MEDIATION IN THE COURT OF PROTECTION

INDEX Paragraph number

WHAT IS MEDIATON UNDER THIS SCHEME

What is mediation?

1. Mediation is a voluntary process in which an impartial third party, a mediator, facilitates the resolution of a dispute with the aim of the parties coming to an agreement to narrow or settle that dispute. A mediator facilitates communication, promotes understanding, focuses the parties on their interests, and engages the parties in creative problem-solving to enable them to reach their own agreement.

2. Before the mediation the mediator may speak individually to the parties on the telephone and/or meet with them face to face for pre-mediation meetings.

3. The mediation process is flexible and can be designed in a way which will best meet the needs of the parties. It can be a whole day or a series of meetings over a period of time. There are different forms of mediation:

    - Round table mediation when the mediator facilitates a joint session with the parties. Each party will have an opportunity to describe their mediation goals, the nature of the dispute; exchange information, explore interests and generate options with the assistance of the mediator.

    - Shuttle mediation when the mediator holds separate meetings with the parties in their own rooms, moving back and forth from individual meetings with one party and the other party and carrying points of communication and settlement offers back and forth.

    - A combination of round table and shuttle mediation

4. Everything that is said in the mediation is without prejudice, or confidential and cannot be referred to in Court unless the parties agree that it can be. This is however subject to the mediators and the parties' obligations to report any safeguarding concerns that arise out of information disclosed during a mediation.

5. If the parties reach an agreement, this becomes legally binding once it is signed by both parties. The agreement is not confidential and can be enforced like any other contract.

What about mediation under the scheme?

6. The scheme is designed for disputes that have resulted in proceedings being issued in the COP. The aim of mediation under the Scheme is to explore whether the parties can reach an agreement about what is in P's best interests, and put this before the Court for approval (so the agreement becomes a Court order), rather than proceed to a contested trial. This means that the parties must agree, not only on the matters in dispute, but also about what information from the confidential mediation can be shared with the Court.

7. As disputes in the COP involve the best interests of P, the mediator must ensure first that P can participate appropriately in the mediation, and secondly given that any agreement reached will be subject to consideration by the COP that (i) the agreement reached is in respect of issues on which P lacks capacity and (ii) that the parties have applied the section 4 MCA best interests test when agreeing what is in P's best interests.

8. Mediation is different to a best interest meeting because the mediator will be entirely independent of those involved in the decision-making process. Best interest meetings are usually chaired by a professional employed by the relevant public body. Mediators on the other hand are not involved in the dispute between the professionals and the family and so can provide a safe neutral space for all perspectives to be heard.

THE LEGAL CONTEXT IN WHICH COP MEDIATIONS TAKE PLACE

Capacity

9. If a person lacks capacity to make decisions for themselves, the Mental Capacity Act 2005 (MCA) establishes that the COP has the jurisdiction to make decisions for them.

10. Everyone is presumed to have capacity to make decisions for themselves (section 1 MCA).

11. Section 2 of the MCA provides:

    For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

12. So a person 'P', must be:
    - **unable** to make a decision (referred to as the functional element of the test)
    - in relation to a **matter**
    - **because of** an impairment/disturbance in the functioning of the mind/brain (referred to as the diagnostic element of the test)

13. The diagnostic part of the test will be met where a 'P' has a diagnosis of a learning disability, dementia, brain injury, a mental illness or a personality disorder.

14. The functional part of the test is defined in section 3 of the MCA;

    For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
    (a)to understand the information relevant to the decision,
    (b)to retain that information,
    (c)to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means).

15. Thus a person has to be unable to do one or more of the functions listed in section 3 of the MCA, and this failure must be cause of an impairment in or disturbance in the functioning of the mind or brain.

16. If a person lacks capacity to make a decision for themselves, decisions must be made in that person's best interests.

17. There is no definition of best interests in the MCA, but section 4 of the MCA sets out the process by which best interests is decided. Section 4 provides:

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

(a) the person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which—

(a) are exercisable under a lasting power of attorney, or

(b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) "Life-sustaining treatment" means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11) "Relevant circumstances" are those—

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

18. Section 4 therefore requires the decision maker to:

- Consult, as far as is practicable and appropriate, with those engaged in caring for 'P' or concerned with P's welfare.
- Take into account P's, reasonably ascertainable, present and past wishes and feelings, beliefs and values.

19. Once proceedings have been issued in the COP, the decision maker on ‘P’s’ best interests becomes the Court.

Consequences for mediating within this legal context

20. The parties will need to ensure that there is evidence that rebuts the presumption that P has capacity to make his/her own decisions on the issues in dispute.

21. The parties will also need to ensure that P’s wishes and feelings on the issues in dispute have been ascertained, as far as they are reasonably ascertainable, so that they can be considered during the mediation.

IS MY CASE SUITABLE FOR MEDIATION UNDER THE SCHEME?

22. We suggest that the following categories of COP cases are potentially suitable for mediation:
    a. Health and welfare disputes, including disputes about medical treatment residence, care and support and deprivation of liberty.
    b. Serious medical treatment disputes.
    c. Property and financial affairs disputes.
    d. Mixed health and welfare, and property and affairs disputes.

23. Where a deputy or attorney is in place, the OPG's pre-issue pilot mediation scheme should be considered in the first instance if the matter is yet to be issued.

24. We suggest that the following COP cases may be *unsuitable* for mediation:
    a. DOLS Re X type cases which would otherwise be using the streamlined process. These are by definition agreed, and require a Court order.
    b. DOLS challenges where P is the only one challenging the deprivation of liberty.
    c. Any best interests decision where P is objecting.
    d. 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.
    e. Disputes about whether P has the capacity to make the decision in question.
    f. Disputes about what the law is.
    g. Disputes in which serious allegations of abuse (save for allegations of financial abuse – see paragraph (h) below) have been made against one party or where there is a dispute about whether abuse (save for allegations of financial abuse - see paragraph (h) below) has taken place.
    h. Disputes in which serious allegations of financial abuse have been made against one party which if substantiated would be likely to result in civil or criminal proceedings or where there is a dispute about whether such serious financial abuse has taken place.
    i. 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.

j. Disputes in which a party other than P lacks capacity to litigate, unless that incapacitated party has a litigation friend/accredited legal representative or rule 1.2 representative.
k. Cases in which there is no way of securing P's participation in the mediation in whatever form that may take.

WHEN TO MEDIATE

25. There is no simple answer to this question although we anticipate that mediation is unlikely to take place before a formal best interest meeting has been unsuccessful in enabling agreement to be reached.
    a. There are benefits to mediating early on in a dispute in terms of costs and court time.
    b. A litigation friend/accredited legal representative or rule 1.2 representative who has not already been involved in P's life is unlikely to be able to engage in a mediation until (s)he has had disclosure of the relevant records and the issues, have been crystallised. Litigation friends/accredited legal representative or rule 1.2 representatives who already have knowledge of P may not be constrained in this way.

26. We suggest that the parties are encouraged at every directions hearing to consider whether the case is suitable for mediation.

27. Mediation will be a voluntary process however:
    a. Judges can, in an appropriate case, encourage parties (i) to seek information about mediation and (ii) to mediate.
    b. Judges can, in an appropriate case, warn parties that a refusal to mediate may amount to unreasonable behaviour and so sound in costs.
    c. Judges in an appropriate case can refused to provide the parties with further court hearings until such time as mediation has been considered.

THE MEDIATORS

28. Mediation in the COP is different from almost any other form of mediation because the parties are mediating about a third party 'P', who will in most cases, not have capacity to enter into a mediation agreement. This means that the mediator must have some expertise in the field of mental capacity to ensure that the agreement the parties reach is likely to be approved/amenable to approval by the Court as being in P's best interests.

29. We have identified a small group of mediators who have declared that they have the appropriate expertise (https://www.courtofprotectionmediation.uk/our-mediators/) who are willing to work for the scheme rates as part of this evaluated Scheme. These mediators are listed here: https://www.courtofprotectionmediation.uk/our-mediators/

30. It is of course open to anyone mediating Court of Protection disputes to choose another mediator.

31. All the named mediators have declared that they have the following experience:
    a. A qualification from a reputable mediation training organisation together with evidence of having mediated at least two cases in the last twelve months.
    b. 5 years of mental capacity or COP experience. For non-lawyers this includes training in the assessment of mental capacity and best interests together with experience of applying this training in practice; appearing as witnesses or expert witnesses in COP cases; applying knowledge of mental capacity law in mediations or in teaching. For lawyers it includes advising and representing parties in COP cases.
    c. Alternatively, 2 years of COP experience together with attendance on the Law Society's Mental Capacity and Welfare Training Course run by City University (which is open to non-lawyers).
    d. Knowledge of safeguarding (which can be evidenced by taking an on-line training module such as the Social Care Institute for Excellence's Safeguarding Adults training https://www.scie.org.uk/training/safeguarding/adults-introduction or

IHASCO's training https://www.ihasco.co.uk/courses/detail/safeguarding-vulnerable-adults.

e. Suitable Professional Indemnity Insurance.
f. Is complaint with GDPR.

PARTICIPATION OF 'P' IN THE MEDIATION

32. If P has capacity to conduct COP proceedings, P will also have capacity to engage in the mediation. P can then agree to participate in the mediation in the same way the other parties can, with independent support as required.

33. If P lacks capacity to conduct COP proceedings (as almost all Ps do), then capacity to engage in the mediation is just one facet of this. P will therefore be considered to lack the capacity to make the decision as to whether to engage in the mediation. However, if P wishes to participate in the mediation (s)he should in most circumstances, be facilitated to do so.

34. Where P has either a litigation friend an accredited legal representative or rule 1.2 representative, they are the decision makers within the meaning of the MCA, as to the extent to which P should participate in the mediation.

35. As set out above, as a minimum, in all mediations, P's wishes and feelings as to the issues in dispute must be available to the parties to the mediation.

36. The litigation friend/accredited legal representative or rule 1.2 representative will be expected to discuss with P, in so far as that is appropriate, how P would like to participate in the mediation. This could range from giving views directly to the litigation friend/accredited legal representative/rule 1.2 representative about the mediation, or attending the mediation. If there is a concern that attending the mediation is not in P's best interests, this is a decision for the litigation friend/accredited legal representative /rule 1.2 representative to make having consulted as to P's best interests pursuant to section 4 of the MCA.

37. Where P does not have a litigation friend/accredited legal representative or rule 1.2 representative, the parties must agree between them, using the menu of options set out below, the best way for P to participate in the mediation. If the parties are unable to come to an agreement in respect of this issue the case is not suitable for mediation.

38. Equally, if there is no way of securing P's participation in the mediation, where P lacks capacity to participate in the mediation, the case is not suitable for mediation.

39. The menu of options where there is no litigation friend/ accredited legal representative or rule 1.2 representative is as follows:

    a. Engage an advocate (either privately or via existing publicly funded schemes) to speak to P about the mediation and obtain P's views about the mediation. In the event that P wants to attend the mediation and all parties agree this is in P's best interests to do so, engage the advocate to attend the mediation with P and support P through the process. The parties will need to consider what adjustments will need to be made to facilitate P's attendance, such as taking the mediation to P, or holding it at a time that suits P. If P does not wish to attend or it is not in P's best interests to attend, the parties can agree that the advocate can attend to put P's wishes and feelings forward.

    b. Engage an advocate (either privately or via existing publicly funded schemes) to speak to P about the mediation and obtain P's views about the mediation. In the event that P wants to participate in the mediation in a way that does not involve attending the mediation (perhaps by recording a message to play at the mediation, or attending by telephone or video link) and all parties agree this is in P's best interests to do so, engage the advocate to facilitate P's participation in the mediation and support P through the process.

    c. Consider whether there is a professional who is sufficiently independent of the parties, who has experience of P's disability, who can elicit P's wishes and feelings. Obtain a report (either informally, or via section 49 or by a private instruction), from that professional regarding the same. In the event that P wants to attend the mediation and all parties agree this is in P's best interests to do so, agree that the professional is to attend the mediation with P and support P through the process. If P does not wish to attend or it is not in P's best interests to attend, the parties can agree that the professional can attend to put P's wishes and feelings forward.

d. Consider whether there is a friend or relative who is sufficiently independent of the parties who can elicit P's wishes and feelings about the mediation. In the event that P wants to attend the mediation and all parties agree this is in P's best interests to do so, agree that the friend/relative is to attend the mediation with or without P and support P through the process. If P does not wish to attend or it is not in P's best interests to attend, the parties can agree that the friend/relative can attend to put P's wishes and feelings forward.

40. Once an appropriate person has been identified to seek P's wishes and feelings consideration needs to be given as to how these should be conveyed to the parties:
    a. This could be in the form of a verbatim note, a report or a letter. This would be appropriate where P's wishes and feelings have been expressed more than once, or have changed over time or in response to who is asking the questions.
    b. It could be in the form of a recording of P.
    c. The information could be delivered orally during the mediation.
    d. It could be a combination of these or some other appropriate way

Mediator meeting P

41. If P wishes to meet the mediator, and the litigation friend/accredited legal representative or rule 1.2 representative (if there is one) or in their absence, the parties, agree this is in P's best interests, this can be facilitated to ensure P's participation in the mediation process. However:
    (a) The mediator should not meet P alone.
    (b) The meeting is not to obtain P's wishes and feelings. The mediator is not a decision maker, so does not need to meet P outside the mediation process in order to secure P's participation in the process.

42. There are risks in P meeting the mediator, if P discloses information to the mediator that has not been disclosed to the parties (such as wishes and feelings that are contrary to those expressed to the parties). This is because P may not have the capacity to consent to this information being shared with the other parties.

43. If the mediator considers that the parties should have this information during the mediation:

    (a) The litigation friend/accredited legal representative /rule 1.2 representative could consent to this information being shared as it would be a step in the litigation.
    (b) In their absence, the mediator would have to make an application to the Court for the Court to authorise the sharing of the information as being in P's best interests.

MEDIATION UNDER THE SCHEME – STEP BY STEP

44. Please note that a mediator checklist and party checklist can be found on the website.

The fact that the parties can run the mediation in any way they choose and can agree matters beyond the legal/factual issues in the litigation is one of the positive aspects of mediation, and so it would always be open to parties to agree to conduct the mediation differently, but it may mean that the mediator cannot conduct it within the Scheme fees.

Engaging the mediator and booking a venue

45. Before engaging the mediator, the parties will need to have obtained permission from the COP to share information about the proceedings with the mediator and the evaluation team. Further, if a transparency order has been made this will need to be shared with the mediator and the evaluation team and any third parties who are invited to the mediation.

46. The first thing the parties will need to agree upon is the identity of the mediator and how the mediator will be paid. Mediators can be contacted via the contact details HERE [LINK TO MEDIATOR PAGE].

47. The mediator will obtain the parties' contact details, and seek permission to share the parties' contact details with the evaluation team, led by Dr Jaime Lindsey. (see information for mediators (https://www.courtofprotectionmediation.uk/scheme-documentation)

48. On being engaged, the mediator will send out an engagement letter and a standard Agreement to Mediate (https://www.courtofprotectionmediation.uk/scheme-documentation/). The Agreement to Mediate is the agreement between the parties to mediate, and the terms upon which they will do so. If the parties do not agree with any of the terms in the Agreement to Mediate provided by the mediator, they can, by agreement, amend them.

49. The parties will need to consider the terms of the Agreement to Mediate carefully, but they include the following terms:
    - Whether and if so how the costs of the mediator are to be split between the parties, or if not, the details of how the costs are to be paid.
    - That if parties wish to attend with legal representatives, or get legal advice about the mediation or the underlying dispute, they must pay for this themselves.
    - That confidentiality in respect of some information starts from the commencement of the appointment of the mediator.
        - The fact that there is a mediation taking place is not confidential, but all information shared within the mediation is confidential.
        - Any written agreement signed by the parties at the conclusion of the mediation is not subject to confidentiality.
        - The parties can agree to share information disclosed at the mediation with third parties.
        - The parties must agree at the conclusion of the mediation what if any information from the confidential mediation process is to be shared with the Court.
    - The confidentiality of the process is subject to the overriding duty on the parties and the mediator to report any information disclosed in the mediation which may suggest that a criminal offence has been committed or that 'P' (or indeed anyone involved in the mediation) has been the subject of abuse.
    - The mediator cannot be called to give evidence about what happened in the mediation in any subsequent proceedings.
    - The mediator has a right to recuse him/herself if on meeting the parties/investigating the issues, the mediator considers he/she is not a suitable mediator or the case is not suitable for mediation.
    - That the parties agree to the mediation being evaluated, and that they will cooperate with the evaluation process.

50. The second thing the parties need to agree on is a venue for the mediation and how this will be paid for. In default of agreement, the venue must be a neutral one, independent of the parties and paid for in equal shares. As to this:
    - Consideration should be given to whether a particular venue might increase P's ability to participate. It might for example be possible to conduct the mediation in P's care home.
    - Some parties and/or mediators may be able to offer a venue at no extra cost.
    - Please note that if any parties are obtaining their funding to participate in the mediation from the Legal Aid Agency (LAA), the LAA will not contribute to the cost of a venue.

51. The third thing the parties will need to agree is whether any non-parties should be invited to the mediation and be bound by the Agreement to mediate. If they do agree this, the parties will need to ensure that the COP has given permission to share information about the mediation with them so there is no breach of any transparency order that has been made. The Transparency Order will also need to be shared with any third party.

52. The parties will be contacted separately by the evaluation team once they have consented to their contact details being passed on to them. https://www.courtofprotectionmediation.uk/evaluation/

53. Once the mediator has been appointed, a venue booked and the terms upon which the mediation is to take place agreed (by signing the Agreement to Mediate), the parties move onto the pre-mediation stage.

Pre-mediation

54. Each party will be sent a pre-mediation questionnaire by the mediator prior to the mediation. The completed questionnaires are to be returned back to the mediator, together with any documents sought. If the parties consent to taking part in the evaluation, the

completed questionnaires only (i.e. not the supporting documentation) will be shared by the mediator with Dr Jaime Linsdey of University of Essex.

55. Parties are encouraged to fill out these forms carefully. This is an important opportunity for the parties to evaluate their position and give careful consideration to the position of the other parties to the mediation.

56. These forms ask the parties to provide the following information to the mediator:

- Mental Capacity Assessment(s) establishing that 'P' lacks the capacity to make the decisions that are the subject matter of the mediation.
- Most recent Care Plan (if appropriate)
- Information on P's 'participation' in the mediation, (direct or indirect, names of relevant professionals who will represent P').
- Information on P's wishes and feelings on the issues in question as far as is reasonably ascertainable. This should preferably be obtained by an independent person such as an advocate or a litigation friend, an appropriate professional with expertise in P's disability or an independent friend/relative). Alternatively of course P could attend the mediation if accompanied by a litigation friend/accredited legal representative, rule 1.2 representative, a suitably independent professionals such as an IMCA or an independent friend/family member.
- The views of anyone who is not a party to the mediation, who should be consulted, as far as is practicable and appropriate, under section 4.
- Any records of best interests meetings relevant to the matters being mediated.
- Any essential documents from the COP proceedings including the transparency order and the permission of the Court to share information from the proceedings with the mediator and any attendees of the mediation who are not parties to the CoP proceedings.

57. Parties should use their best endeavours to keep the information to be provided to the mediator to a minimum and should not in any event exceed 350 pages.

58. The mediator will have a pre-mediation meeting (usually by phone but it could in some circumstances be in person) with each party. The purpose of these pre-mediation meetings is:

- For the each party to meet with the mediator, so the party has at least spoken to the mediator prior to the mediation meeting.
- For each party to tell the mediator in their own words, their story.
- For the mediator to explain the mediation process to each party, and to ensure that they understand the confidential nature of the proceedings, and that the parties understand that if agreement is reached, that agreement will form the basis of an application to be submitted to the Court for either withdrawal of proceedings or for a substantive order from the Court.
- For the mediator to explore with the party whether there are any further documents the mediator should see.
- In the event of any disagreement as to the participation of P in the mediation, for the mediator to explore this with each of the parties to see whether a resolution can be reached. If it cannot, the case will not be suitable for mediation as the mediator cannot become a decision maker in respect of that (or any) issue.
- For each party to have an opportunity to ask any questions of the mediator about the process.
- For the mediator to explore with the parties who they would like to be supported by at the mediation, and whether invitations to the mediation should be issued to parties who are not parties to the COP proceedings and if so, whether any permission is required from the COP to share information with them about the proceedings.
- To explore with the parties the work that they will need to do prior to the mediation so that they can be as clear as possible about which options they can make available for P.
- To answer any questions about the Agreement to Mediate.

The mediation itself

59. The expectation is that the mediation will be in person, however the mediation will be accessible to those who live very far away or have mobility problems and so it may be possible to conduct the mediation or part of it by skype for example.

60. Each party to the mediation must come with authority to settle the dispute (subject to any final approval required of the Court). This needs to be checked with each party prior to the start of the mediation. If approval needs to be sought for funding for packages of care, and the agreement is to be subject to the usual procedures (in addition, it may be that agreement is subject to practical arrangements being able to be commissioned – for example, the ability to procure a private care provider), this must be made clear to the parties at the start of the mediation.

61. At the start of the mediation, each attendee will sign a Declaration of Confidentiality which confirms that they will keep the information shared within the mediation confidential to the parties to the mediation, save for as agreed between the parties. The attendees will also need to confirm that they have seen and understand any transparency order made by the Court.

62. If the parties have consented, a member of the evaluation team may attend the mediation as an observer. Any information published in the research report will be suitably anonymised and all information recorded will be stored securely in accordance with the requirements of the GDPR.

63. Remember, any information disclosed in the mediation is confidential (unless the parties agree that it can be shared).

If agreement is reached

64. Remember that if agreement is reached and a mediation agreement signed by the parties;
    - The terms of the agreement are not confidential.

- The agreement is a legally enforceable contract.
- The terms of the agreement will need to be put before the COP in an application to either withdraw proceedings or for the Court to make substantive orders.

65. If agreement is reached it must include:

    a. A statement from the parties that they consider that P lacks the capacity to make the decision him/herself.
    b. A statement from the parties that the agreement reached is in P's best interests so that the Court can see that the parties have complied with section 4 of the MCA.
    c. The information that it is agreed can be shared with the Court from the mediation, so as to assist the Court in determining whether the agreement is in P's best interests.
    d. Any agreement the parties have come to regarding informing third parties as to the outcome of the mediation. To the extent that this will involve disclosing that P has been the subject matter of COP proceedings, permission from the Court will be required.

POST MEDIATION AND APPLICATIONS TO THE COP

66. As this scheme is concerned with issued COP cases, the parties will need to apply back to the court for permission to withdraw proceedings in the event of an agreement, or further orders depending on the circumstances that arise. Thus it is important that the mediator ensures that the parties consent to relevant information being made available for the Court at the conclusion of the mediation where a Court order is required.

67. The mediator and the parties need to be aware that following the conclusion of the mediation (and as a step outside the mediation), the parties will need to make an application to either:
    a. withdraw the proceedings from the Court on the basis that there is no longer a dispute for the Court to determine;
    b. withdraw some issues from determination by the Court (on the basis that there is no longer a dispute and an order is not required to regularise any agreement reached), with the issues that have not been agreed remaining before the Court; or
    c. seek orders to regularise any agreements reached as required, alongside either of the above (which require the authorisation of the Court).

Applications to Withdraw

68. Where there is an application to withdraw the proceedings (either in their entirety or in part), the Court has to give permission for this and so will need some evidence that such a step is in P's best interests. The Court will also require evidence as to capacity and best interests in support of any application for orders to authorise the substance of the agreement reached between the parties in mediation. This evidence ought to have been provided to the mediator at the pre-mediation stage.

A. Agreement on All Issues where no court orders are required

69. Where the parties are able to come to an agreement in respect of all issues before the Court, and no substantive orders are sought from the Court, the Court is likely to require:
    a. 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. It is sensible to make this a joint position statement so as to ensure that the confidentiality of the mediation is not jeopardised by one party.
    b. An application from the Applicant seeking to withdraw the proceedings together with any supporting evidence as to why this is in P's best interests.
    c. 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.
    d. 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.

70. A draft order authorising withdrawal and citing terms of the agreement.

B Partial Agreement

71. Where the parties have narrowed the issues and so come to an agreement in respect of some of the issues before the Court, the Court is likely to require:
    (a) 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. It is sensible to make this a joint position statement so as to ensure that the confidentiality of the mediation is not jeopardised by one party.
    (b) 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 issues to be agreed in the terms they have.
    (c) The draft order the parties seek disposing of the issues upon which they have agreed and either making directions for determination of the outstanding issues or the orders required to dispose of the outstanding issues.

(d) In the event that P is not a party or does not have a representative, confirmation from all parties that they agree with the order and in particular that making the order is in P's best interests.

C Agreement on all issues where court orders required

72. Where the parties have agreed issues but still require an order from the Court, the Court is likely to require:

a. 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. It is sensible to make this a joint position statement so as to ensure that the confidentiality of the mediation is not jeopardised by one party.

b. 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 issues to be agreed in the terms they have.

c. The draft order the parties seek disposing of the issues upon which they have agreed and the orders required to support that agreement.

d. In the event that P is not a party or does not have a representative, confirmation from all parties that they agree with the order and in particular that making the order is in P's best interests.

THE COST OF A MEDIATION UNDER THE SCHEME

73. As the mediation is a step in the litigation, the usual costs rules will apply to the funding of the mediation, unless and until the Court makes a different order. This means that in the P&A cases, the starting position is that the cost of the mediation will be met from P's funds, and in H&W cases, the starting position is that each party (including litigants in person) will be expected to pay an equal share. The parties can agree and the Court can make a different order on application.

74. For any mediation that is conducted under the Scheme, the mediator will have agreed to act under the scale of fees set by the Scheme. This is an hourly rate of £100.80. The mediator will charge for reading time and pre-mediation discussions. Travel time will be charged at a lower rate.

75. This rate is considerably lower than mediators would usually charge. This is an advantage of mediating under the scheme. The mediators have agreed to mediate at this reduced rate in order that the mediations can be evaluated.

76. It will of course be open to the parties and to the mediator to agree different rates.

77. Any cost of the administration of the mediation will be met by the mediator.

78. If one of the parties is legally aided, the LAA will not contribute to the fee for a venue. In such cases, the legally aided parties share of the cost of the venue will need to be met by the other parties.

EVALUATION OF THE MEDIATION UNDER THE SCHEME

What is the research that is being carried out?

79. Dr Jaime Lindsey of the University of Essex (j.t.lindsey@essex.ac.uk https://www.essex.ac.uk/people/linds59705/jaime-lindsey) is the principal investigator undertaking this evaluation of mediation in the Court of Protection. Dr Lindsey is an experienced researcher on Court of Protection matters and is undertaking this evaluation as part of her wider research. The evaluation will be carried out independently of the Mediation Scheme and with separate funding. Participation in the evaluation is voluntary and parties will need to provide their informed consent to participate The evaluation aims to answer the research questions set out below:

    a. What is mediation's effect on P's participation in the decision-making process as compared to judicial hearing?
    b. What is mediation's effect on judicial time as compared to legal proceedings, including judicial hearing?
    c. What is mediation's effect on costs, including parties' legal costs and the costs to public bodies, as compared with legal proceedings including judicial hearing?
    d. What is mediation's effect on other resources of those involved in CoP disputes? For example, to what extent does mediation divert the time of the professionals from front-line services? Does it lead to the resolution of disputes at an early stage when compared to proceedings?
    e. What is mediation's effect on the working relationship between the parties as compared with legal proceedings?

How will the research be carried out and how will it impact on a mediation?

80. When you appoint your mediator under the scheme:

- You will be asked to give your consent for your contact details to be provided to the evaluation team.
- Once you have agreed to this, a member of the evaluation team will contact you to obtain your informed consent to participate in the evaluation and will provide you with further details regarding what the evaluation will involve.
- Once you have consented to being part of the evaluation, the evaluation team will inform the mediator of your consent and mediator will share the date scheduled for the mediation with the evaluation team (or whether the case did not proceed to mediation and/or when the mediation completed).

81. The first step in the process of mediation is for each of the parties to fill out a pre-mediation questionnaire. This will be provided by the Mediator in the pre-mediation stage, and will be shared by the mediator with the evaluation team to analyse. In some cases, the evaluation team will also seek your consent to observe the mediation. After the mediation, the evaluation team will ask you to complete a survey with a number of questions about your experience of the mediation. There may also be additional follow up interviews with participants whose mediations were observed.

82. If you take part in the survey, interviews or observations, you will be contacted separately by the researchers and be sent consent forms and participation information sheets for those aspects.

83. The evaluation team are subject to the same rules on confidentiality as the parties and the research has been given ethical approval on behalf of the University of Essex Research Ethics Committee. They will therefore not publish any information that has been disclosed in any mediation without anonymising it so that none of the participants can be identified. The findings of the evaluation will be published in a freely available report, academic publications and conference proceedings.

GLOSSARY OF ACRONYMS

COP – Court of Protection

MCA – Mental Capacity Act 2005

'P' – subject matter of the COP proceedings