



Patrick Steel provides commentary  
of the recent reported case;  
X & Y [2024] EWHC 906 (Fam)

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CHAMBERS

## Re X & Y (Intermediary: Practice & Procedure) [2024] EWHC 906 (Fam)

### **Introduction**

In the recent case of [Re X & Y \(Intermediary: Practice and Procedure\) \[2024\] EWHC 906 \(Fam\)](#), Mr Justice Williams addresses the practice and procedure concerning the instruction of intermediaries in family court proceedings. Williams J considers FPR 3A, PD 3AA and, Lieven J's analysis in [West Northamptonshire Council \(acting via Northamptonshire Children's Trust -v- KA and NH \(Intermediaries\) 2024 EWHC 79 \(Fam\)](#).

### **Context of the present case**

During the course of care proceedings, a respondent Mother sought an intermediary assessment. An application was made on a form C2 for a "Part 25 for an Intermediary Assessment", and the statement in support detailed that

*The personal and intimate nature of proceedings, as well as the client's dual diagnoses [ADHD and PTSD], may impact the client's ability to understand, focus and digest documents and information throughout the hearings, and proceedings more generally but a specialist assessment is required to identify these issues and to ensure the Mother's Article 6 rights are protected and she is able to give her best evidence.*

[Ms Sarah Taite](#), on behalf of the Mother, sought to adjourn the application generally, Williams J was content to grant the adjournment but considered that the present case illustrated the issues emerging in the family court in relation to the use of intermediaries.

### **Defining an intermediary**

In addition to setting out the relevant rules and practice directions, Williams J stressed that intermediaries are not to be "used as some sort of safety net or security blanket by lawyers or the

courts” continuing to recognise that intermediaries are a limited resource whose use comes with significant costs [5].

While the Family Procedure Rules (“FPR”) does not set out the duties, qualification, and appointment of intermediaries, specifically, they are incorporated under the rules and practice directions on ‘Vulnerable Persons: participation in Proceedings and Giving Evidence’, namely FPR3A and PD3AA.

FPR3A.8 sets out that participation directions within the FPR, includes the provision of an intermediary to a party or witness to enable that person to either: (i) participate in proceedings, or (ii) be questioned in court.

FPR3A.1 defines intermediaries as a person whose function is to: (a) communicate questions put to a witness or party; (b) communicate to a person asking questions the answers in reply; or (c) to explain questions or answers to enable them to be understood by a witness, party, or by the person asking those questions. Williams J, therefore, emphasises that the rules envisage a narrow remit for the ‘*primary function*’ of an intermediary. Although, in *Re X & Y* Williams J did not hear submissions as to any potential wider remit of intermediaries nor does he suggest that FPR3A.1 is an exhaustive list of functions of intermediaries [8].

### **The Correct Procedure**

#### **Content of the Application**

Williams J confirms that “Applications for Participation Directions must be made by Part 18 applications. [3A.10(3)] and the application must identify the matters set out in PD3AA 6.1. The court can make directions of its own initiative” [13].

PD3AA 6.1 requires an application to detail:

- a) why the party or witness would benefit from assistance;

aa) whether the party or witness falls within the assumption at rule 3A.2A FPR 177057 **(the court assumes that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by a party, a relative of another party, or a witness in the proceedings, then (a) the quality of the party's or witness's evidence is diminished and (b) in relation to a party (only), that their participation in the proceedings is diminished.)**

b) the measure or measures that would be likely to maximise as far as practicable the quality of that evidence;

c) why the measure or measures sought would be likely to improve the person's ability to participate in the proceedings; and

d) why the measure or measures sought would be likely to improve the quality of the person's evidence.

At [20] Williams J notes: "An intermediary assessment in most cases will not be a Part 25 Expert appointment but rather a case management direction by the court of a similar nature to the direction for the appointment of an interpreter". Evidently Part 18 is the correct procedure when seeking participation directions, but it implies that there are limited circumstances in which an intermediary may be a Part 25 Expert appointment.

### **Hearing of the Application**

Once an intermediary assessment is obtained, the court will hold a Ground Rules hearing to consider what participation directions are necessary, [21]. In considering the intermediary assessment the court will have regard to the relevant evidence establishing the necessity (or otherwise) of an intermediary,

Williams J sets out a non-exhaustive list of potentially relevant evidence at [20]:

- An expert report, for which the court has given permission, for example a cognitive assessment.
- Medical history of a party or witness.

- Evidence from their legal team that despite all the efforts of solicitors and counsel (using the Advocates Toolkits), they hold the view their client cannot participate fairly without an intermediary.

### Determination of the Application

Williams J confirms that the core test remains one of necessity [10]. Necessity is given, at [9], the same meaning as in the context of appointment of experts per Munby LJ in Re H-L (Expert

Evidence:

Test for Permission) [2013] 2 FLR 1434 that necessary falls:

*“somewhere between indispensable on the one hand and ‘useful’, ‘reasonable’ or ‘desirable’ on the other hand, having the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable. Whether that means that ‘nothing else will do’ would require consideration of the other means by which fair participation can be achieved.*

Williams J makes clear that the other ‘means by which fair participation can be achieved’ includes steps to be taken by legal representatives. He states:

*“Only if the court is satisfied that the usual support a legal team (adopting the use of the tools available) and other measures available to the court will not enable the party to participate fairly will it be necessary to provide for an intermediary” [11]*

In determining the application, the court must have regard to FPR3A.7(a)-(m):

- (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();
- (j) any characteristic of the party or witness which is relevant to the participation direction which may be made;
- (k) whether any measure is available to the court;
- (l) the costs of any available measure; and
- (m) any other matter set out in Practice Direction 3AA.

Williams J further adopted Lieven J's considerations in *West Northamptonshire Council (acting via Northamptonshire Children's Trust v KA and NH (Intermediaries)* 2024 EWHC 79 (Fam) (which was itself considering the criminal test for the appointment of intermediaries as set out by the Court of Appeal in *R v Thomas (Dean)* [2020] EWCA Crim 117). Lieven J in *West Northamptonshire Council* set out the now further endorsed principles (***emphasis added***):

- i) It will be “exceptionally rare” for an order for an intermediary to be appointed for a whole trial. Intermediaries are not to be appointed on a “just in case” basis. Thomas [36]. This is notable because in the family justice system it appears to be common for intermediaries to be appointed for the whole trial. However, it is clear from this passage that a judge appointing an intermediary should consider very carefully whether a whole

trial order is justified, and not make such an order simply because they are asked to do so.

ii) The judge must give careful consideration not merely to the circumstances of the individual but also to the facts and issues in the case, Thomas [36];

iii) Intermediaries should only be appointed if there are “compelling” reasons to do so, Thomas [37]. An intermediary should not be appointed simply because the process “would be improved”; R v Cox [2012] EWCA Crim 549 at [29]; ***[it must be noted that Williams J does not endorse the use of the term “compelling”, instead noting at [19] that the test in FPR3A is whether or not the participation direction sought is necessary]***

iv) In determining whether to appoint an intermediary the Judge must have regard to whether there are other adaptations which will sufficiently meet the need to ensure that the defendant can effectively participate in the trial, Thomas [37];

v) The application must be considered carefully and with sensitivity, but the recommendation by an expert for an intermediary is not determinative. The decision is always one for the judge, Thomas [38];

vi) If every effort has been made to identify an intermediary but none has been found, it would be unusual (indeed it is suggested very unusual) for a case to be adjourned because of the lack of an intermediary, Cox [30];

vii) At [21] in Cox the Court of Appeal set out some steps that can be taken to assist the individual to ensure effective participation where no intermediary is appointed. These include having breaks in the evidence, and importantly ensuring that “evidence is adduced in very shortly phrased questions” and witnesses are asked to give their

“answers in short sentences”. This was emphasised by the Court of Appeal in *R v Rashid (Yahya)* [2017] 1 WLR 2449.

### **Summary**

- i) Practitioners should ensure that the part 18 procedure is used when applying for participation directions
- ii) The basis of the application should be on one of the grounds provided in PD3AA 6.1
- iii) In considering the application a grounds rules hearing should be held where the court will consider evidence extending but not limited to:
  - a. Expert reports
  - b. Medical records/history
  - c. Evidence from a party/witness’s legal team
- iv) In determining the application, the court will have regard to the factors at FPR3A.7(a)-(m).
- v) Practitioners should ensure they have used all the available tools to support their client, including the ‘Advocates Toolkit’. It is a major part of the role of legal representatives to ensure that their client understands the proceedings and feel able to attend court without significant distress. Only when the court is satisfied that those steps have *also* been taken will the appointment of an intermediary be deemed necessary
- vi) Throughout the course of an application the court and practitioners should have regard to the considerations as set out by Lieven J in *West Northamptonshire Council v KA and NH*

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