

How to solve a problem like the absence of a QLR?

Re: Z (Prohibition on Cross-examination: No QLR) [2024] EWFC 22

The President of the Family Division has delivered a judgment dealing with the prohibition on cross-examination in the context of there being no Qualified Legal Representative.

The legal background

s.31Z Matrimonial and Family Proceedings Act 1989 (inserted by Domestic Abuse Act 2021) prohibits the cross examination in person between a person who is, or is alleged to be, the victim of an offence and the other party if they have been convicted, cautioned, or charged with that offence. S.31S prohibits the cross-examination of those who are protected by on-notice injunctions. S.31T prohibits cross-examination in person by a party where there is evidence that the witness to be cross-examined by a party to the proceedings has been a victim of domestic abuse carried out by the party. This applies both ways so that neither party may cross-examine the other in person.

Further, s31U affords discretion to the court to prohibit a party from cross-examining if it appears to the court that the quality condition or the significant distress condition are met and it would not be contrary to the interests of justice to direct a prohibition.

The above provisions mean there are now a large proportion of cases where a party is prohibited from cross-examining another party in private law proceedings involving domestic abuse and litigants in person.

Where a party is prohibited from cross examining a witness by virtue of the above, the Court must first consider whether there is a satisfactory alternative for the witness to be cross-examined or of obtaining evidence that the witness might have given under cross-examination.

Practice Direction 3AB of the Family Procedure Rules 2010, Paragraph 5.3, states that a satisfactory alternative to cross-examination does not include the court itself conducting the cross-examination on behalf of a party.

If the Court decides there is no satisfactory alternative, a Qualified Legal Representative must be appointed for the purpose of cross-examination if it is necessary in the interests of justice.

What is a QLR?

A qualified legal representative must be a barrister, solicitor or CILEX practitioner. They must have a current practising certificate and have undertaken advocacy and vulnerable witness training (or committed to undertake it within six months of registration). They must have the necessary skills and experience in cross-examining vulnerable witnesses in contested hearings.

The reported case

In this case, as in many cases, despite the above steps being followed, there was no QLR available.

In a '*View from the President's Chambers*' in June 2023, The President suggested as follows - 'if no QLR is found within 28 days, the court should list the case for directions and direct that some summary information is provided by HMCTS about the difficulties that have been encountered'. Cases should not be permitted to drift whilst an open-ended search for a QLR is undertaken. When directing the appointment of a QLR, a requirement should be included in the court's order directing that the case be returned to the judge/justices for further directions if, after 28 days (or whatever reasonable period is chosen), the court has not succeeded in appointing the QLR.

The president notes that the options facing the Court at that stage include:

- a) A further adjournment in the hope that a QLR may be found;
- b) An adjournment to allow one or both parties to engage their own advocate;
- c) Reviewing the need for the vulnerable party to give oral evidence and be cross-examined. This will include reviewing the need for there to be a fact-finding hearing in the proceedings;
- d) Considering any other alternative means of avoiding in person cross-examination between the relevant parties;
- e) The court itself taking on the task of asking questions in place of the in person party.

It does not automatically follow that, if no QLR is available, the Court is automatically required to conduct the questioning itself. All options should be reviewed.

The President makes clear that PD3AB, para 5.3, is not black letter law. It does not, as a matter of law, prevent the Court undertaking the task if it consider that, in the interests of justice, it must nevertheless do so. The Court must apply the Overriding Objective.

Questioning by the Court

The President gives some helpful guidance in the event the questioning is to be undertaken by the Court:

1. The Court has to tread a narrow path between, on the one side, ensuring the witness' evidence is adequately tested by the points that the other party wishes to raise, but, on the other, ensuring the judge does not enter the arena or be seen in any way to be promoting the case of one side or the other.

2. Where, because there is no other means of doing so, a judge is required to ask questions on behalf of a party, they necessarily vacate the detached position and must therefore guard all the more against being drawn into the arena so as to lose objectivity and diminishing their ability properly to evaluate and weigh the evidence.
3. A further need for caution may arise from the need for the judge to avoid taking an important point on behalf of one party which that party has not themselves raised.
4. The lodestar is fairness. Fairness should require the Court to be very open with the parties as to the process to be adopted by explaining what is to happen, step by step, at the start in straight forward terms. The Court should explain that it is taking on the role of asking the questions in order for the hearing to proceed in the absence of a QLR and where there is no satisfactory alternative.
5. The Courts should refer to the process as the court asking questions that the other party wishes to have asked rather than 'cross-examination'.
6. The Court must put the party's cases fully, properly, and fairly. The Court must not edit, neutralise, or otherwise defuse the questions that a party seeks to have asked so as to minimise their potential value.

The President refers to the observations of Hayden J at paragraph 34 of *PS v BP* [2018] EWHC 1987 (Fam). This paragraph sets out key considerations when the Court is asking questions on behalf of a party.

Practical points

1. Whilst there is value in the QLR attending court for the ground rules hearing so that they may meet the party on whose behalf they will be asking questions, where this is impractical, and where holding the hearing remotely means that a QLR who could not otherwise act can be appointed, it should be acceptable for the QLR to attend the ground rules hearing remotely;
2. The default position for the full hearing should be for the QLR to be in attendance at court, rather than joining remotely, as the overall effectiveness and fairness of the process is likely to be diminished if they are not in the courtroom;
3. In all cases (whether there is a QLR or not) at the ground rules hearing, or earlier, the court should direct that the prohibited party should submit a clear statement shortly stating the allegations, facts or findings that they seek to establish;
4. In all cases, the prohibited party should be required to file a written list of the questions that they wish to have asked prior to the main hearing. The list should go to the QLR, or to the court if there is no QLR, but not to the witness or other parties. This process should not prevent the prohibited party from identifying additional questions that may arise during the hearing;

Conclusion

Whilst it is to be hoped that, in time, the continued training programme and ability to claim travel expenses will increase the availability of QLRs, there will inevitably remain some cases where there is no alternative but for the Court to ask the questions itself. Unsatisfactory as that process plainly is, in such cases it will be necessary in order to deliver a just, fair, and timely conclusion to proceedings.

Where that is the case, the advice in this judgment is intended to assist the Court in navigating the tricky path between ensuring that the opposing case is put fully, fairly and properly, but doing so without entering the arena.

Jack McCabe