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VULNERABLE CLIENTS AND THE FAMILY JUSTICE SYSTEM

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Five questions I pose in this lecture:

- *Should a disability prevent someone from being a good enough parent?*
- *What disabilities does the court encounter? Is vulnerability the same as disability?*
- *What does the family justice system do to protect the rights of the disabled person to be a parent and of the child to be adequately parented?*
- *How can a vulnerable parent be helped to ensure their voice is heard in court?*
- *Beyond the court room: do we make a difference in society where it really counts?*

Q1: Should a disability, of itself, prevent someone from being a good enough parent?
A: A resounding No!

As Baker J said in ***Kent County Council v A Mother [2011] EWHC 402****, para 132 and 133*

> "The last thirty years have seen a radical reappraisal of the way in which people with a learning disability are treated in society. It is now recognised that they need to be supported and enabled to lead their lives as full members of the community, free from discrimination and prejudice. This policy is right, not only for the individual, since it gives due respect to his or her personal autonomy and human rights, but also for society at large, since it is to the benefit of the whole community that all people are included and respected as equal members of society. One consequence of this change in attitudes has been a wider acceptance that people with learning disability may, in many cases, with assistance, be able to bring up children successfully.

Parents should not expect to be perfect. As Hedley J said in **Re L (Care: Threshold Criteria)** [2006] EWCC 2 (Fam):

> ". society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, whilst others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the State to spare children all the consequences of defective parenting. In any event, it simply could not be done."

As long ago as 2011 the Family Division was vocal in recognising:

(a) that parents with learning disability need to be supported and enabled to lead their lives as full members of the community, free from discrimination and prejudice,
(b) a wider acceptance that people with learning disability may in many cases, with assistance, be able to bring up children successfully, and
(c) the need for professionals working with families and children to be trained to recognise and deal with parents with learning disabilities and (d) the need for Government Guidance to be followed.

See Baker J again in in Kent County Council v A (ibid)

That case focused on learning disability but is the message confined to that group of parents?

Quite simply "no". The majority of recent family case law in relation to equality of opportunity has centred on learning disability but I see no reason why it should not apply to disability across a wide spectrum: blindness, deafness, mobility limitations, or any combination of vulnerabilities. Physical disability is generally easier to assess because it is visible and its impact on a person skill sets is more obvious, but should anything without physical signpost be any less significant?

The answer is: it should not be: The Equality Act 2010 imposes a duty on local authorities to make reasonable adjustments so as to eliminate discrimination and to advance equality of opportunity.

The President of the Family division acknowledged this issue in **Re D (A Child) (No 3) [2016] EWFC 1, para** 117 (he was talking of the parents before him who had learning difficulties)

> "Here, as they rightly say, the parents *need* help. But how, they ask, do these parents, with their particular difficulties, differ from the parent physically disabled by Thalidomide, or the parent who is blind, or a parent with a brain injury as distinct from a learning disability, who may not be able to see or to react quickly to some risk to which their child is exposed. What such parents need, they submit, is that a reasonable adjustment is made for the deficits in their parenting which arise from their own inherent difficulties rather than from neglect or failure or indifference. The fact that such adjustments are made, and that such parents may be receiving a high level of help and support, does not, they say, mean that they are not bringing up their children. Why, they ask rhetorically, should it be any different for *these* parents with *their* difficulties?"

In the family courts and in our social work and legal practices we should and must recognise and respect the rights of parent with disabilities to raise their child, and they should be entitled to do so with as much support as can properly be given by the state in recognition of the family's Art 8 rights to have a private family life. But parenting with support has its limits. The level of support required should not amount to substitute parenting by the state.

The concern I have is how many families are let down at grass roots level because they are invisible to social services, or not deemed eligible for support if they are seen, and there is no one there to advocate for their needs if they are wrongly being excluded from services they are entitled to.

How many children are accommodated (i.e. taken into state care under a 'voluntary' temporary agreement) because parents don't seem to be coping (without the support they are entitled to)? How many accommodated children drift in care because neither their parents nor the child have access to advocacy services to challenge the status quo?

Anecdotal evidence suggests that the cases we lawyers see in court where we are able to explore, challenge and argue for recognition and support for vulnerable parents represent a tiny fraction of those who need help and don't get it: not because social workers have an 'agenda' to remove the children of such families; nor do I believe that social services deliberately discriminate against a particular social group. None the less, the reality is that families fall through the net because the level of professional knowledge about what should be done, the level of financial and service support required to do what needs to be done and the lack of joined up thinking (and action) between the child, adult and disability systems is grossly inadequate. That systemic failure creates a formidable barrier to effective and timely action for families in need.

I have already delivered a lecture on the significance of the judgment of The President in **RE D, (a child) (no 3) 2016 EWFC 1** which brought to wider attention the wise words of Mr Justice Gillen in the case of **RE G and A (Care Order; Freeing Order) Parents with learning Disability) [2016] NI Fam 8.** Please see *my previous lecture in series 1 2016/7 'Why there is no Typical Family in the Family Court'* in which I explored the case of RE D and Re G and A in some depth. This lecture updates and develops some of its themes.

That guidance from Gillen J, endorsed by The President, has found renewed endorsement and reflection by two judges of the county court.

Judgment was handed down in December 2017 in a very recent disability case by HHJ Dancey **(see *A Local Authority v G (Parent with Learning Disability) [2017] EWFC B94)*** in which Gillen J's words of wisdom and guidance were reiterated and applied. They also resonated with another judge, HHJ Cleary, who in **A Local Authority v C, PW,CW,MW (acting through their Children's Guardian) Case no CV15C00951** (like the President) could not improve on the words of Gillan J and quoted them thus

> 'Children of parents with learning difficulties often do not enter the child protection system as the result of abuse by their parents. More regularly the prevailing concerns centre on a perceived risk of neglect, both as the result of the parent's intellectual impairments, and the impact of the social and economic deprivation commonly faced by adults with learning difficulties. It is in this context that a shift must be made from the old assumption that adults with learning difficulties could not parent, to a process of questioning why appropriate levels of support are not provided to them so that they can parent successfully and why their children should often be taken into care. At its simplest, this means a court carefully enquiring as to what support is needed to enable parents to show whether or not they can become good enough parents rather than automatically assuming that they are destined to fail.

But do not be misled by thinking that this ethos drove either HHJ Dancey, HHJ Clealry or The President to the conclusion that the child/ren should remain with their parents. It did not. These judges concluded that the children could not live at home, the common thread behind their reasoning being

> 'even if a sustainable package could be devised which was in one sense capable of bridging the gap, it would not in fact be promoting [the child's] best interests. His parenting would, in reality become parenting by his professional and other carers rather than by his parents, with all the adverse consequences for his emotional development and future welfare."
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> Per HHJ Cleary in A LA v C (ibid)

Remember that, as I have explained in my previous lectures, there is no legal presumption *or right* in favour of a child being brought up by their natural family: ***Re W (A Child)*** [2016] EWCA Civ 793, per McFarlane LJ at 71:

> "The only 'right' is for the arrangements for the child to be determined by affording paramount consideration to her welfare throughout her life (in an adoption case) in a manner which is proportionate and compatible with the need to respect any ECHR Art 8 rights which are engaged."

YC v UK (2012) 55 EHRR 33:

> "family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. **However,** where the maintenance of family ties would harm the child's health and development, a parent is not entitled under article 8 to insist that such ties be maintained."

In disability cases (of whatever type) the court will be alert to the tension between putting in place a package of support that means the parents deficits in parenting can be ameliorated verses the impact of that degree of interference in the family home for the child. If the package of support required amounts to substitute parenting the reality is that the children exposed to it would be likely to suffer repeated changes of personnel delivering care/support in their home and would be unable to identify who their primary care giver was. Such a lack of continuity and uncertainty is widely recognised as being harmful to their development

Determining how much support is necessary and how much is intrusive is a profoundly difficult balancing exercise the judge who has to decide where a child should live, with their parents or removal from the home

they know? Especially when one consequences of excluding the parent from the care of their child is adoption which severs all legal ties between them.

Just how much support can and should be given to the family to enable a child to remain at home? At what point does that level of support become a burden rather than of benefit to the child and deprive it of the type of family life, free from state interference, that it is entitled to enjoy to reach its own full potential?

A child thrives best with a birth parent or alternative family care, foster care or adoption. Parenting by provision of stranger care through multiple professionals going into the home is not good enough. To be clear: corporate parenting is not a good enough substitute for the child. At that point, the child's right to receive a 'good enough' level of parenting and not to be exposed through the lack of it to the risk of significant harm, neglect or impairment of its development[1], takes precedence over the parent's right to bring up their child within their home.

Often the tipping point between those two options is difficult to pin point because, as so often is the case, the family comes to court as a result of allegations of long term neglect where the adult and children's needs have not been properly addressed in the community.

Remember what Gillen J said "*Children of parents with learning difficulties often do not enter the child protection system as the result of abuse by their parents. More regularly the prevailing concerns centre on a* ***perceived risk*** *of neglect, both as the result of the parent's intellectual impairments, the impact of the* ***social*** *and* ***economic deprivation commonly faced by adults with learning difficulties***

Key words in that sentence are 'social and economic deprivation'. We know there are deserts of funding for community support. And who is entitled to a slice of those scarce resources? 'Vulnerability' does not equate to 'disability': definitions may not make a difference in terms of practical day to day living but they may have significant implications for access to resources: take learning 'difficulty' and learning 'disability' as an example. A parent with a 'learning disability' has an IQ below 70; a parent with a 'learning difficulty' has an IQ above 70,

'Learning disability'? What is it?
"A significantly reduced ability to understand new or complex information, to learn new skills (impaired intelligence); with a reduced ability to cope independently (impaired social functioning); which started before adulthood, with a lasting effect on development".

Department of Health, *Valuing People*2001

Mencap describe it in a more practical way:
'A learning disability is a reduced intellectual ability and difficulty with everyday activities – for example household tasks, socialising or managing money – which affects someone for their whole life.'

But when it comes to access to services, whether someone has a 'disability' as opposed to a 'difficulty' may experience similar struggles with daily life but access to services may diverge

Best Beginnings [2] reports '*Many people who have a learning disability prefer to use the term "learning difficulty". A person with an IQ of less than 70 can be diagnosed as having a learning disability. Around 7% of adults with a learning disability are parents, but most have a mild to borderline impairment, which may make it difficult to identify them as they will not have a formal diagnosis. Around 40% of parents with a learning disability do not live with their children. The children of parents with a learning disability are more likely than any other group of children to be removed from their parents' care. Parents with a learning disability are often affected by poverty, social isolation, stress, mental health problems, low literacy and communication difficulties.'*

A highly respected legal commentator going by the name of Suesspiciousminds identified some thought provoking questions in his blog about the way professionals and the courts assess parents with disabilities. He

[1] 'Harm' in section 31 of the Children Act 1989 Act means ill-treatment or impairment of physical or mental health or development including, for example, impairment suffered from seeing or hearing the ill-treatment of another, including sexual abuse and non-physical ill-treatment. Development means physical, intellectual, emotional, social or behavioural development.

[2] A web site with advice and information for parents with learning difficulties

analysed the President's decision ***Re D (A Child) (No 3) [2016] EWFC 1*** and put into the public domain some of the challenging questions posed to the judge by the highly experienced and able lawyers acting on behalf of the parents. They argued:

1. Were the things that happened to this child a result of parental deficiency, or were they frankly things that could happen to any child and any parent, but they were pathologised because of the parents known issues?
2. Were the failings here attributable to the parents, or the support provided?
3. Is there such a thing in law as reparative care, or is insisting that a child needs higher than good enough care simply a social engineering argument in disguise (topical, given the proposed reforms to adoption)
4. Is a parent with learning difficulties treated differently (or discriminated against) than a parent with physical disabilities?
5. Is a plan that involves extensive professional support and carers really harmful to a child, or is it the sort of thing that happens all the time with children whose parents are very rich?

Questions like these need to be asked and answered because otherwise professionals and the court system run the risk of implementing a policy of indirect discrimination driven by hidden bias.

Q2: What disabilities does the court encounter? Is vulnerability the same as disability?

There is no limit to the disabilities that are brought before the court. As part of the background which informs the decision over the child's welfare needs. Here are just some:-

Physical disability	Autism
Deafness	Aspergers
Blindness	Mental disorder
Learning disabilities	Language Impairment ('hidden' communication difficulties)

Or it could be a combination of any of the above allied with a potential history of neglect and abuse of the parent with a disability as a child themselves.

What if communication difficulties are further hindered by language barriers? Is English the vulnerable party/witness first language? Think about the implications of this when one is talking about assisting a deaf party to particulate. If the witness is speaking in English and the deaf parent is Bengali and does not use British Sign Language then one needs to factor in translation from English speech into both sign language and Bengali. And one needs visibility between the witness and the signer and the signer and the parent. Which requires a relay system in court. If one has the added factor of the parent having learning difficulties as well as being deaf and a non-British Sign Language speaker then the ramifications for the support that should properly be offered to the parent and the interpreters becomes highly complex. Add to that mix mental health difficulties in the parent and one starts to flounder but the family court cannot fail the parent and the child by denying the parent effective access to the evidence.

We have an obligation, as the Lord Chief Justice acknowledged n his welcome speech upon taking office in October 2017 *to 'work to ensure that justice is at the centre of our society; to secure access to justice for all, whatever their means or abilities'.*

And to be clear, the example I have given above of a deaf, Bengali, learning disabled parent with pronounced mental health problems was not a theoretical example: it was something I had to anticipate and manage in a case I was hearing as Recorder.

We cannot afford to pigeonhole people or label them. Vulnerable people are not a homogeneous group and not everyone with a disability will automatically be vulnerable or would wish to be regarded as such. Equally, advocates should note that parties or witnesses who appear to be robust or resistant to assistance may in fact be fearful about the impact of their vulnerabilities on the outcome of their case; for example, concern that disclosure of a mild learning disability or mental health history could negatively impact on the assessment of

their parenting. They may also be embarrassed or ashamed of their vulnerability and do all they can to hide or mask it.[3]

The Honourable Mr Justice Cobb gave the keynote speech to the Family Law Bar Association Conference in November 2017 and his speech was published in Family Law in January[4]. I heartily encourage you all to seek it out and read it in full. Cobb J asked 'Do the vulnerable have effective access to family justice? It is a beautifully expressed piece of writing that illustrates how humanity, as much as intelligence and knowledge, is a quality that the very best of our family judge possess. In it Cobb j talks about identifying the vulnerable. I am going to borrow his words because I cannot improve on them

> 'Vulnerability is not a homogenous concept- it manifests in many forms. Some exhibit their vulnerability visibly and unmistakably; others subtly, silently and discreetly. There are those whose vulnerability is defined by their age (children and the elderly), or mental incapacity. There are those who are paralysingly vulnerable because of the behaviours of others towards them-suffering intimidation and persecution. Some deliberately hide their vulnerability out of shame or fear; the spouse who bears the emotional and unhealed wounds of years of control and coercion. The cohort is populated with many others including those with learning difficulties, dyslexia, dyspraxia, behavioural disorders, with ADHD or Asperger's Syndrome, with autism, the list goes on…
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> There is a huge class who are not readily defined or identified by label or category but who are vulnerable because of a legacy of their own upbringing
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> adults who, as children, were abandoned, criticised, overprotected, abused, or deprived, received parenting which was not by Winnicott's standards 'good enough'; who had their developed pattern of behaviour in their childhoods which have reverberated throughout their adult lives. They go on to be parents who repeat these characteristic tragically recreating the very situations in which they themselves were mistreated. ….. This is large class of vulnerable. I refer to them as 'vulnerable by adverse experience'.

Obviously one needs more than aspirational words to ensure that a party is enabled to participate in a hearing. 'Access to Justice' demands action through practical measures to give expression to that duty.

The Inns of Court have prepared some extraordinarily helpful guidance on how lawyers might explore vulnerability and consequent need with their clients. They have drawn up clear practical 'Toolkits' that guide professionals through the sensitive stage of exploring needs. Toolkit 11 of the Advocates gateway: 'Identifying vulnerability in witnesses and defendants' contains some good practice example questions which can be asked of the client which may assist the advocate in ascertaining vulnerability:

- Do you/did you get any extra help at school from a person just for you?
- Do you need extra help managing money?
- Do you need any extra help with getting about or going to appointments?
- Do you need any extra help with listening, speaking or reading?
- Do you need any extra help to stay calm?[5]

However, self-reporting is not the only or even the most reliable way of ascertaining vulnerability. Certain behaviour, characteristics or circumstances may also suggest vulnerability. [6]Identifying vulnerability in witnesses and defendants (Toolkit 10[7] of the Advocates Gateway: cf in this lecture provides a helpful list of behavioural characteristics or circumstances that may warrant further consideration.

It is important to remember that vulnerability may not be constant, consistent or continuous within an individual.

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[3] see Advocates Gateway Toolkit 13
[4] 'Do The Vulnerable have effective access to family Justice?' Jan (2018) Fam Law 36.
[5] The Advocates' Gateway Toolkit 10
[6] Toolkit 10 again, section 2.18:
[7] paragraphs 1.8–11

I have referred to the UN Convention on the Rights of Persons with Disabilities 2006. It defines 'disabilities' as 'evolving concepts'. 'Disability' is not a fixed state; it can alter from society to society. In addition disability isn't restricted to a medical condition or 'label' or diagnosis. As Cobb J describes it in his lecture it '*is a state that results from the interaction between negative attitudes or an unwelcoming environment with the condition of particular persons'*.

Vulnerability may be transient or situational. Advocates and judges should therefore consider the issue of vulnerability at the time of the relevant hearing. Someone who would be regarded as vulnerable at the initial stage of a case might not be at the final hearing and vice versa. The issue of vulnerability should be kept under review. Individual personal factors (for example, age, incapacity, impairment or medical condition), environmental factors, or a combination of the two can give rise to vulnerability. An environmental factor, such as being in the courtroom or seeing one of the parties, might 'trigger' anxiety.

Clients don't come to court with sign posts saying 'I have this problem; help me'. Lawyers need to be proactive, vigilant, inquisitive and alert to signs of change. As I have said: vulnerability can be transient or fluctuating. It is not the same as capacity. The issue of vulnerability should therefore be regularly and proactively reviewed. Vulnerability may only become apparent or heightened in certain circumstances. For example, a client's vulnerability may not be apparent when in a meeting/conference with their advocate, but may become apparent or heightened when at court, during evidence or in meetings with professionals.

An expert may be necessary to help ascertain the level and extent of vulnerability, so consideration should be given at the earliest stage as to whether an application under Part 25 Family Proceeding Rules 2010 should be made to the court. The type of expert required (if any) will depend heavily on the circumstances of the case. A non-exhaustive list of suggested experts might include: a psychiatrist; a psychologist; an independent social worker; an expert in speech and language difficulties. In addition, information may be helpful from treating doctors and professionals.

Q3: What does the family justice system do to protect the rights of the disabled person to be a parent and of the child to be adequately parented?

Quite simply, vulnerability needs to be recognised before it can be addressed. And how to address it needs to be more widely known about, and put into practice, in the community rather than its absence being exposed in a trial.

One study profiling the lives of 30 birth mothers who had had a child(ren) compulsorily removed found that many of the mothers had 'major issues' around their capacity to exercise choice, long-standing mental health issues and learning disability (Broadhurst 2012). In another study, it was reported that that 12.5% of parents involved in care proceedings had learning difficulties (Masson et al 2008) and, in another, it was found that, in one local authority, one-sixth of care proceedings involved at least one parent with learning disabilities (Booth and Booth 2004). There is evidence which indicates that parents with learning disabilities are often unsupported in their involvement with child protection agencies or courts (Swift et al 2013). There is a well-established chain of authorities and evolution of recent public policy in relation to people with learning disabilities being considered able to act as parents and cautioning against 'social engineering'.

Governmental Good Practice Guidance has been issued in successive editions to address the lack of effective joint working between adult and children's services (2007 and 2016 to name the most recent publications)[8].

This Guidance gives practical expression to the duty on Social and Community Services (both children and adult) to offer help to enable children to live with their parents (as long as this is consistent with the children's welfare) by providing the support they and their families require.

[8] **The DoH/DfES** Good Practice Guidance (updated September 2016.) **Good Practice Guidance on Working with Parents with a Learning Disability (updated September 2016) DoH/DfES**

This accords with the general duty of local authorities under section **17(1)** of the **Children Act 1989** to provide a range and level of services to safeguard and promote the welfare of children in need and their upbringing by their families (with the caveat that it must be consistent with their welfare).

Good professional practice requires an approach to parenting and disability which addresses adult needs relating to impairment and disabling barriers of unequal access and negative attitudes. Such an approach recognises that:

> "... If the problem is seen as entirely related to impairment and personal limitations, it is difficult to understand how to bring about positive changes for parents and their children.
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> ... If the focus is, instead, on things that can be changed (such as inadequate housing) and support needs that can be met (such as equipment to help a parent measure baby feeds), there are many more possibilities for bringing about positive improvements." [9]
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> per HHJ Dancey on 18 December 2017 in **A Local Authority v G (Parent with Learning Disability) 2017 EWFC B94**[10]

Why do the principles of the Good Practice Guidance need to be applied?

Because failure to apply the principles of the Good Practice Guidance is detrimental to the children's welfare and amounts to a breach of their and their parents' rights: such as those under the **United Nations Convention on the Rights of the Child** and the **United Nations Convention on the Rights of Persons with Disabilities**[11], the **Equality Act 2010** and the **Human Rights Act 1998**. Parents with learning disabilities must be given every opportunity to show that they can parent safely and be good enough parents, with appropriate support.

As long ago as 2011 Baker J ***Kent County Council v A Mother [2011] EWHC 402*** identified the principles (and the failure to apply them in practice) of the 2007 guidance:

> 'The 2007 guidance points out, inter alia, that a specialised response is often required when working with families where the parent has a learning disability; that key features of good practice in working with parents with a learning disability include
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> (a) accessible and clear information,
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> (b) clear and co-ordinated referral and assessment procedures,
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> (c) support designed to meet the parent's needs and strengths,
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> (d) long-term support where necessary, and
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> (e) access to independent advocacy; that people may misunderstand or misinterpret what a professional is telling them so that it is important to check what someone understands, and to avoid blaming them for getting the wrong message; that adult and children's services and health and social care should jointly agree local protocols for referrals, assessments and care pathways in order to respond appropriately and promptly to the needs of both parents and children; and that, if a referral is made to children's services and then it becomes apparent that a parent has a learning disability, a referral should also be made to adult learning disability services.
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> The guidance also stresses that close attention should be paid to the parent's access needs, which may include putting written material into an accessible format, avoiding the use of jargon, taking more time to explain things, and being prepared to tell parents things more than once."

I pose the question: since the Governmental Guidance was available in 2007 why have there been so many instances of failures to apply it prior to its relaunch in 2016? Are the 'new' guidelines going to be any more

[11] Article 13 of the UN Convention on the Rights of Persons with Disabilities 2006 (ratified by the UK in 2007) states'

effective? We can see in the judgments of various courts since 2007 that little appears to have been learnt in the community.

In summary, the guiding principles for working with parents with disability are these:

1. People with a learning disability are individuals first and foremost and each has a right to be treated as an equal citizen. Courts must take all steps possible to ensure that people with a learning disability are able to actively participate in decisions affecting their lives.
2. Parents with learning difficulties can often be "good enough" parents when provided with the ongoing support they need. The concept of "parenting with support" must underpin the way in which the courts and professionals approach wherever possible parents with learning difficulties.
3. Judges must make absolutely certain that parents with learning difficulties are not at risk of having their parental responsibilities terminated on the basis of evidence that would not hold up against normal parents. Their competences must not be judged against stricter criteria or harsher standards than other parents.
4. Too narrow a focus must not be placed exclusively on the child's welfare with an accompanying failure to address parents' needs arising from their disability which might impact adversely on their parenting capacity.
5. The court must also take steps to ensure there are no barriers to justice within the process itself. Judges and magistrates must recognise that parents with learning disabilities need extra time with solicitors so that everything can be carefully explained to them… The process necessarily has to be slowed down to give such parents a better chance to understand and participate. This approach should be echoed throughout the whole system including Looked After Child reviews.
6. All parts of the family justice system should take care as to the language and vocabulary that is utilised.
7. The courts must be careful to ensure that the supposed inability of parents to change might itself be an artefact of professionals' ineffectiveness in engaging with the parents in appropriate terms.
8. A shift must be made from the old assumption that adults with learning difficulties could not parent to a process of questioning why appropriate levels of support are not provided to them so that they can parent successfully. The concept of "parenting with support" must move from the margins to the mainstream in court determinations.

Why is this important to know? Because in practice there is little evidence of effective joint working between adult and children's services and practitioners in each area rarely have a good working knowledge of the policy and legislative framework within which the other is working.

Why is this co-ordination important? Because otherwise families can be torn apart.

Per Baker J in ***Kent County Council v A Mother [2011] EWHC 402***, *133*

> "there has been the realisation that learning disability often goes undetected, with the result that persons with such disabilities are not afforded the help that they need to meet the challenges that modern life poses, particularly in certain areas of life, notably education, the workplace and the family."

As HHJ Dancey said in **A Local Authority v G** (ibid)

> 'Where a parent has a learning disability the court must make sure that parent is not being disadvantaged simply because of their disability'

Q4: How can a vulnerable parent be helped to ensure their voice is heard in court?

> The Human Rights Act 1998 entitles a parent to participate fully in the process; this includes stages prior to any formal legal proceedings being initiated as well as within it.
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> Courts have safeguarding responsibilities in respect of children and vulnerable adults please see the Equal Treatment Bench Book 2013 [12] Chapter 13 [13]
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> '{disability} places upon the state (and upon others) the duty to make reasonable accommodation to cater for the special needs of those with disabilities'
>
> **per Lady Hale in P. Cheshire West and Others [2014] UKSC 19 para 45**

Going to court is stressful, for anyone. But what of the extra stress for a person who labours to get to court let alone understand what happens within it? What if you are illiterate or English isn't your first language and you can't read the court letters? What if you are agoraphobic and can't get there? What if you are paralysed by depression? How can such people be helped to participate?

When the price of silence is that their child may potentially be placed for adoption, there can be no room for failures in engagement and access to the judge who make a 'forever' decision.

The New Practice Direction (PD)3AA

On the 27th November2017 a new Part 3A of the Family Procedure Rules 2010 came into force supplemented by a new Practice Direction 3AA. The purpose of the new Part 3A is twofold:

1. to set out the court's duties and powers in relation to assisting parties whose ability to participate in family proceedings may be diminished by reason of their vulnerability, and

2. to assist parties and witnesses in family proceedings where the quality of their evidence is likely to be diminished by reason of their vulnerability.

It has had a long gestation period.

In 2014 The President, Sir James Munby, was issuing a call to arms '*there is a pressing need for us to address the wider issue of vulnerable people giving evidence in family proceedings, something the family justice system lags woefully behind the criminal justice system.'*

*H*e continued '*it is time for an update. This requires-demands- urgent action by all, including ministers and officials. I do not want to start 2018 with a further call to action'.*

By June 2014 Sir James Munby had established the Vulnerable Witnesses and Children Working Group (VWCWG) led by Hayden J and Russell J. The VWCWG published an interim report with initial recommendations in August 2014. The interim report was subject to extensive consultation across the family justice system and the consultation responses informed the final report of the VWCWG, which was published on 17 March 2015.

The need to introduce rules explored by the President in both judgments and views e.g. 16th View— Children and vulnerable witnesses—where are we? He was not happy with the lack of progress made.

As he said, by 2015 nothing had changed: 'there is the wider issue of how we treat the vulnerable, whether they come before us as parties or witnesses. Vulnerability comes in many forms. In our understanding of these issues, and in the practices and procedures which are in place to enable the vulnerable to participate fully and fairly in our courts, the family justice system lags woefully, indeed shamefully, behind the criminal justice system' [14]

[12] https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_all_chapters_final.pdf
[13] Judicial College (2013) Equal Treatment Benchbook
[14] per Munby P speech to Family Law Bar Association [2015] Fam Law 386

As of November 2017, and as a result of The President's industry and that of others, we now have the rules and guidance in place which addresses some, but by no means all, of the problems of participation faced by vulnerable parties and witnesses.

As Her Honour Nasreen Pearce (Retired Circuit Judge) pointed out in her article in the Family Law Journal [2018] Fam Law 5

> "Rule 3A.3 places a duty on the court to consider whether a vulnerable person's participation in the proceedings or the quality of evidence given by a vulnerable party or witness is likely to be diminished by reason of their vulnerability. The duty to identify a vulnerable party and or witness is also to be considered as part of the overriding objective placed on the court and the parties and the courts management of the case as provided in FPR r 1.1(2), 1.2, 1.3 and 1.4). In addition, all parties and their representatives are required to co-operate with each other and the court to ensure that each party or witness can participate in the proceedings without the quality of their evidence being diminished and without being put in fear or distress by reason of their vulnerability. (PD3AA paras 1.3 and 1.4)."

What is Rule 3A.3 'Vulnerable Persons: Participation_' [15]? It represents a recognition of the court's duty to consider how a party can participate in proceedings and how a party or witness can give evidence.

How does it do that? The text is self-explanatory:

> 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(a);
> (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.

Does this mean issue of inequality are now addressed in the family courts? Not yet

I endorse what Professor Penny Cooper had to say in her article '**Participation of vulnerable people: don't expect fireworks' [16](Family Law Journal (2018) No.48 January Page 3)**

[15] http://www.legislation.gov.uk/uksi/2017/1033/pdfs/uksi_20171033_en.pdf
[16] Participation of vulnerable people: don't expect fireworks - Professor Penny Cooper

"The biggest hurdle to the implementation is going to be the lack of resources. Nothing in the rules gives the court power to direct that public funding must be available to provide a measure. We know this for sure because the rules actually say this. The hearing could be moved to 'the nearest or most convenient location' but, even if that is an option, it may be a very unattractive trade-off, particularly for the vulnerable people it is supposed to assist. Live link, communication devices and intermediaries are listed as 'measures' but if there is no money there will be no measure."

"Ground rules hearings made it into the PD but, disappointingly, they are not in the rules. Five years of research into the use of ground rules in the criminal courts led me to conclude in 2014 that rules were needed to ensure a more systematic approach; the Criminal Procedure Rules were changed in 2015 to include ground rules hearings. An opportunity to write something similar into the family rules has been missed."

Practical measures to assist: So, what tools do we have at our disposal as lawyers to do that?

Answer: the phenomenally helpful The Advocate's Gateway – put together by The Inns of Court College of Advocacy, the Advocate's Gateway gives free access to practical, evidence-based guidance on vulnerable witnesses and defendants. Their 'toolkits' provide advocates with general good practice guidance when preparing for trial. See for example the Toolkit 'Case Management in young and other vulnerable witness's cases' as it says '*effective communication is essential in the legal process'* and it gives any reader the most informed and enlightened advice possible anywhere with all the practical tips that one could wish for. I cannot commend it highly enough.

The Toolkits

- 1. Ground rules hearings and the fair treatment of vulnerable people in court - **Updated!**
- Ground rules hearing checklist - **Updated!**
- 1a. Case management in criminal cases when a witness or defendant is vulnerable - **Updated!**
- Essential questions checklist - **New!**
- 2. General principles from research, policy and guidance: planning to question a vulnerable person or someone with communication needs
- 3. Planning to question someone with an autism spectrum disorder including Asperger syndrome - **New!**
- 4. Planning to question someone with a learning disability
- 5. Planning to question someone with 'hidden' disabilities: specific language impairment, dyslexia, dyspraxia, dyscalculia and AD(H)
- 6. Planning to question a child or young person
- 7. Additional factors concerning children under 7 (or functioning at a very young age)
- 8. Effective participation of young defendants - **Updated!**
- 9. Planning to question someone using a remote link - **Updated!**
- 10. Identifying vulnerability in witnesses and parties and making adjustments **- Updated!**
- 11. Planning to question someone who is deaf - **Updated!**
- 12. General principles when questioning witnesses and defendants with mental disorder (Under review)
- 13. Vulnerable witnesses and parties in the family courts
- 14. Using communication aids in the criminal justice system
- 15. Witnesses and defendants with autism: memory and sensory issues
- 16. Intermediaries: step by step - **Updated!**
- 17. Vulnerable witnesses and parties in the civil courts

How does one decide whether any of these toolkits are relevant, and if so, in what particular way for the particular party or witness?
Answer? By scrutiny of the lawyers and the judge at the Ground Rules Hearing

The Ground Rules Hearing(GRH)

In **Re C (A Child) [2014] EWCA Civ 128**, the Court of Appeal, 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)

The purpose of GRHs is to establish how someone who has communication needs, or is otherwise a vulnerable person, should be enabled to give their best evidence or otherwise participate in the trial. The GRH should discuss the contents of the report of any intermediary or expert witness instructed in the case. GRHs will be necessary:

- where an intermediary has been appointed for a party or witness;
- even where there is no intermediary, if a party or witness is vulnerable.

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 way and allocating the appropriate share of the court's resources (**rule 1 FPR 2010**). Further, rule **22.1(4) FPR 2010** provides that the court may limit cross-examination either by limiting the issues to be explored or by limiting the time available for cross-examination of a particular witness, which is in line with the overriding objective.

The GRH checklist below is intended to provide a helpful starting point.

- When exactly will questioning take place? The vulnerable witness or party may have differing concentration spans at different times of day or be taking medication affecting their abilities. The time at which questioning is proposed should take these factors into account.
- Will the questions be submitted in advance? Questions could be submitted in advance to the judge. The advocates could be limited to asking only approved questions. This may be resisted by many advocates for whom such a requirement would be radical and unwelcome.

The GRH could also determine what topics will be covered during questioning.

- How should questions be put to help the witness understand? What language should be used in questions? There should be judicial control of comment, stereotypes and insulting vocabulary and judges should remind advocates that they will intervene if cross-examination strays into that territory.

Any intermediary or other expert instructed should be asked to make recommendations. This may include:

- using clear, concrete language;
- avoiding 'tag' questions;
- using simple everyday words and phrases;
- keeping to a clear chronology and not jumping about in time;
- introducing each new topic and giving the witness time to refocus;
- asking questions at a slow pace;
- allowing time to process the question and formulate the answer;
- keeping sentences short with limited 'key' words;
- avoiding questions with multiple parts;
- asking one short question at a time;
- avoiding front-loaded questions;
- avoiding negatives;
- avoiding non-literal language, acronyms and abbreviations;
- avoiding repeating questions;
- the use of communication cards to communicate simple answers, e.g.: 'no', 'yes', 'can you ask that a different way?', 'I don't understand the question', 'I need some time to consider that question'.

<u>What are the particular communication needs and how can they be addressed</u>?

This will inevitably vary between individuals. For example, a witness with autism may prefer a consistent and stable environment so that if he is giving evidence on more than one occasion it should be in the same court room, with the same people in the same positions (Achieving Best Evidence (ABE) Guidance, paragraph 2.115). A parent with Down's syndrome or other learning disability might be disturbed or become anxious if there is shouting or aggression, especially if they are questioned by unknown people, particularly authority figures.

If a person has hearing loss they may, for example, confuse similar sounding words (which has particular relevance in responses to questions regarding when, where, what, why and who) (ABE Guidance, paragraph 2.116).

- How long will questioning last? Input from the intermediary or other expert should be sought so that a vulnerable person does not become anxious or exhausted, or start responding to questions falsely in an effort to bring the process to an end.
- Who will conduct the questioning? Where there are several parties it could be agreed that one advocate will ask questions on behalf of all parties. It may be appropriate for the intermediary or judge to ask the questions.
- Where will the witness give evidence and how should the evidence be given? What alternatives to video link could be used? (See below section on special measures measures) This should have been addressed at an earlier stage but final arrangements should be confirmed.
- Will the witness or party be able to visit the venue prior to giving evidence? This should not take place during the hearing but on a separate day shortly before giving evidence. If video link is 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.
- 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?
- Who will be present during questioning? This will largely depend on what additional measures are being implemented. Does the individual have any mental health worker, advocate or support worker who could usefully assist?
- 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.
- Will there be scheduled breaks? How long will they last? Breaks are likely to be far more frequently needed than usual and the time period should be agreed. This will also impact the overall time estimate of the hearing. A physical disability may cause additional health problems and the person may require the assistance of a carer or extra time for breaks. Access requirements would have to be considered (ABE Guidance, paragraph 2.120)
- 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.
- 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.
- Are there any other measures required to keep the vulnerable person calm and engaged? This will be specific to each individual, but might involve the vulnerable person having particular items with them which they use as a calming mechanism.
- The ABE Guidance provides that in some cases the vulnerable party or witness may receive support from a person who may be known to them but is not party to proceedings and could be present during evidence given by live link. The ABE Guidance also describes the activities a supporter could undertake, for example: providing emotional support and information; familiarising them with the court and procedures; supporting them through court hearings;
- 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.

'Special Measures'

Special measures are available in the criminal courts for vulnerable and intimidated witnesses. [17]and include:

- screening the witness from the accused;
- giving evidence by live link;
- giving evidence from a private location;
- removal of wigs and gowns by advocates and judges (we don't wear wigs and gowns in family cases in any event);
- evidence being via pre-recorded video interview;
- **giving evidence via an intermediary see further below;**
- giving evidence via an interpreter.
- using communication aids.
- provision of separate waiting areas or reserved, secure conference rooms if the witness/party feels intimidated by others involved in the case;
- making arrangements for the vulnerable witness to arrive at court or leave the court by a different entrance to avoid meeting others in the case;
- requesting that cases involving vulnerable witnesses or parties are given priority in the list so the witness/party does not suffer unnecessary anxiety or stress due to long waiting times;
- allowing a representative of an advocacy service (for example, provided by Mencap, POhWER or the Elfrida Society) to be present during meetings, conferences and in court with the party/witness;
- allowing longer periods for a witness/party to file and serve evidence;
- judges allowing adequate time after handing down judgment for parties to go though it with their advocates;
- provision of sign language interpreters (SLIs) and possibly a deaf relay interpreter or Registered Intermediary (RI) in cases where the party or witness has a hearing disability –[18]
- advocates being required to adjust their style (e.g. fewer leading questions, no 'tagged' questions) or language of questioning (e.g. simple and straightforward language, short sentences);
- 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, a 'pause' card on the table;
- providing the witness/party with a way of alleviating stress and maintaining concentration whilst giving evidence, e.g. a stress toy;
- where the witness is giving evidence by live video link but may become distressed by one or more parties seeing their face, positioning or covering the screen so their face cannot be seen but they can be heard.

Intermediaries

What does an intermediary do?

In court proceedings, the role of an intermediary is to facilitate communication between a vulnerable party or witness and other participants and to ensure that vulnerable people have a fair hearing. Intermediaries are appointed to support vulnerable witnesses or parties to participate in or understand proceedings inside the courtroom.

Re M [2012] EWCA Civ 1905 Thorpe LJ cautioned against an approach that could be summarised as 'let's all try and make it easy for the witness and see how we get on without an intermediary'

> "The judge then debated with Ms Storey-Rae the content of Dr North's report, making the practical points as to the facilities and what was meant by an intermediary in the context of either criminal or

[17] They are set out in sections 23–30 YJCEA 1999

[18] This is preferable to using a deaf relay interpreter whose role is only to translate language. RIs have a wider role in that they can monitor communication, alert the court to any difficulties that arise and adapt communication further to ensure that the deaf witness understands and is understood. Whilst the role of a deaf RI may encompass some relay interpreting, the remit is broader and can offer a more comprehensive solution. RIs will also advise the court in relation to suitable SLIs that meet the deaf person's communication needs and monitor the interpreting process to ensure understanding;

> family proceedings. The judge made the familiar point "well, we will all try, counsel and myself, to make it easy for the witness", but in the end, it is impossible to spell out anywhere in the transcript the judge giving a ruling on the application or saying much beyond that she was minded to, as it were, get on with the case, see how it went and possibly return to the issue at a later stage in the light of the father's performance."

If it appears to the court that a party or witness may require the support of an intermediary, an assessment will normally be required in the first instance to inform the court whether the party needs assistance to participate in the trial through hearing the evidence and giving their own a what step need to be taken by the court and the professionals to enable them to do so.

What is the value of an intermediary? It's about a right to fair trial.

> "It is no reflection at all on the legal teams if I emphasise that the assistance of the intermediaries was not merely invaluable but, in my judgment, essential, if justice was to be done, as in the event I am confident it was. Without the help of their lawyers and their intermediaries, there is no way in which these two parents could have had a fair hearing. I shall have to return in due course, in a fourth and final judgment, to pick up, from where I left off in Re D (Non-Availability of Legal Aid) (No 2) [2015] EWFC 2, [2015] 1 FLR 1247, the unedifying story of the battle these parents had to fight to obtain from a grudging state the assistance which was essential if justice was to be done."

Per Munby P in ***Re D (A Child) (No 3) [2016] EWFC 1 para 20***

What do they do? Intermediaries can assist by:

- Carrying out an initial assessment of the person's communication needs;
- Providing advice to professionals on how a vulnerable person communicates, their level of understanding and how it would be best to question them whilst they are giving evidence;
- Directly assisting in the communication process by helping the vulnerable person to understand questions and helping them to communicate their responses to questions;
- Writing a report about the person's specific communication needs;
- Assisting with court familiarisation.

Organisations offering an intermediary service for Family Court witnesses include Communicourt and Triangle.[19]

Other service providers may be more appropriate for deaf BSL users. SEA Recruitment Services is another organisation offering deaf specialist intermediary support.

The intermediary should be matched according to their communication specialism, their availability and, if possible, their geographic location.

However, as Cobb J remarked in his Nov 17 lecture whilst the intermediary resource is extremely valuable its availability is '*depressingly limited*'. He continued '*whilst it is encouraging that the Ministry of Justice has announced plans to increase their number, it is disappointing, that such an initiative has seemingly stalled without explanation*'.

How do we secure their services? The use of an intermediary is discretionary and requires a judicial order to that effect. 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, HMCTS may provide funding for (i) an

[19] Communicourt – Provides intermediaries at all stages of the legal process for a broad range of individuals. Intermediary Services | Triangle https://triangle.org.uk/service/intermediaries **Triangle** provides **intermediaries** across the United Kingdom to enable communication **with children and young people up to the age of 25**. They have particular expertise with very young and traumatised children and with children and young adults

assessment to determine the nature of support that should be provided through an intermediary in the courtroom, and (ii) funding for that intermediary.

The HMCTS has, in the last week, issued guidance of funding and how to secure it. In essence: where a judicial order is made for an assessment by an intermediary provider and / or for in-court support and the vulnerable party, or any agency working with them such as a local authority, cannot pay then HMCTS will initially fund the cost from local budgets. The MoJ will reimburse HMCTS half of the overall budget costs for intermediaries at quarterly intervals until further notice. HMCTS can also if necessary fund the cost of an intermediary to assist with preparation work outside the court but only if this is directly relevant to matters to be dealt with in the court room and there is a judicial order to this effect. HMCTS is not able to fund the general provision of intermediaries outside the court room. In the majority of cases the vulnerable party's solicitor will source the intermediary and details of the intermediary appointed will appear in the court order. In those cases where the vulnerable party does not have a legal representative, the court staff will need to source one.

Questions arising: How do we assess if an intermediary is doing their job and doing it to the standard required? Has the time now come for some type of industry regulation given how pivotal their role is?

Professor Penny Cooper in her article **'Like Ducks To Water? Intermediaries for Vulnerable Witnesses and Parties' ([2016] Fam Law 374)** summarised their purpose and their limitations

> "The role of the intermediary is to facilitate communication. There is no professional guidance or code of ethics for intermediaries in the family courts but it is tacitly understood that their overriding duty is to the court. Like expert witnesses, they are expected to be impartial; the advice that they give should be the same regardless of who engages them.
>
> Their role is not to provide emotional support though the intermediary may well endeavour to help the witness or party remain calm in order to support communication."
>
> "The intermediary must not be, and must take care not to appear to be, partisan. Transparency in their role is vital. However, with no intermediary scheme in the family court, no regulation, no code of conduct and no procedural guidance, transparency is harder to achieve. In addition, there is no clarity over the status of intermediaries' notes and assessment reports; are they evidence or not?"

Q5: What happens beyond the court room? do we make a difference in society where it really counts?

Families affected by parental learning disability are likely to have an on-going need for support. Although a parent with learning disabilities can learn how to do things, their cognitive impairment will not go away. Just as someone with a physical impairment may need personal assistance for the rest of their life so a person with disabilities may need assistance with daily living, particularly as new situations arise. Secondly, children and their needs change. A parent may have learned to look after a baby and young child and be coping well. However, as the child enters adolescence other support needs may arise.

I was referred to a helpful website by a twitter colleague[20] called 'childprotectionresource.online' which carried an illuminating guest article by a parent. In it s/he wrote about being in meeting 'where social workers spoke about being asked to 'do much more with much less' and how it was impossible to deliver a service where everything from what services are provided by what agency to the social work workforce itself is in flux. Teachers also reported that they were now doing social work in schools, well beyond their capability and training. It was summed up as 'Challenging Families were being passed between services without getting the early intervention they needed'.

Where a need for long-term support with parenting tasks is identified, it should form part of the community care and/or child in need plan. Adult and children's services, and health and social care, should jointly agree

[20] thanks to Sarah Phillimore @SVPhillimore for signposting Child Protection Resource: http://childprotectionresource.online/families-who-need-support-and-the-language-of-casual-disrespect/ collecting information resources and support for everyone involved in child protection in the UK

local protocols for referrals, assessments and care pathways in order to respond appropriately and promptly to the needs of both parents and children.

It is important that services understand who is to take the lead on assessments:

- where there are no welfare concerns but adults need assistance with routine tasks of looking after children, adult learning disability services should take the lead on assessment and care planning
- where parents need support in the medium to long term adult learning disability and children's services jointly co-ordinate assessment and care planning
- where intervention is required to prevent, children suffering impairment to their health or development or significant harm, children's services lead assessment and planning with specialised input from adult learning disability services

Services in contact with parents with learning disabilities should use appropriate assessment materials and resources and/or access specialist expertise. Failing to do so will result in the parent receiving an unfair and therefore invalid assessment, in breach of their legal rights.

In the case of parent support services, an assessment of a parents' learning needs and circumstances should inform the support provided to develop parenting skills. Research indicates that – for parents with learning disabilities – the key elements of successful parenting skills support are:

- clear communication, and ensuring parents have understood what they are told
- use of role-play, modelling, and videoing parent and professional undertaking a task together, for discussion, comparison and reflection
- step by step pictures showing how to undertake a task
- repeating topics regularly and offering opportunities for frequent practice
- providing/developing personalised "props": for example, finding a container which will hold the right amount of milk for the child so that the parent does not have to measure out the milk."

A range of services is required. All families are different and at different stages of their life cycle families require different types of support.

It is particularly important to avoid the situation where poor standards of parental care, which do not, however, meet the threshold of being of significant harm to a child, subsequently deteriorate because of a lack of support provided to the parent. A failure to provide support in this type of situation can undermine a parent's rights to a private and family life, and may also contravene an authority's disability equality duty.

Advocacy and self-advocacy should be made available to help parents access and engage with services. The Care Act 2014 imposes a duty on local authorities to provide an independent advocate where an individual would otherwise have substantial difficulties in being involved in processes such as their own assessment and care planning.

When children are placed in foster care, parents should receive practical support to maximise their chances of improving their parenting capacity. Without this, parents will have little chance of reunification with children who have been removed from their care.

Both children's and adult workers will need specific training in order to respond appropriately to the needs of families affected by parental learning disability. Child protection training strategies should include adult learning disability services.

It is essential that assessments, training and support are both timely and appropriately tailored to the parent with a learning disability. Failure to build in, from the outset, the extra time that a parent with a learning disability needs in order to learn and understand, puts that parent at a significant disadvantage in child protection proceedings, compared to parents without a learning disability.

There must also be joint working across all the agencies (in particular adult and children's services) and appropriate and effective communication permitting parents to participate fully in the process.

In closing

In this lecture I have sought to explored a number of points

i) Parents with disabilities or vulnerabilities that might not amount to a formal diagnosis of disability can often be 'good enough' parents when provided with the ongoing emotional and practical support they need.

ii) The concept of 'parenting with support' must underpin the way in which courts and professionals approach parents with learning difficulties.

iii) Courts must make sure that parents with disabilities are not at risk of having their parental responsibilities terminated on the basis of evidence that would not hold up against parents without such difficulties. To that end parents with disability should not be measured against parents without disability and the court should be alive to the risk of direct and indirect discrimination.

iv) Multi-agency working is critical if parents are to be supported effectively and the court has a duty to make sure that has been done effectively.

v) The court should not focus so narrowly on the child's welfare that the needs of the parent arising from their disability, and impacting on their parenting capacity, are ignored.

vi) Courts should be careful to ensure that the supposed inability of the parents to change is not itself an artefact of professionals' ineffectiveness in engaging with the parents in an appropriate way.

vii) there is a creative range of tools which can be deployed to give a voice to the disabled person: lawyers have a positive duty to seek out and keep abreast of advocacy training to ensure they can be an effective voice for their client

viii) when the State seeks to remove a child from its home, the court must be proactive in ensuring that disability and vulnerability is properly recognised and steps are put in place steps to ensure that that difficulty does not present a barrier to effective participation.

<u>'The language of casual disrespect'?</u>

The parent who posted as a guest on the web site Child Resource Online, to which I have already referred, wrote eloquently about the language of 'casual disrespect' s/he had encountered.

S/he asked this question:

> 'Would anyone have thought it OK to refer to my family in a one-to-one conversation with me as a 'challenging family' needing 'Intervention' and if most would not, then why be it OK to refer families like mine, in this casually disrespectful way? Is it OK because parents of children in need of services are not meant to be listening into this intense conversation or is it that our opinions just do not matter or that we are not expected to have anything of value to contribute unlike the great and the good and the well-intentioned? Or is it that people are afraid of what we might say? Are we that much of a challenge and to whom and what exactly? The only fixed point in this shifting landscape of service provision seems to be to regard families in need of services as, at best, incompetent and in need of an 'intervention'.

S/he makes a powerful point that deserves an answer.

Language can exclude as well as educate and inform and the ability to effectively challenge the language used by professionals is one of the skills the vulnerable are likely to have.

We have been exhorted by the new Lord Chief Justice to *'work together to ensure that justice is at the centre of our society; to secure access to justice for all, whatever their means or abilities'.*

And, channelling the words of Cobb *J "'access to justice' is not an abstract concept created by lawyers for lawyers. Far from it. It is the means by which society, or more accurately, its citizens, assert or protect their rights, or by which citizens seek to resolve their disputes. Access to justice is …….. 'the hallmark of a civilised society*[21]*".*

That 'hallmark' requires us to facilitate access to the court and provide effective representation within it to have disabilities, or vulnerabilities, that otherwise stand as a barrier to participation, advice and the potential for change. The local authority and the court has a wide range of orders available that can protect a child short of its removal from its parent: we have Child in Need plans Family Assistance Orders and Supervision Orders. Care Orders do not debar placement of a child at home. But to be effective, plans for on-going assessment, support and assistance drawn up in court need to be implemented, in practice, in the community. But when they are implemented , but aren't effective, then action needs to be taken to protect the child because the child's right to have a childhood free from significant harm and neglect requires that step to be taken.

In the public law family court room, we deal with cyclical levels of neglect and abuse. We come across generations of families who have bumped along for years at the lowest margins of society having fallen through the education, employment and social work assessment net for decades. Parental disability and vulnerability is unassessed and unaddressed. Vulnerable mothers are easy targets for abusers whether through abuse and violence directed towards them or towards their children: domestic violence, alcoholism, sex abuse, depression, mental health issues too frequently add to the problems of lack of income and disability. That class of parents become those who are '*vulnerable by adverse experience*'[22]. Their children become parents, parenting as they were taught and experienced.

As Cobb J eloquently said

> 'We have a duty to recognise the fragility and vulnerability of the many who seek access to justice in these difficult times and circumstances'. In order to deliver effective justice we must 'continue to remove impediments to their routes of access to justice, to innovate and position the vulnerable at the centre of our practices now and in the future'.

www.gresham.ac.uk/professors-and-speakers/professor-jo-delahunty-qc

www.4pb.com/barrister-profile/jo-delahunty/

Next lecture: 1.3.18

Dealing with Sex Abuse: How does the family justice system confront these emotive and complex cases?

Sexual abuse is always an abuse of power. It can be opportunistic or premeditated; furtive, intra-familial abuse or stranger abuse through rape or abusive acts or images shared on-line. It can be multi-generational and inter-sex: grandmother to grandson, father to daughter, brother to sister. The victim may become an abuser. What can break the cycle? What effect do these cases have on the professionals involved?

[21] Lord Chancellor launching the 2010 Legal Aid Consultation for The Reform of Legal Aid , para 2.2
[22] Per Cobb J again Jan (Fam Law) 2018