

The Advocate's Gateway

This document sets out a summary of the relevant law and procedure for advocates working with vulnerable witnesses in the family courts. For a more detailed guide, practitioners should consult the full 'Toolkit for Vulnerable Witnesses in the Family Courts'. All references to paragraph numbers below are to that associated toolkit.

Practitioners should also refer to the recent guidance of the President of the Family Division: 'The use of Intermediaries, Lay Advocates and Cognitive Assessments in the Family Court'
23 January 2025.

The Advocate's Gateway is the owner or the licensee of all copyright in this document. All rights reserved. You may read, print one copy, or download this document for your own personal use. You may not make commercial use of this document, adapt, or copy it without our permission. Every effort has been made to acknowledge and obtain permission to use any content that may be the material of third parties. We will be glad to rectify any omissions at the earliest opportunity. Use of this Toolkit is subject to our terms of use.

The Advocate's Gateway toolkits aim to support the early identification of vulnerability in witnesses and defendants and the making of reasonable adjustments so that the justice system is fair. Effective communication is essential in the legal process. The handling and questioning of vulnerable witnesses and defendants are specialist skills.

These toolkits draw on the expertise of a wide range of professionals and represent best practice guidance; they are not legal advice and should not be construed as such.

What are Participation Directions?

1. The Court can direct that a party or witness:
 - Be prevented from seeing another party or witness;
 - Give evidence or attend by live link;
 - Use a device to help them communicate;
 - Prescribing the manner in which cross-examination is to be conducted;
 - Provide for the use of an intermediary.
2. It is important to note the distinction drawn by FPR 3A.8(1)(d) which deals with participation in proceedings and FPR 3A.9(1)(e) which deals with giving evidence. A party might require assistance with one of these aspects of the Court process but not the other. (Para 5.4)
3. A Ground Rules Hearing is necessary for all proceedings that have an intermediary, however this will often feature as a part of a hearing which may be listed to deal with other matters of case management.

Why may a party need an intermediary?

1. FPR 3A.7 (a)-(f) sets out the potential factors that might require participation directions such as intermediaries. Common examples of such issues include:
 - Psychological difficulties (Para 2.21)
 - Cognitive difficulties e.g. low IQ, learning difficulties or difficulties in reading
 - Age e.g. approach to children giving evidence (Para 1.36 onwards)
 - Physical disability e.g. a condition which results in pain while sitting or standing in one place for longer periods
 - Concerns arising from abuse (FPR3A.7(d))

What is the function of an intermediary?

1. As per FPR 3A.1 an intermediary means a person whose function is to:
 - communicate questions put to a witness or party;
 - communicate to any person asking such questions the answers given by the witness or party in reply to them; and
 - 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.
2. It will often be appropriate to have a vulnerable party assessed to better understand what their needs might be. If an intermediary is being sought, practitioners should make sure that any such assessment addresses why fair participation could not be achieved by alternative directions.

What is the test for obtaining an intermediary?

1. The relevant procedure rules are set out in FPR 3A and PD 3AA.
2. The FPR makes a distinction between 'vulnerable' witnesses and 'protected parties'. The matters that the Court must consider when evaluating vulnerability are set out at r 3A.7 (a)–(j), (m). Guidance about vulnerability is provided in PD3AA.
3. The Court will ask itself three questions:
 - Whether the person is vulnerable as per FPR 3A.7 and 3A.3
 - whether or not the ability of a person to give evidence or participate in proceedings will be diminished as a result of their vulnerability, as per FPR rules 3A.4 and 3A.7 and PD3AA paragraph 1.2;
 - whether an intermediary and/or other practice directions are necessary to enable that person to give evidence or participate in proceedings, as per FPR rules 3A.5 and 3A.7 and PD3AA paragraphs 1.2 and 5.2.
2. Practitioners need to be aware that, as per FPR 3A.2A(1), victims of domestic violence are automatically deemed vulnerable for the purposes of participation directions (Para 1.20).
3. Where the Court has concluded that the proceedings do involve a vulnerable person the order must set out the reasons why any participation directions have or have not been made – FPR 3A.9.
4. However, the use of an intermediary should not be a simple box ticking exercise and the Court must strike a balance between competing interests e.g. obtaining best evidence from a witness and other parties' right to a fair trial (*Re J (A Child) [2014] EWCA Civ 875*) (Para 4.9 onwards).

What practical guidance is there?

1. Practitioners will be assisted by considering the **Practice Guidance: The Use of Intermediaries, Lay Advocates and Cognitive Assessments in the Family Court**, issued in January 2025.
2. However the Court of Appeal in *Re M (A Child)*, paragraph 50, expressed reservations about the guidance in paragraphs 10 and 12 which refer to rarity in the use of intermediaries.
3. Similar reservations were expressed about paragraph 36 and the last sentence in paragraph 37 of the **Local Practice Note: Adhering to the Public Law Outline in London**, issued 28 November 2024.
4. The test for the use of intermediaries is 'necessity'.

What are the key cases on intermediaries?

- ***Re M (a Child: Intermediaries) [2025] EWCA Civ 440***
— the only Court of Appeal decision on this matter and thus the leading case (at the time of publishing). It summarises early cases and the correct approach to vulnerable participants and intermediaries.
- ***K v L [2021] EWHC 3225 (Fam)*** - Decision made at fact finding hearing was overturned where the mother was a vulnerable witness but no special measures had been in place.
- ***Re X (Domestic Abuse: Participation Directions: Obligation to Consider) [2024] EWFC 121(B)***
- ***X and Y (Intermediary: Practice and Procedure) [2024] EWHC 906 (Fam)*** – note that the approach taken in this case has been questioned in ***Re M (a child: Intermediaries) [2025] EWCA Civ 440***.
- ***Oxford CC -v- A Mother (Intermediary Appointment Refused) [2024] EWFC 161***
- ***Re M (Factfinding: appeal) [2021] EWHC 3225 (Fam) at [60]–[62]*** - The Court's obligation to consider vulnerability (regardless of whether the party in question raises it).
- ***Re M (A Child) (Private Law Children Proceedings: Case Management: Intimate Images) [2022] EWHC 986 (Fam)*** - an example of a case where the Court made a range of different participation directions. See also para 77 where Knowles J provides useful guidelines for cases involving intimate images.

How do I apply for an intermediary?

1. Applications for an intermediary under FPR18 must set out
 - why the party or witness would benefit from assistance;
 - the measure(s) that would be likely to maximise as far as practicable the quality of that evidence;
 - why the measure(s) sought would be likely to improve the person's ability to participate in the proceedings; and
 - why the measure(s) sought would be likely to improve the quality of the person's evidence
2. Litigants in Person are still expected to make formal application
3. Applications must be made as early as possible in proceedings. There is an active duty on advocates to identify any potentially vulnerable witness at the earliest possible stage (FPR1.1(2), 1.2, 1.4 and 3A)
4. As per Jackson LJ at para 7(6) of ***Re M [2025] EWCA Civ 440***, any application "must have an evidential basis" and although this will commonly take the form of a cognitive report, the Court can also "take account of submissions on behalf of the vulnerable person" and the other parties.
5. An intermediary is not an expert (for the purposes of FPR 25) and applications should therefore be made by way of FPR 18. By contrast, cognitive assessments aimed at exploring the need for an intermediary are still governed by the provisions of FPR 25.

What are the Court's powers regarding an intermediary?

1. The Court may order an intermediary assessment where it is clear that there are sufficient vulnerabilities.
2. In other cases where there is not yet enough evidence there can be directions for an intermediary preliminary assessment. However, such assessments still require the permission of the Court.
3. There is also a duty upon the Court to consider vulnerability (see ***Re M (A Child) (Fact Finding: Appeal) [2021] EWHC 3225 (Fam)***).