

WESTGATE CHAMBERS



Tea Time Training - 8 December 2021

Intermediaries: Who are they and what can they can do to help us, help our most vulnerable clients?

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INTRODUCTION

With a rising awareness that the vulnerable need additional support in order to give their best evidence and given the questions raised by *A Local Authority v Mother & Ors* [2021] EWHC 2794 (Fam), we take a closer look at intermediaries.

Who are they and what can they do to help us help our most vulnerable clients?

A joint session hosted by Rebecca James and Cerys Sayer,
Accompanied by intermediaries;
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HOW AND WHY DID THE INTERMEDIARY ROLE EVOLVE IN THE FAMILY COURT?

- The Intermediary role was first introduced by **sec. 29 of the Youth Justice and Criminal Evidence Act 1999**.
- The **Family Procedure Rules (FPR)** introduced the overriding objective, **Rule 1.1**, in 2010
- *M (A Child)* [2012] EWCA Civ 1905
- ‘Advocates must adapt to the witness, not the other way round’ **Lady Justice Hallett** *R v Lubemba; R v JP* [2014] EWCA Crim 2064, para 45.
- The **FPR** defined the role of an Intermediary in 2017, **Part 3A.1**
“intermediary’ means a person whose function is to –
(a) communicate questions put to a witness or party;
(b) communicate to any person asking such questions the answers given by the witness or party in reply to them; and

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(c) explain such questions or answers so far as is necessary to enable them to be understood by the witness or party or by the person asking such questions."

CURRENT INTERMEDIARY ROLE:

- Independent or non-independent, Registered or Unregistered
- No centralised Regulatory body, Professional Code of Conduct or Ethics.
- Varied training, qualifications and expertise
- Officers of the court? Oath:

"I do solemnly, sincerely and truly declare that I will well and faithfully communicate questions and answers, and make true explanations of all matters and things as shall be required of me according to the best of my skill and ability."

INTERMEDIARIES UNDER THE MICROSCOPE: A Local Authority v Mother & Ors [2021] EWHC 2794 (Fam)

1. Judicial desire for future Guidance to be drafted for intermediaries in the family courts, *paragraph 42*
2. It is the solicitors responsibility to check and vet the intermediary, *paragraph 43 & 48.*
3. The importance of the Advocate toolkits for intermediaries and advocates alike.
4. The importance of honouring commitments to ensure continuity, *paragraph 20*

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HOW TO SELECT THE MOST SUITABLE INTERMEDIARY:

Independent intermediaries - CV'S:

- Linked In
- Intermediaries for Justice: <https://www.intermediaries-for-justice.org/find-intermediary>

Consortiums - matching service

- Triangle: : <https://triangle.org.uk/who-we-are>
- The Intermediary Cooperative
<https://theintermediarycooperative.co.uk/>
- Communicourt : <https://www.communicourt.co.uk/our-services/family-proceedings/>

THE ADVOCATE'S GATEWAY (TAG):

<https://www.theadvocatesgateway.org/intermediaries>

- Toolkit 1: Ground Rule Hearings and GRH checklist
- Toolkit 9: Planning to question someone using a remote link
- Toolkit 10: Identifying vulnerability in witnesses and parties and making adjustments
- Toolkit 13: Vulnerable witnesses and parties in the family courts:
- Toolkit 16: Intermediaries: Step by Step
- **PD3AA FPR, Para 5.7 expresses the expectation that all advocates are to be familiar with the TAG toolkits.**

HOW TO IDENTIFY VULNERABILITY : THE VULNERABILITY CHECKLIST

MEMORY

Did the client appear to have a poor memory for:

- personal information such as date of birth, age, address, telephone number or
- knowing basic information such as the day of the week, where they are and who they are talking to.

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PRESENTATION

Did the client present as:

- Very eager to please?
- Over-excited/exuberant?
- Disinterested, lethargic, withdrawn?
- Upset, tearful?
- Anxious and nervous?
- Aggressive?

BODY LANGUAGE

Did they display any of the following:

- constant tapping?
- leg rocking?
- difficulties in regulating breathing ?
- Blushing?

VERBAL EXPRESSION

Did they express any of the following:

- Have difficulty in understanding questions or common expressions?
- Long processing times?
- Repeat back what was said to them?
- Difficulty getting thoughts in order?
- Respond inappropriately or inconsistently to questions?
- Express illogical or irrelevant answers?
- Demonstrate a short attention span?
- Have limited or unclear speech?
- Use signs and gestures to communicate?

CULTURE

- Are there any cultural observations of note?

SUPPLEMENTAL QUESTIONS:

- Is English your first language? If not, what other languages do you speak?

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- Do you need any help with the following: Reading or writing? Filling out forms, Managing money, Attending appointments, Telling the time, Staying calm?
- Are you diagnosed with any physical or mental health condition for example, those on the neurodiversity spectrum: autism, Asperger's syndrome, dyslexia, dyscalculia, epilepsy, hyperlexia, dyspraxia, ADHD, obsessive-compulsive disorder (OCD), and Tourette syndrome (TS)
- Are you taking any medication and if so, do you need any help taking your medicine and how does it affect you?
- Are you in receipt of benefits such as DLA/PIP?
- Do you have a social worker, or do Mental Health Services, Learning Disability services or anyone else help you with daily living?
- What can you tell us about your childhood family and friends network?
- What can you tell us about the school you went to? Did you have any extra help?
- Where did you grow-up, describe your relationship with your parents, Partners, Children?
- Do you consider yourself to be the victim of abuse, now or previously. Abuse of course includes physical sexual, psychological, emotional, controlling coercive, financial.

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NEXT STEPS

1. COGNITIVE ASSESSMENT

2. ASSESSMENT BY INTERMEDIARY

<https://www.communicourt.co.uk/wp-content/uploads/2021/11/What-happens-at-an-assessment-flyer.pdf>

3. DECISION BY THE COURT

PART 3A of FPR VULNERABLE PERSONS: PARTICIPATION IN PROCEEDINGS AND GIVING EVIDENCE...

The rules set out the duty of the Court to consider the vulnerability of a party or of a witness in three respects:

FPR 3A.3 Whether a party or witness' participation in the proceedings will be diminished by reason of vulnerability or a witness is vulnerable

FPR 3A.4 How a vulnerable party or witness will participate in the proceedings

FPR 3A.5 How a vulnerable party or witness can give evidence

FPR 3A.7 The vulnerability factors for the court when deciding whether to make one or more participation directions are as follows:

(a) the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of—

(i) any other party or other witness to the proceedings or members of the family or associates of that other party or other witness; or

(ii) any members of the family of the party or witness;

(b) whether the party or witness—

(i) suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;

(ii) has a physical disability or suffers from a physical disorder; or

(iii) is undergoing medical treatment;

(c) the nature and extent of the information before the court;

(d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;

(e) whether a matter is contentious;

(f) the age, maturity and understanding of the party or witness;

(g) the social and cultural background and ethnic origins of the party or witness;

(h) the domestic circumstances and religious beliefs of the party or witness;

(i) any questions which the court is putting or causing to be put to a witness in accordance with section 31G(6) of the 1984 Act();

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(j) any characteristic of the party or witness which is relevant to the participation direction which may be made...

Practice Direction 3AA paragraph 2.1 provides further elucidation of issues arising in the proceedings which might be relevant to paragraph (d) above:

- Domestic abuse, within the meaning given in Practice Direction 12J;
- Sexual abuse;
- Physical and emotional abuse;
- Racial and/or cultural abuse or discrimination;
- Forced marriage or so called “honour based violence”;
- Female genital or other physical mutilation;
- Abuse or discrimination based on gender or sexual orientation; and
- Human trafficking.

GROUND RULES HEARING AND PARTICIPATION DIRECTIONS

BEST PRACTICE

- Once vulnerability has been identified, get the Assessment and Ground Rules Hearing (GRH) organised as soon as possible. Consider repeating the Assessment if there is extensive delay between it and the focal hearing.
- *The GRH can form part of any interlocutory hearing CMH or IRH, need not be its own separate hearing. The GRH should be a discussion involve not only the judge and representatives for the party but also the intermediary and ideally any other relevant expert witness involved and supports such as interpreters, so that they can contribute to the discussion.*
- If conducting the matching process, consider CV, specific training and background.
- Ideally, ensure continuity by booking the same intermediary for future conferences and hearings as far in advance as possible.
- Make sure that hearings and conferences are listed for sufficiently long enough to provide the vulnerable person with adequate time for breaks and gentle pace.
- *When in court, ensure that the intermediary takes the Oath.*

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- Ensure that the full name, organisation and professional email of the intermediary is recorded on the face of the order and that all decisions made in relation to the intermediary's participation and contribution are fully recorded.
- FEEDBACK FROM SOLICITORS & INTERMEDIARIES – MUTUALLY CRITICAL OF HMCTS

What happens if you can't get an intermediary?

What things can we do across the board to help our lay clients access and understand their cases?

Communication 'Mini Toolkit' – Some good habits to get into

Documents, Emails and Power points

Background colour







Font (Sans-serif fonts best for Dyslexics – Arial, Comic Sans)

Font Size 12 -14 (power points should be at least 18)





Short paragraphs widely spaced

Visuals/Symbols – consider using Widgit/Communicate in Print (Widgit online programme)

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 Use  symbols  and  pictures to  make  your  documents  easier to


understand.

 Do  a visual  timetable for the  day  in  Court.

Glossary/Definitions

Threshold criteria

Hearing

Fact finding

Welfare hearing

Listing

Adjourn

Statement

Witness Statement

Position Statement

Insight

Disguised compliance

DRA

IRH/EFH

Children's Guardian

Judge

Usher

Clerk

Counsel

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Getting the best evidence from the witness

- Vocabulary – clarification of specific terms – e.g. ‘Is there a difference between a tap and a slap?’
- Making sure the witness is using the same terms of reference.
- Use of ‘narrative theory’. You want the witness to give as much relevant information as possible, scaffolding their evidence. (Who? When? Where? What happened?) Short questions. Consider the senses – what did the witness see and hear, physically and emotionally feel?

Advocacy and the Vulnerable (Family)

- This type of questioning is reflected in courts’ protocols for section 28 hearings in criminal trials which refer advocates to 20 Principles of Questioning – A Guide to the Cross examination of Vulnerable Witnesses (ICCA)
- FLBA Advocacy and The Vulnerable - Delegate training (ICCA) (Status?)