For the best?

Is mediation the key to solving MCA 2005 "best interests" disputes, asks Russell Caller

IN BRIEF

▶ Professional deputies, obliged under the MCA 2005 Code of Practice to always act in the "best interests" of mentally incapacitated clients, often find themselves navigating through a mine-field of highly-charged and competing interests. Could mediation be the key?

Who hasn't taken on a seemingly straight-forward deputyship, only to find along the way that formerly disinterested family members are suddenly experts on what's in their incapacitated relative's "best interests"?

Let's face it—human nature dictates that inter-family disputes or disagreements between family members and the court appointed decision-maker—are just part of the daily grind of a professional deputy. If a local authority is involved, then add in a liberal sprinkling of resource agendas and service provision goals. As the Mental Capacity Act 2005 (MCA 2005) Code of Practice obliges us to always act in our client's best interests, we are consequently duty bound to tease out and weigh up this jumble of competing evidence and heavily-charged views. Sometimes the best we can hope for is a complicated and arduous journey to reach that "best interests" decision—at worst we find ourselves embroiled in entrenched stalemate.

The right approach?

Now it's true that the Code of Practice contains numerous suggestions on how to resolve these kinds of disputes, but are the right approaches being employed?

Take, for example Chapter 5.68 of the Code, which proposes a list of eminently reasonable suggestions for resolving a "best interests" dispute ranging from: enlisting the help of an advocate; and getting a second opinion; to holding a case conference; or using the relevant complaints process. Yet for difficult disputes or where conflict has reached an impasse, these approaches rarely work. Realistically, disputes founded on and floundering upon so many competing interests cannot be resolved by individuals or organisations that are too close to the problem—and that includes professional deputies. Further, trying to arbitrate between parties that have reached this entrenched level of conflict takes a skill and a process that needs training and experience.

Accordingly, often the only option left to the decision-maker is to apply to the court for a judgement. Yet turning to court proceedings to resolve a "best interests" dispute not only adds considerable expense, but also jeopardises the professional deputy's future relationship with family members.

Attempting mediation

There is however an alternative. Sitting quietly in the same section of the Code of Practice is another suggestion—"attempt some form of mediation".

Mediation for many people is strongly associated with family disputes, divorce proceedings and child care arrangements. So it's easy to see how arguments about the welfare arrangements of a vulnerable person would sit quite comfortably within its framework.

In essence, mediation focuses on moving the parties in dispute towards more common ground. Arguably the benefits, listed in Chapter 15 of the Code, far outweigh resorting to Court proceedings. They include:

- confidentiality for all parties;
- freedom to speak;
- speedy conclusions;
- significantly reduced costs;
- mutual ownership of outcomes;
- preserved relationships; and
- legally binding agreements.

From my own experience as an accredited mediator, 90% of the mediations I have conducted have resolved the matter under dispute. Unfortunately, despite the obvious benefits of using mediation in these circumstances, experienced MCA 2005 "best interests" dispute mediators are very thin on the ground. As a result "best interests" disputes often end up as acrimonious and expensive exercises played out in the Court of Protection and ever more frequently in the glare of the media.

So what's the solution?

Well, in simplistic terms the answer lies in combining three inter-connected strategies.

First, for mediation services to develop in this area the court itself needs to require a change in mind-set and therefore practice. In some respects this is already beginning to happen. Over the last 12 months the court has, on occasion, deferred applications to resolve "best interests" disputes, instead requiring disputing parties to seek mediation before returning for a judgement.

Second, professional deputies need to seriously consider using mediation, and sooner rather than later. As lawyers we know how to argue a point. We may also feel morally obliged to stand firm against the demands of an "unreasonable" family member. But ploughing on with the "right decision" may permanently damage a relationship with parties who will still need to be consulted, however the current issue is resolved. Further where statutory bodies are involved, promoting mediation early on in any disagreement and definitely before initiating Court proceedings, can only save everyone time, money and aggravation.

And third and perhaps most importantly, the sector needs skilled mediators who understand the unique aspects of Court of Protection work. There's no lack of Court of Protection and mediation professionals available in the market today. Qualified individuals, who combine these two areas of specialisation will, I believe, step forward as more light is shone on this issue. The first step is for decision-makers to recognise their options. The market will take care of the rest.

Using mediation to resolve "best interests" disputes could well be the best kept secret of MCA 2005. Encouraging a more collaborative approach must surely be in everybody's best interests… NLJ

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