

Mediation in the Court of Protection

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| Researcher name and institution: | <p>Charlotte May specialist mediator and local authority solicitor specialising in adult social care</p> |  |
| Funding mode/funder: | <p>self-funded</p> | |
| Start and End date: | <p>Autumn 2015 start - end 2016</p> | |
| 1. Brief summary of what the research is about. | <p><i>'It is the kind of case, I would venture to add, which cries out for mediation and a realistic settlement... A trial of the action is likely to be a painful and damaging experience for all concerned, and I repeat my hope that the parties will even now, be able to come to a settlement.'</i></p> <p>Mr Justice Henderson, Court of Protection, <i>In the Matter of S, D v R and S</i> [2010] EWHC 2405</p> <p>The Court of Protection adjudicates disputes and makes decisions for people who lack capacity to make certain decisions for themselves. These cases are decided in accordance with the Mental Capacity Act principles of 'least restrictive' and 'best interests'. The root of a dispute may be a family feud or a disagreement between relatives and public authorities who are responsible</p> | |

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| | <p>for the provision of care and accommodation and safeguarding those who lack capacity.</p> <p>There are two broad categories of cases:</p> <ul style="list-style-type: none">• Finance and property: For example: where allegations are made about a power of attorney failing to manage a party's money properly, making inappropriate 'gifts' or transfers of property or refusing to fund appropriate care, applications may be made for their removal and the appointment of another attorney or deputy instead.• Health and Welfare: For example: disagreements about contact, residence and care arrangements, allegations about poor care and treatment, Deprivation of Liberty and holidays. <p>The reduced budgets of courts and public authorities will be cut even more over the next few years. There are scant resources to deal with the increasing volume of cases being brought to the Court of Protection every day. The use of mediation in these disputes could be of great benefit in resolving these cases more quickly, both before and after the issue of proceedings, but more information is needed on how and when it can bring benefits and what the risks and challenges are.</p> |
| <p>2. What are the research questions?</p> | <p>Arguments in favour of mediation are that it promotes the principles of best interests and less restrictive alternatives in a way that is rarely achieved by court proceedings because:</p> <ul style="list-style-type: none">• It is usually less stressful, more cost effective and quicker than court proceedings• It offers a wider range of solutions than the court• It can settle a dispute in a way which is less restrictive for the person• It avoids the need for the imposition of a court order• Where people are not communicating well or understanding each other's points of view, it can improve relationships and prevent future disputes. <p>Mediation can be used in Court of Protection matters in the UK but it is unclear how often it is used and also what specialist mediator expertise is available. The Mental Capacity Act 2005 Code of Practice provides guidance on the best ways to settle disputes about issues and</p> |

promotes the use of mediation.

The importance of mediation in Court of Protection matters was emphasised by Mr Justice Henderson in the case of *In the Matter of S, D v R and S* [2010] EWHC 2405 (COP), [2010] COPLR Con Vol 1112. In this case, while Mr S was found not to have the capacity to make decisions in relation to the litigation, he had clear wishes concerning the case, which could not necessarily be met by the court proceedings.

In Canada, parties in child protection and guardianship cases (their equivalent to deputyship cases in the UK) are ordered to consider mediation. Extensive research published by Canadian Center for Elder Law ('CCEL Report')ⁱ in 2012 explores the rates of take-up of mediation, mediator training needs and the issues of concern, such as screening for abuse when assessing suitability for mediation. The findings of that research are useful as a starting point, but more is needed on the issues and concerns of using mediation in such cases in the UK context.

The research questions will include:

- Where are we now in the UK in terms of use of mediation in the Court of Protection? How often is it used (statistics)?
- What examples of actual mediated cases are there?
- What are the obstacles?
- To what extent are those who deal with wide range of Court of Protection disputes aware of the benefits and risks of mediation?
- When does it work best and when doesn't it work?
- Are there issues in the Court of Protection that should not be mediated?
- When is the best time to mediate?

The research will be conducted by a questionnaire, to be sent out over the next few months to mediators, participants, legal professionals, judges, the Official Solicitor and the Office of the Public Guardian. Case studies will be gathered of cases successfully mediated and those which

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| | were unsuccessful, with details of any particular challenges and insights. |
| 3. What, if any, outputs so far? | None yet. |
| 4. What outputs are planned? | The questionnaire will be distributed by the end of 2015. Details of the research will be published in the Elder Law Journal in November 2015. In 2016, articles and presentations will be planned on analysis of questionnaire responses, and a summary will be produced setting out the findings and recommendations. |
| 5. What is the anticipated impact? | <p>The intention is for the research to act as a springboard to raise awareness of mediation in Court of Protection cases and to identify what specialist expertise and training are needed for mediators working in this area as well as to develop an understanding of what issues are and are not suitable for mediation in this context.</p> <p>The CCEL report makes a number of recommendations setting out what is necessary for a court-connected mediation programme to succeed. One of these is the need for a programme and policy to be established through a collaborative process involving key stakeholders and supported by legislation, the courts and government.</p> <p>It is hoped that the research findings can serve as a basis on which to establish a working group with representatives from the Court of Protection, the Law Society, the Bar Council, practitioners, experts and other stakeholders with the aim of developing a practice framework and protocol.</p> |
| 6. Comments / additional information / requests for data or input from the broader administrative justice community | If you are willing to complete the questionnaire please send an expression of interest with your contact details to Charlotte May at charlotte.may@me.com . Your name will then be added to the list of questionnaire participants and the questionnaire will be sent out later in the year. A summary of the results will be prepared and shared with all participants and key stakeholders. |