

**Court of Protection Mediation Research 2016  
Summary of Initial Findings – Phase One  
by Charlotte May,  
Specialist Court of Protection Mediator  
Adult Care Legal Team Leader, Wiltshire Council**

## **Introduction**

This research is being carried out by Charlotte May, a specialist mediator and solicitor in Court of Protection and adult social care. It is being encouraged by the UK Administrative Justice Institute (UKAJI) and the President of the Court of Protection, Sir James Munby.

## **Aims and Objectives**

The research aims to: gather case studies to illustrate the benefits, successes and challenges of Court of Protection mediation and to seek views on pertinent questions. The intention is for the research to act as an evidence-based springboard to raise awareness of mediation. It aims 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. 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. For the purposes of this study 'Court of Protection mediation' encompasses disputes regardless of whether or not they are the subject of Court of Protection proceedings.

## **Participant data**

In Phase One of the survey there were 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. Therefore, the results of this survey represent a snapshot of where we are in the UK based on the responses received.

25 participants responded. Between them they had been involved in a total of 56 mediations and submitted 25 case studies as part of the survey. This report sets out the initial findings of Phase One of the research, which will be ongoing. A more detailed report of Phase 1 with an analysis of the comments of participants will follow in the Spring. Phase 2 of the research which will be open a new participants with experience of CoP mediation and the judiciary will be launched later in the year.

Section 1 asks pertinent questions, the charts below set out the responses to some of the questions.

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

<b>What are the obstacles to Court of Protection mediation?</b>	<b>Response Percent</b>
Awareness	80.0%
Funding	68.0%
Confidence	28.0%
Insufficient legislation	28.0%
Nature of Issue	20.0%
Judiciary	16.0%
Other	24.0%

<b>What are the obstacles to parties engaging in mediation?</b>	<b>Response Percent</b>
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%

<b>To what extent are those who deal with a range of Court of Protection disputes aware of the benefits and risks of mediation?</b>	<b>Response Percent</b>
Partially aware	70.8%
Not aware at all	25.0%
Completely aware	4.2%

<b>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?</b>	<b>Response Percent</b>
Advocate	32.0%
Litigation Friend	28.0%
Solicitor	24.0%
Family	4.0%
Friend	4.0%
Carer	0.0%
Other	8.0%

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In addition to accredited mediation training, what specialist knowledge and experience should mediators have?	Response Percent
Mental Capacity Act	88.0%
Capacity	84.0%
Court of Protection	80.0%
Understanding family dynamics	64.0%
Safeguarding	56.0%
Dementia	52.0%
Health and community care issues	48.0%
Learning disability	44.0%
Abuse	44.0%
The ageing process and dynamics of ageing	36.0%
Other	28.0%

## Case Studies

Section two asks for information about case studies in relation to the types of issues mediated, funding, success rates, benefits and advantages, challenges and frustrations and costs savings .

Below are some initial findings taken from the information of the 27 case studies submitted

What was your role regarding the mediation?	Response Percent	Response Count
Mediator	46.4%	13
Solicitor	35.7%	10
Barrister	14.3%	4
Local Authority Officer	7.1%	2

Did the court order mediation?	Response Percent
No	64.3%
Yes	35.7%

If yes, what did the court order the parties to do?	Response Percent
Attend and/or participate in mediation	61.5%
Consider mediation or ADR	7.7%
Other (please specify)	30.8%

What were the issues to be mediated?	Response Percent
Residence	59.3%

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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%

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

A mediator dealing with Court of Protection disputes will need to consider whether P has capacity to 'participate' in mediation directly by attending in person or with a form of support. Support may be in the form of a support person or representative such as an advocate, lawyer, family member or caregiver, or in the form of physical and/or other accommodations. In this case study did P have capacity to participate either directly by attending in person or with support?	Response Percent
No they didn't participate	78.9%
Yes with support but they did not attend	21.1%
Yes without support	0.0%
Yes with support and they attended	0.0%

If yes with support, how was P supported to participate in the mediation?	Response Percent
Official Solicitor	62.5%
Relevant Person's representative	12.5%
Paid representative	12.5%
Litigation friend	0.0%
Registered intermediary	0.0%
Advocate	0.0%
Communication aids	0.0%
Adjustments to time or venue	0.0%
Other and/ or Comment	25.0%

Were P's wishes and feelings about the issue being mediated able to be conveyed by P or on P's behalf?	Response Percent
Yes	59.3%
No	40.7%

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<b>If yes, how were P's wishes and feelings made known? Please tick all which apply and if you wish add a comment.</b>	<b>Response Percent</b>
Family	36.4%
Legal representative	27.3%
Social work professional	27.3%
Advocate	18.2%
Relevant Person's representative	18.2%
Health professional	9.1%
Directly	0.0%
Paid representative	0.0%
Carer	0.0%
Registered intermediary	0.0%
Other and/ or Comment	18.2%

<b>Was P represented at the mediation?</b>	<b>Response Percent</b>
No	58.3%
Yes	41.7%

<b>How was the mediation conducted?</b>	<b>Response Percent</b>
By sole mediator	57.1%
Pre-mediation telephone calls	53.6%
Full day	46.4%
Shuttle mediation	39.3%
Round table meeting (RTM)	28.6%
Combination of RTM and shuttle mediation	28.6%
Pre-mediation meetings	21.4%
Half day	10.7%
Telephone mediation	7.1%
By co-mediators	7.1%
Series of meetings over a period of time	7.1%
Other	17.9%

<b>How was the mediation funded?</b>	<b>Response Percent</b>
Shared between the parties	48.1%
Local Authority paid all costs	37.0%
Contribution from Legal Aid Agency	14.8%
Health Body paid all costs	7.4%
Other	7.4%

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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%

If Yes, were the terms of the agreement incorporated into a court order?	Response Percent
Yes	59.1%
No	40.9%

**If No, view as to why an agreement was not reached?**

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 ongoing dispute

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

If the case did not proceed to the Court of Protection, or if the case was in proceedings and mediation reduced the length of the proceedings, is it possible to estimate the cost savings achieved by using mediation?	Response Percent
Yes	50.0%
No	50.0%

**If yes, please indicate approximate savings**

Comments:

- in excess of £30,000
- £20k plus - Trust costs and the usual contribution to the OS costs.

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- <£10K for all parties
- £25,000 - £30,000
- £8,000
- Estimate £6,000 Based on saved one day of Judge and court staff time, Counsel for LA, LA solicitor Counsel for Official Solicitor and Official Solicitor legal representative, LA professionals time.
- Cannot estimate but the mediation did give rise to a trial of Father's preferred option which did not succeed and case was then dropped without cost of lengthy final hearing
- If mediation had been used earlier it would have saved family members tens of thousands of pounds. The case to date had cost around £80,000 +; it settled in 1.5 days in mediation which cost approximately 4,000

What were the particular challenges and frustrations encountered?	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%

Did the mediation make things worse in any way?	Response Percent
No	96.2%
Yes. If so, please explain.	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%

Did the mediation make things better in any other way?	Response Percent
No	68.0%

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Yes

32.0%

### **Comment:**

With agreements being reached in approximately 78% of cases, and potential costs savings, these findings indicate it is well worth while considering the use of mediation.

**Chapter 15** MCA Code of Guidance encourages the use of mediation

### **CoP Rules**

Applications to the Court of Protection by applicants falling into the categories under s 50(1) of the MCA 2005 do not require permission. However, other applicants do require permission and in considering such applications, the court is subject to the principles of the MCA 2005. When deciding whether to grant permission for an application to be made, s 50(2) of the MCA 2005 requires the court to consider the reasons for the application, the benefit to the personal lacking capacity and whether the benefit can be achieved in any other way. It can therefore consider whether the parties should be directed to use mediation before an application is issued.

The application can include a request for an order that the parties attend mediation. Once proceedings are issued, the court can consider whether all or any of the issues, which are the subject to application are suitable to be referred to mediation. It may order the parties to attend mediation and can decide whether it merely orders the parties to attend, or whether to include the words 'with a view to reaching an agreement'. This does not mean that the parties are being ordered to come to an agreement. The court may decide to make such orders at an early stage or later in the proceedings.

### **Case Management Pilot**

Part 4: the Personal Pathway

4.2 Pre-Issue:

- (1) "In all cases".. The applicant must take all necessary steps to ..(e) engage with those notified in accordance with sub-paragraph (b) to resolve those matters as far as possible"

4.5 Case Management Conference "...at the CMC the court will record the issues in dispute."

4.6 Final Management Hearing

- (2) A meeting should take place at least five days before the final management hearing between advocates and, so far as practical, any unrepresented parties, with the purpose of resolving or narrowing the issues to be determined at the Final Management Hearing, addressing each of the matters required by Practice Direction Pilot B and preparing a draft order.

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## **Annex A: Pilot Parts 1-5**

### **Overriding objective**

**1.1.**—(1) These Rules have the overriding objective of enabling the court to deal with a case justly and at proportionate cost, having regard to the principles contained in the Act.

(2) The court must seek to give effect to the overriding objective when it—

- (a) exercises any power under the Rules; or
- (b) interprets any rule or practice direction.

(3) Dealing with a case justly and at proportionate cost includes, so far as is practicable—

- (b) ensuring that P's interests and position are properly considered;
- (e) saving expense;

### **Duties to further the overriding objective**

#### **Court's duty to manage cases**

**1.3.**—(1) The court must further the overriding objective by actively managing cases.

- (c) avoiding delay and keeping costs down;
- (d) encouraging the parties to co-operate with each other in the conduct of the proceedings;
- (e) identifying at an early stage—
  - (i) the issues
- (h) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate

#### **The duty of the parties**

**1.4.**—(1) The parties are required to help the court to further the overriding objective.

(2) Without prejudice to the generality of paragraph (1), each party is required to—

- (c) co-operate with the other parties and with the court in identifying and narrowing the issues that need to be determined by the court, and the timetable for that determination;

#### **The duty of legal representatives**

**1.5.**—(1) Legal representatives of parties are required to help the court to further the overriding objective.

(2) Without prejudice to the generality of paragraph (1), a legal representative of a party must

- (c) address whether the case can be swiftly resolved.

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### **The duty of unrepresented litigants**

**1.6.**—(1) Without prejudice to the generality of rule 1.4, unrepresented litigants are required to help the court to further the overriding objective.

(2) This includes—

(a) engaging with the process applicable in the case and co-operating with the court and the

other parties

(d) seeking early resolution of any dispute where practicable.

### **Pilot schemes**

**2.6.**—(1) Practice directions may make provision for the operation of pilot schemes for assessing the use of new practices and procedures in connection with proceedings—

(a) for specified periods; and

(b) in relation to proceedings—

(i) in specified parts of the country; or

(ii) relating to specified types of application.

(2) Practice directions may modify or disapply any provision of these Rules during the operation of such pilot schemes.

### **Pilot Part 3**

#### **Managing the Case**

##### **The court's general powers of case management**

**3.1.**—(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.

(2) The court may—

(m) take any step or give any direction for the purpose of managing the case and furthering the overriding objective.

### **Conversations with the President**

On 23 January at a court users group meeting with the President of the Court of Protection, Sir James Munby, and HHJ Marsden (the lead CoP judge for the south west).

The first question from the attendees was from, Holly Melville-Hawkins private practice solicitor who stated there were significant benefits in mediation to assist with entrenched positions and lack of communication between the parties and asked if it was possible for the court to be more directive and order parties to participate in mediation, as otherwise, in her view they were unlikely to do so.

Comment: her view is in fact support by extensive Canadian research (CCEL 2012). The President agreed and said mediation could be so ordered. He said it was for the profession to 'bang the drum' more in

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order to seek such directions and orders. He referred to the family court and how the profession had been proactive in this regard.

Secondly, Charlotte May, shared a selection of responses from the initial research findings drawn from the 27 case studies gathered during the research, the percentage and difference types of disputes which had been mediated, the agreements reached, main advantages and benefits and likewise the challenges and frustrations.

As a result of our conversation, the President made the following statements:

- 1) He would be willing to grant authorisation for the judiciary to take part in the research.
- 2) Recommended the research be published in the Elder Law Journal, or equivalent.
- 3) He would be supportive of a local CoP Mediation Pilot, with rules developed by local practitioners and the court

Following the court users group in Bristol on 23 January and conversations with the President, HHJ Marsden, the regional lead for COP in the South West, has stated he wants the South West to pilot a compulsory mediation scheme.

### **Phase 2 of Research:**

Once written authorisation from the President has been received and expressions of interest have been received from CoP judges, Phase 2 of the research will be launched to include a range of professionals with experience of mediation in CoP cases including the judiciary.

If you are willing to take part in Phase 2 of the research please send an expression of interest with your contact details to Charlotte May at [charlotte.may@me.com](mailto:charlotte.may@me.com). Your name will then be added to the list of questionnaire participants. A summary of the results will be prepared and shared with all participants and key stakeholders.

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