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A New Era for Mediation in the Court of Protection?

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Fay Collinson



kingschambers.com  [@kings_chambers](https://twitter.com/kings_chambers)  [@kings-chambers](https://www.linkedin.com/company/kings-chambers)



fcollinson@kingschambers.com

[@collinsonfay](#)

My areas of practice include:

- Property & Affairs COP
- Contentious Probate
- Contentious and Non contentious Trusts, including charities
- Property



'When you're at the edge of a cliff, sometimes progress is taking a step back'.

Anonymous



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Kings Court of Protection Mediators



Outline



- Changes in the landscape
- The research
- The legal framework
- Types of cases amenable to mediation
- Costs
- The pilots/practice guidance



A Changing Landscape...

- Mediation so far relatively embryonic in COP compared to family/civil/commercial proceedings.
- A huge surge in applications has led to a new focus on the use of mediation in court of protection.
- South west mediation proposed pilot/practice direction
- OPG mediation pilot



- COP proceedings notoriously slow and expensive
- P&A applications especially take a long time to be processed through First Avenue House due to backlog
- COP proceedings are often intensely personal and involve relationships between family members and professionals that need to be maintained
- The COP's powers are relatively limited when it comes to resolving a lot of the underlying issues that may underpin dispute
- Impact of disputes on P's estate



The Research

- **Initial research carried out at request of UKAJI and Sir James Munby*:**
 - Involved 80 COP mediations
 - Involved health and welfare/P&A/SMT disputes
 - 1/3 of mediations were ordered by the court
 - In 79% of cases P did not formally participate
 - In the other 21% cases P participated by way of the Official Solicitor

*<https://ukaji.org/2017/05/03/mediating-court-of-protection-cases-summary-of-research/> - research conducted by Charlotte May



- In 48% of cases the mediation was funded between the parties
- In 37% of cases the LA paid *all* the costs
- In 14% of cases a health or other body paid *all* the costs
- LAA contributed to costs in 15% of cases
- **Success rate - 78% reached settlement either during or immediately following mediation**
- 59% of agreements incorporated into consent order for approval
- Costs savings between **£6000 - £30,000**



- **Reasons for success?**
- Most disputes resolve at the court room door
- Often include inter-partes agreements outside what court can order
- Mediation provides a structured and formal framework for escalating process/recreates doors of court imperative
- Less stressful environment provides for better communication and identification/resolution of underlying issues
- Strictly confidential



The Legal Framework

- **Rule 1.1 CPR 2017 (The Overriding Objective)**

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

- (c) dealing with the case in ways which are **proportionate** to the nature, importance and complexity of the issues;
- (d) ensuring that the parties are on an equal footing;
- (e) **saving expense**;
- (f) allotting to it an appropriate share of the court's resources, while taking account of the need to allot resources to other cases;



- **Rule 1.3 Court's duty to case manage cases**
- (3) Active case management includes—
- (c) avoiding **delay and keeping costs down**;
- (d) encouraging the parties to co-operate with each other in the conduct of the proceedings;
- (f) deciding promptly—
 - (i) which issues need **a full investigation** and hearing and which do not; and
 - (ii) the procedure to be followed in the case;
- (h) **encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate**;



- **MCA Code of Practice – Chapter 15**

- 15.7 A mediator helps people to come to an agreement that is acceptable to all parties. Mediation can help solve a problem at an early stage. It offers a wider range of solutions than the court can – and it may be less stressful for all parties, more cost-effective and quicker. People who come to an agreement through mediation are more likely to keep to it, because they have taken part in decision-making.



- **Section 50(3) MCA 2005:**
- (3) In deciding whether to grant permission the court must, in particular, have regard to:
 - (a) the applicant's connection with the person to whom the application relates,
 - (b) the reasons for the application,
 - (c) The benefit to the person to whom the application relates of a proposed order or directions, and
 - (d) Whether the benefit can be achieved in any other way.



- **Costs rule 19.5 - Departing from the general rule**
- (1) The court may depart from rules 19.2 to 19.4 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances including—
- (a) the conduct of the parties; .
- (2) The conduct of the parties includes—
- (a) **conduct before, as well as during, the proceedings;**
- (b) whether it was reasonable for a party to raise, pursue or contest a particular matter;



- **Can the court order parties to attend mediation?**
- The President said mediation could be so ordered. He said it was for the profession to **'bang the drum'** more in order to seek such directions and orders.
 - Conversation with the former president Sir James Munby at COP Users Group January 2017 - <https://ukaji.org/2017/05/03/mediating-court-of-protection-cases-summary-of-research/>



Types of Cases

- **Which lend themselves to mediation:**
- Contested attorney applications
- Contested deputyship applications
- Statutory Will applications
- Care fees charging disputes
- Claims for restitution or other action required once deputy/attorney appointed
- Disputes about financial provision/inheritance act claims/care provision/welfare



- **Cases which are not appropriate for mediation:**
- Capacity cases
- Cases where there is a dispute on what the law is
- Cases where there are doubts about the capacity of one of the parties to the mediation



Costs

- **Property and affairs – the general rule**
- **19.2.** Where the proceedings concern P's property and affairs the general rule is that the costs of the proceedings, or of that part of the proceedings that concerns P's property and affairs, shall be paid by P or charged to P's estate.





- **Options for funding mediation/recovering costs:**
- In health and welfare/SMT may be cost effective for LA or health body to pay
- P&A disputes likely to be funded inter-partes
- Most mediated agreements will require consent order to be lodged reflecting agreement for approval
- Can either issue and request an order for a stay and a direction for mediation to be paid for from P's estate

- Alternatively the parties share the upfront cost of the mediation
- The issue of the cost of the mediation and how legal costs are to be apportioned is then dealt with as part of the issues to be considered/agreed at mediation
- Any agreement is then submitted to the court by way of consent order for approval
- Costs of mediation likely to be a fraction of the cost of attending even a first directions hearing
- Professional deputy's costs of attending recoverable from P's estate



- Not 100% guarantee of recovery but client retains much greater control than in proceedings
- The extent of the costs incurred will be much less
- Court arguably more likely to be sympathetic to an order for costs coming out of P's estate where parties can demonstrate they have acted proportionately and reasonably by mediating an outcome
- The 'buy in' of having to financially contribute to the mediation and having the issue of costs on the table may well be psychologically important to success of process



Emerging pilots

- **South West mediation pilot/practice direction**
- Following research referred to above Court of Protection Mediation Work Group set up
- Proposed scheme/practice direction drafted
- Envisages pilot panel of mediators being established
- Covers issued cases only but encourages use pre-issue
- Court to encourage/divert to mediation at gatekeeping
- Parties to file reasons if not considered suitable

- Usual costs rules to be applied (general rule in P&A cases that costs come from P's estate)
- Agreements reached at mediation to be incorporated into a consent order
- Provides for 'approval hearing' for the court to approve consent order
- Evidence of P's incapacity and wishes and feelings must be available to the mediator
- P's participation to be sourced by a variety of options

- Discussions still taking place with senior judiciary
- Likely Practice Guidance will come first
- Practice Direction / Pilot envisaged as next step
- Is relatively tightly focused in its scope as its intended as a statutory scheme
- Use of mediation generally encouraged for disputes outside and in advance of the implementation of the scheme



- **The Public Guardian Mediation Pilot**
- Covers attorney and court appointed deputy disputes – not lay deputy disputes
- Initially started as telephone mediation
- Progressed to face to face mediation
- OPG currently funding costs of mediation whilst pilot ongoing
- OPG investigators will initiate the mediation
- Mediation is set up prior to the issue of proceedings as an alternative (rather than concurrent procedure)





Any questions?
fcollinson@kingschambers.com

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