

VULNERABLE WITNESSES IN FAMILY PROCEEDINGS

Frank Feehan QC

and

Caroline Harris



TOPIC AREAS:

- *Introduction*
- *General principles*
- *During the pandemic*
- *President's working groups*
- *Civil Justice Council – Current position and recommendations for change*
- *Recent case law*

INTRODUCTION: WHAT IS IT TO BE VULNERABLE?

- Don't worry we are not trying to begin a philosophical debate - but what does it mean?
- We would argue, that in many ways it quite simply means to be human.
- In the right circumstances or arguably the wrong circumstances – we can all find ourselves vulnerable and in need of support. Within court proceedings, that potential is arguably heightened.
- Sometimes vulnerabilities that may need support are more obvious to see or predict, for example, when the witness is a:
 - Child;
 - A person with disabilities; or
 - A complainant in sexual cases or domestic violence cases.
- By their nature, family proceedings, which relate very often to a person's children or dealing with intimate aspects of their private lives give rise to a real likelihood that most people involved will be, to some degree, vulnerable and in need of support.

- Further, vulnerability which requires support may not be present on one day but on the following day/week/next court hearing - due to a change in circumstances, that same person may find themselves with their usual strength reserves broken down. Therefore, vulnerability of those in family courts should be considered on a continuing basis, being alive to changing circumstances
- When the Family Procedure Rules were extended to include specific guidance for assisting those within family proceedings it was positive to see the measures not referred to as “special measures” but simply as “measures” or “participation directions”. This approach and use of terminology seems appropriate as these are court directions to ensure people can properly participate within proceedings.
- We would argue that it is appropriate that we see them as something that should be considered rather than something only ‘specially’ considered.
- Positively again, the FPRs ensure that who can be considered as vulnerable is wide, the test for measures being directed is:

“The court must consider whether a party’s participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.” [3A.4]

GENERAL PRINCIPLES

- Fairness:

- Sir Andrew McFarlane emphasises in *Re P (a child: remote hearing)* [2020] EWCFC 32:

'The overarching criterion is that whatever mechanism is used to conduct a hearing must be in the interests of justice, that issue being assessed by reference to the unusual circumstances that prevail and the unhappy alternative if a hearing is adjourned. **Every hearing we conduct in whatever form must provide a fair hearing.**'

- Family Procedure Rules: r 3A and PD 3AA

- Since November 2017 the Family Procedure Rules were amended to include specific provisions in relation to vulnerable witnesses r 3A and PD 3AA. These rules refer to 'participation directions' rather than 'special measures',

Consideration of the rules:

- Interpretation

3A.1. In this Part—

“child” means a person under the age of 18 years whether or not the child is the subject of the proceedings....”

“intermediary” means a person whose function is to—

(a)communicate questions put to a witness or party;

(b)communicate to any person asking such questions the answers given by the witness or party in reply to them; and

(c)explain such questions or answers so far as is necessary to enable them to be understood by the witness or party or by the person asking such questions;

- “live link” means a live television link or other arrangement whereby a witness or party, while absent from the courtroom or other place where the proceedings are being held, is able to see and hear a person there and to be seen and heard by the judge, legal representatives acting in the proceedings and other persons appointed to assist a witness or party;

Consideration of the rules:

- Interpretation continued:

“mental disorder” has the meaning given in section 1 of the Mental Health Act 1983();

“participation direction” means—

(a)a general case management direction made for the purpose of assisting a witness or party to give evidence or participate in proceedings; or

(b)a direction that a witness or party should have the assistance of one or more of the measures in rule 3A.8; and

references to “quality of evidence” are to its quality in terms of completeness, coherence and accuracy; and for this purpose “coherence” refers to a witness’s or a party’s ability in giving evidence to give answers which address the questions put to the witness or the party and which can be understood both individually and collectively.

- Court's duty to consider how a party can participate in the proceedings

- 3A.4

(1) The court must consider whether a party's participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.

(2) Before making such participation directions, the court must consider any views expressed by the party about participating in the proceedings.

Court's duty to consider how a party or a witness can give evidence

- 3A.5.

The court must consider whether the quality of evidence given by a party or witness is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions.

(2) Before making such participation directions, the court must consider any views expressed by the party or witness about giving evidence.

So consideration is mandatory

What the court must have regard to:

3A.7

When deciding whether to make one or more participation directions the court must have regard in particular to—

- (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 other 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.

Measures:

3A.8

(1) The measures referred to in this Part are those which—

- (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.

(2) If the family court makes a direction for a measure which is not available where the court is sitting, it may direct that the court will sit at the nearest or most convenient location where the family court sits and the measure is available

(3) If the High Court makes a direction for a measure which is not available where the court is sitting, it may direct that the court will sit at the nearest or most convenient location where the High Court sits and the measure is available.

(4) Nothing in these rules gives the court power to direct that public funding must be available to provide a measure.

(5) If a direction for a measure is considered by the court to be necessary but the measure is not available to the court, the court must set out in its order the reasons why the measure is not available.

When the duties of the court apply and recording reasons for decisions made under this Part

Case Law:

- *PS v BP* [2018] EWHC 1987 (Fam)
- Key guidance as to how to approach vulnerable witnesses giving evidence in family proceedings by Hayden J- His Lordship states that his ‘observations’ are intended to be a ‘life belt until a rescue craft arrives as there is real need for there to be a legal structure.’

“(i) Once it becomes clear to the court that it is required to hear a case ‘put’ to a key factual witness where the allegations are serious and intimate and where the witnesses are themselves the accused and accuser, a ‘Ground Rules Hearing’ (GRH) will always be necessary;

(ii) The GRH should, in most cases, be conducted prior to the hearing of the factual dispute;

(iii) Judicial continuity between the GRH and the substantive hearing is to be regarded as essential;

(iv) It must be borne in mind throughout that the accuser bears the burden of establishing the truth of the allegations. The investigative process in the court room, however painful, must ensure fairness to both sides. The Judge must remind himself, at all stages, that this obligation may not be compromised in response to a witnesses’ distress;

- *PS v BP* [2018] EWHC 1987 (Fam) continued:

(v) There is no presumption that the individual facing the accusations will automatically be barred from cross examining the accuser in every case. The Judge must consider whether the evidence would be likely to be diminished if conducted by the accused and would likely to be improved if a prohibition on direct cross-examination was directed. In the context of a fact-finding hearing in the Family Court, where the ethos of the court is investigative, I consider these two factors may be divisible;

(vi) When the court forms the view, from the available evidence, that cross-examination of the alleged victim itself runs the real risk of being abusive, (if the allegations are established) it should bear in mind that the impact of the court process is likely to resonate adversely on the welfare of the subject children. It is axiomatic that acute distress to a carer will have an impact on the children 's general well-being. This is an additional factor to those generally in contemplation during a criminal trial;

(vii) Where the factual conclusions are likely to have an impact on the arrangements for and welfare of a child or children, the court should consider joining the child as a party and securing representation. Where that is achieved, the child 's advocate may be best placed to undertake the cross-examination. (see *M and F & Ors.* [2018] EWHC 1720 Fam; *Re: S (wardship)* (Guidance in cases of stranded spouses) [2011] 1 FLR 319);

(viii) If the court has decided that cross-examination will not be permitted by the accused and there is no other available advocate to undertake it, it should require questions to be reduced to writing. It will assist the process, in most cases, if 'Grounds of Cross Examination' are identified under specific headings;

PS v BP [2018] EWHC 1987 (Fam) continued

(ix) A Judge should never feel constrained to put every question the lay party seeks to ask. In this exercise the Judge will simply have to evaluate relevance and proportionality;

(x) Cross-examination is inherently dynamic. For it to have forensic rigour the Judge will inevitably have to craft and hone questions that respond to the answers given. The process can never become formulaic;

(xi) It must always be borne in mind that in the overarching framework of Children Act proceedings, the central philosophy is investigative. Even though fact finding hearings, of the nature contemplated here, have a highly adversarial complexion to them the same principle applies. Thus, it may be perfectly possible, without compromising fairness to either side, for the Judge to conduct the questioning in an open and less adversarial style than that deployed in a conventional cross-examination undertaken by a party's advocate. '

Children giving evidence in family proceedings:

- ❖ All practitioners need to be familiar with the key cases of *Re W (Children)(Abuse: Oral Evidence)* [2010] UKSC 12, [2010] 1 FLR 1485 and *Re E (A Child) (Evidence)* [2016] EWCA Civ 473, [2017] 1 FLR 1675. There is a balance to be struck in deciding whether to call a child to give evidence which is addressed by Lady Hale in *Re W*. In *Re E*, McFarlane LJ is critical of the failure of practitioners to apply properly and rigorously the guidance in that case and that contained in the later guidelines from the Family Justice Council.
- ❖ In *Re W (Children)*, we highlight key paras [22]-[30] Lady Hale said:
‘ [22] ... The existing law erects a presumption against a child giving evidence which requires to be rebutted by anyone seeking to put questions to the child. That cannot be reconciled with the approach of the European Court of Human Rights, which always aims to strike a fair balance between competing European Convention rights. Article 6 requires that the proceedings overall be fair and this normally entails an opportunity to challenge the evidence presented by the other side. But even in criminal proceedings account must be taken of the Art 8 rights of the perceived victim: see *SN v Sweden* (Application No 34209/96) (2002) 39 EHRR 304. **Striking that balance in care proceedings may well mean that the child should not be called to give evidence in the great majority of cases, but that is a result and not a presumption or even a starting point.**

❖ Para 24:

‘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 will bring to the determination of the truth and the damage it may do to the welfare of this or any other child. A fair trial is a trial which is fair in the light of the issues which have to be decided...’

❖ In *Re E* McFarlane LJ said:

‘ [56] It is of note that, despite the passage of some 6 years since the Supreme Court decision in *Re W*, this court has been told that the previous culture and practice of the family courts remains largely unchanged with the previous presumption against children giving evidence remaining intact. That state of affairs is plainly contrary to the binding decision of the Supreme Court which was that such a presumption is contrary to Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention).

Other points:

- Advocate's Gateway and Tool Kits
- Guidelines for Judges Meeting Children who are Subject to Family Proceedings
- Official Solicitor to the Senior Courts

Capacity:

- The topic of capacity could be the subject of a lecture in its own right.
- However, clearly those who do not have capacity to conduct proceedings are vulnerable people within proceedings.
- Parties who do not have capacity to conduct proceedings are referred to as 'protected parties'.
- A party will be a protected party if they lack capacity under the Mental Capacity Act 2005, s 2(1). The participation of a protected party in proceedings is governed by FPR 2010, Part 15 and Practice Directions 15A and 15B.

VULNERABLE
PEOPLE
WITHIN
PROCEEDINGS
DURING
THE
PANDEMIC

- ❖ Nuffield FJO follow up consultation report
- ❖ Civil Justice Council: The impact of COVID-19 measures on the civil justice system

PRESIDENT'S WORKING GROUPS

Consideration of findings and recommendations of the President's working groups

- Public Law Working Group – chaired by Keehan J
- Private Law Working Group - chaired by Cobb J

Private Law working Group

- Second report
- Chapter 1 “Working for and with the vulnerable”
- *“The PrLWG acknowledges the validity of the comments made above. We are reassured that assessment of capacity is part of the core training for mediators. It is now some time since Vulnerable Witnesses and Children Working Group prepared its report; subject to any evidence indicating that the recommendations are outdated, it would wish to endorse the implementation of the full proposals of the working group on Vulnerable Witnesses and Children (2015). The PrLWG was interested to note the recently published Civil Justice Council Report: “Vulnerable Witnesses and Parties within Civil Proceedings” (February 2020) which contains interesting and important reflections on family proceedings esp. at 26 et seq, 49 et seq and 82 et seq.”*

VULNERABLE WITNESSES AND CHILDREN WORKING GROUP

- *Vulnerable Witnesses and Children Working Group prepared its report (2015):*
- *The recommendations are set out at paragraphs 32-37 of the report.*
- *The President's Working group recommends the implementation of the recommendations.*
- *There are over 20 recommendations – a number of which are based on the procedure already present in the Criminal Courts.*

CIVIL JUSTICE COUNCIL



REPORT: FEBRUARY 2020



**VULNERABLE WITNESSES
AND PARTIES WITHIN CIVIL
PROCEEDINGS CURRENT
POSITION AND
RECOMMENDATIONS FOR
CHANGE**



**REPORT SETS OUT 18
RECOMMENDATIONS FOR
CHANGE....**

RECENT CASE LAW

**JH v MF (Child Arrangements:
Domestic Abuse: Appeal) - [2020] 2
FLR 344**

**PS v BP (Evidence: Litigant in
Person) - [2019] 1 FLR 760**