

## **Mediation of Elder Law Disputes**

By Leslie K. Smith, Attorney at Law

I. What is elder law? The term “elder law” encompasses many areas of law and can include issues related to estate planning, trust administration and probate, powers of attorney, elder abuse and fraud, guardianship and conservatorship, nursing homes, Medicaid, Medicare, Social Security and Veterans benefits.

A. Special issues related to mediating the elder law dispute

1. Is the elderly person or disabled person competent to enter into a mediation agreement?

a. A mediation agreement is a contract between parties to resolve a dispute.

b. Idaho Code 32-107 says, “A conveyance or other contract of a person of unsound mind, but not entirely without understanding made before his incapacity has been judicially determined, is subject to rescission.”

c. If there is an issue about competency, then the mediator may want to find out:

1. Does that party have a guardian or conservator?

a. If so, the mediator should obtain copies of the guardianship and conservatorship orders or the Letters of guardianship or conservatorship.

b. Mediator should require that the guardian or conservator be present at the mediation.

2. Under Idaho Code Sec. 32-108, one who is adjudicated incapacitated lacks the capacity to contract as a matter of law. See *Rogers v. Household Life Insurance Company*, 150 Idaho 735, 250 P. 3<sup>rd</sup> 786 (Idaho 2011)

d. If the demented individual or disabled person is the subject of a pending guardianship and conservatorship, then the mediator will want to make sure the court-appointed guardian ad litem is present at the mediation.

1. If a guardianship action is pending for the elderly adult, a guardian ad litem who is an attorney is appointed to represent the interests of that person, ... unless the allegedly incapacitated person has counsel of his own choice...” Idaho Code 15-5-303(b)

2. What if the elderly or quasi-incapacitated person is not the subject of a pending guardianship or conservatorship action, but could be in the foreseeable future, based upon the information provided to the mediator?

a) If that person is represented by their own attorney, then this is probably helpful, and that attorney who represents them should be present at the mediation proceeding. If the mediation contract is later challenged in a proceeding because the party did not have capacity to contract, then their having had their own attorney at the mediation may provide some protection. The Idaho guardianship statute grants the incapacitated person the right to have counsel of his or her own choice and won't appoint a guardian ad litem to represent them in a guardianship proceeding if they do. See Idaho Code 15-5-303(b)

b) Having the attorney representing the incapacitated person sign the mediation settlement agreement as that person's attorney may also help prevent the agreement from being overturned by a court. A court may be able to find that the attorney had the implied authority to agree for the client on their behalf, if the client is later found to be incapacitated. An attorney must have expressed or implied authority to compromise a client's claim. Cabellero v. Wikse, 140 Idaho 329, 332, 92 P.3<sup>rd</sup> 1076, 1079 (Idaho 2004) During a mediation, the claimant Wikse left the room and mumbled that his attorney could handle it, resulting in the attorney agreeing to a settlement on behalf of the client, Wikse. The court agreed with the lower court's finding that Wikse had given the attorney implied or even express authority to settle the claim. They upheld the mediation settlement agreement.

c) Look for conflicts of interests with the attorney they have? If the incapacitated person hires their own attorney to represent them at a mediation, does that attorney have obvious conflicts of interest? Did that attorney also represent one of the parties at one time? It would be important to see the waiver of conflict of interest by the parties to the mediation before proceeding. Idaho Rules of Professional Conduct 1.19-(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

2. What is the quasi-incapacitated person or disabled person won't get an attorney and doesn't have one? The mediator can look to a Durable Power of Attorney and require that the attorney-in-fact be present at the mediation sessions.

a. Use of Durable Powers of Attorney- The elderly person may have designated an individual under a valid Durable Power of Attorney to make decisions for them.  
Idaho Uniform Power of Attorney Act – Idaho Code Section 15-12

- 1) Is it a springing Durable Power of Attorney, or is it effective immediately?
- 2) Is there a separate Durable Power of Attorney for Health-care decisions and another for Property?
- 3) Make sure that the attorney-in-fact is present at the mediation.

3. What constitutes an unsound mind?

a. Idaho case law has interpreted “unsound mind,” as, “mental disability caused by mental illness, retardation or other abnormality or "unsound" as not physically healthy or whole or having disease, abnormality, or defect such that usefulness is impaired. This was as within the context of this term within the rape statute. State v. Elias, 39139, Idaho Ct. of Appeals, July 12, 2013.

b. Idaho law provides more information about the definition of an “incapacitated person” in Rogers v. Household Life Ins. Co., 150 Idaho at 738, 250 P.3d 786 (2011)

“First, an "incapacitated person" is one "who is impaired ... to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person ..." I.C. § 15-5-101(a). "Incapacity" is the legal disability of one "likely to suffer substantial harm due to an inability to provide for his personal needs for food, clothing, shelter, health care, or safety, or an inability to manage his or her property or financial affairs." I.C. § 15-5-101(a)(1). Further, " [i]solated instances of simple negligence or improvidence, lack of resources, or any act, occurrence, or statement ... [that is] the product of an informed judgment[ ] shall not constitute evidence of inability to provide for personal needs or to manage property." I.C. § 15-5-101(a)(3). Rather, a judicial finding of incapacity must be supported by evidence of "acts or occurrences, or statements which strongly indicate imminent acts or occurrences ... [that] occurred within twelve (12) months prior to the filing of the petition for guardianship or conservatorship." I.C. § 15-5-101(a)(2). Thus, a judicial finding of incapacity and appointment of guardian must be supported by evidence of multiple events that demonstrate the individual's inability to care for his basic needs, property, and financial affairs, such that appointment of a guardian who is capable of making those decisions in his stead is justified.” Rogers v. Household Life Ins. Co., 150 Idaho at 738, 250 P.3d 786 (2011)