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by me.

Signed _____



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Eldercaring Coordination: Addressing the Storm of Contentious Family Relationships Jeopardizing the Welfare of Aging Loved Ones

By Judge Michelle Morley, Linda Fieldstone, and Sue Bronson

American Bar Association (ABA) Model Rules of Professional Conduct Rule 1.14 (Client with Diminished Capacity) provides practitioners with guidance if they suspect or determine that a client is losing capacity to make important decisions. But what can a practitioner do for a client who is not the one whose capacity to

make important decisions is diminishing but who is a family member entangled in conflict with the other members of the family over the capacity or the care and safety of that aging loved one?

Transitions in the aging process can spur thundering storms when family relationships are already tumultuous, taxing the stability of families and throwing any semblance of civility overboard. Decades of disappointments and resentments rise to the surface as sudden crises and the new normal settle into a routine. Attorneys practicing as solos or in smaller firms, with fewer support staff, field the brunt of the waves, as clients resort to blame and degradation in order to achieve their “win” in court. Even a “win” in court is not the end, as there is always something to fight about. And at what cost to the elder and family?

ELDERCARE COORDINATION

Eldercare coordination is a dispute resolution process specifically developed to meet the unique needs and characteristics of families in higher conflict over the care and safety of aging loved ones. Appointed by the court for a period of up to two years, an eldercare coordinator (EC) works with the elder, family members, legally authorized decision-makers, and others invited to the process to build a supportive framework to address non-legal issues, thus allowing the court process to proceed in resolving the legal issues less burdened by emotionality and family upheavals. This two-year period makes the EC available to help the family communicate more productively and develop an informed decision-making process based on the elder’s needs and preferences, unimpeded by long-standing personal agendas of various family members. As nonlegal issues arise, the family

has a private forum to address their concerns without exacerbating their conflict further through the inherent delays of a “win-lose” litigation process.

Eldercare coordination is a strength-based, trauma-informed process that promotes collaboration between family members and others by emphasizing each person’s strengths to increase care options and provide safeguards for the benefit of the older adult. Eldercare coordination amplifies the older person’s voice above the conflict and readies the family to utilize available resources. It does not replace legal, mental health, guardianship, mediation, or financial services but calms the conflict for service providers—including lawyers—to be more effective in their roles. Although ECs may come from various professional backgrounds, they perform only the eldercare coordinator role when appointed by the court to serve in this capacity. ECs are highly qualified dispute resolution specialists who have post-graduate degrees and professional experience and have completed both family and elder mediation training as well as specific training in eldercare coordination. To be clear, the process of eldercare coordination is not “mediation on steroids.” Rather than facilitating lasting decisions, ECs assist the families in developing small, doable action steps for the care and safety of the older person. Keeping the elder’s voice in the center of the discussion is paramount. The unique methodology helps families learn to cooperate, applying new strategies and skills that can improve their communication process.

STATE ELDERCARE PROGRAMS AND LEGISLATION

Twenty U.S. and Canadian organizations, including the ABA Commission on Law and Aging and the ABA Sec-

tion of Dispute Resolution, joined in a Task Force hosted by the Association for Conflict Resolution (ACR) in 2013, recognizing a need for a dispute resolution process pertinent to the needs of elders caught in the middle of family feuds. Collaborating with 20 Florida entities in the Florida Chapter of the Association of Family and Conciliation Courts (FLAFCC) Task Force, they developed Guidelines for Eldercaring Coordination in 2014, which include standardized forms and procedures to set up eldercaring coordination programs easily within any jurisdiction (Linda Fieldstone & Michelle Morley, *ACR Guidelines for Eldercaring Coordination*, 53 FAM. CT. REV. 542–51 (2015)). Florida, Idaho, Indiana, Minnesota, and Ohio had the initial pilot sites for eldercaring coordination in 2015. In addition to those five states there are trained ECs in Alabama, Arizona, California, Illinois, Maryland, Michigan, Texas, and Virginia, plus Toronto, Ontario. Plans are currently in process with national stakeholders to bring eldercaring coordination to Australia.

The Ohio Supreme Court adopted Superintendence Rule 79 (Probate Court Dispute Resolution) to enable the referral of guardianship/incapacity cases to eldercaring coordination as a diversion program so that cases that might benefit from the process are identified early. A majority of the cases referred in Ohio were able to avoid guardianships, and, in several cases, guardianships were terminated as families stepped up, better equipped to care for their aging loved ones.

Florida is the first state to enact specific eldercaring coordination legislation (s. 44.407 F.S.; <https://tinyurl.com/3b8jrjpn>). The legislation, passed with the unanimous support of all legislators in both houses of the state legislature, provides organizational

structure for the process and defines the functions of ECs:

- enable more effective communication, negotiation, and problem-solving skills;
- offer education about eldercare resources;
- facilitate the creation, modification, or implementation of an eldercaring plan;
- recommend how to resolve nonlegal conflict; and
- make procedural decisions within the scope of a court order or with the parties' prior approval.

Prior to Ohio's rule and Florida's statute, those states and others referring cases to eldercaring coordination found that more general statutes, often with an emphasis on providing least-restrictive interventions, at least implicitly granted courts jurisdiction to refer cases to eldercaring coordination. Examples are Michigan's Rule 5.143 on Alternative Dispute Resolution (A): The court may submit to mediation, case evaluation, or other alternative dispute resolution process one or more requests for relief in any contested proceeding; Michigan's Court Rule 2.410 (A) (1) and (C) apply to the extent possible.

THE ELDERCARING PROCESS AND ELDER ABUSE

The two-year appointment period during which the eldercaring coordinator is available to the family also gives the EC time to identify risks and safeguard the older adult from abuse and exploitation and monitor any corrective actions that the family incorporates into the eldercaring plan. The family dynamics unfolding over a period of time provides the EC with greater context so that behaviors are recognized as misunderstand-

ings and miscommunication or as patterns of power and control.

According to the World Health Organization, only one in 24 cases of elder abuse is reported (*Elder Abuse Fact Sheet*, WORLD HEALTH ORG. (June 15, 2018), <https://tinyurl.com/r7j7wuak>); according to the National Council on Aging, almost 60 percent of abuse is perpetrated by family members (*Get the Facts on Elder Abuse*, NAT'L COUNCIL ON AGING (Feb. 23, 2021), <https://tinyurl.com/5mukazjj>). Although the eldercaring coordination process is generally confidential, ECs are mandated reporters of abuse, neglect, and abandonment and so must notify the appropriate authority when concerns indicate that an investigation is needed; meanwhile, the EC continues to assuage any potential upheavals of conflict that could further jeopardize the elder or another family member. In a preliminary study on eldercaring coordination, 59 percent of ECs reported identifying between two and ten safety concerns in their cases (e.g., abuse, neglect, exploitation, coercion, isolation, unsafe environment, caregiver incapacity, etc.) (Pamela B. Teaster & Megan L. Dolbin-MacNab, *The Use of Eldercaring Coordination for Resolving Cases Involving Older Adults and High-Conflict Family Dynamics*, 3 INNOVATION IN AGING 576–76 (2019), <https://tinyurl.com/4utzefvc>). The eldercaring coordination process promotes transparency among participants, often dispelling concerns that are unfounded, and, in other instances, referral for investigations that result in affirming allegations. In both instances the family stays focused on the elder and providing the protections needed to maintain the elder's well-being.

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Eldercaring coordinator fees are not paid entirely from the aging incapacitated person's assets. The fees of ECs are shared by the parties referred to the process, including the elder, and allocated among them by the judge in the Order of Referral to Eldercaring Coordinator. It is not always an equal allocation. Allocation depends on each family member's financial abilities. Recognizing that family conflict is a health issue for elders, in 2018 StayWell/WellCare, the largest Medicaid/Medicare health plan provider in Florida at the time, donated sufficient funds to facilitate access to eldercaring coordination for 16 different families. To date, only three of those scholarships have been used, which dispels concern about the affordability of eldercaring coordination.

THE ROLE OF ATTORNEYS IN THE ELDERCARING COORDINATION PROCESS

Attorneys are in a prime position to alert the court when eldercaring coordination may be helpful. Time is of the essence to help the family before their conflict exacerbates further; more importantly, the older adults have no time to lose—rather than peaceful deaths enveloped in the love of family members by their bedside, several have died before the order of referral was effectuated. With the aging loved one's death, family members are

left in disarray, and some are heartbroken that, because of the unaddressed vitriol within the family, they were denied an opportunity to even see their loved one and say goodbye.

Attorneys whose clients are involved in the eldercaring process should undertake the following:

- Prior to determination of incapacity, look for competing petitions for appointment as guardian being filed by opposing family members, as well as inflammatory, unsubstantiated, or immeasurable allegations in the pleadings and indications of control rather than concern.
- After adjudication of incapacity, look for chronic second-guessing and interference in decision-making, gatekeeping behaviors, imbalance of power/alliances, impasses in mediation, or cases completed with adult protective services where concerns continue.

Attorneys who may have been initially reticent to have their clients ordered to eldercaring coordination are more positive once they have participated in the process. When the parties have this accessible, timely, private forum in which to learn new ways to discuss their concerns, the emotionality of the case subsides, and client eruptions decrease, making it easier and more productive to represent parties on their remaining legal issues before the court. Guardians have reported that they can make easier and better decisions when there is greater transparency between family members; guardians feel more equipped to enhance the quality of life of the ward when information is shared as the infighting of family members and their resistance to the guardian are

reduced.

CONCLUSION

While past frustrations and disappointments of family members may continue after eldercaring coordination, throughout the process their aging loved one is shielded from the storm of family conflict. Grandchildren resume relationships with their grandmas and grandpops, and the grandchildren's parents are more available as the legal process is more productive and takes less time away from parental responsibilities. All in the family have new tools to model constructive conflict resolution skills, decreasing stress and anxiety as they focus on the aging person rather than blame and degradation. The elder is reassured as the tumult has subsided, giving way to the calm and comfort of family peace. It is easier for them to seek and accept help from family—their most treasured resource—when they know it will no longer erupt into arguments and accusations.

It is hoped that this article provides practitioners with a new resource to assist them and their clients when their clients are entangled in conflict with other members of their families over the capacity or the care and safety of an aging loved one. Eldercaring coordination programs are easy to replicate. The ACR/FLAFCC Elder Justice Initiative on Eldercaring Coordination can provide standardized forms and procedures developed by the Task Force organizations and vetted for five years by eldercaring coordination pilot sites throughout the country. More information is available at <https://www.eldercaringcoordination.com>. ■

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