[2024] EWHC 906 (Fam)

-

Case No: SD24C50069

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

The Strand
London
WC2A 2LL

Date: 18/04/2024

Before:

THE HONOURABLE MR JUSTICE WILLIAMS

- - - - - - - - - - - - - - - - - - - -

IN THE MATTER OF: X and Y
BETWEEN:

A LOCAL AUTHORITY	Applicant
-and-	
A	1st Respondent
-and-	
B	2nd Respondent
-and-	
X and Y (Through their 16.4 Children's Guardian)	3rd and 4th Respondents

Re X & Y (Intermediary: Practice and Procedure)

- -

Caroline Harris for the **Local Authority**
Sara Taite for the **Mother A 1st Respondent**
Gemma Bower for the **Father B 2nd Respondent**
Delia Minoprio for the **Children 3rd&4th Respondents**

Hearing date: 12 April 2024

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

.....

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Williams:

1. I am dealing with care proceedings relating to 2 children X & Y brought by C Local Authority. Their mother is A, and their father is B. The children are represented by a Guardian. This judgment addresses only one procedural aspect of the case.

2. An application was made on behalf of the Mother on 12th April 2024 on form C2 for a '*Part 25 for an Intermediary Assessment'*. The statement in support says

   The Respondent Mother has a diagnosis of PTSD and ADHD and requires support of an intermediary throughout proceedings. The personal and intimate nature of proceedings, as well as the client's dual diagnoses, may impact the client's ability to understand, focus and digest documents and information throughout the hearings, and proceedings more generally but a specialist assessment is required to identify these issues and to ensure the Mother's Article 6 rights are protected and she is able to give her best evidence.

3. The Statement in Support identified 3 possible 'experts' to undertake the assessment, sought a direction that the mother's solicitors be the lead but that the instruction be a shared/joint one and an order that HMCTS fund the intermediary assessment. The Statement identifies that

   "The ability to instruct an intermediary has been removed by the 2018 Standard Civil Contract Specification 2018 paragraph 4.28 and 6.61 therefore such instruction would fall outside of the scope of the certificate

4. I was informed that all parties were agreed on the issue of the Intermediary assessment. I indicated that I did not agree and that there were a number of issues which seemed to me to present an obstacle to the determination of the application. I shall address some of these below. Following brief submissions counsel for the mother indicated that she did not pursue the application today but sought to adjourn it generally to be restored if an evidential base for it was established. I allowed that adjournment.

5. I am delivering this judgment because this case seems to me to illustrate some of the issues which are emerging in the Family Courts in relation to the use of intermediaries. An intermediary can be an essential component in what the court provides to a party or witness to enable them to participate fairly in proceedings or in giving their best evidence and my own experience demonstrates their value in appropriate cases. The issue however is where is it appropriate to direct the use of an intermediary as they are not to be used as some sort of safety net or security blanket by lawyers or the courts but only where their use is necessary. Like other court funded resources (whether judicial or otherwise) they are a limited resource and a resource which comes with significant costs. Their use is governed by the procedural regime established in FPR 2010 r.3A and PD3AA.

<u>The Legal Framework</u>

6. The position in respect of 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 but they are incorporated into the FPR by inclusion in FPR 3A and PD3AA both sub-headed Vulnerable Persons: participation in Proceedings and Giving Evidence

7. FPR 3A.8 (1) identifies 2 of the measures that are referred to in FPR3A as 'participation directions' as those which

   i) provide for a party or witness to participate in proceedings with the assistance of an intermediary

   ii) provide for a party or witness to be questioned in court with the assistance of an intermediary.

8. FPR r3A.1 defines an intermediary as follows:

   "... [I]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…"

   That identifies a very narrow remit for an intermediary. Whilst I do not think (albeit without hearing full argument) that the definition should necessarily be interpreted as meaning an intermediary can **only** perform those functions it does give an indication of what their primary function is. Thus, assisting a party during a hearing to understand the evidence given by others or assisting a party to read papers and to give instructions is a function not identified in the rules and one which requires to be evidenced. Due to the nature of how this application was disposed of I did not hear full argument on the remit of an intermediary and it may well be that this will require more detailed consideration on another day.

9. Previous cases which described an intermediary as an expert have been superseded by the implementation of FPR3A. However there is still a forensic link between the regime which applies to the appointment of experts because the approach mandated by FPR 3A that the court must take to making a participation direction is whether it is **"necessary to make the participation direction": FPR 3A.2A(3) and 3A..4(1) and 3A.5(1)**.. In the context of the expert, Munby LJ said in Re H-L (Expert Evidence: Test for Permission) [2013] 2 FLR 1434 that necessary falls: "somewhere between indispensable on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand, having 'the connotation of the imperative, what is demanded rather than what is

merely optional or reasonable or desirable. Whether that means that 'nothing else will do' would require consideration of the other means by which fair participation can be achieved.

10. Thus, the test remains a strict one although what is necessary will bear some correlation to the measure proposed The necessity of a direction for a screen or a break is likely to be much easier to demonstrate than a direction for an intermediary. Ultimately the court is engaged in an evaluation of what participation directions are necessary to ensure that a 'fair hearing' is achieved either in relation to a witness' evidence or to a party's participation in the proceedings. The court will have regard to 3A.7(a)-(m) which includes many factors including whether the party or witness suffers from a mental disorder or otherwise has a significant impairment of intelligence or social functioning, the nature and extent of information before the court, whether a matter is contentious, any characteristic of the party or witness which is relevant, the measures available to the court and the cost. In the South Eastern Circuit (excluding London) the available figures show that HMCTS expenditure on intermediaries has increased from £1.065m in 2019/20 to £3.6m in the first 9 months of 2023/24. That is a considerable sum and the instruction of an intermediary and their deployment inevitably also adds to the timeframe for the determination of a case. I emphasise where necessary they are invaluable to the party or witness and their legal team and to the court process but the parties and the court should consider carefully in each case whether the requirements set out in the FPR are met.

11. In considering whether it is necessary the court will wish to consider what other steps can be taken to ensure fair participation. FPR PD3AA identifies a wide range of steps which can support a party participating or giving evidence short of the instruction of an intermediary. It should not be the default position that a witness or party who is identified as vulnerable and needing measures to be taken to support their participation or giving of evidence requires an intermediary. Only if their fair participation cannot be achieved by other measures will an intermediary be necessary. A spectrum exists. The other measures may include those identified in PD3AA para 4.1 and 2 and para 5.3-5.7. A major component of the role of Legal representatives (solicitor and counsel) is to ensure their client understands the proceedings and their role in them, putting their views to the court, ensuring their client is able to give them instructions in advance of court and in court and enabling them to attend court without significant distress. Only if the court is satisfied that the usual support a legal team (adopting the use of the tools available) and other measures available to the court will not enable the party to participate fairly will it be necessary to provide for an intermediary. The tailoring of language and the use of the tools identified in the Advocates Gateway will often be enough to enable fair participation. Only in cases where the court is satisfied that a party or witness cannot give evidence fairly even with the adoption of all the other measures available (see PD3AA 5.3-7 and the Advocates Toolkit Vulnerable Witnesses and Parties in the Family Courts) will it be necessary to appoint an intermediary.

12. Self-evidently in some cases it will be necessary for an intermediary assessment to be carried out and for an intermediary to be appointed. They may be required to

    i) Support the party or witness giving evidence,

    ii) Support a party to participate fairly by attending for other parts of the hearing.

The evidence available to the court from the application or an intermediary report will guide the court on what is necessary. The fact that a party or witness will be assisted by the support of an intermediary will not be likely to be sufficient; it would not meet the 'necessary' threshold. The court must be satisfied that an intermediary support is necessary to enable the party to participate fairly and that the other participation directions which can be put in place short of an intermediary will not achieve that end.

13. Applications for Participation Directions must be made by Part 18 applications. [3A.10(3)] and the application must identify the matters set out in PD3AA 6.1. The court can make directions of its own initiative.

14. In Re N [2019] EWCA Civ 1997 the Court of Appeal concluded that the findings of a cognitive assessment and intermediary report obtained after a Fact-Finding hearing rendered the FFH unfair. The assistance of an intermediary was considered necessary where a psychologist had found the party's full scale IQ was in the borderline range of 70 (i.e. close to learning disability) and in the extremely low range of intellectual ability , but with significant variability and significant difficulty in her ability to understand and express herself verbally evident in conversation and assessment which led to a danger that the reliability of her verbal evidence would be significantly reduced. An intermediary subsequently recommended the mother be assisted by an intermediary. That led the Court of Appeal to conclude that the mother should have had an intermediary for all stages of the court process. The level of difficulty in the mothers functioning was clearly very significant and the court concluded the absence of an intermediary meant the mother did not receive a fair trial. In Re S (***(Vulnerable Party: Fairness of Proceedings)*** [2022] EWCA Civ 8 the court concluded that the emergence after a hearing and shortly before the appeal of psychological and intermediary evidence rendered the procedure irregular and the finding unjust. No view was expressed on the extent to which participation directions involving an intermediary would have been required.

15. The Family Court and the Court of Appeal have not given guidance on the circumstances in which an intermediary must be appointed, and the extent of their role save for the decision of Lieven J I refer to below. In the criminal justice system, the Criminal Practice Directions 2015 gave detailed consideration to the appointment of intermediaries, including steps to assist defendants in their effective participation in the proceedings and organisations like the annual Grange Conference co-organised by Prof Keith Rix and Dr James Briscoe have considered the role of intermediaries for some time.

16. In West Northamptonshire Council (acting via Northamptonshire Children's Trust -v- KA and NH (Intermediaries) 2024 EWHC 79 (Fam) Lieven J considered the main criminal authority on the issue; *R v Thomas (Dean)* [2020] EWCA Crim 117. In that case the Court of Appeal gave detailed consideration to the appointment of intermediaries and how they should be used. Although there are obvious and important differences between Family Court cases and criminal cases the reasons for the appointment of intermediaries and their function in assisting vulnerable parties or witnesses to participate or give their best evidence are essentially the same. Intermediaries are appointed, whether in criminal or family cases, to ensure that the individual in question can participate in the proceedings so that their fair trial rights are protected. Lieven J identified that at [36] to [42] the Court of Appeal went through the relevant considerations for the appointment of an intermediary, and the alternative

strategies that might be adopted, to ensure that a defendant's ability to properly engage in proceedings and Article 6 rights were protected:

"36. As set out above, in the Practice Direction it is observed that the appointment of an intermediary for the defendant's evidence will be a rare occurrence and that it will be exceptionally rare for a whole trial order to be made. That projection as to frequency serves as an important reminder to judges that intermediaries are not to be appointed on a "just-in-case" basis or because the report by the intermediary, the psychologist or the psychiatrist has failed to provide the judge with a proper analysis of a vulnerable defendant's needs in the context of the particular circumstances of the trial to come. These are fact-sensitive decisions that call for not only an assessment of the relevant circumstances of the defendant, but also the circumstances of the particular trial. Put otherwise, any difficulty experienced by the defendant must be considered in the context of the actual proceedings which he or she faces.
37. Criminal cases vary infinitely in factual complexity, legal and procedural difficulty, and length. Intermediaries should not be appointed as a matter of routine trial management, but instead because there are compelling reasons for taking this step, it being clear that all other adaptations to the trial process will not sufficiently meet the defendant's needs to ensure he or she can effectively participate in the trial. The assessment in the Practice Direction as to the number of instances when this is likely to occur, albeit an important reminder to the judge to apply the most careful scrutiny to these applications, cannot derogate from the need to appoint an intermediary as identified by the Lord Chief Justice in Grant Murray "when necessary".
38. It follows that these applications need to be addressed carefully, with sensitivity and with caution to ensure the defendant's effective participation by whatever adaptation of the usual arrangements is required. The recommendation by one or more experts that an intermediary should be appointed is not determinative of this issue. This is a question for the judge to resolve, who is best placed to understand what is required in order to ensure the accused is fairly tried. The guidance given in R v Cox [2012] EWCA Crim 549, [2012] 2 Cr.App.R 6 at page 63 is important in this regard:
i. "29. We immediately acknowledge the valuable contribution made to the administration of justice by the use of intermediaries in appropriate cases. We recognise that there are occasions when the use of an intermediary would improve the trial process. That, however, is far from saying that whenever the process would be improved by the availability of an intermediary, it is mandatory for an intermediary to be made available. It can, after all, sometimes be overlooked that as part of their general responsibilities judges are expected to deal with specific communication problems faced by any defendant or any individual witness (whether a witness for the prosecution or the defence) as part and parcel of their ordinary control of the judicial process. When necessary, the processes have to be adapted to ensure that a particular individual is not disadvantaged as a result of personal difficulties, whatever form they may take. In short, the overall responsibility of the trial judge for the fairness of the trial has not been altered because of the increased availability of intermediaries, or indeed the wide band of possible special measures now enshrined in statute.
ii. 30. In the context of a defendant with communication problems, when every sensible step taken to identify an available intermediary has been unsuccessful, the next stage is not for the proceedings to be stayed, which in a case like the present

would represent a gross unfairness to the complainant, but for the judge to make an informed assessment of whether the absence of an intermediary would make the proposed trial an unfair trial. It would, in fact, be a most unusual case for a defendant who is fit to plead to be found to be so disadvantaged by his condition that a properly brought prosecution would have to be stayed. That would be an unjust outcome where, on the face of the evidence, a genuine complaint has properly been brought against the defendant. If the question were to arise, this court would have to re-examine whether the principles relating to fitness to plead may require reconsideration."

39. In this regard it is important to bear in mind the judgment of the Vice President in R v Biddle [2019] EWCA Crim 86, [2019] 2 Cr.App.R 2 :

i. "39. The principles, as set out in Rashid and the Practice Direction, are clear: the intermediary can make a recommendation based on the material they have considered but it is just that — a recommendation. Ultimately it is for the trial judge to decide, having considered all the material, whether and to what extent an intermediary is necessary […]" [my added emphasis]

40. In Cox the court gave a helpful guide of the extent to which the court proceedings can be modified to ensure effective participation if an intermediary is not appointed, or none is available:

i. "21. […] [The judge] underlined …the word 'effectively'. He examined 'a complete raft of procedural modifications to the ordinary trial process' which would be appropriate in the situation which now obtained. These included short periods of evidence, followed by twenty-minute breaks to enable the appellant to relax and his counsel to summarise the evidence for him and to take further instructions. The evidence would be adduced by means of very simply phrased questions. Witnesses would be asked to express their answers in short sentences. The tape-recordings of the interview should be played, partly to accustom the jury to the appellant's patterns of speech, and also to give the clearest possible indication of his defence to the charge. For this purpose, it was an agreed fact before the jury that 'Anthony Cox has complex learning difficulties. He could understand simple language and pay attention for short periods'. This was a carefully crafted admission to ensure that proper allowances would be made for the difficulties facing the appellant without creating any risk that the jury might reflect on the evidence in the context of the question of whether or not the appellant was potentially dangerous."

41. We would stress that this passage from Cox remains an excellent rehearsal of at least some of the steps that can be taken to accommodate a vulnerable defendant's needs without having to resort to appointing an intermediary.

42. In R v Rashid Yahya [2017] EWCA Crim 2, [2017] 1 Cr.App.R 25 , the court similarly emphasised the need for the advocates to ensure that the case is presented in a readily comprehensible way, particularly as to how the evidence is elicited. The competence expected of the advocates includes:

i. "80. […] the ability to ask questions without using tag questions, by using short and simple sentences, by using easy to understand language, by ensuring that questions and sentences were grammatically simple, by using open ended prompts to elicit further information and by avoiding the use of tone of voice to imply an answer […]"'

17. Lieven J said the following principles can be extracted from this passage:

i) *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 [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.*

ii) *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];*

iii) *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];*

iv) *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];*

v) *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];*

vi) *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];*

vii) *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.*

18. She went on to say

"All these points are directly applicable to the Family Court. Counsel submitted that there was a need for intermediaries because relevant parties often did not understand the proceedings and the language that was being used. However, the first and normal approach to this difficulty 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. All advocates in cases involving vulnerable parties or witnesses should be familiar with the Advocates Gateway and the advice on how to help vulnerable parties understand and participate in the proceedings. I am reminded of the words of Hallett LJ in R v Lubemba [2014] EWCA Crim 2064 at [45] "Advocates must adapt to the witness, not the other way round". A critical aspect of this is for cross-examination to be in short focused questions without long and complicated preambles and the use of complex language. Equally, it is for the lawyers to explain the process to their clients outside court, in language that they are likely to understand.

Finally, it is the role of the judge to consider whether the appointment of an intermediary is justified. It may often be the case that all the parties support the appointment, because it will make the hearing easier, but that is not the test the judge needs to apply.

19. Save for observing that the test in FPR 3A is "necessary" rather than "compelling" I endorse those observations which are entirely consistent with what FPR3A and PD3AA identify. In every case where the court is considering participation directions there will be a range of measures the court should consider and may feel it necessary to adopt to promote fair participation or the giving of their best evidence. The spectrum of vulnerability will self-evidently be very wide. Only towards the far end of the spectrum will be the cases where an intermediary is necessary for the giving of evidence. Only at the very far end will be cases where an intermediary is required for the whole of a hearing and only in the very rarest cases is an intermediary likely to be necessary to enable the party to give instructions in advance of a hearing. Of course, every case will ultimately depend on the evidence before the court, and it is for the experienced family judges to determine what is required to make the process fair.

20. As the rules make clear decisions on the use of an intermediary require evidence to establish that their use is necessary. This evidence may emerge from an expert report which the court has given permission for – for instance a cognitive assessment by a psychologist. It may emerge from the medical history of the party or witness which might confirm they have a learning disability or difficulty, or a condition or disorder which impacts on their ability to participate but which falls short of rendering them incapacitous to conduct proceedings within the meaning of the MCA 2005. There may be evidence from their legal team that even by deployment of all their skills as a solicitor and counsel using the Advocates Toolkits, they do not consider the party or witness can participate fairly without an intermediary. I use these only as examples rather than any attempt to define what evidence would justify an intermediary assessment. An intermediary assessment in most cases will not be a Part 25 Expert appointment but rather a case management direction by the court of a similar nature to the direction for the appointment of an interpreter. HMCTS have contractual arrangements with providers of interpretation and intermediary services to fulfil the courts duty to enable a party or witness to participate. Usually, HMCTS will use their contracted provider but the court may direct an alternative or HMCTS may use an alternative.

21. Once the Intermediary Assessment is obtained that together with the other evidence which caused the court to commission the Intermediary Assessment will enable the court at a Ground Rules hearing to consider what 'participation directions' are necessary. As noted above the fact that an Intermediary Assessment opines that a party or witness will be assisted does not make it necessary to appoint an intermediary. Nor a similar opinion from a court appointed expert although clearly the court will give considerable weight to such opinions in reaching its own decision on what is necessary having regard to the whole range of directions which can be made. In some cases, a combination of regular breaks, the use of focussed and simple language, styles of questions, identification of 'Timelines' to be followed in questioning, or subject matters will be sufficient. In others an intermediary may be required to assist the party in giving their evidence. In rare cases an intermediary may be necessary to assist the party understand the evidence of others. In very rare cases

an intermediary may be necessary to enable the party to consider the written evidence and to give instructions.

22. Although the application was adjourned the following features emerge which would be relevant in this case.

i) The application was made for a Part 25 appointment of an expert to carry out the assessment. That is not the appropriate application.

ii) The basis for the application was a simple assertion that the party had a diagnosis with no supporting evidence of the diagnosis or the impact on the party of that diagnosis in terms of her ability to participate.

iii) There is currently no explanation of why on the specific facts of this case it is needed. In that regard

a) Previous proceedings of various forms have taken place and no issue appears to have been identified in the hearings or reports going back several years in relation to these proceedings and earlier proceedings relating to other children even before.

b) There is little in the current expert, Social worker or Independent Social Worker reports which suggest a significant difficulty, although it is true that they recognise the possible relevance of a diagnosis of ADHD or PTSD. The psychologist (who the mother did not meet with as and when required and so resulted in an incomplete assessment) said

I am not certain that A has a clear understanding of how important this assessment and other court assessments are. This is not because I feel she is not capable of understanding, but more because she is avoiding discussions with professionals regarding the purpose of the court process.

c) In a previous Position Statement filed by a previous legal team it was said

The Mother's instructions are clear; she fully appreciates the importance of engaging with the Guardian and the seriousness of these proceedings. It is hoped that a date can be agreed at the hearing for the Guardian to meet with X, so all have this information upon leaving court

d) Her new solicitors said

In addition, the Mother reports symptoms of possible ADHD which makes for additional complications in respect of the taking of instructions and the fairness of the proceedings moving forward without consideration of special measures.

e) The Threshold Response which had been drafted and the mothers demeanour in court in interjecting to identify errors in counsels submissions or to express her disagreement did not suggest a serious issue with understanding or participation.

23. It has been agreed that the Mother will file the ADHD diagnosis she says she has received. It seems likely a psychiatric expert will be authorised to assess the mother given these issues and her long-term problems with drug and alcohol misuse. The mothers team and this court will, should evidence emerge which suggests the necessity for participation directions including an intermediary, keep the issue under review. As matters currently stand the application is adjourned.

24. That is my judgment.