Mediation, the MCA and the Court of Protection

All public bodies are facing the continued strain on funding, the limitations on resources combined with the challenges of meeting the needs of an aging population. Ensuring that quality of life and opportunity is available to people lacking capacity for many reasons and over all age ranges is proving to be complex, expensive and time consuming for commissioners and providers. Individuals and their families can find the whole process distressing, anxiety provoking and expensive.

There is a legal maze to be negotiated, a range of assessment processes, multi-party involvement and if an application is made to the Court of Protection the process can costs thousands, take many, many months and lead to a sense of powerlessness for many involved.

Mediation may offer assistance to many people: disputed Best Interest decisions around residence, welfare, finance and even medical treatment; Welfare and s15/16 type disputes; Lasting Power of Attorney; and Deprivation of Liberty Safeguards.

Mediation can take place before the dispute reaches court, or within the court process. Any issues around capacity of course need very careful handling, and a real understanding of the underpinning principles of the MCA and other relevant legislation to ensure that any agreed outcomes are in fact realistic and achievable.

The basis for using mediation.

Mediation is recognised as being a tool to be deployed in the MCA Code of Practice.

Chapter 15 looks at many scenarios where mediation can be used. It provides a useful summary about mediation in Chapter 15, and at 15.10 provides more detail and examples.

15.9 Any case that can be settled through negotiation is likely to benefit from mediation. It is most suitable when people are not communicating well or not understanding each other’s point of view. It can improve relationships and stop future disputes, so it is a good option when it is in the person’s interests for people to have a good relationship in the future.

The MCA Code talks about resolving disputes at an early stage prevention of escalation and effective entrenchment of disputes.

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.

The Office of the Public Guardian and Mediation

The guide “Making decisions - A guide for people who work in health and social care” suggests that mediation should be considered if there is a dispute around best interests, if a capacity assessment is challenged or if there is disagreement about advance decisions.

Social Care Institute for Excellence

Judging suitability
Mediation may be appropriate where established processes have failed to achieve effective outcomes and contested issues remain. Mediation may be useful in relation to a number of situations, for example: advance decisions, end-of-life planning and decision-making; financial decision-making and estate planning; intergenerational family disputes; and determining self-determination versus safety issues.

Where there is disagreement as to whether a person is being deprived of their liberty under the DoLS, mediation should not be viewed as an alternative to a person’s legal right to have their deprivation of liberty formally reviewed. It may complement the process and avert some applications to the Court of Protection (CCEL 2012; Mental Capacity Act 2005, Code of Practice, section 15.10; Smyth 2011).

Local Authorities and Mediation

Mediation fits well with the new emphasis on personalisation and empowerment. By facilitating individuals to resolve issues for themselves, even when one of the parties is the LA or another professional.

Mediation also offers good value for money. A mediated settlement is often very much cheaper than alternative remedies. Whether that is around housing and anti-social behaviour, education, workplace disputes or social care.

This emphasis on the importance of trying to resolve issues before any application is made to the Court of Protection is reflected in Policy of Leicestershire, Leicester and Rutland’s Interagency Policy and Procedures of 2009 at para 11

“The Managing Authority and the Supervisory Body should endeavour to resolve any concerns through mediation or their own complaints procedures before the relevant person or their representative refer the matter to the Court.”

Other Local Authorities such as Northamptonshire and South Gloucestershire have a similar requirement. Tower Hamlets talk in terms of the benefit in specific cases - and there is clearly a view that it should be explored.

An example of mediation being a key element of an LA service is Manchester City Council who have a specialist team of LA mediators dealing with a wide variety of issues.

IMCAs and Mediation

It is important to highlight that an IMCA’s involvement must reflect the criteria of the Act, which is clear that if there are family or friends who are appropriate and willing to be consulted, there is no requirement to instruct IMCA. IMCAs cannot be involved in a mediation role when there are disagreements between family and the decision maker. The MCA Code of Practice (5.62 – 5.69) offers further guidance for decision makers on this issue.

What do the courts make of mediation for MCA disputes?

In the recent case of D v R 2010 the potential for mediation is clearly identified. Mr Justice Henderson considered the sensitive and difficult issues involved in Court of Protection matters. Though Mr S clearly lacked the capacity to make decisions, he did have clearly held views which could not easily be facilitated by the court process. Mr Justice Henderson said “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 would add that, if the settlement were one that were relatively generous to Mrs D, that would surely accord with Mr S's wishes."

The judges know that mediation is becoming a standard part of the legal landscape. The pressure of workloads on lawyers, judges and the court staff is reaching unprecedented levels. Whilst there is natural concern that justice is done and that the rule of law is upheld, the reality is that many cases should never see the inside of a court.

Mediation is usual in many parts of the England and Welsh justice system now, and the Ministry of Justice has been very clear that it expects this role to continue to expand.