Have you seen the View? Toolkit 13 Vulnerable Witnesses and Parties in the Family Courts

© Penny Cooper January 2015 for Family Law

In June 2014 I met Sir James Munby, President of the Family Division, at a function hosted by Jordan Publishing. I introduced myself as the chair of The Advocate’s Gateway, a free online resource with best practice advice for advocates working with vulnerable people. I tentatively asked if he might review a draft ‘toolkit’ for family court advocates. Sir James asked if I’d seen his 12th View from the President’s Chambers (I had not) and he welcomed engagement with The Advocate’s Gateway. On reading that View (as soon as I got on the bus) it was clear that The President was reviewing the family courts’ approach to vulnerable witnesses; he had asked Mr Justice Hayden and Ms Justice Russell to chair a Children and Vulnerable Witnesses Working Group and he was aware of the ‘excellent’ Advocate’s Gateway website and materials for criminal practitioners.

Since June 2014, the Children and Vulnerable Witnesses Working Group, of which I am a member, has amongst other things produced the Interim Report of the Children and Vulnerable Witnesses Working Group - 31 July 2014 (‘The Interim Report’) and approved The Advocate’s Gateway’s Toolkit 13 Vulnerable Witnesses and Parties in The Family Courts. The toolkit has been circulated to all Family Law Bar Association members. It has been described as essential reading for family practitioners.

Toolkit 13

Toolkit 13 Vulnerable Witnesses and Parties in the Family Courts was launched on The Advocate’s Gateway in November 2014. It sits alongside a host of free resources including a training film, case law summaries and other ‘toolkits’ on using remote link, questioning child witnesses, understanding learning disabilities, questioning someone with autism, using communication aids etc. The parent body of theadvocatesgateway.org is The Advocacy Training Council which is chaired by Mr Justice Green and exists to promote excellence in advocacy.

Toolkit 13 is the first resource specifically devoted to best practice with vulnerable witness and parties in the family courts. It was researched and written by a working group led by Elizabeth Isaacs QC of the FLBA. Barristers, solicitors and intermediaries were key contributors. One of the first tasks was to define ‘vulnerable’. The criminal courts have a long established definition of ‘vulnerable’ and a range of adaptations or ‘special measures’ set out in statute. There is nothing comparable in family law, in addition most social care professionals prefer to use the term ‘at risk’. The Interim Report pointed out that there ‘was concern that the term [vulnerable] brought with it implications of physical or medical vulnerability to the exclusion of other disadvantages or need for support for witnesses’. It recommended that the ‘term vulnerable witness should remain in use as it is not desirable
for the family court procedure to become distanced or uncoupled from the practice and procedure as it has developed in the criminal justice system. The term needs to be extended to cover the parties as well as witnesses.’ Toolkit 13 uses the term ‘vulnerable’ and recognises that it encompasses a broad range of people who are at risk of unfair treatment unless adjustments are made to the traditional way of doing things in court. ‘Vulnerable’ includes children as well as for example victims of domestic or sexual abuse, those who are fearful or intimidated, those with learning disabilities or mental health issues and those who are deaf.

Within Toolkit 13 practitioners will find many good practice examples which illustrate special adjustments that can have been made. For 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. (Toolkit 13, page 8)

Even teenagers with no developmental delay or diagnosed special needs may need adjustments so that the risk of harm from giving evidence is minimised and they are enabled to give their best evidence:

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. (Toolkit 13, page 9)

Intermediaries in the family courts

Intermediaries regularly assist in family courts, though their function is not always understood properly and funding an intermediary may be problematic (Toolkit 13, pages 28 to 29). Intermediaries facilitate two-way communication between the vulnerable person and the other participants in the legal process with the aim of ensuring that communication is as complete, accurate and coherent as possible. Intermediaries are not expert witnesses and they are not witness supporters. Their overriding duty is to the court.

Intermediaries started to assist vulnerable witnesses in criminal cases in 2004 and soon their skill set was sought after in family cases. There is ample research to show that in criminal cases they have helped police officers and prosecutors achieve results that would not have been possible before. For instance in several cases children as young as four have been
successfully ‘ABE’ interviewed with the assistance of an intermediary. Last year at the Old Bailey a four year old, a witness to his mother’s murder, was carefully and appropriately cross-examined over the live link with the assistance of an intermediary. Although intermediaries have been used in family courts for several years, funding is still a major issue:

In In the Matter of D (A Child) [2014] EWFC 39, the President noted: ‘The mother and the father may require the use of an intermediary, not merely in the court setting but also, for example, when meeting professionals out of court. An intermediary at court is paid for by Her Majesty’s Courts and Tribunals Service: see Q v Q, Re B (A Child), Re C (A Child) [2014] EWFC 31, para 52. But who is to pay the costs of any intermediary whose use is necessary for the purposes of meetings with professionals out of court?’ (Toolkit 13, page 29)

Ground Rules Hearings in family cases

Like intermediaries, Ground Rules Hearings are an innovation imported from the criminal justice system. These hearings evolved out of intermediary training and practice but are now commonly used by judges in criminal cases, even when there is no intermediary, to set the parameters for the fair treatment of vulnerable defendants and vulnerable witnesses. Recently in R v Lubemba; R v JP [2014] EWCA Crim 2064 the Vice President of the Court of Appeal said:

‘...it is best practice to hold hearings in advance of the trial to ensure the smooth running of the trial, to give any special measures directions and to set the ground rules for the treatment of a vulnerable witness. We would expect a ground rules hearing in every case involving a vulnerable witness, save in very exceptional circumstances.’ [para 42]

These principles must surely apply to family cases. Best practice for a Ground Rules Hearing (‘GRH’), in fact the only guidance on this for family practitioners, is set out in the Toolkit 13 (pages 17 to 23). It draws on the lessons that have been learned in criminal cases:

The GRH must involve the judge and representatives for the party and, if there is an intermediary or other relevant expert witness involved, they should attend and be part of the discussion. Where an expert (including intermediary) is instructed to assess the party or witness, they should be asked to make recommendations about how the vulnerable person can engage fully with the court process; for example, giving specific recommendations as to questioning.

GRHs should take the form of a discussion. The judge should decide what ground rules are to apply and a note of what is agreed should be made by the court and the parties. It should indicate the expectation of the judge and all parties that the ground
rules and boundaries are complied with and that the advocates have a duty to comply. (Toolkit 13, page 18)

Toolkit 13 has a checklist of matters that ought to be considered at a Ground Rules Hearing; it provides family judges, advocates and intermediaries with a route map for their discussions.

Looking to the future: Reform and training

Toolkit 13 contains over forty pages of law, best practice guidance and case examples on matters ranging from litigants in person, the role of the Official Solicitor, the use of interpreters etc. In due course the toolkit will be revised to reflect the outcomes of the Children and Vulnerable Witnesses Working Group. From the proposals and recommendations in The Interim Report we can expect changes to the rules and practice directions. These will include amendments to rules on case management and early identification of vulnerability as well as revised practice directions on children seeing judges and on children giving evidence.

It is quite possible that Ground Rules Hearings will make their way into the Family Procedure Rules as they have made their way into the Criminal Procedure Rules. Following the author’s research into Ground Rules Hearings, from April 2015 in appropriate cases the criminal courts will be required to set ground rules which may include ‘a direction relieving a party of any duty to put that party’s case to a witness or a defendant in its entirety...directions about the manner of questioning...directions about the duration of questioning...if necessary, directions about the questions that may or may not be asked...where there is more than one defendant, the allocation among them of the topics about which a witness may be asked, and...directions about the use of models, plans, body maps or similar aids to help communicate a question or an answer.’ (Criminal Procedure Rule 3.9 (7))

On many occasions over the last five years the Court of Appeal has made it clear that the criminal judges have a duty to manage the fair treatment of vulnerable people in court and advocates have a duty to adapt their practices particularly when questioning the vulnerable. In criminal cases judges can and do invite advocates to ‘reduce their questions to writing in advance’ and judges must intervene ‘if an advocate's questioning is confusing or inappropriate’ (R v Lubemba [2014] EWCA Crim 2064, paras 43 and 44). There is every reason to think these principles apply to family judges. The Interim Report recommends training for judges, ‘in the form of an additional module during Judicial College training for Public and Private Law and online material both in respect of judges seeing children and regarding vulnerable witnesses’.

Training for family advocates is also recommended in The Interim Report. If practice in the criminal courts once again indicates the way ahead, mandatory training (or ‘ticketing’) on the proper treatment of vulnerable witnesses and parties is on the cards. The Advocacy
Training Council is likely to take a lead on this as it has done on vulnerable witness training for criminal advocates.

**Bookmark theadvocatesgateway.org**

A significant proportion of witnesses and parties in family cases need assistance to participate effectively and adjustments will be made to ensure that questioning is fair. Advocates must be alert to risk factors that indicate a person may be vulnerable. Making reasonable adjustments and safeguarding the vulnerable should be second nature in the justice system, especially the family justice system. *Toolkit 13* is required reading.

Penny Cooper

Professor of law, co-founder and Chair of The Advocate’s Gateway