

MEDIATION AND COUNSELING ARE THE BEST WAYS TO DEAL WITH
THE DIMINISHED MENTAL CAPACITY OF THE ELDERLY
BY
CHARLES L. DOROTHY

According to a report by the PEW Research Center, starting in January of 2011 10,000 baby boomers began turning 65 every day in the United States, and would do so for 19 years.

According to the United States Social Security System, a male is expected to live to be 84.5, and a female is expected to live to be to be 86.6.

Somewhere between the ages of 65 and 85 most Americans experience declining mental skills that are significant enough to require assistance with financial and personal matters. When that time comes, they are vulnerable to being taken advantage of financially and physically.

To prevent such abuse, state legislatures adopted guardian and conservator laws.

Because of various procedural requirements in these statutes, the time expended by attorneys, accountants, guardians and conservators increased the costs of such proceedings. Partly in an attempt to avoid such costs, attorneys began recommending the use of revocable trusts and powers of attorney rather than guardianships and conservatorships.

For several reasons, a good deal of litigation regarding revocable trusts and powers of attorney occurred. The language used provided differing and often ambiguous definitions of the incapacity that triggered the authority of the agent or successor trustee to handle the affairs of the maker of the power of attorney or revocable trust. The language often did not require mediation and arbitration in resolving disputes regarding the maker's incapacitation. The language often did not provide for accountings regarding financial matters or living and health arrangements by the agent to the maker of the power of attorney, or by the successor trustee to the maker of the revocable trust, or others legitimately concerned with the maker's well being. The language in the powers of attorney often did not set forth the responsibilities of the agent in any detail. The language often did not provide for the agent or successor trustee only handling those matters the maker could not handle or did not want to handle.

Partly in response to the proliferation of litigation regarding powers of attorneys, in 2006 the National Conference of Commissioners on Uniform State Laws adopted the Uniform Power of Attorney Act, which provided standardized definitions, and principles regarding powers of attorney and duties of agents. The act is available for viewing, downloading and printing on www.uniformlaws.org.

From 2006 to 2017, twenty-two states adopted some form of the Uniform Power of Attorney Act.

In 2018, the South Dakota Legislature tried unsuccessfully to adopt some version of the Uniform Power of Attorney Act. A bill to adopt the Uniform Act passed the House but was tabled by the Senate Judiciary Committee and never was sent to the full Senate for a vote.

Consequently, in South Dakota, powers of attorney continue to be governed by SDCL Title 59 entitled "Agency".

Since Title 59 does not deal with the many issues involved with powers of attorney, South Dakota attorneys need to become familiar with the Uniform Power of Attorney Act and incorporate in the powers of attorney they draft those concepts they feel should be in the document.

ASSISTANCE OR CONTROL

Often mental skills diminish incrementally over a period of time. Often an elderly person can still handle some aspects of their life even though they need assistance with other aspects of their life. Assisting an elderly person through the journey from some mental impairment to complete mental disability requires frequent contact with the elderly person by family, friends, and other caregivers, and consultations with attorneys and other advisors when necessary.

The challenge for the elderly person and the agent named in their power of attorney or the successor trustee named in their revocable trust is whether the elderly person just needs a little assistance or is experiencing mental incapacitation such that the agent or successor trustee should take control of the elderly person's affairs.

It is important that the agent or successor trustee have regular contact with the elderly person and initially offer to just assist with various matters such as paying bills, living arrangements, and reviewing contracts. At a minimum, such contacts should be

yearly. This allows the agent or successor trustee to become familiar with the elderly person's wants and needs, as well as providing the opportunity to determine if the elderly person just needs some assistance or the agent or successor trustee should take control and manage the elderly person's affairs.

The concept of only doing for the elderly person what the elderly person cannot do for himself or herself should be incorporated into the power of attorney with language such as:

In furtherance of the personal freedom and responsibility of the Principal, in the case of the partial incapacitation of the Principal, the Agent should only do for the Principal what the Principal cannot do or does not want to do.

South Dakota attorneys drafting declarations for revocable trusts should consider including language such as:

In furtherance of the personal freedom and responsibility of the Trustor, in the case of the partial incapacitation of the Trustor, the Successor Trustee should only do for the Trustor what the Trustor cannot do or does not want to do.

This language is consistent with the fundamental concept of personal freedom and responsibility, and is similar to language in the South Dakota Guardianship and Conservatorship Act (SDCL 29A-5), and the Uniform Power of Attorney Act.

Conflicts can develop between the elderly person and their agent or successor trustee in carrying out this concept, or in dealing with the issue of complete incapacitation. If those conflicts are not resolved through meaningful communication between the elderly person and their agent or successor trustee, costly litigation may occur, which could forever damage the relationship between the elderly person and their agent or successor trustee.

MEDIATION IS WELL SUITED TO ASSIST WITH THE RESOLUTION OF
CONFLICTS BETWEEN THE PRINCIPAL AND THE AGENT AND THE
MAKER OF A REVOCABLE TRUST AND THE SUCCESSOR TRUSTEE
REGARDING WHAT THE PRINCIPAL OR MAKER CAN AND SHOULD DO
AND WHAT THE AGENT OR SUCCESSOR TRUSTEE SHOULD DO

Mediation, with its collaborative and non-adversarial basis and its fundamental

principle of client self-determination, is well suited for resolving many disputes regarding mental and physical capacity that may arise between an elderly person and their agent or their successor trustee. Mediation can provide assistance with the journey of allowing the elderly person as much independence as they are able and want to handle.

It should be remembered that revocable trusts, like conservatorships, deal with property. Powers of attorney can deal with both property, and personal issues such as health care and living arrangements. If the maker has not signed a declaration creating a revocable trust that has a successor trustee provision, the maker's power of attorney should deal with both property and personal issues. If the maker has signed a declaration creating a revocable trust that has a successor trustee provision, the maker's power of attorney should deal with personal issues.

The journey regarding health care and living arrangements may include conflicts regarding whether the elderly person should no longer (a) drive (b) handle his or her checkbook (c) handle his or her bills, (d) handle his or her credit cards (e) enter into contracts (f) continue charitable or other giving and (g) make changes to his or her will, revocable trust declaration, or power of attorney.

The journey may include disputes such as whether the elderly person should (a) continue to live at home with some help from a home care agency or person (b) move in with a child (c) move to an assisted living center or (d) move to a nursing home.

Those are often emotional issues for the elderly person intertwined with feelings of anxiety and loss of personal freedom.

Adversarial proceedings, whether in a private arbitration or a public lawsuit, should not be utilized to resolve disputes over those issues until counseling and mediation have been unsuccessful.

If the elderly person has not lost cognitive skills altogether, mediation may help them accept their diminishing mental skills and find comfort knowing someone they trust is handling their affairs for them, and yet is accountable to others they also trust.

Such issues are best dealt with through education, counseling, collaboration, and mediation, not through litigation.

SHOULD POWERS OF ATTORNEY BE CONTINGENT UPON INCAPACITATION?

There is a dispute among lawyers as to whether a power of attorney should only become operable when the principal becomes unable to handle his or her own affairs, or whether it should be unconditional and effective immediately.

Those who favor a power of attorney that does not become operable until the principal is incapacitated argue that unconditional powers of attorney create the risk that the agent will use his or her authority to steal from the maker.

Those who favor an unconditional power of attorney argue that a power of attorney which is contingent upon the principal's incapacitation results in uncertainty for health care providers, banks, and securities companies, and requires litigation to establish incapacitation which cannot be accomplished in a timely fashion.

But, an unconditional power of attorney does not eliminate uncertainty as to whether the principal is incapacitated such that the agent named in the power of attorney should handle the principal's affairs, or whether the principal was incapacitated when the power of attorney was executed, and since powers of attorney are revocable, whether the power of attorney being relied upon is the most recent one, which are disputes subject to litigation. See *Meyer v. Kneip*, 457 NW 2nd 463 (SD 1990).

Also, when SDCL 59-6-3 says that third parties can rely upon the power of attorney presented them unless they have reason to know it is not valid, why should a person give someone the right to manage their affairs before they are unable to do so themselves just so their health care providers, banks, securities firms and others they deal with do not have to address the issue of their inability to handle their own affairs?

Arbitration, with its privacy and speed, is well suited for incapacity determinations when a party who will be contracting with the agent or successor trustee wants a definitive incapacitation determination. Using arbitration, that decision can be made quickly and in the privacy of the office of the elderly person's lawyer or doctor. But the arbitrator will bill for his or her services. So privacy and speed need to be weighted against the additional cost involved.

IF THE MAKER OF A POWER OF ATTORNEY OR A DECLARATION OF REVOCABLE TRUST WANTS (1) THE AUTHORITY OF THE AGENT OR SUCCESSOR TRUSTEE TO BE CONTINGENT UPON THE MAKER'S MENTAL INCAPACITATION AND (2) MEDIATION OR ARBITRATION TO BE USED TO RESOLVE DISPUTES REGARDING INCAPACITATION, THE DOCUMENT MUST SAY THAT

If the maker of a power of attorney or revocable trust desires that the authority of the agent or successor trustee to handle the maker's affairs is contingent upon the maker's mental incapacitation to handle those affairs, the power of attorney or revocable trust must specifically state that.

If the maker of a power of attorney or revocable trust desires that mediation or arbitration be used to resolve disputes regarding the maker's incapacitation, or the power of attorney or revocable trust must specifically state that.

DEFINITION OF INCAPACITATION IN THE UNIFORM POWER OF ATTORNEY ACT

Section 102 (5) of the Uniform Power of Attorney Act states:

"Incapacity" means inability of an individual to manage property or business affairs because the individual: (A) has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or (B) is: (i) missing; (ii) detained, including incarcerated in a penal system; or (iii) outside the United States and unable to return.

The appropriateness of (B) is questionable for at least three reasons.

First, with the worldwide availability of the Internet, fiber optic cable laid under the oceans, digital technology, and wireless technology, being outside the United States is no longer an impairment to timely communication, including transmission of signed documents.

Second, being incarcerated does not mean one cannot handle his or her affairs.

Third, the word "missing" is undefined, creating ambiguity as to how long one must be out of communication with family, business associates or personal acquaintances before they can be considered missing.

Attorneys drafting powers of attorneys and revocable trust declarations should consider including a definition of incapacitation similar to the following:

“Incapacity” means the inability of an individual to manage property, business affairs, or personal affairs, including living arrangements and health care, care because the individual has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance.”

This definition would include physical incapacitation, which would apply to the elderly who have experienced strokes, or adults of any age who are suffering from bodily paralysis below the neck or from injuries or diseases that make writing and talking impossible. People suffering from such diseases may have lost their ability to communicate but not their ability to hear and understand. Sometimes the ability to communicate comes back after a stroke. Sometimes it does not.

DRAFTING SUGGESTIONS FOR REVOCABLE TRUST DECLARATIONS
REGARDING USE OF MEDIATION AND ARBITRATION IN
DETERMINATION OF INCAPACITATION

South Dakota attorneys drafting revocable trust declarations should consider including wording such as:

If there is a dispute as to whether Trustor is mentally or physically incapacitated to handle Trustor’s own affairs, it shall first be submitted to mediation facilitated by a South Dakota attorney, if Trustor has the mental capacity to meaningfully participate. If the mediation does not occur because of the Trustor’s mental incapacity to meaningfully participate, or the mediation failed to resolve the dispute, the dispute shall be determined by an attorney acting as an arbitrator in a private arbitration proceeding utilizing the laws of the State of South Dakota. The arbitrator’s decision shall be binding for six months. Thereafter, if the dispute remains, the issue can again be presented to the arbitrator every 6 months.

DRAFTING SUGGESTIONS FOR POWERS OF ATTORNEY REGARDING
USE OF MEDIATION AND ARBITRATION IN DETERMINATION
INCAPACITATION

South Dakota attorneys drafting powers of attorney should consider including wording such as:

If there is a dispute as to whether Principal is mentally or physically incapacitated to handle Principal's own affairs, it shall first be submitted to mediation facilitated by a South Dakota attorney if the Principal has the mental capacity to meaningfully participate. If the mediation does not occur because of the Principal's mental incapacity to meaningfully participate, or the mediation failed to resolve the dispute, the dispute shall be determined by an attorney acting as an arbitrator in a private arbitration proceeding utilizing the laws of the State of South Dakota. The arbitrator's decision shall be binding for six months. Thereafter, if the dispute remains, the issue can again be presented to the arbitrator every 6 months.

The words "or physically" is necessary for the power of attorney to be effective should the maker becomes physically incapacitated by brain injury or stroke.

DRAFTING SUGGESTIONS REGARDING
REQUIRING REPORTING TO PREVENT ABUSE

South Dakota statutes regarding conservatorships require annual accountings to the Court as to the handling of property.

South Dakota statutes regarding guardianship require accountings to the Court as to the handling of living arrangement and health care.

The only accounting requirement in SDCL Title 59 is SDCL 59-4-1 which says: "An agent must use ordinary diligence to keep his principal informed of his acts in the course of the agency."

One of the reasons that there is so much litigation regarding powers of attorney and revocable trusts is that the agent or successor trustee does not provide an accounting to the elderly person and immediate family members of the elderly person, or others the elderly persons wants to receive accountings.

South Dakota Attorneys drafting powers of attorney that deal with both assets and health care and living arrangements should consider including wording such as the following:

Agent shall provide Principal and the following person(s) at least an annual report summarizing (1) what assets and liabilities Principal has (2) how Agent handled Principal's income and expenses since the last report and (3) Principal's health condition, medical care, and living situation: _____.

South Dakota Attorneys drafting declarations for revocable trusts should consider including wording such as the following:

Successor Trustee shall provide Trustor and the following person(s) at least an annual report summarizing the assets and liabilities of the trust, and how the Successor Trustee handled the income and expenses of the Trust.

**SOUTH DAKOTA RULES OF PROFESSIONAL CONDUCT 2.3 AND 2.4
ARE THE ETHICAL BASIS FOR PROVIDING COUNSELING AND MEDIATION SERVICES TO
THE ELDERLY AND THOSE THEY HAVE NAMED IN POWERS OF ATTORNEY OR
REVOCABLE TRUSTS TO HANDLE THEIR AFFAIRS IN CASE OF THEIR INCAPACITATION.**

Rule 2.3 and 2.4 of the South Dakota Rules of Professional Conduct are under the category entitled "Counselor".

Rule 2.3 states:

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.

(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless the client gives informed consent.

Rule 2.4 states:

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between

them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

CAN AN ATTORNEY ACT AS A MEDIATOR CONCERNING THE INCAPACITY OF THE MAKER OF A POWER OF ATTORNEY OR REVOCABLE TRUST IF HE OR SHE (1) DRAFTED THE DOCUMENT (2) PRESENTLY REPRESENTS THE MAKER OR (3) HAS REPRESENTED THE MAKER IN THE PAST?

Without any other clarifying Rule of Professional Conduct, the wording of the first sentence of Subsection (a) of Rule 2.4 would seem to preclude an attorney from acting as a mediator concerning the incapacity of the maker of a power of attorney or revocable trust if the attorney drafted the power of attorney or revocable trust, presently represents the maker, or represented the maker in the past.

But, Rule 2.4 needs to be read in conjunction with Rule 1.7, which prohibits an attorney from representing clients with conflicting interests, **unless the clients have in writing consented to such representation.**

Subsection C of Standard III of the ABA Model Standards of Conduct for Mediators, entitled "Conflicts of Interest", states:

C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality. **After disclosure, if all parties agree, the mediator may proceed with the mediation.**

But, the attorney should consider providing counsel and advice to the client and his or her agent or successor trustee without utilization of a mediation process, and, if that

consultation and advice does not result in a mutually agreeable resolution of the dispute, recommending a mediation facilitated by an attorney with no prior dealings with the client or his or her agent.

Having another attorney facilitate the mediation will increase the cost of the mediation, but the neutrality of the mediator is an essential principle of mediation, and having a mediator who has no conflict of interest will most likely result in the disputants feeling that the mediator is neutral and unbiased, and thereby facilitate the possibility of a mutual resolution of the conflict. It also provides the opportunity for a second opinion (a neutral evaluation) if the parties have not been able to reach a resolution during the initial stages of the mediation. That second opinion, if the same as the attorney's evaluation during the consultation session, could facilitate a mutually agreeable resolution.

But the mediator will bill for his or her services. So the advantages of retaining another attorney to act as a mediator must be weighted against the additional cost involved.

It should be remembered that mediators do not have to be attorneys. The resolution of disputes regarding mental incapacitation, health care, and living arrangement would be advanced significantly if practicing psychologists and social workers attended mediation training and were willing to act as mediators for such issues. The reality is that, in nursing home settings, psychologists and social workers are already working with the elderly and their families on these issues.

LAWYER'S ETHIC RESPONSIBILITIES TO A CLIENT WITH DIMINISHED MENTAL CAPACITY

Rule 1.14 (b) of the South Dakota Rules of Professional Conduct for attorneys, entitled "Client With Diminished Capacity", states:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial, financial or other harm

unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6 (a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Rule 1-6 deals with client confidences.

THE AGING OF THE BABY BOOMERS PRESENTS A RESPONSIBILITY AND AN ECONOMIC OPPORTUNITY FOR THE LEGAL PROFESSION

Assisting the aging baby boomers with the journey of dealing with their diminishing mental capacities presents both a responsibility and an economic opportunity for the legal profession.

The profession has a responsibility to urge its members to educate themselves regarding the issues involved with that journey, and to assist the baby boomers, and their families, loved ones, and agents with that journey.

Individual lawyers who choose to educate themselves regarding those issues and assist clients with that journey will provide a valuable service and be appropriately compensated for their services.