

The Advocate's Gateway

Table of Contents

1. GENERAL PRINCIPLES, DEFINITIONS AND CONTEXT	1
2. ADVOCATES' DUTIES AND RESPONSIBILITIES	10
3. EARLY IDENTIFICATION OF POSSIBLE VULNERABILITY AND CASE MANAGEMENT ISSUES	13
4. MEASURES AND OTHER ADJUSTMENTS	16
5. ASSISTANCE TO VULNERABLE PARTIES AND WITNESSES	18
6. OBTAINING AND SHARING EVIDENCE	22
7. USE OF EXPERTS	24
8. PARTIES LACKING CAPACITY	26
9. ACKNOWLEDGEMENTS	29

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.

1. GENERAL PRINCIPLES, DEFINITIONS AND CONTEXT

1. The **Family Procedure Rules (FPR) 2010** 3A, **Practice Direction** (PD)3AA and the revised PD12J outline the duties of the Family Court and the advocates in identifying vulnerable parties or witnesses and implementing necessary measures once any vulnerability has been identified.
2. Advocates will be assisted by the **Practice Guidance: The Use of Intermediaries, Lay Advocates and Cognitive Assessments in the Family Court**, issued on 23rd January 2025.
3. As of 10 April 2025, Advocates should consider **Re M (a child: Intermediaries) [2025] EWCA Civ 440**, which provides a comprehensive overview of how to approach vulnerable parties and witnesses, and the relevant authorities and guidance intermediary use in the Family Court.
4. Advocates should identify risk factors indicating vulnerability in witnesses or parties in family proceedings and seek expert advice when necessary. Whilst Toolkit 10 outlines general risk factors for vulnerable parties, this Toolkit focuses on specific issues relating to vulnerable witnesses and parties in family proceedings involving children, providing guidance for family lawyers and advocates.

The Family Procedure Rules

5. The FPR set out the overriding objective (rule 1.1 (1)): the court must deal with cases 'justly, having regard to any welfare issues involved'. This includes the requirement for courts to take reasonable steps to ensure the effective participation of vulnerable witnesses.
6. The Family Court is not limited by usual courtroom procedures/traditional special measures. Rule 4.1 FPR provides the Family Court with wide-ranging and flexible powers of case management, including the power to 'take any other step or make any other order

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

for the purpose of managing the case and furthering the overriding objective'. Early identification and notification are essential when a witness or party is identified as vulnerable, compromising their effective participation within the hearing.

7. Practitioners should ensure that the Family Court is notified at the earliest opportunity so that it can consider any necessary adjustments to ensure fair hearings.

[Disability] places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities'

P v Cheshire West and Others [2014] UKSC 19 (Lady Hale) at [45]

8. Specific rules relating to vulnerable parties and witnesses are contained in FPR Part 3A and its accompanying practice direction (PD3AA) which came into force on 27 November 2017.
9. The rules outline the Court's duty to consider the vulnerability of a party or of a witness in three respects:
 - a. Whether a party or witness' participation in the proceedings will be diminished by reason of vulnerability or a witness is vulnerable (FPR 3A.3);
 - b. How a vulnerable party or witness will participate in the proceedings (FPR 3A.4); and
 - c. How a vulnerable party or witness can give evidence (FPR 3A.5).
10. The rules do not define vulnerability, but list considerations for assessing it in a party or witness. They are contained at FPR 3A.7 (a)-(j) and (m) ("the 3A.7 factors") :
 - a. the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of:
 - i. any other party or witness to the proceedings or members of the family or associates of that other party or other witness; or
 - ii. any members of the family of the party or witness;

- b. whether the party or witness:
 - i. suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;
 - ii. has a physical disability or suffers from a physical disorder; or
 - iii. is undergoing medical treatment;
 - c. the nature and extent of the information before the court;
 - d. the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;
 - e. whether a matter is contentious;
 - f. the age, maturity and understanding of the party or witness;
 - g. the social and cultural background and ethnic origins of the party or witness;
 - h. the domestic circumstances and religious beliefs of the party or witness;
 - i. any questions which the court is putting or causing to be put to a witness in accordance with section 31G(6) of the 1984 Act.
 - j. any characteristic of the party or witness which is relevant to the participation direction which may be made;
 - k. whether any measure is available to the court;
 - l. the costs of any available measure; and
 - m. any other matter set out in Practice Direction 3AA.
11. PD3AA, paragraph 2.1 provides further elucidation of issues arising in the proceedings which might be relevant to paragraph (d) above:
 - a. Domestic abuse, within the meaning given in PD12J;
 - b. Sexual abuse;
 - c. Physical and emotional abuse;
 - d. Racial and/or cultural abuse or discrimination;
 - e. Forced marriage or so called "honour based violence";

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

- f. Female genital or other physical mutilation;
 - g. Abuse or discrimination based on gender or sexual orientation; and
 - h. Human trafficking.
12. The Court should invite parties case to assist the Court when considering whether the 3A.7 factors may mean that the ability of a party or witness to participate in the case is likely to be diminished by reason of vulnerability. When considering this question the Court should consider the ability of the party or witness to:
- a. understand the proceedings, and their role in them, when in court;
 - b. put their views to the court;
 - c. instruct their representatives before, during and after the hearing; and
 - d. attend the hearing without significant distress.
13. In the event that the court decides that a party or witness is vulnerable applying the 3A.7 factors, it must move on to decide whether to make participation directions.
14. Participation directions are defined as either (a) general case management directions made to assist a witness or party to give evidence or participate in proceedings; or (b) a direction that a witness or party to receive assistance through one or more measures in FPR 3A.8.
15. The measures set out in FPR 3A.8 are:
- a. prevent a party or witness from seeing another party or witness;
 - b. allow a party or witness to participate in hearings and give evidence by live link;
 - c. provide for a party or witness to use a device to help communicate;
 - d. provide for a party or witness to participate in proceedings with the assistance of an intermediary;
 - e. provide for a party or witness to be questioned in court with the assistance of an intermediary; or
 - f. do anything else which is set out in Practice Direction 3AA.
16. Where the Court concludes that a vulnerable party or witness should give evidence, the court must hold a ground rules hearing prior to any hearing where evidence is to be heard.
17. The court's duty under this rule applies as soon as possible after proceedings begin and continues until their conclusion (FPR 3A.9). Directions under this rule may be made upon application (FPR 3A.10) or by the Court of its own motion (FPR 3A.11).
18. If the court determines that the proceedings do include a vulnerable person it must set out the reasons why participation directions have or have not been made in the court order – FPR rule 3A.9.
19. Practitioners should note Jackson LJ's comment in *Re M [2025] EWCA Civ 440* at [19] that "These are case management directions that are firmly in the province of the judge. A considered decision within the framework of FPR Part 3A is most unlikely to be disturbed on appeal."

Adult witnesses and parties

- 20. It is important to take into account the views of the individual witness or the party. Vulnerable people are not a homogeneous group; not all individuals with disabilities are automatically vulnerable or wish to be regarded as such.
- 21. Advocates should recognise that parties or witnesses appearing robust may fear the impact of their vulnerabilities on case outcomes, such as concerns that disclosing a mild learning disability or mental health history could negatively affect parenting assessments. They may also be embarrassed or ashamed, attempting to hide or mask their vulnerability.

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

22. One study of 30 birth mothers whose children were removed found many had 'major issues' with capacity to exercise choice, long-standing mental health issues, and learning disabilities (**Broadhurst 2012**). Other studies reported that 12.5% of parents in care proceedings had learning difficulties (**Masson et al 2008**), and in one local authority, one-sixth of care proceedings involved at least one parent with learning disabilities (**Booth and Booth 2004**).

GOOD PRACTICE EXAMPLE

A parent in care proceedings with mental health difficulties gave evidence in a pre-recorded examination conducted by counsel in her chambers. All advocates and the judge contributed to the planning of topics to be covered and an intermediary helped counsel plan her questions. The recording of the witness's evidence was conducted by a professional third party who signed a confidentiality agreement. Questioning, including breaks, took three-and-half hours and an edited DVD lasting 90 minutes was admitted as evidence in the family proceedings.

23. There are many ways in which adults participating in family proceedings may require assistance due to vulnerability, not only to assist them but also to ensure that proceedings can run as smoothly and efficiently as possible; the following list is not exhaustive but provides a guide to the most common examples that can be encountered in practice.

Domestic violence

24. Practitioners should be aware of the likely stress on adult victims of domestic violence of knowing or fearing that they may have to meet their abuser at court. This may result in the victim refusing to engage in proceedings or to comply with court directions about providing evidence. Additionally, the increasing number of litigants in person conducting their own private law proceedings means that victims may have

to face being directly questioned by their abusers during a hearing.

25. Section 63 of the Domestic Abuse Act 2021, effective 1 October 2021, inserted a provision into FPR Pt3A.2A(1) which automatically deems victims of domestic abuse to be 'vulnerable' for the purposes of any participation directions:
26. Practitioners should note that parties and witnesses can expressly request that this assumption of vulnerability not be applied to them, and that it only applies when the Court decides whether to issue participation directions (FPR 2010, PD 3AA, para 1.1A).
27. If a party or witness is, or is at risk of being, a victim of domestic abuse, the Court must immediately consider participation directions. Practitioners should be aware that failure to seek or issue participation directions (by the parties or the Court's own initiative) may render the final judgment vulnerable to appeal due to procedural irregularity.
28. For example, in *CM v IP* [2022] EWHC 2755 (Fam), the Court breached its s.63 DAA 2021 duty by not providing special measures for the mother (see also *D v R* [2023] EWHC 406 (Fam)). However, a decision not to make participation directions does not automatically mean all orders will be appealable (see: *BF v LE* [2023] EWHC 2009 (Fam)).
29. The court is not obliged to consider vulnerability assumptions without clear reason. If vulnerability has already been addressed, reconsideration is unnecessary at subsequent hearings unless there has been a material change of circumstances (*Re X* (Domestic Abuse: Participation Directions: Obligation to Consider) [2024] EWFC 121 (B)).
30. FPR PD 12J outlines the steps required when domestic abuse by another party is alleged or admitted against a child or party. Practitioners should be particularly aware of the definition of domestic abuse in 2A (as defined in rule 2.3(1) FPR, having the same meaning as in the 2021 Domestic Abuse Act) and 2B, which expressly includes, but is not limited to, forced

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

marriage, honour-based violence, dowry-related abuse, and transnational marriage abandonment.

31. The key matters requiring consideration by PD12J are:

- a. Early listing of a fact-finding hearing and the criteria for deciding whether there should be such a hearing
- b. Prescribed directions in cases where a fact-finding hearing is ordered
- c. The need for a Children Act 1989 section 7 report

GOOD PRACTICE EXAMPLE

In care proceedings the local authority alleged that the father's violence towards the mother mirrored his behaviour towards a previous female partner and sought her attendance to give evidence at the final hearing. The woman persistently refused to provide a statement or to attend court, despite a witness summons being issued. The parties agreed that the child's solicitor and a police officer should go and visit the woman who explained that she was terrified of the repercussions of giving evidence against the father. Arrangements were therefore made for the woman to give evidence by video link from an external location and for the father to be screened from her sight during her evidence.

- d. The need for the child to be represented potentially by a Cafcass children's pursuant to FPR r16.4
- e. Treatment of the fact-finding hearing as an inquisitorial process in order to manage the questions being put or proposed to be put by the parties
- f. The need for special measures
- g. The need for directions to manage contact following the fact-finding hearing.

Sexual abuse

32. Practitioners should be aware of the possible detrimental impact on vulnerable adult sexual abuse survivors if highly personal past information becomes 'common knowledge' in family proceedings. In these situations, practitioners should consider how such

information might be shared on a 'need-to-know-only' basis.

33. In *Re M (A Child) (Fact Finding: Appeal)* [2021] EWHC 3225 (Fam), the Family Division allowed a mother's

appeal regarding allegations of rape and sexual abuse by the father. Despite both parties presenting highly explicit and sensitive video and photographic evidence, the first-instance judge found against the mother without considering participation directions or holding a ground rules hearing. In allowing the appeal, Judd J noted that the mother was fully represented and no special measures application was made, but emphasised that "the obligation to consider vulnerability is upon the court."

34. The Court reiterated that "The provisions of rule 3A and PD3AA are mandatory. The word used is 'must' and the obligation is upon the court, even though the parties are required to cooperate" (para 60), with Judd J describing the case as "crying out for participation directions."

GOOD PRACTICE EXAMPLE

In care proceedings the paternal grandmother was positively assessed as a permanent carer for her grandson who could not return to live with his parents. The mother opposed the grandmother's application and sought full disclosure of the assessment report which referred to her past history of sexual abuse within her family. The judge ordered that an edited, summarised version of the report should be shown to the mother and agreed a limited, prescribed list of questions for cross-examination of the social worker about this particular part of the assessment.

Past medical history

35. Practitioners should be aware of the potential embarrassment for vulnerable adult parties or witnesses when aspects of their past medical histories require disclosure. In these situations, practitioners should consider whether and if so, how, such information can be shared on a 'need-to-know-only' basis.

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

GOOD PRACTICE EXAMPLE

In private law proceedings both parents' GP records were to be disclosed as part of the evidence. The mother, now aged 40, was extremely anxious that information about a termination she had undertaken at the age of 18 was not shared with the father. The mother's advocate therefore invited the judge to read the relevant part of the notes and to redact the other part of the record on the basis that it was not relevant to the current issue of where the children should live; this course of action was accepted and adopted by the judge.

- c. Sir Andrew MacFarlane's keynote address at the ASPIRE conference, **Parents with Intellectual Impairment – Promoting Best Practice in Public Law Proceedings** (February 2023): This speech sets out a range of considerations and guidance for practitioners dealing with adults with learning disabilities.

GOOD PRACTICE EXAMPLE

In care proceedings the father had a limited ability to concentrate due to an acquired brain injury. The judge agreed that he could come in and out of court during the hearing with his personal assistant as he pleased and that there should be slightly extended lunch breaks each day to enable his legal representatives to explain the process of the proceedings to him.

Learning disability

36. In matters involving adult parties as witnesses with learning difficulties, practitioners may need to apply for or arrange for an intermediary or adult services social worker or lay advocate (whose roles are not interchangeable) to attend court to assist with following and understanding proceedings. In any event, extra time may be required for the hearing.
37. **Re S (Vulnerable Parent: Intermediary) [2020] EWCA Civ 763** highlights complications for parties with learning disabilities. In particular, Jackson LJ found that "the use of remote technology has additional implications for parties and witnesses with a learning disability. Being questioned by someone whose face appears on a screen is not the same as face-to-face conversation and the demands of following a hearing in more than one medium inevitably adds to any existing difficulties in understanding what is being said." (at [28]).
38. Practitioners are referred to:
 - a. The **President of the Family Division's Guidance: Family Proceedings: Parents with a Learning Disability (10th April 2018)** which commends for careful consideration and application,
 - b. the updated **Working with Parents with a Learning Disability** by the Norah Fry Centre (September 2016).

Mental health

39. Practitioners should be aware of the potential stressful effects of proceedings on vulnerable adult parties or witnesses with mental health difficulties and consider practical ways in which such stress can be reduced.

GOOD PRACTICE EXAMPLE

In private law proceedings the mother relied on a neighbour to give evidence as part of her case. The neighbour had suffered from agoraphobia for many years and was unable to leave home to attend court. Following an assessment by her GP, arrangements were made for her to give evidence by telephone link from her own home.

See Toolkit 9 - Planning to question someone using a remote link.

Deafness

40. In **Re C (A Child) [2014] EWCA Civ 128**, the Court of Appeal provided guidance on the correct approach in care proceedings involving profoundly deaf parents. In particular, the court listed the following points.
41. It is necessary for all agencies concerned to understand that communicating with a profoundly deaf person is not simply a matter of interpretation or

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

translation. There will be a need for expert insight and support by a suitably qualified person at the earliest stage. It is the duty of those acting for the parents to identify the disabilities as a factor at the earliest stage.

42. The parents and the local authority should make the court aware of the disabilities and need for special measures as a matter of case management.
43. An expert should be appointed so that the impact of the disability can be addressed at a case management hearing. In the case of a profoundly deaf person consideration should be given to the use of an intermediary to communicate with the local authority and the court.
44. The issue of funding by the Legal Aid Agency (LAA), the Courts Service and the local authority must be considered at, if not before, the case management hearing. The issue is not merely a matter of good practice – the court, the local authority and CAFCASS all have a duty under the Equality Act 2010 to afford the right level of support.

See Toolkit 11 - Planning to question someone who is deaf.

Sexuality and gender identity

45. Practitioners should recognise the potential stressful effects on vulnerable adults participating in proceedings due to sexuality or gender identity issues. These issues may not always be obvious but can manifest subtly, such as through an apparent unwillingness to participate or provide assessment information.
46. See Chapter 10 Sexual Orientation, and Chapter 12 Trans People in the **Equal Treatment Bench Book**, 2024.

GOOD PRACTICE EXAMPLE

The mother applied to court for permission to remove her child permanently from the jurisdiction which was opposed by the father. As part of her case, the mother sought to rely on a statement from a gay Russian friend, now living in the UK, whom the father required to attend court to be cross-examined. The man refused to attend court and explained to the CAFCASS officer that he was terrified that if he attended any official government building he would be immediately arrested and deported to Russia. The judge accepted that the man's fears were valid and permitted him to give his evidence via live video link from nearby barristers' chambers.

GOOD PRACTICE EXAMPLE

In care proceedings a paternal uncle had been positively assessed as a potential permanent carer for his nephews. He was only part-way through a process of gender reassignment to become a woman, but made it clear that he fully identified as a woman and wished to be addressed as such. He continued to suffer from depression and anxiety which was exacerbated by social workers' ongoing refusal to refer to him as a woman. As a result, the proposed placement of the nephews appeared to be at risk. The judge passed on a clear message to the uncle via the children's guardian confirming that his wishes and feelings about the way he wanted to be addressed would be respected and complied with throughout the proceedings.

Children and young people as witnesses

47. Children should be automatically considered vulnerable due to their age. Despite the Supreme Court's decision in *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12 removing the presumption against children testifying in care proceedings, it remains relatively rare for them to do so. The test is set out at paragraph 24:
48. 'When the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations: the advantages that that

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

will bring to the determination of the truth and the damage it may do to the welfare of this or any other child.'

49. Practitioners should continue to Family Justice Council's Working Party **Guidelines in Relation to Children Giving Evidence in Family Proceedings** (2011). These guidelines cover children and young people in Children Act 1989 proceedings (public and private law cases), focusing on a child giving evidence in an adversarial court setting. The guidelines were endorsed in *Re KP (A Child)* [2014] EWCA Civ 554 where it was stressed that, in considering whether a child should give evidence, the court's principal objective should be achieving a fair trial (per Moore-Bick LJ, paragraph 21).

GOOD PRACTICE EXAMPLE

An eight-year-old child, who was alleged to have been sexually abused by a family friend, had already given an Achieving Best Evidence (ABE) interview to the police and was subsequently interviewed by an expert child psychiatrist in the family proceedings. All parties contributed to the planning of the psychiatrist's interview. The interview was recorded in a vulnerable witness interview suite at a local police station and the DVD recording was used as evidence in the family proceedings. An order was subsequently made for the interview to be disclosed to the police so that it could be used as evidence in related criminal proceedings.

50. In *Lancashire CC v M* [2023] EWFC 30, at [33], Hayden J ruled that it is "the Court's obligation to the complainant child" for the same judge hearing the substantive case to decide whether a child will give evidence. He also stated that any proposed questions for a child witness must be submitted to the judge well in advance of the hearing, even if agreed by the parties.
51. Teenagers without diagnosed special needs may still require additional measures to give their best evidence and/or to reduce the risk of harm to their welfare.

GOOD PRACTICE EXAMPLE

A 13-year-old young woman with no developmental delay was referred to an expert witness for an assessment of her vulnerability. She had experienced family breakdown, bereavement, sexual abuse, had been placed in foster care and her school attendance was poor. Following an assessment, it became clear that she would need an intermediary in order to give her best evidence.

Children or young person meeting the Judge

52. In most cases in England and Wales, a child or young person's needs, wishes and feelings are conveyed to the court in writing or orally by a guardian or CAFCASS officer. The guardian or CAFCASS officer should discuss with the child, in a developmentally appropriate manner, whether they wish to meet the judge.
53. If separately represented, practitioners may also inform the judge of this wish.
54. In situations where a child or young person does express a wish to meet the judge, that wish should be conveyed to the judge as quickly as possible. Practitioners should take care to explain, from the child or young person's perspective, the purpose of the proposed meeting, to identify whether and how such a meeting would accord with the child or young person's welfare interests.
55. Practitioners should currently follow the **Guidelines for Judges Meeting Children who are Subject to Family Proceedings** (April 2010). These guidelines aim to involve children and young people more in proceedings, allowing them to feel understood by the judge and comprehend the judge's role. The primary purpose of such meetings is to benefit the child or young person, though it may also benefit the judge and other family members.
56. A meeting between the child or young person and the judge is not for evidence gathering, but to help the child or young person understand proceedings and feel reassured that the judge understands their perspective. MacDonald J emphasised the importance

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

of following the 2010 guidance in *LB Brent v D (Compliance with Guidelines on Judges Meeting Children)* [2017] EWHC 2452 (Fam).

GOOD PRACTICE EXAMPLE

A 10-year-old boy in care proceedings told the guardian he wished to see the judge to explain how much he missed his older sister from whom he was separated in foster care. The judge heard representations from all parties who agreed that the child should be seen at the very start of the final hearing. The child's mother and the guardian brought the child into the judge's chambers and remained with him during the half-hour meeting. The guardian spent time with the child before the meeting in helping him draw up a list of things he wanted to tell the judge. The guardian wrote an agreed note of the meeting which was confirmed as accurate by the boy himself at the end of the meeting. The judge then distributed the agreed note to all parties.

GOOD PRACTICE EXAMPLE

A 16-year-old young woman in residential care who was estranged from her family was nonetheless highly anxious to know the outcome of a fact-finding hearing in care proceedings relating to allegations of serious violence between her parents and against her siblings. The hearing took place during the GCSE period and there were concerns that her anxiety about the proceedings would have a detrimental impact on her exam performance. The parties agreed that the guardian would therefore provide her with an agreed summary of the evidence at the conclusion of each day's evidence to help reduce her anxiety during the exam period.

57. In *Re KP (A Child) (Abduction: Rights of Custody)* [2014] EWCA Civ 554, [2014] 1 WLR 4326 (paras 53 and 56), the child-judge meeting was described as an opportunity for the judge to hear the child's wishes and explain the process. The "purpose of the meeting is not to obtain evidence," and the judge should not "probe or seek to test" the child's statements. However, the Court acknowledged that if "the child volunteers evidence that would or might be relevant," the judge should "report back to the parties and

determine whether, and if so how, that evidence should be adduced".

58. If the child or young person does not express a wish to meet the judge, practitioners should initiate discussions between the parties and with the court about other ways of enabling the child to feel a part of the process.
59. Granting party status to a child or young person gives the court wide discretion over their role in proceedings. In *Re LC (Children)* [2014] UKSC 1, Lady Hale noted the "increasing recognition of children as people with a part to play in their own lives" and identified options to limit the child's role.
60. Such options include:
- a. adduce a witness statement by the child or young person, or a report by the child or young person's guardian;
 - b. permit cross-examination of the other parties on the child or young person's behalf;
 - c. permit submissions to be made on the child or young person's behalf.
61. The court's discretion to permit a child or young person party to be present in court will depend heavily on their age, wishes, feelings, understanding, and the issues to be determined.

GOOD PRACTICE EXAMPLE

An articulate but emotionally vulnerable 14-year-old young man was joined as a party in acrimonious private law contact proceedings where his father, who acted in person, was alleged to have raped the mother. All parties and the judge were concerned about the possible damaging effect on the young man of remaining in court during the father's cross-examination of the mother. The judge directed that the young man should be absent from court during the relevant evidence and the parties were invited to agree an edited summary of the key points which was then shown to the young man and relied on in closing submissions.

2. ADVOCATES' DUTIES AND RESPONSIBILITIES

General duties and responsibilities of advocates

62. The Bar Standards Board Handbook 2024 (version 4.8) requires barristers to consider vulnerable clients' interests and needs (oC14), and to ensure clients understand the process and what to expect from their barrister.
 63. However, the core duties with which barristers are required to comply, include the duty:
 - a. to observe your duty to the court in the administration of justice (CD1);
 - b. to act in the best interests of each client (CD2);
 - c. to act with honesty and integrity (CD3);
 - d. not to behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession (CD5);
 - e. not to discriminate unlawfully against any person (CD8).
 64. Solicitors have similar duties: upholding the law and proper administration of justice, and providing a proper standard of service to clients, including those who are vulnerable (Solicitors Regulation Authority Code of Conduct 2023).
 65. All advocates must assist the court in identifying and responding to vulnerable parties and witnesses. Additionally, advocates, as public authorities, should assist the court in upholding European Convention on Human Rights, particularly Articles 6 and 8.
 66. All advocates (solicitors and barristers) should ensure they have received appropriate training and study of relevant materials, such as these toolkits.
- Initial meeting or conference with client**
67. Advocates should identify client vulnerability as early as possible, ideally during the first meeting or conference. Some vulnerabilities will be more apparent than others (as noted in Part 1). Practitioners should also have regard when assessing this issue the checklist of considerations in FPR 3A.7
 68. Advocates can use examples from **The Advocates' Gateway Toolkit 10 - Identifying vulnerability to help ascertain client vulnerability**:
 - a. Do you/did you get any extra help at school from a person just for you?
 - b. Do you need extra help managing money?
 - c. Do you need any extra help with getting about or going to appointments?
 - d. Do you need any extra help with listening, speaking or reading?
 - e. Do you need any extra help to stay calm?
 69. And, if the advocate knows the person is taking medication:
 - a. Do you need any extra help taking your medicine?
 - b. How does your medicine affect you?
 70. Self-reporting is not the sole or most reliable method for ascertaining vulnerability. Certain behaviours, characteristics, or circumstances may also indicate vulnerability. Toolkit 10 (paragraphs 1.8-11) offers a helpful list for further consideration.
 71. Vulnerability can be transient or situational, not constant or consistent. An individual deemed vulnerable at the initial stage may not be so at the final hearing, or vice versa. Advocates and judges should therefore assess vulnerability at the time of the relevant hearing.
 72. Similarly, vulnerability should be continuously reviewed. Individual personal factors (e.g., age, incapacity, impairment, medical condition), environmental factors, or their combination can cause vulnerability. For instance, being in the courtroom or seeing another party might 'trigger' anxiety.

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

73. Information may need to be obtained and shared with other professionals and organizations working with the client, such as police, social workers, and medical or mental health support workers. Section 6 provides further guidance.
74. An expert may be needed to ascertain vulnerability. Early consideration should be given to applying under Children and Families Act 2014 s13 and Part 25 FPR 2010. The type of expert required depends on case circumstances. Suggested experts include:
 - a. a psychiatrist;
 - b. a psychologist;
 - c. an independent social worker;
 - d. an expert in speech and language difficulties.
75. In addition, information from treating doctors and professionals may also be helpful.
76. Advocates should remember that vulnerability is transient or fluctuating, distinct from capacity, and should be regularly and proactively reviewed. Vulnerability may only become apparent or heightened in specific circumstances, such as during court proceedings or meetings with professionals, even if not apparent during advocate conferences.
77. Advocates should be familiar with **Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses and guidance on using special measures** (January 2022) ('ABE'). This document relates solely to criminal proceedings but is a detailed analysis of good practice that has developed for the interviewing of children and vulnerable witnesses and the principles are applicable to public and private family law cases.
78. *Re E (A Child) (Evidence)* [2016] EWCA Civ 473 makes it clear that 'where there are departures from that guidance, the judge has a duty to analyse thoroughly the interview process and departures from the guidance have a bearing on the weight that may be attached to a child's allegations' (**Marchant & Cooper, 2016**).

79. ABE outlines considerations for recognising and supporting witnesses or parties with a mental health disorder (paragraphs 2.79–6, 2.82); a learning disability (2.83–86) and a physical disability (2.87–2.88), including relevant support (2.89–96).

Duties to the client and other witnesses at court

80. In *Re S (Vulnerable Party: Fairness of Proceedings)* [2022] EWCA Civ 8, the appellant's cognitive difficulties and the failure to provide appropriate participation directions constituted a serious procedural irregularity.
81. Baker LJ's judgment summarised vulnerable witness procedures, emphasizing the duty to identify such persons "at the earliest possible stage." This is reinforced in proceedings under Part IV of the Children Act and in Public Law Outline in Practice Direction 12A, which requires considering special measures and intermediaries at the initial case management hearing.
82. Baker LJ noted that "*It will almost invariably be one of the parties or their representatives, rather than the court, who first identifies that a party or witness is or may be vulnerable. We consider that good practice requires the parties' representatives actively to address the question of whether a party is vulnerable at the outset of care proceedings.*"
83. It is imperative for both advocates and the court to be proactive throughout litigation, adopting a planned strategy rather than an ad-hoc approach. In *Re M (A Child)* [2012] EWCA Civ 1905, a psychological report indicated the father's capacity to give evidence had deteriorated due to the stress related to the proceedings, requiring a 'supporter/intermediary'.
84. The judge's refusal to adjourn for an intermediary, opting for a "let's see how we get on" approach, was criticised by the Court of Appeal. Thorpe LJ stated: '*... that general duty [of case management and avoiding delay] cannot in any circumstances override the duty to ensure that any litigant ... receives a fair trial and is guaranteed what support is necessary to compensate for disability*' (paragraph 21).

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

85. In *Wiltshire Council v N* [2013] EWHC 3502 (Fam), the retrial of Re M before Baker J, ensured provisions to assist the father, including an intermediary, a litigation friend, regular breaks, and adjusted questioning. Baker J provided the following guidance for care proceedings involving parents with suspected learning difficulties:

- a. Parents' representatives are responsible for identifying the need for assistance with questions and instructions. They should assess capacity to give instructions and evidence at the outset. Any perceived support needs must be addressed at the earliest opportunity (paragraph 76).
- b. If capacity or competence issues are known before proceedings begin, the local authority or party representatives should inform the court. The court will then direct the appointment of a litigation friend and additional measures at the case management hearing (paragraph 77).
- c. In a case where the issue has not been identified prior to the issue of proceedings, it should be addressed fully at the case management hearing. The party's representatives should, if they consider that expert advice is necessary to identify the existence or extent of a learning disability, apply to the court in accordance with Part 25 FPR 2010. If the court grants such an application, the court may list a further case management hearing after the expert has reported to give directions for an intermediary or such other assistance as may be required. Alternatively, if it is considered that the case for additional measures can be made without expert assistance, then that application should be made at the case management hearing. The legal representatives should also, by the time of the case management hearing, identify an agency to assist their client through an intermediary or otherwise, in the event that the court confirms that such support is required (paragraph 78).
- d. Albeit not 'expert witnesses', a report from an intermediary or deaf relay interpreter in some cases is likely to be able to help in what tailored assistance, additional measures or adjustments the vulnerable witness/party needs.
- e. Funding the cost of an expert (subject to the LAA's approval) will fall on the certificate of the appropriate party (or parties). However, the cost of

an intermediary, as a type of 'interpreting' service, should be borne by the Court Service.

- f. Funding issues should be addressed by the appropriate representative at the earliest opportunity, seeking prior authority from the LAA or giving notice to the Court Service that an intermediary may be required.

86. In *Re C (A Child)* [2014] EWCA Civ 128, the Court of Appeal approved this guidance, in the context of care proceedings involving a mother with speech and hearing impediments and a father who was profoundly deaf. McFarlane LJ stressed that: 'The court as an organ of the state, the local authority and CAFCASS must all function now within the terms of the Equality Act 2010. It is simply not an option to fail to afford the right level of regard to an individual who has these unfortunate disabilities.' (paragraph 35)

Duties during proceedings

87. As emphasised above, proactivity and regular review by advocates will be important. Consideration should also be given to what adjustments will need to be made to allow a party or other witness to participate in proceedings otherwise than when at court.

GOOD PRACTICE EXAMPLE

In care proceedings a mother with significant learning difficulties was assisted by a Mencap advocate who accompanied her to her solicitor's office to help her consider the written evidence and, on occasion, visited her at the mother and baby foster placement to ensure she had understood the information whilst in a less formal and stressful environment.

88. For example, assistance when:
- a. attending and participating in child protection conferences or LAC reviews;
 - b. assimilating and understanding large quantities of evidence;
 - c. attending their solicitors' offices and conferences with counsel;

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

- d. preparing any written evidence.

89. As already noted in section 1, it may become apparent to the advocate that an unrepresented party, or a witness who is not a party, may be vulnerable. Part of the advocate's duty is to raise this with the judge at the earliest stage, to consider whether to obtain expert evidence (and how to fund it if the vulnerable witness is not a party) and (in the case of a witness) to consider whether the court should be invited to join that person as an intervener or even a party. If the issue only arises at a late stage, for example, during that witness or party's evidence, it is likely to be necessary to propose an adjournment to allow for assessment of the need for additional measures.
90. Once it is apparent that additional measures or adjustments are needed, particularly during contested hearings, there will almost certainly need to be a ground rules hearing ('GRH') (guidance about which is provided below). It is part of an advocate's duty to uphold the administration of justice and to act with honesty and integrity to ensure that they adhere to any established ground rules and also to use best endeavours to ensure they are followed by other advocates and the court.

3. EARLY IDENTIFICATION OF POSSIBLE VULNERABILITY AND CASE MANAGEMENT ISSUES

Ground Rules Hearings (GRHs)

91. The requirement to hold a GRH is now contained in FPR PD3AA para 5.2.
92. GRHs aim to determine how individuals with communication needs or vulnerabilities can best participate and give evidence in trial. They should include discussion of intermediary or expert witness reports .
93. GRHs are required when the Court determines that a vulnerable party, witness or other protected party

should give evidence in proceedings. *K v L and another* [2021] All ER (D) 70 (Dec) emphasis that FDR 3A and PD3AA are mandatory, placing the obligation on the court (at para 60).

When should GRHs be held and what form should they take?

94. GRHs must occur before the evidence is heard. They can be part of a CMH, IRH or other interim hearing. At the hearing the court will issue participation directions:
 - a. As to the conduct of the advocates and the parties in respect of the evidence; and
 - b. To put any necessary support in place for the vulnerable party, witness or protected party. The GRH should take place well enough in advance so that the rules can be properly implemented and the advocates and the court can be properly prepared.
 - c. There may be instances where a person's needs only become evident while giving their evidence and ground rules may need to be revisited at the earliest opportunity.
95. Individual needs and required adjustments should be identified and assessed earlier in proceedings, ideally before the GRH (e.g., at the case management hearing stage in public law proceedings).
96. The GRH must include the judge, party representatives, and any intermediary or relevant expert witness. Funding for their attendance requires prior consideration. Experts should recommend how the vulnerable person can participate effectively, including specific questioning recommendations.
97. GRHs should take the form of a discussion and the judge will determine what ground rules are to apply. The Court and the parties should record agreement, emphasising compliance by all advocates.
98. If the vulnerable person is to give evidence at court, the court should consider the form of evidence and necessary communications aid (see Toolkit 13)..

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

99. For vulnerable persons undergoing cross-examination, participation directions may specify the manner, such as prohibiting repeated questions, requiring pre-agreed questions/topics, having one advocate or the judge or ask all questions, or manage taking the evidence in another way.
100. At the GRH the court must also consider whether the vulnerable witness, party or protected party has already been cross-examined or given evidence in criminal proceedings whether, either live or by pre-recorded interview
101. At para 5.7 FPR PD3AA expects all advocates are familiar with the TAG toolkits.

How should the Ground Rules be implemented?

102. Judges have a duty to control the evidence as part of the overriding objective to ensure cases are dealt with expeditiously and justly, dealing with the case in a proportionate manner and allocating resources appropriately (rule 1 FPR 2010). Further, rule 22.1(4) FPR 2010 provides that the court may limit cross-examination by restricting exploration of the issues or imposing time limits.
103. GRHs signify a wholesale shift for many advocates and judges, departing from traditional cross-examination. Judges may intervene to prevent advocates from 'putting their case' where there is a risk of the vulnerable person misunderstanding, becoming distressed, or acquiescing to leading questions.
104. The court should be robust in adhering to the ground rules. In *R v B* [2010] EWCA Crim 4, paragraph 42, the judge noted that new forms of questioning require '... persistence and patience', and that competent witnesses are entitled to have their evidence adduced notwithstanding any difficulties that may exist.'
105. In *R v IA and Others* [2013] EWCA 1308 at [64] the judge observed that forensic techniques challenging accounts often reflect questioners' failure to adapt to communication difficulties.

What should the GRH consider?

106. The issues and questions for the GRH will vary between cases and the individuals' needs.
107. The GRH checklist below is intended to provide a helpful starting point.

The Ground Rules Hearing Checklist

1. When will questioning occur?

Consider the vulnerable person's concentration span, medication effects, and schedule questioning accordingly.

2. Will questions be submitted in advance?

This will depend on the needs of the individual and the approach agreed for the Ground Rules Hearing (GRH). In many cases, the GRH will identify the topics to be covered.

Counsel may also be required to submit proposed questions in advance to the judge, who may review them for length, clarity, or suitability, and to any appointed intermediary. This process helps ensure that questioning is appropriately structured, accessible, and aligned with the witness's needs.

3. How should questions be phrased to maximise witness comprehension?

Use appropriate language, avoid comments, stereotypes, or insults, and judges should intervene if cross-examination strays.

ABE Guidance (paragraphs 3.51-73) and special considerations (3.74-85) provide detailed advice on questioning. Seek intermediary or expert advice on the vulnerable person's communication needs.

4. Who will conduct the questioning?

If multiple parties exist, one advocate may ask questions on behalf of all parties, or it may be appropriate for the intermediary or judge to ask the questions.

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

5. What are the particular communication needs and how can they be addressed?

Identify and address specific communication needs, which will inevitably vary between individuals. For instance, an autistic witness may prefer a consistent environment (ABE Guidance, paragraph 2.127).

A parent with Down's syndrome might become anxious with shouting or aggressive questioning from strangers. A person with hearing loss might confuse similar-sounding words (ABE Guidance, paragraph 2.130).

6. How long will questioning last?

Seek intermediary or expert input on questioning duration to prevent the vulnerable person becoming anxious, exhausted, or giving false answers to end the process.

7. Where will the witness give evidence and how should the evidence be given? What alternatives to video link could be used?

This should have been addressed at an earlier stage but confirm location and method of evidence, including video alternatives. If attending court, consider entry arrangements, separate waiting rooms, and responsibility for practical arrangements.

8. What will be the role of the intermediary during oral evidence?

The intermediary's role is to facilitate effective communication between all parties, ensuring that the vulnerable person understand the questions put to them and give their best evidence. They may explain or rephrase questions or answers without changing their substance.

The intermediary will usually intervene if the witness is struggling and must alert the judge if any ground rules are being breached. Before evidence begins, the court should agree how the intermediary will signal the need to intervene, whether by raising a hand, addressing the judge, or another clearly understood method.

9. What will be the role of the intermediary when the vulnerable party is listening to the proceedings and evidence?

The intermediary should sit next to the vulnerable party and should provide any copies of written statements or and exhibits that may be referenced.

10. Will the witness or party be able to visit the venue prior to giving evidence?

This should be arranged for a separate day before giving evidence, not on the day of the hearing. If using video link, practise its use. If to be used, any visit should include practising the use of the video-link. The GRH should consider whether the vulnerable person will meet the judge.

11. Will the evidence be pre-recorded?

If so, how and when will it be recorded? Who will conduct any editing and copying? How will confidentiality be assured? Who will be responsible for filing and serving the copy?

12. Who will be present during questioning?

This will largely depend on what additional measures are in place. Consider whether a mental health worker, advocate, or support worker would be helpful.

13. Will the witness be under oath and, if so, who will administer it?

The intermediary or other expert witness should be invited to comment on whether the witness can read and understand the oath. Arrangements will need to be made for the oath to be administered if evidence is given by video link from a remote location.

14. Will there be scheduled breaks? How long will they last?

Schedule and agree on break frequency and duration, which may be more frequent than usual and affect the hearing's overall time. Consider physical disabilities requiring carer assistance or extra breaks, and other access requirements (ABE Guidance, paragraph 2.104).

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

15. How will the vulnerable person/intermediary indicate if an unscheduled break is required?

If unscheduled breaks are needed, an intermediary should usually indicate by raising a hand or passing up a note. If there is no intermediary, the judge and advocates should be alert to signs that a break may be needed as the vulnerable person may not ask for themselves. If the intermediary detects signs of concentration loss or anxiety, a short 'in-room' break may be sufficient.

16. How should communication aids be used (if at all)?

Communication cards can be provided to the vulnerable person via the intermediary to communicate simple answers. Photographs, plans, maps, etc. may also be useful.

17. Are there any other measures required to keep the vulnerable person calm and engaged?

Implement individual measures to keep the vulnerable person calm and engaged, such as allowing personal calming items.

ABE Guidance (paragraph 1.25) suggests a known, non-party supporter can be present during live link evidence. Box 4.1(a) details supporter activities, including:

- providing emotional support and information;
- familiarising them with the court and procedures;
- supporting them through court hearings;
- exploring their preference in respect of additional measures and, if approved by the court, accompanying the witness while they give evidence.

18. Has other relevant guidance from The Advocate's Gateway toolkits been consulted?

This could include guidance about the use of remote live link, the best way to question someone who has an autism spectrum disorder, or the most appropriate methods for questioning a young child etc.

4. MEASURES AND OTHER ADJUSTMENTS

108.FPR 3A.8 outlines measures which may be the subject of participation directions for a party or witness:

- a. To prevent a party or witness from seeing another party or witness;
- b. To allow a party or witness to participate in hearings and/or give evidence by live link;
- c. To provide for a party or witness to use a device to help communicate;
- d. To provide for a party or witness to participate in proceedings with the assistance of an intermediary;
- e. To provide for a party or witness to be questioned in court with the assistance of an intermediary; or
- f. Any other step set out in FPR PD3AA.

109.If required measures are unavailable at a particular court, the case will be heard at the nearest convenient court where they are available.

110.FPR 3A.8(4) clarifies that rules do not empower powers to mandate public funding for measures. If a necessary measure is unavailable, the court must state the reasons in an order.

111.The rules allow for flexible implementation of directed measures, such as:

- a. separate waiting areas or secure conference rooms for intimidated witnesses or parties
- b. vulnerable witnesses using different entrances to avoid other parties;
- c. prioritising listing for cases to reduce anxiety from long waits for witnesses/parties;
- d. permitting representatives of advocacy services (for example, provided by Mencap, POHWER or the Elfrida Society) to be present during meetings, conferences and in court;
- e. granting longer periods for a witness/party to file and serve evidence;

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

- f. allowing time for parties to discuss judgment with their advocates;
 - g. provision of sign language interpreters (SLIs), deaf relay interpreters, or a Registered Intermediary (RI) in cases where the party or witness has a hearing disability;
 - h. advocates must ensure that questions are simple and straightforward, for example by limiting each question to a single fact or idea;
 - i. questions should be clearly posted with standing wording such as 'Who?', 'What?', 'Why? Where?', etc. and implied statements should not be used as questions (e.g. avoiding the use of inflection)
 - j. providing the witness/party with a simple way to communicate the need for an extra break (either directly the court or through an intermediary), for example, having a 'pause' card;
 - k. providing the witness/party with a way of alleviating stress and maintaining concentration whilst giving evidence, e.g. a stress ball;
 - l. where a witness gives evidence via video link, positioning or covering the screen where s/he become distressed by one or more parties seeing their face.
112. Witnesses and parties should be consulted about the proposed measures and advocates and the court should seek to seek to accommodate them in a flexible manner.

Striking the right balance

113. A careful balance must be maintained to ensure that any special measures or other adjustments designed to enable 'best evidence' do not inadvertently diminish its probative value or weight.
114. Similarly, where the witness/party's evidence forms the basis of allegations made against another party, safeguards must be in place to ensure taken that an accused's Article 6 rights are not compromised.

Spotlight on case law

Re J (A Child) [2014] EWCA Civ 875

Re J (A Child) [2014] EWCA Civ 875 (overturning *Re A (A Child) (Vulnerable Witness) (Fact-finding) [2013] EWHC 2124 (Fam)*) illustrates the complexity of balancing these competing interests.

FACTS

The proceedings concerned serious allegations of sexual abuse made by a vulnerable young woman, X, against the father of the child, A. A Ground Rules Report was prepared and a Ground Rules Hearing held in advance. One significant measure adopted was that the father would not be permitted to see X's face while she gave evidence.

PROCEEDINGS

During the fact-finding hearing, X gave evidence by video link with the assistance of an experienced intermediary. Although the father was not eligible for legal aid, the local authority agreed to fund his representation on specific days to avoid the risk of him cross-examining X or her mother directly. The judge permitted breaks in the video link to allow X time to respond and receive support from the intermediary. At times, the intermediary relayed X's answers by writing information on a whiteboard and asking her to confirm it, and also suggested suitable open questions that X might be able to answer.

The father, seated in court where he could hear but not see the video link, twice attempted to view the screen.

This breach of the agreed rule left X shocked and distressed, and she initially felt unable to continue. The judge ordered the father's removal from the courtroom, allowing him instead to follow proceedings through typed notes provided by his counsel. Although X agreed to proceed, she became increasingly distressed during cross-examination, leading the judge to rule that it would be inhumane to require her to continue. The judge ultimately concluded that X's allegations were fundamentally true.

APPEAL

The Court of Appeal overturned the findings and held that there should be no rehearing. Delivering the lead judgment, McFarlane LJ held that the trial judge's evaluation of the evidence could not sustain the conclusions reached. While he did not criticise the

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

specific arrangements made for X's evidence, he emphasised that whenever special measures are employed, the judge must assess the extent to which those measures may have affected the reliability of the evidence (para 93).

Gloster LJ went further, finding that the trial procedure was unfair to the father. She highlighted several factors: the restricted availability of legal representation, the extremely short notice on which counsel was instructed, the premature termination of X's cross-examination, and the father's exclusion from the courtroom.

hearing-impaired litigants (presumably including witnesses) and for foreign language speakers (also available on the Justice website).

116. SLIs/British Sign Language (BSL) interpreters are qualified professionals who are skilled in the interpretation of English into BSL and vice versa and are accountable to their registration body, the National Registers of Communication Professionals (NRCPD). All SLIs working in legal settings must be qualified and registered (RSLIs) and should also have experience and/or specific training in working in legal settings.

GOOD PRACTICE EXAMPLE

A judge allowed a young witness to take a very small tent into the live link room which was not visible on the TV link screen in the courtroom. The witness was allowed to have short 'time-out' breaks (usually of just 30 seconds) in the tent when her anxiety peaked but was not at the point where she needed a full break from giving her evidence. While the witness took this short break, the live link was temporarily turned off and the court waited until she was ready to continue.

GOOD PRACTICE EXAMPLE

A witness was taking a significant amount of medication to control psychiatric symptoms. Her ability to give evidence was much improved in the afternoon when her medication had the chance to start working and her mental state was most stable. It was scheduled so that she gave her testimony only in the afternoons.

GOOD PRACTICE EXAMPLE

A witness who struggled with concepts of time was allowed a timeline to assist cross-examination. The advocates had a duplicate copy and indicated certain points on the timeline when putting questions to the witness.

117. It is important that a deaf person in court can fully understand the interpreters provided. Challenges may arise when interpreters from different regions encounter deaf children or young people who use idiosyncratic or highly individualised signs. A deaf RI, court interpreter or an independent expert RSLI should assess the situation and may advise a change of interpreter(s), the use of a different interpreter(s) with particular skills, or the recruitment of a deaf interpreter to the interpreting team.

5. ASSISTANCE TO VULNERABLE PARTIES AND WITNESSES

Interpreters

115. There is brief guidance on interpreters within civil proceedings in England which sets out the court's responsibility to fund interpreters for deaf and

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

KEY POINTS

Key points when using interpreters

- Use registered, qualified interpreters with legal training and experience. It is not appropriate to use family members or friends as interpreters as you have no way of monitoring the accuracy of the interpretation and they are not qualified;
- The role of the interpreter is to translate from one language to another. It is not appropriate to ask their opinion or advice;
- Take account of the fact that there will be a time lag whilst the interpretation process takes place;
- Remember that interpreters are obliged to interpret everything that is spoken or signed;
- Remember that English is a second language for those who communicate in another language (including sign language). Do not expect the person to be able to read written documents without assistance. Written documents will also need to be translated.
- Interpreters need to be supplied with documentation to provide them with some background information and contextual understanding so that they can translate accurately in the court.
- If there is both an interpreter and an intermediary assisting the witness, they must agree how they will work together, e.g., if the intermediary needs to intervene because the advocate's question is too complex and it is necessary for them to rephrase it before it is interpreted to the witness.

Intermediaries

118. Advocates should be guided by the President of the Family Division's '**Practice Guidance: The Use of Intermediaries, Lay Advocates and Cognitive Assessments in the Family Court**' (7 November) and the case of *Re M (a child: Intermediaries)* [2025] EWCA Civ 440.

119. The Court and practitioners should follow the dicta in *Re M* [2025] EWCA Civ 440, and not that in any previous cases of which the Court of Appeal disapproved or had reservations. The correct approach is:

- 'The test for the appointment of an intermediary for any aspect of proceedings is that it is necessary to achieve a fair hearing. Decisions are person-specific and task-specific and the introduction of other tests upsets the balance struck by the FPR' [7(2)]
- 'An application for an intermediary must have an evidential basis' [7(6)] and
- 'The court is entitled to expect specialist family lawyers to have a good level of understanding of the needs of vulnerable individuals in proceedings and an ability to adapt their communication style. . . Intermediaries should clearly not be appointed in a "just in case" basis, or because it might make life easier for the court, but equally advocates should not be required to stray beyond their reasonable professional competence to make up for the absence of an intermediary where one is necessary' [7(7)].

120. The Court's reservations also apply to Paragraphs 10 and 12 of the President's Practice Guidance about the appointment of intermediaries and which relied on early High Court decisions. [50]

121. Intermediaries can assist by:

- carrying out an initial assessment of the person's communication needs
- vulnerable person communicates, their level of understanding and how it would be best to question them whilst they are giving evidence;
- facilitating communication when a vulnerable witness is interviewed or gives pre-recorded evidence;
- writing a report about the person's specific communication needs;
- engage in case conferences with advocates before the hearing to assist the vulnerable person to get their account across to the advocate

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

- f. assisting with court familiarisation;
- g. helping a vulnerable party understand what is being said in a hearing;
- h. helping the vulnerable person to understand questions and helping them to communicate their responses to questions when they give evidence;
- i. helping a lawyer explain the outcome of a hearing to a party etc.

122. Sometimes the same witness is involved in both criminal and family proceedings. In these circumstances, the best practice is for the same intermediary to provide communication support in both settings to ensure continuity for the witness and also to avoid unnecessary cost through duplication of assessment and rapport-building.

GOOD PRACTICE EXAMPLE

A six-year-old child was interviewed by the police with the support of an intermediary. The criminal case collapsed pretrial, but the child's evidence was used in a fact-finding hearing in family proceedings. Initial arrangements were made for the child to be cross-examined at trial with the support of the same intermediary. Eventually, the child's evidence was presented without a requirement for the child to attend and the intermediary was cross-examined about her assessment of the child's communication needs and her involvement at the police interview.

123. Although the Ministry of Justice operates a scheme of RIs, it is only available for Family Court witnesses where there is already an intermediary involved in a criminal case. For more information, contact the Witness Intermediary Scheme (WIS) operated by the National Crime Agency.

124. In family cases, most intermediaries will be operating outside the WIS and in these circumstances they will be non-registered intermediaries.

125. There is no statutory requirement for HMCTS to fund an intermediary or intermediary assessment in family proceedings. However, where it appears to the court

that this is the only way a party or witness can properly participate in proceedings, or be questioned in court, the judge may order that there should be:

- a. an assessment to determine the nature of support that should be provided through an intermediary in the courtroom; and
- b. funding for that intermediary. HMCTS may then provide the funding if there is no other source is available.

GOOD PRACTICE EXAMPLE

At the beginning of the final hearing, an intermediary worked with interpreters to familiarise them with a deaf parent's idiosyncratic signs.

126. Intermediaries are usually appointed to support vulnerable witnesses or parties in understanding and participating in court proceedings. HMCTS can also fund intermediaries to assist with preparation, but only if this is directly relevant to matters to be addressed in court and where there is a judicial order to this effect. HMCTS cannot fund the general provision of intermediaries outside the court room (MoJ 2018).

127. In *Re D (No 2)* [2015] EWFC 2, the President confirmed that the cost of an intermediary in court properly falls to HMCTS, whereas services outside hearings fall to the Legal Aid Agency.

128. In *Re M* [2025] EWCA Civ 440, at [7], Jackson LJ clarified that the court's powers extend to authorising intermediary assistance for legal meetings outside the court building. However, support that is essential in the pressured environment of the courtroom may not be necessary in less formal settings. Applications for such assistance must therefore be considered separately.

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

Interviewers

129. To secure best evidence from vulnerable witnesses in family proceedings, a range of approaches may be required:
130. Use of existing interviews: Some witnesses will already have given a police or joint interview under Achieving Best Evidence (ABE) guidance.
131. Whether or not used in criminal proceedings, such interviews may be admitted in family proceedings, subject to disclosure rules (see **Disclosure of Information between Family and Criminal Agencies and Jurisdictions: 2024 Protocol**, effective 1 March 2024).
132. Supplementary interviews: Where a police interview is of insufficient quality or fails to address essential issues, an additional filmed interview may be required for family proceedings.
133. Alternative arrangements: In some cases, witnesses may not have been interviewed under ABE guidance—for example, due to very young age or complex communication needs.
134. Specialist interviewing: Forensic interviewing of children is a highly skilled task. Where a child's needs are particularly complex, better evidence may be obtained through specialist interviewers trained to adapt questioning and communication appropriately.

GOOD PRACTICE EXAMPLE

A seven-year-old boy with a range of complex needs was interviewed by an independent interviewer under instruction of the family court. His evidence was used at a fact-finding hearing within family proceedings and was later disclosed to the police and used within criminal proceedings.

Triangle provides specialist interviewers for children and young people up to the age of 25.

Cross-examination

135. Vulnerable witnesses can be cross-examined at court by counsel, with or without intermediary support.
136. Preventing the direct cross-examination of vulnerable people by alleged abusers in person has been a matter of concern in the Family Court for some time.
137. Section 65 of the Domestic Abuse Act 2021 creates a statutory scheme preventing alleged perpetrators and alleged victims of domestic abuse from cross-examining each other in person in family proceedings.
138. It inserts new sections 31Q–31Z into the Matrimonial and Family Proceedings Act 1984, sets out automatic and discretionary prohibitions, moving long-standing informal judicial practice into a statutory requirement.

GOOD PRACTICE EXAMPLE

A 13-year-old girl with autism had already given an ABE interview to the police. Cross-examination questions were agreed by all parties in care proceedings and the judge and put to the child by an independent interviewer, who had permission from the court to adapt the questions in line with the child's understanding and also her responses. This was recorded and transcribed for court.

139. In *K v P (Criminal Solicitor as Court-Appointed QLR)* [2025] EWFC 321, the President of the Family Division reviewed the functions of Qualified Legal Representatives who are arranged by the party who is barred from cross-examining in person (MFPA 1984 section 31W(3)) and those who are appointed by the court (31W(5)) where the court feels that it is in the interest of justice for the witness to be cross-examined by a Qualified Legal Representative.
140. In the former case, the QLR will have a 'contractual "lawyer/client" relationship' with the party and will be professionally responsible to them'. The latter does not have that contractual relationship and 'should not take instructions from the prohibited party' in the

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

manner that a party's own lawyer would though they are given access to the court bundles. [32]

141. The court exercises control over the court-appointed QLR who remains independent although the court is entitled to terminate the appointment. This is particularly important where there are parallel proceedings in the criminal courts about the vulnerable person's allegations. 'It is difficult to contemplate many cases where it will be proportionate to continue a lawyer's appointment by the court as QLR where that lawyer also acts directly for the prohibited party in related criminal proceedings'. [36]

142. For historical purposes only, practitioners may wish to consider the remarks of Hayden J in *Re A (A Minor: Fact Finding; Unrepresented Party)* [2017] EWHC 1195 (Fam).

GOOD PRACTICE EXAMPLE

A nine-year-old girl with severely challenging behaviour had been able to give minimal information at an ABE interview with the police. Further questions and cross-examination questions were agreed by all parties and the judge and put to the child by an independent interviewer, who had permission from the court to adapt the questions in line with the child's understanding and also her responses. This was recorded and transcribed for court.

Witness/ Victim Support

143. There is currently no formal witness support system within the Family Court. Victim Support, the national charity, provides assistance to victims and witnesses of crime, but its remit does not extend to Family proceedings.

144. Assistance may be available through other routes, including intermediaries (where appointed) or specialist domestic abuse charities which may offer support through an Independent Domestic Violence Advisor (IDVA). However, there is considerable variation in practice across England and Wales and

funding arrangements for some of these routes is unclear.

GOOD PRACTICE EXAMPLE

A teenage witness with no developmental delay was referred to an expert witness for an assessment of her vulnerability. She had experienced family breakdown; bereavement; an alleged rape; had been placed in foster care; and her school attendance was poor. Following an assessment, it became clear that she would need an intermediary in order to give her best evidence.

6. OBTAINING AND SHARING EVIDENCE

145. It is essential to think widely and carefully about which professionals or services may hold relevant information concerning a vulnerable person. Ensuring the court has access to all pertinent information is essential, and advocates should be familiar with the most effective ways of obtaining that evidence.

146. The information sought is often highly sensitive, personal, and private. Issues of confidentiality are likely to arise, both in the process of obtaining the information and in determining to whom it should be disclosed. Article 6 and Article 8 rights of both witnesses and parties are likely to be engaged.

147. The approach will depend on whether the witness consents to disclosure, whether the witness is an adult or a child, and whether or not they are party to proceedings.

- a. **Public law cases.** Evidence is generally easier to obtain in public law proceedings. Parties typically have access to legal advice and representation; the local authority can be directed to seek evidence; and the child's guardian may also assist in gathering evidence.
- b. **Private law cases.** The process is often more complex, particularly where one or both parents are self-represented. Disputes may arise over

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

responsibility for obtaining the evidence. Even where the child is represented and holds a legal aid certificate, funding restrictions may prevent the guardian from covering more than an equal share of expert costs. In some circumstances, the court itself may need to take steps to obtain this evidence.

FPR 2010

148. FPR 2010, comprising rules and supporting practice directions, set out the procedures for obtaining evidence for family cases.

149. Evidence cannot be obtained without the Court's agreement. Filing evidence requires a direction sought on notice to all parties, usually by way of a C2 or FP2 application. Rule 25 governs the instruction of experts in children and other family cases.

150. Where any party wishes to obtain information/records from a non-party, the application for disclosure and notice of hearing will need to be served on the non-party.

151. Rules 21, 22 and 23 cover the principles related to the gathering of evidence. Rule 12 covers particular evidential issues for all children cases save for placement/adoption orders (rule 14) and parental orders (rule 13).

152. Two terms are worth highlighting at this stage:

- a. **Restricted Disclosure:** In certain circumstances, the court may direct that one or more parties should not see specific documents (or parts thereof). An application must be made, served on the party from whom disclosure is to be withheld, and a hearing listed to determine whether disclosure should occur.
- b. **Compelled Disclosure:** Where consent is required but not given, or where a person refuses disclosure, the court may issue a summons compelling the practitioner to attend and produce the records. The court will then determine the disclosure issues.

Particular sources of information

Police/CPS

153. The Family Court may need to seek information from the police/CPS in relation to:

- a. **Criminal history:** A Police National Computer (PNC) report can provide details of convictions.
- b. **DBS checks:** Wider checks may be relevant but are not provided by police/CPS.
- c. **Ongoing investigations:** The court may need updates on progress and the position of witnesses.
- d. **Identified witnesses:** If a witness from criminal proceedings is relevant to family proceedings, the court must consider:
 - i. Existing reports/assessments and support arrangements.
 - ii. Timing of the criminal trial and whether the family case should wait.
 - iii. Whether transcripts of criminal evidence should be obtained to avoid duplication, especially for vulnerable witnesses.

154. The following process will usually be required:

- a. **Public law cases:** Local authority uses the 2024 Protocol (effective 1 March 2024) to request information.
- b. **Private law cases:** If no local authority is involved, the court directs a party (often the child's solicitor) to make the request.
- c. **Ongoing criminal proceedings:** Joint directions hearings may be needed to coordinate disclosure and witness issues.
- d. **If protocol fails:** The court may order disclosure from police/CPS, require their attendance to raise objections, or consider special measures (e.g. closed hearings, GRHs). A different judge may sometimes handle disclosure issues.

155. Solicitors must give undertakings on how disclosed material is stored and shared, ensuring it is only seen by those entitled.

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

GOOD PRACTICE EXAMPLE

It is essential to follow up requests and to ensure there is close liaison with the police and CPS about any disclosure request. The police/CPS may edit material in a way that is unhelpful to the flow of the evidence; if this happens, the police/CPS may need to be present at a Family Court hearing to consider the editing. It is possible that the court will need to ask to see the material initially without its disclosure to the parties.

The Probation Service

- 156.If a witness has past or ongoing involvement with the Probation Service:
- 157.If a party to proceedings: establish consent; if agreed, the court can direct disclosure via the local authority or solicitor.
- 158.If not a party: the local authority should seek consent. If refused, Probation may be summoned to court so disclosure issues can be considered.

Medical practitioners

- 159.Vulnerable witnesses often have contact with services such as CMHT, CAMHS, or CDAS. Records may be essential to assess vulnerability.
- Children:** Records can be obtained by those with parental responsibility or the local authority (if under an interim care order). If parents refuse, the court may order disclosure from the health authority.
 - Adults:** Consent is required. If refused, the court can summon practitioners to produce records and decide on disclosure.
 - Fees for copying records may apply; the court must decide who pays

CAFCASS

- 160.CAFCASS will be involved in public law cases to represent the child's best interests. CAFCASS may also be involved in private law cases under FPR 2010 or

when directed to provide a section 7 report. CAFCASS can be asked to:

- Analyse vulnerability of child witnesses.
- Evaluate issues around children giving evidence.
- Obtain information about adult witnesses relevant to vulnerability.

Local authorities

- 161.The local authority may be involved as applicants, respondents, or providers of section 7 reports and can provide information about parties or non-party witnesses.
- Confidentiality issues may arise; hearings may be needed to decide disclosure.
 - Witnesses (including children) may need to be joined as interveners for disclosure hearings.
 - If the local authority is not a party, the court can require them to provide information directly.

Education authorities

- 162.A vulnerable child or adult may have records such as Statements of Special Educational Needs or other assessments.
- These records can be highly relevant to vulnerability.
 - The process of obtaining them follows the same approach as with local authorities (see above).

7. USE OF EXPERTS

Commenced proceedings

- 163.Before proceedings start, the local authority should:
- consider the vulnerability of parties/witnesses;
 - decide if expert advice is needed (e.g. adjustments for communication or assessment);
 - plan what measures will be necessary to ensure fairness if proceedings are issued.

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

- 164.If proceedings have commenced, expert evidence in children's proceedings can only be instructed with the court's approval (section 13 Children and Families Act 2014).
- 165.Permission to instruct an expert or an assessor must be sought from the court at the earliest opportunity, and usually no later than the Case Management Hearing .
- 166.If there is uncertainty or a lack of clarity regarding a person's vulnerability, expert advice should be sought. Social workers may provide sufficient expertise, but expert opinions of others, such as a psychologist or psychiatrist; or alternatively that of an intermediary, may be useful.
- 167.An intermediary is not an expert witness. but can assist by carrying out an assessment of the communication needs and abilities of the witness specifically in relation to communication within legal proceedings and facilitating communication.
- 168.Such reports are likely to meet the criteria of being "necessary to assist the court to resolve the proceedings justly"; it must be more than 'merely optional or reasonable or desirable' – Re H-L (A Child) [2013] EWCA Civ 655, [3].
- 169.Parties and the court must be clear about who is to be instructed and why. Practice Direction 25A FPR 2010 and Practice Direction 25C FPR 2010 apply.
- 170.The qualifications and experience of any proposed experts should be carefully considered, especially psychologists (see Re C ('Parental Alienation') [2023] EWHC 345 (Fam) and Guidance from the Family Justice Council and the British Psychological Society (September 2023, 2nd edition).
- 171.Letters of instruction (see Practice Direction 25C, paragraph 4.1) will be case and subject specific; however, they should ask:
 - a. How health / development /functioning [include specific details] affect participation or giving evidence?
 - b. What additional measures, if any, are recommended to ensure a party's participation as a party is effective?
 - c. What additional measures, if any, are recommended to ensure communication with and by the witness is as complete, accurate and coherent as possible?
- 172.Expert evidence must be thorough even if urgent: 'Justice must never be sacrificed upon the altar of speed.' (Re NL (A Child) (Appeal: Interim Care Order: Facts and Reasons) [2014] EWHC 270 (Fam), [29]; Re M-F (Children) [2014] EWCA Civ 991,[26-8].

Domestic abuse

- 173.Under Practice Direction 12J FPR, where domestic abuse has been determined and contact/involvement of a parent is considered, the court should ask:
 - a. Would a social work, psychiatric, psychological, or expert safety/risk assessment assist?
 - b. If so, direct that such assessment be undertaken (subject to consent) and a report filed.
- 174.Reports should address factors set out in PD12J paras 36–37 unless the court directs otherwise.

Litigants in person

- 175.Advocates are directed to the comprehensive advice contains in the **Equal Treatment Bench Book** 2024. See in particular Chapter 1 Litigants in Person and Lay Representatives.
- 176.Litigants in person are individuals who exercise their right to conduct legal proceedings on their own behalf (as opposed to other terms such as 'self-represented litigant' or 'unrepresented party').
- 177.When speaking to such individuals, it would usually be better to use a non-technical term, such as "a person without a representative".

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

8. PARTIES LACKING CAPACITY

178. Parties to family law proceedings may lack capacity to make decisions in various relevant domains; in particular, they may lack capacity to conduct litigation.

179. Capacity is decision-specific and a person who lacks capacity with respect to certain decisions can have capacity with respect to other decisions.

180. In family proceedings a 'protected party' means a party, or an intended party, who lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings (rule 2.3 FPR).

181. Note that:

- a. there must be clear and undisputed evidence that the party, or intended party, lacks capacity to conduct the proceedings;
- b. such evidence, together with the implications of the party being a protected party, must be disclosed and carefully explained to, the party or intended party;
- c. in all circumstances, a formal finding by the court with respect to capacity is required.

182. Advocates are referred to FPR Part 15 in its entirety. FPR Practice Direction 15B sets out the court's approach where an adult may be a protected party.

183. It provides that the court shall:

"...investigate as soon as possible any issue as to whether an adult party or intended party to family proceedings lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct the proceedings.

An adult who lacks capacity to conduct the proceedings is a protected party and must have a litigation friend to conduct the proceedings on his or her behalf. The expectation of the Official Solicitor is that the Official Solicitor will only be invited to act for the protected party as litigation friend if there is no other person suitable or willing to act."

184. Attention is drawn to the Checklist "**Protected Parties in Family Proceedings: Checklist For the Appointment of a Litigation Friend (including the Official Solicitor)**"

Test for capacity

185. Under section 1(2) of the Mental Capacity Act 2005, a person must be assumed to have capacity unless it is established otherwise.

186. General principles set out in Part 1 Mental Capacity Act 2005 stipulate:

- a. Capacity is not lost unless all practicable steps to support decision-making have failed.
- b. Making an unwise decision does not, by itself, demonstrate lack of capacity.
- c. Capacity cannot be denied solely on the basis of person's age, appearance, condition, or behaviour.

187. Capacity to conduct proceedings requires the ability to understand issues with appropriate explanation from legal advisors or experts.

188. Careful, patient, and repeated explanation may enable participation even where there is significant learning disability, avoiding the need for a litigation friend.

189. Capacity must not be assumed absent simply because a person is difficult or hostile. The presumption of capacity can only be rebutted on the balance of probabilities, based on evidence.

190. A person lacks capacity if, at the material time, they are unable to make a decision because of an impairment or disturbance in the functioning of the mind or brain, whether permanent or temporary (Mental Capacity Act 2005, section 2(1)).

191. There are parents whose lack of litigation capacity is lifelong, for example, those with profound learning disabilities, or is likely to be permanent, for example, where it is the result of a neuro-degenerative illness or following brain injury, and those who may regain capacity as their health improves. Thus, litigation capacity may sometimes fluctuate and, indeed, in some individuals it may be affected by the stress of proceedings.

192. There is also a distinction between the capacity to conduct proceedings and the competence to give evidence. It should not be assumed that a parent who

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

lacks litigation capacity cannot give evidence. There may be occasions, for example, during a fact-finding hearing where it is alleged that a child has suffered injury or been sexually abused, where a parent's factual evidence of events may be very important for the protection of the child. The court should strive to facilitate the giving of the best possible evidence by any parent with a disability who is competent to give evidence by the use of additional measures.

Identification of capacity issues

193. When issuing care proceedings, the local authority must ensure that any evidence suggesting a parent may lack litigation capacity—and the possible need for a litigation friend—is brought to the court's attention at the earliest opportunity. If capacity concerns arise unexpectedly, urgent directions should be made to obtain an assessment and resolve the issue.
194. Where doubt exists about a client's capacity, the legal representative has a duty to raise it with the court: see *RP v Nottingham CC and Another* [2008] EWCA Civ 462, [47], where the Court of Appeal confirmed that once counsel or a solicitor suspects a party may lack capacity, it is their professional duty to have the matter resolved promptly.
195. Practitioners should note that Jackson LJ's guidance in *Re M*, that while advocates may assist the court through their interactions with vulnerable persons, it is inappropriate to require them to provide evidence in the form of a witness statement.

Duties of the Advocate

196. The potentially protected party should always be informed of:
- any concerns about their capacity;
 - the purpose of any assessment;
 - the implications if they are found to lack such capacity.

197. It is the solicitor's responsibility to obtain an opinion on litigation capacity. This may come from a treating clinician or, more commonly, an independent expert. The assessor must be provided with adequate information about the legal framework, and the Official Solicitor's standard letter of instruction, proformas, and questions should be used.
198. The expert's report should, where possible, be explained to the party. The expert may assist in ensuring comprehension. The solicitor must advise the party of their right to dispute any opinion that they lack capacity. If the party asserts capacity, the matter must be listed urgently for determination by the court, which may hear evidence from the expert, the party, and other witnesses. If a party declines assessment, the court will decide the issue on the best available evidence.
199. Practice Direction 15B, para 1.5, highlights that where a protected party is able to give evidence, their representative should consider—and invite the expert to consider—the impact of doing so. The court must weigh whether giving evidence would be so detrimental to the party's condition that it is not in their best interests. Advocates may argue against the party giving evidence on this basis.
200. If a protected party is cross-examined, the safeguards for vulnerable witnesses [as set out at FPR PD 3AA, para 5.5 onwards] should be applied. These include:
- avoiding repetition of questions by different advocates without the court's permission;
 - agreeing questions or topics in advance;
 - limiting cross-examination to one advocate, or the judge if appropriate;
 - managing the process to achieve best evidence.
201. Advocates should explore whether the protected party has previously given pre-recorded evidence or interviews, and whether such recordings can be used in the proceedings.

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

Litigation Friend

202. Under FPR 15.2, a 'protected party' must have a litigation friend to conduct proceedings on their behalf.
203. A litigation friend must conduct proceedings fairly and competently in the protected party's best interests, have no interest adverse to that of the protected party, and act in accordance with Part 15 FPR (Representation of Protected Parties).
204. Once the issue of capacity has been raised with the court, the court should give urgent directions to identity of a litigation friend. Initially, the choice of litigation friend for the protected parent and their solicitor. The solicitor should explore whether a suitable person might be identified within their circle of family and friends.
205. The court should explain at the outset that a litigation friend other than the Official Solicitor may be identified. Only if no one suitable or willing is found does the case become a 'last resort' matter, potentially involving the Official Solicitor. In practice, appointments other than the Official Solicitor are rare.
206. Unless disclosure would be harmful (not simply distressing), the solicitor should explain:
- the appointment and role of a litigation friend;
 - that the solicitor remains their legal representative, but acts on the instructions of the litigation friend;
 - that whilst the litigation friend makes decisions about the conduct of the proceedings, the parent must still demonstrate that their ability to meet the child's welfare needs;
 - the steps in the proceedings, court dates, and court orders.
207. If there is credible reason to suggest that a party may have regained capacity, urgent directions should be sought for further assessment. In some cases it may be appropriate to ask an expert already instructed to review capacity. If capacity is regained, the litigation friend should apply immediately for discharge so the

party can resume personal conduct. The court should prioritise such applications.

The Official Solicitor

208. Guidance about the appointment of the Official Solicitor as 'litigation friend' of a 'protected party' is provided in the [Appointment of the Official Solicitor in family proceedings guidance](#) [Updated May 2023].
209. The Official Solicitor is the litigation friend of last resort, only where no other suitable person is available, and consent is given. The Official Solicitor will not accept appointment if another suitable and willing person exists.
210. No person, including the Official Solicitor, can be appointed to act as litigation friend without their consent. The Official Solicitor will not accept appointment where there is another person who is suitable and willing to act as litigation friend.
211. The criteria for appointment are (a) the party is an adult protected party; (b) there is satisfactory security for costs of legal representation (via Legal Aid, personal funds, or an undertaking from another party such as the local authority); and (c) that the case is a genuine last resort.
212. Pro forma certificates of capacity and guidance notes are available (see downloadable versions of the Official Solicitor's Standard Instructions [last updated February 2024]; and an 'easy read' explanation of the Official Solicitor's role as litigation friend to be found on the gov.uk website.

The Official Solicitor and Litigants in Person

213. Where one or more parties are litigants in person and may lack capacity, the court should consider:
- who will arrange the assessment of capacity;
 - how the cost will be funded;
 - how invitations to act as litigation friend will be made, and what documents and information should be provided.

TOOLKIT 13

VULNERABLE WITNESSES AND PARTIES IN THE FAMILY COURT

REVISED JANUARY 2026

- d. timetabling, including the Official Solicitor's need to investigate criteria, allocate a case manager, and (if necessary) seek Court of Protection authority to pay costs from the protected party's funds.

214. The Official Solicitor will notify the court if delays are expected, either because the criteria are not met or for other reasons.

Additional Resources

215. In May 2010 the Public Law Committee of the Family Justice Council published good practice guidance in relation to parents lacking capacity in public law proceedings – **Parents Who Lack Capacity to Conduct Public Law Proceedings**.

216. The Family Justice Council has also produced **Guidance on the Capacity to Litigate in Proceedings involving Children**, which is to assist Judges of the Family court with respect to this area.

9. ACKNOWLEDGEMENTS

This amended toolkit was produced gratis by practitioners from Deka Chambers. We are indebted to them for their contributions and years of experience in the field of vulnerability in legal settings.

The most recent revision was undertaken by:

- Kyah Mufti, barrister
- Thomas Clarke, barrister,
- Max Melsa, barrister

The Advocate's Gateway also wishes to extend its thanks to all contributors and reviewers of this Toolkit in its present form.

FURTHER WORK FROM THE ADVOCATE'S GATEWAY

Visit <https://www.theadvocatesgateway.org/> for further resources published and shared by The Advocate's Gateway, including our internationally recognised Toolkits, case law updates and guidance on intermediaries.

TOOLKIT 1: Ground Rules Hearings

TOOLKIT 1A: Case Management in Criminal Cases

TOOLKIT 2: General Principles from Research, Policy, and Guidance

TOOLKIT 3: Planning to Question Someone with Autism

TOOLKIT 4: Planning to Question Someone with a Learning Disability

TOOLKIT 5: Planning to Question Someone with 'Hidden Disabilities'

TOOLKIT 6: Planning to Question a Child or Young Person

TOOLKIT 7: Additional Factors Concerning Children under Seven

TOOLKIT 8: Effective Participation of Young Defendants

TOOLKIT 9: Planning to Question Someone using a Remote Link

TOOLKIT 10: Identifying Vulnerability in Witnesses

TOOLKIT 11: Planning to Question Someone who is Deaf

TOOLKIT 12: Planning to Question Someone with a Suspected (or Diagnosed) Mental health Disorder

TOOLKIT 13: Vulnerable Witnesses in the Family Courts

TOOLKIT 13A: Family Court Cribsheet

TOOLKIT 14: Using Communication Aids

TOOLKIT 15: Witnesses and defendants with autism

TOOLKIT 16: Intermediaries: Step by Step

TOOLKIT 17: Vulnerable Witnesses in the Civil Courts

TOOLKIT 18: Working with traumatised witnesses, defendants and parties

TOOLKIT 19: Supporting Participation in Courts and Tribunals

TOOLKIT 20: Court of Protection