

ELDERCARE COORDINATION: A DISPUTE RESOLUTION OPTION FOR HIGH CONFLICT ELDER DISPUTES IN CALIFORNIA

SARAH J. GROSS, M.ED., J.D., LL.M.

I. INTRODUCTION

The aging of a family member is an inevitable process, and families hope that their aging parent or grandparent will gracefully step into their elder years. For many families, however, this process is not so graceful. As the parent or grandparent ages, he or she may require more care and help in making decisions. Family members faced with these increased needs cross into the difficult territory of decision-making for the elder and must work together in this effort. The decisions that must be made—financial, residential, and health-related—tend to engender conflict within the family or intensify existing conflict because of the stress that accompanies these decisions. While families want what is best for the elder, family members may disagree over what “best” entails and conflict erupts over who will care for, have access to, and make decisions for the elder. As a result, adult siblings may find themselves in court arguing over decisions for an elder parent.¹

The conflict between family members over the care of an elder is often referred to as a family dispute, but more specifically is an “elder law dispute.” Elder law disputes involve the care and needs of elders and encompass a variety of issues including adult guardianship or conservatorship, elder abuse, long-term planning, and quality of care.² The field of elder law developed as a specialization to respond to these issues, and elder law attorneys are well-versed in managing the family dynamics that come into play. Family dynamics are an inherent part of elder law disputes, and conflicts between family members, and particularly between siblings, are common in the decision-making process.³ Research on elder law disputes and family conflict indicates that pre-existing disagreements within a family intensify as the family members grapple for decision-making power and control over the elder.⁴ Siblings who must assume a caregiving role for an aging parent are prone to enter into disagreements if some refuse to accept responsibility, provide insufficient assistance, or neglect their obligations for

¹ Linda Fieldstone & Sue Bronson, *Eldercaring Coordination in Your Community or Your Law Practice: New Approaches to Dealing with High-Conflict Families*, 14 NAELA J. 1, 2 (2018) [hereinafter Fieldstone & Bronson, *Eldercaring Coordination*].

² Lawrence A. Frolik, *The Developing Field of Elder Law Redux: Ten Years After*, 10 ELDER L.J. 1, 4 (2002).

³ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 3; Bonnie Lashewicz & Norah Keating, *Tensions Among Siblings in Parent Care*, 6 EUROPEAN J. AGEING 127, 134 (2009).

⁴ See, e.g., Lashewicz & Keating, *supra* note 3. This is also discussed further *infra* Section III.B.

shared responsibility for parent care.⁵ Sibling disagreements can instigate high-conflict family dynamics and lead to the filing of a conservatorship petition, where the conservatorship process itself tends to heighten the conflict.⁶ When family members are enmeshed in interpersonal conflict such that it overshadows the elder's needs, the elder law attorney must be equipped to handle the underlying conflict; this means that the elder law attorney must be informed of and amenable to alternative forms of resolving the family's dispute.

Elder mediation has been a growing and increasingly common avenue for resolving elder disputes outside of the courtroom.⁷ In most cases involving mild to moderate conflict, mediation is successful in getting parties to set aside their differences and focus on solutions for the elder.⁸ In high-conflict cases, however, where family members demonstrate an unwillingness to cooperate even with the intervention of a mediator, a different approach is needed to address the underlying conflict and encourage families to focus their efforts on the care and wellbeing of the elder.

Eldercaring coordination has developed as an alternative dispute resolution ("ADR") option for high-conflict elder disputes. The goal of eldercaring coordination is to complement other services such as legal representation and mediation, and to "help manage high conflict family dynamics so that the elder, family and stakeholders can address their non-legal issues independently from the court."⁹ Modeled after parenting coordination, which is used in high-conflict family law disputes, eldercaring coordination recognizes the incidence of high-conflict family dynamics in disputes involving elders and provides an ADR option for those instances where mediation fails.¹⁰

This article analyzes the incidence and impact of high-conflict family dynamics in elder disputes and proposes that eldercaring coordination is a viable ADR option in California, and a useful tool for elder law practitioners in resolving these disputes. Part I will provide an introduction to eldercaring coordination as an ADR process. Part II will discuss the research and scholarship on high-conflict family dynamics in elder law disputes. Part III will provide background on elder mediation as an ADR process to address elder disputes, distinguish elder mediation and eldercaring coordination, and analyze the extent to which eldercaring coordination is better suited to manage high conflict. Part IV will discuss the need for eldercaring coordination in California probate courts. Part V will analyze how the

⁵ Lashewicz & Keating, *supra* note 3, at 128–29.

⁶ Jennifer L. Wright, *Making Mediation Work in Guardianship Proceedings: Protecting and Enhancing the Voice, Rights, and Well-Being of Elders*, 8 J. INT'L AGING L. & POL'Y 89, 95 (2015) [hereinafter Wright, *Making Mediation Work*].

⁷ Erica F. Wood, *Dispute Resolution and Aging: What Is the Nexus and Where Do We Stand?*, 36 BIFOCAL 73, 75 (2015) [hereinafter Wood, *Dispute Resolution*].

⁸ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 8.

⁹ ASSOCIATION FOR CONFLICT RESOLUTION TASK FORCE ON ELDERCARE COORDINATION, ELDERCARE JUSTICE INITIATIVE ON ELDERCARE COORDINATION SANTA FE HANDOUT 1 (2017).

¹⁰ Linda Fieldstone & Sue Bronson, *From Friction to Fireworks to Focus: Eldercare Coordination Sheds Light in High-Conflict Cases*, 24 EXPERIENCE 29, 30 (2015) [hereinafter Fieldstone & Bronson, *Friction to Fireworks*].

development of eldercaring coordination can support California probate courts and note the factors that may support and deter its development.

II. INTRODUCTION TO ELDERCARING COORDINATION: A NEW APPROACH TO DEALING WITH HIGH-CONFLICT ELDER DISPUTES

Family involvement in elder law disputes is common as families engage in decision-making for an elder, initiate long-term life planning, or participate in the creation or revision of trust documents. Based on their years working with families, Linda Fieldstone and Sue Bronson¹¹ have noted that some families are able to work through challenging issues with little to no outside guidance.¹² In cases of mild or even moderate conflict, families are able to find common ground as they set their differences aside and focus on the needs of an elder family member.¹³ If different opinions arise and families cannot work out a solution on their own, an elder mediator¹⁴ may step in to assist the families in developing options to suit the elder's needs.¹⁵ A mediator can help many families have the necessary conversations to reach a satisfactory resolution.¹⁶ Not all families, however, fit within this collaborative model, and in some situations the issues have become so ridden with conflict that they are beyond the ability of the mediator or the mediation process to address.¹⁷

The following scenario from Bonnie Lashewicz's and Norah Keating's study on sibling tensions in parent caregiving demonstrates some of the conflicts that may arise in elder care.¹⁸ Two sisters, "A" and "B," had provided live-in care for their elder father. Sister "A" was set to receive assets from their father's estate, but Sister "B" would not. The sisters argued over the distribution of assets. To ensure Sister "B" would receive nothing, Sister "A" began discrediting Sister "B," claiming that she had restricted their father from communicating with her. She also claimed that Sister "B" isolated and exerted control over their father by keeping him in a locked

¹¹ Linda Fieldstone, M.Ed., is co-chair of the Association for Conflict Resolution ("ACR") and Florida Chapter of the Association of Family and Conciliation Courts ("AFCC") Elder Justice Initiative on Eldercaring Coordination. Her former roles include Supervisor of Family Court Services for the Eleventh Judicial Circuit, Florida, Miami-Dade County; past president of the AFCC; past president of the Florida Chapter of the AFCC; and secretary of the AFCC Task Force on Parenting Coordination. She is involved in international research, training, and consultation and has written articles on high-conflict families, family court services, empirically based parenting plans, and parenting and eldercaring coordination.

Sue Bronson is a Licensed Clinical Social Worker ("LCSW") and teaches mediation at the University of Wisconsin-Milwaukee School of Continuing Education. She is also co-chair of the ACR Elder Justice Initiative on Eldercaring Coordination and a committee chair on the American Bar Association ("ABA") Task Force on Elder Abuse Screening Tool for Elder Mediators. She has been a mediator, trainer, and psychotherapist for family, elder, workplace, and other disputes. Her former roles include chair of the ACR Family Section and co-chair of the ACR Elder Section.

¹² Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 1.

¹³ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 8.

¹⁴ Elder mediation as an ADR process is discussed *infra* Part III.

¹⁵ Fieldstone & Bronson, *Friction to Fireworks*, *supra* note 10, at 30.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Lashewicz & Keating, *supra* note 3, at 132.

room. Another sibling, Brother, supported Sister “A” and claimed that Sister “B” was forceful and controlling, denying her siblings access to their father.

Lashewicz and Keating define the alleged conduct of Sister “B” as a dominating strategy to separate the elder parent from other siblings.¹⁹ Domination by Sister “B” engenders conflict within the family as the siblings exchange accusations and unearth harbored jealousies which can easily overshadow the most important issue: the elder parent’s care. Fieldstone and Bronson define the dynamic between the siblings as “high-conflict” because of the siblings’ behavior. “High-conflict” in an elder dispute signifies disputes driven by conflict rather than by content or issues.²⁰ The dispute is triggered by, and centers on, high-conflict family dynamics, which include the following indicators: possessive or controlling behavior toward the elder; difficulty separating the elder’s needs from personal desires; and sibling splitting.²¹ The scenario between the siblings displays high-conflict family dynamics through these behavior indicators, and suggests that the dispute over the care of the elder parent requires a dispute resolution process that specifically addresses the underlying conflict.²² This dispute resolution process is called “eldercaring coordination.” Its purpose is to address high-conflict family dynamics in cases such as this which involve the care, needs, and safety of elders.

Eldercaring coordination developed as a result of a collaboration between Task Forces of the Florida Chapter of the Association of Family and Conciliation Courts (“AFCC”) and the Association for Conflict Resolution (“ACR”), which noted a growing need to address high-conflict issues concerning elders.²³ Linda Fieldstone, past president of the AFCC, initiated the project in 2012. The AFCC had been instrumental in developing parenting coordination, a dispute resolution process in family courts for high-conflict cases involving children. Fieldstone worked with family courts as a parenting coordinator in high-conflict family cases and observed the effects of family dynamics on the care and wellbeing of children caught in a custody dispute. The parenting coordination process assists parents in caring for their children during these disputes and developing viable parenting plans.²⁴ Most importantly, parenting coordination facilitates communication between family members and reduces litigation so that parents can focus on their child’s wellbeing.²⁵ Fieldstone sought to determine if a comparable process existed to support the inverse situation of children caring for their aging parents. If a process exists to protect the safety and wellbeing of

¹⁹ *Id.*

²⁰ Linda Fieldstone & Sue Bronson, Address at Association for Conflict Resolution Annual Conference, Solutions for High Conflict Families: Eldercaring Coordination Research Results (Oct. 11–14, 2017).

²¹ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 8.

²² Jan Pudlow, *A New Way to Resolve ‘High-conflict Family Dynamics’ for Elders*, FLA. B. NEWS (June 1, 2016), <https://www.floridabar.org/news/tfbnews/?durl=%2FDIVCOM%2FJN%2Fjnnews01.nsf%2FArticles%2FD9ADC243F3412A0B85257FB9004C6FD0>.

²³ See generally Linda Fieldstone et al., *Association for Conflict Resolution Guidelines for Eldercaring Coordinators*, 53 FAM. CT. REV. 545 (2015) [hereinafter Fieldstone et al., *Association for Conflict Resolution*].

²⁴ Christine A. Coates et al., *Parenting Coordination for High-conflict Families*, 41 FAM CT. REV. 1, 2 (2003).

²⁵ Wilma J. Henry et al., *Parenting Coordination and Court Relitigation: A Case Study*, 47 FAM. CT. REV. 682, 684 (2009).

children, then, Fieldstone proposed, there should be a process in place to protect elders.²⁶ Enlisting the assistance of the National Association of Juvenile and Family Court Judges and still finding no comparable dispute resolution process, she created two task forces by partnering with Bronson, a family and elder mediator and trainer and the former Co-Chair of the Association for Conflict Resolution (“ACR”) Section on Elder Decision-Making and Conflict Resolution (“Elder Section”), and with Judge Michelle Morley, then Board member of the Florida Chapter of the AFCC.²⁷

These Task Forces included various U.S. organizations and individuals with expertise in the fields of elder law, conflict resolution, and high-conflict family dynamics. Working collaboratively, the task forces developed eldercaring coordination programs with the goal of

reducing conflict and court involvement so the elders, family members, and other participants are able to focus productively on the issues related to the needs and safety of the elder and to work collaboratively with others in the support network that provides legal advice and social and medical care and guidance.²⁸

The ACR published detailed guidelines (“Guidelines”) for the application and implementation of eldercaring coordination, as well as a recommended grievance procedure, training protocols, a court project pilot template, and project assessment tools.²⁹ In November 2014, the AFCC Board of Directors endorsed the Guidelines and paved the way for a new dispute resolution process in the area of elder disputes.³⁰ The goal of the Guidelines is to “address the current discrepancy between dispute resolution options available for high conflict parents dealing with young children and high conflict cases regarding an elder’s needs, care and safety.”³¹ While the Guidelines are inspired by the processes that led to the development of parenting coordination, the eldercaring coordination process is tailored to elders and centers on a thorough understanding of elder law, capacity determinations, and family dynamics related to elders.³² Eldercaring coordination is meant to provide an ADR option with the goal of improving relationship dynamics so that families in conflict can make decisions in the best interests of the elder, supporting their autonomy to the extent possible, and providing for their safety.³³

Why the need for another dispute resolution process for elder disputes when the court system and mediation already exist? To answer this, it is important to understand the relationship dynamics in elder law disputes, specifically the high-conflict dynamics that arise within conservatorship and probate disputes.

²⁶ Pudlow, *supra* note 22.

²⁷ Fieldstone et al., *Association for Conflict Resolution*, *supra* note 23, at 547.

²⁸ *Id.*

²⁹ *Id.* at 546.

³⁰ *Id.* at 545.

³¹ ASS’N FOR CONFLICT RESOLUTION, GUIDELINES FOR ELDERCARING COORDINATION 1, 3 (Oct. 2014).

³² *Id.*

³³ Fieldstone & Bronson, *Friction to Fireworks*, *supra* note 10, at 30.

III. WHY ELDERCARE COORDINATION? UNDERSTANDING HIGH-CONFLICT FAMILY DYNAMICS

A. ADULT GUARDIANSHIP/CONSERVATORSHIP DISPUTES

Within the ambit of elder law, adult guardianship/conservatorship³⁴ cases are among the most highly contested. Indeed, although the proceedings are oriented towards advocacy—acting out of concern for an alleged incapacitated person (“AIP”)—in practice, they are civil disputes that result in litigation.³⁵ Conservatorship in California is a court proceeding in which the court, based upon a petition and a hearing, determines that an elder (the “ward” or “conservatee”) is incapable of making decisions for himself or herself and orders that the elder be placed under the control of a conservator.³⁶ This is a severe measure, and the state is entitled to take this action only with clear and convincing evidence that the ward is mentally incapable of making his or her own decisions.³⁷ This evidence must be presented in the petitioner’s filing for conservatorship. The petitioner must prove: (1) that the proposed ward is incapable of receiving and understanding relevant information and making decisions based on that information; (2) that the incapacity creates a risk to the proposed ward’s well-being; and (3) that conservatorship will improve the proposed ward’s well-being.³⁸ The petitioner must also prove that conservatorship is the least restrictive alternative for protecting the ward.³⁹ The court should view a conservatorship as the last resort after a careful weighing of the evidence to determine that there is no other means of protecting the ward.⁴⁰ Once the court makes this determination, a conservator is appointed.

The conservatorship system is an integral aspect of probate courts, and one that is likely to continue as the aging population in the U.S. increases.⁴¹ The U.S. Bureau of the Census predicts that the number of people older than sixty-five will more than double between 2000 and 2050, and the population

³⁴ For the purposes of this paper, the term “conservatorship” will be used to cover the terms “adult guardianship” and “conservatorship” to refer to the process of appointing an individual as decision-maker for an incapacitated elder, except when citing sources that refer to the process as “guardianship.” Guardianship proceedings in the U.S. typically refer to either the appointment of a guardian for a minor (minors’ guardianship) or for an incapacitated person (adults’ guardianship). See UNIF. GUARDIANSHIP & PROTECTIVE PROCEDURES ACT art. I § 102 (UNIF. LAW COMM’N 2018). In California probate courts, guardianships refer to the appointment of an adult over a minor child, while conservatorships refer to the appointment of an adult over another adult who cannot care for himself or herself or his or her finances. See *Probate: Conservatorship*, SUPERIOR CT. CAL.: COUNTY ORANGE, <http://www.occourts.org/self-help/probate/conservatorship/> (last visited Dec. 5, 2019); *Probate: Guardianship*, SUPERIOR CT. CAL.: COUNTY ORANGE, <http://www.occourts.org/self-help/probate/guardianship/> (last visited Dec. 5, 2019).

³⁵ A. KIMBERLY DAYTON ET AL., ADVISING THE ELDERLY CLIENT §§ 34:9–10, :13.

³⁶ CAL. PROB. CODE § 1801(a) (Deering 2018) (“A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter.”).

³⁷ *Id.*

³⁸ Jennifer L. Wright, *Guardianship for Your Own Good: Improving the Wellbeing of Respondents and Wards in the USA*, 33 INT’L J. L. & PSYCHIATRY 350, 351 (2010) [hereinafter Wright, *Guardianship*].

³⁹ *Id.* at 351–52; CAL. PROB. CODE § 1800.3(b) (Deering 2019) (“No conservatorship of the person or of the estate shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.”).

⁴⁰ Wright, *Guardianship*, *supra* note 38, at 352.

⁴¹ Kathleen Wilber et al., *New Perspectives on Conservatorship: The Views of Older Adult Conservatees and their Conservators*, 8 AGING, NEUROPSYCHOLOGY, & COGNITION 225, 239 (2001).

over eighty-five will quadruple.⁴² The U.S. Department of Health and Human Services' Administration on Aging expects that by 2060, approximately ninety-eight million Americans will be sixty-five or older.⁴³ The persons assisting the aging population (including elder law practitioners) must be able to address associated health and wellness concerns that arise as individuals age. Conservatorship is a solution, assuring that legal, financial, and personal decisions are made for an incapacitated elder with some degree of oversight, consistency, and control. When family members are at a loss as to how to care for and monitor an elder, the conservatorship system provides a method of accountability where an appointed conservator must report to a court regularly.⁴⁴ Further, the conservator or entity appointed to care for the elder ordinarily has sole legal authority to make decisions on the elder's behalf, which offers consistency and provides relief to family members who may otherwise struggle with care decisions.⁴⁵ The conservator's legal authority also grants them access to third parties, such as health care providers, to serve the elder's needs.⁴⁶ The process can build a bridge between the elder, the conservator, and family members, allowing for the provision of care and educating families about eldercare options which may eliminate the continued need for a conservator.⁴⁷ Conservatorship remains an important legal tool for families and their aging relatives.

While these advantages of the conservatorship system support its continued use, it is not free from criticism regarding the effectiveness of the process in ensuring an elder's safety and wellbeing. In contrast to the therapeutic model of adult guardianship/conservatorship, in which the court facilitates the provision of helpful services to the incapacitated elder with minimal unnecessary hassle and expense, the current adversarial model raises concerns and is a subject of reform.⁴⁸ Critiques focus on the failure of the adult guardianship/conservatorship system to adequately protect incapacitated elders, emphasizing the problems posed by an adversarial model rather than a therapeutic one.⁴⁹ The adversarial model entails zealous advocacy for both the respondent and petitioner in a traditional courtroom setting which encourages the parties to adopt hardened positions. To meet the standard of clear and convincing evidence,⁵⁰ the petitioner may exaggerate the elder's cognitive limitations to present all evidence of the elder's decline and inability to function.⁵¹ Consequently, the elder becomes estranged from the petitioner and the petitioner's witnesses, thus disrupting

⁴² Brenda K. Uekert & Richard Schaufler, *The Need for Improved Adult Guardianship Data*, 93 JUDICATURE 201, 202–03 (2010).

⁴³ Michael S. Brophy & Dina Y. Nam, *Parse the Issues Involving Guardians in Legal Proceedings*, 45 EST. PLAN. 23, 23 (2017).

⁴⁴ DAYTON ET AL., *supra* note 35, at § 34:10.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Wright, *Guardianship*, *supra* note 38, at 362–64.

⁴⁸ Marshall B. Kapp, *Reforming Guardianship Reform: Reflections on Disagreements, Deficits, and Responsibilities*, 31 STETSON L. REV. 1047, 1048–49 (2002).

⁴⁹ Wright, *Guardianship*, *supra* note 38, at 352.

⁵⁰ CAL. PROB. CODE § 1801(e) (Deering 2018) (“The standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence.”); *People v. Karriker*, 149 Cal. App. 4th 763, 780 (2007) (“[T]he inability to care for one’s personal needs need be established by only clear and convincing evidence [for a probate conservatorship]”).

⁵¹ DAYTON ET AL., *supra* note 35, at § 34:13; Kapp, *supra* note 48, at 1050.

relationships that are important to the elder.⁵² Establishing these extreme positions places the parties on opposing sides, causing a chasm between family members and influencing the way that they interact with one another. “Once an adult child has stated the need for a guardian,” elder law scholar Jennifer L. Wright explains, “that child may feel s/he must win her case in order to prove that s/he is really acting for the parent’s best interests.”⁵³ The courtroom dynamics do not encourage open communication but rather hinder it, and families are consequently less amenable to discussion, negotiation, and compromise.⁵⁴ Once the adult child asserts and defends publicly that the elder parent cannot handle his or her own affairs, he or she will look for behavior by the elder that confirms this assertion.⁵⁵ By doing so, he or she distances himself or herself from the parent.

Although due process in adversarial proceedings affords the elder and/or the elder’s counsel an opportunity to be fully heard and to challenge the petitioner, the adequacy of due process is another glaring concern. Adult guardianship/conservatorship entails stripping the ward of his or her rights in order to protect his or her wellbeing.⁵⁶ The proceedings focus on the elder’s failings and weaknesses, and the elder is removed from the conversation about what his or her life should be like.⁵⁷ This deprivation of rights is designed to be in the best interests of the ward and is representative of the state’s power to protect those who can no longer care for themselves.⁵⁸ Critics note, however, the lack of reasonable notice to the elder, and “lack of adequate information about alternatives to [adult] guardianship and the procedures for taking advantage of these alternatives prior to the adjudication of incapacity.”⁵⁹ In California, conservatorship laws seek to remedy these inadequacies by ensuring, for example, notice and information about the proceedings and the appointment of counsel for the ward.⁶⁰ The extent to which the provisions of the Probate Code remedy due process concerns depends upon the court and the ward’s attorney, if appointed, and critics contend that there is insufficient oversight of conservatorship proceedings to determine whether the court and attorneys are fulfilling due process obligations. California does not aggregate data on conservatorship cases⁶¹ which makes assessment of the conservatorship system and the implementation of court improvements much more difficult.⁶² Criticism of the system also highlights the requirement that courts consider the “least restrictive alternative” before approving conservatorship.⁶³ There is insufficient data to address whether California courts provide information

⁵² Wright, *Making Mediation Work*, *supra* note 6, at 95.

⁵³ Wright, *Guardianship*, *supra* note 38, at 359.

⁵⁴ *Id.*

⁵⁵ *Id.* at 360.

⁵⁶ *Id.* at 351.

⁵⁷ Wright, *Making Mediation Work*, *supra* note 6, at 96.

⁵⁸ *Id.*

⁵⁹ DAYTON ET AL., *supra* note 35, at § 34:9.

⁶⁰ Luke Erburu Cocalis, *The Consequences of Choice: Does California Adequately Protect Choice of Residence for*

Individuals with Alzheimer's, 19 S. CAL. REV. L. & SOC. JUST. 407, 440 (2010) (citing CAL. PROB. CODE §§ 1825, 1471 (Deering 2019)).

⁶¹ Sarah Anders et al., *Conservatorship Reform in California: Three Cost-effective Recommendations*, GOLDMAN SCH. PUB. POL’Y, U.C. BERKELEY 1, 6 (May 2009).

⁶² Uekert & Schauffler, *supra* note 42, at 204–05.

⁶³ Anders et al., *supra* note 61, at 14.

about and assess alternative options to conservatorship before adjudicating the ward's incapacity.

Further criticism centers on the role of the adult guardian/conservator once appointed by the court.⁶⁴ The conservator stands responsible for making decisions on behalf of the elder, substituting his or her judgment for the elder's.⁶⁵ This requires the conservator to understand and approximate the decisions the elder would have made if the elder had the capacity to do so. This appointed individual may be able to base decisions on the elder's pre-incapacity choices, but many decisions, especially those which arise after and because of the elder's incapacity, cannot be accurately made. The further difficulty is that by virtue of being deemed incapacitated, the elder is not capable of making good decisions, and so the appointed conservator makes "better" decisions by default.⁶⁶ As Jennifer L. Wright notes, the concept of "better" decision-making is problematic, as it presupposes that the adult guardian/conservator who approximates an elder's choices or defaults to a decision-making standard objectively improves the elder's well-being.⁶⁷ Studies have shown, however, that in many instances conservatorship decreases an elder's well-being and is associated with a decline in physical and mental health.⁶⁸ The conservatorship process is intended to protect the elder and provide a sense of security and peace of mind to the elder's family members, but it does so at the risk of injury, loss of function, and depression for the elder.⁶⁹ Studies on elder wellbeing after the imposition of a conservatorship indicate that the elder conservatee had frequently been involved in family conflict prior to conservatorship, which worsened when the elder developed a cognitive impairment.⁷⁰ The cognitive impairment⁷¹ makes the elder dependent on others, a circumstance which can spur sibling rivalry and cause the elder's relationships with one or more family members, including children, to suffer.⁷² Studies also show that an elder conservatee, particularly one who is the product of family conflict, feels regret, loneliness, and isolation.⁷³

These various concerns surrounding guardianship and conservatorship proceedings inspired a push to reform adult guardianship law. As early as the 1980s, groups such as The Center for Social Gerontology and the American Bar Association ("ABA") Commission on Law and Aging sponsored conferences on guardianship law to discuss the applicability of ADR processes to address problems common to the aging population. The Wingspread and the Wingspan National Guardianship Conferences, held in

⁶⁴ See, e.g., Wilber et al., *supra* note 41, at 226–27; Erica Wood, *Recharging Adult Guardianship Reform: Six Current Paths Forward*, 1 J. AGING, LONGEVITY, L., & POL'Y 8, 11 (2016) [hereinafter Wood, *Recharging*]; Wright, *Guardianship*, *supra* note 38, at 354.

⁶⁵ Wilber et al., *supra* note 41, at 225, 235; Wright, *Guardianship*, *supra* note 38, at 354.

⁶⁶ Wright, *Guardianship*, *supra* note 38, at 354.

⁶⁷ *Id.*

⁶⁸ *Id.*; Wright, *Making Mediation Work*, *supra* note 6, at 95.

⁶⁹ Wilber et al., *supra* note 41, at 237–38; Wright, *Guardianship*, *supra* note 38, at 354; Wright, *Making Mediation Work*, *supra* note 6, at 95.

⁷⁰ Carmelle Peisah et al., *Family Conflict in Dementia: Prodigal Sons and Black Sheep*, 21 INT'L J. GERIATRIC PSYCHIATRY 485, 488 (2006).

⁷¹ "Cognitive impairment" in the context of the studies referenced in this paper refers to mental conditions which affect capacity, including all stages of dementia and Alzheimer's disease.

⁷² Peisah et al., *supra* note 70, at 489; Wright, *Guardianship*, *supra* note 38, at 360.

⁷³ Wilber et al., *supra* note 41, at 233.

1988 and 2001 respectively, made recommendations on accountability of guardians and training for guardians and judges, as well as reinforced the compelling need for stronger court oversight.⁷⁴ Adult guardianship/conservatorship reform emphasizes the need for increased oversight, particularly to curtail instances of elder abuse and guardians'/conservators' misuse of authority.⁷⁵ Numerous conferences have been held since then to discuss guardianship reform in light of the prevailing concerns.⁷⁶

Among the issues at the forefront of the discussions is the need for data on conservatorship proceedings in the U.S. While a substantial amount of data exists on family court proceedings, including statistics on high conflict,⁷⁷ there is a dearth of comparable data for probate cases. Very few states report complete data on adult guardianships and conservatorships.⁷⁸ California does not report conservatorship as a distinct case type but rather includes it under the umbrella of probate, which makes it difficult to obtain an accurate count of the number of conservatorships.⁷⁹ The lack of reliable data is a problem that scholars have noted must be rectified, given the aging in America and the increase in adult guardianships/ conservatorships.⁸⁰

Family conflict is a contributing factor in the decision to seek adult guardianship or conservatorship for an elder, where conflict between family members can serve as the trigger for the filing of a petition with the probate court.⁸¹ Existing research indicates the prevalence of interfamily conflict as elders require more care and provides a basis for understanding intractable family dynamics in adult guardianship/conservatorship proceedings.

B. FAMILY CONFLICT IN ELDERCARE

Family conflict has been the subject of studies and research in the field of eldercare for many years.⁸² Family conflict is embedded in family systems, and the incidence of cognitive impairments among older adults tends to precipitate conflict or escalate disagreements between family members into disputes. When adult children and other family members are faced with an aging parent's mental and/or physical decline, different opinions about how to provide care and make decisions for the parent can easily erupt into bitter disputes. A family's historical relationship patterns influence how family members approach one another as an elder parent's health status declines. Old disputes and instances of prior conflict rise to the surface when an elder

⁷⁴ Wood, *Recharging*, *supra* note 64, at 25, 47.

⁷⁵ *Id.*; Judge David Hardy, Certified Elder Law Attorney, *Who Is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring*, NAELA J. 1, 11 (2008).

⁷⁶ For a summary of the movement toward guardianship reform, see generally Wood, *Recharging*, *supra* note 64.

⁷⁷ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 6. n.23 (citing Ron Neff & Kat Cooper, *Progress and Parent Education: Parental Conflict Resolution*, 42 FAM. CT. REV. 99 (2004)).

⁷⁸ Uekert & Schauffler, *supra* note 42, at 203.

⁷⁹ *Id.*

⁸⁰ *Id.* at 201.

⁸¹ See, e.g., Rebecca C. Morgan, *Family Matters in an Elder Law Practice*, 29 J. AM. ACAD. MATRIM. L. 109, 117–25 (2016).

⁸² Morton A. Lieberman & Lawrence Fisher, *The Effects of Family Conflict Resolution and Decision Making on the Provision of Help for an Elder with Alzheimer's Disease*, 39 GERONTOLOGIST 159, 160 (1999) (citations omitted) ("Overall, the central focus of family research in caregiving for frail elders has centered on family conflict.").

needs care, as the decisions that must be made may contribute to additional stress and discord.⁸³

Much scholarship focuses on the impact of an elder's decline in health on family relationships.⁸⁴ In a 2006 Australian study, the first of its kind to examine "the nature of involvement of the person with dementia in family conflict," Peisah et al. determined that cases of dementia are associated with family conflict, particularly between siblings.⁸⁵ A U.S. study, also published in 2006, examined conflict in the care of elders at the end of life and found that the decline in an elder's health or functioning underlay family conflict, leading to family anger and distrust and contributing to delayed care planning, reduced quality of care for the elder, and increased distress or tension.⁸⁶ Family conflict may arise in managing the decisions, both personal and legal, that a family requires when dealing with an elder family member. Where families lack a support system and interpersonal conflict is not well-managed, there is greater risk that the elder's basic care needs will be delayed. Elder law attorneys must be prepared to handle family dynamics of conflict, inquiring into those dynamics and anticipating points of contention in order to best serve families in the care of an elder.⁸⁷ Attorneys can better support families in meeting an elder's needs by understanding the conflict dynamics that can occur, sorting out non-legal issues from legal issues, and therefore keeping the legal process moving forward with more efficiency.⁸⁸ The relevant phases of eldercare to elder law attorneys include: family transitions as an elder develops a cognitive impairment; sibling conflict surrounding eldercare; and family conflict in relation to conservatorship petitions and proceedings.

1. Family Transitions in Eldercare

The aging of a family member is a period of transition for both the aging adult and the immediate family. As an aging adult transitions into his or her later years, he or she may confront health concerns and changes in mental and physical capacity. For many aging adults, the transition into life as an elder comes with some degree of cognitive impairment, ranging from occasional forgetfulness to a diagnosis of Alzheimer's Disease. The aging adult often approaches this transition in his or her life with a sense of precarity, not knowing the effect of the cognitive impairment on his or her future.⁸⁹ Changes in mental ability and increased difficulties in thinking can cause the elder to feel shame and distress. The elder may be aware of the cognitive impairment, and experience anxiety, panicking, and anger along

⁸³ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 2; B.J. Kramer et al., *Family Conflict at the End of Life: Lessons Learned in a Model Program for Vulnerable Older*

Adults, 9 J. PALLIATIVE MED. 791, 795 (2006); Peisah et al., *supra* note 70, at 490.

⁸⁴ Lieberman & Fisher, *supra* note 82, at 160.

⁸⁵ Peisah et al., *supra* note 70, at 485.

⁸⁶ Kramer et al., *supra* note 83, at 797.

⁸⁷ Morgan, *supra* note 81, at 117 ("The attorney must go beyond the recognition of the family and inquire into the family dynamics, because these dynamics, whether good, bad, or really bad, will come into play.").

⁸⁸ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 13.

⁸⁹ Elena Portacolone et al., *The Precarity of Older Adults Living Alone with Cognitive Impairment*, 58 GERONTOLOGIST 271, 274–75 (2018).

with a sense of growing uncertainty about his or her life.⁹⁰ Alternatively, the elder may seek to compensate for the cognitive impairment and attempt to conceal it.⁹¹ While working to cover up embarrassment about the impairment and assert independence, the elder simultaneously struggles with managing on his or her own without access to appropriate services.⁹² This is a difficult time for the elder. Understanding and support from family members is important for the elder's wellbeing during this time but might fall short when the elder attempts to conceal the cognitive impairment out of embarrassment and a desire not to burden the family.

For family members, the transition is also fraught with difficulty and uncertainty as they recognize changes in the elder's behavior. A family's response to an elder who has a diagnosed cognitive impairment ranges from an impending sense of responsibility to care for the elder to a sense of fear and loss. Family members want to provide care for an ailing elder but the extent of care can become burdensome, especially when family members lack outside support in negotiating care within the family.⁹³ In providing care, family members may need to redefine family dynamics in order to accommodate the elder while striving to maintain family balance. Even when responsibilities are assigned, families may struggle to define the parameters of care, which can lead one family member to appropriate decision-making power.⁹⁴ This family member assumes an understanding of the elder's preferences, but the elder and other family members tend to have different goals and perceptions of what the elder needs.⁹⁵ Conflict ensues from lack of communication and consensus among family members. As the following quote from Kramer's study on family conflict at the end of life demonstrates, negative family relationship patterns that fester over the years manifest when families disagree over care for an elder: "They build up bitterness over time because they've had arguments in the past . . . and they just don't want to let things go . . . don't communicate with each other . . . things begin to build as grudges that last for years."⁹⁶

Families may employ an outside caregiver to relieve some of the burden, but frequently a family member is the primary caregiver. Family dynamics of support where caregiving is a unifying force can improve family relationships during this time of transition for the family and the elder.⁹⁷ For many families, however, the assumption of care by a family member leads to constant disagreements that exacerbate caregiver strain and negatively impact the caregiver's health.⁹⁸

Family members who are dealing with interpersonal conflict may be unable to communicate effectively, inhibiting their ability to coordinate care for the elder. As a result, the implementation of a care plan is delayed, the

⁹⁰ *Id.* at 275.

⁹¹ *Id.*

⁹² *Id.* at 276.

⁹³ Nuria Esandi et al., *Keeping Things in Balance: Family Experiences of Living with Alzheimer's Disease*, 58 *GERONTOLOGIST* 56, 64 (2018).

⁹⁴ *Id.* at 63.

⁹⁵ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 3.

⁹⁶ Kramer et al., *supra* note 83, at 795.

⁹⁷ Esandi et al., *supra* note 93, at 63; Morgan, *supra* note 81, at 110.

⁹⁸ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 4.

elder's wellbeing is jeopardized, and tension within the family increases.⁹⁹ One major consequence of conflict is that the elder's care takes a back seat as family members become embroiled in personal issues that, in some instances, lead to threats of litigating those issues in court. The problem herein is that the court system functions to render legal decisions and is ill-equipped to manage interpersonal conflict amongst family members.¹⁰⁰

Dr. M. Gregg Bloche, professor of law at Georgetown University, opines that end-of-life care begins with clinical caregivers anticipating and managing interpersonal conflict.¹⁰¹ "When these cases blow up," Bloche stated in an interview on managing conflict at the end of life, "it's because there's family conflict that hasn't been well-managed. . . . [W]hat we need to do is think of this as a shared process of working things out."¹⁰² I would contend that managing family conflict and initiating the "shared process of working things out" rests on the shoulders of the attorney retained to handle an elder dispute. The attorney, in conjunction with third parties such as clinical caregivers, is in a good position to inquire into family dynamics, identify interpersonal conflict which may disrupt the legal process, and refer the client(s) to resources to resolve the conflict. This is an important aspect of the attorney's role and is needed for cases in which family conflict disrupts the provision of care for an elder.

2. Family Dynamics and Sibling Conflict

While the family as a unit may struggle with care decisions, the incidence of conflict is most pronounced when siblings are called upon to care for an aging parent. When parents become increasingly dependent on their offspring it signals to the children to step into the shoes of a caregiver under the expectation that parent care responsibilities will be shared equally.¹⁰³ Studies on sibling relationships in caregiving, however, indicate that responsibilities are not shared and that the siblings' transition from child to caregiver is anything but harmonious.¹⁰⁴ As with other family status transitions, the shift from child to caregiver is a time of stress where siblings are vulnerable to criticism, high demands, and unsolicited or unhelpful advice.¹⁰⁵ During this time, emotional support is an important buffer from stressors and thus a ripe opportunity for siblings to strengthen their relationship and form a closer familial bond.

Unfortunately, the opposite can occur during parental caregiving. Sibling support is often expected and appreciated, but tensions among siblings tend to overshadow and undermine any emotional support offered.¹⁰⁶ Siblings may approach the caregiver role with good intentions of dividing parent care responsibility in as seamless a manner as possible, but existing behavioral

⁹⁹ Kramer et al., *supra* note 83, at 797.

¹⁰⁰ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 6.

¹⁰¹ M. Gregg Bloche, *Managing Conflict at the End of Life*, N. Eng. J. Med. (2005), <https://www.nejm.org/doi/full/10.1056/NEJMp058104>.

¹⁰² *Id.*

¹⁰³ Lashewicz & Keating, *supra* note 3, at 128.

¹⁰⁴ J. Jill Sutor et al., *Caregiving, Perceptions of Maternal Favoritism, and Tension Among Siblings*, 54 GERONTOLOGIST 580, 581 (2014).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

patterns and parent-child relationships can dash these intentions. Many researchers, including J. Jill Sutor, Lashewicz, and Keating, have conducted studies which determine that an elder parent's incapacity serves as the hotbed for long-standing sibling feuds.¹⁰⁷ Siblings fall into old patterns of conflict when they engage in decision-making for the parent. The questions of "who will be mom's guardian, where will she live, who will visit her, how will her funds be protected, and how will the funds be spent"¹⁰⁸ initiate rivalry as siblings vie for decision-making authority. Old disputes surrounding parental favoritism reactivate when an elder parent indicates, unconsciously or directly, that one child is the favorite in the family and the other siblings perceive that child as receiving preferential treatment.¹⁰⁹ Even though the siblings are now adults and have presumably outgrown such juvenile spats, research indicates that parental favoritism, however imperceptible, does have a strong impact on sibling relations and leads to the parent's preference for that child to serve as caregiver.¹¹⁰ These dynamics aggravate sibling relationships. Conflict narratives are a constant refrain in these families' lives, where siblings remain stuck in the groove left by perceptions of parental favoritism and are unable to move forward and outside of conflict.

The dynamics of favoritism thus factor into the siblings' decision-making process and make it that much more difficult to coordinate the elder parent's care. The primary caregiver's role becomes more stressful and demanding when sibling conflict worsens and the support system within the family withers. In situations where sibling conflict is not managed but instead festers, siblings may resort to aggressive tactics to assert control over the elder. A sibling may isolate or neglect the elder, misuse finances, or abuse advanced healthcare directives and powers of attorney. "Dominating siblings" may act to control the amount and type of contact between their parent and siblings by separating the parent from other siblings.¹¹¹ One sibling may also prevent other siblings from participating in decision-making by making all decisions unilaterally and excluding other siblings from conversations about parent care.¹¹² All of this destructive behavior has serious ramifications on an incapacitated elder's quality of care. When siblings cannot make care decisions on account of interpersonal conflict, they may resort to the court to make these decisions for them in the form of a petition for conservatorship.

3. Family Conflict and Conservatorship

The sibling conflict described above may lead one sibling to initiate litigation by filing a petition for adult guardianship/conservatorship.¹¹³ This occurs when high-conflict family dynamics become aggravated to the point that family members seek to use the court as the ultimate decision-making authority and thus settle the dispute over which sibling will be the caregiver

¹⁰⁷ See, e.g., *id.* at 581; Lashewicz & Keating, *supra* note 3, at 134; Wood, *Recharging*, *supra* note 64, at 33.

¹⁰⁸ Wood, *Recharging*, *supra* note 64, at 33.

¹⁰⁹ Morgan, *supra* note 81, at 113–15; Sutor et al., *supra* note 104, at 582.

¹¹⁰ Morgan, *supra* note 81, at 115; Sutor et al., *supra* note 104, at 586.

¹¹¹ Lashewicz & Keating, *supra* note 3, at 132–33.

¹¹² *Id.*

¹¹³ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 4; Morgan, *supra* note 81, at 122.

once and for all. Furthermore, in some cases, the elder is involved in the conflict and allies with certain parties to the conflict.¹¹⁴ The proceedings give the family members an opportunity to vent and air grievances, which does not reduce conflict but rather exacerbates it as the family members argue for their own agendas and lose sight of how this affects the elder.¹¹⁵ Old sibling rivalries, perhaps echoing the damaging effects of parental favoritism, find their way into the proceedings as adult children argue over who is best-suited to assume responsibility for the elder.¹¹⁶ A child's desire to feel appreciated and respected in the family may motivate him or her to exaggerate or embellish the truth in order to "win" and thus prove his or her worth to the family. These dynamics in the courtroom are destructive. They not only hinder the legal proceedings but also delay and impede the elder's care and tarnish family relationships.

As noted, courts are not equipped to settle deeply embedded feuds between family members. The adversarial process is confined to legal determinations and a presiding judge lacks the time and resources to settle these conflicts.¹¹⁷ To address the family conflicts present in elder disputes, elder mediation has developed as an ADR option "to give disputing parties in an elder's case an opportunity to work out differences and explore options to avoid a court judgment and restrictions of the elder's rights."¹¹⁸

IV. ADR IN ELDER LAW

A. ELDER MEDIATION

Mediation has developed as a preferred method for resolving conservatorship disputes, and the specific field of elder mediation blossomed from the discussions and research of scholars and practitioners. Through the efforts of these groups in raising awareness of elder law issues, mediators increasingly sought to focus their practice around aging issues, and several state court systems developed pilot projects.¹¹⁹ Elder mediation is the mediation of issues regarding a person's life situation where the issues arise due to the person's actual or perceived diminished mental and/or physical capacity.¹²⁰ The ACR defines elder mediation in its Elder Section as "all mediation in which participants address issues that occur as a result of life cycle events, transitions, and/or losses often associated with aging and

¹¹⁴ Peisah et al., *supra* note 70, at 488 ("person with dementia was frequently involved in the conflict and had formed alliances with certain parties to the conflict while holding hostile or antagonistic beliefs about other parties"); Sutor et al., *supra* note 104, at 581 ("studies have revealed a pattern of higher tension and lower closeness among siblings when they perceived that their parents felt more emotional closeness for some siblings than others").

¹¹⁵ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 7.

¹¹⁶ Morgan, *supra* note 81, at 117, n.29 (citing P. MARK ACCETTURA, BLOOD & MONEY: WHY FAMILIES FIGHT OVER INHERITANCE AND WHAT TO DO ABOUT IT 24–26 (2011) ("The illness or death of a parent breathes new life into old and perhaps dormant rivalries. Resentments over past inequities or transgressions are rekindled as siblings jockey to determine who will be in charge of aging parents and who will inherit prized possessions.")).

¹¹⁷ *Id.* at 119 (citing *Estate of Schooler v. Schooler*, No. D062877, 2014 WL 5305910, at *1 (Cal. Ct. App. Oct. 17, 2014) ("[the family is] totally dysfunctional and unable to cooperate, and it appears that every act by one side appears to be opposed by the other")).

¹¹⁸ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 5.

¹¹⁹ Wood, *Dispute Resolution*, *supra* note 7, at 75.

¹²⁰ Wright, *Making Mediation Work*, *supra* note 6, at 102.

dying.”¹²¹ The Michigan-based Center for Social Gerontology led the way in the use of elder mediation in resolving adult guardianship and caregiver disputes.¹²² In 2007, Temple University School of Law held a national symposium on ethical issues in elder mediation which raised further awareness of the use of mediation to resolve elder disputes.¹²³ The ACR formed its Elder Section in 2009, and the field of elder mediation has subsequently been more widely used to resolve the broad range of disputes involving elders.¹²⁴

1. Benefits of Elder Mediation

There are numerous advantages to using elder mediation as an ADR option for conservatorship disputes involving family conflict. Proponents of elder mediation highlight its effectiveness in dealing with and managing the complex emotions that trigger conservatorship disputes. Mary F. Radford, professor and elder law scholar, notes that “emotions such as fear, jealousy and greed may underlie the legal dynamic” and that “[a] dispute over who should serve as [conservator] may reflect deeply entrenched emotional issues.”¹²⁵ Elder mediation is effective in handling these emotions because, unlike the forum for conservatorship proceedings, the mediation forum offers the opportunity for the elder and other concerned parties to come to a mutual understanding of each person's values and concerns.¹²⁶ Mediation preserves the voice and participation of the elder as the focus is on enabling the voice of the elder to be fully heard and respected rather than to discuss and determine the elder's incapacity.¹²⁷ This addresses the concern about due process in conservatorship proceedings: where an elder's voice and rights may not be fully recognized during conservatorship proceedings, the goal of elder mediation is to include the elder's voice to the greatest extent possible.¹²⁸

Mediation provides a constructive and secure environment that encourages the participation of all parties to discuss issues pertaining to the elder's care, including issues arising in the context of a conservatorship petition.¹²⁹ As conservatorship proceedings commence, family members may believe their only recourse is to place their elder family member under conservatorship. The goal of elder mediation is to provide families access to resources that are not available in court, where the mediator has knowledge of these resources to serve the needs of elders within the relevant

¹²¹ ASS'N FOR CONFLICT RESOLUTION SECTION ON ELDER DECISION-MAKING & CONFLICT RESOLUTION COMM. ON TRAINING STANDARDS, ELDER CARE AND ELDER FAMILY DECISION-MAKING MEDIATION: TRAINING OBJECTIVES AND COMMENTARY 1 (July 30, 2012), http://acrelrsection.weebly.com/uploads/3/0/1/0/30102619/eldercareobjectives_7_30_2012.pdf.

¹²² Wood, *Dispute Resolution*, *supra* note 7, at 75.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 PEPP. DISP. RESOL. L. J. 241, 243 (2001).

¹²⁶ *Id.*; Wright, *Making Mediation Work*, *supra* note 6, at 109.

¹²⁷ Wright, *Making Mediation Work*, *supra* note 6, at 107.

¹²⁸ ASS'N FOR CONFLICT RESOLUTION SECTION ON ELDER DECISION-MAKING & CONFLICT RESOLUTION COMM. ON TRAINING STANDARDS, *supra* note 121, at 11, II-2 (“[Adult Guardianship Mediation] training should stress the importance of protecting and enhancing self-determination of the vulnerable adult to participate in mediation to the maximum extent possible and practical.”).

¹²⁹ Wright, *Making Mediation Work*, *supra* note 6, at 109.

community.¹³⁰ In encouraging this type of communication, the facilitative approach of elder mediation helps to preserve family relationships and build connections to community resources of which families may otherwise be unaware.¹³¹ Erica Wood, Assistant Director of the ABA Commission on Law and Aging, notes that once families have the opportunity to discuss elder care in mediation and are informed of community resources, “the resulting solutions can be more creative and better tailored to individual needs than a court proceeding, and parties are likely to adhere better to solutions they have designed themselves.”¹³² Another noted benefit of elder mediation is efficiency and reduction in cost as compared to litigation.¹³³ Conservatorship proceedings can be costly in terms of time and money. Mediation, especially if initiated early on, can curtail costs and potentially resolve disputes more efficiently than conservatorship proceedings.

These benefits to mediation make it a viable and important ADR option for disputes involving families and elders, and thus it is an appropriate intervention in the majority of cases. Mediation can be effective in managing family conflicts—even those involving interpersonal sibling feuds and patterns of blame—by strengthening family bonds.¹³⁴ An elder mediator can oftentimes intervene early on in the dispute to address non-legal issues and prevent interpersonal conflict from manifesting in the courtroom.¹³⁵ However, there are situations where the mediator may be limited in his or her ability to address the high-conflict dynamics that can arise in an elder dispute.

2. Limitations of Elder Mediation

Cases involving high-conflict family dynamics often include one or more conditions indicating that mediation is not an appropriate method to resolve the dispute and, if utilized, may further exacerbate conflict and result in impasse. For example, some cases may involve an imbalance of power if the elder is unrepresented or is not appointed counsel. This can create the risk of an “uneven table,” resulting in rights being bargained away without understanding or an agreement being reached that satisfies some parties’ goals but does not align with the needs and preferences of the elder.¹³⁶ The elder mediator can implement measures to remedy this issue and ensure that the elder’s voice is heard; however, without remedying measures in place, it may not be appropriate for the mediation to go forward.¹³⁷ A party who is

¹³⁰ *Id.* at 112; ASS’N FOR CONFLICT RESOLUTION SECTION ON ELDER DECISION-MAKING & CONFLICT RESOLUTION COMM. ON TRAINING STANDARDS, *supra* note 121, at 12, II-1 (commenting on the role of the mediator in “assuring that participants have access to necessary information about guardianship and alternatives in order to make informed decisions and to exercise self-determination. This information should include ways to access resources that are not available in court”).

¹³¹ Radford, *supra* note 125, at 244; Wood, *Recharging*, *supra* note 64, at 34.

¹³² Wood, *Recharging*, *supra* note 64, at 34.

¹³³ Wright, *Making Mediation Work*, *supra* note 6, at 118.

¹³⁴ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 8; Morgan, *supra* note 81, at 141–42.

¹³⁵ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 8; Morgan, *supra* note 81, at 141–42.

¹³⁶ Wood, *Recharging*, *supra* note 64, at 34.

¹³⁷ Erica F. Wood, *Dispute Resolution and Dementia: Seeking Solutions*, 35 GA. L. REV. 785, 820–22 (2001) (stating that, in order to support the autonomy of parties with dementia and counter the power

unwilling or unable to participate also frustrates the intent of mediation and indicates that the mediation may be unproductive. If a contentious family member demonstrates an aversion to engaging in good-faith compromise and the mediation proceeds, that family member may misuse the mediation as a forum to vent, escalate conflict, and restate absolute positions. This setting can negatively impact the elder by making him or her feel unheard or unsafe. The elder may be incapacitated and unable to participate in mediation, which can greatly affect how or whether the mediation proceeds. A core value of mediation is to support the self-determination of the elder to the greatest extent possible, even if the elder exhibits cognitive impairment. The mediator must screen for capacity, however, to determine whether the elder can participate fully and, if not, whether the mediation should proceed. This screening process is complex and nuanced and the mediator should consider various factors when determining whether the mediation should go forward.¹³⁸

Allegations of abuse, neglect, or exploitation further indicate that mediation may not be appropriate.¹³⁹ The elder mediator should understand issues of elder abuse, including how to recognize it and whether to continue or rule out mediation.¹⁴⁰ If a party raises the concern of elder abuse, the mediator must determine how the allegation will affect the mediation going forward. Feelings of threat or duress can affect the parties' ability to speak openly and make decisions, which may indicate that terminating rather than continuing the process is the better course. The mediator will need to rule out or terminate the mediation if he or she determines that the process poses serious safety and fairness concerns in the event of suspected elder abuse. Evidence of abuse is a red flag that the mediator must consider when assessing whether to continue the mediation and may require the mediator to voice concerns to the court and/or the current conservator.¹⁴¹

A further indication that mediation may be ineffective is that parties are engaged in high conflict and are not amenable to reaching a compromise for the best interests of the elder family member. Under these conditions, mediation can be unproductive and may be unable to provide the time and resources to address underlying conflicts that interfere with an elder's care. The mediation process occurs within a concrete period of time rather than on a long-term basis; for high conflict dynamics, a concrete period of time is

imbalance, "the mediator could be sensitive to the power differential in managing the process" by including support persons or advocates, as well as varied communication techniques).

¹³⁸ See Am. with Disabilities Act Mediation Standards Work Grp., *ADA Mediation Guidelines*, MEDIATE.COM (Feb. 16, 2000), <https://www.mediate.com/articles/adaltr.cfm> ("If, despite support, a party lacks capacity to participate in the mediation, mediation should not proceed unless a surrogate participates . . . to represent the interests of the party . . .").

[Elder mediation] training should include how to screen for capacity to mediate issues . . . [with] a presumption that the older person will participate, to the extent possible . . . Assuring that an older person has the opportunity to make his or her wishes known and considered, either through direct participation in the process or through other means can be crucial to the integrity of the mediation process, especially in situations where decisions made in mediation will have a direct impact on the older person. ASS'N FOR CONFLICT RESOLUTION SECTION ON ELDER DECISION-MAKING & CONFLICT RESOLUTION COMM. ON TRAINING STANDARDS, *supra* note 121, at 4, I-5.

¹³⁹ Catherine A. Seal & Michael A. Kirtland, *Using Mediation in Guardianship Litigation*, 39 COLO. LAW. 37, 43 (2010); Wood, *Recharging*, *supra* note 64, at 34.

¹⁴⁰ ASS'N FOR CONFLICT RESOLUTION SECTION ON ELDER DECISION-MAKING & CONFLICT RESOLUTION COMM. ON TRAINING STANDARDS, *supra* note 121, at 5, I-7.

¹⁴¹ *Id.* at 4, I-5; Seal & Kirtland, *supra* note 139, at 43; Wood, *Recharging*, *supra* note 64, at 36.

sometimes insufficient to help parties manage conflict and implement a plan to care for an elder. Therefore, parties who demonstrate high conflict tendencies—such as sibling splitting, exploitation of the elder, and chronic disputes—may not be best served in the limited context of mediation.¹⁴²

In high conflict situations, mediation is more likely to reach impasse and further delay the provision of care to an elder. In these situations, families may require a different dispute resolution process that goes beyond what elder mediation can provide.

B. COMPARING ELDER MEDIATION AND ELDERCARING COORDINATION

Eldercaring coordination is the missing link between elder mediation and the court, and serves to manage family conflict, facilitate productive communication, and help implement an elder care plan. As described in Part I, eldercaring coordination was developed as a collaborative effort to reduce high-conflict family dynamics and court involvement in disputes involving the care and needs of elders. In conservatorship/probate cases where conflict narratives amongst family members overshadow elder caregiving, limit adherence to court orders, impede court processes, and detract from the efficacy of conservatorship, eldercaring coordination is a remedy that, when applied, focuses on addressing underlying conflict and improving relationship dynamics so that the elder, family, and others can make well-informed decisions.¹⁴³ The processes of elder mediation and eldercaring coordination both aim to help families make informed decisions, but these two processes differ in their approach to managing high-conflict family dynamics.

The eldercaring coordination process involves eldercaring coordinators (“ECs”), impartial third persons who assist the parties in a high-conflict dispute to resolve their non-legal issues. An EC is appointed by the court for a term of up to two years to assist a family in making decisions related to an elder’s care.¹⁴⁴ ECs must complete training and meet specific qualifications to ensure adequate knowledge and experience to effectively assist families in decision-making under high-conflict conditions. The work of ECs complements and enhances elder mediation to help families work more productively in resolving high-conflict disputes, as the EC often steps in to assist families after mediation to address subsequent and reoccurring conflicts.¹⁴⁵ Family conflict may result in a mediation impasse when family members are enmeshed in chronic disputes that take the focus away from the elder and detract from the goal of resolving the dispute. An EC can be an effective intervention when mediation fails because of intractable family

¹⁴² ASS’N FOR CONFLICT RESOLUTION SECTION ON ELDER DECISION-MAKING & CONFLICT RESOLUTION COMM. ON TRAINING STANDARDS, *supra* note 121, at 4, 1-5; LINDA FIELDSTONE ET AL., ELDERCARING COORDINATION FREQUENTLY ASKED QUESTIONS: TOPICS, QUESTIONS & OPTIONS REGARDING ELDERCARING COORDINATION (Mar. 29, 2017), https://www.eldercaringcoordinationfl.org/uploads/7/7/2/6/77265035/faqs_5-29-17_public_.pdf; Seal & Kirtland, *supra* note 139, at 43; Wood, *Recharging*, *supra* note 64, at 36.

¹⁴³ ASS’N FOR CONFLICT RESOLUTION, *supra* note 31, at 3.

¹⁴⁴ *Id.* at 37; FIELDSTONE ET AL., *supra* note 142, at 7.

¹⁴⁵ ASS’N FOR CONFLICT RESOLUTION, *supra* note 31, at 3; FIELDSTONE ET AL., *supra* note 142.

conflict or when mediation is likely to fail because of high-conflict indicators such as: (1) controlling behavior toward the elder; (2) multiple non-substantive motions to the court; or (3) sibling entrenchment. ECs may use some of the same strategies and interventions that an elder mediator employs to help families work through conflict and are further trained to delve into and address high-conflict dynamics, identify issues of accord and conflict, and assist families with methods of resolving conflicts to make better decisions regarding elder care.¹⁴⁶

In a dispute involving a family's access to an elder parent, for example, an elder mediator can help the family decide on access on one occasion, whereas an EC can address subsequent occasions where family access becomes an issue of contention. Eldercaring coordination effectively addresses these underlying non-legal conflicts because the process is longer in duration than elder mediation. It is within the judge's discretion to vary the duration of the process as necessary; however, a two-year term ensures the availability of an EC to assist the elder and family through difficult decisions and the transitions of the elder, and to address subsequent problems as they arise.¹⁴⁷ The EC can maintain a good working relationship with the elder and family members by serving as a support person as families make decisions and by saving families from unnecessary court hearings.¹⁴⁸ ECs schedule sessions as needed and meetings may be more frequent initially as family conflict interferes with decision-making. Once families develop and implement an elder care plan, sessions will decrease but the EC remains available to address any issues that surface and require attention.

The process of eldercaring coordination, unlike mediation or a court hearing, allows elders and families time to work through high-conflict dynamics and more productively resolve disputes, testing temporary resolutions to make sure they work and reassessing as needed. It allows the EC to fulfill their role and purpose as delineated in the ACR Guidelines.¹⁴⁹ The EC's ability to accomplish the aspects of their role, including providing a support system for the family during eldercare, is critical in bringing resolution to otherwise high-conflict disputes that place a strain on families and contribute to delays in the court system and legal representation.

When high-conflict dynamics are addressed within the setting of eldercaring coordination after mediation fails, families can begin to separate from conflict narratives and focus their energies on the wellbeing of the elder. The resulting benefits include: reduced court time and interventions; greater use of community resources; and earlier attention to the needs of families and elders so that attorneys can more effectively assist clients on legal issues.¹⁵⁰

¹⁴⁶ Linda Fieldstone & Sue Bronson, *Eldercaring Coordination for High-Conflict Cases Involving Elders and Vulnerable Adults*, 12 ACRESOLUTION 22, 23 (2013), <http://www.acresolution-digital.org/acresolutionmag/summer2013?pm=2&pg=22#pg22>.

¹⁴⁷ *Id.*

¹⁴⁸ See generally FIELDSTONE ET AL., *supra* note 142.

¹⁴⁹ ASS'N FOR CONFLICT RESOLUTION, *supra* note 31, at 6.

¹⁵⁰ *Id.* at 5–6. See generally FIELDSTONE ET AL., *supra* note 142.

V. THE NEED FOR ELDERCARING COORDINATION IN CALIFORNIA

The factors that indicate a need to introduce and develop eldercaring coordination as an ADR process in California probate courts have been touched upon throughout this article. The following subsections address how these factors can be applied in California.

A. THE INCREASING AGING POPULATION & IMPACT ON THE COURT

The aging population nationwide is increasing. As previously mentioned, the U.S. Bureau of the Census predicts that the number of people older than sixty-five will more than double between 2000 and 2050.¹⁵¹ The U.S. Department of Health and Human Services' Administration on Aging expects that by 2060, approximately ninety-eight million Americans will be sixty-five or older.¹⁵² These numbers are echoed by the California Department of Aging ("CDA") Population Demographics for 2019, estimating that 8,202,155 California residents will be sixty years old or older.¹⁵³ In Orange County, California, the CDA projects a 100 percent to 150 percent increase in the aging population.¹⁵⁴ This increase correlates to increased care needs and use of community and court services by elders. Research also indicates that the aging population has a significant impact on court services.¹⁵⁵

In 2012, a study was conducted on the impact of the increasing elderly population on court services in Orange County, California.¹⁵⁶ The study sought to determine: the projected increase in caseload relative to the elderly population; whether court programs exist to address the needs of elders; and what court programs Orange County Superior Court ("OCSC") can implement to further meet elders' needs.¹⁵⁷ Information was gathered by compiling and analyzing data from court filing reports and case management systems, and from surveys. The study resulted in several findings. First, data indicated an increase in elder abuse cases and conservatorship filings.¹⁵⁸ This comports with the 2018 data on elder abuse and conservatorship filings in OCSC.¹⁵⁹ Second, OCSC provides services to elders, including physical accommodations and referrals to mediation through Family Court Services,

¹⁵¹ Uekert & Schauffler, *supra* note 42, at 202–03.

¹⁵² Brophy & Nam, *supra* note 43, at 23.

¹⁵³ CAL. DEP'T OF AGING, POPULATION DEMOGRAPHIC PROJECTIONS BY COUNTY AND PSA FOR INTRASTATE FUNDING FORMULA (2018).

¹⁵⁴ Cal. Dep't of Aging, *Facts About California's Elderly*, https://www.aging.ca.gov/Data_and_Reports/Facts_About_California's_Elderly/ (last visited Dec. 5, 2018).

¹⁵⁵ VICKY BRIZUELA, THE AGING POPULATION OF ORANGE COUNTY, CALIFORNIA AND ITS IMPACT ON COURT SERVICES I (Inst. for Ct. Mgmt. ed., 2012).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 7.

¹⁵⁸ *Id.* at 25–27.

¹⁵⁹ ORANGE COUNTY BAR ASS'N, TRUSTS & ESTATES, ELDER LAW & CONSERVATORSHIP, GUARDIANSHIP & PROTECTIVE PROCEEDINGS JOINT SECTION MEETING: 2018 UPDATE FROM THE BENCH (Feb. 14, 2018) (indicating a 14.4 percent increase in conservatorship filings and a 4.7 percent decrease in elder abuse filings).

but there is still a need for a specialized court or process to address elder needs.¹⁶⁰

Some courts have implemented programs that aim to specifically accommodate the elderly. The most progress in California has been made in Alameda County, Contra Costa County, and Ventura County, which implemented elder protection courts to handle all cases related to elder issues.¹⁶¹ Elder protection courts seek to “make the court more accessible to elderly victims of physical, financial, and emotional abuse and to provide a single venue where all of these issues can be resolved expeditiously and compassionately.”¹⁶² The movement to establish courts specifically geared to resolving cases related to elder issues began in 2002 in Alameda County by Judge Julie Conger.¹⁶³ The elder court applied a holistic approach to the legal needs of elders, including the creation of a specialized calendar to hear and process elder abuse cases. The Alameda program demonstrated positive outcomes including: early resolution of matters; greater compliance with orders; and prevention of conflicts between civil elder restraining orders and criminal protective orders.¹⁶⁴ Using the Alameda program as a model, Contra Costa County developed its own elder court in 2008, which operated until 2016 to coordinate services for elders, manage elder abuse cases, and provide appropriate remedies for older victims.¹⁶⁵ Ventura County followed in 2009 by establishing an elder abuse court to handle “financial abuse resulting from theft, fraud and embezzlement, as well as domestic violence, senior-on-senior crimes, and abusive care giving.”¹⁶⁶ These programs demonstrate a collaborative effort that already exists in California to serve the needs of elders and enhance court services, with a positive impact on the court system and on elders.

In light of the benefits of elder courts, the 2012 study recommended that OCSC: identify needed elder services; conduct a review of procedures for handling elder cases and implement training for judges and court personnel in meeting elders’ needs; and evaluate the potential benefits in establishing an Elder Community Court.¹⁶⁷ This study, which is the only one of its kind to address the current impact of the elderly population on California courts, demonstrates that there is a need for a comprehensive response to address the needs of elders and the increase in case filings. While some courts have increased the services they provide to elders, including the implementation of programs such as elder protection courts, there continues to be a need for additional services that preserve court time and resources.

¹⁶⁰ BRIZUELA, *supra* note 155, at 29–34.

¹⁶¹ *Id.* at 38–40; see Patricia Banks et al., *Elder Protection Courts: Judicial Perspective, Holistic Approach*, 24 EXPERIENCE 12, 13–14 (2014).

¹⁶² Banks et al., *supra* note 161, at 12.

¹⁶³ *Id.* at 13.

¹⁶⁴ *Id.* at 13–14.

¹⁶⁵ *Id.* at 14; *Elder Court*, CAL. CTS.: JUD. BRANCH CAL., <http://www.courts.ca.gov/14124.htm> (last visited Dec. 5, 2019).

¹⁶⁶ *Collaborative Justice Court Programs*, SUPERIOR CT. CAL., COUNTY VENTURA, <http://www.ventura.courts.ca.gov/collaborative-programs.html> (last visited Dec. 5, 2019) **Error! Hyperlink reference not valid.** (navigate to “Elder Law Court”).

¹⁶⁷ BRIZUELA, *supra* note 155, at 41–44.

As this study shows, OCSC is an ideal candidate for the implementation of programs to serve the needs of elders and would make great strides in this effort by piloting eldercaring coordination.

B. THE LACK OF AGGREGATE DATA

Apart from the 2012 OCSC study and CDA demographic projections as correlated with case filings, there is a general lack of aggregate data in California on conservatorships and other elder disputes. Most cases involving elders are characterized as “probate” cases and are filed with and heard in the Probate Division.¹⁶⁸ Accordingly, it is difficult to obtain an accurate count of the number of conservatorships filed statewide.¹⁶⁹ As noted in Part II, there is a push for greater oversight of conservatorship proceedings, which is compounded by the lack of data.

C. THE PREVALENCE OF ELDER ABUSE CASES

Incidents of elder abuse in California are beyond the scope of this article, however data indicates that elder abuse cases increase as the elder population increases. Elder abuse cases continue to be filed as separate cases in criminal and family courts, and allegations of elder abuse arise in conservatorship proceedings.¹⁷⁰ At the same time, many elder abuse cases in California are not litigated due to, among other factors, deficient investigations, challenges posed by an elder’s incapacity, and inadequate legal remedies.¹⁷¹ It is often a challenge to identify elder abuse and safety issues, particularly for those without the knowledge and training to identify and report it.

VI. ELDERCARING COORDINATION

A. THE PROCESS OF ELDERCARING COORDINATION

1. Court Order of Referral

Eldercaring coordination begins with a court order of referral. The parties may request that the case be referred to eldercaring coordination through a stipulated agreement or the court can identify a high conflict case on its own. At that point, the Order of Referral to Eldercaring Coordination is entered and processed and an EC is appointed by the court. In conservatorship cases, the presiding judge may refer the parties to eldercaring coordination as a less restrictive alternative to conservatorship. The presiding judge may also refer the parties to eldercaring coordination after a conservator has been appointed, where an EC can work to address conflicts that arise post-conservatorship. These conflicts can encompass the misuse of power by conservators, including financial abuse and

¹⁶⁸ *Id.* at 7; Uekert & Schauffler, *supra* note 42, at 203.

¹⁶⁹ Uekert & Schauffler, *supra* note 42, at 203.

¹⁷⁰ BRIZUELA, *supra* note 155, at 25–27; ORANGE COUNTY BAR ASS’N, *supra* note 159.

¹⁷¹ See generally Daniel L. Madow, *Why Many Meritorious Elder Abuse Cases in California Are Not Litigated*, 47 U.S.F.L. REV. 619 (2013).

mismanagement of elder conservatees' estates.¹⁷² ECs can assist probate courts in regulating conservators once they have been appointed by providing oversight and addressing suspected misuses of power and associated conflicts as they arise. The court directs the parties to contact the appointed EC within ten days of entry of the Order of Referral.

ECs, whether appointed pre-conservatorship or post-conservatorship, are responsible for working with the parties on a regular basis for the time designated on the Order of Referral. Tasks generally include: reporting to the court on a regular basis to inform on the progress of the case; educating parties on the effects of conflict on each other and on the elder; helping parties identify sources of conflict; helping parties better communicate, minimize conflict, and focus on the needs of the elder; contacting proper authorities if abuse or neglect of the elder is suspected; and referring parties to resources that can assist in caring for the elder.¹⁷³ These responsibilities require that the court only appoint those who are qualified to address issues concerning family dynamics in a multiparty context and make decisions on how conflict is resolved for the elder and his or her family. The EC is not an evaluator and does not make decisions for the elder and the family but rather models the decision-making process to support the elder and family in making informed decisions. For example, in addressing a conflict between family members over whether to place the elder in a long-term care facility, the EC will not decide on a facility for the elder but rather will guide family members through different care options and teach conflict resolution skills to help the family members make a supported and informed decision. By supporting the family through the conflict resolution process instead of making decisions on the family's behalf, the EC equips the family with the skills to make better decisions together in the future.

To support families in this way, it is important for ECs to have proper training and qualifications. The ACR Guidelines reflect the requisite qualifications for ECs, which include state licensing or certification by a state regulatory body, training, and practical experience managing high conflict within families.¹⁷⁴ ECs must also be psychologically and cognitively able to perform their role and uphold their responsibility to the elder while maintaining relationships with family members and others involved in the elder's care.¹⁷⁵ The EC is impartial throughout the eldercaring coordination process but maintains the goal of supporting the wellbeing and safety of the elder. In this vein, the EC does not promote or assist the parties in effecting decisions that threaten harm to the elder or otherwise obstruct the process.¹⁷⁶

2. Impact on the Court

The EC serves as a resource to the court and others involved, such as the elder mediator, the attorney, and the therapist, because the EC's primary focus is reducing and managing family conflict on a consistent basis until the

¹⁷² Robin Fields et al., *When a Family Matter Turns Into a Business*, L.A. TIMES, (Nov. 13, 2005), <http://www.latimes.com/local/la-me-serve13nov13-story.html> (discussing findings of a study conducted on 2400 conservatorships in Southern California between 1997–2003).

¹⁷³ Fieldstone & Bronson, *Friction to Fireworks*, *supra* note 10, at 32–33.

¹⁷⁴ ASS'N FOR CONFLICT RESOLUTION, *supra* note 31, at 7.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 7–13.

family is able to make supported, issue-focused decisions (rather than conflict-focused decisions) and channel energies into supporting the elder.¹⁷⁷ When interpersonal dynamics are addressed through the eldercaring coordination process, the family and stakeholders are better able to then work with an elder mediator, a geriatric care manager, financial experts, a conservator, an elder law attorney, and physicians.¹⁷⁸ The EC helps families navigate the difficult transitions of eldercare and prevent conflicts from interfering with other processes, such as mediation and court proceedings. Thus, the EC is a resource for the legal system, allowing attorneys and the court to focus on legal issues without the interference of family conflict.

As of 2019, eldercaring coordination is in the pilot stage. The ACR Task Force on Eldercaring Coordination includes a Pilot Project to assess the effectiveness of the process through pre-surveys and post-surveys that are intended to measure benchmarks related to the reduction in probate court hearings and the increased use of community resources.¹⁷⁹ A pilot site for Eldercaring Coordination consists of “a judge or magistrate [who will] refer at least six cases to eldercaring coordination, or a group of attorneys [who will] commit to referrals to eldercaring coordination through agreed orders.”¹⁸⁰ Pilot sites are easily initiated and significant support is given to the pilot site and ECs through training and implementation of eldercaring coordination.¹⁸¹ As of July 2018, six states have participated in Pilot Projects: Florida, Indiana, Idaho, Ohio, Maryland, and Minnesota. Ohio launched the program in 2016 in Stark County through a \$200 thousand grant from the Department of Justice and has since generated greater awareness of ADR in the area of probate disputes and highlighted the benefits of using eldercaring coordination.¹⁸² Initial research on the process indicates that ECs assist participants in respecting the elder’s voice, the process reduces conflict and litigation, fewer cases require adult guardian designations, and parties participating in the process seek to reduce conflict, ensure the elder’s safety, and improve decision-making.¹⁸³ A study conducted at Virginia Tech to generate information regarding outcomes and progress continues this research. Several benefits already noted at pilot sites include reduced court time, safety issues for the elder addressed, and increased collaboration and informed out-of-court decision-making.¹⁸⁴ Further research is expected to demonstrate a benefit to the court system and to attorneys representing clients in an elder dispute. As Judge Michelle Morley, of Florida’s Fifth Judicial Circuit and co-chair of the Florida Chapter of the AFCC on Eldercaring Coordination, describes:

When the court's calendar is being dominated by lengthy, antagonistic hearings over matters that aren't guided by the law, e.g., whether an

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 31.

¹⁸⁰ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 10.

¹⁸¹ *Id.* at 11.

¹⁸² Marion Online News, *Marion Judge Trained in Eldercaring Coordination*, MARION ONLINE (Feb. 14, 2018), <https://www.mariononline.com/news/2018/02/marion-judge-trained-eldercaring-coordination/>.

¹⁸³ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 11.

¹⁸⁴ *Id.* at 12.

elder should be cared for at home or placed in a care facility, whether certain family members should be allowed to visit the elder, etc., . . . eldercaring coordination can be the silver bullet the court is looking for as an effective and long-term alternative.¹⁸⁵

Judge Morley further notes that eldercaring coordination can assist attorneys in managing high-conflict clients who present non-legal interpersonal issues:

Eldercaring coordination is an excellent opportunity for lawyers to assist their clients in obtaining the relief that they seek. Once they sort out the non-legal issues from the legal issues, lawyers can turn their own attention to the legal issues and encourage their clients to address their non-legal issues through eldercaring coordination. The emotional and personal grievances that clients harbor are often exacerbated in the courtroom. . . . Eldercaring coordination. . . will enable clients to let go of those grievances and focus on the needs and welfare of their elder loved one instead. The lawyers can then more effectively assist clients unencumbered by emotional drama.¹⁸⁶

Eldercaring coordination aims to provide the support that families in conflict need while working through a conservatorship dispute. ECs' training and specialization goes above and beyond what is required of mediators, and ECs partner with the mediator, the attorneys, and other professionals in working with families to resolve a dispute. This suggests that eldercaring coordination will be a viable option for resolving conservatorship disputes in California outside of the courtroom in the event that mediation fails.

3. Data Collection

The introduction of a pilot project in California courts, where data is collected and assessed to implement improvements, will provide the data on conservatorships and elder cases and the oversight of the California conservatorship system that has been lacking. The Eldercaring Coordination Pilot Project includes assessment tools to gauge the success of the program and its effect on the probate court. Implementing a pilot project in California courts will provide an opportunity to not only evaluate the efficacy of eldercaring coordination as an ADR process but also provide a level of oversight in conservatorship proceedings and contribute to data collection.

4. Identification and Reduction of Risk to Elders

Eldercaring coordination offers assistance in the way of identifying and reporting allegations of abuse, neglect, exploitation, and safety concerns. ECs are trained to screen for elder abuse, neglect, exploitation, and family violence, and to follow appropriate reporting procedures and courses of action when safety parameters are needed.¹⁸⁷ Research on ECs in current

¹⁸⁵ Karen Campbell, *Dispute Resolution Tactics Emerge to Aid the Elderly*, 27 EXPERIENCE 2, 13 (2017).

¹⁸⁶ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 13.

¹⁸⁷ Fieldstone et al., *Association for Conflict Resolution*, *supra* note 23, at 557.

pilot sites already indicates that risks are addressed and abuse is reported when appropriate; that safety issues are addressed; and that ECs make appropriate referrals.¹⁸⁸ The duration of eldercaring coordination combined with the ECs' training makes it ripe for identifying and reporting allegations of abuse. An EC who works with a family for a two-year term and builds relationships is well-positioned to identify risks to prevent abuse, neglect, and exploitation, address existing safety concerns, and monitor the elder's safety. This aspect of eldercaring coordination indicates a potential to expand its applicability to elder restraining order cases and trust litigation where risk to elders is a concern. In Orange County, California alone, 548 conservatorship cases were filed in fiscal year 2016–17, representing a 14.4 percent increase from 2015–16, and 485 elder abuse cases were filed in fiscal year 2016–17.¹⁸⁹ The hearing wait time for conservatorship appointment (both general and limited) in Orange County is twenty-one weeks.¹⁹⁰ Current data on eldercaring coordination indicates a significant reduction in time and expense, where issues including safety risks to elders are resolved more quickly without the delays attendant with the court process.¹⁹¹

Eldercaring coordination can provide significant support in conservatorship cases and other elder disputes involving high-conflict family dynamics. Its development as an ADR process demonstrates progress in reducing conflict, increasing court efficiency, and addressing safety concerns for elders, with continued progress expected as the process expands in use.

B. BARRIERS TO IMPLEMENTATION IN CALIFORNIA

Initiating a pilot project for eldercaring coordination in Orange County and other counties throughout California would provide an excellent opportunity to serve the needs of elders and families in high conflict, and further address the needs noted above. As with the introduction of any new court program, barriers may exist that hinder the implementation of eldercaring coordination. Following is a discussion of several of those barriers and suggested solutions.

1. Resistance within the Legal Field

One potential barrier is resistance from the legal community. While ADR is a growing field in California that is gaining in prevalence and acceptance from attorneys, judges, and others, eldercaring coordination presents a new process that many may question. Attorneys are familiar with the court system and interventions such as mediation and may not understand the purpose or need for a different dispute resolution option. Attorneys may also perceive eldercaring coordination as a threat to their role.

Educating the legal community on the purpose and benefits of eldercaring coordination can address this barrier. For many, resistance to the

¹⁸⁸ Fieldstone & Bronson, *Eldercaring Coordination*, *supra* note 1, at 12.

¹⁸⁹ ORANGE COUNTY BAR ASS'N, *supra* note 159.

¹⁹⁰ *Id.*

¹⁹¹ Eldercaring coordination is in the pilot stage and research is being conducted to assess anticipated outcomes on factors including court time, identification and reduction of elder abuse, and increased use of community resources.

idea of a new ADR process stems from lack of understanding about the process and why it may be needed. Education about eldercaring coordination is essential in its development as an ADR option and its acceptance by the legal community. In addition to the publication of additional articles and studies on the effect of eldercaring coordination, efforts should be made to educate the legal community through seminars, trainings, and in-person and online events. Many universities offer seminars to discuss developments in ADR and are the ideal platform to reach a large and diverse number of legal professionals. The ABA has supported eldercaring coordination, providing presentations in its conferences. The Dispute Resolution Section and Senior Lawyers Division¹⁹² have hosted seminars and workshops, and the Commission on Law and Aging has provided educational conferences.¹⁹³ In addition, a plenary session on eldercaring coordination was included in the National College of Probate Judges Spring Conference in 2017 and the National Academy of Elder Law Attorneys Conference in 2016.

2. Rotation of Judges

The rotation or retirement of judges is another potential barrier. Once a judge establishes his or her courtroom as a site for eldercaring coordination, the judge can make great progress in educating other judges in their division and legal community. The judge will become familiar with the process and will be able to gauge its impact on the court as cases continue to be referred to eldercaring coordination. However, once a judge rotates out of the probate court or retires, the process risks losing stamina. A new judge may not be aware of or understand eldercaring coordination. Without knowledge of the process, its procedures, and its benefits, a new judge will be less amenable to adopting it. This barrier can be traversed through efforts to ensure that a new judge is educated on, and understands the process of, implementing eldercaring coordination in the courtroom. Each pilot site is managed by a pilot site administrator who communicates with judges and ECs and serves as a liaison among families referred to eldercaring coordination, the appointed EC, and the court. Consistent communication between the pilot site administrator and the implementing judges is imperative in ensuring the success of the pilot site and its smooth transition to a new judge. The pilot site administrator can coordinate meetings to introduce and inform the new judge about eldercaring coordination, including connecting the new judge with existing ECs. Education and guidance will help preserve the process despite the rotation or retirement of implementing judges.

3. Fees and Affordability

Fees and affordability in terms of the cost of implementing eldercaring coordination to the court, as well as the cost of ECs, may be a deterrent. Courts may be willing to spend the time needed to implement eldercaring coordination but will be dissuaded from doing so if there is an associated cost. The cost to families in using an EC also raises a concern, as there may

¹⁹² For example, the ABA Senior Lawyers Division's Spring 2017 Meeting included a presentation on eldercaring coordination.

¹⁹³ The National Aging and Law Conference in October 2018 included a plenary session on eldercaring coordination.

be some families who can afford to pay the EC and some who cannot. First, there is little to no cost to the court to implement the project. To date, costs have been avoided by utilizing existing court staff and the pilot site administrator. Cases referred to eldercaring coordination demonstrate a reduction in court motions, and a corresponding reduced impact on court time and services. Second, the cost to families is not intended to be prohibitive or deterring. The fees associated with an EC can be addressed by providing information to families about fees and the allocation of costs upfront. Families who cannot afford to pay the EC can be identified early on in the process and may qualify for financial assistance. In Florida, StayWell Health Plan Provider has contributed eight thousand dollars in scholarship funds for families with eligible financial need.¹⁹⁴ These families may also be paired with an EC who provides pro bono service; ECs can also provide services using sliding scale fees. The referring judge may participate in allocating the percentage of fees per participant, and, in some areas, may set a cap on ECs' fees. Efforts to ensure affordability are an important aspect of the project, as the purpose is to serve the needs of families and elders.

VII. CONCLUSION

Disputes involving the care and needs of elders are increasingly common with the rise in the elder population in the United States. As families seek to find ways to manage the care of an aging family member, interpersonal disputes can create high-conflict situations. As the studies in this field demonstrate, these high-conflict family dynamics can cause families to file a petition for conservatorship. The proceedings tend to place strain on the family, which can aggravate existing conflicts. ADR processes can help resolve these conflicts and guide families toward focusing on the care and wellbeing of the elder. Eldercaring coordination provides the necessary support to the courts, elder law attorneys, and elder mediators who are presented with a high-conflict dispute. When mediation reaches impasse in a conservatorship dispute, the default option is to return to court at the risk of ensuing litigation. With eldercaring coordination, the parties have an alternative process at their disposal. Eldercaring coordination addresses the need for a dispute resolution option for high-conflict cases regarding an elder's needs that complements and enhances existing services. California has made strides in this arena through the use of elder mediation and the development of elder protection courts. Eldercaring coordination is another resource and another step forward in serving the needs of the elder population, assisting families through the transitions of eldercare, and allowing the court process, mediation, and attorney representation to function efficiently. In order for elder dispute resolution to progress, California attorneys, judges, and mediators should consider eldercaring coordination as an ADR process that supplements, but does not replace, elder mediation. I encourage elder law practitioners, including judges, attorneys, and mediators, to take a united approach and start an eldercaring

¹⁹⁴ Staywell, *Press Release: Staywell Awards \$8,000 in Grants to Support Eldercaring Coordination Program in Florida*, WELLCARE (June 18, 2018, 8:30 AM), <http://ir.wellcare.com/file/Index?KeyFile=393919246>.

coordination program in California courts, securing California as an ACR pilot site. Since the elder population in the U.S. is increasing, and elders continue to be a vulnerable population, this is an important and necessary endeavor.