

## Like ducks to water? Intermediaries for vulnerable witnesses and parties

Penny Cooper, Chair of The Advocate's Gateway, Hon Visiting Professor (City University London), Academic Associate at 39 Essex Chambers



Penny Cooper is a professor of law and former practising barrister. She researches and publishes on the effective participation of vulnerable witnesses and parties. Penny co-founded and leads 'The Advocate's Gateway'. She devised

the 'ground rules approach' now incorporated into the Criminal Procedure (Amendment) Rules 2015 and trains intermediaries internationally.

### Introduction

In *Re X, Y, Z (Minors)* [2011] EWHC 402 (Fam), Baker J said this:

'The last thirty years have seen a radical reappraisal of the way in which people with a learning disability are treated in society. It is now recognised that they need to be supported and enabled to lead their lives as full members of the community, free from discrimination and prejudice . . . learning disability often goes undetected, with the result that persons with such disabilities are not afforded the help that they need to meet the challenges that modern life poses, particularly in certain areas of life, notably education, the workplace and the family.'

Family practitioners will be well aware of the impact on their clients and witnesses of learning disabilities and other factors, such as age or physical, mental and social disorders. Intermediaries play a major role in advising courts how to make proper adjustments for the vulnerable witness's or party's communication needs.

### 'Should intermediaries be showing us the way?'

That was the question I posed in *Family Law* in 2011 ('Child witnesses in family proceedings: should intermediaries be showing us the way?' [2011] Fam Law 397). How have family courts taken to the use of intermediaries for vulnerable witnesses and parties? There is no empirical research about their use, but a search of family judgments reveals many references to the use of intermediaries in family courts over the last couple of years. Some principles and good practice are emerging which have roots in the criminal justice system. The intermediary role was first established as a result of s 29 of the Youth Justice and Criminal Evidence Act 1999. A pilot scheme was implemented in 2003 and later rolled out across England and Wales.

#### Section 29:

'The function of an intermediary is to communicate –

- (a) to the witness, questions put to the witness, and
- (b) to any person asking such questions, the answers given by the witness in reply to them, and to explain such questions or answers so far as necessary to enable them to be understood by the witness or person in question.'

In crime, the intermediary role is now much broader than suggested by the brief wording of the statute. In 2012, at the 17th Australian Institute of Judicial Administration Conference, Lord Judge (then our Lord Chief Justice) said the intermediary role has delivered 'fresh insights' into the criminal justice system. Now the role is delivering the same in

family justice. In *Newcastle City Council v WM and Others* [2015] EWFC 42, [2016] 1 FLR (forthcoming and reported at [2015] Fam Law 877) Cobb J remarked:

‘The mother has significant communication difficulties, both with understanding and using language . . . [the intermediary report] was clear and practical, providing guidance about how best to manage the case in a way which would optimise the mother’s participation.’ (para [6])

The mother’s intermediary took part in a discussion with the judge and advocates before the final hearing and also attended the final hearing:

‘[The intermediary] performed her role with great skill and discretion . . . Specific ground rules were set for the mother’s evidence, which we all endeavoured conscientiously to observe. Overall, I was satisfied that the mother had been enabled to participate in the process as fully and effectively as could possibly be achieved. I am indebted to the intermediary service for its assistance.’ (paras [7]–[8])

### **An intermediary – neither expert witness nor witness supporter**

The role of the intermediary is to facilitate communication. There is no professional guidance or code of ethics for intermediaries in the family courts but it is tacitly understood that their overriding duty is to the court. Like expert witnesses, they are expected to be impartial; the advice that they give should be the same regardless of who engages them.

Their role is not to provide emotional support though the intermediary may well endeavour to help the witness or party remain calm in order to support communication. A recent criminal appeal demonstrates how the line between intermediary and witness supporter might appear ‘fuzzy’.

‘The second ground of appeal is the conduct of the intermediary . . . defence counsel raised a concern with the judge

which was that the intermediary had been seated next to KC with her arm around her whilst the ABE video was being played. The judge mentioned that before the luncheon adjournment he could see that KC was extremely distressed as the video was being played, so much so that he had been considering stopping the proceedings. He said that the intermediary had worked hard to keep KC calm . . . We have a full transcript of the proceedings whilst KC was giving her evidence. The intermediary appears to us to have been extremely helpful in facilitating communication. There are at least two occasions on which she can be heard speaking to KC, telling her to take time to breathe when she became upset during the giving of her evidence. At the end of the process the judge thanked the intermediary for having been very helpful.’ (*R v Christian* [2015] EWCA Crim 1582, at paras [28]–[30])

The intermediary must not be, and must take care not to appear to be, partisan. Transparency in their role is vital. However with no intermediary scheme in the family court, no regulation, no code of conduct and no procedural guidance, transparency is harder to achieve. In addition there is no clarity over the status of intermediaries’ notes and assessment reports; are they evidence or not?

In criminal cases an intermediary’s assessment notes and subsequent report are not evidence. Different rules and considerations apply in the family courts. The uncertain status of the intermediary assessment in a family case is highlighted by these two anecdotal reports from intermediaries:

Intermediary 1: In family cases I often see a person who is not able to communicate well and who can get angry and frustrated. When properly supported they can follow the hearing calmly. The assessments can be tricky because often the parent does not wish to reveal the extent of their communication difficulties in case this is used as evidence against them. I always

reassure them that my report is not evidence in the case and my role is to help in the courtroom only.

Intermediary 2: The local authority solicitor wrote to me and explained the family court judge had ordered that I disclose my notes and report from the criminal case. I do not know what use the family court is going to make of these.

### Applications and eligibility for an intermediary in the family court

At the moment each family judge follows their own course when determining an application for the use of an intermediary. Recently draft family procedure rules (Part 3A: Children and Vulnerable Persons: Participation in Proceedings and Giving Evidence) were the subject of a consultation.

A scheme of ‘measures’ is proposed including the power to ‘provide for a party or witness to be questioned in court with the assistance of an intermediary’ (draft Rule 3A.7). The court would need to be satisfied that the ‘quality of evidence given by a party or witness is likely to be diminished’. Before ordering a measure the court would have regard to a lengthy list of matters including ‘mental disorder’ or ‘significant impairment of intelligence or social functioning’, ‘physical disability’, ‘physical disorder’, ‘medical treatment’ or ‘age’ of the witness or party (draft rules 3A.5 (1) and 3A.6). The outcome of the consultation is awaited.

### Finding and funding an intermediary for a family case

In criminal cases the Witness Intermediary Team at the National Crime Agency provides a matching service using a database of specially trained Registered Intermediaries. There is nothing comparable for family cases. The intermediary funding confusion was clarified by the President in 2015:

‘The cost of funding an intermediary in court properly falls on Her Majesty’s Courts and Tribunals Service because, as the LAA has correctly pointed out, an

intermediary is not a form of “representation” but a mechanism to enable the litigant to communicate effectively with the court, and thus analogous to translation, so should therefore be funded by the court.’ (*Re D (Non-Availability of Legal Aid) (No 2)*, [2015] 1 FLR 1247, at para [17], subsequently approved in *Re K and H (Private Law: Public Funding)* [2015] EWCA Civ 543, [2016] 1 FLR (forthcoming and reported at [2015] Fam Law 778)

As Charles Geekie QC pointed out at The Advocate’s Gateway International Conference in June 2015, this still ‘leaves in dispute the issue of the funding of intermediaries for work done in supporting a litigant other than at court.’

*Re D* returned to court in November and December of 2015 and was the subject of the President’s first judgment of 2016. In it he unreservedly commended ‘to every family judge, to every local authority and to every family justice professional in this jurisdiction’ the words Gillen J (as he then was) about cases where parents have a learning disability (see *Re G and A (Care Order: Freeing Order: Parents with a Learning Disability)* [2006] NIFam 8). The President also said this – and notably he said this about the assistance provided by the intermediaries appointed to facilitate communication with the parents:

‘It is no reflection at all on the legal teams if I emphasise that the assistance of the intermediaries was not merely invaluable but, in my judgment, essential, if justice was to be done, as in the event I am confident it was. Without the help of their lawyers and their intermediaries, there is no way in which these two parents could have had a fair hearing.’ (*Re D (No 3)* [2016] EWFC 1, [2016] 1 FLR (forthcoming), at para [20])

### Fair hearings without intermediaries?

Intermediaries are in short supply with demand outstripping supply at present. In

the Court of Appeal in *Re M* [2012] EWCA Civ 1905, Thorpe LJ cautioned against an approach that could be summarised as ‘let’s all try and make it easy for the witness and see how we get on without an intermediary’. In *Re M* expert evidence was that the father had a ‘very low IQ and limited abilities’. An expert concluded that he ‘should be offered a ‘supporter’ whilst he is in the witness box who can help him to understand any difficult questions and encourage him to provide accurate answers’ and as ‘a very vulnerable man and in order to help him to give oral evidence it will be essential that he be provided with an advocate or intermediary in order to help him to negotiate and understand the court processes and proceedings.’

On the eve of the hearing the judge refused an application by the father’s counsel for an adjournment because no intermediary, no screen and no video-link were available. The hearing went ahead. The Court of Appeal noted the ‘unsatisfactory makeshift’ arrangements put in place and emphasised that a litigant must receive a fair trial and must be ‘guaranteed what support is necessary to compensate for disability’.

However even when no intermediary is available, it may be possible to have a fair hearing so long as proper adjustments are discussed, planned and enforced by the judge. For instance see *R v Cox* [2012] EWCA Crim 549 and more recently Russell J in the family court *WSCC v H and Others (Children) (Care Proceedings: Brain Injury)* [2015] EWHC 2439 (Fam):

‘On the first day of the fact finding trial I heard a ground rules hearing to decide how the case could progress without the assistance of an intermediary taking into account the recommendations which had been made by [the expert witness]. It was agreed that the trial could go ahead with frequent breaks to allow M to have time to consider the evidence broken up into shorter more manageable sections. There were to be breaks every 30 minutes or more often if needed. M’s evidence was to be similarly divided; she was to be asked short questions and cross-examined by

one counsel only, who would agree the area of questioning with other counsel. Counsel for the local authority undertook this task with the assistance of the guidance provide by the ATC in their toolkit for family proceedings. As there were seven files of evidence the documents that M was to be referred to during her evidence were placed in one file; in addition it was agreed that she would be supported by someone she knew from her solicitor’s firm to find pages or if she needed any other assistance.’ (para [7])

This family judgment builds on principles from the Court of Appeal Criminal Division:

- ground rules hearings for vulnerable witnesses and parties even when there is no intermediary (*R v Lubemba and R v JP* [2014] EWCA Crim 2064 and see now Criminal Procedure Rules (2015) at 3.9(7) on ground rules hearing procedure);
- short (and simple) questions because advocates must adapt their communication to the witness not the other way around (*R v B* [2010] EWCA Crim 4);
- counsel taking a collaborative approach when planning cross-examination (*R v FA* [2015] EWCA Crim 209);
- no unnecessary repetition of at cross-examination when there are multiple parties (*R v Sandor Jonas* [2015] EWCA Crim 562);
- use of guidance contained in the toolkits of The Advocate’s Gateway (*R v Lubemba and R v JP* [2014] EWCA Crim 2064, *R v RL* [2015] EWCA Crim 1215).

### Intermediaries and social workers

Adjusting to the communication needs of vulnerable witnesses and parties is a requirement (not an option) for a fair hearing. It is therefore not surprising that a review of recent case law indicates suggests family courts have taken to intermediaries like ducks to water. But a systematic approach is missing. In 2011 Theis J said ‘although the use of intermediaries has been

considered at the highest level no scheme has yet been made available for family cases' (*Re X (A Child: Evidence)* [2011] EWHC 3401 (Fam), [2012] 2 FLR 456, at para [42]). This is still the case and it is a major concern.

In 2003, before intermediaries even existed as a profession or had started to operate in the justice system, Munby J (as he then was) said in *Re G (Care: Challenge to Local Authority's Decision)* [2003] EWHC 551 (Fam), [2003] 2 FLR 42:

'Where for whatever reason – whether physical or mental disability, illiteracy or the fact that English is not their mother tongue – parents cannot readily understand the written word, the local authority must take whatever ameliorative steps are necessary to ensure that the parents are not for that reason prevented from playing a full and informed part in the decision-making process.' (para [59])

Are local authority social workers sufficiently well trained to identify when their clients have special communication needs? If a social worker needed to use an intermediary to facilitate communication with a vulnerable person (for example, during a core assessment, at a case conference, when discussing a voluntary arrangement for placing a child in foster care accommodation, for a capacity assessment or at a best interests discussion, etc) how would the social worker find the right intermediary and who would fund their use? These are social work practice issues of fundamental importance with the most serious of legal implications not least because a 'supposed inability of parents to change might itself be an artefact of professionals ineffectiveness in engaging with the parents in appropriate terms.' (Gillen J in *Re G and A (Care Order: Freeing Order: Parents with a Learning Disability)* [2006] NIFam 8, para [5(d)(6)]).