



Working Party of the Family Justice Council

Guidelines in relation to children giving evidence in family proceedings

**December
2011**

Contents

Foreword by Sir Nicholas Wall	3
The guidelines	4
Working Party members	8

Foreword by the President of the Family Division

These guidelines on the issue of children giving evidence in family proceedings, have been produced by the Family Justice Council Working Party on Children Giving Evidence, chaired by the Rt. Hon. Lord Justice Thorpe. They have been approved by the Council and I wish to add my endorsement.

The working party was set up following a referral from the Court of Appeal in *Re W* [2010] Civ 57. The Supreme Court in *Re W* [2010] UKSC 12 subsequently held that there was no longer a presumption or even a starting point against children giving evidence in such cases.

Sir Nicholas Wall
President of the Family Division

I am sure that these guidelines will be of benefit to members of the judiciary, lawyers and professionals, who have to deal with applications for children to give evidence in family proceedings.

May I take this opportunity to express my gratitude to all the members of the working party, and in particular to Alex Verdan QC, for the final version of these guidelines.

Guidelines in relation to children giving evidence in family proceedings

1. These Guidelines have been produced by Lord Justice Thorpe's Working Party.

2. This Working Party was set up following a request to the President of the Family Division by the Court of Appeal in *Re W* [2010] Civ 57, a case which considered the issue of children giving evidence in family proceedings.

3. That same case then went to the Supreme Court and is reported as *Re W* [2010] UKSC 12. It is now the leading authority on this issue. The Supreme Court held that there was no longer a presumption or even a starting point against children giving evidence in such cases.

4. Enquiries by this Working Party suggests that the number of applications for children giving evidence since this decision may be increasing.

5. The aim of these Guidelines is to provide those involved in family proceedings with advice as to what matters should be taken into account in such situations.

6. Hearsay evidence is of course admissible in family proceedings: *Children (Admissibility of Hearsay Evidence)* Order 1993 SI 1993/621.

7. The issue of whether a child should be further questioned or give evidence in family proceedings should be considered at the earliest possible opportunity by the court and all the parties and not left to the party intending to so apply.

Legal considerations

8. In light of *Re W*, in deciding whether a child should give evidence, the court's principal objective should be achieving a fair trial.

9. With that objective the court should carry out a balancing exercise between the following primary considerations:

i) the possible advantages that the child being called will bring to the determination of truth balanced against;

ii) the possible damage to the child's welfare from giving evidence i.e. the risk of harm to the child from giving evidence;

having regard to:

a. the child's wishes and feelings; in particular their willingness to give evidence; as an unwilling child should rarely if ever be obliged to give evidence;

b. the child's particular needs and abilities;

c. the issues that need to be determined;

d. the nature and gravity of the allegations;

e. the source of the allegations;

f. whether the case depends on the child's allegations alone;

g. corroborative evidence;

h. the quality and reliability of the existing evidence;

i. the quality and reliability of any ABE interview;

j. whether the child has retracted allegations;

k. the nature of any challenge a party wishes to make;

l. the age of the child; generally the older the child the better;

m. the maturity, vulnerability and understanding, capacity and competence of the child; this may

be apparent from the ABE or from professionals discussions with the child;

- n. the length of time since the events in question;
- o. the support or lack of support the child has;
- p. the quality and importance of the child's evidence;
- q. the right to challenge evidence;
- r. whether justice can be done without further questioning;
- s. the risk of further delay;
- t. the views of the guardian who is expected to have discussed the issue with the child concerned if appropriate and those with parental responsibility;
- u. specific risks arising from the possibility of the child giving evidence twice in criminal or other and family proceedings taking into account that normally the family proceedings will be heard before the criminal; and
- v. the serious consequences of the allegations i.e. whether the findings impact upon care and contact decisions.

10. The Court must always take into account the risk of harm which giving evidence may do to children and how to minimise that harm, although that may vary from case to case but the Court does not necessarily need expert evidence in order to assess the risk.

11. Where there are concurrent or linked criminal proceedings there should be close liaison between the respective parties and the allocated judges and ideally linked directions hearings. The Police/CPS should be informed of any proposal that a child give evidence in family proceedings and their views obtained before any such decision is made.

Alternatives to child giving live evidence at a hearing

12. The Court needs to consider seriously the possibility of further questions being put to the child on an occasion distinct from the substantive hearing so as to avoid oral examination. This option would have significant advantages to the child and should be considered at the earliest opportunity and in any event before that substantive hearing. Such further questioning should be carried out as soon as possible after the incident in question.

The Court will need to take into account practical and procedural issues including:

- a. giving the child the opportunity to refresh his memory;
- b. the appropriate identity of the questioner;
- c. matching the skills of the questioner to the communication needs of the child;
- d. where the questioning should take place;
- e. the type and nature of the questions;
- f. advance judicial approval of any questions proposed to be put to the child;
- g. the need for ground rules to be discussed ahead of time by the judge, lawyers (and intermediary, if applicable) about the examination; and
- h. how the interview should be recorded.

Practical considerations pre-hearing

13. Once a decision has been made that a child should give evidence at a hearing and be questioned at court, the Court must factor in steps to improve the quality of the child's evidence and minimise the risk of harm to the child.

14. At the earliest opportunity and in any event before the hearing at which child's evidence is taken, the following matters need to be considered:

- a. if 'live' cross examination is appropriate, the need for and use of a registered intermediary [insert details of register of intermediaries] [subject to their availability] or other communication specialist to facilitate the communication of others with the child or relay questions directly, if indicated by the needs of the child;
- b. the use of other 'special measures' in particular live video link and screens;
- c. the full range of special measures in light of the child's wishes and needs;
- d. advance judicial approval of any questions proposed to be put to the child;
- e. the need for ground rules to be discussed ahead of time by the judge, lawyers (and intermediary, if applicable) about the examination;
- f. information about the child's communication skills, length of concentration span and level of understanding e.g. from an expert or an intermediary or other communication specialist;
- g. the need for breaks;
- h. the involvement and identity of a supporter for the child;
- i. the timetable for children's evidence to minimise time at court and give them a fresh clear start in the morning;
- j. the child's dates to avoid attending court;
- k. the length of any ABE recording, the best time for the child and the Court to view it (the best time for the child may not be when the recording is viewed by the court);
- l. admissions of as much of the child's evidence as possible in advance; including locations, times, and lay-outs;

m. save in exceptional circumstances, agreement as to i) the proper form and limit of questioning and ii) the identity of the questioner.

15. If a child is to give oral evidence at the hearing the following should occur:

- a. a familiarisation visit by the child to the court before the hearing with a demonstration of special measures, so that the child can make an informed view about their use;
- b. the child should be accompanied and have a known neutral supporter, not directly involved in the case, present during their evidence;
- c. the child should see their ABE interview and/or their existing evidence before giving evidence for the purpose of memory refreshing;
- d. consideration of the child's secure access to the building and suitability of waiting/eating areas so as to ensure there is no possibility of any confrontation with anyone which might cause distress to the child (where facilities are inadequate, use of a remote link from another court or non-court location);
- e. identification of where the child will be located at court and the need for privacy.

16. Where possible the children's solicitor/Cafcass should be deputed to organise these matters.

17. A child should never be questioned directly by a litigant in person who is an alleged perpetrator.

Practical considerations at hearing

18. If the decision has been made that the child should give oral evidence at the hearing the following should occur:

- a. advocates should introduce themselves to the child;
- b. judges and magistrates should ask if the child

- would like to meet them, to help to establish rapport and reinforce advice;
- c. children should be encouraged to let the court know if they have a problem or want a break but cannot be relied upon to do so;
 - d. professionals should be vigilant to identify potential miscommunication;
 - e. the child should be told how the live video link works and who can see who;
 - f. a check should be made (before the child is seated in the TV link room) to ensure that the equipment is working, recordings can be played and that camera angles will not permit the witness to see the Respondents;
 - g. the parties should agree which documents the child will be referred to and ensure they are in the room where the child is situated for ease of access.
- b. use simple common words and phrases;
 - c. repeat names and places frequently;
 - d. ask one short question (one idea) at a time;
 - e. let the child know the subject of the question;
 - f. follow a structured approach, signposting the subject;
 - g. avoid negatives;
 - h. avoid repetition;
 - i. avoid suggestion or leading, including 'tag' questions;
 - j. avoid a criminal or 'Old Bailey' style cross examination;
 - k. avoid 'do you remember' questions;
 - l. avoid restricted choice questions;
 - m. be slow and allow enough time to answer;
 - n. check child's understanding;
 - o. test the evidence not trick the witness;
 - p. take into account and check the child's level of understanding;
 - q. not assume the child understands;
 - r. be alert to literal interpretation;
 - s. take care with times, numbers and frequency;
 - t. avoid asking the child to demonstrate intimate touching on his or her own body (if such a question is essential, an alternative method, such as pointing to a body outline, should be agreed beforehand).

Examination of children

19. If the Court decides a child should give oral evidence, the Court and all parties should take into account the Good Practice Guidance in managing young witness cases and questioning children (part of the NSPCC/ Nuffield Foundation research 'Measuring Up' July 2009 by Joyce Plotnikoff and Richard Woolfson; and the subsequent Progress Report which Guidance has been endorsed by the Judicial Studies Board, the Director of Public Prosecutions, the Criminal Bar Association and the Law Society:

http://www.nspcc.org.uk/Inform/research/findings/measuring_up_guidance_wdf66581.pdf.

20. Examination of the child should take into account the Court of Appeal judgment in *R v Barker* [2010] EWCA Crim 4, para 42, which called for the advocacy to be adapted 'to enable the child to give the best evidence of which he or she is capable' and which questioning should:

- a. be at the child's pace and consistent with their understanding;

Court's overriding duty

21. All advocates have a responsibility to manage the questioning of a child witness fairly. However the ultimate responsibility for ensuring that the child gives the best possible evidence in order to inform the court's decision rests with the tribunal. It should set out its expectations of the advocates and make it clear to the child witness that they can indicate to the court if they feel they are not saying what they want to say or do not understand what is being said to them.

The court must be scrupulous in the attention it gives to the case management and control of the questioning process and should be prepared to intervene if the questioning is inappropriate or unnecessary.

22. These Guidelines will be reviewed periodically. Those involved in family proceedings are invited to contact the Family Justice Council with any relevant comments.

Members of the Working Party

The Rt. Hon. Lord Justice Thorpe (Chair)

Head of International Family Justice for England and Wales

Sue Berelowitz – CEO and Deputy Children's Commissioner, Office of the Children's Commissioner

Katherine Gieve – Partner and Head of the Family Department, Bindmans LLP Solicitors

Ann Haigh – Chair, Nagalro and Children's Guardian

Dr. Brian W. Jacobs for the Royal College of Psychiatrists, Consultant Child and Adolescent Psychiatrist, South London & Maudsley NHS Trust

Jackie Kerr – Strategy and Policy Directorate, CPS

Her Honour Judge Lesley Newton, Circuit Judge Manchester

Joyce Plotnikoff – Independent researcher, Director, Lexicon Limited

Deborah Ramsdale – Assistant Director of Children's Services, Staffordshire

Alison Russell QC – Member, Family Justice Council

Christine Smart – Director of Practice and Strategic Development, Burnside Associates

Alex Verdan QC – Barrister, Mediator, Chambers of Jonathan Cohen QC, 4 Paper Buildings, Temple