Guidance on Intermediaries in the Family Courts

Intermediaries

The Family Court comes into frequent contact with lay parties who require additional assistance due to their own vulnerabilities. One particular form of assistance is that of the use of intermediaries, who assist those lay parties (and sometimes witnesses) who help with proper engagement and understanding of the court process.

Under the Family Procedure Rules r3A:1 defines an intermediary as:

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…

The use of intermediaries is not limited to that of the Family Court, as the Criminal Courts also utilise intermediaries for vulnerable witnesses, most commonly child witnesses. In fact, there is guidance as to the appointment of intermediaries in the Criminal Practice Directions 2015. The Court of Appeal gave detailed consideration as to the appointment of intermediaries and how they should be used in *R v Thomas (Dean) [2020] EWCA Crim 117*. There is no such guidance on intermediaries in the Family Court. Until now.

Reporting on the instruction and use of intermediaries arose initially on 19th January 2024 in the matter of *West Northamptonshire Council (acting via Northamptonshire Children's Trust) v KA (Mother) & NH(Father) and X [2024] EWHC 79 (Fam),* before Lieven J.

Some of the key facts in this case are:

- The mother is profoundly deaf.

- The risk issues that caused the Local Authority to issue surround domestic abuse, the mother's unstable mental health and her inability to recognise dangerous situations.
- The mother had a child previously who was subject to public law proceedings, where the threshold facts found by the court surrounded the same risk issues.
- At the point of the hearing before Lieven J, the matter was in week 127.
- The Local Authority's final care plan was that of care and placement orders.

A number of applications had been made by the mother following an interim removal hearing on 6th May 2022 (the mother had previously cared for the child in a mother and child residential placement, which concluded with a negative assessment), one of which included an application for an intermediary. That application was granted, and the intermediary assessment is dated 6th June 2022. There was a further application for a specialist updated cognitive assessment, to be completed by a deaf specialist. Amongst a number of recommendations, the specialist updated cognitive assessment summarised that the mother "would benefit from a deaf intermediary".

After further assessments completed by other experts, the matter was listed for a 5 day final hearing, starting on 6th November 2023. The deaf intermediary did not attend and attempts to contact her were met with an out of office reply (it later transpired there was a family emergency). The pool of deaf intermediaries was small, and nobody was available, and so the matter had to be relisted in January 2024. The acting DFJ for Northampton listed the matter before Lieven J to consider the question of wasted costs against the deaf intermediary who was instructed to attend the final hearing and had failed to do so. It is clear from reading the judgment that the necessity of the deaf intermediary was considered, to avoid any further delay.

Lieven J granted the instruction of a deaf intermediary for the mother as it was, in her view, entirely necessary, when considering the points below. It is clear to Lieven J that *R v Thomas (Dean)* guidance is applicable to the same issues in the family justice system – to ensure the individual in question can participate in the proceedings so that their trial rights are protected.

The principles outlined in *R v Thomas (Dean*), to be applied in the Family Court, can be summarised as follows:

a. It will be "exceptionally rare" for an order for an intermediary for a whole trial. Intermediaries are not to be appointed on a "just in case" basis. A Judge appointing an intermediary should consider very carefully whether a

whole trial order is justified, and not make such an order simply because they are asked to do so.

b. The Judge must give careful consideration not merely to the circumstances of the individual but also to the facts and issues in the case.
c. Intermediaries should only be appointed if there are "compelling" reasons to do so, and not because the process "would be improved" (*R v Cox [2012] EWCA Crim 549 at [29]).*
d. In determining whether to appoint an intermediary the Judge must have regard to whether there are other adaptations which will sufficiently meet the need to ensure the at the defendant can effectively participate in the trial;
e. The application must be considered carefully and with sensitivity, but the recommendation by an expert for an intermediary is not determinative. The decision is always one for the Judge.
f. If every effort has been made to identify an intermediary but none has been found, it would be unusual (indeed it is suggested very unusual) for a case to be adjourned because of the lack of an intermediary.
g. In *Cox* the Court of Appeal set out some steps that can be taken to assist the individual to ensure effective participation where no intermediary is appointed. These include:
    a. Having breaks in the evidence
    b. Ensuring that "evidence is adduced in very shortly phrased questions" and;
    c. Witnesses are asked to give their "answers in short sentences".

On that last point, Lieven J reminds all advocates of the need to be familiar with the Advocates Gateway, and the words of Hallett LJ in *R v Lubemba [2014] EWCA Crim 2064 at [45]* that "*Advocates must adopt to the witness, not the other way round."*

<u>Conclusion</u>

Whilst there has been a reliance on intermediaries, and they have proven to be very helpful in particular cases, the recent decisions of Lieven J remind us all as advocates that there is a skill to engaging the client you have before you. Not only do we as advocates have to adapt to a witness but adapt to our own clients in being able to get the best out of them, but also to allow us to get the best out of ourselves as practitioners. The Court still has to be satisfied that an intermediary is necessary and makes that decision itself based upon the factors identified in *R v Thomas (Dean).*

Oh, and make sure you've read, and are familiar with, the Advocates Gateway!!

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