

## **Using Mediation to resolve MCA 'best interests' disputes**

### **A training for Local Authority Adult Social Care providers and Safeguarding teams**

#### **The Trainer:**

Russell Caller is a solicitor with 30 years experience in legal practice and Managing Partner of Gillhams Solicitors LLP, a five partner law firm based in NW London. Russell specializes in legal services for the elderly and mentally incapacitated and is a Court of Protection Panel-appointed Professional Deputy – a position he has held continuously since 2000 - currently managing the affairs of more than 70 clients who lack mental capacity. There are only eleven COP panel-appointed Professional Deputies in the Greater London area.

As a professional deputy Russell works hard to ensure that all parties to the process - doctors, health workers, social workers, the family and the person lacking capacity - are all able to have their views heard and considered before he makes a decision as to what is in the 'best interests' of the person on who's behalf he is acting.

Russell is also a CEDR accredited mediator – a role he has held for nearly 15 years. In the course of resolving complicated and often contentious disputes between parties in conflict, he regularly uses his skills in explaining complex legal matters, often of a sensitive and personal nature, in an easily understood way with clarity, openness and empathy.

In Court of Protection matters, where families are in dispute with one-another or with the professional decision-makers, Russell now combines his expertise in Court of Protection work with his accredited mediation skills, to offer a bespoke Mediation service for MCA 'best interests' disputes. Using a mediation process, Russell navigates the views and interests of family members and service providers, and then assists disputing parties to find a suitable solution to their dispute, leading to an agreement that all parties can buy into. More than 90% of the mediations Russell has conducted have resolved the matter under dispute.

Russell has also written about the benefits of using mediation to resolve MCA 'best interests' disputes – see his article in Community Care – September 2013:

<http://www.communitycare.co.uk/2013/09/02/why-mediation-is-key-to-helping-social-workers-resolve-best-interests-disputes/>

## **Course Description:**

This course will focus on informing and advising Local Authority Safeguarding teams and decision-makers on the use, benefits and practice of Mediation to help resolve entrenched Mental Capacity Act 'best interests' disputes. Course topics will cover the three parts of the mediation process: preparing for mediation; conducting the mediation; and settlement and follow-up. A real life scenario (case study) will be included to help illustrate the points discussed during the training. Throughout the course emphasis will be placed on an interactive discussion and using a training approach based on conveying information to a lay audience in a clear and accessible format.

## **Course Outline**

### **Training Goals:**

To share information, knowledge, best practices and examples on the following matters:

- a) Choosing the Mediator
- b) Establishing the Ground rules (including parties involved)
- c) The Mediation process
- d) Settlement & Follow-up
- e) Mediation costs

A case study based on a real life scenario will be used to demonstrate the course of a mediation process.

### **Part 1 (approx 75-80 minutes)**

#### **1. Choosing a mediator**

- a) Sources of mediators
- b) Other ways of balancing the skills:
  - Using Experts
  - Using Co-mediators
  - Using 'pupil' mediators

## **2. Establishing the Ground Rules**

- a) The Mediation Agreement
- b) Codes of Conduct
- c) Who will be involved?

## **3. The Mediation Process**

- a) Mediator Roles
- b) Representative and party roles
  - Authority to settle
  - Party involvement
- c) Duration
- d) Location Arrangements
- e) Documentation
- f) Arrivals
- g) Mediator's opening to meeting
- h) Opening statements by parties
- i) Private Meetings (Caucuses)
  - Purpose
  - Issues to address in caucus
  - Issues the mediator should raise
  - Disclosure of information
  - At the end of the caucus
  - Between Caucuses
- j) Questions and Discussion
  - The advisors
  - The mediator
- k) Evaluation
- l) At the end of the day – no agreement?

## **15 minute break**

### **Part 2 (approx 45 minutes)**

#### **4. Case Study**

Synopsis:

An elderly couple – husband in early 80s and wife in mid 70s- had 5 children (all adults). The eldest daughter (in her early 40s) had been given an EPA by her father some years ago. The husband/father owned the marital home.

Approximately 2 years ago the wife discovered, for the first time, that for a large part of their married life the husband had had a long affair. In addition over the past 10 years he had been seeing another woman.

The husband had Dementia and was suffering from mild Alzheimers. He was also incontinent and waking up at night. The wife had “lost interest” in the husband and wanted to put him into a home.

The wife was also preventing the husband from seeing his lady friend. The eldest daughter sympathised with her dad, and did not want to put him into a home. In any event this daughter had the “purse strings” as under the EPA she was the only person who could authorise the release of money for him. The other children were on their “mother’s side” and wanted their dad to be placed in a care home. The latest girl friend wanted to see the husband and wanted him to move in with her.

There was dispute amongst all the parties about the husband’s health and welfare and property and affairs and a stalemate had been reached.

Mediation to the Rescue!!

#### **5. Settlement and Follow-up**

a) Settlement Agreement

- Written or oral?
- Binding or non-binding?
- Detailed agreement or heads of terms?
- Standard form of terms of settlement?

b) Enforceability

- Contract
- Consent or 'Tomlin' Order

c) Continuing Role for the mediator following Settlement

d) Options where the Mediation 'fails'

- Partial settlement
- Further mediation
- Further direct negotiation

## **6. Mediation costs?**

a) Who pays?

b) Variation on who pays

c) Costs of the litigation or arbitration

d) How much?

## **7. Questions and discussion**