The Advocate's Gateway

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURTS

Toolkit 13

8 November 2014

The Advocate's Gateway toolkits aim to support the early identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair. Effective communication is essential in the legal process. The handling and questioning of vulnerable witnesses and defendants is a specialist skill (Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants in Court 2011). Advocates must ensure that they are suitably trained and that they adhere to their professional conduct rules.

Courts are expected to make reasonable adjustments to remove barriers for people with disabilities giving effect to the Equality Act 2010.

These toolkits draw on the expertise of a wide range of professionals and represent best practice guidance; they are not legal advice and should not be construed as such.

This toolkit brings together policy, research and guidance relating to:

1. general principles, definitions and context;
2. advocates' duties and responsibilities;
3. early identification of possible vulnerability and case management issues;
4. the use of additional measures and other adjustments;
5. assistance to vulnerable parties and witnesses
6. obtaining evidence and sharing evidence;
7. use of experts;
8. litigants in person;
9. litigant friends and the role of the Official Solicitor.

The toolkit contains information about vulnerable witnesses in the family and is primarily intended for use by advocates as well as solicitors, social workers, guardians, the Children and Family Court Advisory Service (CAFCASS) officers and judges.

Key points include:

- In the family justice system there is no definition of a 'vulnerable witness' or a 'vulnerable party'; however, a significant proportion of parties and witnesses are likely to be vulnerable such that they will need assistance to give their best evidence.
- Vulnerability should be identified at the earliest possible stage and information-sharing is key to achieving this.
- Courts must take reasonable steps to ensure the effective participation of vulnerable parties and witnesses. A ground rules hearing (GRH) must take place if a vulnerable witness is due to give evidence.

- Family judges should consider 'additional measures' and other reasonable adjustments throughout proceedings.
- Special consideration should be given to managing and funding cases with interpreters or intermediaries.

1. GENERAL PRINCIPLES, DEFINITIONS AND CONTEXT

1.1 In the family justice system there is currently no legal definition of 'vulnerable witness' or 'vulnerable party'. [1] **However a significant proportion of witnesses and parties are likely to be vulnerable such that they will need assistance to give their best evidence, particularly in light of the increasing number of litigants in person in private family proceedings.**

1.2 Advocates should therefore be alert to risk factors which may indicate that a witness or party in family proceedings is vulnerable and, where necessary, expert advice should be sought. General risk factors which suggest a witness is vulnerable are outlined in Toolkit 10 Identifying vulnerability in witnesses and defendants. However, this toolkit deals with the specific issues relating to vulnerable witnesses and parties in family proceedings involving children and aims to provide general guidance for family lawyers and advocates for use in family cases.

Current context and proposed changes in guidance

1.3 The Family Procedure Rules (FPR) 2010 set out the overriding objective (rule 1.1 (1)): the court must deal with cases 'justly, having regard to any welfare issues involved'. This includes the requirement for courts to take reasonable steps to ensure the effective participation of vulnerable witnesses. The Family Courts are not limited by usual courtroom procedures/traditional special measures. Rule 4.1 FPR provides the Family Court with wide-ranging and flexible powers of case management, including the power to 'take any other step or make any other order for the purpose of managing the case and furthering the overriding objective'. Early identification and notification is essential when a witness or party is identified as being vulnerable such that their ability to effectively participate in the hearing is compromised. Practitioners should ensure that the Family Court is notified at the earliest opportunity so that it can consider what, if any, adjustments should be made to ensure that hearings are fair.

> '[Disability] places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities', Lady Hale in *P V Cheshire West and Others* [2014] UKSC 19, paragraph 45.

[1] As at October 2014.

1.4 The Children and Vulnerable Witnesses Working Group (headed by Hayden J and Russell J) was set up by Sir James Munby, President of the Family Division, to consider the practical application of the principles within the criminal justice system for adaptation to use in the family justice system. In its interim report (July 2014), the Working Group identified a pressing need to address the family justice system which '… lags woefully behind the criminal justice system in terms of the wider issue of vulnerable people giving evidence in family proceedings', including the inadequacy of procedures for taking evidence from alleged victims (noted in *H v L and R* [2006] EWHC 3099 (Fam). At the time of writing, the Working Group is considering the extent to which the current principles now embedded within the criminal justice system can be adapted for use in the Family Division and the Family Court.

1.5 The Working Group has endorsed the substantial benefits of a revised approach to the family justice system, including the greater likelihood of a fair and just hearing and outcome for all the parties in each case. In particular, it is intended that the revised approach will optimise conditions in which the best evidence can be given, as well as the more effective and efficient use of court time. The Working Group's interim report (July 2014) particularly noted the need for the provision of training for advocates and support for witnesses who are in need of support to give their evidence.

1.6 At the time of writing, the Working Group is currently reviewing the following key documents and advocates are therefore advised to ensure that they remain up-to-date with forthcoming changes in guidance.

- The Family Justice Council's ***Guidelines for Judges Meeting Children who are Subject to Family Proceedings*** **(April 2010)**,[2] particularly in the light of the Court of Appeal's recent decision in *Re KP (Abduction: Child's Objections)* [2014] EWCA Civ 554. It is proposed that there should be reform and further guidance of the procedure for judges communicating with children, which will provide the framework to allow a recognition of the place of children and for the 'voice of the child' to be heard in all family court proceedings in which children are involved.
- The Family Justice Council Working Party's ***Guidelines in Relation to Children Giving Evidence in Family Proceedings*** **(December 2011).**[3] These guidelines were prepared following the decision of the Supreme Court in *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12, but should now be read in light of the decision of the Supreme Court in *Re LC (Reunite: International Child Abduction Centre Intervening)* [2014] UKSC 1.

[2] [2010] 2 FLR 1872.
[3] [2012] Fam Law 79.

1.7 The Working Group has proposed that the FPR 2010 should be amended in 2015 to emphasise the importance of the role of the child and the need to identify the necessary support/special measures for vulnerable witnesses and/or parties from the outset of any proceedings, or at the earliest opportunity. It is likely that a new mandatory rule(s) will be proposed in respect of children and vulnerable witnesses and parties, supplemented by a practice direction and guidance approved by the President.

Adult witnesses and parties

1.8 There is currently no data available to indicate whether there has been a recent increase in the number of vulnerable adult witnesses in the family justice system. There is, however, a rising tide of awareness that certain groups of adults are particularly vulnerable and are therefore over-represented in the justice system as a whole. For example, a recent report confirms that, contrary to popular perceptions, people with mental health problems are more likely to be victims of crime than perpetrators.[4]

1.9 It is important to take into account the views of the individual witness or the party. Vulnerable people are not a homogeneous group and not everyone with a disability will automatically be vulnerable or would wish to be regarded as such. Equally, advocates should note that parties or witnesses who appear to be robust or resistant to assistance may in fact be fearful about the impact of their vulnerabilities on the outcome of their case; for example, concern that disclosure of a mild learning disability or mental health history could negatively impact on the assessment of their parenting. They may also be embarrassed or ashamed of their vulnerability and do all they can to hide or mask it.

1.10 One study profiling the lives of 30 birth mothers who had had a child(ren) compulsorily removed found that many of the mothers had 'major issues' around their capacity to exercise choice, long-standing mental health issues and learning disability (Broadhurst 2012). In another study it was reported that that 12.5% of parents involved in care proceedings had learning difficulties (Masson et al 2008) and, in another, it was found that, in one local authority, one-sixth of care proceedings involved at least one parent with learning disabilities (Booth and Booth 2004). There is evidence which indicates that parents with learning disabilities are often unsupported in their involvement with child protection agencies or courts (Swift et al 2013). There is a well-established chain of authorities and evolution of recent public policy in relation to people with learning disabilities being considered able to act as parents and cautioning against 'social engineering'; see, for example: *Re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806 at 812; *Re O (A Minor) (Custody: Adoption)* [1992] 1 FLR 77 at 79; and *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 at 2063 where it was held that

[4] *At Risk, Yet Dismissed: The criminal victimisation of people with mental health problems* (2013).

'... society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent … it is not the provenance of the state to spare children all the consequences of defective parenting'.

1.11 One of the government's recent stated key policy objectives in *Valuing People Now* (Department of Health 2009) has been to confirm that people with learning disabilities should have the choice to have relationships, become parents and continue to be parents, and will be supported to do so.[5] A key strategy was identified with regard to relationships and having a family for people with learning disabilities. There is a highlighted need for services to support parents with a learning disability. Evidence suggests that such parents do not get sufficient access to support, putting families at risk of enforced separation, and that such parents are at a disproportionate risk of losing their children into care.[6] However, it is plain from the government's review of the implementation of *Valuing People Now*[7] that there is still significant progress to be made in enabling people with learning disabilities to access supported living and that parents with a learning disability often do not get the support they need and many are faced with the prospect of losing their children.

Good practice example A parent in care proceedings with mental health difficulties gave evidence in a pre-recorded examination conducted by counsel in her chambers. All advocates and the judge contributed to the planning of topics to be covered and an intermediary helped counsel plan her questions. The recording of the witness's evidence was conducted by a professional third party who signed a confidentiality agreement. Questioning, including breaks, took three-and-half hours and an edited DVD lasting 90 minutes was admitted as evidence in the family proceedings.

1.12 There are many ways in which adults participating in family proceedings may require assistance due to vulnerability, not only to assist them but also to ensure that proceedings can run as smoothly and efficiently as possible; the following list is not exhaustive but provides a guide to the most common examples that practitioners may encounter in practice.

Domestic violence

1.13 Practitioners should be aware of the likely stress on adult victims of domestic violence of knowing or fearing that they may have to meet their abuser at court. This may result in the victim refusing to engage in proceedings or to comply with court directions about providing evidence. Additionally, the increasing number of litigants in person

5 Department of Health (2009) page 17, paragraph 7.
6 Department of Health (2009) pages 90–1, paragraphs 3.55–63.
7 Department of Health (2010–2011).

conducting their own private law proceedings means that victims may have to face being directly questioned by their abusers during a hearing.

Good practice example In care proceedings the local authority alleged that the father's violence towards the mother mirrored his behaviour towards a previous female partner and sought her attendance to give evidence at the final hearing. The woman persistently refused to provide a statement or to attend court, despite a witness summons being issued. The parties agreed that the child's solicitor and a police officer should go and visit the woman who explained that she was terrified of the repercussions of giving evidence against the father. Arrangements were therefore made for the woman to give evidence by video link from an external location and for the father to be screened from her sight during her evidence.

Sexual abuse

1.14 Practitioners should be aware of the possible detrimental impact on vulnerable adult survivors of sexual abuse of knowing that highly personal and sensitive information about their past histories could become 'common knowledge' in family proceedings. In these situations, practitioners should consider whether and if so, how, such information can be shared on a 'need-to-know-only' basis.

Good practice example In care proceedings the paternal grandmother was positively assessed as a permanent carer for her grandson who could not return to live with his parents. The mother opposed the grandmother's application and sought full disclosure of the assessment report which referred to her past history of sexual abuse within her family. The judge ordered that an edited, summarised version of the report should be shown to the mother and agreed a limited, prescribed list of questions for cross-examination of the social worker about this particular part of the assessment.

Past medical history

1.15 Practitioners should be aware of the potential embarrassment for vulnerable adult parties or witnesses of realising that aspects of their past medical histories may need to be disclosed within proceedings. In these situations, practitioners should consider whether and if so, how, such information can be shared on a 'need-to-know-only' basis.

Good practice example In private law proceedings both parents' GP records were to be disclosed as part of the evidence. The mother, now aged 40, was extremely anxious that information about a termination she had undertaken at the age of 18 was not shared with the father. The mother's advocate therefore invited the judge to read the relevant part of the notes and to redact the other part of the record on the basis that it was not relevant to

the current issue of where the children should live; this course of action was accepted and adopted by the judge.

Learning disability

1.16 Practitioners may need to request extra time when proposing the time estimate of a hearing in cases where an adult party or witness has learning difficulties, or they may need to make arrangements for an intermediary, an adult services social worker or an advocate to attend court with the adult to assist them in following and understanding proceedings.

Good practice example In care proceedings the father had a limited ability to concentrate due to an acquired brain injury. The judge agreed that he could come in and out of court during the hearing with his personal assistant as he pleased and that there should be slightly extended lunch breaks each day to enable his legal representatives to explain the process of the proceedings to him.

Mental health

1.17 Practitioners should be aware of the possible stressful effects of proceedings on adult parties or witnesses who are vulnerable due to mental health difficulties and to consider practical ways in which such stress can be reduced.

Good practice example In private law proceedings the mother relied on a neighbour to give evidence as part of her case. The neighbour had suffered from agoraphobia for many years and was unable to leave home to attend court. Following an assessment by her GP, arrangements were made for her to give evidence by telephone link from her own home.

See Toolkit 9 Planning to question someone using a remote link.

Deafness

1.18 In *Re C (A Child)* [2014] EWCA Civ 128, the Court of Appeal gave guidance about the correct approach to be applied in care proceedings involving profoundly deaf parents. In particular, the court listed the following points.

- It is necessary for all agencies concerned to understand that communicating with a profoundly deaf person is not simply a matter of interpretation or translation. There will be a need for expert insight and support by a suitably qualified person at the earliest stage. It is the duty of those acting for the parents to identify the disabilities as a factor at the earliest stage.

- The parents and the local authority should make the court aware of the disabilities and need for special measures as a matter of case management.
- An expert should be appointed so that the impact of the disability can be addressed at a case management hearing. In the case of a profoundly deaf person consideration should be given to the use of an intermediary to communicate with the local authority and the court.
- The issue of funding by the Legal Aid Agency (LAA), the Courts Service and the local authority must be considered at, if not before, the case management hearing. The issue is not merely a matter of good practice – the court, the local authority and CAFCASS all have a duty under the Equality Act 2010 to afford the right level of support.

See Toolkit 11 Planning to question someone who Is deaf.

Sexuality and gender identity

1.19 Practitioners should be aware of the possible stressful effects of participating in proceedings on adults who are vulnerable due to the impact of issues relating to their sexuality or gender identity. Such issues may not always be immediately apparent, but may be manifested in more subtle ways; for example, the person's apparent unwillingness to participate or to provide assessment information in proceedings.

Good practice example The mother applied to court for permission to remove her child permanently from the jurisdiction which was opposed by the father. As part of her case, the mother sought to rely on a statement from a gay Russian friend, now living in the UK, whom the father required to attend court to be cross-examined. The man refused to attend court and explained to the CAFCASS officer that he was terrified that if he attended any official government building he would be immediately arrested and deported to Russia. The judge accepted that the man's fears were valid and permitted him to give his evidence via live video link from nearby barristers' chambers.

Good practice example In care proceedings a paternal uncle had been positively assessed as a potential permanent carer for his nephews. He was only part-way through a process of gender reassignment to become a woman, but made it clear that he fully identified as a woman and wished to be addressed as such. He continued to suffer from depression and anxiety which was exacerbated by social workers' ongoing refusal to refer to him as a woman. As a result, the proposed placement of the nephews appeared to be at risk. The judge passed on a clear message to the uncle via the children's guardian confirming that his wishes and feelings about the way he wanted to be addressed would be respected and complied with throughout the proceedings.

Children and young people as witnesses

1.20 Children should be automatically regarded as vulnerable by virtue of their age. It is still relatively rare for a child to give evidence in a family case, notwithstanding the Supreme Court's decision in *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12 removing the presumption, or even the starting point, that children should not be called as witnesses in care proceedings. The test is set out at paragraph 24:

> 'When the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child.'

1.21 Practitioners should currently follow the Working Party of the Family Justice Council *Guidelines In Relation To Children Giving Evidence In Family Proceedings* (2011). These guidelines are intended to include children and young people who are the subject of proceedings under the Children Act 1989, including both public and private law cases. The focus of the guidelines is upon a child giving evidence within the ordinary setting of an adversarial court hearing. The guidelines were endorsed in *Re KP (A Child)* [2014] EWCA Civ 554 where it was stressed that, in considering whether a child should give evidence, the court's principal objective should be achieving a fair trial.[8]

Good practice example An eight-year-old child, who was alleged to have been sexually abused by a family friend, had already given an Achieving Best Evidence (ABE) interview to the police and was subsequently interviewed by an expert child psychiatrist in the family proceedings. All parties contributed to the planning of the psychiatrist's interview. The interview was recorded in a vulnerable witness interview suite at a local police station and the DVD recording was used as evidence in the family proceedings. An order was subsequently made for the interview to be disclosed to the police so that it could be used as evidence in related criminal proceedings.

1.22 Teenagers who do not have any diagnosed special needs may still need additional measures in place to assist them to give their best evidence and/or to reduce the risk of harm to their welfare.

Good practice example A 13-year-old young woman with no developmental delay was referred to an expert witness for an assessment of her vulnerability. She had experienced family breakdown, bereavement, sexual abuse, had been placed in foster care and her

[8] Per Moore-Bick LJ, paragraph 21.

school attendance was poor. Following an assessment, it became clear that she would need an intermediary in order to give her best evidence.

Child or young person meeting the judge

1.23 In most cases in England and Wales, a child or young person's needs, wishes and feelings are expressed to the court in written form and/or in oral evidence by a guardian or a CAFCASS officer. Part of the role of the guardian or the CAFCASS officer should be to discuss with a child or young person, in a manner appropriate to their developmental understanding, whether their participation in the process includes a wish to meet the judge. In circumstances where a child or young person is separately represented, practitioners may also inform the judge of his or her wish to meet the judge.

1.24 In situations where a child or young person does express a wish to meet the judge, that wish should be conveyed to the judge as quickly as possible. Practitioners should take care to explain, from the child or young person's perspective, the purpose of the proposed meeting, to identify whether and how such a meeting would accord with the child or young person's welfare interests.

1.25 Practitioners should currently follow the *Guidelines for Judges Meeting Children who are Subject to Family Proceedings* (April 2010) issued by the Family Justice Council and Sir Nicholas Wall, the then President of the Family Division. The purpose of the guidelines is to encourage judges to enable children and young people to feel more involved and connected with proceedings in which important decisions are made in their lives, to give them an opportunity to satisfy themselves that the judge has understood their wishes and feelings and to understand the nature of the judge's task. The primary purpose of a meeting between a child or young person and the judge is to benefit the child or young person. However, it may also benefit the judge and other family members.

1.26 A meeting between the child or young person and the judge is *not* for the purpose of gathering evidence. The purpose is to enable the child or young person to gain some understanding of what is going on and to be reassured that the judge has understood him or her.

Good practice example A 10-year-old boy in care proceedings told the guardian he wished to see the judge to explain how much he missed his older sister from whom he was separated in foster care. The judge heard representations from all parties who agreed that the child should be seen at the very start of the final hearing. The child's mother and the guardian brought the child into the judge's chambers and remained with him during the half-hour meeting. The guardian spent time with the child before the meeting in helping him draw up a list of things he wanted to tell the judge. The guardian wrote an agreed note of

the meeting which was confirmed as accurate by the boy himself at the end of the meeting. The judge then distributed the agreed note to all parties.

1.27 If the child or young person does not express a wish to meet the judge, practitioners should initiate discussions between the parties and with the court about other ways of enabling the child to feel a part of the process.

Good practice example A 16-year-old young woman in residential care who was estranged from her family was nonetheless highly anxious to know the outcome of a fact-finding hearing in care proceedings relating to allegations of serious violence between her parents and against her siblings. The hearing took place during the GCSE period and there were concerns that her anxiety about the proceedings would have a detrimental impact on her exam performance. The parties agreed that the guardian would therefore provide her with an agreed summary of the evidence at the conclusion of each day's evidence to help reduce her anxiety during the exam period.

Children and young people as parties

1.28 A grant of party status to a child or young person leaves the court with a wide discretion to determine the extent of the role which he or she should play in the proceedings. In *Re LC (Children)* [2014] UKSC 1, Lady Hale, while noting an 'increasing recognition of children as people with a part to play in their own lives, rather than as passive recipients of their parents' decisions', identified a number of possible options which could be used if necessary to limit the role of the child or young person role as a party; for example:

- adduce a witness statement by the child or young person, or a report by the child or young person's guardian;
- permit cross-examination of the other parties on the child or young person's behalf;
- permit submissions to be made on the child or young person's behalf.

1.29 The extent to which the court should permit the child or young person who is a party to be present in court will be in the court's discretion and will very much depend on the child or young person's age, wishes and feelings, level of understanding, and the issues for determination before the court.

Good practice example An articulate but emotionally vulnerable 14-year-old young man was joined as a party in acrimonious private law contact proceedings where his father, who acted in person, was alleged to have raped the mother. All parties and the judge were concerned about the possible damaging effect on the young man of remaining in court during the father's cross-examination of the mother. The judge directed that the young man

should be absent from court during the relevant evidence and the parties were invited to agree an edited summary of the key points which was then shown to the young man and relied on in closing submissions.

2. ADVOCATES' DUTIES AND RESPONSIBILITIES

General duties and responsibilities of advocates

2.1 The Bar Standards Board Handbook 2014 provides that the barrister should ensure that the interests of vulnerable clients and their needs are taken into account (oC14) and barristers should do what they reasonably can to ensure that the client understands the process and what to expect from it and from their barrister. It also states that barristers should also try to avoid any unnecessary distress to the client (gC41).

2.2 However, the core duties with which barristers are required to comply, include the duty:

- to observe your duty to the court in the administration of justice (CD1);
- to act in the best interests of each client (CD2);
- to act with honesty and integrity (CD3);
- not to behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession (CD5);
- not to discriminate unlawfully against any person (CD8).

2.3 Solicitors are subject to similar duties, to uphold the rules of law and proper administration of justice, and to provide a proper standard of service to clients including vulnerable clients (principles 1 and 5 Solicitors Regulation Authority Code of Conduct 2011).

2.4 These duties mean that all advocates have a responsibility to assist the court to identify and appropriately respond to the vulnerability of parties and other witnesses. In addition, it is suggested that advocates should, as part of their duty to assist the court in the administration of justice, assist the court as a public authority in its duty to act compatibly with the European Convention on Human Rights, especially articles 6 and 8.

2.5 Although the Bar Council has encouraged the creation of a required training programme in this area,[9] no compulsory course yet exists. The Advocacy Training Council has developed toolkits and courses for barristers. It is suggested that all advocates (solicitors

[9] In a press release dated 1 July 2013 (responding to the Advocacy Training Council's 2011 report *Raising the Bar: The handling of vulnerable victims, witnesses and defendants in court).*

and barristers) have a duty to ensure they have received appropriate training, from attendance on courses or private study of relevant materials such as the toolkits.

Initial meeting or conference with the client

2.6 Advocates should try to establish at the earliest possible stage whether a client could be considered 'vulnerable'. Ideally, this will be at the first meeting or conference with a client. Some types of vulnerability will be more obvious than others (as noted in Part 1 above).

2.7 In the criminal jurisdiction, the Youth Justice and Criminal Evidence Act (YJCEA) 1999 provides definitions of 'vulnerable witnesses' and 'intimidated witnesses' which may be useful in the family law context, when trying to ascertain whether a party or witness is vulnerable.

- **Vulnerable witnesses** are defined by section 16 YJCEA 1999 as:
    - all child witnesses (under 18); and
    - any witness whose quality of evidence is likely to be diminished because they:
        - are suffering from a mental disorder (as defined by the Mental Health Act 1983);
        - have a significant impairment of intelligence and social functioning;
        - or have a physical disability or are suffering from a physical disorder.
- **Intimidated witnesses** are defined by section 17 YJCEA 1999as those suffering from fear or distress in relation to testifying in the case. Complainants in sexual offences are defined by section 17(4) as automatically falling into this category unless they wish to opt out. Witnesses to certain offences involving guns and knives are similarly defined as automatically falling into this category unless they wish to opt out. Victims of domestic violence, racially motivated crime and repeat victimisation, the families of homicide victims, witnesses who self-neglect/self-harm or who are elderly and/or frail might also be regarded as intimidated.

2.8 The Advocates' Gateway Toolkit 10 Identifying vulnerability in witnesses and defendants contains some good practice example questions to the client which may assist the advocate in ascertaining vulnerability:

- Do you/did you get any extra help at school from a person just for you?
- Do you need extra help managing money?
- Do you need any extra help with getting about or going to appointments?
- Do you need any extra help with listening, speaking or reading?
- Do you need any extra help to stay calm?

2.9 And, if the advocate knows the person is taking medication:

- Do you need any extra help taking your medicine?
- How does your medicine affect you?

2.10 However, self-reporting is not the only or even the most reliable way of ascertaining vulnerability. Certain behaviour, characteristics or circumstances may also suggest vulnerability. Toolkit 10: Identifying vulnerability in witnesses and defendants (paragraphs 1.8–11) provides a helpful list of behavioural characteristics or circumstances that may warrant further consideration.

2.11 It is important to remember that vulnerability may not be constant, consistent or continuous within an individual. Someone who would be regarded as vulnerable at the initial stage of a case might not be at the final hearing and vice versa. Vulnerability may be transient or situational. Advocates and judges should therefore consider the issue of vulnerability at the time of the relevant hearing.

2.12 Similarly, the issue of vulnerability should be kept under review. Individual personal factors (for example, age, incapacity, impairment or medical condition), environmental factors, or a combination of the two can give rise to vulnerability. For example, an environmental factor, such as being in the courtroom or seeing one of the parties, might 'trigger' anxiety.

2.13 It may also be necessary to obtain and share information with other professionals and organisations working with the client, such as the police, social workers, medical or mental health professionals or other support workers. Further guidance is given later in this toolkit in section 6.

2.14 An expert may be necessary to help ascertain the level and extent of vulnerability, so consideration should be given at the earliest stage as to whether an application under Part 25 FPR 2010 should be made to the court (see section2.18). The type of expert required (if any) will depend heavily on the circumstances of the case. A non-exhaustive list of suggested experts might include:

- a psychiatrist;
- a psychologist;
- an independent social worker;
- an expert in speech and language difficulties.

In addition, information may be helpful from treating doctors and professionals.

2.15 Advocates should bear in mind that vulnerability can be transient or fluctuating and is not the same as capacity. The issue of vulnerability should therefore be regularly and proactively reviewed. Vulnerability may only become apparent or heightened in certain circumstances. For example, a client's vulnerability may not be apparent when in a meeting/conference with their advocate, but may become apparent or heightened when at court, during evidence or in meetings with professionals.

2.16 Advocates should be familiar with *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures* (March 2011) (ABE Guidance). It relates solely to criminal proceedings but is a detailed analysis of good practice that has developed for the interviewing of children and vulnerable witnesses and the principles are applicable to public and private family law cases. It helpfully sets out the relevant considerations for recognising witnesses or parties with a mental health disorder (paragraphs 2.62–6, 2.73); a learning disability (2.67–70) and a physical disability (2.71–2) and also in providing the relevant support (2.73–94).

Duties to the client and other witnesses at court

2.17 The need for the advocate, and the court, to be proactive throughout the litigation process is imperative. The importance of having a planned strategy – rather than an ad-hoc approach – is vital. In *Re M (A Child)* [2012] EWCA Civ 1905, a psychological report on the father concluded that his capacity to give evidence within care proceedings had deteriorated due to the stress and anxiety of proceedings, necessitating the use of a 'supporter/intermediary'. The judge refused an adjournment to obtain an intermediary, adopting instead a '"let's see how we get on" management policy'. The father successfully appealed against findings that he caused injuries to his 18-month-old daughter. The trial judge's approach was criticised by the Court of Appeal where Thorpe LJ stated: '… that general duty [of case management and avoiding delay] cannot in any circumstances override the duty to ensure that any litigant … receives a fair trial and is guaranteed what support is necessary to compensate for disability' (paragraph 21).

2.18 In *Wiltshire Council v N* [2013] EWHC 3502 (Fam), the retrial of *Re M* before Baker J, the court ensured that various provisions were in place to assist the father. An intermediary as well as a litigation friend were provided, the father had regular breaks (every 45 minutes in the morning and every 30 minutes in the afternoon and during his own evidence), and the advocates adjusted their questioning to reflect the father's difficulties. Baker J set out the following guidance for dealing with care proceedings where there were grounds for believing a parent had learning difficulties.

- The duty to identify the need for assistance in responding to questions and giving instructions falls to the parents' representatives. Parents' representatives should

consider the question of capacity to give instructions and competence to give evidence at the outset of their instruction. If there is perceived to be a need for support, that issue must be addressed at the earliest opportunity (paragraph 76).

- In a case where it is known prior to the issue of proceedings that there may be an issue about capacity or competence, the local authority or the party's representatives should draw this to the attention of the court on issue. The court will then give directions for the appointment of a litigation friend and give directions for additional measures at the case management hearing (paragraph 77).
- In a case where the issue has not been identified prior to the issue of proceedings, it should be addressed fully at the case management hearing. The party's representatives should, if they consider that expert advice is necessary to identify the existence or extent of a learning disability, apply to the court in accordance with Part 25 FPR 2010. If the court grants such an application, the court may list a further case management hearing after the expert has reported to give directions for an intermediary or such other assistance as may be required. Alternatively, if it is considered that the case for additional measures can be made without expert assistance, then that application should be made at the case management hearing. The legal representatives should also, by the time of the case management hearing, identify an agency to assist their client through an intermediary or otherwise, in the event that the court confirms that such support is required (paragraph 78). Albeit not 'expert witnesses', a report from an intermediary or deaf relay interpreter in some cases is likely to be able to help in what tailored assistance, additional measures or adjustments the vulnerable witness/party needs.
- Funding the cost of an expert (subject to the LAA's approval) will fall on the certificate of the appropriate party (or parties). However, the cost of an intermediary, as a type of 'interpreting' service, should be borne by the Court Service.
- Funding issues should be addressed by the appropriate representative at the earliest opportunity - seeking prior authority from the LAA or giving notice to the Court Service that an intermediary may be required.

2.19 In *Re C (A Child)* [2014] EWCA Civ 128, the Court of Appeal approved this guidance, in the context of care proceedings involving a mother with speech and hearing impediments and a father who was profoundly deaf. McFarlane LJ stressed that: 'The court as an organ of the state, the local authority and CAFCASS must all function now within the terms of the Equality Act 2010. It is simply not an option to fail to afford the right level of regard to an individual who has these unfortunate disabilities.' (paragraph 35)

Duties during proceedings

2.20 As emphasised above, proactivity and regular review by advocates will be important. Consideration should also be given to what adjustments will need to be made to allow a party or other witness to participate in proceedings otherwise than when at court; for example, assistance when –

- attending and participating in child protection conferences or LAC reviews;
- assimilating and understanding large quantities of evidence;
- attending their solicitors' offices and conferences with counsel;
- preparing any written evidence.

Good practice example In care proceedings a mother with significant learning difficulties was assisted by a Mencap advocate who accompanied her to her solicitor's office to help her consider the written evidence and, on occasion, visited her at the mother and baby foster placement to ensure she had understood the information whilst in a less formal and stressful environment.

2.21 As already noted in section 1, it may become apparent to the advocate that an unrepresented party, or a witness who is not a party, may be vulnerable. Part of the advocate's duty is to raise this with the judge at the earliest stage, to consider whether to obtain expert evidence (and how to fund it if the vulnerable witness is not a party) and (in the case of a witness) to consider whether the court should be invited to join that person as an intervener or even a party. If the issue only arises at a late stage, for example, during that witness or party's evidence, it is likely to be necessary to propose an adjournment to allow for assessment of the need for additional measures.

2.22 Once it is apparent that additional measures or adjustments are needed, particularly during contested hearings, there will almost certainly need to be a GRH (guidance about which is provided below). It is part of an advocate's duty to uphold the administration of justice and to act with honesty and integrity to ensure that they adhere to any established ground rules and also to use best endeavours to ensure they are followed by other advocates and the court.

3. EARLY IDENTIFICATION OF POSSIBLE VULNERABILITY AND CASE MANAGEMENT ISSUES

Ground rules hearings

3.1 **GRHs** are a **form of case management hearing**. GRHs are required in criminal cases in which an intermediary is appointed and are considered good practice when a witness or defendant has communication needs (Criminal Practice Directions 2013, 3E.3). GRHs are not

yet regularly used in family proceedings but it is good practice to have a GRH where a witness or party has communication needs or is vulnerable for some other reason and, arguably, where there is a litigant in person who is an alleged perpetrator cross-examining an alleged victim. The court and the parties should be particularly alive to the types of difficulties that could give rise to communication issues – mental disorder, learning disability and physical disability – and the variety of measures and approaches that will be necessary.

3.2 The purpose of GRHs is to establish how someone who has communication needs, or is otherwise a vulnerable person, should be enabled to give their best evidence or otherwise participate in the trial. The GRH should discuss the contents of the report of any intermediary or expert witness instructed in the case.

3.3 GRHs will be necessary:

- where an intermediary has been appointed for a party or witness;
- even where there is no intermediary, if a party or witness is vulnerable.

When should GRHs be held and what form should they take?

3.4 GRHs should be held prior to the commencement of the trial if there are vulnerable parties and prior to any vulnerable witness giving evidence. The GRH should take place well enough in advance so that the rules can be properly implemented and the advocates and the court can be properly prepared. There may be instances where a person's needs only become evident while giving their evidence and ground rules may need to be revisited at the earliest opportunity.

3.5 The identification and assessment of an individual's needs should have been undertaken earlier in the proceedings (for example, at case management hearing stage in public law proceedings). The additional measures and other adjustments that parties or witnesses require should also have been identified prior to the GRH.

3.6 The GRH must involve the judge and representatives for the party and, if there is an intermediary or other relevant expert witness involved, they should attend and be part of the discussion. Where an expert (including intermediary) is instructed to assess the party or witness, they should be asked to make recommendations about how the vulnerable person can engage fully with the court process; for example, giving specific recommendations as to questioning.

3.7 GRHs should take the form of a discussion. The judge should decide what ground rules are to apply and a note of what is agreed should be made by the court and the parties.

It should indicate the expectation of the judge and all parties that the ground rules and boundaries are complied with and that the advocates have a duty to comply.

How should the ground rules be implemented?

3.8 The judge has a duty to ensure that the ground rules are complied with to prevent breaches. Professor Penny Cooper's 2011 Registered Intermediary Survey *(Tell Me What's Happening 3: Registered intermediary survey* 2011, City University 2012) found that GRHs were taking place in 76% of criminal trials with intermediaries, but three-quarters of respondents reported breaches in all or most trials and 19 respondents said they had been the first to point out the breach.

3.9 In the criminal case of *R v Wills* [2011] EWCA Crim 1938, there was no intermediary. The defendant appealed his conviction following a trial where his counsel adhered to the agreed ground rules but counsel for the co-defendant repeatedly breached them. The Court of Appeal dismissed the appeal, considering that the actions of counsel for the co-defendant did not lead to unfairness and any unfairness was, in any event, dealt with by the judge's direction to the jury (paragraph 35). However, the Court of Appeal was clear that there is a duty on the judge to ensure any limitations on the advocates are complied with. Limitations must be clearly defined, for example, using a practice note or protocol drafted for use by advocates and the judge (paragraph 37).

3.10 Judges have a duty to control the evidence as part of the overriding objective to ensure cases are dealt with expeditiously and justly, dealing with the case in a proportionate way and allocating the appropriate share of the court's resources (rule 1 FPR 2010). Further, rule 22.1(4) FPR 2010 provides that the court may limit cross-examination either by limiting the issues to be explored or by limiting the time available for cross-examination of a particular witness, which is in line with the overriding objective.

3.11 The use of GRHs will represent a wholesale shift for many advocates and judges within the family justice system. They will often require a departure from traditional cross-examination. They might involve a judge preventing an advocate from 'putting his or her case' where there is a risk of the vulnerable person failing to understand and becoming distressed or acquiescing to leading questions.

3.12 The court should be robust in adhering to the ground rules. In *R v B* [2010] EWCA Crim 4, paragraph 42, the judge found such new forms of questioning '… will involve a degree of persistence and patience by all concerned. A witness found competent is entitled to have the best efforts made to adduce his or her evidence before the Court notwithstanding the difficulties that may exist.'

3.13 In *R v IA and Others* [2013] EWCA 1308 at [64] the judge said: '… very often the forensic techniques used to challenge the account being given by RB or to seek to demonstrate inconsistency are in reality examples of questioning where the questioners failed sufficiently to adapt their questions in order to take account of RB's difficulties in communication'.

What should the GRH consider?

3.14 The issues and questions for the GRH will vary between cases and the individuals' needs. The GRH checklist below is intended to provide a helpful starting point.

- **When exactly will questioning take place?** The vulnerable witness or party may have differing concentration spans at different times of day or be taking medication affecting their abilities. The time at which questioning is proposed should take these factors into account.
- **Will the questions be submitted in advance?** Questions could be submitted in advance to the judge. The advocates could be limited to asking only approved questions. This may be resisted by many advocates for whom such a requirement would be radical and unwelcome. The GRH could also determine what topics will be covered during questioning.
- **How should questions be put to help the witness understand? What language should be used in questions?** There should be judicial control of comment, stereotypes and insulting vocabulary and judges should remind advocates that they will intervene if cross-examination strays into that territory. Further guidance as to the types of questions that should or should not be used (albeit in the context of interviews) are detailed in the ABE Guidance, paragraphs 3.44-–64, and special considerations for children and vulnerable witnesses are at 3.69–79. Any intermediary or other expert instructed should be asked to make recommendations. This may include:
    - using clear, concrete language;
    - avoiding 'tag' questions;[10]
    - using simple everyday words and phrases;
    - keeping to a clear chronology and not jumping about in time;
    - introducing each new topic and giving the witness time to refocus;
    - asking questions at a slow pace;
    - allowing time to process the question and formulate the answer;
    - keeping sentences short with limited 'key' words;
    - avoiding questions with multiple parts;

[10] A 'tag' question is a statement with a question added on at the end; for example: 'You don't like your stepdad, do you?', 'That's right, isn't it?'; as opposed to more straightforward questions or requests such as 'Do you like your stepdad?' or 'Tell me about your stepdad'.

    - asking one short question at a time;
    - avoiding front-loaded questions;
    - avoiding negatives;
    - avoiding non-literal language, acronyms and abbreviations;
    - avoiding repeating questions;
    - the use of communication cards to communicate simple answers, eg: 'no', 'yes', 'can you ask that a different way?', 'I don't understand the question', 'I need some time to consider that question'.
- **What are the particular communication needs and how can they be addressed?** This will inevitably vary between individuals. For example, a witness with autism may prefer a consistent and stable environment so that if he is giving evidence on more than one occasion it should be in the same court room, with the same people in the same positions (ABE Guidance, paragraph 2.115). A parent with Down's syndrome or other learning disability might be disturbed or become anxious if there is shouting or aggression, especially if they are questioned by unknown people, particularly authority figures. If a person has hearing loss they may, for example, confuse similar sounding words (which has particular relevance in responses to questions regarding when, where, what, why and who) (ABE Guidance, paragraph 2.116).
- **How long will questioning last?** Input from the intermediary or other expert should be sought so that a vulnerable person does not become anxious or exhausted, or start responding to questions falsely in an effort to bring the process to an end.
- **Who will conduct the questioning?** Where there are several parties it could be agreed that one advocate will ask questions on behalf of all parties. It may be appropriate for the intermediary or judge to ask the questions.
- **Where will the witness give evidence and how should the evidence be given? What alternatives to video link could be used?** (See section 4 on additional measures) This should have been addressed at an earlier stage but final arrangements should be confirmed.
- **What will be the role of the intermediary during oral evidence?** The role of an intermediary is to facilitate communication between all parties and to ensure the vulnerable person's comprehension and participation in the proceedings, for example, by explaining the question or answer to enable it to be understood without changing the substance of the evidence. The intermediary will usually intervene if the person is having difficulty understanding or being understood. If the ground rules are not being adhered to, the intermediary should be encouraged to alert the judge.
- **What will be the role of the intermediary when the vulnerable party is listening to the proceedings and evidence?** The intermediary should sit next to the vulnerable party and should have available to them copies of written statements and exhibits that may be referred to during the hearing.
- **Will the witness or party be able to visit the venue prior to giving evidence?** This should not take place during the hearing but on a separate day shortly before giving

evidence. If video link is to be used, any visit should include practising the use of the video-link. The GRH should consider whether the vulnerable person will meet the judge.

- **Will the evidence be pre-recorded?** If so, how and when will it be recorded? Who will conduct any editing and copying? How will confidentiality be assured? Who will be responsible for filing and serving the copy?
- **Who will be present during questioning?** This will largely depend on what additional measures are being implemented. Does the individual have any mental health worker, advocate or support worker who could usefully assist?
- **Will the witness be under oath and, if so, who will administer it?** The intermediary or other expert witness should be invited to comment on whether the witness can read and understand the oath. Arrangements will need to be made for the oath to be administered if evidence is given by video link from a remote location.
- **Will there be scheduled breaks? How long will they last?** Breaks are likely to be far more frequently needed than usual and the time period should be agreed. This will also impact the overall time estimate of the hearing. A physical disability may cause additional health problems and the person may require the assistance of a carer or extra time for breaks. Access requirements would have to be considered (ABE Guidance, paragraph 2.120)
- **How will the vulnerable person/intermediary indicate if an unscheduled break is required?** If unscheduled breaks are needed, an intermediary should usually indicate by raising a hand or passing up a note. If there is no intermediary, the judge and advocates should be alert to signs that a break may be needed as the vulnerable person may not ask for themselves. If the intermediary detects signs of concentration loss or anxiety, a short 'in-room' break may be sufficient.
- **How should communication aids be used (if at all)?** Communication cards can be provided to the vulnerable person via the intermediary to communicate simple answers. Photographs, plans, maps etc. may also be useful.
- **Are there any other measures required to keep the vulnerable person calm and engaged?** This will be specific to each individual, but might involve the vulnerable person having particular items with them which they use as a calming mechanism. The ABE Guidance provides [11] that in some cases the vulnerable party or witness may receive support from a person who may be known to them but is not party to proceedings and could be present during evidence given by live link. The ABE Guidance also describes[12] the activities a supporter could undertake, for example:
    - providing emotional support and information;
    - familiarising them with the court and procedures;
    - supporting them through court hearings;

[11] Paragraph 1.23.
[12] Box 4.1(a).

    - exploring their preference in respect of additional measures and, if approved by the court, accompanying the witness while they give evidence.
- **Has other relevant guidance from The Advocate's Gateway toolkits been consulted?** This could include guidance about the use of remote live link, the best way to question someone who has an autism spectrum disorder, or the most appropriate methods for questioning a young child etc.

4. ADDITIONAL MEASURES AND OTHER ADJUSTMENTS

4.1 Special measures are available in the criminal courts for vulnerable and intimidated witnesses. They are set out in sections 23–30 YJCEA 1999 and include:

- screening the witness from the accused;
- giving evidence by live link;
- giving evidence from a private location;
- removal of wigs and gowns by advocates and judges;
- evidence being via pre-recorded video interview;
- giving evidence via an intermediary;
- giving evidence via an interpreter.
- using communication aids.

4.2 In addition to special measures, the YJCEA 1999 also contains the following provisions intended to enable vulnerable or intimidated witnesses to give their best evidence:

- mandatory protection of witness from cross-examination by the accused in person: a prohibition on an unrepresented defendant from cross-examining vulnerable child and adult victims in certain classes of cases involving sexual offences;
- discretionary protection of witness from cross-examination by the accused in person: in other types of offence, the court has discretion to prohibit an unrepresented defendant from cross-examining the victim in person;
- restrictions on evidence and questions about complainant's sexual behaviour: the Act restricts the circumstances in which the defence can bring evidence about the sexual behaviour of a complainant in cases of rape and other sexual offences;
- reporting restrictions.

4.3 The Crown Prosecution Service (CPS) guidance also requires prosecutors to consider whether the witness would benefit from more informal arrangements such as pre-trial visits and having regular breaks while giving their evidence.

4.4 Pre-recorded video evidence in chief and cross-examination is current being piloted at the Crown Courts in Liverpool, Leeds and Kingston-upon-Thames.

4.5 Although the Public Law Outline and Practice Direction 12J FPR 2010 (Domestic Violence and Harm) require the court to give consideration to special measures, special measures are not specifically defined. It is suggested that, in addition to what is provided for in the YJCEA 1999, possible appropriate additional measures and other adjustments in the family court may include:

- provision of separate waiting areas or reserved, secure conference rooms if the witness/party feels intimidated by others involved in the case;
- making arrangements for the vulnerable witness to arrive at court or leave the court by a different entrance to avoid meeting others in the case;
- requesting that cases involving vulnerable witnesses or parties are given priority in the list so the witness/party does not suffer unnecessary anxiety or stress due to long waiting times;
- allowing a representative of an advocacy service (for example, provided by Mencap, POhWER or the Elfrida Society) to be present during meetings, conferences and in court with the party/witness;
- allowing longer periods for a witness/party to file and serve evidence;
- judges allowing adequate time after handing down judgment for parties to go though it with their advocates;
- provision of sign language interpreters (SLIs) and possibly a deaf relay interpreter or Registered Intermediary (RI) in cases where the party or witness has a hearing disability – RIs who are themselves deaf can communicate with deaf witnesses in their first language and adapt communication as appropriate. This is preferable to using a deaf relay interpreter whose role is only to translate language. RIs have a wider role in that they can monitor communication, alert the court to any difficulties that arise and adapt communication further to ensure that the deaf witness understands and is understood. Whilst the role of a deaf RI may encompass some relay interpreting, the remit is broader and can offer a more comprehensive solution. RIs will also advise the court in relation to suitable SLIs that meet the deaf person's communication needs and monitor the interpreting process to ensure understanding;
- advocates being required to adjust their style (e.g. fewer leading questions, no 'tagged' questions) or language of questioning (e.g. simple and straightforward language, short sentences);
- providing the witness/party with a simple way to communicate the need for an extra break (either directly the court or through an intermediary), for example, a 'pause' card on the table;

- providing the witness/party with a way of alleviating stress and maintaining concentration whilst giving evidence, e.g. a stress toy;
- where the witness is giving evidence by live video link but may become distressed by one or more parties seeing their face, positioning or covering the screen so their face cannot be seen but they can be heard;
- in *Q v Q* [2014] EWFC 31, the President of the Family Division held that in some circumstances the court has power to direct that the Court Service fund representation of a litigant in person who is not eligible for legal aid or able to fund representation privately, where that person would otherwise be directly questioning another party about allegations of a sexual nature made against them by that other party.

4.6 Vulnerable witnesses and parties should be consulted about the proposed additional measures. However, advocates and the court should be alert to the fact that it is not uncommon for witnesses to change their mind about additional measures. There should therefore be some flexibility in arrangements.

Striking the right balance

4.7 A careful balance must be reached, however, to ensure that additional measures or other adjustments to ensure the party/witness can give their 'best evidence' do not diminish the value of that evidence or the weight which can be placed on it. Similarly, where the witness/party's evidence forms the basis of allegations made against another party, care must be taken that that party's article 6 rights are not breached.

4.8 *Re A (A Child) (Vulnerable Witness) (Fact-finding)* [2013] EWHC 2124 (Fam) highlights the difficulties in a striking and extreme way. This was a fact-finding hearing in private law proceedings, involving allegations of serious sexual abuse made by a young vulnerable woman, X, against the father of the subject child, A. There was a ground rules report and a GHR prior to the fact-finding. One significant rule was that the father would not be able to see X's face.

4.9 At the fact-finding, X gave evidence by video link, assisted by an experienced intermediary. The father was not eligible for legal aid but, to avoid the possibility of him cross-examining X or her mother directly, the intervening local authority agreed to fund his representation on specific days. The judge allowed a number of occasions where, during X's evidence, the video link was broken to allow her time to respond and to receive support from the intermediary. On occasion, when the link resumed, the intermediary relayed X's response to a question by referring to information on a whiteboard and asking X to confirm the information written thereon. The intermediary also made suggestions as to particular 'open' questions which X could answer.

4.10 The father, who had been seated in court so he could hear but not see the video link of X's evidence, attempted twice to see the screen. The effect of this breach of the agreed ground rules was that X was said to be shocked and upset and felt unable to carry on. The judge ruled that the father should leave the courtroom but have access to the typed notes of junior counsel. X agreed to continue but became so distressed during cross-examination by father's counsel, that the judge ruled it was 'inhumane' to require her to continue. The judge went on to conclude that X's allegations were fundamentally true.

4.11 The Court of Appeal overturned the findings on appeal and held that there should be no rehearing – reported as *Re J (A Child)* [2014] EWCA Civ 875. The central part of the reasoning in the lead judgment by McFarlane LJ turned on whether the judge's evaluation of the evidence could uphold the determination she had made; the Court of Appeal considered it could not. McFarlane LJ did not criticise the particular arrangements made for X to give evidence, but made clear that, when special measures are deployed, it is necessary for the judge evaluating the resulting evidence to assess the degree (if any) to which the process may have affected the ability of the court to rely on the witness's evidence (paragraph 93). However, Gloster LJ went further and considered that the trial procedure was unfair to the father. She placed emphasis on the limited availability of legal representation (it was limited to specific days), the fact his counsel was instructed on extremely short notice, the premature termination of X's cross-examination and the father's exclusion from the courtroom, particularly given that he was (for large parts of the trial) a litigant in person.

Good practice example The witness was taking a significant amount of medication to control psychiatric symptoms. Her ability to give evidence was much improved in the afternoon when her medication had the chance to start working and her mental state was most stable. It was scheduled so that she gave her testimony only in the afternoons.

Good practice example The judge allowed a young witness to take a very small tent into the live link room which was not visible on the TV link screen in the courtroom. The witness was allowed to have short 'time-out' breaks (usually of just 30 seconds) in the tent when her anxiety peaked, but was not at the point where she needed a full break from giving her evidence. While the witness took this short break the live link was temporarily turned off and the court waited until she was ready to continue. (If the live link remains on, the judge should ensure that the microphones in the court are turned off so that the witness does not hear the conversations in the courtroom.)

Good practice example The witness who struggled with concepts of time was allowed a timeline to assist cross-examination. The advocates had a duplicate copy and indicated certain points on the timeline when putting questions to the witness.

5. ASSISTANCE TO VULNERABLE PARTIES AND WITNESSES

Current routes for witness assistance in the Family Courts

5.1 Whether the witness is vulnerable because of age, situation or communication need, or a combination of these, assistance is available through a number of routes. Although there is no special or additional measures regime in the Family Courts in England and Wales, there are sources of expertise and guidance, as well as several recent reviews and reports making recommendations about what *should* happen. Practice is, however, erratic.

Interpreters

5.2 There is brief guidance on interpreters within civil proceedings in England which sets out the court's responsibility to fund interpreters for deaf and hearing-impaired litigants (presumably including witnesses) and for foreign language speakers.[13]

5.3 *SLIs/British Sign Language (BSL) interpreters* are qualified professionals who are skilled in the interpretation of English into BSL and vice versa and are accountable to their registration body, the National Registers of Communication Professionals (NRCPD). All SLIs working in legal settings must be qualified and registered (RSLIs) and should also have experience and/or specific training in working in legal settings. It is important that the deaf person in court understands the interpreters provided; difficulties can arise with interpreters from different areas of the country in working with deaf children or young people if the deaf person has idiosyncratic signs or if the interpreter is just not well-matched to the deaf person. A deaf RI, the court interpreter or an independent expert RSLI will advise if this is the case and may recommend a change of interpreter(s), or the use of a different interpreter(s) with particular skills, or the recruitment of a deaf interpreter to the interpreting team.

Key points when using interpreters

- Use registered, qualified interpreters with legal training and experience. It is not appropriate to use family members or friends as interpreters as you have no way of monitoring the accuracy of the interpretation and they are not qualified.
- The role of the interpreter is to translate from one language to another. It is not appropriate to ask their opinion or advice.
- Remember to take account of the fact that there will be a time lag whilst the interpretation process takes place.

[13] Also available on the Justice website.

- Remember that interpreters are obliged to interpret everything that is spoken or signed.
- Remember that English is a second language for those who communicate in another language (including sign language). Do not expect the person to be able to read written documents without assistance. Written documents will also need to be translated.
- Interpreters need to be supplied with documentation to provide them with some background information and contextual understanding so that they can translate accurately in the court.

Intermediaries

5.4 Intermediaries provide skilled support to enable communication with vulnerable witnesses within the criminal justice system and there are precedents for intermediaries to work with vulnerable witnesses and other parties in the Family Courts. The role of an intermediary is to improve access for vulnerable people. This can include vulnerable parents who are required to give evidence in family proceedings. They can assist by providing practical information about the needs of the parents or of the child to the court and can also assist the witness to give evidence by supporting their communication. This may include helping them to prepare to give evidence, to understand court documents and court processes.

5.5 Intermediaries can assist by:

- carrying out an initial assessment of the person's communication needs;
- providing advice to professionals on how a vulnerable person communicates, their level of understanding and how it would be best to question them whilst they are giving evidence;
- directly assisting in the communication process by helping the vulnerable person to understand questions and helping them to communicate their responses to questions;
- writing a report about the person's specific communication needs;
- assisting with court familiarisation.

5.6 Sometimes the same witness is involved in both criminal and family proceedings. In these circumstances the best practice would be for the *same intermediary* to provide communication support in both settings to ensure continuity for the witness and also to avoid unnecessary cost through duplication of assessment and rapport-building. This has happened, but is rare.

Good practice example A six-year-old child was interviewed by the police with the support of an intermediary. The criminal case collapsed pre-trial but the child's evidence was used in a fact-finding hearing in family proceedings. Initial arrangements were made for the child to be cross-examined at trial with the support of the same intermediary. Eventually, the child's evidence was presented without a requirement for the child to attend and the intermediary was cross-examined about her assessment of the child's communication needs and her involvement at the police interview.

Good practice example At the beginning of the final hearing, the intermediary worked with interpreters to familiarise them with a deaf parent's idiosyncratic signs.

5.7 Although the Ministry of Justice operates a scheme of RIs, it is only available for Family Court witnesses where there is already an intermediary involved in a criminal case. For more information, contact the Witness Intermediary Scheme (WIS) operated by the National Crime Agency.

5.8 In family cases, most intermediaries will be operating outside the WIS and in these circumstances they will be non-registered intermediaries.

5.9 Organisations offering an intermediary service for Family Court witnesses include *Communicourt* and *Triangle.* Other service providers may be more appropriate for deaf BSL users. *SEA Recruitment Services* is another organisation offering deaf specialist intermediary support. The intermediary should be matched according to their communication specialism, their availability and, if possible, their geographic location. Funding must be agreed on a case-by-case basis as there is no standard procedure in Family Courts. Sometimes the cost of the intermediary is shared by the LAA, the court and the local authority. Sometimes it is funded solely by the court.

5.10 Some intermediaries have reported a lack of clarity amongst practitioners about the role of the intermediary in family cases (Cooper 2014). Intermediaries are not expert witnesses; they are 'a person who facilitates two way communication between the vulnerable witness and the other participants in the legal process, to ensure that their communication is as complete, accurate and coherent as possible' *(R v Secretary of State for Justice and Cheltenham Magistrates' Court and Crown Prosecution Service and Just for Kids Law (Intervener)* [2014] EWHC 1944 (Admin), paragraph 3. In *In the Matter of D (A Child)* [2014] EWFC 39, the President noted: 'The mother and the father may require the use of an intermediary, not merely in the court setting but also, for example, when meeting professionals out of court. An intermediary at court is paid for by Her Majesty's Courts and Tribunals Service: see *Q v Q, Re B (A Child), Re C (A Child)* [2014] EWFC 31, para 52. But who is to pay the costs of any intermediary whose use is necessary for the purposes of meetings with professionals out of court?' (paragraph 32, iii)

Interviewers

5.11 When the evidence of a vulnerable witness is required for family proceedings, there are different ways that best evidence can be achieved. Some witnesses have a police interview or joint interview conducted within ABE Guidance and therefore available on DVD. Whether or not this interview is used within criminal proceedings, it can be used as evidence in family proceedings subject to the rules of disclosure.[14]

5.12 Sometimes an existing police interview is not of sufficient quality, or does not cover some essential issues, in which case an additional filmed interview may be required for family proceedings.

5.13 Sometimes witnesses have not been interviewed within ABE guidance (perhaps because of their young age, or because their communication needs have been seen as too complex).

5.14 In both of the above situations, alternative interview arrangements may be needed. Forensic interviewing of children is a skilled task and, where the child's needs are particularly complex, better evidence may be obtained through specialist interviewers.

Good practice example A seven year old boy with a range of complex needs was interviewed by an independent interviewer under instruction from the family courts. His evidence was used at a fact finding hearing within family proceedings and later disclosed to the police and used within criminal proceedings.

Triangle provides specialist interviewers for children and young people up to the age of 25.

Cross-examination

5.15 Some vulnerable witnesses are cross-examined live at court by counsel, with or without intermediary support. More radical alternatives are for the questions to be put to the witness by a third party and/or to pre-record the cross-examination. One advantage of the lack of any formal special or additional measures regime is that the Family Courts have been able to innovate in recent years. A pilot of pre-recorded cross-examination (section 28 YJCEA 1999) is currently underway in the criminal courts.

Good practice example A 13-year-old girl with autism had already given an ABE interview to the police. Cross-examination questions were agreed by all parties in care proceedings and

[14] *2013 protocol and good practice model: 2013 Protocol and Good Practice Model: Disclosure of Information in cases of alleged child abuse and linked criminal and care directions hearing* (October 2013).

the judge and put to the child by an independent interviewer, who had permission from the court to adapt the questions in line with the child's understanding and also her responses. This was recorded and transcribed for court.

Good practice example A nine-year-old girl presenting with severely challenging behaviour had been able to give minimal information at an ABE interview with the police. Further questions and cross-examination questions were agreed by all parties and the judge and put to the child by an independent interviewer, who had permission from the court to adapt the questions in line with the child's understanding and also her responses. This was recorded and transcribed for court.

Witness/victim support

5.16 There is no formal witness support system within the Family Courts. Victim Support, the national charity supporting victims and witnesses, is clear that its role is with victims and witnesses of crime.

Good practice example A teenage witness with no developmental delay was referred to an expert witness for an assessment of her vulnerability. She had experienced family breakdown, bereavement, an alleged rape, had been placed in foster care and her school attendance was poor. Following an assessment it became clear that she would need an intermediary in order to give her best evidence.

5.17 Assistance is thus available through a number of routes for vulnerable witnesses, litigants and parties. However, there is considerable variation in practice across England and Wales and funding arrangements for some of these routes is currently unclear.

6. OBTAINING EVIDENCE AND SHARING EVIDENCE

6.1 It is essential to think widely and carefully about any professionals or services who may have information about a vulnerable person in order that the court has before it all relevant information. There are many sources of evidence that might be available in a family case to provide information about the level and nature of vulnerability in a party or a witness and how to put in place the necessary measures to assist the vulnerable witness. It is therefore important for advocates to understand the most effective ways of obtaining that evidence.

6.2 Information being sought for this purpose is likely to be very sensitive and of a personal and private nature. Issues of confidentiality of information are likely to arise when obtaining the information and when considering to whom it should be disclosed. These issues will need to be considered at every stage in a family case. The article 6 and article 8

rights, both of the witness and of those parties involved in the case, are likely to be engaged.

6.3 Much will depend on whether the witness is in agreement with the information being sought, or not, on whether the witness is an adult or a child, and whether or not the witness is a party to the Family Court proceedings.

6.4 **Public law cases** Obtaining evidence will be easier in public law cases where the key parties (i.e. the parents, any other adult with parental responsibility and the child) have access to legal advice and representation, where the local authority is involved and can be directed to seek evidence, and where the child's guardian can also be involved in gathering evidence.

6.5 **Private law cases** The process will be more complicated in private law cases, particularly where one or both parents may be acting in person and one of them may be the vulnerable witness. This will lead to complex issues in determining who is to obtain the evidence. Even if the child is represented, and has a legal aid certificate, current legal aid difficulties sometimes prevent the guardian undertaking more than an equal share of costs for any particular expert. In some circumstances it therefore may be that the court has to obtain this evidence.

FPR 2010

6.6 The FPR 2010 set out the rules for obtaining evidence for family cases. The FPR 2010 are made up of rules and supporting practice directions.

6.7 The basic principle is that evidence cannot be obtained without the court's agreement and therefore the filing of any evidence requires a direction to be sought, on notice to all parties. This should usually be made in a C2 or FP2 application form, but often is covered in position statements or other practice direction documents filed for hearings. Rule 25 covers the instruction of experts.

6.8 If any party wishes to obtain information/records from a non-party to the proceedings, the application for disclosure and notice of hearing will need to be served on the non-party.

6.9 Rules 21, 22 and 23 cover the principles related to the gathering of evidence. Rule 12 covers particular evidential issues for all children cases save for placement/adoption orders (rule14) and parental orders (rule 13)

6.10 There are some circumstances when the court may direct that one or more parties should not see certain documents (or parts of documents). If this direction is to be sought, an application will need to be made, served on the party from whom the evidence is to be withheld, and for a hearing to be listed to hear representations about whether or not disclosure of material should take place

6.11 Where any disclosure of information/records is sought for which consent is needed but where consent is *not* given, or if any person from whom disclosure is sought is not willing to give it, then the court can compel the practitioner to come to court (by a writ of *subpoena duces tecum*) and bring the records, and the court can then determine the issues of disclosure.

Particular sources of information

Police/CPS

6.12 There will be two reasons why the Family Court may need to seek information from the police/CPS.

- In many cases information is needed about the criminal history of any participant in a family case. This will either be in the form of an 'over the phone' check (i.e. to confirm if there is a reason why a child should not be placed with a parent or other carer) or a Police National Computer report listing all convictions. A wider Disclosure and Barring Service check will usually be sought but this would not be provided by the police or the CPS.
- If there is/are a criminal investigation/proceedings into matters that may be or are relevant to the family case, it will be necessary to establish the progress of the investigation (i.e. is it pre-charge, or have charges been made, when is the criminal trial and what is the timetable?) and to establish the position for any witnesses in the criminal proceedings who are potential witnesses in family proceedings). In some cases the witnesses in the criminal proceedings will be children or parties who are subjects in the family proceedings. In other cases they will not be related to the family proceedings but may be intervenors or witnesses who are required to give evidence in the family proceedings.

6.13 If a witness has already been identified in criminal proceedings, then the first task for the Family Court will be to establish if that witness is a potential witness in the family proceedings. If so, then the Family Court will need to establish the following points.

- What information is already available about the witness and any potential vulnerability? What reports/assessments have already been obtained? What arrangements are being put in place to support that witness?
- What is the timing of the criminal case? Will it be before any Family Court hearing involving the same issues? Should the family case wait for the criminal case? The impact of giving evidence twice needs to be carefully considered.
- If the criminal case has already taken place, or is going to take place before the family case, consideration should be given to obtaining the transcripts of any evidence given by the relevant witness in the criminal case. If the criminal case is yet to take place, consideration should be given to whether any of the advocates or professionals will attend the criminal proceedings from the family proceedings. Obtaining the transcripts may avoid, or shorten, the evidence required in a family case which will be particularly relevant when managing the needs and requirements relating to vulnerable witnesses.

6.14 If information is required from criminal proceedings, the following process will usually be required.

- In a public law case, the local authority should use the protocol procedure to request from the police/CPS any information about the witness which would be relevant to the Family Court proceedings. The current protocol was published in October 2013 and also contains pro forma requests : *2013 Protocol and Good Practice Model: Disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings*
- If the local authority is not involved, the court will direct one of the parties to send the protocol request (if the child is represented, this will usually be the child's solicitor). In the absence of any party being represented, the court will either need to ask the one of the parties acting in person or to consider making the request itself.
- If there are ongoing criminal proceedings, consideration must be given to joint directions hearings of both the family and the criminal proceedings so that the issues relating to vulnerable witnesses can be considered together as can the issues of disclosure.
- If the information is not provided via the protocol procedure, the Family Court will be asked to make orders against the police/CPS for disclosure and for an order for the police/CPS to attend the Family Court hearing to lodge objections to disclosure or in default of disclosure. At this point it may become clear that there are arguments about the safety or protection of witnesses. It may be necessary for the Family Court to consider hearings with additional measures (see section 3 on GRHs), or closed hearings, or, where the information is provided to the judge, to consider the issue of disclosure. Consideration will always need to be given to whether the

trial judge should consider the material or whether that hearing should be before a different judge for the purposes of this discrete issue.

- When information is disclosed, the parties' solicitors will be required to give undertakings as to the retention of that material in the office, and as to how it is to be sent to others who are entitled to see it.

Good practice example Disclosure causes difficulty in many family cases. Requests are often made late and are often not followed up until the day before a hearing. The police/CPS sometimes ignore or fail to deal quickly with the request and often do not comply with directions made. It is therefore essential to follow up requests and to ensure there is close liaison with the police and CPS about the disclosure request. The police/CPS often edit material in a way that is unhelpful to the flow of the evidence and, if this happens, the police/CPS may need to be present at a Family Court hearing to consider the issues of the editing. In these circumstances, it is possible that the court will need to ask to see the material initially without its disclosure to the parties.

Probation

6.15 If a vulnerable adult or child witness has some past or ongoing involvement with probation services, the following steps will need to be taken.

- If the witness is a party to the family proceedings, it should be established whether the witness agrees to the probation service being asked to disclose information.
- If agreement is forthcoming, the court can direct one of the parties to seek from probation the information relevant to assessing the vulnerability of the witness. In a public law case this could either be the local authority or the person's solicitor.
- If the witness is not a party to the proceedings, the local authority can be directed to contact the witness to ask if he or she is agreeable to probation being contacted and, if so, consent can be provided and the information sought. If agreement is not forthcoming, the probation service should be asked or summoned to attend a hearing so that the issues relating to the proposed disclosure can be considered.

Medical practitioners who may be involved with the vulnerable person

6.16 It is likely that a vulnerable party or witness (adult or child) will have had contact with the medical services and may also be a patient with the Community Mental Health Team (CMHT), Child and Adolescent Mental Health Service (CAMHS) and /or the Community Drug and Alcohol Service (CDAS). Any information from such professionals is likely to be essential to determine the issues of vulnerability in the Family Court.

6.17 In these circumstances, the court will request one of the parties to obtain the relevant records. Usually a fee will be required for copying and the court will need to consider who should pay such fees.

6.18 If the vulnerable person is a child, anyone holding parental responsibility for the child can obtain those records, including the local authority if the child is the subject of an interim care order. If the local authority is not involved and the child's parent refuses to consent to obtaining the relevant records, then the court will need to consider whether an order should be made directing the relevant health authority to provide the records.

6.19 If the vulnerable person is an adult, his or her consent will be required to obtain the relevant records. If consent is not given, the court can compel the relevant medical practitioner to come to court (by a writ of *subpoena duces tecum*) and bring the records, and the court can then determine whether the records should be disclosed.

CAFCASS

6.20 CAFCASS will be involved in a case in public law proceedings because it represents the child's interests in care proceedings. CAFCASS can be involved in private law proceedings where it represents a child who has been joined pursuant to rule 16 FPR 2010, where there are proceedings under the inherent jurisdiction or where they have been directed to provide a section 7 Children Act 1989 report in private law proceedings.

6.21 CAFCASS can be directed to conduct an analysis of the vulnerability of a potential witness. Where the subject child is potentially a vulnerable witness, then the CAFCASS officer can be asked to evaluate the issues involved in the child giving evidence, based on information obtained from any other professionals involved with the child or the family.

6.22 CAFCASS can also be asked to obtain and provide information about adult witnesses that is likely to be helpful to the Family Court in determining vulnerability issues.

Local authorities

6.23 The local authority may be involved in a family case for various reasons:

- as the applicant in a public law case;
- as a respondent in a public law case (for example, where a parent applies to discharge a care order);
- as a respondent joined in a private law case;
- as the provider of a Children Act 1989 section 7 report for family proceedings about a family with whom it has had previous involvement;

- as the provider of information about a witness who is not a party to the family proceedings or who is a potential witness in the family proceedings.

6.24 Where the local authority is already involved as a party to the proceedings and the witness is a party to those proceedings, it is likely that it will already have shared information (or can be asked to) about a possible witness to the case who is a party to the proceedings. In the event that a local authority refuses to disclose certain information to all parties, the court will need to consider whether the proposed material should be disclosed into the family proceedings.

6.25 Where the local authority is already involved as a party to the proceedings, but has information about a witness who is not a party to the proceedings, the local authority can be directed to provide relevant information about the witness to assess the court in assessing vulnerability. There are likely to be issues regarding the confidentiality of this information which may need to be considered at a hearing. The court will need to consider inviting the witness to be an intervener for the purposes of that hearing to consider his/her evidence. If the witness is a child, the court will need to consider involving those with parental responsibility for that child.

6.26 Where the local authority is not a party to the proceedings but has information about a witness, the court will need to direct the local authority to provide the relevant information about the witness. If there are other solicitors in the case, they can be asked to pass on this request and to liaise with the local authority. However, where no party has legal representation, the court will need to serve this request/order directly on the local authority. Again, there are likely to be issues regarding the confidentiality of this information which will need to be considered at a hearing. In these circumstances, the court will need to consider inviting the witness to be an intervener for the purposes of that hearing to consider his/her evidence. The witness will need to be advised to seek legal representation. If the witness is a child, the court will need to consider involving those with parental responsibility for that child to represent that child's interests at a court hearing.

<u>Education authorities</u>

6.27 A vulnerable child or adult may have had involvement with the education authorities. They may have had a Statement of Special Educational Needs, or been the subject of other assessments. This information is likely to be highly relevant in assisting the court in determining and managing issues of vulnerability.

6.28 In these circumstances, the process of obtaining the relevant information is likely to be the same as that already outlined for local authorities (see above).

7 USE OF EXPERTS

7.1 Prior to commencing proceedings, the local authority should have already considered the vulnerability of the parties/prospective witnesses and made adjustments to ensure complete, accurate and coherent communication with that person. In addition, if proceedings are being contemplated, the local authority should consider what adjustments will be necessary to ensure that the proceedings will be fair. Expert advice from someone suitably qualified may be necessary.

7.2 If proceedings have commenced, permission must be sought from the court to 'instruct a person to provide expert evidence for use in children proceedings' (section 13(1) Children and Families Act 2014), or to 'cause a child to be medically or psychiatrically examined or otherwise assessed for the purposes of the provision of expert evidence in children proceedings' (section 13(3) Children and Families Act 2014). In relation to such assessments, the 'court may give permission … only if the court is of the opinion that the expert evidence is necessary to assist the court to resolve the proceedings justly' (section 13(6) Children and Families Act 2014).

7.3 Necessary 'has a meaning lying somewhere between "indispensable" on the one hand and "useful", "reasonable" or "desirable" on the other hand'. For the expert evidence to be necessary, it must be more than 'merely optional or reasonable or desirable' – *Re H-L (A Child)* [2013] EWCA Civ 655,paragraph 3.

7.4 Permission to instruct an expert or an assessor must be sought from the court at the earliest opportunity and no later than the *Case Management Hearing* (see the PLO 2014). If there is uncertainty about the existence, type or impact of a person's vulnerability, expert advice should be sought. If the social worker has sufficient expertise he or she may be able to provide this. Alternatively, it may be necessary to obtain an opinion from an expert witness, such as a psychologist or psychiatrist, or from an intermediary. An intermediary is not an expert witness but can assist by carrying out an assessment of the communication needs and abilities of the witness specifically in relation to communication within legal proceedings and facilitating communication.

7.5 Parties and the court must be clear about who is to be instructed to report and the purpose of their report. The instruction of experts or assessors in family proceedings should be in accordance with Practice Direction 25A FPR 2010 and Practice Direction 25C FPR 2010.

7.6 Preliminary discussions with the expert/assessor should take place in good time for the hearing at which permission to instruct will be sought (Practice Direction 25C, paragraph 3.2 FPR 2010).

7.7 Questions in the letter of instruction (for which see Practice Direction 25C, paragraph 4.1) will be case and subject specific; however, the following are suggested.

- How does the party or witness's current health, development and functioning affect their ability to participate effectively in the current family proceedings and/or give evidence?
- For a party – What additional measures, if any, do you recommend for these proceedings to ensure that the party's participation as a party is effective?
- For a witness – What additional measures, if any, do you recommend for these proceedings to ensure communication with and by the witness is as complete, accurate and coherent as possible?

7.8 Notwithstanding the need to avoid delay and even urgency in some cases, expert evidence should not be rushed: 'Justice must never be sacrificed upon the altar of speed.' - see *Re NL (A Child) (Appeal: Interim Care Order: Facts and Reasons)* [2014] EWHC 270 (Fam), paragraph 29. See also, for example, the President's comments in *Re M-F (Children)* [2014] EWCA Civ 991, in particular paragraphs 26–8.

8. LITIGANTS IN PERSON

8.1 Much of the content of this section is adapted from the guidance for the judiciary contained in the most recent version of the Judicial College Equal Treatment Bench Book, *Litigants in Person* (November 2013). This is essential reading for advocates. There is also helpful guidance produced in the Law Society's practice note on litigants in person.

8.2 The term 'litigant in person' is the sole term used to describe individuals who exercise their right to conduct legal proceedings on their own behalf. This applies to proceedings in all courts – family, criminal and civil. The term encompasses those preparing a case for trial or hearing, those conducting their own case at a trial or hearing and those wishing to enforce a judgment or to appeal. There are a number of reasons why individuals may choose to represent themselves rather than instruct a lawyer in family cases.

- Many do not qualify for public funding, either financially or because of the nature of their case. One of the consequences of the Legal Aid, Sentencing and Offenders Act 2012 is that public funding in many family cases (particularly in private law) is now available in only exceptional circumstances.
- Some cannot afford a solicitor or may distrust lawyers.
- Others believe that they will be better at putting their own case across to the court.

8.3 It is important to remember that most litigants in person are stressed and worried, operating in an alien environment in what for them is a foreign language. They are trying to

grasp concepts of law and procedure about which they may be totally ignorant. They may well be experiencing feelings of fear, ignorance, frustration, bewilderment and disadvantage, especially if appearing against a represented party. The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances and therefore feel passionately about their situation. While many of these circumstances apply generally to litigants in person, they are likely to be particularly relevant in family proceedings where the issues are usually highly emotive and where the stakes are often extremely high.

8.4 It is important for advocates to maintain patience and an even-handed approach in cases involving litigants in person, particularly where the litigant in person is being oppressive or aggressive towards another party or their representative or towards the court or tribunal. In particular, it is important to try and remain understanding, so far as possible, as to what might lie behind their behaviour.

8.5 Maintaining a balance between assisting and understanding what the litigant in person requires, while protecting their represented opponent against the problems that can be caused by the litigant in person's lack of legal and procedural knowledge, is the key issue for the court – and for advocates – in these situations.

8.6 The disadvantages faced by litigants in person stem from their lack of knowledge of the law and court or tribunal procedure. For many, their perception of the court or tribunal environment will be based on what they have seen on television and in films. They tend to:

- be unfamiliar with the language and specialist vocabulary of legal proceedings;
- have little knowledge of the procedures involved and find it difficult to apply the rules even if they do read them;
- lack objectivity and emotional distance from their case;
- be unskilled in advocacy and unable to undertake cross-examination or test the evidence of an opponent;
- be ill-informed about the presentation of evidence;
- be unable to understand the relevance of law and regulations to their own problem, or to know how to challenge a decision that they believe is wrong.

8.7 All these factors are likely to have an adverse effect on the preparation and presentation of a litigant in person's case.

Particular areas of difficulty

8.8 Litigants in person may face a daunting range of problems of both knowledge and understanding arising from the following issues.

Language

8.9 English or Welsh may not be the first language of the litigant in person and they may have particular difficulties with written English or Welsh. Any papers received from the court or from other parties may therefore need to be translated. The hearing may need to be adjourned in order to ensure that a mutually acceptable interpreter can attend the proceedings to explain what is taking place to the litigant in person in their own language and to assist in the translation of evidence and submissions.

8.10 It is worth noting that there are free tools available on the internet that provide instant translations, free of charge, in most languages – see, for example, Google Translate, although these will not adequately take the place of an interpreter/intermediary where one is needed.

Intellectual range

8.11 Litigants in person come from a variety of social and educational backgrounds. Some may have difficulty with reading, writing and spelling. Advocates should therefore be sensitive to literacy problems and be prepared where possible to agree short adjournments to allow a litigant more time to read or to ask anyone accompanying the litigant to help them to read and understand documents.

Hearings

8.12 Advocates should ensure that litigants in person are informed at an early stage that they must prove what they say by witness evidence so may need to approach witnesses in advance and ask them to come to court. The need for expert evidence should also be explained and the fact that no party can call an expert witness unless permission has been given by the court, generally in advance.

8.13 Litigants in person may phrase questions wrongly and some find it hard not to make a statement when they should be cross-examining. In these circumstances, the judge may need to explain the difference between evidence and submissions and help them put across a point in question form. Litigants in person may also have difficulty in understanding that, merely because there is a different version of events to their own, this does not necessarily

mean that the other side is lying. Similarly, they may construe any suggestion from the other side that their own version is not true as an accusation of lying.

9. LITIGATION FRIENDS AND THE ROLE OF THE OFFICIAL SOLICITOR

9.1 In May 2010 the Public Law Committee of the Family Justice Council published good practice guidance in relation to parents lacking capacity in public law proceedings – *Parents Who Lack Capacity To Conduct Public Law Proceedings*.

The test for incapacity

9.2 By section 1(2) Mental Capacity Act 2005, a person is not to be treated as unable to make a decision unless all practicable steps to enable him or her to do so have been taken without success.

9.3 Section 1 Mental Capacity Act 2005 sets out the general principle that a person must be assumed to have capacity unless it is established that he or she lacks capacity.

9.4 The assessment of capacity to conduct the proceedings involves consideration of whether the party is capable of understanding issues 'with the assistance of such proper explanation from legal advisors and experts in other disciplines as the case may require'. Sometimes, particularly patient, careful and repeated explanation and discussion with a legal representative may enable a parent or a party, with even a significant degree of learning disability, to participate in proceedings without a litigation friend.

9.5 A lack of litigation capacity must *not* be assumed simply because a litigant in person is difficult or hostile. The presumption of capacity to conduct the proceedings can only be rebutted on the balance of probabilities having regard to the evidence.

9.6 There is also a distinction between the capacity to conduct proceedings and the competence to give evidence. It should not be assumed that a parent who lacks litigation capacity cannot give evidence. There may be occasions, for example, during a fact-finding hearing where it is alleged that a child has suffered injury or been sexually abused, where a parent's factual evidence of events may be very important for the protection of the child. The court should strive to facilitate the giving of the best possible evidence by any parent with a disability who is competent to give evidence by the use of additional measures (see section 4 above).

9.7 Section 2(1) Mental Capacity Act 2005 provides that a person lacks capacity in relation to a matter if, at the material time, he or she is unable to make a decision for themselves in relation to the matter because of an impairment of or disturbance in the

functioning of the mind or brain, whether the impairment or disturbance is permanent or temporary. There are parents whose lack of litigation capacity is lifelong, for example, those with profound learning disabilities, or is likely to be permanent, for example, where it is the result of a neuro-degenerative illness or following brain injury, and those who may regain capacity as their health improves. Thus, litigation capacity may sometimes fluctuate and, indeed, in some individuals it may be affected by the stress of proceedings.

9.8 In family proceedings a 'protected party' means a party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings (rule 2.3 FPR 2010). It should be noted that:

- there must be undisputed evidence that the party, or intended party, lacks capacity to conduct the proceedings;
- that evidence, and what flows from the party, or intended party, being a protected party, should have been disclosed to, and carefully explained to, the party or intended party;
- the party, or intended party, is entitled to dispute an opinion that they lack litigation capacity and there may be cases where the party's or intended party's capacity to conduct the proceedings is the subject of dispute between competent experts. In either case, a formal finding by the court under rule 2.3 FPR 2010 is required.

9.9 The local authority issuing care proceedings should ensure that any available evidence as to the potential lack of litigation capacity in a parent and the need to consider whether a litigation friend should be appointed is brought to the court's attention at the earliest opportunity. If an issue of capacity to conduct the proceedings arises unexpectedly, then urgent directions should be given in order to obtain an appropriate assessment and resolve the issue.

9.10 Once instructed, if there is doubt as to a client's capacity to conduct proceedings, the party's legal representative is under a duty to draw it to the attention of the court – see *RP v Nottingham CC and Another* [2008] EWCA Civ 462, paragraph 47, where it was held that:

> '… once either counsel or [the solicitor] had formed the view that … [the protected party] might not be able to give them proper instructions, and might be a person under a disability, it was their professional duty to have the question resolved as quickly as possible'.

Duties of the advocate

9.11 The potentially protected party concerned should always be informed of any worries the legal representative has about their capacity to conduct the proceedings, the purpose of

any assessment directed at the issue, and the implications if they are found to lack such capacity.

9.12 It is the responsibility of the party's solicitor to obtain an opinion on litigation capacity. There may be occasions when it is appropriate to seek an opinion from a treating clinician. Otherwise, an appropriately qualified independent expert must be identified. The legal representative must ensure that the assessor receives appropriate and adequate information about the legal framework for the assessment and the Official Solicitor's standard letter of instruction, proformas and questions should be used.

9.13 Once received, the expert's report should, if possible, be explained to the party. This can be a difficult task and the relevant expert may be able to assist as to how it can best be accomplished. The solicitor must advise the party that he or she is entitled to dispute any opinion as to the effect that they lack capacity. If the parent wishes to assert his or her own capacity, the case must be listed urgently for the issue to be determined by the court. It may be necessary for the court to hear evidence from the expert, the party concerned and any relevant witnesses. A party may choose to decline professional assessment and, in those circumstances, it will be for the court to determine the issue on the best evidence that is available.

Litigation friends

9.14 Part 15 FPR 2010 requires that a 'protected party' requires a litigation friend.

9.15 A litigation friend must fairly and competently conduct the proceedings in the protected party's best interests and must have no interest in the proceedings adverse to that of the protected party. The procedure and basis for the appointment of a litigation friend and the duty of a litigation friend are contained in Part 15 (Representation of Protected Parties) FPR 2010.

9.16 Once the issue of capacity has been raised with the court, then the court should give directions urgently in order to resolve the identity of a litigation friend. Initially, the identity of the litigation friend is a question for the protected parent and his or her solicitor. It is not an issue for the other parties. The solicitor should explore whether there is any person the protected party would suggest in their circle of family and friends.

9.17 Where appropriate, the court should explain to a parent from the outset that they may wish to identify a potential litigation friend other than the Official Solicitor. It is only if there is no one identified to act that the case becomes a 'last resort' case and an invitation may need to be extended to the Official Solicitor. However, in reality the appointment of anyone other than the Official Solicitor as a litigation friend appears to be rare.

9.18 Unless there is clear evidence that particular information would be *harmful* (not simply distressing), the solicitor should inform the protected party:

- about the appointment of a litigation friend;
- about the role of a litigation friend;
- that the solicitor remains the protected party's solicitor, although acting upon the instructions of the litigation friend;
- that whilst the litigation friend makes decisions about the conduct of the proceedings, it is for the parent to demonstrate that he or she is able to meet the welfare needs of their child;
- about steps in the proceedings;
- of court dates;
- about orders of the court.

9.19 If there is credible reason to suggest that a party may have regained capacity, then it may be necessary for a further assessment to be conducted. The litigation friend or the protected party should seek urgent directions for the obtaining of further expert advice. In some cases it may be appropriate to ask an expert instructed during the course of the case to conduct that review depending on the nature of their primary instructions. If the party's capacity is regained, then the litigation friend should immediately apply for his or her discharge so that the party can resume personal conduct of the proceedings. The court should give priority to such an application.

The Official Solicitor as litigation friend

9.20 Guidance about the appointment of the Official Solicitor as 'litigation friend' of a 'protected party' is also provided in the Practice Note of March 2013: The Official Solicitor to the Senior Courts: Appointment in family proceedings and proceedings under the inherent jurisdiction in relation to adults [2013] Fam Law 744.

9.21 The Official Solicitor is the litigation friend of last resort. No person, including the Official Solicitor, can be appointed to act as litigation friend without their consent. The Official Solicitor will not accept appointment where there is another person who is suitable and willing to act as litigation friend. The Official Solicitor is able to provide a pro forma certificate of capacity to conduct proceedings and notes for guidance. The Justice website has downloadable versions of the Official Solicitor's Standard Instructions under the Children Act 1989 and Standard Instructions Under the Adoption and Children Act 2002 to Solicitors.

9.22 There is an 'easy read' explanation of the Official Solicitor's role as litigation friend to be found in the leaflet *The Official Solicitor and How He Can Help You*. The Family Justice

Council has also published 'easy read' leaflets to assist parents involved in either private law or public law proceedings which are available in a number of languages on its website.

9.23 The Official Solicitor's criteria for consenting to act as litigation friend are as follows:

- In the case of an adult that the party or intended party is a protected party.
- There is security for costs of legal representation of the protected party which the Official Solicitor considers satisfactory. Sources of security may be –
    - the LAA where the protected party is eligible for public funding;
    - the protected party's own funds; or
    - an undertaking from another party (for example, the local authority) to pay his costs.
- The case is a last resort case.

The Official Solicitor and litigants in person

9.24 If one or more parties is or are litigants in person and there is reason to believe that any litigant in person may lack capacity to conduct the proceedings, the court will need to consider and if necessary give directions as to the following circumstances.

- Who is to arrange for the assessment of capacity to conduct the proceedings?
- How the cost of that assessment is to be funded.
- How any invitation to act as litigation friend is to be made to either any suitable and willing person, or the Official Solicitor, so as to provide him or her with the documents and information (including information to enable him or her to make the enquiries necessary to establish whether or not there is funding available).
- Any resulting timetabling, and where the Official Solicitor is being invited to be litigation friend, having regard to the Official Solicitor's need to investigate whether their acceptance criteria are met, the need for the Official Solicitor to have a case manager available to deal with the case and the possibility that an application to the Court of Protection (for authority to pay the costs out of the protected party's funds) may be necessary.

9.25 In such circumstances, the Official Solicitor will notify the court in the event that he or she expects a delay in accepting appointment either because it is not evident that their criteria are met or for any other reason.

This toolkit was developed by a working group of The Advocate's Gateway. The working group was chaired by Elizabeth Isaacs QC and the members were Professor Penny Cooper, Craig Flynn, Radhika Handa, Samantha Little, Ruth Marchant and Sarah Tyler. Contributions were also made by the President's Vulnerable Witness Working Group and District Judge Barbara Barnes.

The toolkit summarises key points from research and guidance including:

Booth, T and Booth, W (2004) *Parents with Learning Difficulties: Child protection and the courts – a report to the Nuffield Foundation on Grant No CPF/00151/G* (Sheffield: Sheffield University, Department of Sociological Studies)

Broadhurst, K (2012) Lecture given at Family Justice Council, Annual Debate, 3 December 2012: motion for the debate: 'Women who have children removed to care, year after year, are being failed by a system unable to respond to them as vulnerable adults needing support in their own right'

Cooper, P (2014) *Highs and Lows: The 4th intermediary survey* (Kingston University)

Cooper, P (2014) 'Speaking when they are spoken to: hearing vulnerable witnesses in care proceedings' *CFLQ* 26(2):132–51

Department of Health (2009) *Valuing People Now: A new three-year strategy for people with learning disabilities* (London: Department of Health) 19 January 2009

Department of Health (2010–2011) *Valuing People Now: The delivery plan* (London: Department of Health)

Handa, R and Tyler, S (2014) '"Let's see how we get on" or the need for regulated provision of registered witness intermediaries in family proceedings' *Family Law* (Jan) 75–80

Judicial College (2013) *Equal Treatment Benchbook*

Masson, J, Pearce, J and Bader, K, with Joyner, O, Marsden, J and Westlake, D (2008) *Care Profiling Study* Research Series 4/08 (London: Ministry of Justice)

Solicitors Regulation Authority Code of Conduct 2011

Surrey County Council Safeguarding Adults Board/H Brown (2014) *The Death of Mrs A: A Serious Case Review*

Swift, P et al (2013) *What Happens When People with Learning Disabilities Need Advice about the Law?* (University of Bristol)

The Bar Standards Board Handbook (2014)

The Public Law Outline (2014) Practice Direction 12A Care, Supervision and other Part 4 Proceedings: Guide to Case Management

Working Party of the Family Justice Council, *Guidelines in Relation to Children Giving Evidence in Family Proceedings* (London: Family Justice Council)