



Vulnerable parents within the Care System (Law).

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Mr Justice Hedley in *Re L (Care: Threshold Criteria)* (Family Division 26 October 2006)

Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, whilst others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the State to spare children all the consequences of defective parenting. In any event, it simply could not be done. ...It would be unwise to a degree to attempt an all embracing definition of significant harm. One never ceases to be surprised at the extent of complication and difficulty that human beings manage to introduce into family life.

Pauffley J *Re NL (A child)* (Appeal: Interim Care Order: Facts and Reasons) [2014] EWHC 270 (Fam)

'Justice must never be sacrificed upon the altar on speed'.

Case Management Guidance in Public Law Cases issued in March 2022

We all have a duty to 'make every hearing count' and to 'make cases smaller'.

Parents with LD

- Gillen J, as he then was, sitting in the Family Division of the High Court of Justice in Northern Ireland, in *Re G and A (Care Order: Freeing Order: Parents with a Learning Disability) [2006] NKFam 8*
- Key points emerging from 8 paragraphs are as follows:
 - People with a [learning disability] are individuals first and foremost and each has a right to be treated as an equal citizen...courts must take all steps possible to ensure that people with a learning disability are able to actively participate in decisions affecting their lives.
 - Parents with [learning difficulties] can often be "*good enough*" parents when provided with the ongoing...support they need. The concept of "*parenting with support*" must underpin the way in which the courts and professionals' approach wherever possible parents with learning difficulties.
 - Judges must make absolutely certain that parents with learning difficulties are not at risk of having their parental responsibilities terminated on the basis of evidence that would not hold up against normal parents. Their competences must not be judged against stricter criteria or harsher standards than other parents.
 - Too narrow a focus must not be placed exclusively on the child's welfare with an accompanying failure to address parents' needs arising from their

disability which might impact adversely on their parenting capacity.

- The court must also take steps to ensure there are no barriers to justice within the process itself. Judges and magistrates must recognise that parents with learning disabilities need extra time with solicitors so that everything can be carefully explained to them...The process necessarily has to be slowed down to give such parents a better chance to understand and participate. This approach should be echoed throughout the whole system including LAC reviews
- All parts of the Family justice system should take care as to the language and vocabulary that is utilised.
- The courts must be careful to ensure that the supposed inability of parents to change might itself be an artefact of professionals' ineffectiveness in engaging with the parents in appropriate terms.
- A shift must be made from the old assumption that adults with learning difficulties could not parent to a process of questioning why appropriate levels of support are not provided to them so that they can parent successfully...The concept of "*parenting with support*" must move from the margins to the mainstream in court determinations.

- Gillen J's words require to be read in full, but two passages set the tone:
 - (2) People with a learning disability are individuals first and foremost and each has a right to be treated as an equal citizen. Government policy emphasises the importance of people with a learning disability being supported to be fully engaged playing a role in civic society and their ability to exercise their rights and responsibilities needs to be strengthened. They are valued citizens ...

(4) This court fully accepts that parents with learning difficulties can often be “good enough” parents when provided with the ongoing emotional and practical support they need. The concept of “parenting with support” must underpin the way in which the courts and professionals’ approach wherever possible parents with learning difficulties ... judges must make absolutely certain that parents with learning difficulties are not at risk of having their parental responsibilities terminated on the basis of evidence that would not hold up against normal parents. Their competences must not be judged against stricter criteria or harsher standards than other parents.”

Munby P set out key principles to consider in cases involving parents with learning difficulties in **Re D (A Child) (No 3) [2016] EWFC 1**. In a case such as this it is vitally important always to bear in mind two well-established principles. The first is encapsulated in what the Strasbourg court said in *Y v United Kingdom* (2012) 55 EHRR 33, [2012] 2 FLR 332, para 134:

- “family ties may only be severed in very exceptional circumstances and ... everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. *It is not enough to show that a child could be placed in a more beneficial environment for his upbringing.* However, where the maintenance of family ties would harm the child's

health and development, a parent is not entitled under article 8 to insist that such ties be maintained (emphasis added).”

And at para 134 he endorsed what is said in *Y v United Kingdom* (2012) 55 EHRR 33, [2012] 2 FLR 332,

- *"...It is not enough to show that a child could be placed in a more beneficial environment for his upbringing..."*

Munby P entirely endorsed Gillens 8 paragraphs, to the extent that he appended them in full to the end of his judgment, saying at [28] *'I commend his powerful words to every family judge, to every local authority and to every family justice professional in this jurisdiction.'*

Human Rights Act 1998/European Convention on Human Rights

- Article 14 – Right to enjoy rights within the convention without discrimination of any kind;
- Article 8 – Right to respect of private and family life. The State can only interfere with family life if is necessary
- Article 6 – Right to a fair hearing (includes court cases and the process leading to a court case – meetings, case conference etc).

Supporting parents under the Children Act 1989 and Children Act 2004

S17 Children Act 1989 – duty on LA to promote the upbringing of children in need in their area by providing a range and level of services appropriate to those children’s needs.

Supporting parenting within adult social care

- National Health Service and Community Care Act 1990 s47 – LA provision of statutory support for [LD] parents, dependent on assessment and eligibility criteria. Guidance set out in “Putting People First: A Whole System Approach to Eligibility for Social Care” DOH 2010.

Care Act 2014

- Following the reform of adult social care and support legislation, setting out the new principle of promoting adults’ wellbeing and preventing, delaying or reducing the development of care and support needs
 - Wellbeing = LA decisions must promote the adult’s wellbeing
 - Preventative – LA must provide preventative services ie services that help prevent, delay or reduce the development of care and support needs
 - Integration – Duty on LA to carry out their care and support functions with the aim of integration services with those provided by the NHS or other health-related services
 - Information and Advice – LA are required to make available information about their services – in a clear and accessible format
 - Cooperation – General duty to cooperate between the LA and other organisations.

Good Practice Guidance DOH – published 2007 – updated 2020

https://www.sclد.org.uk/wp-content/uploads/2015/06/Scottish_Good_Practice_Guidelines_for_Supporting_Parents_With_Learning_Disabilities.pdf

“It is particularly important to avoid the situation where poor standards of parental care, which do not however meet the threshold of being of significant harm to a child, subsequently deteriorate because of a lack of support provided to the parent. *A failure to provide support in this type of situation can undermine a parent’s rights to a private and family life, and may also contravene an authority’s disability equality duty.* Families affected by [parental learning disability] are likely to have an on-going need for support, and where a child protection plan is not considered necessary, a child in need plan should be drawn up for each identified child, drawing on the good practice identified in Section 1 of this guidance”(emphasis added)

Nuffield Family Justice Observatory when dealing with learning disabled parents with needs and vulnerabilities

<https://www.nuffieldfjo.org.uk/wp-content/uploads/2024/06/Babies-in-care-proceedings-What-do-we-know-about-parents-with-learning-disabilities-or-difficulties.pdf>

The contemporary position needs to move very much towards supported parenting and what can be done to enable families to remain together. The same must equally apply to neurodiverse parents

Use of intermediaries

What has emerged from the recent case law is practitioners should expect more questions from the court about the need for an intermediary to be appointed and present throughout the final hearing. Each case will turn on its merits, but particular regard should be placed on the issues that fall to be determined at the final hearing, the case the client wants to advance at the final hearing, and what adjustments can be made on how the hearing proceeds and how the client is supported by their legal team (and others).

FPR 3 and PD3AA Vulnerable Persons: Participation in proceedings and giving evidence

FPR r3A.1 defines an intermediary as follows:

“...[Intermediary means a person whose function is to –

(a) communicate questions put to a witness or party;

(b) communicate to any person asking such questions the answers given by the witness or party in reply to them; and

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

The appointment, qualification and duties of intermediaries in the family justice system is not clearly set out either in the Family Procedure Rules ("FPR") or in any Practice Direction.

It is incorporated into the FPR by inclusion in FPR 3A and PD3AA both sub-headed
Vulnerable Persons: participation in Proceedings and Giving Evidence

FPR 3A.7 What the court must have regard to:

When deciding whether to make one or more participation directions the court must
have regard in particular to—

(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.

FPR3A.8 measures

- (1) The measures referred to in this Part are those which—
- (a) prevent a party or witness from seeing another party or witness;
 - (b) allow a party or witness to participate in hearings and give evidence by live link;
 - (c) provide for a party or witness to use a device to help communicate;
 - (d) provide for a party or witness to participate in proceedings with the assistance of an intermediary;
 - (e) provide for a party or witness to be questioned in court with the assistance of an intermediary; or
 - (f) do anything else which is set out in Practice Direction 3AA.

Recent cases

West Northamptonshire Council v KA & NH (intermediaries) [2024] EWHC 79 (Fam)

<https://www.bailii.org/ew/cases/EWHC/Fam/2024/79.html> Ms Justice Lieven recently gave guidance regarding intermediary appointments in the family court; these not clearly being set out in the Family Procedure Rules or any Practice Direction.

In the absence of any further guidance on the point within the family justice system, the court referred to the jurisprudence in the criminal justice system and extracted the following principles:

a. 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* [2020] EWCA Crim 117 [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.

b. 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];

c. 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];

d. 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];

e. 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];

f. 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];

g. 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.

X v Y [2024] EWHC 906

<https://www.bailii.org/ew/cases/EWHC/Fam/2024/906.html>

Following on from the guidance of Ms Justice Lieven, further judgment relating to the use of intermediaries in family proceedings was handed down by Mr Justice Williams in April 2024.

§6 – 21 sets out the relevant law to consider

The new guidance does not prevent a judge from granting intermediary assistance throughout proceedings, if there are “*compelling*” reasons to do so (see below).

- **Intermediaries should only be appointed if there are “*compelling*” reasons to do so.**
- **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.** Lieven J considered in the case of *West Northhamptonshire Council v KA* that a deaf intermediary was required for the entirety of the hearing.
- **The Judge must give careful consideration, not merely to the circumstances of the individual but also to the facts and issues in the case.**
- **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 court user can effectively participate in the trial.**

- **The application must be considered carefully and with sensitivity, but the recommendation by an expert for an intermediary [for example a psychologist] is not necessarily a deciding factor.**
- **If no intermediary is available, cases should almost never be adjourned. Instead, adaptations should be implemented to support participation in the absence of an intermediary.**

A Local Authority v D & E (Parent with Autism) [2020] EWFC B18 where the court held the parent's diagnosis of ASD was highly significant and many of the features of the mother's presentations which had given rise to concerns on the part of the Local Authority were features in the diagnosis. This case highlights the need for appropriate, targeted assessments to be undertaken

<https://www.bailii.org/ew/cases/EWFC/OJ/2020/B18.html>