



PUMP COURT  
CHAMBERS

# Vulnerable Parties and Witnesses

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## Outline

- Refresher on vulnerable witnesses and parties
- ***Re X & Y (Intermediary: Practice and Procedure)***  
**[2024] EWHC 906 (Fam)**
- What now?

# Who is vulnerable

Family Procedure Rules 2010, Part 3A & Practice  
Directions 3AA & 3AB

- r.3A.2A – assume that a party or witness who is or is at risk of being a **victim of domestic abuse** is vulnerable and may require participation directions
- The party or witness concerned can request that the assumption does not apply – r.3A.2A(2)

# Who is vulnerable

- r.3A.4 – court must consider whether a **party's participation in the proceedings** (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions
- r.3A.5 – court must consider whether **the quality of evidence given by a party or witness** is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions

# Who is vulnerable

- r.3A.4 does not apply to a party who is a child – r.3A.2(1)
- rr.3A.3-3A.5 do not apply to a party who is a protected party - r.3A.2(2)
- Rr.3A.3-3A.5 do not apply to victims of domestic abuse
- ‘Child’ = person under the age of 18 years – r.3A.1
- ‘Protected party’ = a party who lacks capacity within the meaning of the Mental Capacity Act 2005) to conduct proceedings – r.2.3(1)

# Who is vulnerable

Provisions that apply to a party who is a child

- r.3A.2A – victims of domestic abuse
- r.3A.5 – giving evidence
- Part 16 FPR 2010

Provisions that apply to a protected party

- r.3A.2A – victims of domestic abuse
- r.3A.6 – court must consider whether it is necessary to make one or more participation directions to assist the protected party participating in proceedings or giving evidence
- Part 15 FPR 2010

# Who is vulnerable

Matters to which the court must have regard when considering the vulnerability of a party or witness – rr.3A.3 & 3A.7:

- Impact of actual or perceived intimidation
- Mental disorder or significant impairment of intelligence or social functioning
- Physical disability or disorder
- Medical treatment
- Nature and extent of information before the court
- Issues arising in the proceedings, including concerns arising in relation to abuse
- Whether matter contentious
- Age, maturity and understanding

# Who is vulnerable

Matters to which the court must have regard when considering the vulnerability of a party or witness – rr.3A.3 & 3A.7 - continued:

- Social and cultural background and ethnic origins
- Domestic circumstances and religious beliefs
- Any questions the court is putting or causing to be put in accordance with s.31G(6) Matrimonial and Family Proceedings Act 1984
- Any characteristic relevant to participation direction



# Who is vulnerable

Any other matter set out in Practice Direction 3AA, i.e., the ability of the party or witness to :

- Understand the proceedings and their role in them
- Put their views to the court
- Instruct their representative/s before, during and after the hearing
- Attend the hearing without significant distress

# Who is vulnerable

## Examples of vulnerability:

- Children
- Victims of domestic abuse
- Substance or alcohol misuse
- Physical disability or illness
- Mental illness
- Old age
- Non-native speaker of English
- Learning difficulties
- Neurodivergence

# Participation directions

- Rule 3A.8 – measures, including:
  - Screens
  - Live link
  - Use of a device to help communicate
  - Intermediary
- Rule 3A.9 – when court’s duties apply & recording reasons for decisions made under this part
  - Duties arise as soon as possible after the start of proceedings and continue until resolution of proceedings
  - Record reasons in the court order

# Participation directions

- Factors the court must consider when deciding whether to make participation directions:
  - Any views expressed by the party or witness – rr.3A.4(2) & 3A.5(2)
  - Factors in r.3A.7 looked at when considering vulnerability
  - Whether any measure is available to the court
  - The cost of any available measure

# Litigants in person

- Prohibition of cross-examination under Part 4B Matrimonial and Family Proceedings Act 1984:
  - Those convicted, cautioned for or charged with a specified offence – s.31R
  - Victims of a specified offence – s.31R
  - Those against whom an on-notice injunction is in place – s.31S
  - Those protected by an on-notice injunction – s.31S
  - Alleged perpetrator of domestic abuse – s.31T
  - Victim of domestic abuse – s.31T
  - Other cases – s.31U

# Litigants in person

- Section 31U:
  - (1) In family proceedings, the court may give a direction prohibiting a party to the proceedings from cross-examining (or continuing to cross-examine) a witness in person if*
    - a) None of sections 31R to 31T operates to prevent the party from cross-examining the witness and*
    - b) It appears to the court that –*
      - i. The quality condition or the significant distress condition is met, and*
      - ii. It would not be contrary to the interests of justice to give the direction.*

# Litigants in person

- The “quality condition” is met if the quality of evidence given by the witness on cross-examination –
  - (a) is likely to be diminished if the cross-examination (or continued cross-examination) is conducted by the party in person, and
  - (b) would be likely to be improved if a direction were given under this section. – s.31U(2)

# Litigants in person

- The “significant distress condition” is met if –
  - (a) the cross-examination (or continued cross-examination) of the witness by a party in person would be likely to cause significant distress to the witness or the party, and
  - (b) The distress is likely to be more significant than would be the case if the witness were cross-examined other than by the party in person. – s.31U(3)



## Litigants in person

- In determining whether the quality condition or significant distress condition is met, the court must have regard to, among other things:
  - (a) any views expressed by the witness as to whether they are content to be cross-examined in person
  - (b) any views expressed by the party as to whether they are content to cross-examine in person
  - (c) nature of the questions likely to be asked, having regard to the issues in the proceedings
  - (d) any behaviour by the party in relation to the witness in respect of which the court is aware that a finding of fact has been made in the proceedings or other proceedings

## Litigants in person

- Factors to which the court must have regard, continued:
  - (e) any behaviour by the witness in relation to the party in respect of which the court is aware that a finding of fact has been made in the proceedings or other proceedings
  - (f) any behaviour by the party at any stage in the proceedings, both generally and in relation to the witness
  - (g) any behaviour by the witness at any stage of the proceedings, both generally and in relation to the witness
  - (h) any relationship (of whatever nature) between the witness and the party. – s.31U(5)

# Litigants in person

- Section 31W
- Applies where a party to family proceedings is prevented from cross-examining a witness in person by virtue of ss.31R to 31U
- The court must consider whether (ignoring this section) there is a satisfactory alternative means –
  - (a) For the witness to be cross—examined in the proceedings, or
  - (b) of obtaining evidence that the witness might have given under cross-examination in the proceedings.
- If not, Qualified Legal Representative (QLR)

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

- Decision of Williams J on 18 April 2024
- Part 25 application for an intermediary assessment of M, who had PTSD and ADHD
- All parties agreed to the assessment
- Williams J did not and gave guidance on how to approach the issue of intermediary assessments
- Application adjourned generally to be restored if an evidential base is established

- An intermediary can be an essential component in what the court provides to enable a witness or party to participate fairly in proceedings or give their best evidence – [5]
- BUT
- Only where necessary
- Not to be used as some sort of safety net or security blanket
- Limited resource that comes with significant costs
- Use is governed by FPR 2010 r.3A and PD3AA

## FPR r.3A.1 – definition of intermediary:

- 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

- Narrow remit for intermediary
- Not necessarily exhaustive
- Does not include assisting a party during a hearing to understand the evidence given by others or read the papers and give instructions

- Previous cases which described an intermediary as an expert have been superseded by FPR Part 3A
- BUT
- The question is still whether “it is necessary to make the participation direction”  
rr.3A.2A(3), 3A.4(1), 3A.5(1)
- Same test as Part 25/s.13 Children and Families Act 2014 – *Re H-L* [2013] 2 FLR 1434  
*“somewhere between indispensable on the one hand and ‘useful’, ‘reasonable’ or ‘desirable’ on the other hand”*



- Whether any particular participation direction is necessary requires consideration of other means by which fair participation can be achieved
- Lower hurdle for measures such as a screen or a break
- Consider factors in r.3A.7
- r.3A.7(l) – cost – given particular weight
- South Eastern Circuit (excluding London) cost of intermediaries to HMCTS up from £1.065m in 2019/2020 to £3.6m in the first 9 months of 2023/2024

- Intermediary only necessary if other steps not enough to achieve fair participation
- Major component of the role of legal representatives to –
  - ensure client understands proceedings and their role in them
  - put client's views to the court
  - ensure client is able to give instructions in advance of court and in court
  - enable them to attend court without significant distress

- Tailoring of language and the use of tools identified in the Advocates' Gateway will often be enough to enable fair participation
- If consider intermediary needed, Part 18 application (not Part 25)

- Application must identify matters in PD3AA 6.1:
  - whether party or witness is a victim of domestic abuse – assumption in r.3A.2A
  - why party or witness would benefit from assistance
  - measure(s) likely to maximise quality of evidence
  - why measure(s) would be likely to improve ability to participate
  - why measure(s) would be likely to improve quality of evidence

- No guidance from Court of Appeal or Family Court on the circumstances in which an intermediary must be appointed, save Lieven J in ***West Northamptonshire Council v KA and NH* [2024] EWHC 79 (Fam)**
- Referring to Court of Appeal decision in *R v Thomas (Dean)*, which sets out guidance at [36]-[42]

- Principles extracted by Lieven J:
  - i. exceptionally rare for an order for an intermediary to be appointed for the whole trial
  - ii. give careful consideration not merely to the circumstances of the individual but the facts and issues in the case
  - iii. intermediary only if compelling reasons
  - iv. have regard to whether other adaptations sufficient
  - v. application must be considered carefully and with sensitivity but recommendation of an intermediary not determinative
  - vi. unusual to adjourn for lack of intermediary if none found after every effort made
  - vii. steps to take if no intermediary: breaks and, importantly, shortly phrased questions and witnesses asked to give answers in short sentences

- Lieven J:  
*“[T]he first and normal approach [...] is for the judge and the lawyers to ensure that simple language is used, and breaks taken to ensure that litigants understand what is happening.”*
- Role of the judge to consider whether appointment of an intermediary justified
- Williams J adopted Lieven J’s principles, save that the test is “necessary” rather than “compelling reasons”

- Need evidence to establish intermediary necessary
  - expert evidence, e.g. cognitive assessment; or
  - medical history, e.g. of learning disability or difficulty, or condition or disorder which impacts ability to participate
  - evidence from legal team
  - other evidence



## What now?

- Has the court's approach to intermediary assessments changed?
- Has the court's approach to the appointment of intermediaries changed?
- Has there been a change to recommendations made in intermediary assessments?
- What is your experience?

# What now?

- Alternatives to intermediaries:
  - lay advocates – funding & availability?
  - ground rules without intermediaries
  - emotional support for parties and witnesses by friends and family
  - screens, remote evidence and other measures
- Onus on judge and advocates to adjust language and procedure to the needs of vulnerable parties and witnesses

## What now?

- Focus on cognitive assessment and other sources of evidence as to participation directions and other adjustments that may need to be made
- Ground rules hearings, arguably more important where no intermediary
- Consider using agreed facts to reduce the amount of time a vulnerable witness has to spend giving evidence

- Advocates' Gateway toolkits  
<https://www.theadvocatesgateway.org/>
- Toolkit 1 – Ground Rules Hearings
  - Ground Rules Hearings Checklist
- Toolkit 2 – General principles from research, policy and guidance
- Toolkit 3 – planning to question someone with autism
- Toolkit 4 – planning to question someone with a learning disability
- Toolkit 5 – planning to question someone with 'hidden disabilities'
- Toolkit 6 – planning to question a child or young person
- Toolkit 10 – identifying vulnerability in witnesses
- Toolkit 13 – vulnerable witnesses in the family courts
- Toolkit 15 – witnesses and defendants with autism
- Resolution Good Practice Guide to Working with Vulnerable Clients
- Advocacy and the Vulnerable Training (Law Society for criminal lawyers; Family Law Bar Association for barristers)