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Mediation of Guardianships Adds New Twist

There is an exciting new alternative to contested guardianship proceedings: elder care mediation. Attorneys, mediators, and family members are applauding this skillful approach to minimizing guardianship disputes. Thirty mediators were recently trained in Indianapolis, Fort Wayne, and Chicago to provide these services, and a national network has been launched at www.EldercareMediators.com.

Guardianships are akin to losing dignity, freedom and personal choices. They can divide families, or entrench already broken families into permanent and irreconcilable camps. Family members are often overwhelmed by having to make crucial decisions for their loved one, especially when no end-of-life documents, including a power of attorney, have been prepared.

Family members often argue strenuously about who should serve as the guardian. In situations without a power of attorney, mediation is a useful tool to assist family members by helping them to reach consensus, avoiding a dragged-out court battle. In mediation, family members are assisted by a neutral third party in focusing on the best interest of the elderly person, and in arriving at agreements regarding the person. Once a family mutually agrees on who should serve as guardian, the necessary papers can be drafted by attorneys and presented to the courts on an agreed-upon and not contested basis. Contested guardianship proceedings are time-consuming and expensive for all involved, and a burden to already overcrowded courts.

Elder mediation focuses on the needs of the elderly and their families. Using a facilitative model, rather than shuttle mediation, mediation is used to resolve conflict among families, seniors and organizations. It offers seniors and their families an opportunity to clarify what is most important to them, share resources, consider alternatives, and find effective and satisfying solutions. Mediation puts the decisions back into the hands of those who have a vested interest and who must live with the results of a court order. Estate matters, end-of-life decisions, living arrangements, medical preferences, and driving privileges are typical of the types of disputes which may successfully be resolved through mediation.

Attorneys should consider mediation over litigation for several reasons: it has a high success rate; it permits the elderly to be involved to the greatest extent possible, giving "power" to those

The IBA and Indianapolis Legal Aid Society Inc. are offering a training session on "Guardianship of a Minor Cases for the Pro Bono Volunteer" on Tuesday, June 27, 2006. The program, for 1 Hour general CLE credit, is designed to help lawyers who are willing to take a pro bono guardianship of a minor case become familiar with the process. Speakers are Hon. Charles J. Deiter and Master Commissioner Larry E. Bradley, both of the Marion Superior Court, Probate Division. The session will be held from noon to 1 p.m. in the IBA Board Room, 107 N. Pennsylvania St., Suite 200. The seminar is free to those who take one case/\$25 Members/\$50 Non-Members and includes lunch. Register at www.indybar.org or e-mail iba@indybar.org.

who will be most effected by any court decision; it is goal-directed, helping family members focus on future needs in arriving at sound decisions; and it helps attorneys fulfill their ethical duty to provide effective alternatives to litigation.

Guardianship Law

Guardians are substitute decision makers appointed by the probate court to manage the affairs of the incapacitated or protected person. Indiana's Guardianships and Protective Proceedings statute is found in Article 3, Title 29, of the Indiana Code. The statute sets forth the procedures by which a person becomes a guardian for the personal and/or business affairs of another.

Non-Relative Serving as Guardian

Two recent Indiana Supreme Court cases found that non-relatives could serve as guardians, looking at the best interest standard. These cases involve minors, but since there are no published opinions discussing the application of the guardianship law to the incapacitated, they may provide needed guidance.

The Court in *In the Parenting Matter of A.B. Dawn King v. S.B.*, 837 N.E.2d 965 (Ind. 2005), held that a female domestic companion was entitled to parenting time rights, child support obligations, and certain other parental rights and responsibilities with respect to respondent mother's 6-year-old child, whom the couple had jointly decided to bear and raise. The highest court construed the complaint liberally to conclude that the companion, even though not a natural parent, could be entitled to relief based upon the Court's previous decision in *In re Guardianship of B.H.*, 770 N.E. 2d 283 (Ind. 2002).

In the *Guardianship of B.H.* case, the Court affirmed a trial court's grant of permanent guardianship of two children to their stepfather after the death of their mother. The Court rejected the children's biological father's motion to dismiss the stepfather's request that he be appointed guardian. B.H. and S.H. were born to Edward and Sherrie Holley during their marriage.

Edward and Sherrie separated in 1991 and the children moved with their mother to Indiana. During this time, their father, who was serving in the Army, was stationed in Germany and Boston. The children remained with their mother, who began living with John Childress Sr. in September 1994. The Holley's marriage was dissolved in December 1996 pursuant to a decree reflecting the parties' agreement that the mother have custody of the children and the father have specified visitation. The decree ordered the father to pay child support. The mother and Childress were married in August 1997. The mother died on December 22, 1998, when the children were 13 and 14 years old. Childress, as their stepfather, immediately sought and obtained an emergency order appointing him temporary guardian of the children. On January 11, 1999, the father filed a petition to terminate the temporary guardianship. Three days later, the stepfather petitioned for appointment as permanent guardian, which the father sought to dismiss. Following a contested hearing on the pending motions, the trial court denied the father's motions and appointed the stepfather as permanent guardian.

Role of Eldercare Mediation

Since the Indiana Supreme Court is permitting such an interpretation of the guardianship law, the possibility of additional contested adult cases could result. Providing mediation instead would serve the elder's best interest.

Since a "preferred" guardian is a person who has been designated in a valid power of attorney, where a power of attorney has been properly executed, a guardianship proceeding may not be needed. Guardianships may be needed for those incapacitated persons who have not designated an attorney-in-fact. The alternative of eldercare mediation for guardianships is an important one. It helps to preserve family relationships, cuts emotional and financial costs, and serves the best interest of the incapacitated person. •