

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE CREATION
OF A COMMISSION TO STUDY THE
CREATION AND ADMINISTRATION
OF GUARDIANSHIP

ADKT 0507

FILED

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APPENDIX I
TO REPORT IN SUPPORT OF THE ADOPTION OF A MEDIATION MANUAL

Dated this 7 day of October, 2019.

Respectfully submitted,

[Signature]
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Elder and Guardianship Mediation

A Report prepared by

The Canadian Centre for Elder Law

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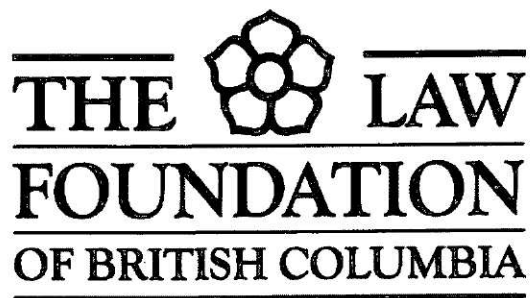
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- It is important to hold trainings and in-service presentations for community organizations or agencies that serve the aging, to seek to understand their questions and concerns, and work as partners to resolve them.
- A steering committee (or task force) that meets at least biannually or quarterly to oversee and advise the mediation program is helpful for feedback and oversight.
- Members of a steering committee should include representatives from the elder law community, the court, aging network agencies, social service agencies, mediators and other stakeholders within the community.⁴⁸²

3. Alaska – A Model Program

In 2005, the Alaska Court System initiated a court-connected adult guardianship mediation program to provide mediation in appropriate adult guardianship and conservatorship cases.⁴⁸³ The Alaska Court System Adult Guardianship Mediation Pilot Project (the “AGMP”) was established as a five-year evaluated pilot project funded by the Alaska Mental Health Trust Authority.⁴⁸⁴ The initial two years of the AGMP was piloted in Anchorage, Homer and Kenai in court cases in which guardianship or conservatorship petitions had been filed.⁴⁸⁵ Based on the positive results of the initial two-years of the pilot, the program was expanded to serve court cases in Fairbanks, Bethel, Palmer, Kodiak, Dillingham, Valdez and Kotzebue.⁴⁸⁶

Following a successful evaluation of the project by the Alaska Judicial Council in 2009, the Alaska legislature approved sustaining the guardianship mediation program as part of the Alaska Court system budget: The Adult Guardianship and Conservatorship Mediation Program (the “Program”) is now a permanent program of the Alaska Court System.⁴⁸⁷ The Program is considered by many to be “the model” for adult guardianship mediation programs in the US.

The following section provides an overview of the AGMP pilot project and project evaluation by the Alaska Judicial council.

a. Pilot Project

The AGMP was “inspired and informed by the groundbreaking work of The Center for Social Gerontology Inc. (TCSG)...and their 2001 report evaluating mediation as a means of resolving adult guardianship cases.”⁴⁸⁸ The AGMP was developed in collaboration with the Alaska courts, organizations, agencies and individuals involved in areas related to

⁴⁸² TCSG Evaluation, *supra* note 408 at 129-141.

⁴⁸³ Alaska Judicial Council, *Alaska Adult Guardianship Mediation Project Evaluation*, March 2009 at 4 [AGMP Evaluation].

⁴⁸⁴ *Ibid.* at 1.

⁴⁸⁵ *Alaska Court System Adult Guardianship/Conservatorship Mediation Pilot Project Policies and Procedures Manual*, August 2005 (Revised July 2007 and April 2010) at 2 [Policies & Procedures Manual].

⁴⁸⁶ AGMP Evaluation, *supra* note 483 at 14.

⁴⁸⁷ *Policies & Procedures Manual*, *supra* note 485. The Program’s services are offered by the Alaska Court System through court’s in Anchorage, Bethel, Dillingham, Fairbanks, Homer, Juneau, Kenai, Kodiak, Palmer, Sitka and Valdez, see “Guardianship and Conservatorship Mediation Program”, online: <<http://www.courts.alaska.gov/mediation.htm#b>>.

⁴⁸⁸ AGMP Evaluation, *supra* note 483 at 14.

guardianship, and with technical input and guidance from TCSG, which continues to be a resource to the project.⁴⁸⁹

Like the programs established by TCSG, Alaska's adult guardianship mediation program focuses on "finding ways to protect vulnerable adults whose cases have reached the courts, but for whom the difficulties and cost of a contested hearing might be avoided."⁴⁹⁰ The overall aim of the AGMP is described as follows:

[T]o develop an approach to guardianship and conservatorship concerns using mediation to preserve the autonomy and dignity of these adults, while assisting and enabling family to resolve problems, which if left unresolved, could destroy the family and caregiver support system and result in the affected adult's loss of independence and rights, institutionalization, or in financial exploitation, neglect or abuse.⁴⁹¹

The goals of the AGMP are to develop an approach to guardianship, which will:

- Engage the adult, his or her family and others closely involved, in a productive, creative, problem-solving process addressing care, safety and capacity concerns
- Protect the adult's autonomy
- Seek creative and least restrictive options by exploring alternatives to guardianship or conservatorship for meeting the needs of the adult
- Increase communication and understanding among family members and others involved
- Encourage consensus building among family and others closely involved
- Maintain supportive family relationships
- Prevent victimization of vulnerable adults
- Create plans that reflect the real needs of the adult
- Provide the adult, family and others a satisfactory decision-making process
- Avoid the trauma and adversarial nature of a contested court proceeding
- Eliminate unnecessary appointments of guardians or conservators
- Conserve judicial resources.⁴⁹²

b. Statutory Framework

Court-ordered mediation is set out in Rule 100 of Alaska's *Rules of Civil Procedure*⁴⁹³ and Rule 4.5 of Alaska's *Rules of Probate Procedure*.⁴⁹⁴ Rule 100 applies to any civil law action. Rule 4.5 applies more specifically to actions related to estates, guardianship, transfers and trusts.⁴⁹⁵

c. Mediation Model & Style

The AGMP employs a confidential, voluntary, facilitative style mediation model:

[The] project offers a facilitative, non-evaluative, collaborative problem-solving model

⁴⁸⁹ *Policies & Procedures Manual*, *supra* note 485.

⁴⁹⁰ *AGMP Evaluation*, *supra* note 483 at 4.

⁴⁹¹ *Policies & Procedures Manual*, *supra* note 485 at 2; *AGMP Evaluation*, *supra* note 483 at 13-14.

⁴⁹² *Policies & Procedures Manual*, *supra* note 485 at 2; *AGMP Evaluation*, *supra* note 483 at 13-14.

⁴⁹³ Alaska R. Civ. P. 100 [*CP Rules*].

⁴⁹⁴ Alaska R. Prob. 4.5 [*Probate Rules*].

⁴⁹⁵ *Id.* citing as AS 13.06.050 (24) [*Alaska Statutes*].

of mediation that is voluntary and confidential. The emphasis of this form of mediation is on helping empower participants to reach understandings that benefit and improve communication, resolve difficult issues - beyond the legal issues - and to address conflict in ways that encourage ongoing relationships. It seeks to create understanding and consideration of the participants' needs and concerns, building a foundation for consensus, and expanding the options for possible solutions. Mediators are not decision-makers and do not take sides, nor do they give advice or make recommendations. Decision-making rests with the participants. The mediator offers them a structure and process for discussion and decision-making.⁴⁹⁶

All mediators in the program are required to complete training in facilitative mediation and to practice facilitative style mediation in their work with the program.⁴⁹⁷

d. Program Administration

The AGMP staff includes a Dispute Resolution Coordinator ("DRC") and a part-time Administrative Assistant.⁴⁹⁸ The DRC and court staff are involved in monitoring court referral orders to ensure timely scheduling and to assist the court with tracking where cases are in the mediation process.⁴⁹⁹ Staff also assist with managing information so mediators know court timelines and have copies of referral orders, and contact information for the parties.⁵⁰⁰ The DRC is also responsible for publicizing the program and works to ensure parties, judges, attorneys and families are aware of the option mediate in guardianship cases.⁵⁰¹

The AGMP also "strives to incorporate into its policies, procedures, practice, and philosophy, a knowledge and understanding of, sensitivity to, and appreciation for the culture and diversity of the community it serves."⁵⁰²

e. Parties and Participants

In addition to legal parties in a court case (i.e. applicant and respondent), Alaska's AGMP policies provide for the inclusion of "necessary" and "potential" participants in guardianship mediation.⁵⁰³ The Alaska Court System's recently revised *Adult Guardianship/Conservatorship Mediation Pilot Project Policies and Procedures Manual* (the "Policies & Procedures Manual") defines a necessary participant as someone who had:

- an opinion about the issues being discussed,
- a stake in the outcome, and who
- is necessary to agree on a resolution of the issues.⁵⁰⁴

⁴⁹⁶ *AGMP Evaluation*, *supra* note 483 at 14-15; see also *Probate Rules*, *supra* note 494 Rule 4.5(h) re: Confidentiality.

⁴⁹⁷ *Policies & Procedures Manual*, *supra* note 485 at 18.

⁴⁹⁸ *Policies & Procedures Manual*, *supra* note 485 at 43.

⁴⁹⁹ *Policies & Procedures Manual*, *supra* note 485 at 43.

⁵⁰⁰ *Policies & Procedures Manual*, *supra* note 485 at 43.

⁵⁰¹ *Policies & Procedures Manual*, *supra* note 485 at 44.

⁵⁰² *Policies & Procedures Manual*, *supra* note 485 at 46.

⁵⁰³ *Policies & Procedures Manual*, *supra* note 485 at 24.

⁵⁰⁴ *Policies & Procedures Manual*, *supra* note 485 at 24.

Policy #8 notes the requirement that every participant must have the necessary capacity to participate, with accommodation.⁵⁰⁵ The factors to be considered in determining the capacity to mediate as a participant are identified in Policy #8 as follows:

- Can he or she tell his or her own story and understand what is being discussed?
- Can he or she listen to and understand the story of the other party?
- Does he or she understand who the parties are?
- Does he or she understand the role of the mediator?
- Does he or she understand the idea of mediation and how it will proceed?
- Can he or she generate options for a solution?
- Can he or she assess options?
- Is he or she expressing a consistent and clear opinion or position?
- Can he or she make and keep an agreement?⁵⁰⁶

Further, a number of “potential participants” are identified in the Policies & Procedures Manual, including: the respondent; attorney for the respondent; family of the respondent; guardian ad litem; Adult Protective Services (APS) worker; Assistant Attorney General; court visitor; guardian or conservator; and others who may be central to the issues being mediated (e.g. Care facility staff, caregivers, treatment or health providers, support persons, landlords, other service providers, etc.).⁵⁰⁷

With respect to participation of the respondent, Policy #8 of the Policies & Procedures Manual provides as follows:

The aim of this program is for the respondent or ward to have the option to participate in mediation to the highest level possible and desired by the adult, and to the extent possible, to truly have a voice in the process; to articulate his or her needs, concerns and wishes; and to participate in the negotiation of a resolution agreeable to the adult. As a rule, mediation does not take place without the opportunity being created for the adult whose needs are being discussed to participate or be present. The role the adult takes in mediation is determined by several factors: his or her desire to participate in any or all of the process; whether or not he or she is a necessary participant given the topics for mediation; and his or her capacity to actively mediate as a necessary participant.⁵⁰⁸

The Policy and Procedures Manual also instructs that in any case where a formal allegation of incapacity of a person has been made, and the allegedly incapable person is identified as a necessary participant in mediation, mediation should not go forward unless the person has access to legal representation.⁵⁰⁹ Policy #8 emphasizes that if an allegedly incapable adult is not going to participate in mediation, “mediation should not take place unless his or her interests are adequately represented in mediation, usually through an attorney.”⁵¹⁰

Mediators are required to prepare adequately for the mediation “to be able to assess for safety, protection of the adult’s rights, and balance of power issues”, including assessing for

⁵⁰⁵ *Policies & Procedures Manual*, *supra* note 485 at 24.

⁵⁰⁶ *Policies & Procedures Manual*, *supra* note 485 at 24.

⁵⁰⁷ *Policies & Procedures Manual*, *supra* note 485 at 25-29.

⁵⁰⁸ *Policies & Procedures Manual*, *supra* note 485 at 25 & 31-32.

⁵⁰⁹ *Policies & Procedures Manual*, *supra* note 485 at 25.

⁵¹⁰ *Policies & Procedures Manual*, *supra* note 485 at 25.

“family violence, abuse, neglect and exploitation issues that might create an environment that is unsafe or would render mediation inappropriate.”⁵¹¹ The Policies & Procedures Manual notes that “in most cases the mediator is capable of creating a safe, supportive environment in which power can be balanced, the respondent or ward’s adults rights protected, and non-coercive agreements formed.”⁵¹² Specific actions and strategies that may be used by the mediator to balance the power in mediation include:

- providing information and an orientation to the mediation process
- facilitating information sharing
- reframing issues
- clarifying interests
- acknowledging feelings
- seating of participants
- assuring the respondent has legal representation before proceeding with mediation
- providing for the participation of other advocates and support persons
- utilizing caucuses
- de-jargonizing the talk at mediation using language that makes it easier for all involved to understand the process
- raising unrepresented interests
- taking a topic off the table
- reality-testing agreements
- showing equal respect to all parties through use of names, titles, etc.
- exposing imbalances.⁵¹³

The mediator is expected to assess for safety from the beginning preparation stage and throughout the mediation, “screening for coercion, control, intimidation, threats, and other signs of emotional and physical abuse as well as potential for violence.”⁵¹⁴

f. Procedure

After an adult guardianship petition is filed, the *Alaska Statutes* (“AS”) require that an incapacity hearing to be scheduled within 120 days of the petition being filed.⁵¹⁵ If the respondent cannot afford legal representation, the court will appoint an attorney from the Office of Public Advocacy to represent the respondent in the proceeding.⁵¹⁶ The court appoints a court visitor, who meets with the parties and files a report with the court.⁵¹⁷ The court visitor provides a copy of the petition and a written statement of the respondent’s rights to the allegedly incapable respondent.⁵¹⁸ After the respondent’s rights have been explained, the court visitor will meet with the applicant (“petitioner”) and any other person

⁵¹¹ *Policies & Procedures Manual*, *supra* note 485 at 30.

⁵¹² *Policies & Procedures Manual*, *supra* note 485 at 30.

⁵¹³ *Policies & Procedures Manual*, *supra* note 485 at 30-31.

⁵¹⁴ *Policies & Procedures Manual*, *supra* note 485 at 31.

⁵¹⁵ *Alaska Statutes*, *supra* note 495 at AS 13.26.106(a), in Disability Law Center of Alaska, *Guardianship in Alaska: A Guide to Understanding and Petitioning for Guardianship of Adults with Disabilities* (September 2008) at 7 [*Guardianship in Alaska*].

⁵¹⁶ *Alaska Statutes*, *supra* note 495 at AS 13.26.106(c), in *Guardianship in Alaska*, *ibid.*

⁵¹⁷ *Alaska Statutes*, *supra* note 495 at AS 13.26, s. 106(c), in *Guardianship in Alaska*, *ibid.*

⁵¹⁸ *Alaska Statutes*, *supra* note 495 at AS 13.26. 107.

who has knowledge of the respondent's capacity.⁵¹⁹ The court visitor then files a report, which may be used to help determine whether a matter should be mediated. An expert, usually a physician with expert knowledge of the respondent's condition, is also appointed by the court pursuant to AS 13.26.107.⁵²⁰

Guardianship cases are referred to the AGMP by a judge, master or magistrate in response to a request from respondent, a family member, the plaintiff or petitioner, the court visitor, a guardian, attorneys for the plaintiff or respondent and other interested persons.⁵²¹ Parties or the court may request or initiate mediation, at any time during an application for guardianship.⁵²² Alaska's Superior Court has the authority to order parties in a contested adult guardianship application to attend mediation.⁵²³

A court order for mediation includes the following:

- The date(s) by which mediation must be completed, if applicable
- How the sessions will be conducted
- Appointment of the mediator or statement of how the mediator is to be appointed
- Authorization for the assigned mediator to access confidential information, including the court file.
- Statement that mediation is confidential.
- Statement that mediation is voluntary and an explanation of the responsibilities of the parties to meet the requirement of the court order.⁵²⁴

The party who requests mediation may choose a mediator, without the consent of other parties. However, each party is able to challenge the appointment of a mediator.⁵²⁵

The Alaska Court System maintains a court-approved list of qualified mediators.⁵²⁶ A dispute resolution coordinator monitors the performance, scheduling and payment of mediators.⁵²⁷ Mediators are required to conduct mediation pursuant to the guidelines of the mediation program, at a reasonable cost, and to report the outcome of the mediation process to the court.⁵²⁸

⁵¹⁹ *Alaska Statutes*, *supra* note 495 at AS 13.26, 107.

⁵²⁰ *Guardianship in Alaska*, *supra* note 515 at 8.

⁵²¹ *AGMP Evaluation*, *supra* note 483 at 16; *Policies & Procedures Manual*, *supra* note 487 at 7.

⁵²² *Policies & Procedures Manual*, *supra* note 487 at 6. The AGMP emphasizes the importance of early referrals. The AGMP evaluation noted that about half of the adult guardianship matters that went to mediation filed a request for mediation at the outset of the petition. The other half of the adult guardianship matters requested mediation later in the process, after a guardian had been appointed for some period of time, see *AGMP Evaluation*, *supra* note 483 at 4.

⁵²³ *Probate Rules*, *supra* note 494 at Rule 4.5(a) and (b); *CP Rules*, *supra* note 493 at Rule 100 (a) and (b).

⁵²⁴ *Policies & Procedures Manual*, *supra* note 485 at 6; *CP Rules*, *supra* note 493 at Rule 100(b); *Probate Rules*, *supra* note 494 Rule 4.5(b).

⁵²⁵ *Policies & Procedures Manual*, *supra* note 485 at 40; *CP Rules*, *supra* note 493 at Rule 100(c) "Notice of Challenge of Mediator".

⁵²⁶ *Policies & Procedures Manual*, *supra* note 485 at 40.

⁵²⁷ *Policies & Procedures Manual*, *supra* note 485 at 48.

⁵²⁸ *Policies & Procedures Manual*, *supra* note 485 at 40-41.

g. Case selection and exemption

The AGMP Policies & Procedures Manual identifies the types of cases that are appropriate and not appropriate for referral to mediation. Policy #2 states that “Court cases in which there are contested issues, or a plan or decision that needs to be made are appropriate for referral.”⁵²⁹ Cases that are identified as not appropriate for referral include the following:

- Where the mediator determines that any necessary participant is not able to understand the nature of the mediation process and how it proceeds, the role of the mediator and the parties’ relationship to the mediator
- When a quick emergency decision is required
- Certain cases in which there are allegations or findings of abuse, neglect or exploitation of the adult (which may include physical, emotional, or financial abuse by a family member, spouse/partner or caregiver), where the true voluntariness and fairness of mediated agreements may be in doubt because of the likelihood of coerced agreement arising from fear of or threat from the abuser, if they are a party to the mediation
- Cases in which there is an active domestic violence protective order between individuals who would be necessary participants in mediation.⁵³⁰

Policy #2 also identifies the *issues* that are appropriate and not appropriate for mediation. Issues identified as appropriate for mediation include:

- Personal and financial issues
- Whether a guardian is needed (safety concerns, whether the level of risk is understood and acceptable, whether autonomy and self-determination should be limited)
- The type or level of care or assistance that may be needed and alternatives
- Who should provide services or care or be the guardian
- Communication
- Decision-making
- Family disputes and obstacles to decision-making
- Financial decisions
- Living arrangements
- Health/medical decisions
- Needs of other family members and caregivers
- Post-appointment issues.⁵³¹

Issues identified as not appropriate for mediation include:

- Legal findings of fact or law
- Legal capacity or incapacity
- Whether or not abuse, neglect or exploitation is occurring, or occurred

The court may order mediation where it determines that mediation may result in an equitable settlement.⁵³² The court must consider whether there is a history of domestic violence

⁵²⁹ *Policies & Procedures Manual*, *supra* note 485 at 7.

⁵³⁰ *Policies & Procedures Manual*, *supra* note 485 at 7.

⁵³¹ *Policies & Procedures Manual*, *supra* note 485 at 8-9.

⁵³² *Probate Rules*, *supra* note 494 at Rule 4.5(a); *CP Rules*, *supra* note 493 at Rule 100 (a).

between the parties, which could affect the fairness of the mediation process or the physical safety of the victim.⁵³³ If so, the case should not be referred to mediation.

The 2008 publication entitled *Guardianship in Alaska: A Guide to Understanding and Petitioning for Guardianship of Adults with Disabilities*, published by the Disability Law Center of Alaska, states that any issues that arise in caring for an individual subject to guardianship may be mediated, including:

- Health, medical and care decisions;
- Financial decisions;
- Independence: balance between safety and self-determination;
- Living arrangements;
- Decision-making: Who should be involved? Who has authority?;
- Respite and support for caregivers;
- Safety concerns;
- Who should be guardian, if needed?; or
- Least restrictive alternatives.⁵³⁴

h. Attendance and Participation

In order to fulfil their obligations under a court order, parties referred to mediation must attend the “Orientation Meeting” (pre-meeting) with the mediator and the Initial Joint Mediation Session.⁵³⁵ Parties are not required to make a “good faith effort” to mediate; they are only required to attend. If any party declines to continue with the mediation after satisfying the required attendance at the initial session, the mediator must accept the party’s decision to do so; a party may withdraw from mediation at any time after attending the Initial Joint Mediation Session.⁵³⁶

If a party who is essential to the resolution of issues being mediated withdraws from the mediation, the mediator must terminate the mediation and report the termination without disclosing details of the negotiation or the reason(s) for terminating the mediation.⁵³⁷ However, the mediator may continue the mediation without the unwilling party if the mediator, in consultation with other willing parties, determines that the withdrawing party is not necessary to resolution of the issues being mediated.⁵³⁸

Any party may voluntarily submit a confidential brief to the mediator explaining his or her view of the dispute.⁵³⁹ A brief is limited to a maximum of five pages and should be provided

⁵³³ *Probate Rules*, *supra* note 494 at Rule 4.5(a); *CP Rules*, *supra* note 493 at Rule 100(a). Mediation normally will not be allowed where domestic violence has occurred in family law applications (i.e. marital and domestic relations applications, made under A.S. 25 or in cases involving safety protection orders).

⁵³⁴ *Guardianship in Alaska*, *supra* note 515 at 16-17.

⁵³⁵ *Policies & Procedures Manual*, *supra* note 485 at 10.

⁵³⁶ *Policies & Procedures Manual*, *supra* note 485 at 10; *Probate Rules*, *supra* note 494 at Rule 4.5(g); *CP Rules*, *supra* note 493 at Rule 100 (f).

⁵³⁷ *Policies & Procedures Manual*, *supra* note 485 at 10.

⁵³⁸ *Policies & Procedures Manual*, *supra* note 487 at 10.

⁵³⁹ *Probate Rules*, *supra* note 494 at Rule 4.5(d); *CP Rules*, *supra* note 493 at Rule 100 (d).

to the mediator not less than three days before the mediation.⁵⁴⁰ The brief is optional and confidential, and may not be disclosed to anyone without the party's consent.⁵⁴¹

As mentioned above, in any formal petition for guardianship of a person, the allegedly incapable respondent must have legal counsel. If the person who allegedly lacks capacity cannot afford legal counsel, the court will appoint counsel from the Office of Public Advocacy to represent the respondent.⁵⁴²

i. Mediator Credentials, Training and Standards

As mentioned above, the Alaska Court System maintains a court-approved list of qualified mediators, who are typically hired on contract to provide mediation services in the AGMP.⁵⁴³ According to the *Alaska Court System Mediation Programs - Mentoring Program for Mediators Protocol*:

It is the goal of the Alaska Court System to provide high quality mediation services and the Alaska Court System seeks to do this in several ways:

- By recruiting prospective candidates who have the experience, background, and personal capacities to become effective mediators
- By providing high quality training and ongoing education
- By providing ongoing case consultation
- By regularly reviewing the performance of mediators⁵⁴⁴

The Policies and Procedures Manual emphasizes that adult guardianship mediation “is highly specialized and require a variety of competencies and specific skills to be effective.”⁵⁴⁵ Policy #13 further emphasizes:

While basic mediation skills are essential, it is not sufficient to understand the principles and process and demonstrate a capacity to apply those concepts. Mediators in this arena must also have extensive knowledge of the adult guardianship/conservatorship system; the special issues affecting these adults, their families and caregiver and support networks; and of family functioning. They must understand the substantive law relevant to these cases and have a good grasp of available community resources. Mediators must also understand and respond appropriately to the context of culture and diversity within which they practice.⁵⁴⁶

The Policy & Procedure Manual sets out the qualifications and competencies sought for mediators in the AGMP as follows:

- 1) A degree in a relevant area of study (such as social work, law, psychology).

⁵⁴⁰ *Probate Rules*, *supra* note 494 at Rule 4.5(d); *CP Rules*, *supra* note 493 at Rule 100 (d).

⁵⁴¹ *Probate Rules*, *supra* note 494 at Rule 4.5(d); *CP Rules*, *supra* note 493 at Rule 100 (d).

⁵⁴² AS 13.26.106(b)

⁵⁴³ *AGMP Evaluation*, *supra* note 483 at 15; *Policies & Procedures Manual*, *supra* note 487 at 40; see also online: <<http://www.courts.alaska.gov/mediation.htm#8>>.

⁵⁴⁴ Alaska Court System, *Alaska Court System Mediation Programs - Mentoring Program for Mediators Protocol* (updated August 2008) at 1 [*Mentorship Protocol*].

⁵⁴⁵ *Policies & Procedures Manual*, *supra* note 485 at 47.

⁵⁴⁶ *Policies & Procedures Manual*, *supra* note 485 at 47.

- 2) Experience related to issues and concerns associated with adult guardianship cases.
- 3) Empathy and compassion for adults and those involved with them who face concerns about capacity and care-giving needs.
- 4) Communication skills that foster rapport and trust building.
- 5) Training and experience in the mediation of family issues.
- 6) Knowledge in the following areas:
 - Adult guardianship and conservatorship proceedings
 - State statutes and court rules relevant to adult guardianship cases
 - Family functioning and dynamics
 - Abuse and exploitation of vulnerable adults
 - Understanding of the following as they may affect capacity, care-giving needs, and the support and service resources related to them:
 - Mental illness
 - Developmental disabilities
 - Substance abuse and addictions
 - Dementias and related disorders, including Alzheimer's Disease
 - Impacts of aging
 - Traumatic brain injury
 - Other physical trauma or illness
- 7) Cultural awareness and understanding of issues of diversity, with an emphasis on Alaska Native issues;
- 8) Availability to provide mediation services.⁵⁴⁷

As in Ontario, a mediator must complete a certain standard of training to be on the mediator list. Mediators are required to complete a week-long, 40 hour, multi-party mediator training course and orientation in the facilitative mediation model within the context of adult guardianship issues.⁵⁴⁸

New mediators must also participate in the Alaska Court System mentorship program.⁵⁴⁹ Mentors are selected using the following criteria:

- Experience and effectiveness as mediators
- Capacity to act as guide, teacher and advisor
- Capacity to engage in and promote reflective practice
- Knowledge of and adherence to program policies and procedures
- Availability to mentor and interest in mentoring program
- Knowledge, familiarity and comfort with the diverse communities (e.g., ethnically, geographically, linguistically, culturally and with regard to family structure) the mediation programs serve
- Needs of the program for diversity, capacity and optimal mentor to mediator ratio
- Participation in specific training for mentors.⁵⁵⁰

⁵⁴⁷ *Policies & Procedures Manual*, *supra* note 485 at 47-48.

⁵⁴⁸ *Policies & Procedures Manual*, *supra* note 485 at 48.

⁵⁴⁹ *Mentorship Protocol*, *supra* note 544.

⁵⁵⁰ *Mentorship Protocol*, *supra* note 544.

An individualized mentoring contract is worked out between the assigned mentor and each new or transitioning mediator to reflect his or her particular circumstances, however the standard mentorship process involves the following activities:

- New mediator observation of mediations conducted by mentor or other experienced mediators followed by discussion
- Co-mediation with the mentor (typically about three mediations)⁵⁵¹
- Mentor observes a number of cases in which the new mediator is the primary mediator
- Following the co-mediation and observation activities, the mentor will consult in person or by phone and email about subsequent cases and discuss cases with the mediator prior to and following each mediation session. Mentor will also review all written agreements, summaries and related documents prepared by the mediator
- Mentor and mediator will discuss progress and approach throughout mentorship process and will have periodic formal performance reviews
- Indicators of readiness for independent practice will be discussed and identified in the contract
- After intensive mentoring phase, mentor continues to be available for consultation
- Other activities which may be considered useful, include: Guided reading of relevant literature; Meeting in a group format with other mediators and mentors; Attending additional training or conferences; Establishing or participating in an ongoing on-line dialogue; Devising ways to fill in particular knowledge gaps (e.g. ICWA procedures or the special needs of adults with significant cognitive impairment)

Pursuant to the AGMP Policies and Procedures Manual, mediators with the project are required to comply with professional standards of practice and to strive for impartiality and neutrality in the performance of their duties.⁵⁵² AGMP mediators are required “to practice in accordance with the Model Standards of Conduct for Mediators, prepared in 1994 and revised and approved August 2005 by the American Bar Association, the American Arbitration Association and the Association for Conflict Resolution.”⁵⁵³

Mediator conduct is monitored on an ongoing basis, through mentoring, case consultation, record reviews, observation, interviews and mediator-self-evaluations.⁵⁵⁴ The Dispute Resolution Coordinator monitors that the quality of mediation practice, timely scheduling and reasonable payment.⁵⁵⁵

j. Confidentiality and Reporting

Mediation communications are confidential.⁵⁵⁶ Mediators and participants cannot testify about the mediation proceedings, unless the court orders otherwise or there is a duty to disclose imposed by law.⁵⁵⁷

⁵⁵¹ *AGMP Evaluation*, *supra* note 483 at 17.

⁵⁵² *Policies & Procedures Manual*, *supra* note 485 at 11.

⁵⁵³ *Policies & Procedures Manual*, *supra* note 485 at 11.

⁵⁵⁴ *Policies & Procedures Manual*, *supra* note 485 at 47.

⁵⁵⁵ *Policies & Procedures Manual*, *supra* note 485 at 47.

⁵⁵⁶ *Probate Rules*, *supra* note 494 at Rule 4.5(h).

⁵⁵⁷ *Probate Rules*, *supra* note 494 at Rule 4.5(h).

Prior to mediation, parties are required to review and agree to a “Confidentiality and Mediation Agreement”, which sets out fourteen points about the mediation process and protection of each party’s privacy.⁵⁵⁸

As mentioned above, if a party withdraws and/or the mediation is terminated, the mediator must report the termination without disclosing details of the negotiation or the reason(s) for terminating the mediation.⁵⁵⁹

There are statutory limits on confidentiality. Therefore, in certain circumstances the mediator and other participants may have to break confidentiality, possibly including the following:

- reporting allegations of threat or harm to a frail or vulnerable adult to the adult and to the appropriate social welfare and/or law enforcement agency;
- reporting allegations of abuse or neglect of a child and to the appropriate social welfare and/or law enforcement agency;
- reporting specific threats of harm to oneself or to an identified third party to the third party, to law enforcement and/or to a social welfare agency.⁵⁶⁰

Further, mediators or other participants may have other professional roles in which they are mandatory reporters – the AGMP considers all mediators to be mandated by program policy to report when they have “reasonable cause to believe that a vulnerable adult suffers from abandonment, exploitation, abuse, neglect, or self-neglect” pursuant to Alaska Statute 47.24.⁵⁶¹ In addition, any person may anonymously report an incident to Adult Protection Services, if a vulnerable adult suffers harm from abuse, exploitation, abandonment, neglect or self-neglect.⁵⁶²

k. Fees, Costs and Sanctions

Mediation services are available at no cost to when referred by court order; however, participation costs (such as transportation, counsel, etc.) are borne by the participants.⁵⁶³ As of March 2009, the average cost per referral to mediation in the AGMP was calculated to be \$1,380, which included: mediator and mentor time in preparation, joint session(s), agreement writing, program paperwork; mediator travel, interpreter, teleconference, and room rental costs (in locations where the court is not able to provide).⁵⁶⁴ AGMP mediators are compensated for cases preparation, pre-mediation and mediation conferences by the Alaska Court System at a rate set by the Alaska Court system.⁵⁶⁵ The set rate increases once a mediator has mediated 10 cases post-mentorship.⁵⁶⁶

⁵⁵⁸ *Policies & Procedures Manual*, *supra* note 485 at 12; see also Alaska Court System, Self-Help Center: Family Law, Guardianship and Conservatorship, Adult Guardianship and Conservatorship Mediation Program, “Confidentiality and Mediation Agreement - Adult Guardianship and Conservatorship”, online: <<http://www.courts.alaska.gov/guardianship.htm#mediation>>.

⁵⁵⁹ *Probate Rules*, *supra* note 494 at Rule 4.5(g); *Policies & Procedures Manual*, *supra* note 487 at 10.

⁵⁶⁰ *Policies & Procedures Manual*, *supra* note 485 at 14.

⁵⁶¹ *Policies & Procedures Manual*, *supra* note 485 at 14.

⁵⁶² *Alaska Statutes*, *supra* note 495 at AS 47.24; *Policies & Procedures Manual*, *supra* note 487 at 14.

⁵⁶³ *Policies & Procedures Manual*, *supra* note 485 at 44.

⁵⁶⁴ *AGMP Evaluation*, *supra* note 483 at 17.

⁵⁶⁵ *Policies & Procedures Manual*, *supra* note 485 at 44.

⁵⁶⁶ *Policies & Procedures Manual*, *supra* note 485 at 44.

Where parties choose to use independent mediation services, the parties are responsible for the costs of mediation. Costs are normally split equally between the parties, unless the court orders otherwise.⁵⁶⁷ If a petition for adult guardianship is found to be malicious, frivolous or without just cause, the court can order that the applicant party ("petitioner") pay all or part of the costs.⁵⁶⁸

1. AGMP Evaluation

As mentioned above, Alaska's AGMP originated as an evaluated pilot project, in Anchorage, Fairbanks and South central Alaska.⁵⁶⁹ The court asked the Alaska Judicial Council to evaluate the success of the AGMP based on the following criteria:

1. Did participants reach agreements on some or all of the issues?
2. Did the mediations result in plans that enhanced the care and safety of high-risk adults?
3. Did the use of mediation avoid a contested court proceeding in the case?
4. Did participants experience mediation as a satisfactory process?⁵⁷⁰

This evaluation differed from the Ontario evaluation in that it included an assessment of the care and safety of older adults considered "at high-risk". The measure used to assess this element was based on whether Adult Protection Services (APS) were involved in the matter.⁵⁷¹

It was noted that mediation could occur either at the point that a petition for adult guardianship was filed, or following appointment of a guardian.⁵⁷² Professionals interviewed as part of the program evaluation observed that families, service agencies and communities were able through mediation to work out ways to care for adults without going to court.⁵⁷³

The Alaska Judicial Council evaluation outcome measures and findings included the following:

- Agreements were reached on some or all issues in 87% of the cases mediated.⁵⁷⁴
- If Adult Protective Services was involved in the case, agreements were reached 95% of the time - plans were created that enhanced the care and safety of high-risk adults.⁵⁷⁵
- Interviews suggested that if agreements were reached in mediation, contested court hearings were avoided.⁵⁷⁶
- Participants were satisfied with the agreements reached most (91%) of the time.⁵⁷⁷

⁵⁶⁷ *Probate Rules*, *supra* note 494 at Rule 4.5(b)(3)

⁵⁶⁸ *Alaska Statutes*, *supra* note 515 at AS 13.26.131.

⁵⁶⁹ *AGMP Evaluation*, *supra* note 483 at 14.

⁵⁷⁰ *AGMP Evaluation*, *supra* note 483 at 3.

⁵⁷¹ *AGMP Evaluation*, *supra* note 483 at 7.

⁵⁷² *AGMP Evaluation*, *supra* note 483 at 4-5.

⁵⁷³ *AGMP Evaluation*, *supra* note 483 at 5.

⁵⁷⁴ *AGMP Evaluation*, *supra* note 483 at 6.

⁵⁷⁵ *AGMP Evaluation*, *supra* note 483 at 7.

⁵⁷⁶ *AGMP Evaluation*, *supra* note 483 at 8.

⁵⁷⁷ *AGMP Evaluation*, *supra* note 483 at 8.

- Participants believed that they were listened to and that their concerns were understood most of the time. Almost all would recommend mediation to others.
- The evaluation included 103 mediations conducted during the first three years of the project. The judge or professionals referred tough cases that they thought would need costly court hearings to resolve. Mediators and project staff believed that the referral for mediation avoided contested court hearings in all but a handful of cases.
- The mediators served much of the state, from Kotzebue to Kenai, all of Southcentral, and Fairbanks and the Fourth District. Mediators also worked with parties by telephone.
- In most of the cases mediated, questions about whether there were alternatives to guardianship were discussed and resolved. Other common issues mediated included the finances of the protected adult, the level of care needed, and decision-making and communication among family members and those responsible for the adult.⁵⁷⁸

4 Maryland - Appellate Guardianship Mediation Program

a. Program Overview and Administration

The Maryland Court of Special Appeals (the "Court"), Maryland's intermediate appellate court, recently established a Civil Mediation Pilot Program (the "CMPP") within the Court's existing pre-hearing conference program.⁵⁷⁹ The two-year pilot program project was initiated in February 2010, supported by a grant from the Maryland Mediation and Conflict Resolution Office (MACRO).⁵⁸⁰ A Director of Mediation was employed to manage and administer the CMPP and report directly to the Chief Judge of the Court or his designate.⁵⁸¹ The program will operate as pilot program for the initial two years and is anticipated to become permanent, pending the outcome of a program evaluation.⁵⁸²

Maryland's appellate level CMPP is described in further detail below, including the following aspects of the program: statutory framework, case selection and exemption; attendance and participation, qualifications of the mediator, confidentiality and reporting; and fees, costs and sanctions.

b. Statutory framework

The Civil Mediation Pilot Program was established pursuant to an administrative order adopted by the Court of Appeals and Court of Special Appeals, and provides "Pre-hearing Conference for Mediation" as an extension of the existing pre-hearing conference program in the Court of Special Appeals created by Maryland Rules 8-205 and 8-206."⁵⁸³ The

⁵⁷⁸ *AGMP Evaluation*, *supra* note 483 at 4. For a more detailed review and analysis of the data compiled by the AGMP, see *AGMP Evaluation*, *supra* note 483 at Appendix C.

⁵⁷⁹ Office of Mediation, Maryland Court of Special Appeals, online: <<http://www.courts.state.md.us/cosappeals/mediation/index.html>>.

⁵⁸⁰ *Ibid.*

⁵⁸¹ *Ibid.*, "Administrative Order on Civil Mediation Pilot Program" and "Guidelines". The current Director of Mediation is Robert J. Rhudy, Esq. "Bob Rhudy was selected by Chief Judge Peter Krauser in October 2009 as Director of Mediation for the Maryland Court of Special Appeals to establish and manage the new civil appellate program," online: www.courts.state.md.us/cosappeals/mediation/pdfs/rhudybio.pdf

⁵⁸² See "Administrative Order on Civil Mediation Pilot Program" at 4, *supra* note 579 [*Administrative Order*].

⁵⁸³ "COSA Mediation Brochure", *supra* note 579.