



ENABLELAW

MEDIATION IN THE COURT OF PROTECTION

BACKGROUND

- January 2017 – Bristol Court of Protection Court User Meeting with Sir James Munby. Charlotte May from Wiltshire Council and I raised the possibility of a Court approved mediation scheme in the Court of Protection, in a similar vein to that of the Family Courts. Met with positive judicial response.
- Contemporaneously, a group of London practitioners were considering the same issues, and first working group meeting held in March 2017 in Bristol.
- Core members: Andrew Hannam (Enable Law), Katie Scott (39 Essex Street), Chris Danbury (ICU Consultant and mediator), Charlotte May (Wiltshire Council and mediator), Hannah Taylor (Bevan Brittan), Holly Mieville-Hawkins (Enable Law), Polly Sweeny (Irwin Mitchell), Sarah Barclay (Medical Mediation).

WHY MEDIATION?

- Positive personal, anecdotal experience of positive outcomes in mental capacity cases
- Quantitative and qualitative research carried out by Charlotte May, Mediator (www.adultcaremediation.co.uk) and Solicitor at Wiltshire Council in 2016:
 - 25 participants, including private practice and local authority solicitors, barristers, the Official Solicitor (health and welfare) and a local authority Mental Capacity Team Manager and mediators
 - UK wide
 - 80 mediations covered
 - 25+ case studies collected

WHY MEDIATION?

- Key findings (procedure):

When is the best time to mediate?	Response Percent
As soon as possible	44.0%
Before proceedings	32.0%
During proceedings	24.0%
After proceedings	0.0%

When did the mediation take place?	Response Percent
During proceedings	66.7%
Before proceedings commenced	29.6%
After proceedings	3.7%

WHY MEDIATION?

- Key findings (procedure):

Where P lacks capacity to express wishes and feelings regarding the issues being mediated, what is the most appropriate way for P's best interests be represented during the mediation?	Response Percent
Advocate	32.0%
Litigation Friend	28.0%
Solicitor	24.0%
Family	4.0%
Friend	4.0%
Carer	0.0%
Other	8.0%
NB: In the studies, P only partook in 21.1% of cases, but was represented in 58.3% of cases.	

Did the mediator have experience of Court of Protection?	Response Percent
Yes	88.9%
Don't know	7.4%
No	3.7%

WHY MEDIATION?

- Key findings (subject matter):

What were the issues to be mediated?	Response Percent
Residence	59.3%
Care arrangements	55.6%
Contact	44.4%
Finance and property	29.6%
Power of Attorney	22.2%
Deputyship	22.2%
Holidays	14.8%
Deprivation of Liberty	11.1%
Medical treatment	7.4%
Statutory wills	7.4%
Withdrawal of life-sustaining medical treatment	0.0%
Other	14.8%

WHY MEDIATION?

- Key findings (outcome):

Was an agreement reached?	Response Percent
Yes – written agreement signed on the day	51.9%
No	22.2%
Yes – written agreement after the mediation	18.5%
Yes – verbal agreement	7.4%
NB: This is a 77.8% success rate. Of the successful mediations, 59.1% of agreements were incorporated into a Court Order.	

If no agreement reached, why not?
Entrenched view of family member Due to entrenched positions of both parties There were 8 parties, with only 1 day there was not enough time Parties positions too entrenched The case involved allegations of financial abuse and fraud Some points were narrowed but there remained an on going dispute

WHY MEDIATION?

- Key findings (barriers to successful mediation):

What are the obstacles to parties <i>engaging</i> in mediation?	Response Percent
Awareness	72.0%
Entrenched positions	72.0%
Family dynamics	72.0%
Cost	64.0%
Lack of trust	44.0%
Confidence	40.0%
Other	24.0%

What were the particular challenges and frustrations encountered <i>during</i> mediation?	Response Percent
Entrenched positions	85.2%
Dysfunctional family dynamics	55.6%
Lack of communication between parties	48.1%
Verbal aggression	33.3%
Imbalance of power	29.6%
Time taken to set up mediation	14.8%
Long geographical distances between parties	3.7%
Physical aggression	3.7%
Other	33.3%

WHY MEDIATION?

- Key findings (additional benefits of mediation):

Did the mediation make things worse in any way?	Response Percent
No	96.2%
Yes	3.8%

What were the advantages and benefits of the mediation?	Response Percent
Narrowed the Issues	73.1%
Reduced court time required to determine the issues	69.2%
Developed dialogue between the parties	65.4%
Reduced costs	61.5%
Reduced time to reach an agreement	57.7%
Improved the relationship between the parties	42.3%
Other	30.8%

WHY MEDIATION?

■ Case study 1 – Health and Welfare

The dispute was between the local authority and a family as to where the family's young son with Down's syndrome (age 22) should reside; at home or in supported housing. Lengthy proceedings to date had cost the parties in excess of £80,000. Dispute settled after 1.5 days mediation costing £4,000.

- During proceedings
- Court ordered parties to attend/participate in mediation.
- P was represented by his legal representative and relevant person's representative.
- P's wishes and feelings conveyed by relevant person's representative, his legal representative, social work professional and his health professional.
- Pre-mediation telephone calls, combination of shuttle and round table meetings with a half day follow up mediation day four months later.
- Costs shared between the parties including a contribution from Legal Aid Agency
- Agreement made on the day amended, finalised and signed by parties
- Incorporated into a court order.

WHY MEDIATION?

■ Case study 1

Cont.....

- In proceedings for a long time already cost the parties in excess of £80,000. Settled after 1.5 days mediation at the comparatively low cost of £4,000.
- A challenge was the entrenchment of the matter itself which had been
- Matter had been simmering for over 20 years. Since the young man had been born, his family had repeatedly felt let down by local authority's perceived lack of support. They needed to be heard in a calm mediated space.
- The mediation was the first time all parties had met and talked. A better, more co-operative relationship was created in the young man's best interests.

WHY MEDIATION?

■ Case study 2 – Finance and affairs

Sibling Dispute – estimated savings £30,000

- The dispute was (1) between siblings over who should act as attorney and how information should be provided to the non attorney sibling and (2) a professional negligence complaint by sister of P and his new deputy relating to how a professional deputy had been removed had acted including a fee dispute re that deputy's firm's charges.
- During proceedings
- Court did not order mediation
- P did not participate in the mediation, nor were P's wishes and feeling able to be conveyed.
- Two pre-mediation telephone calls.
- Telephone mediation over half a day.
- The cost of mediation was shared between the parties.
- A written agreement was reached on the day.
- The mediation reduced the length of the proceedings
- Estimated savings over £30,000

BACKGROUND TO SCHEME

- Working document designed to be practical, informative and supportive of mediation, not prescriptive or restrictive
- All working group members have had positive experience of mediation in the Court of Protection
- Judicial feedback made it clear that:
 - For the scheme to be officially incorporated into COP practice and procedure, a clear body of evidence of the benefits of mediation would need to be obtained.
 - The benefits would need to go beyond those provided for by the case management practice directions
 - Any consent order arrived at via mediation would require judicial approval in post issue cases in order to confirm that the agreement is in the best interests of P and legal
 - Court do not sanction a pilot, but in principle they will support a scheme that all can use, and that will be evaluated
 - Court PD would only be forthcoming if the scheme proved successful

OBJECTIVES OF SCHEME

- Establish a system to obtain a clear body of evidence regarding whether mediation achieves the following:
 - Saving of Judicial time by resolving issues which would otherwise have to be resolved by the Court at a final hearing, thereby easing the pressure on listing and on Court budgets
 - Saving the parties (specifically P) money by reducing or removing the need to incur the legal costs of preparing for contested hearings, instead incurring the cost of preparing for a mediation
 - Represents a saving for public bodies involved in the disputes, by diverting the time of the professionals involved from front line services to the mediation rather than litigation
 - Either improves or does not further damage, the working relationships between the parties when compared to litigation, thus making future disputes less likely

STRUCTURE OF WORKING DOCUMENT

- Very much a document in progress at the moment. Open to suggestions.
- Two parts:
 - Scope of scheme and legal basis for mediation in the Court of Protection
 - Practical application and evaluation of the scheme / pack of documents to assist mediation and evaluation
- P at the very centre of the scheme
- The full process will only apply to issued cases, due to the need for Court sanctioning of the decision. However, there is nothing preventing mediation occurring informally or via the OPG scheme before cases are issued.
- Each case will differ as to when the best time to mediate is, however, in many cases, comprehensive factual details will aid all parties

PROPOSED SCHEME

- Types of case covered:
 - Health and welfare pathway
 - Serious medical treatment
 - Property and affairs pathway
 - Combined pathway
- It must be established that P lacks capacity in relation to the issue being mediated
- No postcode lottery intended, but for the purposes of evaluation, the South West and one other region will be used to test scheme
- Not intended to be compulsory, but can be strongly encouraged by the judge at any time, and a refusal to comply with such a request can be relevant conduct to be taken into account by the Court
- Funding to follow the usual COP rules

PROPOSED SCHEME

- Cases unsuitable for mediation:
 - DOLS Re X type cases which would otherwise be using the streamlined process. These are by definition agreed, and require a Court order
 - DOLS challenges where P is the only one challenging the deprivation of liberty.
 - Cases where there may be an overlap with the Inherent Jurisdiction (including wardship cases), and where there are issues around forced Marriage. These cases require High Court orders
 - Disputes about whether P has the capacity to make the decision in question
 - Disputes about what the law is
 - Disputes in which serious allegations of abuse (save for allegations of financial abuse) have been made against one party or where there is a dispute about whether abuse (save for allegations of financial abuse) has taken place

PROPOSED SCHEME

- Cases unsuitable for mediation cont.....
 - Disputes in which very serious allegations of financial abuse have been made against one party or where there is a dispute about whether very serious financial abuse has taken place
 - Disputes in which there are allegations of substance abuse with respect to one of the parties rendering them unsuitable to take part in a voluntary process
 - Disputes in which a party other than P lacks capacity to litigate, unless that incapacitated party has a litigation friend

PROPOSED SCHEME

- Type of mediator:
 - Committee unanimously felt that mediators should have a solid working knowledge of Mental Capacity law, as the decision must be lawful and in the best interests of P
 - Online qualification in issues surrounding vulnerable adults, and how to deal with safeguarding issues should they arise
 - 5 years experience in Mental Capacity law?
 - Qualified mediator
 - Willing to work for a fixed price in cases where the LAA / LA's are involved
 - Ad hoc / panel TBC
- Type of mediation
 - Face to face mediation
 - No rules about how mediation is to take place, but it parties must agree ahead of mediation

PROPOSED SCHEME

■ Participation of P

- Lack of capacity to litigate will be deemed lack of capacity to mediate
- Mediator must ensure that P's wishes and feelings have been taken into account by the parties in order to comply with section 4 of the MCA
- Where P has a litigation friend / rule 3A representative, they are the decision maker as to how it is best for P to participate in the mediation
- P's wishes and feelings on the matters in issue need to be available to the parties when making their decision on best interests
- Evidence (letters, recordings and/or reports may be appropriate) should be obtained prior to or at the mediation (preferably by an independent person such as a public or private advocate or a litigation friend, an appropriate professional with expertise in P's disability or an independent friend/relative)
- It is open to P to attend the mediation if accompanied by a suitable person (see above)
- If P cannot partake, the matter cannot be mediated

PROPOSED SCHEME

■ Pre mediation process

- Mediator to lead on how P should be best represented at mediation but should only meet P if they are to attend mediation
- Mediation bundle to be prepared between parties, with a maximum page limit of 350 pages, with an agreed list of areas of disagreement and agreement
- Venue to be agreed, with mediator having final say in the event of conflict
- Mediator having pre mediation contact with parties by phone or face to face is strongly encouraged to try and determine issues
- Attendees to be agreed in advance, with any party having the right to attend, with support if requested. Any dispute to be settled by mediator
- 3rd parties can attend with mediator approval
- Mediator has the right to recuse his/herself if case is or becomes unsuitable for mediation
Each party must come with authority to settle the dispute in hand, or have access to such authority, subject to funding approval if required

PROPOSED SCHEME

- Process if mediation is successful in all areas and no Order is sought
 - Signed mediation agreement is compulsory setting out the terms of the agreement. The agreement is binding on parties on signature, but cannot be acted on until it has been ratified by the Court.
 - Applicant must seek to withdraw the proceedings together with:
 - A joint position statement from the parties explaining the issues, the ambit of the dispute between the parties prior to mediation, the outcome of the mediation and annexing the mediation agreement
 - A position statement from P's representative (where P has one) setting out (without jeopardising the confidentiality of the mediation process), why it is in P's best interests for the proceedings to be withdrawn.
 - In the event that P is not a party or does not have a representative, confirmation from all parties that they agree with the application for withdrawal and in particular that granting the application is in P's best interests.
 - Any supporting evidence as to why the agreement is in P's best interests
 - Draft agreed Order authorising the withdrawal and approval of the mediation agreement

PROPOSED SCHEME

- Process if mediation is successful in some areas but an Order is sought
 - Signed mediation agreement is compulsory setting out the terms of the agreement. The agreement is binding on parties on signature, but cannot be acted on until it has been ratified by the Court.
 - Applicant must seek to withdraw part of the proceedings together with:
 - All those items listed above, PLUS:
 - The draft order must cover the making directions for determination of the outstanding issues.
 - In the event that the outstanding issues are non-contentious, a draft order seeking those orders from the Court together with the relevant supporting evidence to enable the Court to determine whether or not to make the order.

PRACTICALITIES – QUALITY AND EVALUATION

- Scheme must be evaluated, and therefore all mediations must follow a strict process and evaluation system
- Due to work involved in setting up mediations and complying with scheme requirements, a scheme administrator is being proposed
- A clear list of mediators that comply with requirements of the scheme must be publically available, and must be vetted and maintained
- A very difficult balance must be reached between comprehensive evaluation and the cost of the same, and also the depth of the evaluation and the attractiveness of the scheme to participants

PRACTICALITIES - ADMINISTRATION

- Key paperwork to facilitate the scheme must be publically and easily available via a website, including:
 - Letter of guidance from the Judiciary
 - Other relevant material such as relevant COP rules and PDs
 - Contact details of scheme administrator and suitable mediators, including whether they are prepared to work for legal aid / reduced LA rates.
 - Details of the evaluation/research project in respect of COP mediation and what this will require of mediators / participants
 - Suggested ground rules
 - Precedent mediation agreements, incorporating confidentiality agreements, agreement to evaluation, agreement to safeguarding issues being reported, that can be used
 - Precedent consent orders
 - Links to other useful mediation material

9TH ELDER MEDIATION WORLD SYMPOSIUM AND SUMMIT

- Valuable and extensive Canadian Research published in 2012 <http://www.bcli.org/ccel/publications/elder-and-guardianship-mediation-report>
 - Review in ELJ <http://www.adultcaremediation.co.uk/profile.html>
 - Research to discover where we are in the UK and raise awareness of mediation
 - Links with Canadian Elder Mediation International developed and ongoing
 - 9th Elder Mediation International Summit in 14-16 May 2018 in Bristol (<https://elder-mediation-international.net/bristol-england-2018/>)
 - Further queries contact Charlotte May
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