President of the Family Division

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PRACTICE GUIDANCE

The Use of Intermediaries, Lay Advocates and Cognitive Assessments in the Family Court

Introduction

1. In any case in which an application is made for a cognitive assessment or for an intermediary or lay advocate assessment, there will be an expectation that the party making the application will have considered this Practice Guidance and be able to provide evidence and reasons in support of the application.

Lay Advocates

2. A lay advocate, whilst neither an intermediary nor a McKenzie Friend, is in a very similar position to that of an intermediary [see *Re C (Lay Advocates) (No 2)* [2020] EWHC 1762 (Fam)]. For the purposes of this guidance, lay advocates are on all fours with intermediaries and where the term 'intermediary' is used it is to be taken to include 'lay advocate'.

Intermediaries

3. The role of an intermediary in family proceedings sits within the range of provisions describing the approach that the court is required to take by Family Procedure Rules 2010 ('FPR 2010'), Part 3A: '*Vulnerable Persons: Participation in Proceedings and Giving Evidence*'. Under Part 3A the court has a duty to consider the vulnerability of parties and witnesses, to consider how a party can participate in the proceedings and to consider how a party or witness can give evidence. In such cases, and where the individual is, or is at risk of being, a victim of domestic abuse, the court must consider whether it is necessary to make one or more 'participation directions' to assist in participation and/or giving evidence [r 3A.6].

4. Advocates should consider how vulnerable parties and witnesses can be supported to give their best evidence and engage with the proceedings. Guidance on working with parties who are neurodiverse should be embedded into day to day professional practice. Support and reasonable adjustments take a wide variety of forms and should be carefully considered with the vulnerable party/witness. This approach will likely reduce the number of cases where an intermediary is considered necessary.

5. A child is automatically a witness whose participation is presumed to be diminished by reason of vulnerability [FPR, r 3A.2(1)]. A young witness' ability to comprehend language, no matter how advanced they appear, is likely to be less than that of an adult witness. A child's vulnerability is likely to be enhanced if they are a younger child, or an older child with mental health difficulties or learning difficulties, or one who is neurodiverse, or affected by trauma or emotional health difficulties.

6. Amongst the measures that a court may direct under Part 3A are those which:

    - Provide for a party or witness to participate in proceedings with the assistance of an intermediary [r 3A.8(1)(d)];
    - Provide for a party or witness to be questioned in court with the assistance of an intermediary [r 3A.8(1)(e)].

7. Whilst they may assist a party or witness to participate more generally in proceedings [FPR, r 3A.8(1)(d)], the primary function of an intermediary, as defined by FPR, r 3A.1, is limited to the process of communicating/explaining questions to a party or witness within the court process, and the communication of such answers that they may give:

    '"an 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.'

8. Advocates should familiarise themselves with the Court of Appeal decision in *Re M (A Child: Intermediaries)* [2025] EWCA Civ 440 where, in particular, it is held that the court will determine whether or not to appoint an intermediary within the framework of FPR 2010, Part 3A and will do so when that is 'necessary to achieve a fair hearing'. Earlier decisions at High Court level suggesting a different test should not be followed.

9. An intermediary is not an expert within FPR Part 25. Applications to instruct an intermediary should be made in accordance with FPR Part 18. The question for the court in considering whether to direct an assessment by, or appointment of, an intermediary is whether that direction or appointment is *'necessary'* to enable a party to participate in proceedings fairly by enhancing their ability to receive and answer questions that may be put to them.

10. FPR Part 3A addresses two distinct issues: whether a party's ability to participate in proceedings is diminished by vulnerability and/or whether a party's or witness' ability to give evidence is diminished by vulnerability. It should be noted that one may exist without the other, or both may be present. Where an intermediary is necessary for the giving of evidence, it may not be necessary for them to be required to attend for the entirety of the hearing.

11. The circumstances of the case may require the court to undertake a more investigative process, by reference to the factors in Rule 3A.7, to determine vulnerability and its nature and to inform the ultimate decision on what, if any, participation directions are necessary to reduce the effect of that vulnerability.

12. Vulnerability covers a wide spectrum. The approach to evaluating whether or not an intermediary should be instructed should follow that set out in paragraph 7 of Lord Justice Peter Jackson's judgment in *Re M*. The mandatory checklist in FPR 2010, r 3A.7 is an essential reference point to ensure that the factors relevant both to the individual and to the proceedings are taken into account. The weight to be given to them is a matter for the court, making a broad and practical assessment.

13. All practitioners working in the area of Family justice should familiarise themselves with the Advocates Gateway[1] and in particular, Toolkit 13[2], which relates to vulnerable witnesses in the Family Court.

Preliminary Assessments

14. In some cases, the court will be able to reach a clear conclusion on vulnerability in which case the court may direct an intermediary assessment. In others the court may find that there is insufficient material to determine whether vulnerability exists. In such cases the court may wish to order an 'intermediary preliminary assessment' to help inform its decision, or to seek further information from those who know the individual. The decision whether to commission an intermediary preliminary assessment is to be taken by the court; a party should not obtain and file a preliminary assessment report without the prior leave of the court.

15. When framing the direction for an intermediary assessment the court should narrow the remit to that which is necessary for the hearing.

Cognitive Assessments

16. A cognitive assessment is expert evidence and is governed by FPR Part 25. The instruction of an expert to conduct a cognitive assessment will only be granted if it is 'necessary' to resolve proceedings justly, pursuant to FPR, r 25.4(3).

17. In addition, if used to justify an assessment by an intermediary, any such cognitive assessment **must**:

    (a) provide evidence that the use of an intermediary is necessary to enable the party to participate in the proceedings fairly;
    (b) provide reasons, and evidence in support, to explain why fair participation could not be achieved by alternative means, for example, by the court applying the principles set out in the Advocates Gateway;

[1] https://www.theadvocatesgateway.org
[2] https://www.theadvocatesgateway.org/_files/ugd/1074f0_48a0c6b6fca942fc819255e4104ac9de.pdf

(c) when answering those questions, an assessment must consider the party's participation specifically at each stage of the proceedings;
    i. case management hearings,
    ii. conferences/taking instructions,
    iii. giving evidence at a contested hearing.

18. An assessment by an intermediary should normally be directed where there is a cognitive assessment supporting the use of an intermediary as being necessary to enable the party to engage with the proceedings fairly.

Conclusion

19. The decision to appoint an intermediary is always one for the judge. The conclusions of either a cognitive assessment and/or an intermediary assessment, whilst informative, are not definitive on this issue.

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