self-determination of the parties in mandatory mediation for indigent parties. These experts recommended that indigent parties who are required to attend mediation should be assigned an advocate or counsel to represent them and/or their wishes, particularly in the case of indigent parties with capacity issues (as is typically the case in adult guardianship matters).

e. Mediation & Abuse

The presence of adult protection legislation and mandatory reporting requirements in the US is a significant difference between the US and Canada. Most US experts agreed that cases involving abuse or neglect should not be mediated (subject to limited exceptions in certain cases, such as cases of financial exploitation involving misunderstanding or misinterpretation, or certain cases involving one-time acts of physical aggression in a moment of frustration). Further, should a mediator suspect or become aware of abuse during the course of the mediation, he or she may be required to terminate the mediation and report the abuse pursuant to adult protection legislation.

Most Canadian experts agreed that cases involving serious allegations of abuse should not be mediated. On the other hand, several Canadian experts were of the opinion that whether or

not a case involving abuse should be mediated depends upon the specific circumstances of the case and the skills and experience of the mediator in mediating in situations of abuse. A number of experts suggested that certain cases involving financial abuse or exploitation could be mediated. Both US and Canadian experts agreed that mediation is usually inappropriate in situations involving serious allegations of abuse, such as physical, psychological or financial abuse that puts the adult's safety at risk.

f. Mediation and Capacity

Experts and stakeholders emphasized that elder and guardianship mediators must have a solid understanding of capacity, including the law of capacity, how to assess capacity to mediate, and how to accommodate incapacity in mediation. Experts and stakeholders, particularly in the US, also emphasized that the capacity to mediate refers to an adult's capacity to mediate "with support".

Further, experts and stakeholders were unanimous that the question of whether or not an adult is incapable cannot be mediated. It is a question of fact that must be determined by a court.

g. Participation in Mediation

As elder and guardianship mediation often involves multiple parties, the mediator is usually faced with the challenge of determining who should participate in the mediation. With respect to identifying who should participate in the mediation session, most experts were of the opinion that participation in elder and guardianship mediation should be as inclusive as possible, as long as the roles of all the participants are clearly identified, and that all participants have an interest in the case or information that adds value to the mediation.

Particularly in adult guardianship cases, experts and stakeholders emphasized the need to ensure the maximum participation of the older adult. In circumstances where the adult is incapable of participating in the mediation, experts and stakeholders stressed the necessity of ensuring the voice of the adult is represented in the mediation either through an advocate, legal counsel or other individual charges with representing the adult's wishes.

h. Challenges in Elder and Guardianship Mediation

While not necessarily unique to elder and guardianship mediation, a number of the following challenges were identified by experts and stakeholders as being pronounced or prevalent in elder and guardianship disputes:

- Complex, multi-party mediation (including who should participate in the mediation)
- Complexity and multiplicity of issues
- Capacity
- Complex family dynamics and intergenerational relationships
- Elder abuse and neglect
- Power imbalance
- Ensuring self-determination of the parties (including least restrictive alternatives to guardianship)
- Accommodation and support of participants

- Ageism (including stereotyping older persons and making assumptions based on disability)
- Ensuring the voice/participation of older person in mediation (particularly where there are concerns about capacity)
- Impartiality and neutrality
- Ensuring quality of the process and protection of legal rights.

A number of experts, including the majority of experts in the US, stressed the importance of mediators in guardianship cases having a thorough knowledge and understanding of the least restrictive alternatives to guardianship, and how these alternatives can help ensure the self-determination and autonomy of adult respondents in guardianship cases.

i. Court-connected Adult Guardianship Mediation Program

Canadian experts and stakeholders also emphasized the need for an evaluated pilot program for any court-connected adult guardianship mediation program. A number of BC experts referred to the BC Child Protection Mediation Program as a model for a potential court-connected adult guardianship mediation program. Experts in Ontario referred to the case-management based, mandatory mediation pilot project evaluation under Ontario Civil Procedure Rule 24.1. Canadian experts identified the following key features that should be included in a court-connected adult guardianship mediation program:

- Collaborative program/project design involving key stakeholders
- Collaborative development of program policies
- Court support for the program
- Program staff charged with screening and case referral
- Roster of trained and experienced mediators hired on contract through a request for qualifications process
- Practicum program for roster mediators
- Mentorship program for program mediators
- Clear policies on case selection and referral
- Non-evaluative mediation model (most recommended facilitative style mediation) that includes individual pre-mediation meetings with each participant in the mediation
- Co-mediation model where resources allow.

US experts and the literature on adult guardianship mediation identify TCSG as the organization that pioneered adult guardianship mediation in the US, including adult guardianship training and program development. Accordingly, most US experts recommended consulting TCSG or referring to TCSG's Adult Guardianship Mediation Manual if considering developing a court-connected adult guardianship mediation program. US experts also pointed to the Alaksa Adult Guardianship Mediation Program (developed with the support of the TCSG) as the model court-connected adult guardianship mediation program in the US (see Chapter 6).

US experts identified the following key features of a successful court-connected adult guardianship mediation program:

- Pilot program and evaluation
- Policy development for the program involving consultation with key stakeholders

- Court support for the program
- Trained program staff charged with screening and case referral
- Trained and experienced mediators that meet standards set by the program (e.g. roster of qualified mediators)
- Non-evaluative mediation model that includes individual pre-mediation meetings with each participant in the mediation
- Representation for respondents
- Representation for indigent parties
- Co-mediation model where resources allow
- Mentorship program
- Program education and promotion
- Clear policies on case selection and referral.

APPENDIX C - Survey Results

Survey methodology

As part of the Field Research for the Canadian Centre for Elder Law's Elder and Guardianship Mediation Project, a survey was created and distributed. The survey is opinion-based, which prompted a variety of responses and comments.

The survey included a demographical component, which most survey participants did not complete. Participants included lawyers, gerontologists, mediators, social workers, and others.

The survey was composed of several types of questions, including:

- Ranked lists of preferred responses
- Single answer selection (e.g. always, usually, sometimes, etc.)
- Check all that apply
- General comments

Participants were given a "Do not know," "Prefer not to say," or "Other" option wherever it was suitable to do so.

For the purposes of gathering and analyzing the results of the survey, tables were created to express the responses of participants.

If a participant circled two answers instead of only one, 0.5 units were awarded for each.

If a participant answered both Q31 & Q32, the recorder referred to their jurisdiction of primary practice in the Demography section. If no jurisdiction was entered, the recorder entered both answers in the results.

For Q33, if the entire question was left blank, the question was deemed unanswered as opposed to "unsure or blank".

Demography

If a participant selected more than one "Highest level of education" all responses were entered.

General Overview Questions

1. Do you think mediation for / with older adults is appropriate and useful to resolve issues? (circle one)

Response	Percentage	Number
Always		2
Usually		4
Sometimes		6
Usually not		1
Never		
Do not know		2
Prefer not to say		

Participants who responded: 15

Comments:

I cannot answer these questions as I do not know what is meant by mediations.

2. Do you think guardianship mediation for / with older adults is a good idea to resolve issues? (circle one)

Response	Percentage	Number
Always		
Usually		4.5
Sometimes		7.5
Usually not		
Never		
Do not know		2
Prefer not to say		

Participants who responded: 14

3. If yes, what should be able to be mediated? (check all that apply)

Response	Percentage	Number
Appointment of Financial / Health Guardian		10
Guardianship Plan details		8
Visitation of older adult with family		6
Inter-generational transfers of wealth		5
Abuse & Neglect issues		6
Whether the older adult is mentally capable		4
Whether the older adult's effects should be sold / stored / moved		7
Admission to nursing home		5
Risk safety arrangements (e.g. living alone,		10

smoking, wearing hip protectors)		
Do not know		2
Other		2

Participants who responded: 14

Comments:

Other: Not really sure

Other: Choice of caregiver & living arrangements

4. Do you think a “guardianship plan” detailing financial arrangements for the older adult / adult under guardianship can be mediated? (circle one)

Response	Percentage	Number
Always		
Usually		4
Sometimes		5
Usually not		1
Never		
Do not know		3
Prefer not to say		

Participants who responded: 14

5. Do you think a “guardianship plan” detailing financial arrangements for the older adult / adult under guardianship should be mediated? (circle one)

Response	Percentage	Number
Always		1
Usually		4
Sometimes		5
Usually not		
Never		
Do not know		3
Prefer not to say		

Participants who responded: 13

6. Do you think a “guardianship plan” detailing health care decisions for the older adult / adult under guardianship can be mediated? (circle one)

Response	Percentage	Number
Always		
Usually		3
Sometimes		8

Usually not		
Never		1
Do not know		1
Prefer not to say		

Participants who responded: 13

7. Do you think a “guardianship plan” detailing health care decisions for the older adult / adult under guardianship should be mediated? (circle one)

Response	Percentage	Number
Always		
Usually		2
Sometimes		8
Usually not		
Never		
Do not know		3
Prefer not to say		

Participants who responded: 13

8. Rank in preferred order who you think are the best financial guardians.

Response	Overall ranking
Spouse	
Family member	
Friends	
Private Banking / Financial Advisor	
Public Trustee	
Private Trustee / advisor	
Other	

Participants who responded:

Partial responses:

Comments:

Other: family or friend + bank dept/financial advisor

Other: depends on circumstances (each situation is different)

Other: depends on relationship & skill (some spouses are 80+)

Other: Depends on the situation. If there’s a financial predator this changes everything.

9. Rank in preferred order who you think are the best health guardians.

Response	Overall ranking
Spouse	

Family member	
Friends	
Health Care provider	
Public Guardian	
Proxy health care decision maker (appointed pursuant to advance care plan doc)	
Other	

Participants who responded:

Partial responses:

Comments:

What kind of guardian?

Other: POA for PC

Other: whoever the person trusts

Other: depends on relationship & skill (some spouses are 80+); depends on situation

Other: Again, it depends on the situation.

It depends on circumstances

10. Rank in preferred order what you think are the best places to hold an EGM? (check box)

Response	Overall ranking
Home/residence of older adult	
Neutral office site	
Home of other mediation participants	
Court / Tribunal	
Community services offices	
Other	

Participants who responded:

Number of partial responses:

Comments:

What is an EGM? In case of having the EGM in the home/residence of the older adult, the situation must be safe - Requires pre-assessment

11. Rank in preferred order in what contexts EGMs are best performed. If two answers are equally desirable, feel free to give the same rank to more than one.

Response	Overall ranking
Tribunal	
Private legal practice – mediation or other	
Public legal practice	

Court based / annexed mediation program	
Community agency or services	
Other	

Participants who responded:

Partial responses:

Comments:

None without really good training

12. Rank the contexts in which EGMs are most often performed in your community:

Response	Overall ranking
Tribunal	
Private legal practice	
Public/non-profit legal practice	
Court	
Community based services	
Other	

Participants who responded:

Partial responses:

Comments:

They think they are doing mediation (community based services)

OPGT investigators often do informal mediations

Don't know

13. Do you think mediation is appropriate in nursing home type institutional care settings?

Response	Percentage	Number
Always		
Usually		5
Sometimes		5
Usually not		1
Never		
Do not know		2
Prefer not to say		

Participants who responded: 13

Comments:

- Depends on who are the parties: is older adult included or excluded and on what basis
- When family cannot agree or causing problems in care for elder person
- Perhaps to help residents participate in home admin & programming decisions

14. **Whose role is** it to determine capacity in your jurisdiction? (check all that apply)

Response	Percentage	Number
Doctor		6
Special assessor		8
Social Worker		3
Lawyer		3
Other		4

Participants who responded: 11

Comments:

- Capacity for ___?
- Other: depends for what; HCCA and SDA state who makes the determination
- Other: can include other professions
- Other: health care providers; families do it all the time
- Anyone who thinks they're entitled to an opinion

15. What **type of definition of capacity** do you use in your jurisdiction? (check all that apply)

Response	Percentage	Number
Legal		7
Medical		5
Mixed		1
Prefer not to say		
Do not know		1
Other		1

Participants who responded: 9

In your view, is this effective? (circle one)

Response	Percentage	Number
Yes		3
No		3

Participants who responded: 6

Why or why not?

- No - Difficult to access a practitioner
- Yes – Clear, concise definition – no room for confusion

- No – Too vague to interpret – NO formal guideline to follow, subjective to person doing the assessment
- No – Lawyers ignore doctor’s assessments. Doctors and lawyers get personally involved in family’s dramas.

Comments:

- Again, depending on which capacity.
- In general, no type of definition is used – often is more person’s personal judgment, gut feelings, etc.
- Depends on situation.

16. Do you think that mediation with older adults is **appropriate** when there is a **suspicion of incapacity**? (circle one)

Response	Percentage	Number
Always		2
Usually		2
Sometimes		5
Usually not		1
Never		
Do not know		
Prefer not to say		

Participants who responded: 10

Comments:

- Sometimes – if families are in disagreement.
- Mediation with whom – older adult? Others?
- Usually not – especially where there might be abuse

17. Do you think a person with fluctuating ability / capacity can participate in an EGM pertaining to them? (circle one)

Response	Percentage	Number
Always		2
Usually		2
Sometimes		6
Usually not		1
Never		
Do not know		
Prefer not to say		

Participants who responded: 11

Comments:

- Usually not – same (especially where there might be abuse)

18. Do you think a person with fluctuating ability / capacity should participate in an EGM pertaining to them? (circle one)

Response	Percentage	Number
Always		4
Usually		4
Sometimes		2
Usually not		1
Never		
Do not know		
Prefer not to say		

Participants who responded: 11

Comments:

- Usually not – same (especially where there might be abuse)

19. Do you think the **details of a “guardianship plan” can** be mediated before or without determining issues of capability or incapability? (circle one)

Response	Percentage	Number
Always		
Usually		1
Sometimes		2
Usually not		5
Never		3
Do not know		
Prefer not to say		

Participants who responded: 11

Comments:

- If someone is capable, they don’t need a plan.
- Depends on what is meant by guardianship plan.

20. Do you think the **details of a “guardianship plan” should** be mediated before or without determining issues of capability or incapability? (circle one)

Response	Percentage	Number
Always		1
Usually		1
Sometimes		
Usually not		5.5
Never		2.5

Do not know		
Prefer not to say		

Participants who responded: 10

Comments:

- Depends on whether or not there's indicators for concern

21. What **style** of mediation is best suited for older adults? (check all that apply)

Response	Percentage	Number
Facilitative		3
Transformative		6
Evaluative		4
Other		1
Do not know		1
Prefer not to say		

Participants who responded: 10

Comments:

- Other: this depends on the situation.
- Each has major drawbacks for older adults.
- Other: Depends on the situation

22. What format of mediation is best suited for older adults? (check box)

Response	Percentage	Number
Joint session		7
Caucus and shuttle		1
Other		2
Do not know		
Prefer not to say		

Participants who responded: 4

Comments:

- Other: Chat at home or some other place the older person feels comfortable
- Other: Depends on the situation

23. What role should a substitute decision maker have in a mediation involving an incapable adult:

Response	Percentage	Number
Decision maker		3.5

Advisor		0.5
Partial / Co-decision maker		1
Passive support		
None		1
Do not know		3
Prefer not to answer		

Participants who responded: 9

24. Do you think older adult mediation is appropriate when there is suspicion of abuse?
(circle one)

Response	Percentage	Number
Always		1
Usually		3
Sometimes		4
Usually not		2
Never		
Do not know		
Prefer not to say		

Participants who responded: 10

Comments:

- Degree & type of abuse suspected?
- Nip it in the bud!

25. If yes, when there are suspicions of abuse, who should decide if the mediation should go forward? (check all that apply)

Response	Percentage	Number
Mediator		5
Advocate		3
Participants		3
Do not know		2
Prefer not to say		
Other		2

Participants who responded: 8

Comments:

- Mediator – Depending on the mediator’s experience and affiliation
- Other – Older adult
- While mediation of issues reduce & resolve issues underlying abuse
- Participants – senior first
- Other – Representative for elders (as for children & youth)

26. If you think older adult mediation is appropriate when there is a suspicion of abuse, what **modifications**, if any, should be made to the mediation to ensure safety? (check all that apply)

Response	Percentage	Number
Shuttle Mediation		4
Use of Mediator techniques to balance power		3
None		
Pre-mediation meetings with participants		5
Do not know		1
Prefer not to answer		

Participants who responded: 7

Comments:

- No right answer – requires assessment

27. Rank in preferred order who you think are the **people most likely to abuse / mistreat / take advantage of older and incapable adults:**

Response	Overall ranking
Spouse	
Family member	
Friends	
Health Care provider	
Financial Advisor / Trust Advisor	
Proxy health care decision maker	
Strangers	
Lawyers/notaries/other legal professionals	
New “best friends”	
Other	

Participants who answered:

Partial responses:

Comments:

- Because they are in the best position to do so
- Other - #1 – adult children

28. Should specialized training be required for guardianship mediation.

Response	Percentage	Number
Yes		11
No		
Do not know		
Prefer not to say		

Participants who responded: 11

Comments:

- Bad mediation can sanction abuse

29. Should specialized training be required for elder mediation.

Response	Percentage	Number
Yes		11
No		
Do not know		
Prefer not to say		

Participants who responded: 11

Comments:

- Mediators need to know about geriatric syndromes.
- Understanding aging, stereotypes, family dynamics.
- Same - Bad mediation can sanction abuse

30. If in BC:

If you believe that people should have specialized mediation training / certificate to do elder or guardianship mediation please select the minimum level of training required: (rank)

Response	Overall ranking
Family Mediation Canada Certification	
Mediation Roster – Family	
Mediation Roster – Civil	
Certificate in Dispute Resolution (Justice Institute)	
Post-Graduate Diploma / Degree in Mediation / Conflict Resolution	
Courses in alternate dispute resolution:	
1 – 4	
5 – 10	
>10	
Do not know	

Participants who responded:

Partial responses:

Comments:

- Re: Courses in ADR – >10 - specialized degree/diploma (+/-) gerontology, psychology, financial pl, law, ethics...

31. If in other Canadian Province / Territory:

If you believe that people should have specialized mediation training / certificate to do elder or guardianship mediation please select the minimum level of training required: (rank)

Response	Overall ranking
Family Mediation Canada Certification	
Ontario Association for Family Mediators	
Qualifications necessary for Provincial Rosters	
Certificate in Dispute Resolution (Justice Institute)	
Post-Graduate Diploma / Degree in Mediation / Conflict Resolution	
Courses in alternate dispute resolution:	
1 – 4	
5 – 10	
>10	
Do not know	2

Participants who responded: 2

Partial responses:

Comments:

- I am not familiar enough with these qualifications but think that the mediators should have at least 5 years working with older adults
- Re: Courses in ADR – >10 - specialized degree/diploma (+/-) gerontology, psychology, financial pl, law, ethics...

32. Should mediation in guardianship proceedings be mandatory? (check one)

Response	Percentage	Number
Yes		3
No		2
Do not know		5
Prefer not to say		

Participants who responded: 10

If yes should it be mandatory: attendance or participation (check box)

Response	Percentage	Number
Attendance		
Participation		1

Participants who responded:

Comments:

- But with specific circumstances, it could be waived
- Don't know what this means

Should the mediation be binding? (check box)

Response	Percentage	Number
Yes		
No		2
Do not know		5
Prefer not to say		

Participants who responded:

Comments:

- The appeal court?

33. In guardianship mediation who should be at the table and what should their roles be? (circle the desirable role for each of the following people, if unsure, or unable to answer please leave blank)

	Active	Passive	Absent	Depends	Unsure/blank
Lawyers	4	1		3	1
Spouse	7			1	
Family	6			3	
Experts	5			3	1
Friends	1	1		6	
Social Worker	4			2	2
Financial advisor	1	2		4	1
Public Guardian and/or Trustee	2	1		2	2
Community services resources person	3	2		2	1

Participants who responded: 9

Partial responses: 5

34. Should an older adult always be present in a guardianship mediation?

Response	Percentage	Number
Always		7
Usually		5
Sometimes		
Usually not		
Never		
Do not know		
Prefer not to say		

Participants who responded: 12

Comments:

- If capable
- Critical decision process
- Requires assessment of undue influence indicators

DEMOGRAPHY

Participants who responded: 10

Partial responses: 5

Average age: 47, 36, 45, 46, 66, 37, -, -, 38, 52, 55

Gender:

	Percentage	Number
Male		1
Female		9
Other		

Province or Territory of primary practice:

Jurisdiction	Percentage	Number
AB		
BC		1
MB		
NB		
NL		
NS		1
NT		
NU		
ON		8
PE		
QC		
SK		

YT		
USA		1
Other		

BC regions:

Region	Percentage	Number
Lower Mainland		1
Vancouver Island & Coast		
Thompson Okanagan		
Kootenay		
Cariboo		
North Coast		
Nechako		
Northeast		
On a First Nations' Reserve		

Mediation services available in community: (check all that apply)

Service	Percentage	Number
Community-based mediation service for older adults		2
Student-based mediation service for older adults		
Mediator in private practice who does elder mediation		2
Lawyer in private practice who does elder mediation		3
Do not know		5
Other		

Highest level of education:

Education	Percentage	Number
High school / Equivalency		
Diploma		1
Undergraduate degree		2
Law degree		1
Graduate degree		10
Prefer not to say		
Other		1

Comments:

Other: Certificate; Undergraduate degree (x2)

Graduate degree (x2)

Field: (check all that apply)

Field	Percentage	Number
Mediator		
Law		2
Academia		3
Gerontology		4
Social Work		2
Other		2

Comments:

Other: Linguistics & Archives

Other: Capacity Assessor

If you are a mediator of any type, would you benefit from any of the following: (check all that apply)

Training	Percentage	Number
Guardianship issues		
Elder mediation		1
Elder specific issues		
Other		

Do you provide Elder Mediation services?

Response	Percentage	Number
Yes		
No		11

If yes, in what areas? (check all that apply)

Area of EM	Percentage	Number
Guardianship		
Estate Planning		
Intergenerational transfers of wealth		
Caregiver issues		
Long Term Care issues		
Private Care Agreements		
Loans & Guarantees		
Later Life Marriage / Divorce		
Pension issues		
Supports and services for older adults		
Powers of attorney / Substitute decision making documents		
Other		

Participated in an EGM:

Response	Percentage	Number
Yes		1
No		6

Comments:

Participated in informal EGMs, but not formal.

If yes, how many:

Response	Percentage	Number
1 – 4		1
5 – 10		
>10		

Mediated an EGM:

Response	Percentage	Number
Yes		
No		8

If yes, how many:

Response	Percentage	Number
1 – 4		
5 – 10		
>10		

Have any of your clients participated in an EGM?

Response	Percentage	Number
Yes		2
No		4

Referred a client for EGM:

Response	Percentage	Number
Yes		4
No		5

If yes, factors in decision to choose the mediator: (check all that apply)

Factors	Percentage	Number
Legal training of mediator		1
Mediator's practice experience in elder law		1
Positive recommendation from		2

colleague		
Training in Gerontology or related social science areas		1
Mediator's specialized mediation training		1
Other		1

APPENDIX D – Annotated Bibliography

Notes

This annotated bibliography is compiled from a number of online and print sources. The references appear in alphabetical order. In order to facilitate research, each reference has been categorized into one of three areas, as follows:

(A) = Benefits of /Reasons for Mediation: these articles provide examples of where elder guardianship mediation should apply, why mediation is important and/or what benefits can come out of mediation (e.g. reduced costs, etc). Essentially, these articles are aimed at answering the question: why is elder guardianship mediation important?

(B) = Best Practice Guidelines for Elder Mediation: these articles provide analysis and academic research on the difficulties faced in elder guardianship mediation, identifying key problem areas and providing best practice guidelines or recommendations to enhance mediation. Essentially, these articles are aimed at answering the question: what are the problems and problem-solving techniques involved in elder guardianship mediation?

(C) = Pilot Projects: these articles provide reports of specific pilot projects that have been conducted on elder guardianship mediation. Essentially, these articles are aimed at answering the question: how has elder guardianship mediation been conducted in other jurisdictions?

Annotated Bibliography – CCEL

Allen, Tracy L., “Mama Always Loved You Best: An Alternative to the Family Feud.” (1988) *Michigan Probate and Estate Planning Journal* 17:3, 15. (A)

This article identifies the benefits of mediation in the “probate arena”, including end-of-life decision-making and estate planning. Alternative Dispute Resolution (ADR) is offered as a viable solution for family conflicts, as a money-saving, face-saving and relationship-saving way of resolving conflicts.

Alaska Judicial Council, *Alaska Adult Guardianship Mediation Project Evaluation*, March 2009. (C)

This report provides an evaluation of the Alaska Adult Guardianship Mediation Project. The report includes an introductory overview of the project, specific outcome measures and findings related to the success of mediation (i.e. avoiding court proceedings, satisfactory experience for the participants, etc). A detailed description of the purpose and structure of the project includes: the development of the project; the chosen mediation model (i.e. facilitative, non-evaluative, collaborative problem-solving model that is voluntary and confidential, with an emphasis on empowering participants); the competency requirements for mediators; the issues and people involved; the referral process; preparation, screening and engagements of participants; and cost of services.

American Bar Association Commission on Law and Aging, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers*. (Washington: American Bar Association, 2005). (B)

This handbook is a frequently cited resource for legal professionals who have clients with diminished capacity. The contents include a thorough explanation of why capacity is important to legal professionals, legal standards for assessing capacity in specific transactions, how this relates to guardianship law and ethical guidelines for making assessments. Clinical models of capacity and lawyer assessment of capacity are covered. Also included are practical enhancement techniques, a worksheet for lawyers, guidance on how to access referral process for consultation or formal assessment and how to utilize a capacity assessment report. The appendices include a capacity assessment algorithm, case examples, a brief guide to psychological and neuropsychological instruments and an overview of dementia.

Barrocas, Janice and Diane Persson, “Mediating Disputes in Long-Term Care” (2005) *BIFOCAL*, 36-37. (C)

This article briefly reviews the Harris County Long-term Care Mediation Pilot, held at Houston’s Center on Aging, University of Texas. This pilot project offered free on-site mediation services of for-profit and not-for-profit nursing homes. The article reviews the outreach, referral and education programs for staff and community. Various roles are also identified, including: 1) any resident, family member or staff person who requests mediation, 2) the coordinator’s role to “handle intake”, contact and educate participants and arrange for an adult’s support or accommodation participate; and 3) the role of certified volunteer ombudsmen and staff ombudsman who act as a resource for staff and an advocate for residents. Finally, the article identifies the need to tailor mediation to the resident and the need to recognize “decision-specific capacity”.

Beane, Leona, "Should Mediation Be Available as an Option to Reduce Litigation in Contested Guardianship Cases?" (2002) *New York State Bar Journal*, 27-31. (A)(C)

This article discusses the difficulties involved in guardianship litigation in New York State. The author presents mediation as an effective tool to assist in the resolution of a guardianship proceeding. The arguments for mediation are based on the statutory process for mediation in guardianship in Michigan, Washington and Utah. The article argues that mediation could provide "alternatives" to litigation, such as limited guardianship, tailored powers and mediated agreements. Mediation is viewed as a means to provide family members the opportunity "to vent", resolve interpersonal disputes, find long-term solutions, and protect privacy.

Bird, Katherine, "Mediation: Its time Has Come." (1992) *Elder Law Forum* 4:3, 1. (A)

This article illustrates how mediation can be used to find underlying causes to conflicts. Case scenarios are provided, based on the experience of mediators at the Pittsburgh Mediation Center. Three types of cases are identified as suitable for mediation: 1) relationship disputes; 2) nursing home and high rise residents' disputes; and 3) business-consumer disputes. Cases involving violence and abuse are identified as unsuitable for mediation.

Bloche, M. Gregg, "Managing Conflict at the End of Life." (2005) *The New England Journal of Medicine* 352, 2371-2373. (B)

This article identifies the complexity of end-of-life choices, arguing that the goal of courts, clinical caregivers and others should be to pursue private, family-friendly accommodation within the wide limits of the law. The author refers to the widely publicized case of Terri Schiavo (2005), as an example of how mediation may fail to reach a solution.

British Columbia Mediator Roster Society, "Safety Screening in Family Mediation: A Discussion Paper", (2008). (B)

This discussion paper outlines practical information on how to adequately screen potential mediation scenarios for safety. The paper recognizes that screening is a field that is evolving. As such, no best-practice guidelines are provided. Instead, the paper highlights the principles and purpose of screening and provides a contextualized description of various types of screening processes, including: telephone interviews, questionnaires, checklists, in-person pre-mediation interviews, mid-mediation prompts or queries. The paper also provides some practice discussion around not proceeding with mediation or adapting the mediation process to suit particular case-by-case requirements.

British Columbia Ministry of Attorney General, Justice Services Branch, "Reaching Resolution: A Guide to Designing Public Sector Dispute Resolution Systems", (2003). (C)

This guide provides a thorough description of how dispute resolution systems may be designed. Seven steps are identified in the design and implementation processes for establishing a dispute resolution program. The elements of these seven steps include: establishing a team, the mandate and work plan; assessing the organization, the types of disputes and potential barriers in the existing system; utilizing the principles, identifying objectives and integrating policy values; developing appropriate processes and approaches; confidentiality; power imbalance; providers of

dispute resolution; outcomes and enforcement; training and qualifications; establishing plans to evaluate dispute resolution and measuring performance.

Burns, Anne and Lauren Barrit Lisi. "Mediation in Guardianship Cases: A Promising Future". (1992) *Clearing House Review* 26, 644-645. (C)

This article provides an overview of the Guardianship Mediation Project (TCSG). The mediation project is designed to include an advocate or representative of the person and involves in-depth functional assessments, including a medical examination, social worker evaluation, interviews with the person, family or others. Cases where a person "appears too incapacitated" to understand the mediation process or come to an agreement and cases which involve a "serious question of financial, emotional or physical abuse" are identified as inappropriate for mediation. Evaluation of the project has identified four positive outcomes and at least seven contexts which have resulted in mediation agreements.

Butterwick, Susan and Penelope A. Hommel. "Mediation: A Tool for Resolution of Adult Guardianship Cases." (2001) *NAELA Quarterly* 14.4, 4. (A)

This article relies on case scenarios provided by the TCSG pilot adult guardianship mediation projects. The author identifies the reasons for considering adult guardianship mediation as an alternative to litigation, identifying the benefits for participating parties. The article highlights that an agreement should not be the result of pressure; the parties decide the effect of an agreement; and if no agreement is reached, then the court can still hear the case. Practical issues such as time and cost of mediation, the appropriate role of attorneys, how to prepare clients and how to arrange for a mediation are covered. An overview of what types of guardianship cases engage in mediation is provided, including: disputes over who should be the guardian and disputes over certain aspects of a situation (e.g. change in living arrangements, decision-making, etc). Cases that are inappropriate for mediation include where: domestic abuse or substance abuse are involved; where an emergency decision is needed; the parties exhibit volatile or extremely hostile behaviour; or where the possibility of coercion or intimidation of a vulnerable party exists. The article briefly mentions the need for guardianship mediation in situations where the person is incapable and the need to ensure rights and safety of vulnerable persons are not compromised.

Campisi, Lynn. "Taking Care of Your Elder Clients – The Problem with Transfers" (2000) *National Elder Law Foundation*. (B)

This article provides detailed information on the difficulties faced by elders who are transferring assets, in the State of Alabama. The content of the article includes an overview of the qualification for Medicaid and examples on how elders are penalized on transfers. The author also highlights other legal aspects, such as criminal asset transfers, capacity, statutory powers, fiduciary duties, power of attorney, voidable gifts, liability for payment, etc. Exempt trusts are presented as an alternative way to preserve assets.

Carbine, Michael E. "Adapting Dispute Resolution Techniques to the Health Care Field." (1991) *NIDR FORUM*, 15. (B)

This brief article focuses on dispute resolution in the context of health care, specifically medical malpractice. The author cites Thomas Metzloff, of the Private Adjudication Center's Medical malpractice Research Project, to argue that dispute

resolution provides a less expensive, more efficient way of resolving conflict. Robert Stein, an expert in dispute resolution is also cited, to make the point that dispute resolution will only succeed if there are credible and authoritative structures to support the process. The author's summary statement is that dispute resolution provides a way to reduce the caseload, speed the disposition of cases and reduce costs to the participants and the public.

Clarke, Antoinette, Atsuko Matsuoka and Darlene Murphy, "Elder Abuse and Mediation: Restorative Justice-based Mediation" (2008) Canadian Association of Gerontology. (B)

This brief presentation examines restorative justice-based mediation as a means to address elder abuse and neglect. The authors propose that mediation can be an intervention and an alternative approach to prevent re-victimization. Seven essential characteristics to a successful mediation are listed and include: informed consent, confidentiality, ability and sincere will to negotiate, working with power differences, voluntary determination and reaching meaningful outcomes. The authors also identify six underlying principles and a mediation process to elder abuse. Four areas for further research are recommended, including: systemic roots of elder abuse, community outreach, developing a critical approach and developing specialized knowledge and training.

Cohen, Judith. "The ADA Mediation Guidelines: A Community Collaboration Moves the Field Forward." (2002) Cardozo Journal of Conflict Resolution. 2:2. (C)

This article identifies the Americans with Disabilities Act, as a statute that provides legal cases that are particularly well suited for mediation. The author summarizes the experience of twelve mediators (known as the ADA Mediation Guidelines Working Group) in addressing issues including: mediator training, the need for self-determination of parties and fair process, representation of participants, informing mediation parties, legal information and disability-related accommodation. The author provides a brief history of how the mediation field has developed since the early 1990's. Specific concerns raised by the working group include: capacity, mediator competency, participation, information and preparedness of parties.

Cox, Enid O. and Ruth J. Parsons. "Senior-to-Senior Mediation Service Project." (1992) The Gerontologist 32:3, 420-422. (C)

This brief article summarizes the experience of a senior mediation service project, which was conducted on the premise that older adults may be preferable to other potential volunteer mediators. A summary and brief report of the findings of the project, which was sponsored by the University of Denver Institute of Gerontology, is provided. Volunteer senior mediators is strongly promoted in the article and being implemented by a local not-for-profit agency.

Craig, Yvonne. "Elder Mediation: Can It Contribute to the Prevention of Elder Abuse and the Protection of the Rights of Elders and Their Carers?" (1994) Journal of Elder Abuse & Neglect 6:1, 83. (B)

This article provides an analysis of the American mediation system, presenting mediation a potentially appropriate way to confront and resolve conflicts between abused elders and their caregivers. The author presents mediation by seniors, for seniors as a valid option and provides a critique of mediation, particularly in light of the need to ensure the rights of an elder are protected. The voluntary and non-coercive aspects of mediation are emphasized. The article concludes that elder

mediation is a “valid contribution to the ongoing discourse about elder conflict” and can be a useful intervention tool in the early stages of relational conflict.

Craig, Yvonne. “Elder Mediation Project” (2007) *Peer Counsellor Journal* 12:1. (B)

This brief article provides comment on the peer-to-peer mediation work that the author has been involved with in British Columbia, Ontario, California and the UK. Ten tips for coping with conflict are listed. There is an emphasis placed on a commitment to under-represented groups (e.g. AIDS/HIV and First Nations).

Crawford, Susan H., Lewis Dabney, Judith M. Filner, and Peter R. Maida. “From Determining Capacity to Facilitating Competencies: A New Mediation Framework” (2003) *Conflict Resolution Quarterly* 20:2, 385. (B)

This article provides a thorough review of the literature on capacity. The literature shows that a mediator is expected to perform some determination of capacity of the parties. Issues such as disempowerment and the need to protect the rights of parties, while maintaining ethical standards of mediators are discussed in detail. The authors suggest a conceptual framework for determining competencies to mediate. Practice considerations are discussed at length.

De Angelo, LeAnna M. “Mediation in Health Care Settings: Some Theoretical and Practical Concepts.” (2000) *Journal of Clinical Psychology in Medical Settings* 7:2, 133. (B)

This article discusses “medical mediation” that involves – or is relevant to – professional psychologists. Medical mediation is presented as a promising, new concept that is evolving and in need of research, particularly regarding processes and outcomes. The author discusses professional issues, such as training, ethics and malpractice, as well as the role of the mediator and medical-ethical dilemmas. The article tends to focus on bioethics and end-of-life decision-making. Practical procedures take into account the dynamics involved when conflicts occur between family members.

Dize, Virginia. “Uses of Mediation in Assisted Living – And Some Advice Thrown In: An Ombudsman Training Module” (2001) *National Long Term Care Ombudsman Resource Center*. (B)

This in-depth report provides a framework for training an ombudsman with respect to conflicts that arise in assisted living situations. The author provides an overview of the role of an ombudsman as an advocate in assisted living. Mediation training content is presented in a “short course” format, followed by expert advice on several issues, including: whether or not to mediate, legal aspects and regulations, and the appropriate role of the ombudsman. Case scenarios are provided.

Fiester, Autumn. “The Failure of the Consult Module: Why ‘Mediation’ Should Replace ‘Consultation’.” (2007) *The American Journal of Bioethics* 7:2, 31. (A)

This brief article discusses health care mediation settings. The author relies on previous research to question whether the ethics consult service model is legitimate and argues for ethics mediation.

Fleming, Robert B. “Protecting Seniors’ Autonomy.” (2004) *NAELA Advanced Practitioners Invitational Program*. (B)

This article argues for a legal framework that ensures autonomy of a person. Elements of this framework include: informed consent; right to refuse treatment;

patient self-determination; evidence required to prove an individual's wishes with respect to end of life decisions, etc. Guardianship and Conservatorship is discussed as a process whereby the elimination of risk of danger can have a devastating impact on autonomy and rights. The author provides case law that promotes judicial decision-making where capacity of a person to make an agreement is in doubt.

Furlong, Erin B. "Legal Trends in End-of-Life Health Care Decision-Making" (2005) BIFOCAL 27:2, 21. (A)

This article promotes the use of advance planning tools for end-of-life care. The author relies on the highly publicized experience of Terri Schiavo, to highlight the important discussions and policy-making that needs to occur about end-of-life health care. The article also provides a brief summary of the statutory trends with respect to advance directives and other decision-making tools. The ABA Commission on Law and Aging has identified four common areas of legislative activity: 1) simplification and consolidation of advance planning laws; 2) establishment of default decision-makers in the absence of advance directives; 3) institutionalization of more social prompts and tools for making advance directives more available; and 4) establishment of processes to translate patient care wishes into treatment plans. The author describes each of these areas of development in some detail, providing specific references to States that are making legislative reforms.

Gage, David and Dawn Martin. "The Benefits of Mediated Family Estate-Planning Retreats" (2005) ACResolution 4:4, 18-21. (A)

This article presents mediated retreats for collaborative estate planning as a useful process for families experiencing conflict. The authors identify the benefits and obstacles to collaborative estate planning, as well as the typical challenges of estate planning: personal conflicts, money, end-of-life issues, gift giving, equity, intangibles, elder care and multiple marriages. In conclusion, mediation is promoted as the "ideal process for assisting families", which improves the likelihood that families will become healthier.

Gentry, Deborah. "Advanced Medical Directives and Family Conflict: A Potential Opportunity for Mediator Intervention." (1995) Mediation Quarterly 13:2.

This article discusses mediator intervention in the context of health care decisions (advance directives) and family conflicts. The author provides a brief summary of legislative changes, demographic trends and relevant research findings. Mediation of family conflicts is presented as a practical way that professionals can intervene and resolve conflicts.

Gibson, Joan McIver and Mary Beth West. "Hospital Ethics Committees: Mediation and Case Review" (1991) NIDR FORUM 22. (C)

This brief article identifies a case scenario where intervention by an ethics committee – or mediation - might be appropriate in an end-of-life health care situation. The Institute of Public Law of the University of New Mexico School of Law conducted a year-long project, which interviewed and surveyed 20 ethics committees representing different geographical locations, levels of care, sizes, patient populations and stages of maturity. The pilot project identified that case consultation follows a "typical mediation" pattern: intake, consultation, and follow-up. From this observation, the project makes general recommendations.

Goodman, Oscar and Nancy Hanawi. "Care and Conflict in Nursing Homes" NIDR FORUM (1991), 26-30. (C)

This brief article focuses on mediation as a way of improving quality of life and care by resolving conflicts between nursing home residents, their families, staff and management. The authors summarize the findings of a NIDR project, titled "Mediating Nursing Home Conflicts: A Tool for Improving the Quality of Care", which was conducted in 1989. The project focused on training for mediators, in Georgia and California. The cases cited cover a wide range of conflicts, within a nursing home.

Gottlich, Vicki, "Guardianships and their Alternatives: Legal Services and the Role of the Advocate" *Representing Older Persons: An Advocates Manual*, (Washington: National Citizens Law Center, 1985). (B)

This chapter focuses on the problems in the guardianship system, arguing for advocacy of the rights of incapable adults. The problems identified include jurisdiction, notice, right to counsel, hearing rights, appointment standards, evidence requirements, selection of who is appointed, powers of the guardian and inadequate procedures for review and modification. The author identifies a need for appeals and remedies, as well current developments to address the recognized problems. Alternatives to guardianship applications include "least restrictive" options, powers of attorney, and representative or family-based surrogate consent.

Groh, Arlene, "A Healing Approach to Elder Abuse and Mistreatment: The Restorative Justice Approaches to Elder Abuse Project" (2003) Community Care Access Centre of Waterloo Region. (C)

This report provides a framework for the development of a restorative justice approach to elder abuse and mistreatment. The initial chapter of this material defines and identifies situations of abuse, recognizing the causes, intervention, legal perspectives and need for restorative justice. The remaining chapters provide details of the project, including objectives and structure, guiding principles, training of facilitators, key elements to consider, legal process, public education, project evaluations and future recommendations.

Hartman, Susan D. "Adult Guardianship Mediation." (1996) Best Practice Notes 7:3, 6. (B)

This brief article provides a summary of the more complete chapter by the same author, with the same title. The author identifies guardianship as a "way to care for and protect (incapable) adults", which primarily results from a court application procedure. Mediation is introduced as a solution to the complex situations often faced by older adults and their advocates. The author explains what factors are important for mediation to bring resolution, at less financial and emotional cost compared with litigation. These factors include: willingness to participate; maximum participation for the respondent, and an attorney or advocate where there is an allegation of incapacity; and access to available resources. Availability and use of mediation is raised as prevalent concerns; However, the article promotes the TCSG program to expand guardianship mediation as a viable way to alleviate these concerns.

Hartman, Susan D., "Adult Guardianship Mediation" *ADR Handbook for Judges*, Donna Steinstra and Susan M. Yates, eds. (Washington D.C.: American Bar Association Section of Dispute Resolution, 2004: 141-65). (B)

This chapter provides a thorough description of adult guardianship mediation, with detailed steps for planning a court-based alternative dispute resolution program. Case selection is broken into simple, distinct steps of deciding whether a case is appropriate for referral to mediation; how to handle issues involving incapacity; who will make referrals; when a referral should be made; and whether mandatory or voluntary. Mediation services may be provided by community mediation centers, students from a law school or university clinical program, pro bono mediator panel, roster of private mediators, and court staff mediators (including judges). The author recognizes that qualifications for mediators should consist of a specific list of training topics. Payment of mediator fees could be by the court, the indigent or the parties. Management of the mediation session and the overall administration of the program are discussed in detail. Issues of ethics, confidentiality, recognizing and responding to abuse and neglect and identifying conflicts of interest are highlighted. The need to have evaluation for effectiveness and oversight of the complaint process is also identified. Finally, program cost and funding is mentioned.

Hartman, Susan D. and Saïdy Barinaga-Burch, "Mediation Can Provide a Good Option in Adult Guardianship Cases." (1996) SPIDR News_ 20:1, 1. (A)

This article briefly explains the benefits of mediation. The author identifies what is involved in settling up guardianship mediation, including special training. Factors to assess the suitability of the case for mediation are identified. A list of possible issues for mediation include: the respondent's need for assistance; identification of the individual to serve as guardian; the need to change the respondent's place of residence; the need to make medical or financial decisions; and post-appointment issues, which arise after a guardian has been appointed. The author also discusses representation of the respondent, confidentiality and potential outcomes of mediation.

Hartman, Susan D., *Adult Guardianship Training Manual* (Ann Arbor: The Center for Social Gerontology, 2002). (B)

This training manual was created as a tool to expand adult guardianship mediation programs. The training material includes practical aspects of mediation and mediation program development. The author advises that the manual "can be used by court-annexed programs, community dispute resolution programs, organizations, or individuals.

Hin Hung, "Neutrality and impartiality in mediation" (2002) ADR Bulletin 5:3, 7. (B)

This brief article provides an explanation of the often complex but practical need for a mediator to maintain a neutral and impartial role in mediation. The author highlights that the principle of non-partisan fairness is a key ingredient to mediation. However, the mediator does not need to be "totally indifferent to the outcome or process of mediation". The author discusses mediation standards, the need for distinct mediator roles, and the principle of objectivity. The author explains that a mediator will have beliefs and biases, but should not impose these on the participants. The mediator is expected to utilize personal values to promote the ongoing values of respect, trust, credibility and legitimacy, understanding and caring and procedural fairness.

"Idea Checklist for Guardianship Mediators." BIFOCAL (2007) 28:3, 48. (B)

This practical tool identifies twelve areas of concern/argument and provides possible responses for guardianship mediators. The twelve issues identified include: safety of the older person at home; adult children lack the ability, resources, willingness or time to provide assistance; disputes over end-of-life care or home care; disputes over who is the best person to handle health care or financial decisions; disputes over quality of care or access to the person in a health care facility; privacy concerning bills and health care; family relationship issues; landlord and tenancy conflicts; decisions made about money or drafting a will; power of attorney misuse or manipulation; and concerns or second-thoughts about gifts/transfers made.

Justice Services Branch Ministry of Attorney General, “Child Protection Mediation Questions and Answers” (2011) Family Justice Services Division. (C)

This brief set of questions and answers provides a quick and helpful resource to explain the child protection mediation program and services. The information provided includes: an explanation of the relevant law, a definition of mediation, the advantages of mediation, the requirements for mediators, the types of issues that may be mediated, issues that can not be referred to mediation, eight steps in the mediation process, who may participate, selection of a mediator and where to find more information.

Kadish, Josh, “The Role of the Attorney in Elder Mediation.” (2004) Elder Law Section Newsletter 7:2, 7. (B)

This brief article presents mediation as a first choice for resolving elder law issues. The article provides practical guidance on how an attorney can best facilitate the elder mediation process, including: careful selection of a mediator, understanding the approaches and standards of elder mediation, advising clients, identifying ethical duties and assisting in negotiation. The article cites the disciplinary rule on mediation from the Oregon Code of Professional Responsibility.

Karp, Naomi and Erica Wood. “Mediating Nursing Home Care Disputes: A Workable Option?” (1997) Clearinghouse Review 31:6., 243. (C)

This article discusses the outcomes of a elder mediation pilot project conducted by the American Bar Association Commission on Legal Problems of the Elderly. The pilot project focused on the use of mediation to resolve a broad range of nursing home disputes, from roommate conflicts to multi-party conflicts involving family, staff, physicians and long-term care ombudsmen. The article provides a description of the project and synopsis of lessons learned. Issues identified include: lack of access to families and residents to inform them of mediation, staff turnover and a lack of sufficient and/or perceived neutrality. The ABA project advances the field of elder mediation – and poses new questions.

Karp, Naomi and Erica Wood. “Building Coalitions in Aging, Disability and Dispute Resolution” [Mediate.com](http://www.mediate.com) (C)

This article focuses on the demographic trends of aging in America and the work being done by the ABA Commission on Legal Problems of the Elderly. The article provides a summary of various pilot projects, including the Dispute Resolution Center of Montana; Montgomery County Mediation Center; Just Solutions, in Kentucky; and the Institute for Advanced Legal Studies, Denver.

Karp, Naomi and Erica Wood. "Guarding the Guardians: Promising Practices for Court Monitoring" (2007) AARP Public Policy Institute. (C)

This in-depth report provides the results to a study of guardianship monitoring, which was conducted by the AARP Public Policy Institute, in collaboration with the American Bar Association Commission on Law and Aging. The study included: site visits to four courts with exemplary practices, telephone interviews with other courts, and a symposium of experts to identify and discuss promising practices. The report identifies nine areas of practice: reporting by the guardian, court assistance to reporting, protecting assets, court review of reporting, investigating, technical support (i.e. database and other technology), community links, training and assistance and funding. The substance of the report provides a detailed view of how guardians can – or should - be monitored by the courts, highlighting best practices.

Kelly, Elizabeth A. "Mediating Disputes Involving Older Adults and People with Disabilities" *Colorado Elder Law Handbook*. (Denver: CBA, 2006). (B)

This chapter of a handbook on elder law provides a practical approach to elder mediation. The author introduces elder mediation with a discussion of underlying issues, benefits and barriers, as well as identifying which cases are appropriate (or inappropriate) for mediation. Topics such as specialized training, qualification and multi-disciplinary approaches are also covered. The "how to" section of the chapter identifies the way to screen cases, the roles of participants, issues of mental incapacity and sources of referral. Final considerations include suggestions for mediators, legislative changes, integration of mediated agreements with judicial findings and outcomes to mediation. A bibliography and list of works cited is also provided.

Kim, Scott Y.H., Jason H.T. Karlawish, and Eric D. Craine. "Current State of Research on Decision-Making Competence of Cognitively Impaired Elderly Persons." (2002) *American Journal of Geriatric Psychiatry* 10:2, 151. (C)

This article provides the findings of a study on decision-making capacity, conducted from a neuropsychological perspective. The findings raise important questions, such as how measuring decisional abilities can be translated into a finding of incompetence and whether a brief cognitive test can serve as a useful screening method to identify patients who need more intensive evaluations of competence. The autonomy and welfare of an older person, and the task-specific aspect of decision-making competence are also discussed.

Lanier, Ellie Crosby. "What Is Quality in Elder Care Mediation and Why Should Elder Law Advocates Care?" (2010) *BIFOCAL*, 32:2,1. (A)

This article defines mediation as a process that assists disputing parties in reaching an acceptable settlement, used widely in different countries. The author identifies why mediation is an effective tool and reviews the need for objective standards for elder care mediators. The article highlights the formation of the National Elder Mediation Network, as well as the foundation for training standards and "best practice" objectives. How to find a qualified, elder care mediator and further areas for collaboration between lawyers and advocates are also mentioned.

Larsen, Rikk and Crystal Thorpe. "Elder Mediation: Optimizing Major Family Transitions." (2006) *Marquette Elder's Advisor* 7:2, 293. (B)

This article introduces elder mediation as a "holistic" decision-making process, where families can discuss difficult issues with the help of a neutral facilitator. The article distinguishes mediation from arbitration and identifies five key principles: confidentiality, voluntary participation, mediator neutrality, informed consent and self-determination. The complexity of elder mediation (i.e. the typical matrix of family dynamics) is identified, while the authors define an appropriate role for a mediator and other professionals (i.e. legal, medical, financial, social worker, home care, etc). A list of issues addressed in mediation includes: disputes among siblings, financial decisions, residence decisions, estate planning, selling the house and other assets, inheritance disputes, medical treatment decisions, guardianship and post-appointment decisions by a guardian. The authors highlight where mediation may or may not be applicable, ethical considerations, how to measure "success" in mediation, and how to select a mediator. Finally, a very brief history of elder mediation in the US and other countries is provided.

Lustbader, Wendy. "Conflict, Emotion, and Power Surrounding Legacy." (1996) *Generations* 20:9, 54. (B)

This article provides a health counselor's perspective of how family members can engage in conflict as older parents make legacy decisions. The author discusses examples of "power and pain" that arises between generations and among siblings. Fairness in distribution of assets and the need for creative solutions are discussed at length.

Madoff, Ray D. "Mediating Probate Disputes: A Study of Court Sponsored Programs" (2004) *Boston College Law School Public Law and Legal Theory Research Paper Series*. 32, 698. (C)

This report provides an in-depth analysis of court-sponsored probate dispute resolution programs, in five States: Texas, Florida, Georgia, California and Hawaii. Common issues identified include encouraging acceptance of mediation (i.e. voluntary or mandated), educating parties and attorneys, and establishing standards for mediators. Fees and funding for programs is also discussed, as well as the timing of mediation.

Marcantel, Virginia. "EM-Power Squared for Mediation." (2002) *BIFOCAL* 23:3. 6. (C)

This article reviews the Elder Mediation ("EM-Power") Project that was conducted in Union and Snyder counties, Pennsylvania. A description of the model, objectives and development/implementation is provided. The author identifies recruitment of seniors as volunteer mediators as the "crucial element" of the first phase of the project. Issues related to training and internship, project administration and community outreach and education are also described and discussed. Five important issues are recommended to consider for replications of the EM-Power model: location and availability of services; support and acceptance from the community; profile of volunteers; identifying other mediation projects and methods of practice and establishing working relationships with them; and building flexibility into management and timeline.

Mariani, Kathryn. "Briefing on the First National Symposium on Ethical Standards for Elder Mediation." (2007) BIFOCAL 28:5, 75. (B)

This article provides an overview of the First National Symposium on Ethical Standards for Elder Mediation, which was held April 19-20, 2007. A description of the participants, issues addressed and panel discussions is provided. The article highlights the view that an elder should be present at the mediation table whenever possible; accommodations should be sought where there is physical or cognitive impairment; and support persons, advocates and surrogates should be able to accompany the elder.

Mariani, Kathryn. "Developing Ethical Standards for Elder Mediation: Questions Along the Way." (2007) BIFOCAL 28:6, 85. (B)

This article provides a summary of discussion points raised at the First National Symposium on Ethical Standards for Elder Mediation. The article identifies why elder mediation is unique, how mediation can be tailored for various contexts, and a mediator's interest in the outcomes. Issues related to vulnerability and capacity were discussed at length. Other issues discussed include attendance (i.e. should the older person always be present?), differentiating mediation from advocacy, capacity issues for other participants, intake and screening, and the appropriate roles of advocates, support persons and experts. A list of training recommendations is provided, as well as topics for further exploration.

McGinnis, Patricia L. "Dispute Resolution in Nursing Homes." (1991) NIDR FORUM, 24.

This brief article provides an analysis of a conflict between a nursing home administrator and a resident's daughter. Dispute resolution in nursing homes are categorized into two types: disputes involving standards of care (which may involve federal enforcement agencies and the state long-term care ombudsman) and conflicts that arise because of the imbalance of power (which result from feelings of powerlessness for the resident and family members). Mediation is introduced as a tool to allow the individual resident to voice their concerns.

M. Jerry McHale, Irene Robertson, and Andrea Clarke "Building a Child Protection Mediation Program in British Columbia" (2009) Family Court Review, 47:1, 86. (C)

This article outlines the complex and challenging issues that were involved in implementing a new child protection mediation program. The historical rationales, legislative changes and support are explained, followed by a brief description of how the model established a province-wide roster, successful mediator training and effective strategic partnership. The authors are candid in arguing for practical ways to tweak the model, such as implementing more education to facilitate expansion. The remainder of the article focuses on a second wave of development in the model, including a second pilot project, titled the "Surrey Court Project" and renaming or rebranding of mediation to become known as a "Facilitated Planning Meeting". In summary, the article provides details of the evaluation of the revised model and how the program has expanded since implementation.

M. Jerry McHale, Irene Robertson, and Andrea Clarke "Child Protection Mediation in British Columbia" (2011) Ministry of Attorney General, Province of British Columbia, Justice Services Branch, Family Justice Services Division. (C)

This short report provides a description of the child protection mediation system in British Columbia. The authors discuss the background to the program, including the

legislative changes and rationales for why the dispute resolution program was implemented. The scope of the report includes both the initial pilot and the Surrey Court Project, highlighting the barriers and solutions to establishing a successful mediation program. Finally, the report provides recent statistics, showing the steady increase in the volume of referrals to and completion of child protection mediation.

Medford, Pat E. "Elder mediation is useful in many situations." (2004) Elder Law Section Newsletter 7.2,3.

This brief article defines elder mediation as a framework that is designed to serve the needs of the elder, family members and others involved. A list of contexts for mediation is provided. The author suggests that elder mediation is particularly effective to explore the least restrictive forms, or alternatives to court-appointed guardianship, where capacity is in question. The benefits of mediation (e.g. the opportunity for elders to talk about their values and risks involved, etc.) are described.

Mewhinney, Kate "Guardianship and Estate Mediation" (2006) North Carolina Bar Association: Dispute Resolution Section 20:2, 1. (B)

This article provides an overview of the new laws and rules in place for guardianship and estate mediation in North Carolina. The author provides a "feuding sisters" case scenario, describes the advantages of mediation for family members and the respondent and comments on the national trend for increase in mediation. Concerns about unsuitable cases for mediation and the need for adequate training of mediators are also discussed.

Mewhinney, Kate. "North Carolina Tries Mediation for Estate and Guardianship Disputes." (2007) BIFOCAL, 28.3, 1, 43-47. (C)

This article reviews how new laws and rules for guardianship and estate mediation have been implemented in North Carolina. The author provides a background and summary of the new rules, as well as some specific case analysis. Advantages of mediation in guardianship are identified for family members and the respondent. The article also identifies the growing national trend in guardianship mediation, common disputes, concerns about unsuitable cases, and the need for adequate mediator training.

Mewhinney, Kate. "THE MEDIATOR – Coming Soon to a Guardianship Case Near You?" (2005) The Intermediary 4:4, 5. (A)

This article introduces a case scenario between "feuding sisters" and argues that mediation would provide a clear process for this family to "air their concerns" and "aim for consensus". The author provides a brief description of the advantages of guardianship mediation for family members and the respondent. A brief history of mediation and the national trend towards mediation is also provided. Concerns about guardianship mediation focus on cases where mediation would not be suitable: extremely polarized views, emergency situations and where a person's health or assets are at risk. The role of an advocate is also discussed, as well as a brief description of mediator training initiatives.

Morrison, Virginia L. "Heyoka: The Shifting Shape of Dispute Resolution in Health Care" (2005) 21 Georgia State University Law Review 931.

This article discusses new approaches to health care conflict, introducing collaboration as a catalyst for a new culture to resolve health care related disputes. The author suggests that conflict resolution techniques can be integrated into operations and mandates in various areas, including: bioethics concerns, patient safety implementations, administrative oversight, and patient harm disclosures. Mediation is discussed as an adaptive tool that can be used to avoid litigation. Health care staff and physician practices are the focus of this in-depth discussion of how mediation can be utilized to resolve disputes with claimants.

Neace, William Patrick. "Neighbourhood Dispute Resolution: Helping Seniors – Seniors Helping" (1988) American Association of Retired Persons. (C)

This article discusses program approaches for dispute resolution, including neighbourhood justice centers and court-referred and administered mediation or arbitration programs. Negotiation, mediation, arbitration and the ombudsman process are identified as forms of dispute resolution. Mediation is presented as a process, which requires special skills or personal attributes, and training. Volunteer support roles (i.e. seniors-helping-seniors) are described as key participants in the mediation process.

Park, Marilyn, Erica F. Wood and Vicki Gottlich. "Developing a Legal Services Program Policy on Alternative Dispute Resolution: Important Considerations for Older Clients and Clients with Disabilities." (1992) Clearinghouse Review 26:6, 635. (B)

The article provides guidance on how legal services workers can "safeguard and strengthen" the rights of older clients and clients at risk of abuse, in a dispute resolution process. The article highlights some of the weaknesses of mediation, which often involves an inherent power imbalance due to the relationship between participants, or vulnerability of participants due to age or disability. The authors provide practical insight into how to weigh the client's values and priorities, find timely and practical alternatives, etc. Legal issues, power imbalances, capacity issues and the need to provide accommodation are also discussed.

Parsons, Ruth J. and Enid O. Cox. "Family Mediation in Elder Caregiving Decisions: An Empowerment Intervention." (1989) Journal of the National Association of Social Workers 34:2, 122. (B)

This article focuses on the demographic trends that will increase the demand for caregiving decision making and conflict resolution within families. The authors outline the sources of conflict in caregiving decision making, family mediation as an area of social work and principles of mediation. Mediation is defined as an "intervention between conflicting parties or viewpoints to promote reconciliation, settlement, compromise, or understanding". The article provides practical guidance on how to guide the mediation process and how to measure effectiveness of family mediation.

Philpotts, Jamie. "Report Urges Paradigm Shift in Approach to Dying" (2005) BIFOCAL 27.2, 25. (B)

This brief article provides a review of the 60-page compilation of essays, published in the November/December 2005 issue of The Hastings Center Report. Essayists include experts of law, medicine, ethics and disability. The essays focus on care of

the dying. Thomas H. Murray and Bruce Jennings provide three summary points of the collection of essays: 1) approach end-of-life from a collective perspective, one that is less individualistic and more family oriented; 2) reevaluate advance directives and surrogate decision-making, with a focus on education, counseling and other support for health care agents and family members to help them make better decisions on behalf of the dying patient; and 3) provide bioethics mediation and conflict resolution services in all health care institutions.

Picard, Cheryl, "Common language different meaning: what mediators mean when they talk about their work" (2002) 18 *Negotiation Journal*, 25. (A)

This article explores the many different facets of how mediation is defined and understood. The author provides discussion about how mediators have a pivotal role in identifying the principles and objectives of mediation and how the process may assist participants in resolving conflicts.

Podnieks, Elizabeth. "Elder Abuse: The Canadian Experience." (2008) *Journal of Elder Abuse and Neglect* 20, 126-150. (C)

This article provides an overview and analysis of elder abuse trends in Canada. The author provides a brief summary of history in the field and legal approaches to elder abuse and neglect ("mistreatment") in criminal law, and provincial statutes that focus on adult protection, adult guardianship, and/or domestic violence. Models of intervention discussed include domestic violence programs, advocacy programs, multidisciplinary approaches and restorative justice. Research areas of elder mistreatment include: theoretical approaches, practical interventions, institutional preventative measures, faith community responses, and prevention in first nations and multicultural communities. The article describes the pilot program titled "Generations Together: Addressing Elder Abuse", funded by National Crisis Prevention Centre, Justice Canada, and the formation of Elder Abuse Networks.

Podnieks, Elizabeth, et al. "Elder Mistreatment: An International Narrative" (2010) *Journal of Elder Abuse and Neglect*, 22: 131-163. (B)

This article provides an overview of the national and cross-national research that has been done regarding elder abuse and neglect ("mistreatment"), in the United Kingdom, Germany, Russia, Finland, Sweden, Norway, Japan, Australia, and South Korea.

Pope, Thaddeus M. and Ellen A. Waldman. "Mediation at the End of Life: Getting Beyond the Limits of the Talking Cure" (2007) 143 *Ohio State Journal on Dispute Resolution* 23.

This article highlights the difficulties faced in the mediation process, arguing that mediation cannot succeed where surrogate health care decision-makers are given too much legal power. The authors argue that bargaining power must be equalized by creating statutory protections for health care providers to refuse inappropriate treatment. Several weaknesses in mediation are identified, in light of the relationship between surrogate decision-makers and health care providers, including: the inability to resolve futility disputes; the surrogates' passion for continued treatment; mistrust; therapeutic illusions; religion; family dynamics; externalization; and misperceptions that the law disfavors health care providers.

Radford, Mary F. "Is the Use of Mediation Appropriate in Adult Guardianship Cases?" (2002) *Stetson Law Review*. 31, 1-58.

This article provides a thorough analysis of mediation, as a process for determining guardianship. The author provides an overview of mediation, including confidentiality and privacy. Issues of incapacity and "protection of welfare" are discussed in the context of adult guardianship procedures. To answer the question of whether mediation is appropriate, the author identifies three arguments: incompatibility, lack of protections, and the need for self-determination. The issue of timing is discussed, identifying four points in adult guardianship cases where mediation might be applicable: pre-petition stage, initial petition stage, ongoing issues during guardianship and termination of guardianship. Finally, the article makes recommendations for integrating mediation into the adult guardianship system, including: education about mediation, training for mediators, representation of the adult, conduct of the mediation and development of standards for mediators. The conduct of mediation covers four key aspects: accommodations, intake and pre-mediation interviews, deciding who should participate, and privacy and confidentiality issues. The development of standards focuses on determining capacity, maintaining an environment that is free from coercion and avoiding unwarranted interventions.

Rhudy, Robert J. "Senior Mediation in Maryland and the United States: Reaching the Tipping Point" (2008) *The Maryland Bar Journal* 41:2., 12-19. (C)

This article provides a brief overview of senior mediation in the United States followed by a more detailed description of the Maryland Senior Mediation Project. The Project, which was funded by the ABA Commission, AARP, TCSG and the Montgomery County Mediation Center's Elder Mediation Project, raises the question of whether senior mediation has "reached the tipping point". The author provides several indicators that senior mediation is currently expanding, particularly in Maryland and New York.

Rhudy, Robert J. and Carolyn J. Rodis. "Expanding Mediation for Seniors and their Families in Maryland." (2005) *ACResolution* 2, 30. (C)

This brief article provides scenarios that illustrate the types of conflicts faced by aging persons. The authors present mediation as a way to help families acknowledge and resolve personal disputes and "family issues". The article also recognizes the Maryland Senior Mediation Project, which aims to set standards for mediation.

Rhudy, Robert J. and Carolyn J. Rodis. Eds. *Elder Mediation Today: Manual and Resource Guide* (Baltimore: Senior Mediation and Decision-Making, Inc., 2009). (B)

This practical manual and resource guide provides information for mediation that involves an older adult. The material could be used as best practice guidance for mediation where a person lacks capacity and there are significant disputes concerning the financial, personal or health care decisions that should be made.

Wood, Erica. "Addressing Capacity: What is the Role of the Mediator?" (2003) [Mediate.com](http://www.Mediate.com) (B).

This brief article addresses the issue of capacity to mediate. The author explains how mediators must make judgments about the understanding of the parties. The author cites the [Americans with Disabilities Act Mediation Guidelines](#), to highlight that several factors need to be considered. The article questions whether a person can

mediate with capacity and how the facilitator should enhance capacity and/or provide accommodations.