USING INTERMEDIARIES IN CARE PROCEEDINGS TO ENSURE EFFECTIVE PARTICIPATION OF VULNERABLE CLIENTS

The use of intermediaries in Care Proceedings

1. Intermediaries have been used in Criminal proceedings for some time. It is surprising that it took the family jurisdiction so long to get on board with the idea that vulnerable parties and witnesses required help in order to ensure effective participation in the hearing.

2. I first remember the use of an intermediary being mooted in a case I was involved with back in 2013. At that stage there was no guidance or statutory recognition of their need. In ***re X (A Child: Evidence*)[2011]EWHC 3401 (Fam) [2012] 2 FLR 456** Theis J noted the absence of an intermediary scheme in family cases led to 'real obstacles'. Penny Cooper, barrister and academic had noted in an article that the FGC Guidelines encouraged practitioners to consider the use of intermediaries at the earliest opportunity but a November 2011 survey of MOJ Registered Intermediaries revealed that one intermediary had four pending referrals to act in family cases but all 4 were 'stuck in funding negotiations'[1].

3. The funding of intermediaries was unclear – did it fall on the LAA [Or LSC as it was back then] or the HMCTS. I recall in the case I was involved in 2013 which was before Hogg J, that Michael Rimmer from the LSC was asked to attend court to explain the funding situation and in fact agreed on that occasion for the LSC to fund to the intermediaries. It was a case involving many parties and interveners many of whom had learning difficulties. It in fact ended before the fact finding hearing commenced – but the costs would have been huge. Nowadays of course we know that the Court fund the use of intermediaries.

4. Who is a vulnerable person in family proceedings? There is no specific definition of 'vulnerable' but we do now have some assistance about how the court should deal

1. [1] P Cooper – Tell me what's happening 3 (City University London 2012).

with a vulnerable person's ability to take part in proceedings in the form of Part 3 A and PD3AA of the FPR 2010. They are attached to this handout.

5. Of note the definition of an intermediary is:

"intermediary" means a person whose function is to—
(a)communicate questions put to a witness or party;
(b)communicate to any person asking such questions the answers given by the witness or party in reply to them; and
(c)explain such questions or answers so far as is necessary to enable them to be understood by the witness or party or by the person asking such questions;

6. All practitioners will be familiar with their use for parties with a learning disability or learning difficulty. Of course, they are also used for those with a mental health condition which affects their ability to communicate under pressure and stress.

7. Intermediaries are also used to assist with evidence of a child. Prior to the supreme court 's decision in ***Re W (Children) (Abuse: Oral Evidence)*** **[2010] UKSC 12**, there was a presumption against children being called as witnesses in care proceedings. In ***LM v Medway*** **[2007] EWCA Civ 9**, Smith LJ said that children giving evidence in care proceedings would be rare. Even 15 years later there has not been a real shift in the approach to child witnesses in the family courts. The Court will, however, hear the evidence in other ways. It is still very rare for children to give evidence. However, as long ago as 1989, the Pigot report envisaged exceptional cases where the court could order 'that questions advocates wish to put to a child should be relayed through a person approved by the Court who enjoys the child's confidence'. Pigot referred to this person as the 'interlocutor'. This was not implemented but I am sure some of you have experience of using an intermediary to put agreed questions to a child [a cross examination of sorts] with the answers being recorded instead of that child being cross examined by video link during the hearing. This was also one of the recommendations that came out of the **Working Party of the Family Justice Council**

review in December 2011 which followed on from the case of ***Re W .*** This requires specially trained intermediaries who undertake this questioning. If you are representing a child in care proceedings who has given an ABE which sets out allegations of abuse, then this is one route to consider if the Court concludes that they do need to hear the child's evidence.

8. Intermediaries also undertake a role with supporting children who are being ABE interviewed. Of note, in the case of ***Re T (Children) [2020]*** **EWCA Civ 507** there was criticism of the interviewer in an ABE interview not listening to the advice of an intermediary who had been used to support the child during the interview. The interviewer persisted with questions against the clear advice of the intermediary. Intermediaries from Triangle have also carried out ABE interviews where none has been undertaken before care proceedings. Again, specialist training is undertaken to provide this service.

9. The key point is that the vulnerable must be able to fully take part in the proceedings. It is key to protecting their article 6 rights to a fair hearing.

10. It is not only a matter for those representing the vulnerable in proceedings before the Court, but this principle of fairness is also set out within the Social Work template for evidence. The local authority social worker has to confirm that parents have been treated fairly within the process leading up to care proceedings and set out how their procedure has been fair. *In* ***A & B (Children) (deaf parent – assessment and practice)*** **[2021] EWFC 10**, the issue of the LA ensuring that they explicitly identified how they fulfilled the requirement to communicate adequately with a deaf parent was considered. As was observed in that case at paragraph 86, "***The duty for social workers and local authorities to consider and implement procedural fairness is not just a box to be ticked at the end of the SWET. The SWET represents sworn evidence of how the local authority has fulfilled its duty to guarantee a parent's Article 6 rights to a fair trial throughout its involvement; see Munby J (as he then was) in*** **Re L (Children) (Care: Assessment: Fair Trial) [2002] 2 FLR 730 –**

> ***'151. The state, in the form of the local authority, assumes a heavy burden when it seeks to take a child into care. Part of that burden is the need, in the interests not merely of the parent but also of the child, for a transparent and transparently fair procedure at all stages of the process – by which I mean the process both in and out of court…'***

11. My advice is always to get a cognitive assessment of your client if you have any concerns about their educational background, or having spoken to them you have any concerns at all about whether they are really understanding what is going on and the what is happening in the court process. Definitely consider whether you need an intermediary if your client has any learning difficulty, any mental health issue that may impact on their ability to understand and communicate effectively, they are under 18, or they have any disability that may impact on their communication or ability to manage stress. The cognitive assessment will assist in identifying any particular issues or needs in respect of your client and previously the route to an intermediary was through a cognitive assessment or psychological assessment of a party making that recommendation. The assessor would be asked whether an intermediary was recommended. However, that appears not always to be the case now adays and I have had several cases where the intermediary has been asked to do the assessment without such a recommendation. Of course, it is also worth noting that intermediary services will not accept that a client needs an intermediary on the basis of a report from a psychologist or other expert and will want to do their own assessment in any event.

12. The application is in theory made by way of a part 25 but in practice the court will grant assessments to avoid delay, if it is clear that one is required, and one route to get the assessment undertaken is by listing the case for a hearing in the morning with only the advocate for the person to be assessed attending court along with the client and the intermediary. All other parties can then attend later for a Ground Rules Hearing and the intermediary will give feed back orally to the court about whether an intermediary should be appointed and what measures need to be put in place.

13. Generally recommendations will include how often the client will need a break, what sort of language to use, whether questions need to be submitted in advance of the hearing (to the intermediaries only for vetting – a course of action that is often objected to!) and any other special measures which might be necessary (such as recording evidence in chief, giving evidence by video link etc.)

14. Intermediaries are neither expert witnesses nor witness supporter. They provide communication guidance and sit alongside the witness in order to monitor communication and intervene to assist with communication matters. They should be seen as assisting the family judge to hear the voice of the child or the vulnerable party / witness.

15. Professor Penny Cooper has been particularly instrumental in writing on this subject and highlighting the need for assistance for vulnerable parties and witnesses and for children. She has also been instrumental in devising the Toolkit available on The Advocates' Gateway, an independent body founded in 2012 which is run by a volunteer management committee which Penny Cooper chairs. The Toolkits cover all aspects of questioning – there is guidance on 'planning to question someone with autism', 'planning to question someone with a learning disability' and 'planning to question someone with hidden disabilities' among others.

16. The use of intermediaries has really come to prominence in recent years and several recent court of appeal cases have recognised the importance of using an intermediary to ensure proceedings are fair and that the vulnerable can participate.

17. In ***Re S (Vulnerable Parent: Intermediary) [2020] EWCA Civ 763***, a full psychological assessment undertaken in January 2020 made several recommendations as to how best to communicate with the mother (e.g. by using her own vocabulary, using no more than 20 words in a question , avoiding leading questions, taking breaks every 20 minutes etc). The psychologist subsequently agreed in answer to a specific question from the mother's representatives that she would benefit from and require the

assistance of an intermediary at the IRH. An application was issued for an intermediary assessment and for the appointment of an intermediary.

18. The Judge at first instance refused the mother's application on the basis that it was neither proportionate nor necessary when her communication difficulties would be adequately addressed by the adoption of the practical recommendations made by the psychologist. The Judge made participation directions giving effect to these recommendations and listed the matter to consider the arrangements for the hybrid final hearing. It was envisaged that the mother and her representatives would attend court and some or all of the other advocates and witnesses would attend remotely. When those representing the mother sought clarification of the impact of the format of the hearing upon the mother's need for intermediary support, the Judge stated that reconsideration of her decision was not required. The Court of Appeal allowed the mother's appeal, ordering an intermediary assessment and, subject to any different order made at the pre trial review, ordering the intermediary to attend the final hearing.

19. The Court of Appeal noted that the Judge had carefully directed herself to the legal framework provided by Part 3 A and PD 3AA of the FPR 2010. She was entitled to depart from the opinion of the expert psychologist on this issue, since it did not relate to a matter which was distinctively within his specialist expertise. However, she had failed to give consideration to the specific effect of the hybrid nature of the hearing on the mother's ability, in view of her cognitive difficulties, to participate effectively in it. In particular, she had overlooked the fact that the process would remove 'many of the visual cues that are so valuable to individuals with a cognitive impairment' and that an intermediary could provide the mother with communication support as regards the unusual experience of being questioned by advocates whose faces appear on the screen. The Judge was therefore wrong to refuse the applications and should have at least deferred the decision about the intermediary's attendance at the final hearing until she had seen the assessment report. Lord Justice Jackson emphasised that the decision in this case was not to be interpreted as requiring intermediaries in all remote or hybrid hearings where there is a party or witness with a similar cognitive

profile to the mother: it is a case specific decision which has been reached by considering the particular circumstances of the case.

20. However, the importance of the role of the intermediary in ensuring proceedings are fair was considered again in the very recent case of ***S (Vulnerable Party: Fairness of proceedings)*** **[2022] EWCA Civ 8** (18 January 2022). In this case, the failure to appoint an intermediary to assist a vulnerable party led to the appeal being granted and the case being remitted for a possible re hearing before the liaison High Court Judge. It was an NAI case and the trial Judge made findings against an intervenor, 'A'. Of note the original permission to appeal application did not mention any issue about lack of an intermediary and breach of Article 6. The LA had issued separate proceedings in respect of A's child and the relevant reports were provided in those proceedings. A's solicitors then applied to add a further ground after permission had been granted on other grounds citing cognitive difficulties which were previously unidentified. By then, a forensic psychologist had assessed that the appellant may be assisted by an intermediary and an appointment with Communicourt for assessment was due to take place. The additional ground put forward was that 'the court made findings against the appellant in proceedings where the appellant's cognitive issues were not considered or adjustments made to ensure her fair participation.'

21. The Court of Appeal were shown two reports – the first by Dr Gary Taylor and Lucy Howe which stated "we are not recommending any special measures to enable A to participate in a hearing although she is likely to take benefit from there being regular breaks in the proceedings so that information can be explained to her in words that she can understand, important information pertaining to the proceedings may need to be explained to her more than once. Professionals should ask her to repeat, using her own words what has been said to her so that they can confirm her understanding".

22. The second report prepared by Dr Josling, a Consultant Clinical and forensic psychologist included the following: "A's cognitive functioning assessment showed that she is better at perceptual reasoning than verbal reasoning; she prefers written and verbal information to be presented in clearer formats extra time given to her to

assimilate material. Her full comprehension of what she may be reading may need further support and time and would not necessarily be immediate. I ensured that I gave A adequate time on all of her assessments to enable her to do so. I would also question whether she may need a separate assessment for dyslexia which may also present as a learning need. FSIQ score was assessed as being 88, low average [A] may therefore require an advocate or intermediary in formal meetings, interviews and assessments to help assimilate written and verbal material and her comprehensions needs may be better accommodated if other forms of communication were to be used e.g. flow diagrams, charts etc.".

23. A attended an assessment with Communicourt and on the day before the appeal hearing, Communicourt indicated in an email: "I am recommending an intermediary for [A] as she has difficulties with processing long sentences, understanding court specific terminology, understanding and responding to complex grammatical structures, understanding complex vocabulary, processing simple information, remembering key dates, and often gets the details confused".

24. The appeal was opposed by LA and mother and it appears that there was much dissection of the transcript of A's evidence and her use of vocabulary and submissions made on her apparent understanding of what was being said to her.

25. The Court of Appeal recognised that in recent years courts have recognised the need to make due provision for vulnerable persons to participate in proceedings. They referred to the rules in Part 3A of the Family procedure Rules "Vulnerable Persons: Participation in Proceedings and Giving Evidence" introduced in 2017 and supplemented by PD 3AA. The Court confirmed that there is no definition of "vulnerability" in the rules but the provisions plainly extend to persons with comprehension difficulties of the sort identified by Dr Josling in her assessment of A.

26. They reminded the parties that it was good practice for all parties' representatives to actively address the question of whether a party is vulnerable at the outset of

proceedings or that the issue should even be identified by social workers pre proceedings.

27. They referred to the case of ***Re N (A Child)*** **[2019] EWCA civ 1997** and the words of King LJ: "Part 3A and its accompanying Practice Direction provide a specific structure designed to give effective access to the court, and to ensure a fair trial for those people who fall into the category of vulnerable witnesses. A wholesale failure to apply Part 3 procedure to a vulnerable witness must, in my mind, make it highly likely that the resulting trial will be judged to have been unfair"

28. The Court of Appeal made it clear that it would not always lead to an appeal. The question on appeal in each case will be, first, whether there has been a serious procedural or other irregularity and secondly if so whether as a result the decision was unjust.

29. They observed in this case that 'Legal representatives should be particularly vigilant to detect possible vulnerabilities in their client's when they are unable to meet them in person. They noted that the need for an intermediary was not identified in the initial cognitive assessment carried out by Dr Taylor and Ms Howe and the extent of A's difficulties only became apparent in the subsequent assessments carried out by Dr Josling and Communicourt.

30. Nevertheless they reached the clear conclusion that the failure in this case to identify A's cognitive difficulties and to make appropriate participation directions to ensure the quality of her evidence was not diminished as a result of vulnerability amounted to a serious procedural irregularity and that as a result, the outcome of the hearing was unjust. The appeal was allowed. Given the reliance on the Communicourt report in addition to Dr Josling's report it is arguable that the intermediary assessment was treated as an expert assessment by the Court of Appeal.

31. I am extremely grateful for the assistance that intermediaries have given me and my clients over recent years and I reflect back on older cases where intermediaries were

not used and do wonder whether the outcome might have been different in some of those cases.

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