

Court of Protection Mediation Research

Where are we in the UK?



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EXECUTIVE SUMMARY

This research was carried out to address the question ‘Where are we in the UK in Court of Protection mediation?’ It does this through analysis of responses to a survey and a number of case studies received from professionals involved in the Court of Protection (CoP), including mediators, lawyers, a social care professional and a health professional.

Aims

The primary research aim was to gather and present evidence on the use of mediation in the Court of Protection. Case studies were gathered to illustrate the benefits, successes and challenges and to seek views on pertinent questions. The research also aimed to identify what specialist expertise and training are needed for mediators working in this area and to develop an understanding of what issues are (and are not) suitable for mediation in this context.

Headline Findings

Issues in dispute

The issues covered in the mediation case studies included residence, care, contact, finance and property, statutory wills and medical treatment. Residence was the most frequently cited, (at 59%), care arrangements (56%), contact (44%), to medical treatment and statutory wills (7%). Almost one-third of cases involved finance and property. Other issues in the mediation case studies included power of attorney, deputyship, holidays, and deprivation of liberty.

Timing

Regarding when is the best time to mediate, the majority of respondents suggested it should take place as soon as possible and before proceedings. The majority of the case studies, however, were mediated during proceedings (two-thirds), with nearly one-third mediated before proceedings and a single case after several sets of proceedings.

Awareness

A very small percentage of respondents (4%) considered professionals were ‘completely aware’ of the benefits and challenges of CoP mediation. The majority (71%) thought there was a ‘partial awareness’ and 25% considered they were ‘not aware at all’. Lack of awareness was considered to be a major obstacle to the parties themselves engaging in CoP mediation by 72% of respondents.

P’s participation

In 79% of mediated cases P did not attend or participate. In 21% of cases P did not attend but was enabled to participate with support, mostly from the Official Solicitor.

Of all mediated cases, P’s views were conveyed in 59% by another person – family members (41%), legal representatives (35%), social workers (35%) or other advocate or representative; as respondents could indicate whether the views were conveyed by more than one category of person, the percentages add up to more than 100%.

Funding

An interesting picture emerges as to who funds mediation. In 48% of cases, the costs of mediation were shared between the parties and in 37%, the local authority paid all the costs. The Legal Aid Agency contributed to costs in 15% of cases. In the remainder, the costs were paid by the Health body involved (7%) and from P's funds/by the deputy for property and affairs (7%).

Rates of agreement

The rate of agreement in the reported cases was high, with 78% of reported cases reaching an agreement either during or following mediation. Written agreement was reached on the day in 52% of cases, with a further 19% achieving written agreement following the mediation. Oral rather than written agreement was reached in 7% of cases. In 22% of cases there was no agreement. In most of those where an agreement was reached (59%), the terms of agreement were incorporated into a court order.

Reasons for lack of agreement being reached included entrenched positions, too many parties and too little time, and allegations of financial abuse and fraud.

Cost savings

Information on costs savings were estimates only as this is a notoriously difficult area to research, especially in a study of this modest scale. Examples given by half of the respondents of approximate cost savings were between £6,000 and £30,000 – the exact savings depended on length of case and when in the proceedings the mediation took place, as well as estimates of savings of judicial and court staff time, and time of counsel and local authority professionals.

Experience of mediators

The majority of the mediators instructed in the case studies (89%) had previous experience of the Court of Protection cases from their work in the legal profession

Methodology

In the first instance, information about the proposed research together with an invitation to take part was sent to professionals with interest and experience in Court of Protection mediations including: legal professionals, mediators, Solicitors for the Elderly, and the Official Solicitor. The invitation to participate in the research was mentioned in the Law Society's Gazette publication. Expressions of interest were received and a register of 25 participants was compiled.

Secondly, the survey was designed in two sections. Section 1 set out pertinent questions to seek participants' views about CoP mediation. Section 2 asked about specific mediations the participants had been involved in. The survey was launched via Survey Monkey at the end of November 2016 and closed in January 2017.

In Section 1 of the survey, the respondents, who between them had at that time been involved in 80 mediations (as mediators, lawyers or social care professionals) set out their views on pertinent questions, such as when is the best time to mediate and what knowledge and experience should mediators have to deal with such disputes?

In Section 2 of the survey, in response to case-specific questions, the respondents provided detailed information on mediations they had been involved in. From this information 25 case studies were created. In these cases, more than one-third of the mediations were ordered by the court, and in nearly two thirds of these, the court ordered the parties to attend and/or participate in mediation.

Both Section 1 and 2 were completed by 80% of participants. The remaining 20% responded only to Section 1; they were professionals practising in the field but without actual experience of CoP mediation.

Abbreviations

CoP	Court of Protection
MCA	Mental Capacity Act 2005
P	Person assessed to lack capacity to make a specific decision
LPA	Lasting Power of Attorney
EPA	Enduring Power of Attorney
OPG	Office of the Public Guardian
CRPD	Convention of Rights for People with Disabilities
CCEL	Canadian Centre for Elder Law

INTRODUCTION

Role of the Court of Protection

The Court of Protection ('CoP') plays an important role as it exists to safeguard vulnerable people who lack the mental capacity to make decisions for themselves. These decisions may relate to the person's finances or their health and welfare. The Mental Capacity Act ('MCA') came into force on 1st October 2007, changing the status of the CoP. Before this date, it had existed as an office of the Supreme Court with jurisdiction only over the property and affairs of people who lacked mental capacity.¹ The MCA created the new CoP to continue to safeguard the affairs of vulnerable people and extended to health and personal welfare cases, in addition to financial ones.

In finance and property cases, the parties are commonly family members of P who are in dispute with each other about matters relating to deputyship, powers of attorney, sale of property, finances and possessions and statutory wills.

Health and welfare cases include disputes over residence and care arrangements, contact, holidays, deprivation of liberty and serious medical treatment. Where families are in dispute with the public body that is responsible for arranging P's accommodation, care arrangements and/or treatment, parties will include the relevant local authority or health body.

Where there are safeguarding concerns over the conduct of family members in relation to P's property and financial affairs or health and welfare matters, and these are found to be substantiated and not capable of resolution, the local authority or health trust may be involved in court proceedings so the CoP will make a decision in P's best interests.

CoP case studies can be found on the CoP Hub website at www.courtofprotectionhub.uk/cases.

In Court of Protection Practice 2019 reference is made to the caseload of the CoP. Paragraphs 1.240-241 state:

'It was anticipated that the vast majority of its workload would be property and affairs ...and the government anticipated that the number of health and welfare applications would be relatively low, estimating this at about 200 per year.² The prediction that the main work of the CoP would be property and affairs has proven correct; but the number of applications concerning health and welfare matters has continued to rise, bolstered in particular by applications concerning deprivation of liberty.³

and

'... today the majority of cases heard under the CoP's welfare jurisdiction concern questions such as where a person should live and whom they should have contact with.⁴ This is important, because research indicates that these cases, particularly where they concern personal relationships or questions of sexuality – tend to involve

¹ Its powers derived from part 7 of the Mental Health Act 1983. On 1st October 2007, part 7 of the Mental Health Act 1983 was repealed, and the office of the Supreme Court ceased to exist.

² Department of Constitutional Affairs, The Mental Capacity Bill: Full Regulatory Impact Assessment (2005)

³ Ministry of Justice, 'Family court statistics quarterly – January to March 2017 available at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2017>

⁴ L Series, P Fennell and J Doughty, Welfare cases in the Court of Protection: a statistical overview.

*more parties, last longer, result in more hearings and cost more than cases about serious medical treatment.*⁵

Further information about the increasing volume of welfare litigation is given in a statistical overview by Cardiff University which states:

*'In 2008 the number of welfare related applications received by the CoP was fewer than 1000, in 2016 it is greater than 4000 and expected to continue to rise.'*⁶

Mediation

Mediation can be broadly defined as a voluntary, flexible and confidential process conducted by a neutral person who actively assists parties to work towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution.

While mediators are proactive and creative in the way they assist parties to find solutions, the parties have ownership of the outcomes.

There are different areas where mediation is used including civil and commercial, divorce and family arrangements, workplace, neighbourhood and community disputes. In all of these cases, all the people in dispute are able to voluntarily agree to take part in mediation because they have capacity to make a decision and therefore agree to a solution.

There are a number of reference sources on mediation. "Mediation: Principles Process Practice" by Boule and Nestic covers all aspects of mediation, ranging from the principles and policies, the roles and functions in mediation, to the skills and techniques of mediator and legal issues in mediation. Secondly, *Mediation Theory and Practice* is the journal of the College of Mediators published by Equinox.⁷

Court of Protection mediation

The key and fundamental difference in mediation in the CoP relates to the person's capacity. In these cases mediation works towards a negotiated agreement on a specific dispute or issue which relates to 'P', namely a person who has been assessed to lack capacity to make a specific decision, within the meaning of the MCA 2005.

Where a person 'P' lacks capacity to make a specific decision for themselves, the key principles of the MCA govern how decisions are made, including how disputes are resolved. Where there is a dispute between family members, professionals, and/or private or public bodies responsible for the provision of care or medical treatment, mediation can assist to resolve disputes in accordance with a person's *best interest* and in a way which is *least restrictive*.

The court, person or public body (such as a local authority) making a best interest decision has a duty to consider a number of factors set out in s4 MCA.⁸ Two factors in particular must be carefully considered by the mediator and the parties involved in the mediation, namely: how P will be represented within the mediation to enable him/her to 'participate' and whether P's wishes and feelings can be ascertained and conveyed.

⁵ Ibid

⁶ Ibid available at <http://sites.cardiff.ac.uk/wccop/files/2017/09/Series-Fennell-Doughty-2017-Statistical-overview-of-CoP.pdf>

⁷ <https://journals.equinoxpub.com/index.php/MTP>

⁸ s4 MCA Best interests

The Act states the person making the decision:

- As far as reasonably practicable, must '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' (s4.4 MCA) and
- They 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. (s4.6 MCA)

Participation of P and human rights

In 2009 the UN Convention of Right for People with Disabilities (CRPD) was ratified by the United Kingdom. There are parts of the Convention which are pertinent to the participation of P in decision-making (whether before the CoP or in CoP mediation). Article 3 includes in the general principles: (a) respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons; and (c) full and effective participation and inclusion in society. Article 12 sets out the right to equal recognition before the law and at 12.2:

'States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Under 12.3 States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.'

In 2014 the Committee on the Rights of Persons with Disabilities published General Comment No 1 (2014) on Article 12 calling for State parties to abolish substituted decision making and adopt supported decision making.

CoP Practice Direction 1A on Rule 1.2 on Participation of P states:

'Developments in case law both of the European Court of Human Rights and domestic courts have highlighted the importance of ensuring that P takes an appropriate part in the proceedings and the court is properly informed about P, and the difficulties of securing this in a way which is proportionate to the issues involved and the nature of the decision which needs to be taken and avoids excessive delay and cost'.

-
- (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.

The CoP Practice Direction continues at paragraph 2 ‘.. rule 1.2 makes provision to a) ensure that in every case the question of what is required to ensure that P’s voice is properly before the court is addressed; and b) provides flexibility for a range of different methods to achieve this, with the purpose of ensuring that the court is in a position to make a properly informed decision at all relevant stages of a case.’

There are ethical, human rights, practical and resource implications involved in maximising P’s participation, supported decision-making, reasonable adjustments and taking all practicable steps to ascertain P’s wishes and feelings.

P’s participation in the CoP proceedings is the subject of research by Dr Jaime Lindsey,⁹ one of whose findings was the limited participation of vulnerable adults:

‘P’s absence was the most striking theme that emerged ... for example, of the eight cases observed over 11 hearings, P was present on three occasions. Of the further case files reviewed, there was no evidence in the files that P attended any of the hearings, gave evidence or spoke to the judge informally. The reasons for P’s absence appeared not to be the result of specific rules. In fact, in most cases there was no or very limited discussion of whether or not P should give evidence. Instead the data suggests that it was assumed that P was unable to participate or give evidence in proceedings.’

In the mediation case studies, P did not attend but was said to have capacity to participate with support in 21%. In 42%, P was represented at the mediation. In 59%, P’s wishes and feelings were capable of being conveyed by P, or on his behalf, during the mediation. P’s capacity to participate (directly or indirectly) in mediation and ascertaining P’s wishes and feelings is explored more fully in the discussion section. A key question going forward is whether mediation facilitates a role for P more effectively than CoP procedures. It is recommended this is addressed in one of the questions in the evaluated CoP Mediation Scheme.

Research background

Useful background to this project is the Canadian Elder and Guardianship Mediation Report (‘CCEL Report’),¹⁰ which this author reviewed in the *Elder Law Journal*.¹¹ The CCEL research, carried out over a five-year period, is extensive and brings a deepening of knowledge and good working practice for mediators in this field. Little is known of mediation in the UK’s CoP, however, and this gave rise to the idea to carry out a survey to establish an initial evidence base. At the end of 2016, a register was compiled of people with direct relevant experience willing to participate in a survey. In November 2016 the Court of Protection Mediation Research survey was launched.

This was an unfunded piece of research. Due to the author’s own connections with the legal profession, the respondents were primarily lawyers and mediators with experience of the CoP. Other respondents included a local authority social care professional, a mediator/consultant in anaesthetics and intensive care medicine and three family mediators. As the research is based on their views, it does not capture the voices of all the parties in the case studies. It is recommended that going forward it will be important to consider the best way to get the views of a wide range of interested stakeholders.

⁹ Protecting and empowering vulnerable adults: mental capacity law in practice by Jaime Lindsey. See full report Testimonial Injustice and Vulnerability: A Qualitative Analysis of Participation in the Court of Protection <http://repository.essex.ac.uk/22697/>

¹⁰ http://www.bcli.org/sites/default/files/EGM_Report_Jan_30_2012.pdf

¹¹ <http://www.adultcaremediation.co.uk/profile.html> click on link at bottom of page.

Aims and objectives

The primary aim for this research was to gather and present evidence on the use of mediation in the CoP. Case studies were gathered to illustrate the benefits, successes and challenges and to seek views on pertinent questions. The research also aimed to identify what specialist expertise and training are needed for mediators working in this area and to develop an understanding of what issues are (and are not) suitable for mediation in this context.

The intention for the research was for it to act as an evidence-based springboard to raise awareness of mediation and to serve as a basis 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 both before and after the issue of proceedings. If a dispute is capable of being resolved by mediation before proceedings have commenced, court proceedings may not be necessary.

The findings from this survey have helped to shape the proposals for an evaluated CoP mediation scheme to be run. In January 2017, four of the initial research findings were shared at a court users group meeting in Bristol with the then President, LJ Munby and HHJ Marston: the percentages and types of issues mediated, main advantages and benefits, challenges and frustrations. An overall success rate of 77% was reported in the case studies (52% written agreement on the day, 18% written agreement after the mediation and 7% verbal agreement). Judicial encouragement was given to explore a pilot being set up, and the Court of Protection Mediation Working Group was established. The working group met in April and June 2017 and prepared the first version of the draft CoP Mediation Scheme.

In October 2017, three members of the working group met with members of the judiciary to discuss the draft CoP Mediation Scheme. Snapshots of the case studies were shared to illustrate the benefits mediation can offer. In response to issues, raised by the judiciary, the draft Court of Protection Mediation scheme document was amended, prior to being sent out to stakeholders for consultation in April 2018. The working group considered the consultation responses and the CoP Mediation Scheme was revised before further meetings with the judiciary took place. The judiciary has now approved the launch of CoP mediation scheme on a trial basis. It is expected the scheme will start later in 2019 will be evaluated during 2019-2020 and run for a period of approximately 1 year.

During the trial period, the scheme proposes mediators with sufficient relevant experience of CoP and the MCA will be able to join a specialist panel of mediators

It is important to build up evidence about mediation in the CoP, and therefore an independent research team who will be appointed and set the outcome measures will evaluate mediations under the scheme. The working group considers the evaluation will include looking at the following research questions:

- What is mediation's effect on P's participation in the decision-making process as compared to judicial hearing?
- What is mediation's effect on judicial time as compared to legal proceedings including judicial hearing?
- 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?
- What is mediation's effect on diverting the time of the professionals from front-line services to mediation rather than litigation (by resolving disputes at an early stage)?
- Whether mediation has improved working relationships?

QUESTIONNAIRE RESPONSES

The survey questions and graphic presentation of responses can be found in Appendices A and B.

Participants' involvement in mediation

By early January 2017 when the research data was collected, the 25 research participants (which included lawyers, mediators and a social work professional - See Table 1 in Appendix B) had been involved in over 80 Court of Protection mediations. While one had mediated over 20 cases, others had mediated a range of between one to eight cases. Two participants, lawyers with experience of CoP cases, who had not been involved in mediation, nevertheless did wish to contribute their views and respond to the pertinent questions in Section One.

Best time to mediate

The majority (76%) considered it is best to mediate at an early stage. 44% said as soon as possible; for example, before the parties adopt rigid positions and become too entrenched. The other 32% thought before proceedings, and one person explained, once the issue of proceedings is contemplated parties are more likely to focus their minds on the issues at hand.

The remaining 24% stated it was best to mediate during proceedings. One participant thought that mediation would be helpful at all stages of the process whereas another suggested that there should be multiple entry points and that it could be attempted more than once.

As soon as possible - comments:

'It depends on the case and the readiness of the parties to engage realistically with the process.'

'There simply is no right answer to this. Ideally as soon as possible, before people get entrenched but people may not engage or may be wholly unrealistic.'

'The Official Solicitor property and affairs team will only become involved in a case following the issue of proceedings. However, in most contested cases, mediation would probably be best, as soon as possible, before the parties' positions become too rigid.'

Before proceedings - comments:

'Before proceedings, because this gives the maximum savings in cost and time. It would however depend on the circumstances of each case and is certainly beneficial both during and after proceedings too.'

'The issues need to be clear but significant cost savings can be achieved by early mediation.'

'Once the issues have crystallised.'

'Mediation helps either: to resolve matters which avoid the need to make an application or it narrows the issues.'

'Once proceedings are issued, parties are often entrenched.'

'I've only identified 'before proceedings' rather than 'as soon as possible', because experience teaches me that it is only when proceedings are in contemplation, that legal services are involved and the issues start to be identified: absent the identification of issues, mediation is unlikely to achieve very much.'

'While I think that mediation is incredibly helpful, I'd like to have answered 'as soon as possible'. However, as funds are limited, informal efforts to resolve conflicts are used before accessing more formal mediation. When proceedings are a real likelihood and other efforts have failed to resolve the disputed issues, the parties' minds are often focused on the issue at hand – thus increasing the likelihood of success. Avoiding litigation is usually a good thing.'

During proceedings - comments:

'Mediation seems to focus the parties' minds if it is during the proceedings, particularly if the parties are aware that there could be an adverse costs order made against them if they do not attempt to resolve (or narrow) the issues.'

'As the Official Solicitor is only involved once proceedings have been issued it is difficult to comment on mediation before an application is made to the court. But if mediation can prevent proceedings being issued in the first place then this must be a good thing.'

'Until proceedings are issued, neither side knows how seriously the other one will take it. Having a court hearing on the horizon, and all the costs that will incur, focuses minds.'

'The bundle for the Court of Protection application is a very useful starter for the mediation bundle.'

'On balance during proceedings when the evidence has been gathered.'

Obstacles

Participants were asked 'what are the obstacles to CoP mediation?' They could select more than one answer.

- Lack of awareness: this factor was considered by 80% to be a major obstacle because 'not much is known about it by practitioners', *'there is a lack of awareness of how successful it can be', 'some have anxiety it will 'weaken' a case' and 'often people feel it is too late once you are in court'.*
- Funding: 68% of participants considered funding to be a significant obstacle. One stated *'people are unwilling to pay for it as there is no guarantee of a result.'* On the availability of funds, one said *'..often P's funds are not available at the stage of mediation (either pre or during proceedings). It would be helpful for the judge to specify in the directions order for access to P's funds to be permitted for the purpose of funding the costs of the mediation..'* Regarding funding by the Legal Aid Agency and local authorities, one participant stated that *'it is difficult to get funding from the Legal Aid Agency although statutory bodies will sometimes fund it all',* another said *'there remains a lack of willingness on the part of local authorities to embrace mediation, in part, I suspect because they often end up paying.'*
- Lack of legislation: 28% of participants considered this an obstacle. One commented there are a *'lack of protocols within the legal profession generally'* and *'within local authority legal teams, that mediation should be attempted in all CoP matters'*. Another stated there was a *'lack of legislation urging mediation'*.

- 20% cited the nature of the issue, namely reaching an agreement on behalf of P, to be an obstacle in itself, stating: 'the court is the decision maker, so any agreement reached via mediation will have to be agreed by the court, but mediation may well serve to narrow the issues and thereby reduce court time and expense', and 'court approval is required as the Court needs to consider whether the terms are in the best interests of P.'¹² One person cited 'difficulty in securing P's involvement' as an obstacle.
- 16% considered the judiciary to be an obstacle (though no specific reasons were provided).
- 24% gave examples of other obstacles, including a lack of CoP mediators.

Obstacles to parties engaging

The three main obstacles to parties engaging, cited by 72% of participants were: awareness, entrenched positions and family dynamics.

Awareness: participants were asked, to what extent are professionals who deal with a range of CoP disputes aware of the benefits and risks of mediation? A very small percentage (4%) considered professionals were 'completely aware'. The majority (71%) thought there was a 'partial awareness' and 25% considered they were 'not aware at all'.

It was commented that 'there is still a lot of work to do to raise awareness' and 'once parties and solicitors have experienced mediation it is likely to become more widely used, and it would be helpful for the judiciary to give clearer 'steers' towards mediation.'

Family Dynamics: the concept of 'The Other Side' was raised and it was noted that 'people are very worried about meeting the 'other side' in such disputes as they are very personal and entrenched by their very nature. They go to the 'core' of family disharmony and identity. This is the major barrier. If a person isn't forced to mediate, they will try not to, so they can keep a distance.'

Entrenched Positions: whereas one person stated that in their experience 'most people would agree to mediation even where there are entrenched positions' another said, 'people like the idea of 'winning' to prove they were right, not agreeing.' As to conduct and costs, one participant commented that 'it was often the case that one party was happy to be involved in mediation but the other party refused and that this should go towards the party's conduct in the proceedings in relation to costs.'

Other obstacles to parties mediating were cost (64%), lack of trust (44%), and confidence (40%).

24% of participants considered other obstacles to parties engaging in mediating were lack of CoP mediators and the attitudes of lawyers. The following comments were made regarding lawyers:

'there is a 'lack of encouragement to mediate from lawyers to their clients.'

'Lawyers not understanding fully about the benefits of mediation (namely it is confidential/without prejudice/they will be in control of the process etc).'

'Reticence of lawyers to 'sell' mediation to their clients in a positive and enabling light.'

'Lawyers' wariness that mediation might damage or prejudice their case in some way.'

'Lawyers trying to sort it out in an adversarial way, making it much worse and not getting it to mediation.'

¹² See Discussion Section on Nature of Issue – Decisions for P and Best Interest Decision Making

'The idea that mediation will take the matter out of their control or that mediation could put them out of business.'

'There are points made in the National Audit Office Report into family mediation (divorce) in 2007 that are equally relevant to this, namely, lawyers have a contrary interest to their client to earn fees and can actually divert people from mediation.'

'Lack of understanding that mediation involves ALL parties and that lawyers are a valuable part of the process.'

Representation of P's best interests

Participants were asked '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 to be represented during the mediation?' The three most favoured options were the involvement of an advocate (32%), a litigation friend (28%) and solicitors (24%). Only a small minority (4%) considered family and friends would be appropriate. No one suggested that P's carers would be appropriate to represent P's interests.

The participants' commented as follows:

'It would depend on the circumstances of the case as to who would be best placed to represent P's best interests.'

'It varies, depending on the situation. However, if I had to pick one, I think an advocate is probably the safest bet. A decision as to who would be the best advocate in any given situation needs to be made.'

'It all depends! But I would say someone neutral like a solicitor or advocate, rather than a family member who has their own view.'

'In the absence of a litigation friend, then an advocate would be appropriate, assuming they have had the opportunity to explore with P their wishes and feelings and can give an entirely independent representation of their views, obtained in an unbiased way.'

'This is tricky to answer as a litigation friend is only appointed once proceedings have been issued and P has been joined as a party.'

'Ideally litigation friend and family.'

'Ideally a solicitor deputy if at all possible.'

'Family members are fine if able to stand back from their own beliefs and look at P 'standing alone' that is in his own right. Mostly this is not feasible. Furthermore, it is not always possible for closely related family to act as litigation friend either.'

'Other way found to be successful was by having one person from each 'side' meeting with P together to discuss various issues with P, recording his views, signing an agreed schedule of expressed views following the meeting.'

Specialist knowledge and experience

Participants were asked 'in addition to accredited mediation training, what specialist knowledge and experience should mediators have? They could select more than one answer. The majority (over 80%) considered the most important areas of expertise were: capacity, the Mental Capacity Act and the Court of Protection. Other areas included: understanding of family dynamics (64%), safeguarding (56%), dementia (52%), health and community care issues (48%), learning disability (44%), abuse (44%), the ageing process and dynamics of ageing (36%) and other (28%).

A Mental Capacity Act local authority team manager suggested that the vital topics would be: 'MCA, Capacity, Court of Protection, health and community issues and understanding family dynamics' and further stated: 'all the other areas might be necessary depending on the situation. An understanding of dementia, for example, is usually helpful (as most cases we have involve older people with dementia), but this would not be the case if the mediation involved a person without dementia'.

One solicitor with expertise of capacity issues derived from doing wills, probate and power of attorney work suggested mediators in CoP cases '*need to understand the basic law*' and recommended '*a day's training to get them up to speed on its various aspects.*'

28% stated that mediators should have other knowledge and experience as follows:

'An ability to communicate and an understanding of different means of communication with those with limited ability to communicate.'

'Knowledge of testamentary capacity and contested will applications, as they are so often interlinked.'

'In certain disputes, deprivation of liberty and/or lasting powers of attorney.'

Issues most suitable for mediation

A number of participants considered all issues could be mediated. One said: 'there should not be a bar to mediation in any case, though there are some issues which are less likely to be resolved by mediation than others'. Another added 'it would be preferable for almost any issues to be mediated than decided by a stranger'.

Where the parties are amenable, it was indicated, all issues are appropriate for mediation. One stated:

'all cases which would benefit from having a quicker and cheaper resolution than is available via the court, where there are no contra indications to proceeding with mediation.'

Issues cited as being appropriate for mediation included: property and money matters, family control issues, disputes between social services and families, contact, care options, medical treatment, residence, best interest disputes, appointment of deputy or attorney, validity of power of attorney and statutory wills; and where the central issues are ones of trust between family members and social care professionals or clinicians.

One participant felt mediation was particularly appropriate 'where P is aware of family conflict, as hopefully a mediation will pave the way for future harmony or closer working between families'.

Family dynamics and grief: issues can be triggered or inflamed by family dynamics and this can be affected by grief. In some cases, as a result of a 'tug of love' between family members, P can be caused significant emotional and psychological distress. Family disputes are more likely to be made worse by a court case, whereas mediation offers the opportunity to build communication and improve relationships within the family and this is likely to benefit P's well being.

Families at war: one participant who referred to Elisabeth Kubler-Ross's description of the different stages of grief, loss and death¹³ commented:

'often the war is driven by the anger and blame stage of the grieving process. Even when a family member is alive, their identity is changed or gone and the family are grieving. This leads people to fight, as they are grieving for their dying loved one.'

In relation to probate mediations participants commented:

'there is often a terrible argument over something of virtually no value caused by grief. The dynamics of the early sibling relationships assert themselves, who mummy loved best, control and all sorts.'

'These issues are not issues of right or wrong requiring the administration of a judicial intervention. They need teasing apart and careful mediation to try and preserve family relationships rather than breaking bonds forever with litigation.'

Issues not suitable for mediation

Some participants considered however that some matters should never be mediated:

Crime and Fraud: 'generally speaking most disputes can be mediated, except disputes that involve one or more of the parties being in breach of the criminal law should not be mediated.' Another agreed and said, 'I don't think anything should be off the table, possibly except criminal acts'; and another said, in 'questions of fraud where the result is a compromise ... P will most likely suffer some loss to their estate'.

Capacity: 'if there is a dispute as to whether a person has capacity to make a decision on a specific issue, this cannot be mediated' and 'where the parties also lack capacity'.

Deprivation of Liberty: 'whether there is need for a deprivation of liberty safeguard, or whether the court needs to decide and make an order to deprive someone of their liberty, cannot be mediated.'¹⁴

'Hard-edged issues of law: for example, whether P has or has not been deprived of their liberty, whether or not an advance decision is valid and applicable, serious medical treatment and the withdrawal of life support'

Judicial Big Stick: it was said 'occasionally, there is a situation where the weight of a court judgement can be helpful in ensuring any agreement is put into practice. Other than this 'judicial big stick' situation, I think most cases could be helpfully mediated.'

Medical treatment cases: one person considered there would be 'no issues which could not be mediated, except serious medical treatment', and another thought 'withdrawal of life support'.

Abuse cases: two participants thought any abuse, where abuse is alleged whereas another specified only serious financial or emotional abuse.

¹³ "On Death and Dying" by Dr. Elisabeth Kübler-Ross 1969

http://www.psicoterapiapalermo.it/PDFS/On%20Death%20and%20Dying_Kubler%20Ross%20Elizabeh.pdf

¹⁴ However see discussion on mediation and Deprivation of Liberty.

CASE STUDY FINDINGS

In response to questions in Section Two of the survey, participants submitted information on a total of twenty-five case studies. The case study findings are drawn from those responses.

Graphic illustrations of the responses are set out in Appendix B and the case studies in Appendix C.

Role in mediation

The participants were invited to indicate which role(s) they had played in the case studies. They could indicate more than one role. There were thirteen mediators, ten solicitors, four barristers, two local authority officers and one party. No judges, family members, carers, or health officers took part in this survey.

Court-ordered mediation

The court ordered mediation in ten of the case studies: in eight cases the parties had been ordered to 'attend and/or participate in mediation' and in the other two they were required to 'consider mediation or ADR'.

In case study 1, a finance, property and business dispute between P's sons and his second wife, the Office of the Public Guardian had ordered mediation before proceedings under its telephone mediation pilot scheme.

In case study 24, where there was a dispute about serious medical treatment, the mediation was said to take place more by accident than by design.

In case study 16, a serious family dispute between P's siblings and his wife, the issues included arguments about what flowers and photos were to be put in P's room in the care home. Though the solicitors had eventually managed to get everyone to mediation, the mediator considered it occurred far too late really and stated:

'Mediation needs to be ordered or encouraged much sooner, as a lot of avoidable damage had been done'.

Issues mediated

The three most frequently mediated issues that emerged in the case studies were residence (59%), care arrangements (56%) and contact (44%). Other issues were finance and property (30%), deputyship and power of attorney (22%), deprivation of liberty (11%), statutory wills (7%) and medical treatment (7%).

Other issues specifically mentioned were end of life contact and funeral arrangements, the tenancy of a cottage and land, business assets; and where a young man should live, as well as his visiting and holiday arrangements.

Timing of mediation

In eighteen (67%) of the case studies, mediation took place during proceedings, eight (30%) before proceedings and one (4%) after proceedings had ended.

P's role in the mediation

(i) Participation by P

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, with a form of support, or indirectly. Even if P does not attend, indirect support may be by way of a support person or representative such as an advocate, lawyer, family member or carer attending the mediation to represent P's views. Physical and/or other reasonable adjustments can be made to maximise the opportunity for P to participate. For example, designing the mediation and making changes to the process and set up of the mediation to take into account the best venue, time of day or P's medication.

Participants were asked: i) whether P had capacity to participate in mediation with support, and if so, how was P supported to participate, ii) whether P was represented at the mediation and iii) whether P's wishes and feelings were capable of being conveyed.

In 22 case studies, participants indicated P did not participate in mediation. In another six cases, it was said that P did not attend but did participate with support; in three by the Official Solicitor alone, in one by the Official Solicitor together with a Relevant Person's Representative under the DoLs. In one case, P was supported to participate in mediation, and this was achieved by way of *'an agreed list of questions being put to him by family members prior to mediation, his views being recorded and shared during the mediation.'* In one case no details were provided as to how P was supported.

While, in ten case studies P was 'represented' at the mediation, five of these did not indicate P was supported to participate. Capacity to participate in mediation can be tricky to understand. Where P is represented at mediation, it can be said P has capacity to participate in mediation with support. Capacity to participate in mediation requires further explanation and is considered in the discussion section.

(ii) P's wishes and feelings

In 16 case studies, P's wishes and feelings on the issues being mediated were capable of being conveyed as follows: seven by family, six by a social work professional and/or a legal representative, three by relevant person's representative, two by an advocate and one by a paid representative/health professional. In one case P had never had capacity and her family had always advocated for what they believed would have been her wishes. In another, P's wishes and feelings were obtained before the mediation and a written record taken which was then shared with the parties during the mediation.

(iii) Representation of P

P was represented at mediation in ten case studies: in six by the Official Solicitor, in one by a litigation friend and in one by a solicitor. Two participants did not give information as to how P was represented. In one case, it was said that P was 'sort of represented' as *'everyone there cared about him; but he was so far gone it was not really about him'*. In another, the mediator visited to *'ascertain whether P had any ability to understand the nature of the dispute, the concepts of mediation and resolution'* but it was reported *'P had none of these understandings.'*

About the mediation process

It was reported a single mediator was used in 21 cases and co-mediators in 2 cases. Two cases studies were silent as to the mediation style. The pre-mediation process involved telephone calls in 15 cases and face-to-face meetings in six. There were round table meetings in eight cases, shuttle meetings (with the mediator going between the individual rooms) in 11 and a combination of round table and shuttle in eight cases. Telephone mediation was used in two cases.

Regarding the duration of the mediation, it was reported that 18 lasted a whole day, three half a day, and two were a series of meetings, over a period.

In summary, most of the mediations were carried out by a sole mediator, who spoke with the parties prior to the mediation, and used a combination of round table meetings and shuttle meetings during a mediation which lasted one day.

In one case, there were numerous pre-mediation telephone calls between solicitors to try and narrow and define issues. On the day, there was mainly shuttle mediation, but some members of each party were able to meet in a room to resolve some issues.

In another shuttle mediation, the Official Solicitor's legal representative joined in some of the individual meetings with the mediator.

Two examples were given of a series of meetings. In one, there were meetings with the mediator and the family members with different professionals on different days in the family home. In another, the mediation took place over one full day with a half-day follow-up four months later.

Funding of the mediation

In 13 cases, the cost of the mediation was shared between the parties (with the Legal Aid Agency contributing in four of them). In ten cases, all the costs were paid solely by the local authority. In two cases the health body paid all the costs. In two cases, P himself/his deputy for property and affairs funded the mediation.

Outcome of mediation

In over half the case studies (52%) a written agreement was made on the day. In 18.5%, a written agreement was made after the mediation and 7% reached a verbal agreement. This indicates an overall success rate of 77%. The majority of agreements (59%) were incorporated in a court order.

Where an agreement was not reached, the reasons were given as follows:

- due to entrenched views and positions – in three cases
- one day was not enough in a case involving eight parties.
- due to allegations of financial abuse and fraud.

The survey questions did not ask for information as to whether full or partial agreement was reached on the issues in dispute. It would be helpful for the forthcoming CoP Mediation Scheme evaluation questions to ask whether an agreement was reached on all the issues, and if not, details of the issues which remained outstanding, as this may indicate whether there are issues which are more amenable to mediation than others.

Experience of mediator

It was reported that 89% of mediators in the case studies had experience of CoP. One participant said the mediator did not have relevant experience and two cases participants did not know.

Costs savings

Savings can be made as a result of mediation, where pre-proceedings mediation avoids the need for proceedings completely, or if the case is already in court, the mediation can reduce the length of the proceedings. The estimation of costs is not an easy question to answer, because participants will mostly have knowledge only of their own costs, if at all, and mediators are quite unlikely to know what are the usual costs incurred by legal practitioners, public body professionals, the courts and the legal aid agency.

Estimates of cost savings were given in half of the case studies.

(i) Before proceedings:

- Where there was a best interest dispute between P's two children, (who had different views) and the local authority about where P should be discharged to from hospital, the estimated costs savings were £8,000.
- In a dispute about where a young adult should live between P, P's mother and the local authority the estimated costs savings were £10,000 for each party.
- Where P was an elderly gentleman, and his wife discovered he had been having long term affairs and no longer wanted to care for him, it was estimated mediation probably saved more than £30,000.
- In an LPA dispute between the sons from P's first marriage and his second wife where she was controlling, secretive and objected to the sons taking over P's business, the estimated savings were £8,000.
- Where there was a medical treatment dispute about whether a feeding tube should be replaced, it was estimated the savings were £20,000+ (Trust costs and the usual contribution to the Official Solicitors costs).

(ii) During proceedings:

- Where a lay deputyship application was made for a husband to act as his wife's deputy, P's daughter from a previous difficult relationship thought she should act, an agreement was reached and the estimated savings were £10,000.
- Where the points of a lengthy mediation agreement, though not signed were later incorporated into an annex to the final court order, it was estimated at least one day of court time was saved. An estimate of £6,000 was given to represent savings of the time of the Judge, court staff, legal representatives for the local authority and the Official Solicitor and social work professionals.
- In a sibling dispute as to who should be power of attorney and what information should be provided to the non-attorney sibling, which included a professional negligence complaint against a previous deputy, it was estimated there were costs savings of £30,000.
- Where there was a dispute about who should act as P's attorney, following the revocation of one LPA appointing some siblings, and the making of a new LPA appointing other siblings, costs savings were estimated at £25,000 - £30,000.

In one case of a dispute between a father of a profoundly learning-disabled adult and professionals as to whether her care should be provided at home with him with a package of care or in a residential care type setting, costs savings could not be estimated, but there was an indication of saved costs down the line: *'I cannot estimate a cost saving but the mediation did give rise to a trial of the father's preferred option which did not succeed and the case was then dropped without cost of a lengthy final hearing.'*

Two examples were given to illustrate the potential significant costs savings if mediation had been used earlier:

- In what was described as a serious dispute involving a group of P's siblings, wife and another sibling where the issues included who visited P in the care home, what flowers could be taken in and where photos should be placed, it was said; *'if mediation had been used earlier it would have saved family members tens of thousands of pounds.'*
- In a dispute between the local authority and a family as to where their young son with Down's Syndrome (aged 22) should reside, at home, or in supported living. It was said the case to date had cost around £80,000+. It settled following mediation of one and a half days which cost, very approximately, £4,000!

Participant's reflections

(i) Challenges and frustrations

Whether mediation was successful or not, in the specific mediations in this research, 85% of participants stated that the biggest challenge by far was entrenched positions, with others citing: dysfunctional family dynamics (56%), lack of communication between the parties (48%), verbal aggression (33%), imbalance of power (29%), time taken to set up the mediation (15%), physical aggression (4%) and long geographical distances between parties (4%)

Other challenges reported by 33% participants included:

'An adversarial barrister representing the NHS Trust'

'A sense of one-up-man-ship plus long burning anger about issues from long ago'.

'Adversarial negotiations through solicitors had made matters worse.'

'One solicitor had tried and failed to get the case to mediation with the other side opposing it - if courts were more pro-active it would help immeasurably'.

'Unrealistic expectations of one of the parties'

'Immediately after the mediation the applicant reneged on his agreement.'

'After the mediation day one of the parties withdrew from the agreement citing emotional blackmail. This had happened before. The judge ordered similar terms to the agreement, but after having listened to the parties at court.'

'Difficulties encountered where family members had mild learning disabilities, resulted in lack of insight into the reasons for care agencies repeatedly withdrawing'.

In a case regarding a learning-disabled adult, a poignant comment was made:

“a challenge was the entrenchment of the matter. It had been simmering for 20+ years, since the young man had been born, and the family repeatedly felt let down by the local authority’s perceived lack of support. They needed to be heard in a calm mediated space.”

(ii) Costs and proportionality

In case study 16, where the complex family dispute was endangering P’s care home placement, the adversarial negotiations through solicitors had made the matter worse. One solicitor had tried and failed to get the case to mediation with the other side opposing it. The mediator stated:

“..if courts were more pro-active it would help immeasurably. Courts should DEFINITELY interpret the rule about proportionate costs in such a way that referral to mediation is automatically part of costs management...’ with a provision that ‘...once costs reach 20% of case value all cases should be referred to mediation, so people have a chance to do a deal instead of being forced to continue arguing over rights and wrongs, evidence and the legal positions...’

(iii) Making things worse

Whether or not an agreement was reached, all but one of the 25 participants did not consider mediation had made things worse in any way.

In case study 15, though an agreement was reached over contact and an interim agreement over residence, the participant stated mediation had made things worse and explained:

‘... there was an underlying hard-edged issue which was not suitably identified by the parties (or the mediator); namely the local authority’s willingness to fund a particular package of care. The mediation process, which had been encouraged by the court and the independent social worker, led to a prolongation of proceedings as it encouraged P’s mother to think that the care package was a possibility when in fact it was not on the table.’

(iv) Advantages and benefits

The participants considered mediation was beneficial and advantageous in a variety of ways: it narrowed the issues (73%), reduced court time required to determine the issues (69%), developed dialogue between the parties (65%), reduced costs (61%), reduced time to reached an agreement (58%) and improved the relationship between the parties (42%).

Where an agreement was reached ‘other benefits’ included:

‘Mediation not only ‘reduced’ court time but actually avoided proceedings’.

‘It gave P clarity about contact and management of his finances and this produced a more relaxed and fulfilling lifestyle for him.’

‘Given the nature of this dispute, mediation was the obvious solution. It just seemed so incredible that the normal routes for dispute resolution actually involve processes that vastly escalate disputes rather than focus on resolution, understanding, improving communication and all those good things people in dispute need.’

'Detailed heads of agreement drafted during the mediation, though not agreed on the day, with the parties' agreement, were later annexed to the court order therefore saving about a day of court time and associated costs.'

'Where a seemingly intractable dispute had previously been to court 6 times, on the last occasion the court ordered the parties to engage in mediation for a period of 3 months before returning to court again. An agreement regarding contact was made over one day. Further, when the mediator checked one year later to see how things were going, the agreement was still being followed.'

'Mediation enabled P to leave the care home which was supposed to have been just for respite and to live once again with one of her daughters, more speedily than if full court proceedings with a final hearing had been necessary to reach a final decision.'

'Even where an agreement had not been reached, mediation was beneficial in that it confirmed the parties were not able to communicate positively and act together to ensure the best outcome for P'

(v) Making things better

To gather other insights as to the benefits of mediation, the survey asked if mediation made things better into any other way? Where an agreement was reached 32% of participants indicated there were other ways in which mediation made things better:

'It developed a more relaxed approach between all family members (and the girlfriend!)

'It enabled a trial of a different model of care'

'It helped the estranged parents feel much better and more positive about the situation.'

'P did return to live at home, however, she was now enabled to have regular contact with her daughter, whereas contact between them had previously been obstructed by another family member.'

'The outcome of the mediation resulted in a shift in the local authority being willing to try an assessment of P living with his parents' alternate weeks. It turned out this arrangement of shared living benefitted P directly, he became happier and his behaviour was improved.'

'P did return home with a care agency in place to deliver his care (though the issues with the care agency were the same as before).'

'The legal route had made it worse in every possible way. Mediation made it better in every possible way. It was the first time all parties had met and talked. It gave the opportunity for all parties to have their say in a safe (and managed) space. The family felt heard and treated with respect and dignity. The local authority had opportunity to put their perspective and also felt heard and considered. A better, more co-operative relationship was created in the young man's best interests.'

DISCUSSION

Best time to mediate?

Over three quarters (76%) of the participants considered mediation should take place early on with 44% stating 'as soon as possible' and 32% 'before proceedings'; whereas in 64% of the case studies cited, the mediation took place during proceedings. As awareness of the benefits of mediation increases, it is likely that more mediation will take place at an early stage to take advantage of the potential for greater savings and other benefits.

(i) Entrenchment

In case study 21, the mediator, instructed just after the issue of proceedings, wondered if it may be too early for mediation, as evidence has not yet been exchanged. Two daughters had not communicated at all for 8 months, regarding the issues relating to their elderly mother. Nevertheless, the parties were willing to mediate. During the mediation process, information was exchanged which cast doubt on the truth of allegations made by a teenager which had triggered the dispute between the sisters. The parties were keen that the teenager should not be called to give evidence in a finding of fact hearing. This, together with disclosure of a new accommodation option, resulted in an agreement being made on the day, shortening the proceedings considerably.

One participant thought there was not necessarily a right answer to the question 'when is the best time to mediate?' Participants indicated it is best to mediate as soon as possible, or before proceedings are issued, before parties get too entrenched. With the issue of proceedings comes the service of witness statements. Statements set out a party's case in detail from their own perspective, often making adverse comments against the other party. Therefore, service of statements can cause emotions to escalate and issues of entrenchment to deepen. Others considered before evidence is gathered or the issued identified, it was considered the mediation would be unlikely to achieve much. The challenge of entrenchment is discussed later under obstacles to parties engaging in mediation.

(ii) Multiple entry points

One participant considered there could be multiple entry points and mediation should be tried more than once where appropriate. Practice directions and procedural rules could set out requirements to encourage mediation being considered more actively by the parties; for example, pre-proceedings protocols and case management directions. There are options for possible court orders ranging from: parties being ordered to 'consider mediation or ADR', being ordered to participate in a mediation information and advice meeting, or being ordered to participate in mediation.

Mandatory and non-mandatory mediation

The CCEL Report at pages 12-13 and 137-138 discusses mandatory and non-mandatory mediation.

‘With respect to mandatory mediation, our research indicated unanimous agreement that mandatory mediation should be restricted to mandatory attendance but not mandatory participation. Experts and stakeholders stressed that mediation is by definition a voluntary process in which any mediated settlement between the parties must be reached voluntarily and without coercion. As such, all experts further agreed that parties can never be required to reach a settlement.

However, several experts noted that in their experience, court ordered/mandatory mediation (in reference to mandatory attendance) was very effective and that without it, parties were much less likely to choose to try to resolve disputes through mediation. Further, experts noted that it is common that parties who are required to attend mediation often choose to participate once the process is explained to them prior to and/or at start of the mediation. (emphasis added)

A number of experts recommended that indigent¹⁵ parties who are required to attend mediation pursuant to a mandatory mediation program should be assigned an advocate or counsel to represent them, particularly in the case of indigent parties with capacity issues.’

If the results of the evaluation of the CoP Mediation scheme confirm there are similar benefits and success rates to those identified in this research, it is recommended positive steps are taken to encourage more parties to mediate in CoP disputes. Ways in which this could be achieved include developing the CoP rules and practice directions to require:

- (i) parties to attend an initial mediation information and assessment meeting along similar lines to family and SEND disputes - in the absence of a good reason not to attend; and
- (ii) to ensure that those with capacity issues are assigned an appropriate advocate or lawyer to represent them at the mediation.

Lack of awareness

The study confirmed there is a lack of awareness among professionals and parties. While 80% of participants consider lack of awareness to be an obstacle to CoP mediation generally, 72% consider lack of awareness to be an obstacle which affects parties engaging in mediation.

In case study 17, the parties had been engaged in litigation for over a year, and the arguments were said to have arisen as a result of anger and fear arising from grief; at the end of a successful one-day mediation, according to the mediator, the parties complained that *‘..if they had known earlier about mediation they could have been spared what they had been through!’*

¹⁵ Indigent means poor, needy, having no money or anything else of value.

Regarding the knowledge and awareness of professionals working in this field, 70% of participants considered there was only a partial awareness of the benefits and risks of CoP mediation; 25% considered professionals are not aware at all. Though not specified within the research, these professionals could include judges, lawyers, health and social care professionals. Raising awareness will be beneficial to professionals and those whom they represent.

One of the main aims of the research was to raise awareness. The research and case studies will be shared by way of publications and presentations to a range of professionals and stakeholders with the aim of raising awareness as widely as possible.

Decisions for P

Reaching an agreement on behalf of P, was cited by 20% of participants to be an obstacle. There were two main concerns: (i) difficulty in securing P's participation; and (ii) determining the decision maker in these cases.

(i) Participation by P

Where P has been assessed to lack capacity to make a specific decision and those needing to make a decision, caring or concerned for P are in dispute about the decision; the principles of the MCA play a vital part in the mediation process.

The purpose of the MCA is to protect and empower vulnerable people who lack capacity. All decisions made on behalf of P, including those made in mediation, must be in line with the key MCA principles of best interests and least restriction. It is important for mediators and parties to consider the key principles of the MCA¹⁶ before and during mediation.

One of the principles at s1(3) MCA states:

'A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.'

In respect of best interest decision making under s4(4) MCA those making decisions must, as 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'

Further, under s4(6) they 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),

¹⁶ s1 MCA 2005 The principles:

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

- (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.

As all practicable steps should be taken to support and empower individuals to make decisions for themselves, the question participants were asked to consider is not, has the person got capacity to mediate, but rather, did they have capacity to participate in mediation with support? The flexibility of mediation enables support and appropriate measures to be put in place to maximise P's participation in mediation. Support could be provided by: an advocate, a professional with specialist expertise in P's disability, a legal representative and family members where suitable. Appropriate measures and reasonable adjustments to the mediation process include for example: the use of communication aids, support persons, choice of venue, assistance with travel, breaks and additional time.

In the human rights context, the general principles of the CRPD at Article 3 include: respect for inherent dignity, individual autonomy including the freedom to make one's own choices, independence of persons, full and effective participation, inclusion in society and accessibility. Article 12 covers the right to equal recognition before the law. Paragraph 12.2 sets out:

'States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Under 12.3 States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.'

In other jurisdictions, the phrase 'reasonable adjustment' is sometimes referred to as 'accommodation'. In addition to the use of a suitable advocate and/or legal representative, Eric Woods at page 42 of the CCEL report states:

"accommodations might include changing the place or time of session, including a support person, keeping the sessions short, or using techniques and strategies helpful for communications with persons with memory loss or confusion."

In the CCEL report helpful comments are made on self-determination and capacity. Quoting from an article by Mary Radford (M Radford, 'Is the Use of Mediation Appropriate in Adult Guardianship Cases?') the report notes at page 40¹⁷:

'Self-determination is the pivotal feature of mediation. Both the process and the outcome are the responsibility of the participants. The mediator has no authority to impose a decision or settlement on the parties, but rather is there solely to assist the parties in resolving the dispute in a way that is mutually agreeable.'

'Mediation ... is grounded in the principle of self-determination and presumes that the parties are capable of participating in the process and bargaining for their own interests.'

The fact that the capacity of an adult is typically the central issue in guardianship cases raises the concern about the appropriateness of mediation in guardianship matters. The TCSG Manual¹⁸ notes that:

¹⁷ (2002) 31 Stetson LR 611) – please note the Canadian research related to guardianship under a different statutory framework and should not be confused with guardianship in the English context of s7 MHA 1983.

¹⁸ The Center for Social Gerontology, Adult Guardianship Training Manual (2002) is quoted widely in the CCEL Report.

‘Mediation assumes an ability of the parties to take part in a negotiation – to express opinions, evaluate options and follow through on decisions. For this reason, many people raise concerns about the appropriateness of mediation in guardianship cases, in which the decision-making ability of a party is often in question.’

The requirement that every party must be capable of entering into an agreement voluntarily and without coercion means that mediators in guardianship cases must pay particular attention to the adult’s capacity and be aware of any coercion or possibility of coercion of the adult by other parties. Radford acknowledges:

‘The challenge in the mediation of an adult guardianship case is to determine whether the adult has the capacity to participate as a party to the mediation, either with or without representation’ and/or other support or accommodation of the mediation process.’

Radford notes that:

‘a more subtle obstacle to self-determination by an adult in an adult guardianship case is the tendency of family members, attorneys, judges, and perhaps even mediators to want to structure a framework that is protective of the adult but that may not necessarily protect the adult’s fundamental right to autonomy. Therefore, the mediator must be aware of the potential for other parties in the mediation to assert their own values rather than those of the adult. Further, it is stressed that ‘the need for the mediator to protect the autonomy of the adult in a guardianship case does not necessarily violate the mediator’s impartiality and neutrality.’

On representation and support, the CCEL report emphasises the necessity in guardianship mediation of ensuring that the voice of the adult respondent is represented, whether or not the adult is capable of participating in the mediation in person.

The TCSG Manual emphasises (at p 42):

‘the overriding question for the mediator when determining an adult’s capacity to participate in mediation is whether the adult has the capacity to participate in mediation with support - support may be in the form of a support person or representative such as a lawyer, family member or caregiver, or in the form of physical and/or other accommodations.’

Radford states:

‘the mediator should be aware of the need to make accommodations to maximize each individual’s ability to participate in the mediation process, such as accommodating visual and hearing loss and adjusting the schedule and timing of mediation to accommodate medications and other needs.’

In the case studies, there were no cases where P had attended the mediation and made his views made known directly. This is unsurprising. Nevertheless, if P was aware of the mediation and wished to participate directly, reasonable adjustments could be made to take this into account, when the mediation is set up.

The CoP Mediation Scheme to be launched later in 2019, sets out a range of ways to enable and support P to participate in mediation in order that P’s wishes and feelings can be elicited and taken into account during the mediation.

For example:

- Litigation Friend
- Rule 1.2 Representative ¹⁹
- Advocate
- Independent professional with expertise in P's disability
- Friend/relative who is sufficiently independent

Once an appropriate person has been identified to seek P's wishes and feelings, the CoP Mediation Scheme will require consideration to be given to the following matters:

- how these should be conveyed during the mediation.
- does P want to attend the mediation? and if so, whether it is in P's best interests to do so, with the identified person;
- whether the identified person will attend and convey P's wishes and feelings on P's behalf.
- a verbatim note, report, or letter could be used where P's wishes and feelings have been expressed more than once, or have changed over a period, in response to who is asking the questions, they could be conveyed orally, by a recording of P or a combination.

(ii) Best interest decision-making

Some participants were concerned that it was difficult to secure P's involvement and considered any agreement reached in mediation would need to be agreed by the court, so that in effect, only the court could make the best interest decision. However, mediation can and does take place before proceedings are issued. Where best interest meetings are particularly difficult due to strongly held opposing views between family members themselves and/or professionals, mediation can be used to facilitate a discussion with a view to reaching an agreement.

Where P lacks capacity to make a specific decision, there will be a decision maker. Examples include:

- A power of attorney empowered by a LPA or EPA to make decisions in relation to finance and property or health and welfare,
- A deputy authorised by the court.
- When there is no-one empowered to make decisions on behalf of P; where a public body is commissioning care and/or accommodation, they will be the decision-maker on the best available option.
- If a decision is disputed, for example by the family members, or by P himself if he is supported or represented, it is possible for this to be resolved in some other way, such as, informal or formal mediation.

Provided decisions are made in line with the principles of the MCA, and P is enabled to participate in mediation with direct or indirect support, best interest decisions and agreements are capable of being mediated. However, when the issue remains in dispute, then the matter must be referred to the court for a decision as to what is in P's best interests together with appropriate orders.

¹⁹ This could be an accredited legal representative, or if P has a family member or friend who is appropriate to act as his/her representative, they are likely to be appointed as the representative. The court may decide it is not appropriate to appoint a family member. For example, if the family agree about P's placement and care, but do not have good relationships with each other, it would be difficult for consultation to take place in line with best interests.

Insufficient legislation and protocols

In this research, 28% considered that insufficient legislation was an obstacle to CoP mediation.

Chapter 15 MCA Code of Practice does encourage the use of mediation²⁰ and mentions that using advocates can help people who find it difficult to communicate (including those who have been assessed as lacking capacity) to say what they want, claim their rights, represent their interests, and such advocates may be involved in supporting the person during mediation.²¹ In the Court of Protection Rules 2017, though there is not a specific reference to mediation, rule 1.3 which deals with the court's duty to manage cases it states at (3)(h):

'...active case management includes ... encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate...'

There are other areas where there is degree of compulsion to consider or take part in mediation:

- (i) In family proceedings, there is a requirement to attend a Mediation Information and Assessment Meeting before certain applications to court are made,²²
- (ii) In Special Education Needs and Disabilities (SEND) cases there is now a requirement, in all but a few exceptions, for parents or young people to consider mediation before appealing to the tribunal, and if they wish to do so the local authority must agree to mediate.²³

The CoP Mediation scheme is being launched with judicial endorsement. Participants in the scheme will be invited to take part in an independent evaluation led by an academic.

Once the success of the scheme is known, it is recommended that consideration is given by the Court of Protection Rules Committee to developing procedural requirements to enable P to participate in mediation.

Entrenchment

A majority (72%) of participants consider entrenched positions to be a major obstacle to parties engaging. One person responded to the question 'when is the best time to mediate?' by stating '*as soon as possible, before people get too entrenched*'.

In the author's experience, once parties are in proceedings and professionals and/or family members have filed statements, as these include adverse comments about the other; issues of lack of trust and feelings of being judged negatively increase and this is most likely to deepen entrenched positions.

Mediation generally is a less stressful and more flexible process - where the aim for those involved is to come to an agreement rather than having one imposed by the court - it is not of itself an easy process.

²⁰ pages 260-261 MCA Code of Practice 2005

²¹ paragraphs 15.4-15.6 MCA Code of Practice

²² s10(1) of the Children and Families Act 2014, has a requirement for a person to attend a MIAM before making certain kinds of applications to obtain a court order. A list of which is set out in Practice Direction 3A Family Mediation Information and Assessment Meetings (MIAMS)

²³ Children and Families Act 2014 and in 2015 SEND Code of Practice

Even where an agreement is reached, parties may experience a range of different feelings. They may feel relief and pleased to have reached an agreement without the need for further court proceedings. However, where both parties have given up something and compromised with the aim of finding a solution, they could feel disgruntled even when an agreement is reached. Though it may not feel like 'winning' - there being no victor and loser as there is with a court judgment - a successful mediation brings an array of benefits, which court proceedings rarely achieve.

Entrenchment of the parties is a common challenge for a mediator. Building rapport and developing the trust of the parties in the mediator can assist in resolving issues of entrenchment. Pre-mediation meetings and support persons can assist.

i) Pre-mediation meetings offer several benefits:

- they enable a party enough time to tell their individual story to the mediator. It is an opportunity, and indeed may be the first time, a party has been able to 'get things off their chest' to an independent impartial third party. This facilitates the party to 'feel heard' and truly listened to without blame or judgment, which assists to build trust and rapport with the mediator in advance of the mediation day;
- they provide an opportunity for the mediator to coach the party on how best to convey their views in the mediation in an unpressured way prior to the mediation day.

ii) Support persons:

On the mediation day, support persons who are known and trusted by a party, a relative or advocate can be of assistance. Though not necessarily completely neutral, supporters may be able to reaffirm points made by the mediator to an entrenched party and explain the options and benefits of resolution in the face of resistance.

In case study 25, the parents of a learning-disabled adult, having divorced many years earlier, argued about contact; it would seem continuously. The case had previously been to court no less than six times. On the last occasion, the court made an order prohibiting the parties from returning to court again on the issue of contact, unless they had engaged in mediation for a period of 3 months. The mediator was informed that the mediation was not likely to be successful, but because of the court order it had to be tried. Both parties seemed particularly entrenched. One party was particularly angry, refusing to meet with the mediator, and only reluctantly speaking with her briefly on the phone prior to the mediation. During the pre-mediation discussions, the mediator encouraged both parties to bring a support person to the mediation. It was a shuttle mediation which lasted all day, with carefully arranged breaks, as neither party wanted to have any contact with the other person. As both parties had their partners with them; when the mediator was out of the room, they appeared to play a positive role, acting as sounding boards, and providing an opportunity for their partner to take stock and shift their positions in order to find a solution.

The agreement made on the day covered weekly, Christmas and holiday contact arrangements. As they left one party said to the mediator 'it's a miracle'. When the mediator checked one year later, the agreement regarding contact remained effective.

Family dynamics

While a large majority (72%) of participants indicated family dynamics are an obstacle in CoP mediation, 64% considered mediators should have knowledge of and experience in understanding family dynamics.

All families have their own unique dynamics, however, families presenting with *dysfunctional* dynamics who are 'at war' with each other present as a significant challenge to mediators in CoP mediation. Therefore, mediators will need to have robust skills to deal with highly charged emotions and untangle entrenched family positions.

In the section on Participants Reflections, several indicated mediation is helpful where the issues are triggered or inflated by family dynamics and how these are affected by grief.

Case study 17, is an illustration of a serious family dispute. P had a number of siblings. Following the death of their parents' P had acted like a parent to them. Later in life he had married a much younger wife. He developed fast progressing dementia. The fear and anger arising from their grief caused arguments, leading to a 'massive' dispute between P's siblings and his wife. The issues included: who visited P in the care home and when, took what into his room, where photos were placed and, if and what flowers could be in his room. The fighting within the family endangered the placement in the care. After 1 year and £36,000 in legal costs the dispute was referred for mediation. It was resolved after one day of mediation. The family said: *'if they had been told about mediation earlier, they would have been spared what they had been through'*.

One participant, discussing family dynamics, referred to Kubler-Ross's 5 stages of grief. This is a model which sets out the 5 stages as denial, anger, bargaining, depression and acceptance. Kubler-Ross later expanded her model to include any form of personal loss, such as the death of a loved one, major rejection, the end of a relationship or divorce, the onset of a disease.

As a high number of participants cited family dynamics as one of the obstacles to parties engaging in mediation and one of the aims of mediation is to act as a facilitator and encourage parties to reconsider their positions, it may be helpful for mediators dealing with the range of issues in the Court of Protection to be aware of the Stages of Grief and how best to respond to parties when they are in a stage of grief or shock.

Funding

During proceedings the normal litigation costs rules apply to the funding of mediation unless and until the Court makes a different order. In finance and property cases the starting position is that the costs of the mediation will be met from P's funds. In health and welfare cases the starting position is that each party (including litigants in person) will be expected to pay an equal share. However, the parties can agree otherwise, and the Court can make a different order.

Funding was considered by 68% to be an obstacle to CoP mediation and difficulties cited included: gaining access to P's funds and obtaining legal aid to pay towards the mediation.

On the availability of P's funds, one participant stated *'..often P's funds are not available at the stage of mediation (either pre or during proceedings).'* It is recommended judicial consideration is given to making directions orders permitting access to P's funds for the purposes of funding mediation.

Legal aid may be available before and during proceedings, to contribute towards the cost of mediation under the legal help scheme or under a legal representation certificate during proceedings, subject to means and merits criteria, in accordance with the regulations.²⁴ The Legal Aid Agency has been asked by the Court of Protection working group to provide further guidance in time for the launch of the CoP Mediation Scheme later in 2019.

During the period of the evaluation of the CoP Mediation Scheme it is expected that the panel mediators will act for hourly rates set by the Scheme which will be the current legal aid rates.

Knowledge and experience of mediators

Over 80% of participants consider mediators need to have knowledge and experience of the MCA and CoP. Concerns were expressed about a lack of available CoP mediators with relevant specialist experience. The Scheme aims to address these concerns and proposes parties may, if they wish, choose to refer a case to a mediator from a panel of mediators with specialist experience of mental capacity and CoP proceedings.

For the purposes of the trial and evaluation of the CoP Mediation Scheme, there will be a panel of mediators with 5 years specialist knowledge of the MCA and CoP and relevant mediation experience.

Issues suitable for mediation

A wide range of issues were considered to be suitable for mediation including: property and money matters, family control issues, disputes between social services and families, contact, care options, medical treatment, residence, best interest disputes, appointment of deputy or attorney, validity of power of attorney and statutory wills; and where the central issues are ones of trust between family members and social care professionals or health clinicians.

(i) mediation between local authorities and family

Case study 5 provides an illustration of a dispute between a local authority and P's parents about where a young adult should live. The local authority paid all the costs of the mediation. Despite initial entrenched positions the mediation was successful. It reduced time to reach an agreement, avoided proceedings and was estimated to save costs of £10,000 per party. Most importantly, the mediation helped the estranged parents feel much better and more positive about the situation, developed dialogue and improved the relationship between the parties.

(ii) mediation between health body and family

Case study 8 is an example of a medical treatment dispute about whether or not a feeding tube should be replaced. The mediation was successful. The parties came to an agreement that there would be one more attempt to replace the feeding tube and then no further attempts if/when that failed. The mediation took place before proceedings therefore reducing court time to determine the issue. It developed dialogue between the parties, improved the relationship between them and saved an estimated £20,000 plus in costs.

²⁴ The Civil Legal Aid (Merits Criteria) Regulations 2013 and Civil Legal Aid (Procedure) Regulations 2012

(iii) Families

When a loved one develops dementia, or other serious condition, family members may experience grief, unconsciously or consciously. Where a family is in dispute over issues surrounding P, the dispute may be triggered by long standing family dynamics and further inflamed by grief. From P's perspective, 'tug of love' arguments and disharmony between family members may cause P significant emotional and psychological distress. Depending on the extent of P's ability to pick up on what is going on within the family and to communicate; P's response and signs of distress may be more or less visible.

One participant felt mediation was particularly appropriate:

'where P is aware of family conflict, as hopefully a mediation will pave the way for future harmony or closer working between families'.

One participant who referred to Elisabeth Kubler-Ross's description of the different stages of grief, loss and death commented:

'often the war is driven by the anger and blame stage of the grieving process. Even when a family member is alive, their identity is changed or gone, and the family are grieving. This leads people to fight, as they are grieving for their dying loved one.'

(ii) Probate

Mediation was said to be suitable in probate cases. It was stated:

'there is often a terrible argument over something of virtually no value caused by grief. The dynamics of the early sibling relationships assert themselves, who mummy loved best, control and all sorts,'

and ..

'These issues are not issues of right or wrong requiring the administration of a judicial intervention. They need teasing apart and careful mediation to try and preserve family relationships rather than breaking bonds forever with litigation'

Unsuitable

Three issues which were cited as not suitable for mediation are discussed below.

(i) Deprivation of Liberty

It was stated: 'whether there is need for a deprivation of liberty safeguard', or 'whether the court needs to decide and make an order to deprive someone of their liberty, cannot be mediated.'

However, where there is a dispute relating to residence, care and contact arrangements and the issue of deprivation of liberty arises, if the underlying dispute is resolved via mediation, the issue of deprivation of liberty may be resolved too as, for example, in case study 21.

In case study 21, two sisters (A and B) were in dispute regarding the residence of their elderly mother, who for many years had lived with A in rented property. When A went on a 6-week holiday, P went to a care home for respite. Without any warning or explanation, B

(who had an ‘enduring power of attorney’ for P) cancelled the tenancy of the rental property. There was nowhere for the P to go. The local authority was involved via the DoLS process and because P was vulnerable. During the mediation, A disclosed she had found a new rental property. An agreement was reached. P moved back to live with A sooner than she would have done if court proceedings were necessary to determine the issue. Therefore, the deprivation of liberty issue was resolved by mediation.

Guidance on judging the suitability of mediation from the Social Care Institute of Excellence states:

“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.”²⁵

It remains important to remember, if a person who lacks capacity remains deprived of their liberty, it is a legal requirement for there to be an appropriate authorisation under the statutory scheme or court order.

(ii) Hard Edged Issue

A helpful point was made about the importance of parties (and mediators) being clear and identifying real options for settlement.

In case study 15, a dispute about residence between a local authority and P’s mother, mediation was said to make things worse and led to a prolongation of proceedings as it encouraged P’s mother to think a particular care package was on offer, when it was not. The participant considered this was an underlying hard-edged issue, which had not been suitably identified by the parties (or the mediator).

(iii) Safeguarding

Several participants considered abuse cases would not be suitable. Two thought where ‘*any abuse is alleged*’; whereas others specified it was only where there was serious financial or emotional abuse, crime or fraud, that a case should not be mediated.

In Case Study 2: a dispute about finance and property, power of attorney and removal of an attorney, where the challenges were entrenched positions and verbal aggression, an agreement was not reached, ‘*due to allegations of financial abuse and fraud*’. It was reported, though an agreement was not reached, the mediation was beneficial as: a) it narrowed the issues, b) developed dialogue between the parties and c) reduced court time to determine the issues.

The CCEL Report, in the section dealing with Ethical Considerations provides commentary on Abuse and Neglect (at pages 44-46), is worthy of note.

Below are two relevant extracts:

²⁵ This is supported by reference to (CCEL report 2012; Mental Capacity Act 2005, Code of Practice, section 15.10; Smyth 2011).”
<https://www.scie.org.uk/publications/mediation/mediation/index.asp>

Mediation is usually not appropriate in a case in which there are allegations of serious physical, emotional, or financial abuse of the respondent by another party. Because of the likelihood of coerced agreement, arising from fear or threat from the abuser, the true voluntariness and fairness of agreements reached in these situations are doubtful.²⁶ and;

“..most experts agreed that mediation was inappropriate in cases involving allegations of serious physical abuse, the majority of the experts interviewed also agreed that mediation might be appropriate in certain cases involving allegations of financial exploitation or abuse.²⁷ For example, as noted in the TCSG Manual²⁸, mediation might actually help communication and understanding in a situation involving alleged financial abuse or exploitation where “the allegation concerns different judgment or interpretation of the needs of the respondent (e.g., one person feels that an expenditure benefited the respondent and another believes it was wasteful).”²⁹

There have been further studies on mediation in safeguarding.³⁰

²⁶TCSG Manual, supra note 21, Module 3 at 59

²⁷ See Annex 2

²⁸ TCSG Manual is published by The Centre for Social Gerontology. <http://www.tcsg.org/med.htm>

²⁹ TCSG Manual, supra note 21, Module 3 at 60.

³⁰ For example, Judy McCann-Beranger Exploring the Role of Elder Mediation in the Prevention of Elder Abuse'. <http://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mp-pm/mp-pm.pdf>

CONCLUSIONS

This section briefly sets out the findings from this research, highlights key areas of importance, recommendations and next steps.

Key Findings

Timing

While the majority (76%) of the participants considered mediation should take place early on, with 44% stating 'as soon as possible' and 32% 'before proceedings'; in 64% of the case studies cited, the mediation took place during proceedings. One participant thought there was not necessarily a right answer to the question 'when is the best time to mediate?' On the one hand, participants indicated it is best to mediate as soon as possible, or before proceedings are issued, before parties get too entrenched. On the other hand, another indicated before evidence is gathered or the issued identified, it was considered the mediation would be unlikely to achieve much.

P's participation:

The framework of the MCA needs to be considered in CoP mediations, in particular, how P will be represented in the mediation to enable him/her to 'participate' directly or indirectly and whether P's wishes and feelings be can ascertained or conveyed.

There were no cases where P had attended the mediation and made his views made known directly.

Though P was said to have capacity to participate in mediation with support in six cases, it was stated P was represented at the mediation in 10 cases and that P's wishes and feelings could be conveyed during the mediation in 11 cases. No mention was made about reasonable adjustments which could have been made to increase P's ability to participate.

The three most favoured options for P's wishes and feelings to be conveyed about the issues to be mediated were: the involvement of an advocate (32%), a litigation friend (28%) and solicitors (24%). Only a small minority (4%) considered family and friends would be appropriate. No one suggested that P's carers would be appropriate to represent P's interests. In contrast, in the majority of case studies (41%), P's wishes and feelings were actually conveyed by family, with 35% by a social work professional and/or a legal representative, 18% by relevant person's representative, 12% by an advocate and 6% by a paid representative/health professional.

Entrenchment:

A large majority (72%) of participants consider entrenched positions to be a major obstacle to parties engaging. As to when is the best time to mediate? One person said 'as soon as possible, before people get too entrenched'.

In the case studies, whether or not an agreement was reached, 85% of participants stated the biggest challenge was entrenched positions.

Entrenchment of the parties is a common challenge for a mediator. Building rapport and developing the trust of the parties in the mediator can assist in resolving issues of entrenchment. Pre-mediation meetings and support persons can assist with this as well.

Family dynamics

Family dynamics was cited by 72% to be a major obstacle to parties engaging in mediation and in the case studies, 56% cited this to be a significant challenge within the mediation itself.

Participants considered mediators need to have robust skills to deal with highly charged emotions and untangle entrenched family positions, and in addition, that it would be helpful for mediators dealing with the range of issues in the CoP to be aware of stages of grief and how best to respond to parties when they are in a stage of grief or shock

Awareness

The study confirmed there is a significant lack of awareness among professionals and parties. While 80% of participants consider lack of awareness to be an obstacle to CoP mediation generally, 72% consider lack of awareness to be an obstacle which affects parties engaging in mediation.

As to the level of knowledge and awareness of professionals working in this field, 70% of participants considered there was only a partial awareness of the benefits and risks of CoP mediation; and 25% considered that professionals are not aware at all. Though not specified within the research, these professionals could include, for example, judges, lawyers, health and social care professionals.

Funding

Funding was considered by 68% to be an obstacle to CoP mediation and difficulties cited included obtaining legal aid or gaining access to P's funds to pay towards the mediation.

Advantages and benefits

The participants considered mediation was beneficial and advantageous in a variety of ways: it narrowed the issues (73%), reduced court time required to determine the issues (69%), developed dialogue between the parties (65%), reduced costs (61%), reduced time to reached an agreement (58%) and improved the relationship between the parties (42%).

Making things better

Where an agreement was reached, 32% indicated there were other ways mediation made things better including: developing a more relaxed approach between all family members, P was able to return and have contact again with her daughter which had previously been obstructed, a better and more cooperative relationship was created in the young man's best interests, the family felt heard with respect and dignity and the local authority had an opportunity to put their perspective and felt heard and considered.

Cases suitable

Issues cited as being appropriate for mediation included: property and money matters, family control issues, disputes between social services and families, contact, care options, medical treatment, residence, best interest disputes, appointment of deputy or attorney, validity of power of attorney and statutory wills, probate; and where the central issues are ones of trust between family members and social care professionals or clinicians and where it is important to re-establish communication and working relationships for the benefit of P.

Cases not suitable

Cases cited as not suitable for mediation included: crime and fraud, disputes about legal capacity and serious financial and emotional abuse. Hard-edged issues of law such as whether P has or has not been deprived of their liberty were also cited as unsuitable for mediation. However, where there is a dispute relating to residence, care and contact arrangements, if the underlying dispute is resolved via mediation, the issue of deprivation of liberty may be resolved too.

One person considered serious medical treatment and withdrawal of life support could not be mediated. Nevertheless, in two case studies an agreement was achieved by mediation about serious medical treatment issues: one case concerned one final attempt to replace a feeding tube and another, serious medical treatment in an intensive care unit.

Making things worse?

One example was given where there is an underlying hard-edge issue, namely, an authority's unwillingness to fund a care package, mediation was said to lead to a prolongation of proceedings as it encouraged P's parent to think the care package was possible when it was not.

Knowledge and experience of mediators

The majority (over 80%) considered, in addition to accredited mediation training, the most important areas of expertise for CoP mediation were: capacity, the MCA and the CoP. Other areas included understanding of family dynamics (64%), safeguarding (56%), dementia (52%), health and community care issues (48%), learning disability (44%), abuse (44%), the ageing process and dynamics of ageing (36%) and other (28%).

In addition, it was considered: it would be important for mediators to have robust skills to deal with highly charged emotions and entrenched positions arising from dysfunctional family dynamics; and helpful for them to understand the different stages of grief and how best to respond to parties in the various stages.

Legislation

Though the survey did not ask a question to seek views on whether mediation in the CoP should be mandatory or non-mandatory, lack of legislation was considered by 28% to be an obstacle to CoP mediation.

Outcome of mediation

There was an overall success rate of 77% and in 59% the agreements were incorporated into a court order. In over half the case studies (52%) a written agreement was made on the day. In 18.5%, a written agreement was made after the mediation and 7% reached a verbal agreement.

Key Recommendations

Participation

Given the differential in the answers relating to participation, representation and wishes and feelings, it is recommended steps are taken to raise awareness among a wide range of professionals and stakeholders about P's capacity to 'participate in mediation' and ways to make use of support, use reasonable adjustments and how to design the mediation process to maximise P's participation.

In appropriate cases, if P was made aware of the mediation and wished to participate directly, reasonable adjustments could be made to take this into account, when the mediation is set up.

Awareness

One of the main aims of the research was to raise awareness. It is recommended that steps are taken to raise awareness by sharing the findings and case studies to a range of professionals and stakeholders. A non-exhaustive list could helpfully include health and social care professionals, care homes, care agencies, advocates and organisations providing advice and assistance to those with learning disabilities and issues related to aging.

Funding

It is recommended:

- For judicial consideration to be given to making directions orders permitting access to P's funds for the purposes of funding mediation.
- For the Legal Aid Agency to provide guidance and clarification as to when legal aid is available to pay towards mediation both pre and post proceedings.

Skills and knowledge

It is recommended mediators wishing to practice CoP mediation:

- demonstrate a minimum 2 years knowledge and experience of the MCA and the CoP, together with knowledge of safeguarding.
- develop an understanding of the following: health and community issues, understanding family dynamics' and other areas as necessary depending on the situation, for example, an understanding of dementia and learning disability.
- develop robust skills to deal with highly charged emotions and untangle entrenched family positions,
- develop an understanding of the stages of grief and how best to respond to parties when they are in a stage of grief or shock.

Evaluation questions

It is recommended that the evaluation team for the CoP Mediation evaluation team consider exploring the following questions:

- What is mediation's effect on P's participation in the decision-making process as compared to judicial hearing?

- What is mediation's effect on judicial time as compared to legal proceedings including judicial hearing?
- 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?
- What is mediation's effect on diverting the time of the professionals from front-line services to mediation rather than litigation (by resolving disputes at an early stage)?
- Whether mediation has improved working relationships?
- Whether an agreement was reached on all the issues, and if not, details of the issues which remained outstanding, as this may indicate whether there are issues which are more amenable to mediation than others.
- the best way to get the views of a wide range of interested stakeholders?

Post evaluation

If the results of evaluation demonstrate mediation in the CoP is beneficial, it is recommended:

- positive steps are taken towards encouraging more parties to mediate in Court of Protection disputes
- those with capacity issues should be assigned an appropriate advocate or lawyer to represent them at the mediation
- the CoP Rules Committee develops procedural requirements to enable P to participate in mediation
- the Court of Protection Rules Committee considers and develops rules to establish:
 - a requirement for parties to attend an initial mediation information and assessment meeting prior to the issue of proceedings, in the absence of a good reason not to,
 - a requirement that where proceedings have been issued, parties must consider at first and subsequent direction hearings, whether the case is suitable for mediation, in the absence of a good reason not to,
 - multiple entry points for mediation, including before proceedings to allow for mediation at an early stage, during proceedings and provision for mediation to be tried more than once.

Next Steps

This study has produced a starting point of a necessary evidence base for designing mediation into the CoP process. The findings suggest there is greater scope for mediation in CoP. However, it will be important for an independent evaluation of the CoP Mediation Scheme to build on these findings and provide a robust analysis of the benefits and opportunities as well as the risks and concerns of more use of mediation in the CoP context.

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- My husband, Peter Newland for doing the final edit before the survey launch, collecting and transporting the data into spreadsheets, proof reading the final report and most of all his patience.

Charlotte May

APPENDICES

APPENDIX A: THE QUESTIONS

Section 1 General Questions

- Q1 How many CoP Mediations have you been involved in?
- Q2 When is the best time to mediate?
- Q3 What are the obstacles to Court of Protection Mediation?
- Q4 What are the obstacles to parties engaging in mediation?
- Q5 To what extent are those who deal with a range of Court of Protection disputes aware of the benefits and risks of mediation?
- Q6 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?
- Q7 In addition to accredited mediation training, what specialist knowledge and experience should mediators have? Please tick all which apply.
- Q8 Which issues should not be mediated?
- Q9 Which issues are most appropriate for mediation?

Section 2 Case Study Questions

- Q1 Give a brief introduction to your case study, such as who was involved and what the dispute was about?
- Q2 What was your role regarding the mediation?
- Q3 Did the court order mediation?
- Q4 If yes to Q3, what did the court order the parties to do?
- Q5 What were the issues mediated?
- Q6 When did the mediation take place?
- Q7 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 the case study did P have capacity to participate either directly by attending in person or with support?
- Q8 If yes with support to Q7, how was P supported to participate in the mediation?

- Q9 Were P's wishes and feelings about the issue being mediated able to be conveyed by P or on P's behalf?
- Q10 If yes to Q9, how were P's wishes and feelings made known?
- Q11 Was P represented at the mediation?
- Q12 How was the mediation conducted?
- Q13 How was the mediation funded?
- Q14 Was an agreement reached?
- Q15 If No to 14, please give you view as to why not?
- Q16 If yes to Q14, were the terms of the agreement incorporated into a court order?
- Q17 Did the mediator have experienced of Court of Protection?
- Q18 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?
- Q19 If yes to Q18, please indicate approximate savings.
- Q20 What were the particular challenges and frustrations encountered?
- Q21 Did the mediation make things worse in any way?
- Q22 What were the advantages and benefits of the mediation?
- Q23 Did the mediation make things better in any other way?

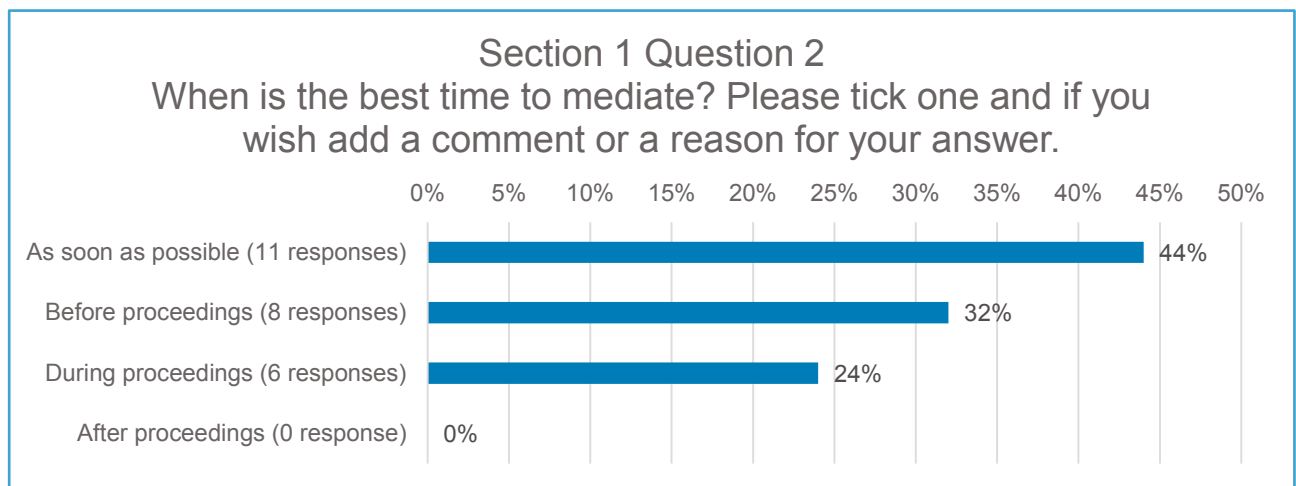
APPENDIX B: GRAPHIC ILLUSTRATION OF RESPONSES

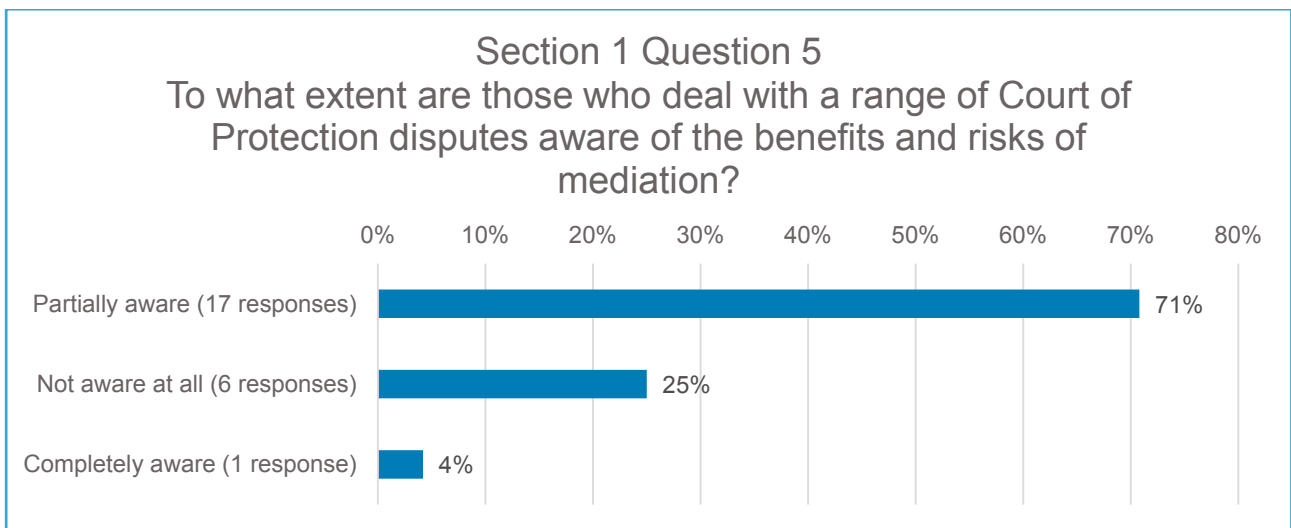
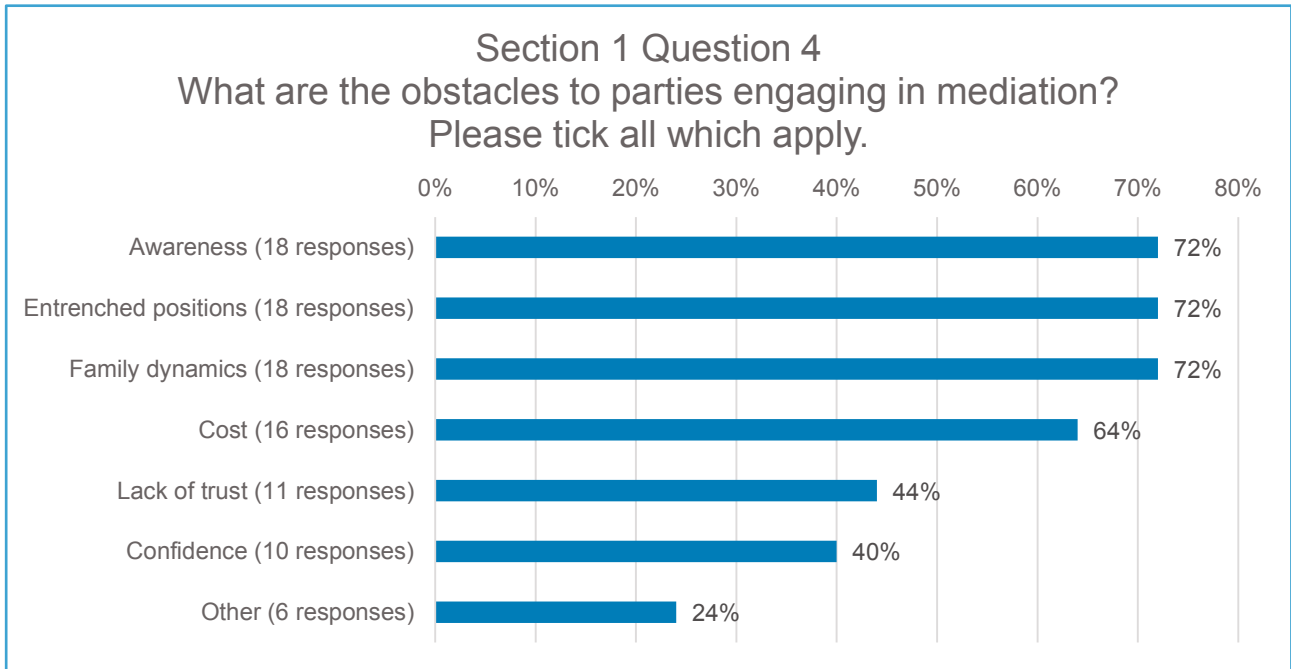
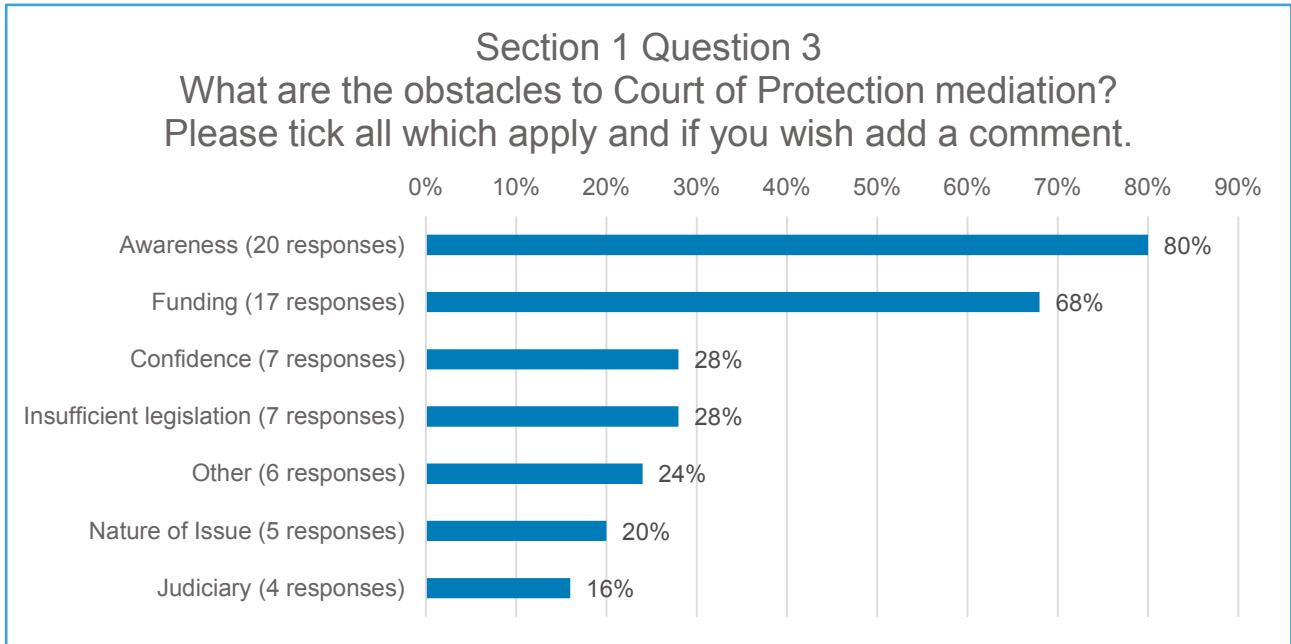
Note on Responses

Where participants were asked to tick just one answer, the total of responses adds up to 100%. Where asked to tick 'all which apply' the totals exceed 100%.

There are no graphic illustrations for questions where there were no pre-set options and respondents were only asked for their own views; namely section one questions 8 and 9 and section two questions 15 and 19.

Section 1 Question 1 How many Court of Protection mediations have you been involved in?		
Number of mediations	Number of respondents	Total
0	2	0
1	6	6
2	6	12
3	4	12
4	3	12
5	1	5
6	1	6
8	1	8
20	1	20
Total number of mediations		81

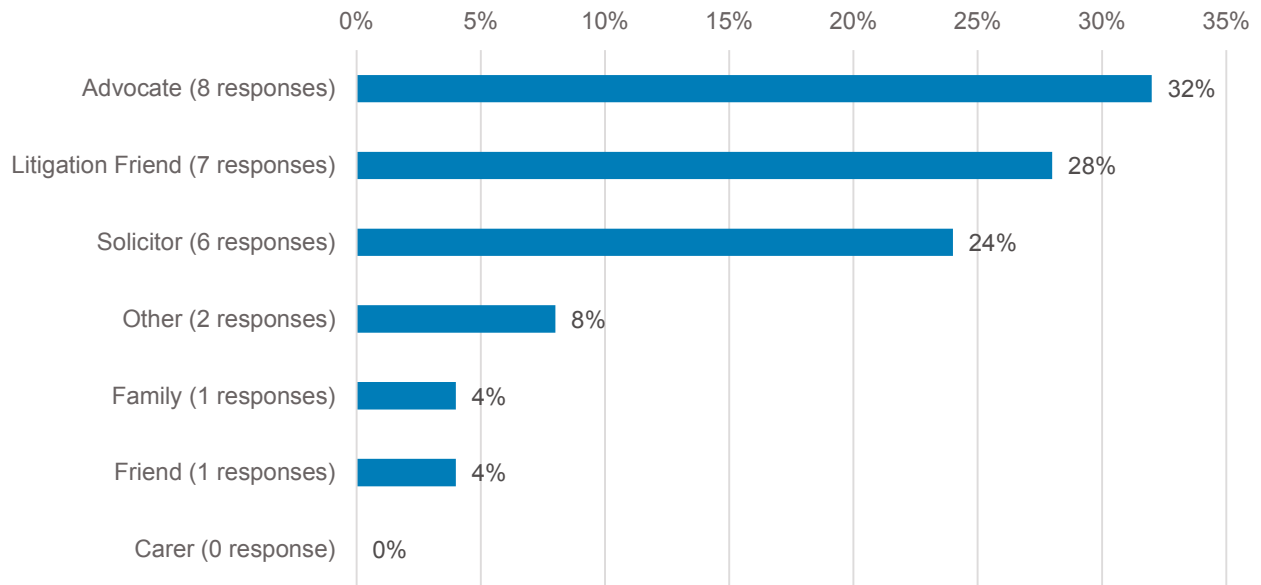




Section 1 Question 6

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 to be represented during the mediation?

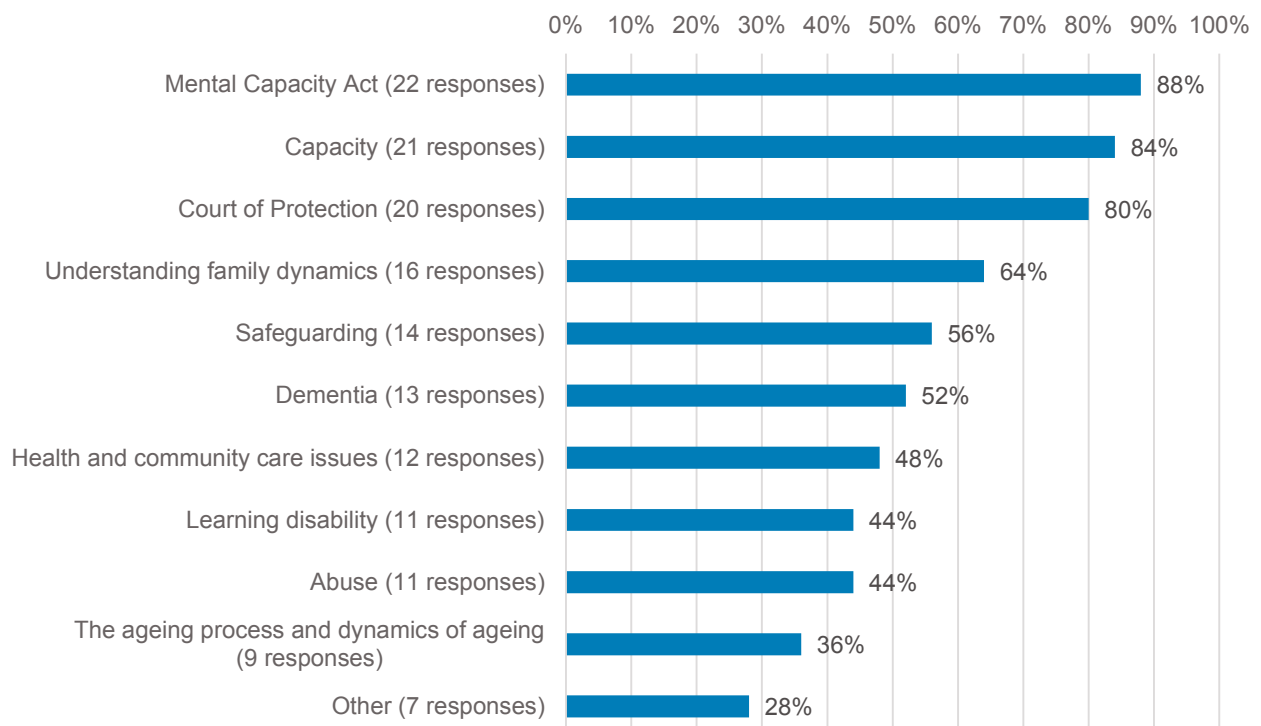
Please tick one and if you wish add a comment.

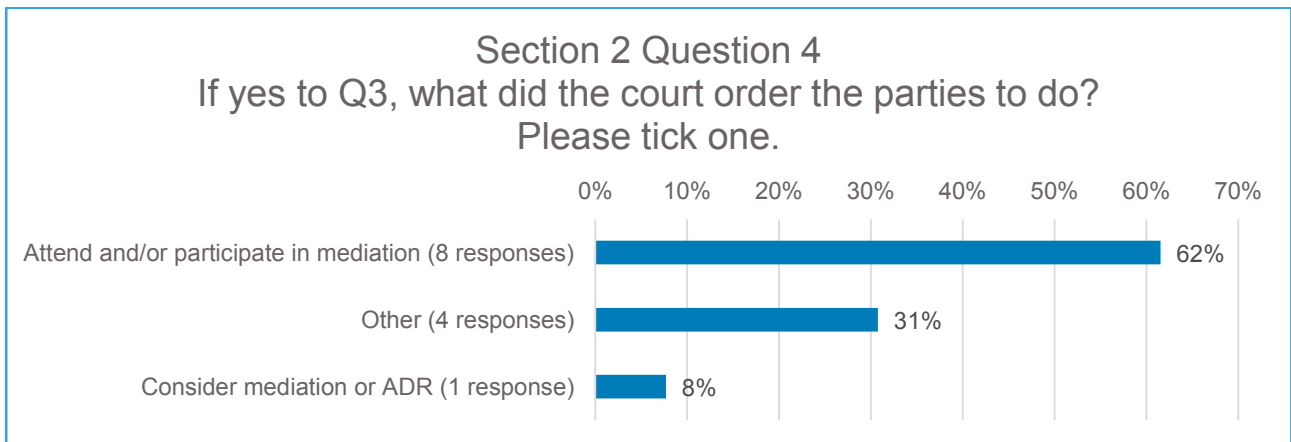
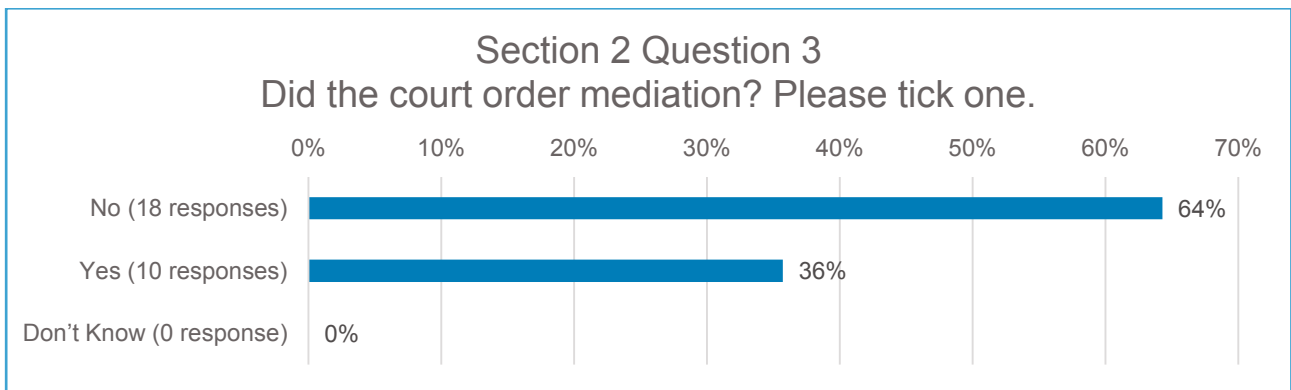
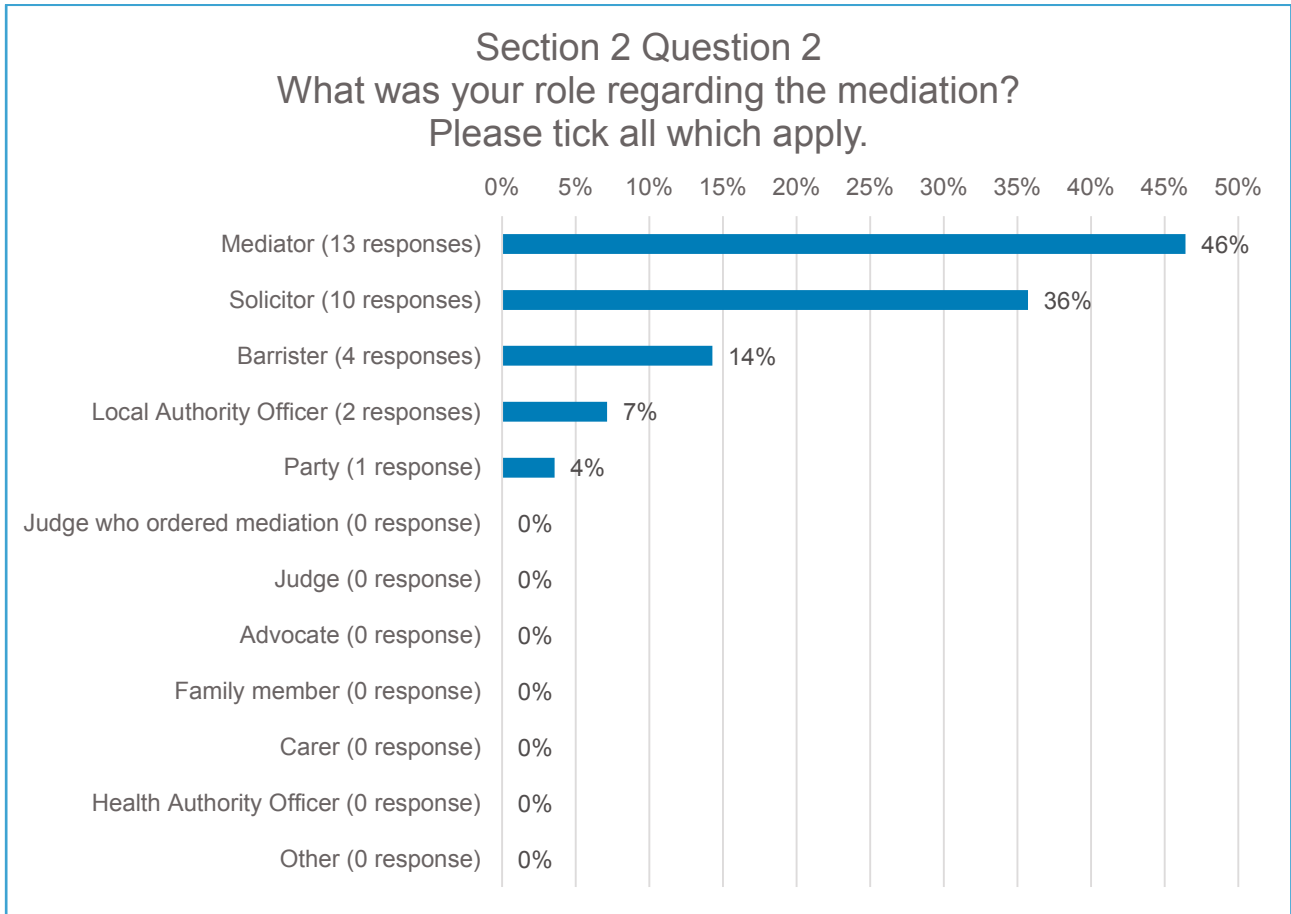


Section 1 Question 7

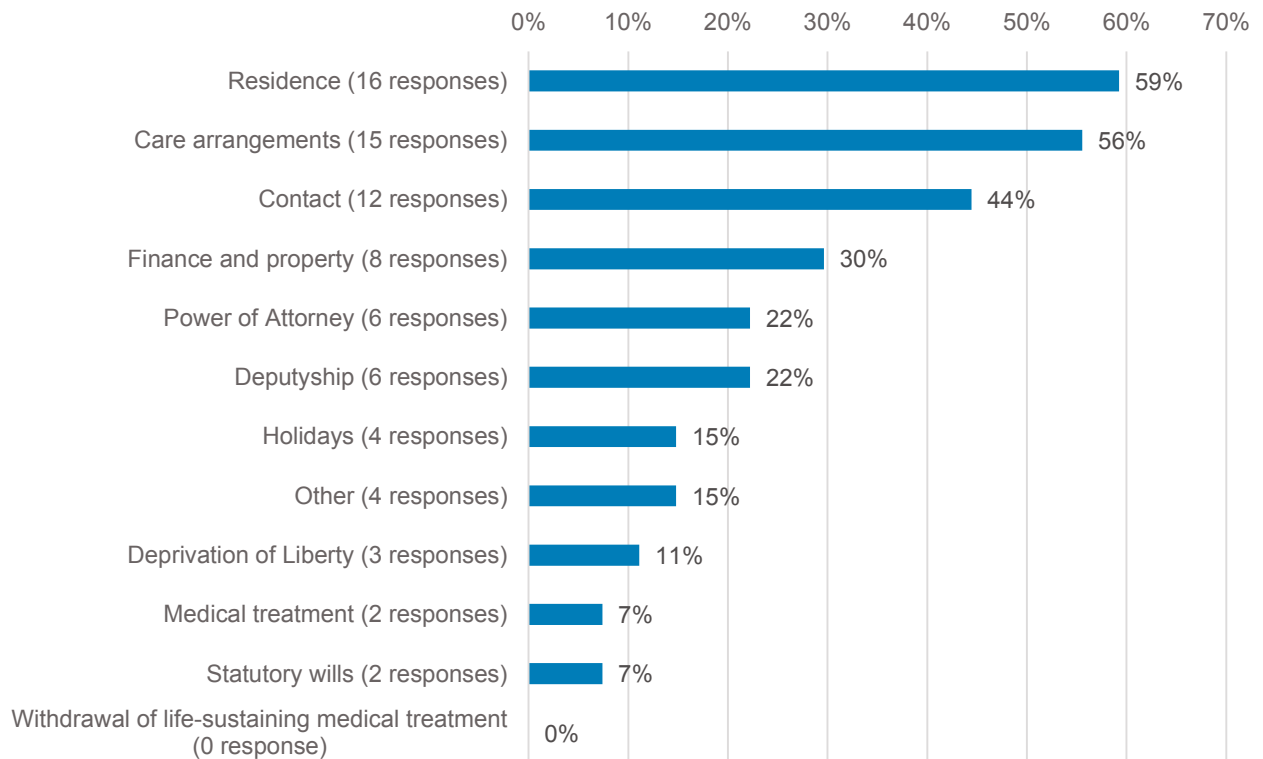
In addition to accredited mediation training, what specialist knowledge and experience should mediators have?

Please tick all which apply.

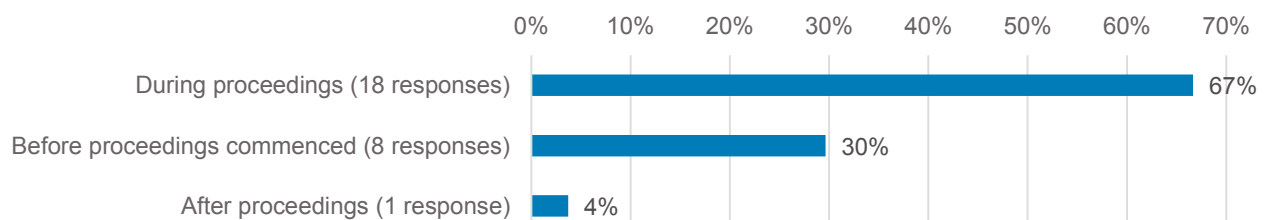




Section 2 Question 5 What were the issues to be mediated? Please tick all which apply.



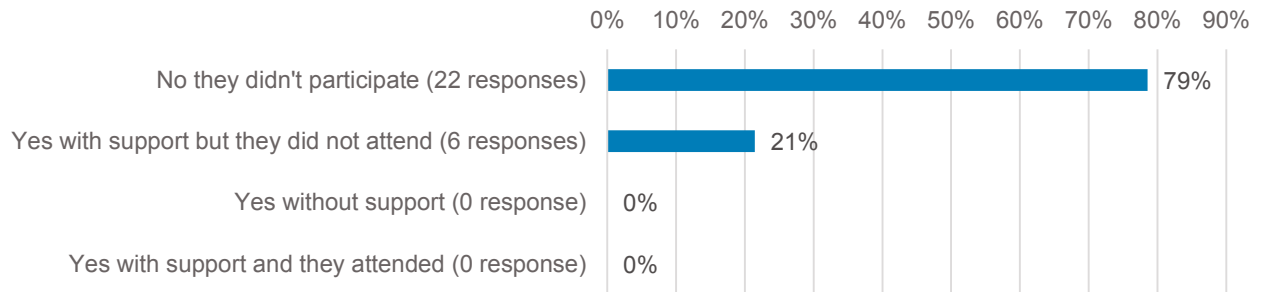
Section 2 Question 6 When did the mediation take place? Please tick one.



Section 2 Question 7

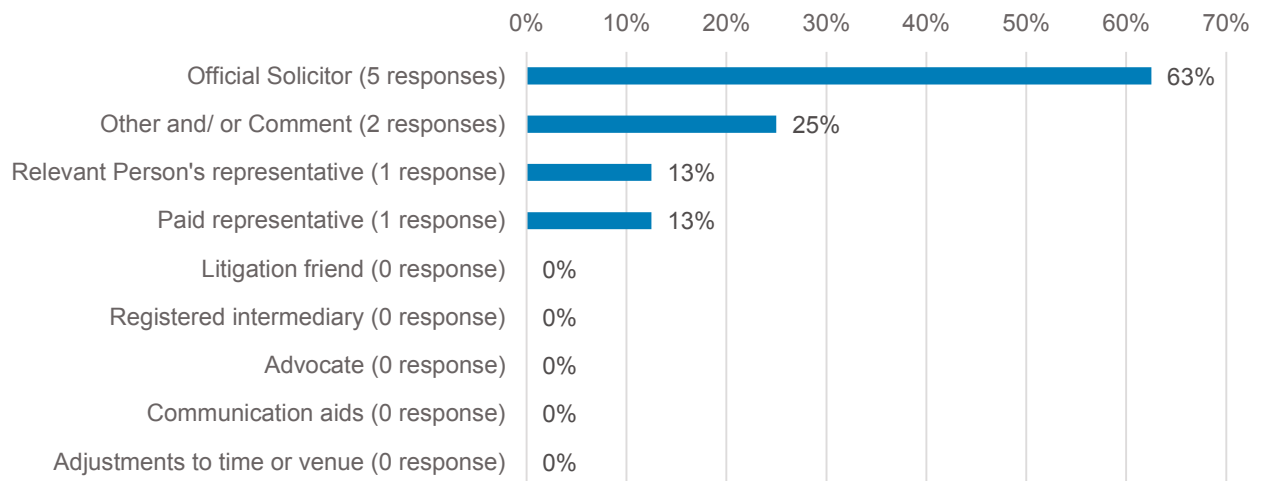
In this case study did P have capacity to participate either directly by attending in person or with support?

Please tick one.



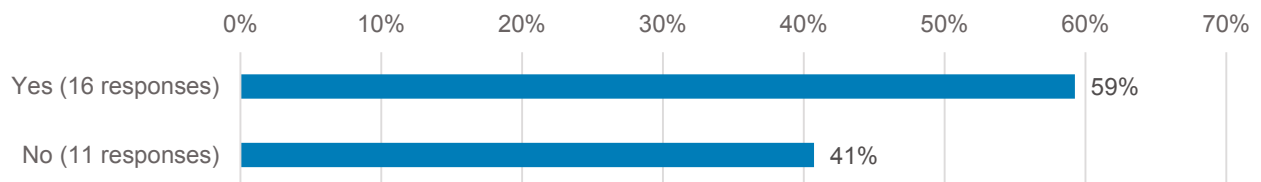
Section 2 Question 8

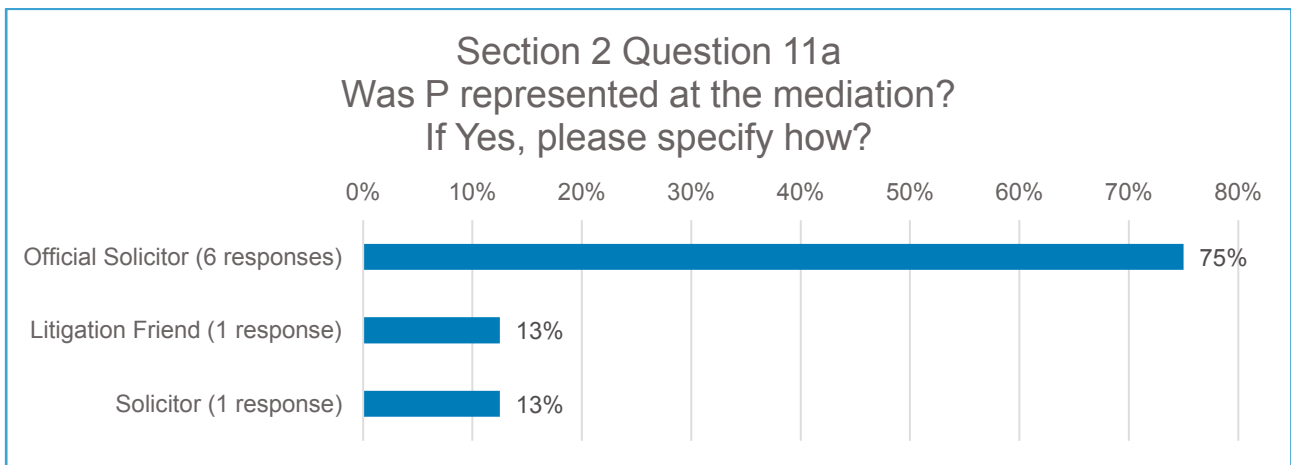
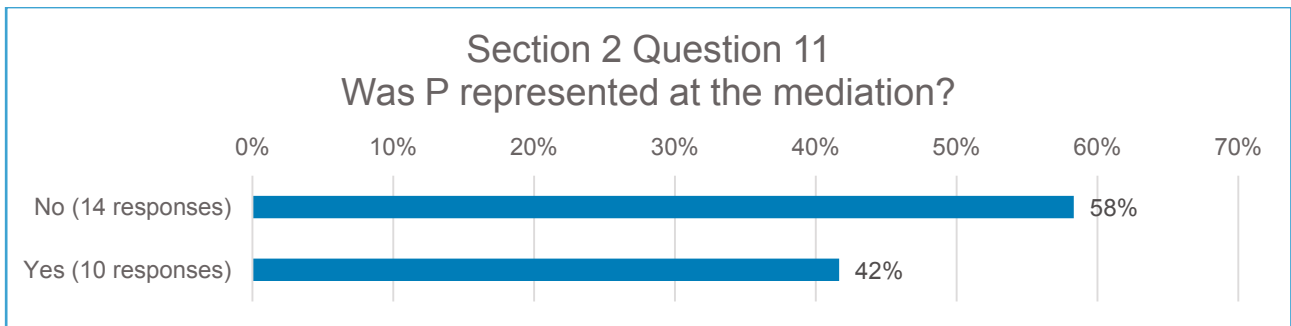
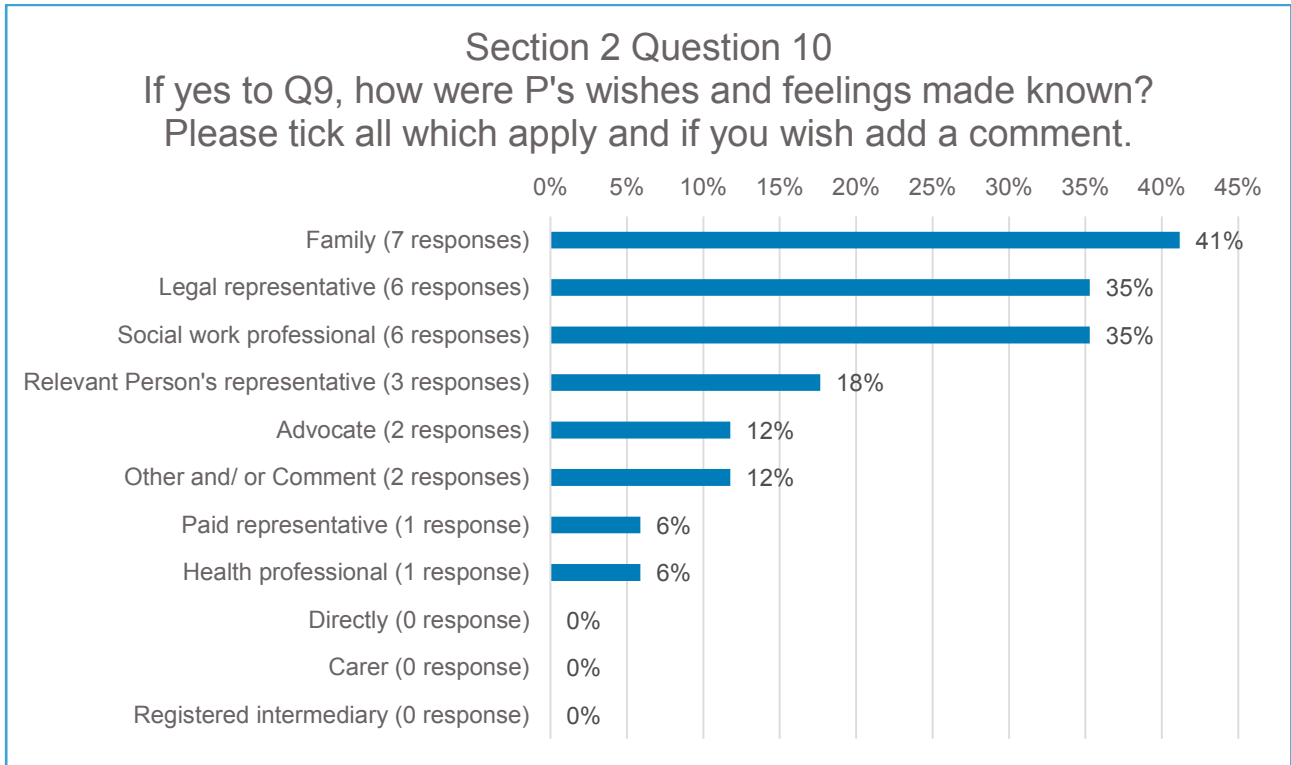
If yes with support to Q7, how was P supported to participate in the mediation? Please tick all which apply and if you wish add a comment.



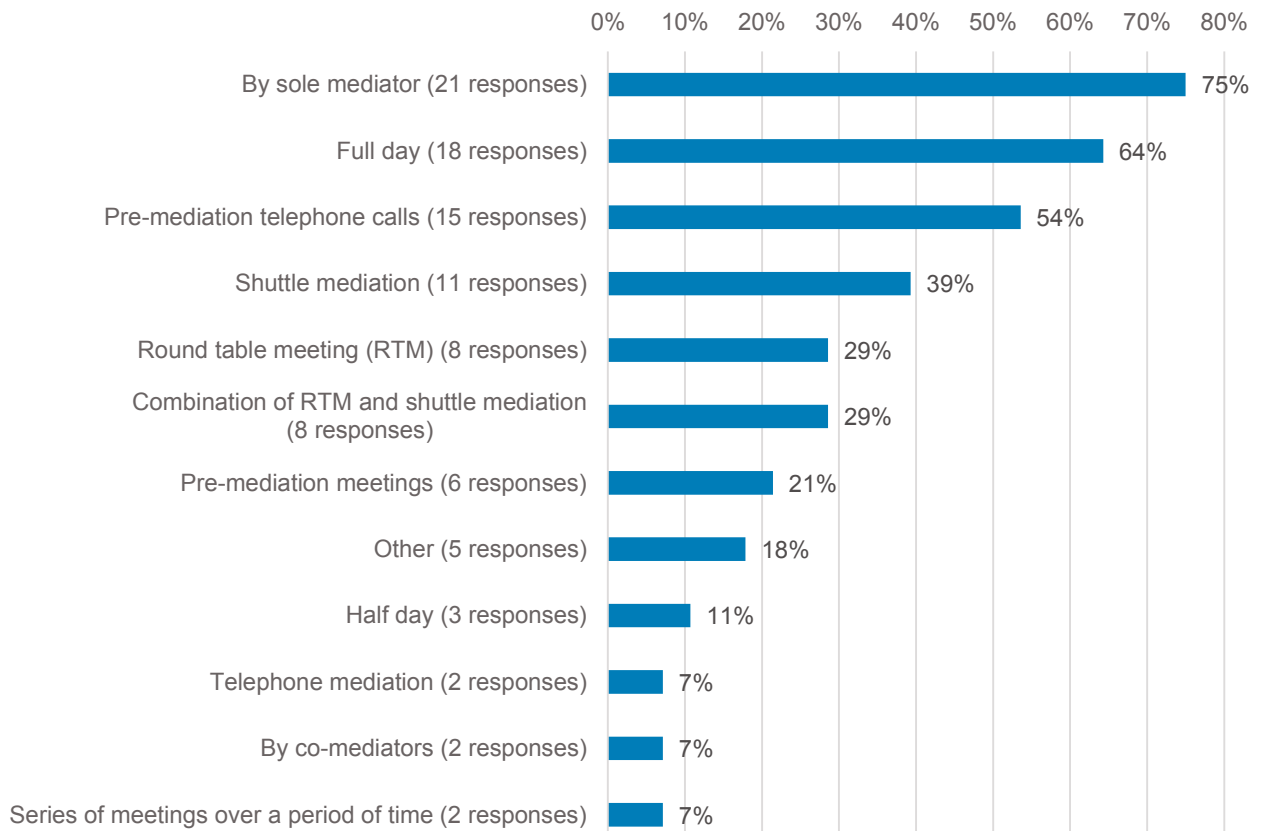
Section 2 Question 9

Were P's wishes and feelings about the issue being mediated able to be conveyed by P or on P's behalf?

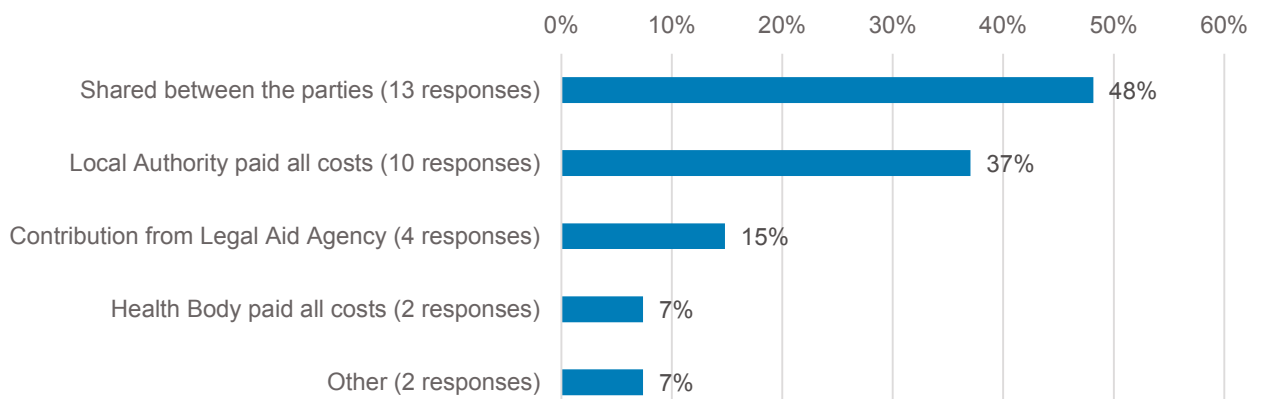


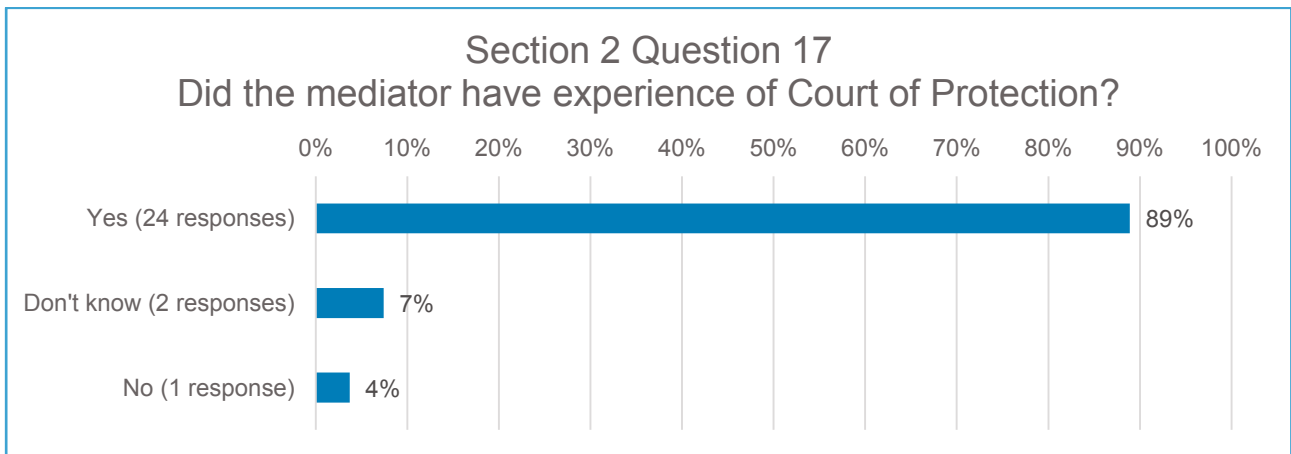
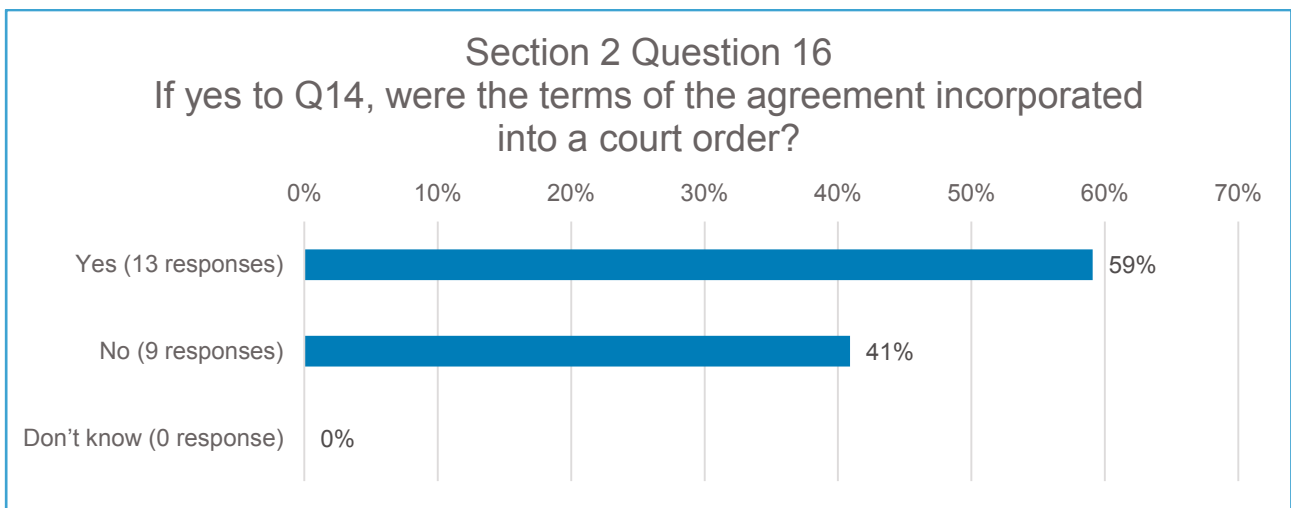
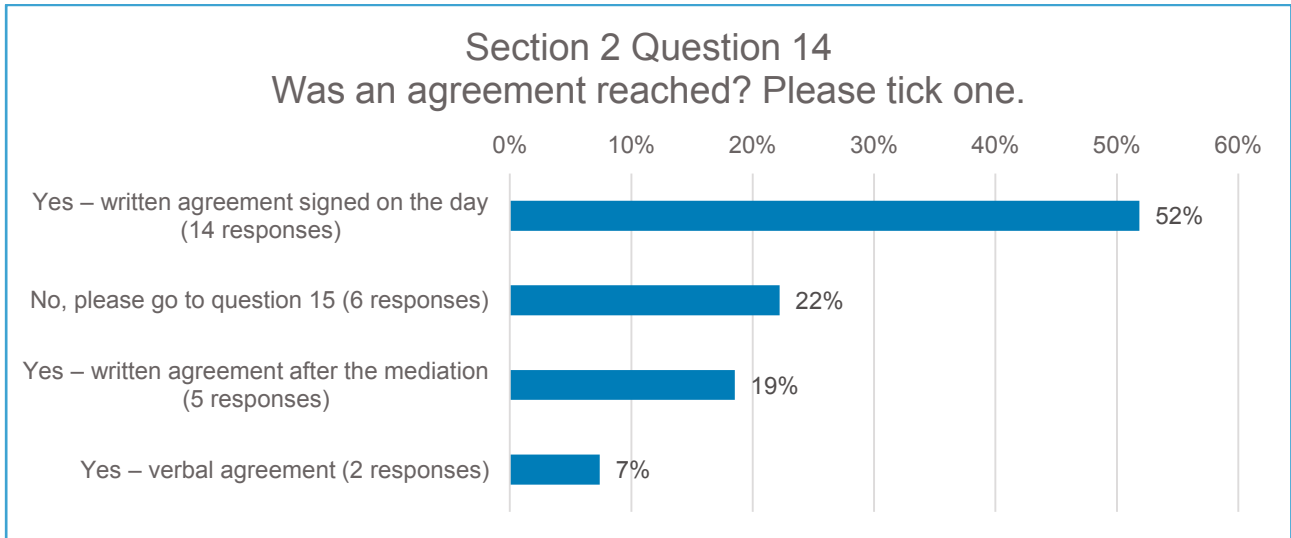


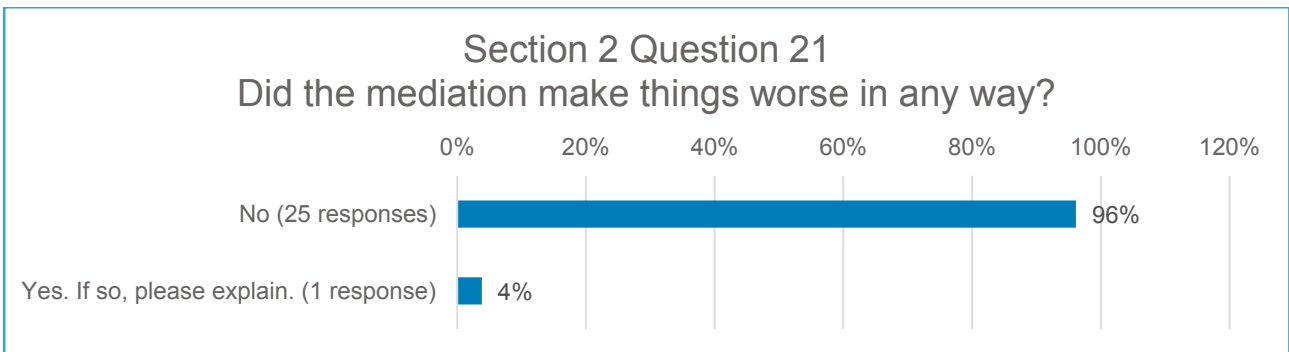
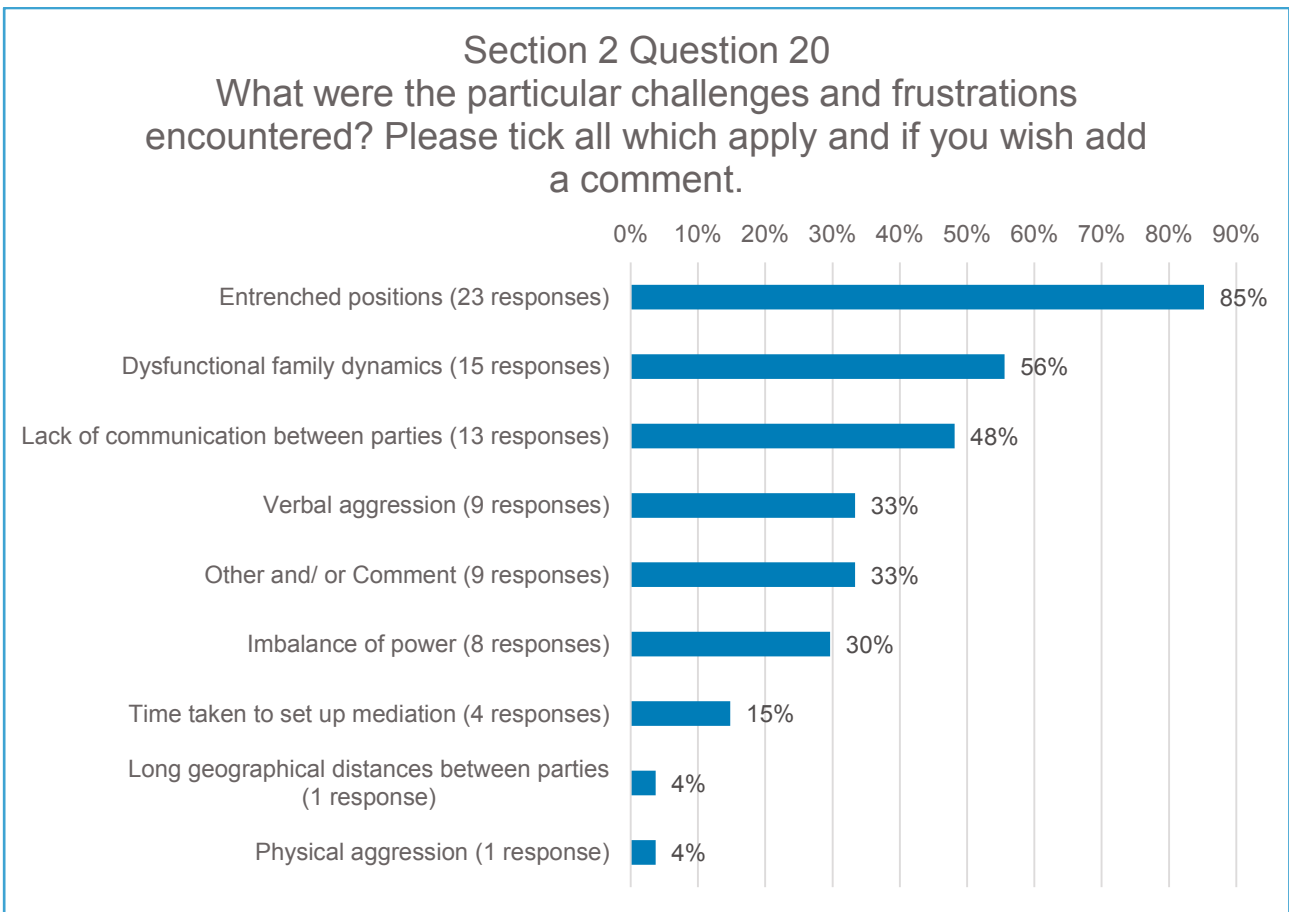
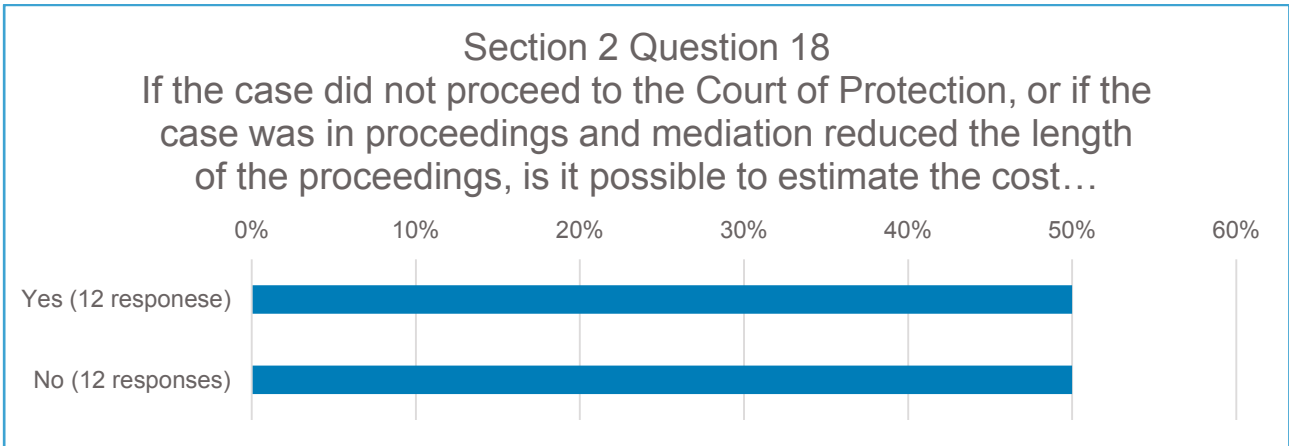
Section 2 Question 12 How was the mediation conducted? Please tick all which apply.



Section 2 Question 13 How was the mediation funded? Please tick all which apply.

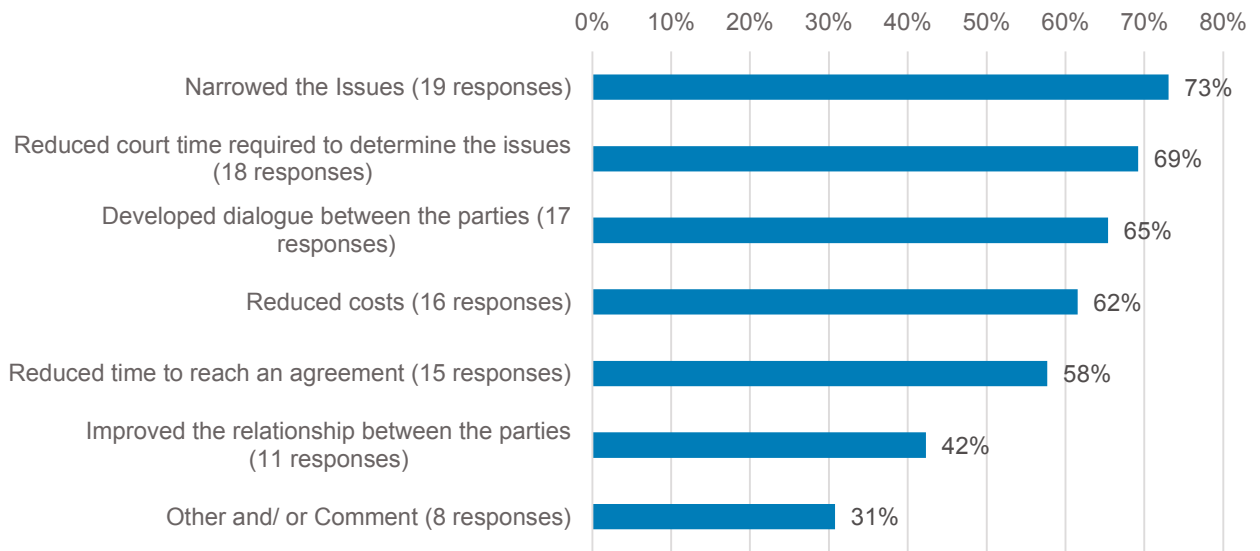






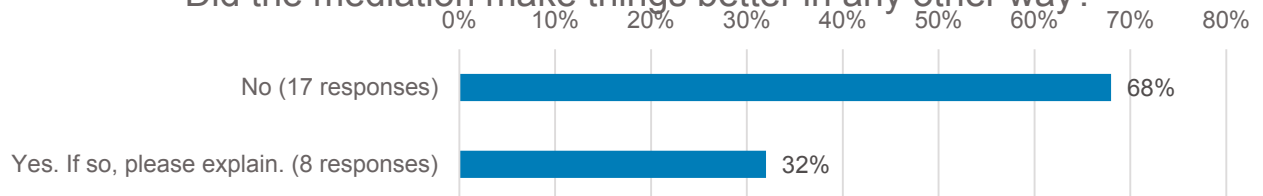
Section 2 Question 22

What were the advantages and benefits of the mediation?
Please tick all which apply and if you wish add a comment.



Section 2 Question 23

Did the mediation make things better in any other way?



APPENDIX C: CASE STUDIES

The author using the participants' responses to questions in section two of the research survey created these case studies. The participant reference number is shown in brackets in the title of the case study.

Before proceedings

Finance and property

1. P's business, his sons and second wife (2)

The background to this dispute was a lasting power of attorney appointing a father and wife, jointly and severally in respect of finances and property. P's second wife controlled P's money and was secretive about the accounts and other information. P had a business, which his sons from his first marriage took over. P's wife disagreed and when she tried to prevent the business from continuing, P did not want this to happen and he objected to her interference. The OPG ordered mediation under its pre-proceedings pilot scheme. The costs of mediation were shared between the parties. In advance of the mediation day, the mediator held pre-mediation telephone calls with the parties. The mediation was conducted by telephone and lasted half a day.

The challenges of the mediation were: lack of communication between the parties, entrenched positions, imbalance of power and verbal aggression.

After the mediation day, a written agreement was reached which: narrowed the issues, allowed access to the bank account for the father to determine if any financial abuse had taken place; and fixed an agreed rental period for the business property.

The benefits: a) it narrowed the issues, b) reduced court time to determine the issues and reach an agreement, c) developed dialogue between the parties and improved their relationship, d) court proceedings were avoided and e) costs savings were estimated to be £8,000.

2. Removal of an attorney (11)

In a dispute about finance and property, power of attorney and removal of an attorney; the costs of mediation were shared between the parties. During the mediation, P was not legally represented, though the family did convey P's wishes and feelings. The challenges were entrenched positions and verbal aggression. An agreement was not reached, it was said, due to allegations of financial abuse and fraud.

Though an agreement was not reached the benefits of mediation were a) it narrowed the issues, b) developed dialogue between the parties and c) reduced court time to determine the issues.

Health and welfare

3. Discharge from hospital (3)

The parties in dispute were P's daughter, son and a local authority. The local authority paid all the costs of the mediation. There was only one issue namely, where P should live when he was discharged from hospital? Though P was not represented legally, his advocate conveyed his wishes and feelings, during the round table mediation meeting.

The frustrations and challenges were: the time taken to set up the mediation, dysfunctional family dynamics and entrenched positions.

The benefits: the mediator reported while an agreement was not reached because the parties' positions were too entrenched, the mediation was beneficial as it narrowed the issues between the parties.

4. Dispute between local authority and mother of two adults with learning disabilities (13)

The solicitor for the local authority reported this mediation. The local authority funded it. The issues in dispute were i) where P & P should reside and receive care, ii) how this would be funded and iii) whether it would be funded by a direct payment or a directly commissioned service. An agreement was not reached. The solicitor for the authority was of the view this was due to the entrenched position of the mother. The mediator considered this case would have benefitted from pre-mediation meetings with the parties prior to the mediation day. The case proceeded to the CoP.

The benefits: it had narrowed the issues before the court.

5. Dispute: where young adult should live (16)

The dispute as to where a young adult should live was between the local authority and P's parents. The local authority paid all the costs of the mediation which was facilitated at a round table meeting. P's family communicated his views, wishes and feelings during the mediation.

The challenges were: the lack of communication between the parties, dysfunctional family dynamics and entrenched positions. Despite the initial entrenched positions, the mediation was successful in moving the parties towards an agreement.

The benefits: a) mediation developed dialogue and improved the relationship between the parties, b) reduced time to reach an agreement c) not only reduced court time but actually avoided proceedings d) reduced costs with an estimate of costs savings of £10,000 for each party and e) helped the estranged parents feel much better and more positive about the situation.

6. Flexibility: mediation at home (25)

P, an elderly gentleman with dementia and physical disabilities, had been discharged from hospital to a care home. A DoL standard authorisation was in place. The dispute was between the local authority, P's wife and two adult sons. The family wanted P to return home with a package of care provided by a care agency. As no less than 8 care agencies had previously withdrawn, the local authority initially considered, P could only return home if the family directly employed PAs to deliver care.

Before proceedings, the local authority commissioned and funded mediation. There were two challenges, firstly, P's wife was refusing to go to any meetings and secondly, it appeared the family members had mild learning disabilities. This made it difficult for them to sustain insights into the reasons care agencies kept withdrawing. The mediator spent time speaking with different family members about mediation over the telephone and listening to their concerns. P's Paid Representative informed the mediator over the phone about P's wishes and feelings. He confirmed P wanted to return home. The flexibility of the mediation process encouraged P's wife and sons to agree to a series of mediated meetings at their home. Firstly, they met with the mediator, secondly, with the mediator and manager from the independent living organisation, who discussed the benefits of having direct payments and employing PAs. Finally, they met with the mediator and the social worker for P.

The benefits: a) P's wife agreed to an advocate for herself b) P did return home with a care agency in place to deliver his care. It was later heard the care agency still experienced difficulties with the assignment.

7. P's wife and girlfriend (24)

The dispute was about where P should live and contact. P owned his home but when his wife discovered P had had affairs for a long time, she would not look after him in the matrimonial home (which was in his name). P's wife wanted P to live in a care home, whereas his 'current' girlfriend wanted him to live with her. P's children were split over where P should live. P's wife wanted to prevent the current girlfriend have access to him at any time.

The mediation took place before proceedings, paid for by the deputy from P's funds. It was reported, P was represented in the mediation, only in so far as the mediator, visited him and tried to ascertain whether he had any ability to understand the nature of the dispute and the concepts of mediation and resolution. The mediator reported that unfortunately, P had none of these understandings and his mental capacity was virtually non-existent.

A sole mediator held pre-mediation meetings and facilitated the mediation by way of round table meetings, shuttle mediation and a combination of both; holding a series of meetings over a period of time.

The challenges were: entrenched positions, dysfunctional family dynamics, lack of communication between the parties, imbalance of power and verbal aggression.

An agreement was made on the day which enabled: i) P to go to a very good residential care home, ii) P's girlfriend to visit him regularly and iii) P to leave the care home to visit his girlfriend too.

The benefits: a) it narrowed the issues, b) reduced time to reach an agreement, c) developed dialogue between the parties, d) improved the relationship between the parties, d) the dispute was resolved without the issue of proceedings, e) savings were estimated to be over £30,000.

In addition, it was reported mediation made things better creating a 'more relaxed approach between all family members (and the girlfriend)'.

Medical treatment

8. Medical treatment: replacing a feeding tube (19)

This medical treatment dispute was about whether a feeding tube should be replaced. The Health Body paid all the mediation costs.

P had never had capacity. Her wishes and feelings were not capable of being conveyed. P's family advocated for what they believed would have been her wishes. By way of a written agreement, which was signed on the day, the parties agreed there would be one more attempt to replace the feeding tube and then no further attempts if/when that failed.

The benefits: a) reduced court time required to determine the issues, b) reduced costs, c) developed dialogue between the parties d) improved the relationship between them and e) costs savings were estimated at £20,000 plus (the Health Trust costs and the usual contribution from P's estate to the Official Solicitor's costs.)

During proceedings

Finance and property

9. Lasting power of attorney – sibling dispute (1)

The dispute between the siblings was twofold: firstly, who should act as attorney and how information should be provided to the non-attorney sibling and secondly, a professional negligence complaint by P's sister and his new deputy about how a previous professional who had been removed had acted (including a fee dispute about charges).

The court did not order mediation and the cost of mediation was shared between the parties. P did not participate nor were P's wishes and feelings able to be conveyed. Prior to the mediation the mediator spoke with the parties on the telephone. A sole mediator facilitated the telephone mediation, which lasted 1 day.

The challenges were: the dysfunctional family dynamics, imbalance of power, entrenched positions and unrealistic expectations of one of the parties.

A written agreement was reached on the day.

The benefits: a) the mediation reduced the length of the proceedings, b) costs savings were estimated to be over £30,000.

10. Family dispute causes care home to serve notice (9)

There was a dispute between certain family members, resulting in the care home serving notice on P. Proceedings had been issued and stayed for mediation, with court ordering the parties to attend and/or participate in mediation. The local authority paid all the costs of the mediation. The issues were residence, care arrangements and contact. The Official Solicitor, as litigation friend, represented P in the mediation. P's wishes and feelings could not be conveyed.

In advance of the mediation, the sole mediator spoke with the parties on the telephone. The mediation took place as a series of shuttle meetings over a whole day.

The particular challenges and frustrations were: the dysfunctional family dynamics and entrenched positions. An agreement was not reached. It was the view of the mediator, this was because there were 8 parties and one day which was not enough time.

11. Appointment of financial deputy (11)

In this case, the issues mediated were finance, property and deputyship. The court ordered the parties to attend/participate in mediation. The costs of the mediation were shared between the parties. One of the challenges in setting up the mediation was the long geographical distance between the parties. During round table mediation, P was not represented, though the family conveyed P's wishes and feelings. A verbal agreement was made on the day and the applicant agreed to withdraw his application. However, immediately after the mediation the applicant reneged on his agreement.

Notwithstanding the applicant had reneged, mediation was reported to be beneficial: a) it narrowed the issues, b) developed dialogue between the parties, c) reduced court time required to determine the issues and d) reduced costs.

12. Dispute about will and gifts (17)

In a dispute about a will and gifts, P was joined as a party. The Official Solicitor who was appointed to act as litigation friend, took part in the mediation on P's behalf. It was reported there was a lot of money at stake and the expense of the mediation was proportionate. A sole mediator facilitated the mediation over one day. The challenges were: the lack of communication between the parties, dysfunctional family dynamics and entrenched positions. An agreement was not reached.

The benefits: though the mediation did not entirely resolve the dispute, it was beneficial as it did narrow the issues.

13. Deputyship: dispute between P's husband and P's daughter (2)

P's husband made an application to act as her deputy. P's daughter (from a previous relationship) opposed the application as she thought she should act as deputy. The court did not order mediation. The costs were paid for from P's funds. The mediation took place at a round table meeting over half a day.

The particular challenges and frustrations encountered in the mediation were: entrenched positions, lack of communication between the parties and verbal aggression.

A written agreement was reached after the mediation, which was later incorporated into a court order.

The benefits: a) it reduced the length of the court proceedings and b) costs savings were estimated at £10,000.

Health and welfare disputes**14. Residence of 22-year-old (home or supported living) (8)**

The dispute was between the local authority and a family as to where the family's 22-year-old son with Down's Syndrome should reside - at home or in supported housing. The court ordered parties to attend/participate in mediation. The costs were shared between the parties including a contribution from the Legal Aid Agency

P's legal representative and Relevant Person's Representative represented him during the mediation; with his wishes and feelings being conveyed by them, together with his social work professional and health professionals.

The sole mediator had pre-mediation telephone calls with the parties. The mediation was a combination of shuttle and round table meetings over one day, with a half day follow up mediation four months later. The lawyers drafted a consent order on the day with all parties' input. Over the next few days, the order was amended by the parties, signed by them and then endorsed by the court.

The challenges and frustrations were: dysfunctional family dynamics, lack of communication between the parties, verbal aggression, entrenched positions and imbalance of power. A particular challenge was the entrenchment of the matter itself, which had been simmering for over 20 years. Since the young man had been born, his family had repeatedly felt let down by local authority's perceived lack of support. They needed to be heard in a calm mediated space.

The benefits: a) narrowed the issues, b) reduced court time required to determine the issues, c) reduced time to reach an agreement, d) reduced costs, e) developed dialogue between the parties and improved the relationship between them f) Costs: This matter had been in proceedings for a long time and already cost the parties in excess of £80,000. It settled after 1.5 days mediation at the comparatively low cost of £4,000. h) in addition, mediation was said to make things better as *".. it was the first time all parties had met and talked. It gave the opportunity for all parties to have their say in a safe (and managed) space. The family felt heard and treated with respect and dignity. The local authority had an opportunity to put their perspective and felt heard and considered. A better, more co-operative relationship was created in the young man's best interests."*

15. An underlying hard-edged issue (14)

In a dispute between a local authority and P's elderly mother, the issues were: residence, care arrangements, contact and holidays. The mediation took place during proceedings following encouragement from an independent social worker and the court, though there was no specific court order to mediate. The costs of the mediation were shared between the parties. A sole mediator at a round table meeting facilitated the mediation. The Official Solicitor, acting as litigation friend, represented P and conveyed P's wishes and feelings during the mediation.

A written agreement was reached on the day i) as to contact and ii) an interim agreement as to residence

The particular frustrations were: the time taken to set up the mediation and entrenched positions. In addition, it was stated the mediation made things worse because the mediation process, actually led to a prolongation of proceedings as it encouraged P's mother to think that the care package was a possibility when in fact it was not on the table.

This case study illustrates a view that mediation only works where the public body has worked out what it is actually prepared to do and not do, namely fund a particular care package and has made this clear at the outset.

16. 'Massive' family dispute (18)

This was a dispute between a group of P's siblings and his wife and another sibling. Years before, when P's parents died, he had acted in loco parentis to his siblings, provided them with a home and bought them up. P married very late in life and his wife was the same age as a younger sister. When P was diagnosed with fast progressing dementia, he appointed his wife as attorney for property and financial affairs, but was advised as he was married, he did not need health and welfare power of attorney.

This was reported as a 'massive' dispute between P's siblings and his wife about: who visited him in the care home when, took what into his room, where photos were placed and, if and what flowers could be in his room (as one party was allergic to pollen). P had totally lost capacity and was not aware of anything or anyone.

The fighting within the family endangered P's placement in the care home. After 1 year and £36,000, in legal costs the case was referred for mediation. It was resolved in one day. The arguments were caused by anger and fear arising from grief.

The court did not order mediation and the mediator commented: *'Eventually, far too late really, the solicitors managed to get everyone to mediation. Mediation needs to be ordered or encouraged much sooner as a lot of avoidable damage had been done.'*

The costs of mediation were shared between the parties.

The issues to be mediated were: power of attorney, care arrangements, contact, end of life contact with P and funeral arrangements.

P was not represented legally. He was *'sort of represented in that everyone there cared about him, but he was so far gone it wasn't really about him.'*

There were pre-mediation telephone calls and co-mediators facilitated the shuttle mediation over a whole day.

The challenges encountered were: the time taken to set up the mediation, lack of communication between the parties, dysfunctional family dynamics, entrenched positions, imbalance of power and verbal aggression.

A particular frustration in this case was:

'adversarial negotiations through solicitors had made matters worse. One solicitor had tried and failed to get the case to mediation with the other side opposing it – if courts were more-active it would help immeasurably.'

The issues were resolved in one day, a written agreement signed at the mediation. The terms of the agreement were then incorporated in a court order. The main points of the agreement were: i) who would visit P when, ii) what was allowed in the room, (iii) contact at end of life, (iv) how and when P's wife would notify the siblings about the death and funeral, (v) funeral arrangements agreed and (vi) an action plan for all family members.

The benefits: a) it developed dialogue, b) improved the relationship between the parties b) narrowed the issues, c) reduced time to reach an agreement, d) reduced costs.

Additional comment by the mediator:

'..If mediation had been used earlier it would have saved family members tens of thousands of pounds..'

'Given the nature of this dispute, mediation was the obvious solution and it just seemed so incredible that the normal routes for dispute resolution actually involve processes that vastly escalate disputes rather focus on resolution, understanding, improving communication and all those good things people in dispute need'

Mediation made things better 'in every possible way, and the legal route had made it worse in every possible way.'

The mediator cited the only criticism by the parties and solicitors:

'If they had known about mediation earlier, they could have been spared what they had been through!'

17. Multi-party dispute re profoundly learning-disabled adult (21, 25)

The dispute was between the father of P, a 48-year old profoundly learning-disabled woman, and a number of professionals from two Local Authorities and a Health Trust. The issue was whether P's care should be provided at home with the father with a package of care or in a residential care type setting. The mediation was arranged by agreement between the parties. The parties shared the costs (including a contribution from the legal aid agency).

The mediator held pre-mediation telephone calls and meetings. At the mediation, the Official Solicitor's legal representative represented P, though P's wishes and feelings were not capable of being conveyed. The mediator facilitated a round table meeting discussion. Using a best interests balance sheet approach, she created a balance sheet with the parties to set out the advantages and disadvantages of the options.

The challenges were: an imbalance of power and entrenched positions. An agreement was signed on the day. It set out the next steps including: i) for P's father to explore the provision of a motability vehicle, ii) increased weekday contact and staying weekend contact, iii) completion of risk assessments of the father's home, v) care planning by the local authority, vi) contact reports to be completed and shared with the parties and vii) the prepared balance sheet of options would be shared at further meetings and viii) the mediation agreement was to be attached to a court application to vacate the next hearing with a request for a stay of the proceedings.

The Official Solicitor's legal representative reported; the mediation made things better as it gave rise to a trial of the father's preferred option for care at home; which did not succeed. P's father then dropped the case without the costs of a lengthy final hearing.

The benefits: a) mediation narrowed the issues, b) developed dialogue between the parties, c) reduced court time required to determine the issues, d) reduced costs and e) made things better as it had enabled a trial of a different model of care.

Health and welfare & finance and property disputes

18. Dispute between P's divorced parents and a local authority re P, aged 22 with learning disabilities (23, 25)

The dispute was between P's father on one side and his mother and sister on the other; and the local authority. The issues were: care, residence, contact, finance and property.

The parents had been divorced for 10 years. P had been living with his father and stepmother for approximately 2 years and attending day activities locally. The father held appointeeship and refused to disclose financial information to the mother. P's mother and sister wanted a shared care arrangement. The relationships were very strained and contact arrangements were problematic. The local authority was concerned about the detrimental effect this was having on P's well-being.

The local authority paid all the costs of the mediation.

The Official Solicitor was acting for P in the CoP proceedings. They did not attend the mediation but were kept informed about its progress during the day. P did not participate in the mediation; his wishes and feelings were not capable of being conveyed.

The main challenges and frustrations were: the entrenched positions, dysfunctional family dynamics, highly charged emotions and verbal aggression.

There were two main shifts in party positions: firstly, the authority agreed to a trial of care with P living with each his parents in two-week blocks and to assess whether this worked well for P and secondly, the father agreed to the trial of shared care and to the disclosure of financial information.

On the day an agreement was made which included i) there would be an assessment period with P living alternately with his mother and father in 2 week blocks, ii) the transition point would take place at P's day work placement scheme, iii) the father would continue as appointee, iv) the father would share information of P's benefits with the local authority and the mother v) P would be provided with personal monies during his stay with each parent and vi) P's assessment would be subject to regular review.

A frustration was that a few days later the father (who had previous history of reneging on agreements) filed a statement with the court stating he had been 'bullied' into signing the agreement. The court heard the parties and ordered similar arrangements to those covered by the mediation 'agreement', namely for P to have a trial of living alternatively with his parents, such as 2 weeks with one and 2 weeks with the other.

The benefits: the authority reported, mediation was beneficial in that it confirmed the parties were not able to communicate positively and act together to ensure the best outcome for P. Later it was heard the shared care arranged had worked well for P.

19. Family dispute re contact and residence (11)

In this family dispute over care and contact, P's wishes and feelings were made known by his legal representative. The costs were shared between the parties, one part being a contribution from the Legal Aid Agency. While some points in dispute were narrowed, an agreement was not reached, and an ongoing dispute remained. The solicitor reporting the case considered this was because of the entrenched positions and dysfunctional family dynamics.

The benefits: a) narrowed the issues and b) developed dialogue between the parties.

20. Elderly mother with dementia (8)

The dispute was between five siblings who were in dispute with each other and concerned arrangements for their elderly mother, who had advanced Alzheimer's. Decisions needed to be made by five siblings about where she should live, her will and about her house. The issues to be mediated included finance and property, residence, contact, care arrangements and statutory wills. The court ordered parties to attend and/or participate in mediation with the costs being shared between the parties with a contribution from the Legal Aid Agency.

The Official Solicitor represented P at the mediation. It was not possible for P's wishes and feelings to be conveyed during the mediation.

Before the mediation the sole mediator spoke with the parties on the telephone. The mediation, lasting one day, was a combination of round table meetings and shuttle mediation.

The particular challenges were: lack of communication between the parties, dysfunctional family dynamics, entrenched positions, verbal and physical aggression.

The agreement was signed on the day and later incorporated into a court order. The main points agreed were: i) the mother should stay in her care home and not return to her home and her children's care, ii) her house should be sold, iii) how items of sentimental value should be divided, iv) separate visiting plans to the care home for the children and v) funeral plans.

The benefits: a) narrowed the issues, b) reduced court time to determine the issues, c) reduced time to reach an agreement, d) developed dialogue between the parties and e) reduced costs as a consent order was written up on the mediation day.

21. A 'teenage trigger' (10,25)

This case was reported by a local authority social care professional and the mediator. It was a dispute between two sisters (A and B) about where their elderly mother should live. The local authority was involved via the Deprivation of Liberty safeguards process and because P was a vulnerable person. The issues were: deprivation of liberty, residence, care, finance and property, power of attorney and deputyship,

P had lived with A for many years. It was agreed while A was on holiday; P would go into a care home for respite. While A was on holiday, her daughter T, complained to her aunty B about A's care of her which raised concerns about the ability of A to care for P too. T's allegations acted as a trigger. B, who held an LPA, cancelled the tenancy of the rental property where P had lived with A. B did not explain to A why she had done so. When A returned from holiday P had to remain in the care home. The local authority was involved under the DoLs scheme as P did not wish to stay in the care home.

The court order did not order mediation; it was suggested by one of the solicitors. The local authority paid all the costs.

By the time the mediator was instructed, the sisters had not communicated for 8 months. Prior to the mediation the mediator met with both sisters and spoke with the LA representative on the phone.

P was supported to participate indirectly in the mediation by way of her DoLs Representative. The Official Solicitor represented P during the mediation. The social work professional, relevant person's representative and her litigation friend conveyed P's wishes and feelings. She was consistent in expressing a wish to live with A again.

The mediation was conducted by way of shuttle meetings with each sister, with the solicitor for the Official Solicitor joining the individual meetings with their agreement.

The challenges were: the lack of communication between the parties, dysfunctional family dynamics and entrenched positions.

There were significant developments during the mediation: the enduring power of attorney was invalid, and A announced she had found a new rental property for herself and P. However, the main turning point was when the mediator was asked by A to tell B, T had told a friend she was being treated for a serious medical condition. This was not true and cast doubt on T's disclosures. B was visibly shocked. None of the parties wished for T to be involved in a finding of fact hearing.

An agreement was reached and signed on the day. It was agreed i) P would live with A in the newly rented accommodation ii) the local authority would carry out a needs assessment and a review after 3 months and iii) a panel deputy would be appointed to deal with P's finances.

The benefits: a) it reduced time to reach an agreement, b) reduced court time required to determine the issues and c) as mediation took place early in proceedings, it is expected cost savings would be considerable; d) it enabled P to leave the care home which was supposed to have been for respite only and to live once again with A, more speedily than if full court proceedings with a final hearing had been necessary.

22. A more relaxed fulfilling lifestyle for P (15)

The dispute centered on the revocation of one lasting power of attorney appointing some siblings and the making of a new one, appointing other siblings. The issues mediated included: power of attorney, finance and property, deputyship, contact, care arrangements and the tenancy of a let cottage and land.

The court ordered the parties to consider mediation or ADR.

P was not represented at the mediation. However, P's views were made known during the mediation by way of statements made to family members prior to mediation in response to an agreed list of questions, which were posed to P and his views recorded.

Prior to the mediation there were numerous pre-mediation calls between solicitors to try to narrow and define the issues. A sole mediator facilitated the one-day mediation, mainly by way of shuttle meetings, though some members of each party were able to meet in a room to resolve some issues.

The challenges and frustrations encountered included: a lack of communication between the parties, dysfunctional family dynamics and a 'sense of one-up-man-ship and long burning anger' of issues from long ago.

An agreement was reached and signed on the day. The main points agreed included: i) deputies from each side of the family to be appointed, ii) property and land lettings in principle, iii) arrangements for contact, iii) the current care arrangements to remain in place.

The benefits: a) narrowed the issues, b) developed dialogue and improved the relationship between the parties c) reduced time to reach an agreement and the length of the court proceedings d) reduced costs and made a costs savings estimated to be £25,000-30,000 and e) it enabled P to have clarity about contact and management of his finances which would produce a more relaxed and fulfilling lifestyle for him.

23. Local authority concerns for P re care and contact (25)

P's adult grandson had lived with P in her home for many years. There had been an underlying family tension between the grandson and P's daughter for some years. The local authority had concerns about i) her care at home and ii) contact between P and her daughter being curtailed by the grandson. P was admitted to hospital suffering from dehydration. P was discharged from hospital to a care home.

The issues to be mediated were where P should reside (back at home with her grandchild or in residential care), her care, direct payments and contact.

The local authority paid the costs of mediation.

A significant challenge and frustration was an imbalance of power. An agreement had been reached and was in the process of being drawn up. There was one dominant party taking up much of the mediator's time with minute detail. At 8pm the other party who had been in a room with their support person for long periods of time, tired and upset after such a long day walked out.

The parties later agreed that the document prepared in mediation could be used in proceedings and annexed to the court order as Heads of Agreement.

The benefits: a) the mediated detailed heads of agreement reduced court time, b) an estimated one day of time was saved for the court staff, judge, barristers and solicitors for the authority and official solicitor together with local authority professional's time - estimate of cost savings was £6,000, c) when P did return to live at home she was able to have contact with her daughter.

Medical treatment

24. Serious medical treatment in an intensive care unit (20)

The dispute was between an NHS Trust and the Official Solicitor on behalf of P about serious medical treatment in an intensive care unit. The court did not order mediation, which it was said, took place more by accident than by design. The Health Body paid all the costs of mediation. The mediation was carried out by a sole mediator by way of a combination of round table and shuttle meetings. It lasted a full day. During the mediation, the Official Solicitor represented P. P's family and legal representative conveyed P's wishes and feelings about the issues on P's behalf. One particular challenge encountered by the mediator was an adversarial barrister representing the NHS Trust. A written agreement was signed on the day about which medical treatment which would be in P's best interests and which would not. A judge of the CoP later endorsed it.

The benefits: a) mediation reduced the time to reach an agreement, b) reduced court time required to determine the issues, c) narrowed the issues, d) developed dialogue between the parties, e) improved the relationship between the parties.

After proceedings

25. Mediation after six sets of proceedings

Contact dispute between divorced parents (25)

The dispute was between parents, who had been divorced for many years, about contact with their 50-year-old daughter with learning disabilities. The significant feature of this matter was that the case had previously been to the CoP six times before different judges. On the last occasion, the court order stated that the parties could not return to court, unless and until, they had taken part in mediation for a period of 3 months. The solicitor for one party considered mediation was not expected to succeed, but because of the court order, it had to be tried. The costs of mediation were shared between the parties.

P did not participate in the mediation. Her wishes and feelings were not conveyed and she and was not represented during the mediation.

The challenges were: a lack of communication between the parties, an imbalance of power and entrenched positions.

Pre-mediation telephone calls and meetings took place with the parties. There was a one-day mediation facilitated by a sole mediator using shuttle meetings.

A written agreement was signed on the day regarding regular contact, staying contact at Christmas and other holidays.

The benefits: a) it avoided the parties returning to court with yet another set of proceedings, b) saved further public funding and court time c) one year later, when the mediator checked, though there were other issues between the parties, the agreement about contact was still holding.

USEFUL LINKS

Elder and Guardianship Report 2012

www.bcli.org/project/elder-and-guardianship-mediation

Dr Jaime Lindsey

Absent voices: Researching the role of P in the Court of Protection

ukaji.org/2018/08/15/absent-voices-researching-the-role-of-p-in-the-court-of-protection/

The Centre for Social Gerontology

www.tcsg.org/med.htm

‘Exploring the Role of Elder Mediation in the Prevention of Elder Abuse’
by Judy McCann-Beranger.

www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/mp-pm/mp-pm.pdf

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