# CHILDREN GIVING EVIDENCE


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## 4PB Family


I have been asked to speak about children giving evidence. I will deal with the following topics in turn:

1. The statutory starting point
2. Vulnerability
3. Judicial determination of whether a child should give evidence
4. Guidelines in relation to children giving evidence in family proceedings
5. Other key authorities
6. Procedure including intermediary assessments and Ground Rules Hearings
7. Credibility
8. Recent case law
9. Conclusions

**The statutory starting point:**

1. A child's evidence may be heard only if, in the opinion of the court, the conditions of section 96(2), Children Act 1989 are met. The definition of a child for these purposes is a person under the age of 18 (section 105, Children Act 1989).

   *s96 Evidence given by, or with respect to, children.*

   1) *Subsection (2) applies where a child who is called as a witness in any civil proceedings does not, in the opinion of the court, understand the nature of an oath.*
   2) *The child's evidence may be heard by the court if, in its opinion—*
   *(a)he understands that it is his duty to speak the truth; and*
   *(b)he has sufficient understanding to justify his evidence being heard.*

2. There is no fixed age at which a child should be regarded as competent to give evidence. However, the court is likely to make inquiries of anyone under the age of 14 to form an opinion as to whether or not they are competent, and those aged between 8 and 10 will probably be considered too young. The court will need to be satisfied that the child has sufficient maturity and understanding (*Gillick v West Norfolk and Wisbech Area Health Authority [1985] UKHL 7*).

**Vulnerability:**

1. Children are automatically assumed to be vulnerable (irrespective of whether they are witnesses or parties).
2. FPR PD3AA applies.

3. Should a child wish to meet a judge practitioners should follow the **Guidelines for Judges Meeting Children who are Subject to Family proceedings (April 2010).**
4. I do not deal with the topics of children being joined as parties or interveners in this seminar. Please do direct any questions about those topics to me in Chambers.

**Re W hearings: Judicial determination of whether a child should give evidence:**

1. **Re W** saw an end to the presumption against a child giving evidence.
2. Instead the court adopts a principled approach. A balance must be struck between the article 6 requirement of fairness, which includes the opportunity to challenge evidence, and the article 8 right to respect for private and family life.
3. Striking the balance may well mean that a child should not be called to give evidence in a great majority of cases, but this is a result and not a presumption nor even a starting point [22, 23].

*[22] However tempting it may be to leave the issue until it has received the expert scrutiny of a multi-disciplinary committee, we are satisfied that we cannot do so. The existing law erects a presumption against a child giving evidence which requires to be rebutted by anyone seeking to put questions to the child. That cannot be reconciled with the approach of the European Court of Human Rights, which always aims to strike a fair balance between competing Convention rights. Article 6 requires that the proceedings overall be fair and this normally entails an opportunity to challenge the evidence presented by the other side. But even in criminal proceedings account must be taken of the article 8 rights of the perceived victim: see SN v Sweden, App no 34209/96, 2 July 2002. Striking that balance in care proceedings may well mean that the child should not be called to give evidence in the great majority of cases, but that is a result and not a presumption or even a starting point.*

*[23] The object of the proceedings is to achieve a fair trial in the determination of the rights of all the people involved. Children are harmed if they are taken away from their families for no good reason. Children are harmed if they are left in abusive families. This means that the court must admit all the evidence which bears upon the relevant questions: whether the threshold criteria justifying state intervention have been proved; if they have, what action if any will be in the best interests of the child? The court cannot ignore relevant evidence just because other evidence might have been better. It will have to do the best it can on what it has.*

**The relevant case law:**

***Re W [2010] 1 FLR Baroness Hale Re W (Children) (SC) 1495***

The proceedings began in June 2009 when the eldest child, a 14 year old girl, alleged that her de facto stepfather had seriously sexually abused her. All the children were taken into foster care and the four younger children are having supervised contact with both parents. The father was subsequently charged with 13 criminal offences and was on bail awaiting trial.

The court at first instance denied the Father's application for the eldest child (who had accused him of sexually abusive behaviour) to give live evidence in court. He appealed the decision to the High Court and then to the Supreme Court, arguing against the presumption that children should not be called to give live evidence in court and cross-examined.

Judgment:

The Supreme Court unanimously allowed the appeal and remitted the question of whether the child should give evidence, and if so in what way, to Her Honour Judge Marshall to be determined at the fact finding hearing in light of the principles set down in this judgment. The key principle set down was as follows: in determining whether a child should be called to give evidence the court should engage in a balancing exercise, but the starting point was no longer considered to be that the child should not be called to give evidence except for in exceptional circumstances. **The essential test is whether justice can be done to all the parties without further questioning of the child.**

**I set out here for ease of reference the Re W[1] criteria, paras 23 – 30 in full:**

"23. The object of the proceedings is to achieve a fair trial in the determination of the rights of all the people involved. Children are harmed if they are taken away from their families for no good reason. Children are harmed if they are left in abusive families. This means that the court must admit all the evidence which bears upon the relevant questions: whether the threshold criteria justifying state intervention have been proved; if they have, what action if any will be in the best interests of the child? The court cannot ignore relevant evidence just because other evidence might have been better. It will have to do the best it can on what it has.

24. When the court is considering whether a particular child should be called as a witness, the court will have to weigh two considerations: the advantages that that will bring to the determination of the truth and the damage it may do to the welfare of this or any other child. A fair trial is a trial which is fair in the light of the issues which have to be decided. Mr Geekie accepts that the welfare of the child is also a relevant consideration, albeit not the paramount consideration in this respect.

[1] **[2010] 1 FLR Baroness Hale Re W (Children) (SC) 1495**

He is right to do so, because the object of the proceedings is to promote the welfare of this and other children. The hearing cannot be fair to them unless their interests are given great weight.

25. In weighing the advantages that calling the child to give evidence may bring to the fair and accurate determination of the case, the court will have to look at several factors. One will be the issues it has to decide in order properly to determine the case. Sometimes it may be possible to decide the case without making findings on particular allegations. Another will be the quality of the evidence it already has. Sometimes there may be enough evidence to make the findings needed whether or not the child is cross-examined. Sometimes there will be nothing useful to be gained from the child's oral evidence. The case is built upon a web of behaviour, drawings, stray remarks, injuries and the like, and not upon concrete allegations voiced by the child. The quality of any ABE interview will also be an important factor, as will be the nature of any challenge which the party may wish to make. The court is unlikely to be helped by generalised accusations of lying, or by a fishing expedition in which the child is taken slowly through the story yet again in the hope that something will turn up, or by a cross examination which is designed to intimidate the child and pave the way for accusations of inconsistency in a future criminal trial. On the other hand, focused questions which put forward a different explanation for certain events may help the court to do justice between the parties. Also relevant will be the age and maturity of the child and the length of time since the events in question, for these will have a bearing on whether an account now can be as reliable as a near-contemporaneous account, especially if given in a well-conducted ABE interview.

26. The age and maturity of the child, along with the length of time since the events in question, will also be relevant to the second part of the inquiry, which is the risk of harm to the child. Further specific factors may be the support which the child has from family or other sources, or the lack of it, the child's own wishes and feelings about giving evidence, and the views of the child's guardian and, where appropriate, those with parental responsibility. We endorse the view that an unwilling child should rarely, if ever, be obliged to give evidence. The risk of further delay to the proceedings is also a factor: there is a general principle that delay in determining any question about a child's upbringing is likely to prejudice his welfare: see Children Act 1989, s 1(2). There may also be specific risks of harm to this particular child. Where there are parallel criminal proceedings, the likelihood of the child having to give evidence twice may increase the risk of harm. The parent may be seeking to put his child through this ordeal in order to strengthen his hand in the criminal proceedings rather than to enable the family court to get at the truth. On the

other hand, as the family court has to give less weight to the evidence of a child because she has not been called, then that may be damaging too. However, the court is entitled to have regard to the general evidence of the harm which giving evidence may do to children, as well as to any features which are particular to this child and this case. That risk of harm is an ever-present feature to which, on the present evidence, the court must give great weight. The risk, and therefore the weight, may vary from case to case, but the court must always take it into account and does not need expert evidence in order to do so.

27. But on both sides of the equation, the court must factor in what steps can be taken to improve the quality of the child's evidence and at the same time to decrease the risk of harm to the child. These two aims are not in opposition to one another. The whole premise of Achieving Best Evidence and the special measures in criminal cases is that this will improve rather than diminish the quality of the evidence to the court. It does not assume that the most reliable account of any incident is one made from recollection months or years later in the stressful conditions of a courtroom. Nor does it assume that an "Old Bailey style" cross examination is the best way of testing that evidence. It may be the best way of casting doubt upon it in the eyes of a jury but that is another matter. A family court would have to be astute both to protect the child from the harmful and destructive effects of questioning and also to evaluate the answers in the light of the child's stage of development.

28. The family court will have to be realistic in evaluating how effective it can be in maximising the advantage while minimising the harm. There are things that the court can do but they are not things that it is used to doing at present. It is not limited by the usual courtroom procedures or to applying the special measures by analogy. The important thing is that the questions which challenge the child's account are fairly put to the child so that she can answer them, not that counsel should be able to question her directly. One possibility is an early video'd cross examination as proposed by Pigot. Another is cross-examination via video link. But another is putting the required questions to her through an intermediary. This could be the court itself, as would be common in continental Europe and used to be much more common than it is now in the courts of this country.

29. In principle, the approach in private family proceedings between parents should be the same as the approach in care proceedings. However, there are specific risks to which the court must be alive. Allegations of abuse are not being made by a neutral and expert local authority which has nothing to gain by making them, but by a parent who is seeking to gain an advantage in the battle

against the other parent. This does not mean that they are false but it does increase the risk of misinterpretation, exaggeration or downright fabrication. On the other hand, the child will not routinely have the protection and support of a Cafcass guardian. There are also many more litigants in person in private proceedings. So if the court does reach the conclusion that justice cannot be done unless the child gives evidence, it will have to take very careful precautions to ensure that the child is not harmed by this.

30. It will be seen that these considerations are simply an amplification of those outlined by Smith LJ in the *Medway* case, at para 45, but without the starting point, at para 44. **The essential test is whether justice can be done to all the parties without further questioning of the child. Our prediction is that, if the court is called upon to do it, the consequence of the balancing exercise will usually be that the additional benefits to the court's task in calling the child do not outweigh the additional harm that it will do to the child. A wise parent with his child's interests truly at heart will understand that too. But rarity should be a consequence of the exercise rather than a threshold test (as in *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, para 20).**

31. Finally, we would endorse the suggestion made by Miss Branigan QC for the child's guardian, that the issue should be addressed at the case management conference in care proceedings or the earliest directions hearing in private law proceedings. It should not be left to the party to raise. This is not, however, an invitation to elaborate consideration of what will usually be a non-issue."

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**Guidelines in relation to children giving evidence in family proceedings:**

Following the Supreme Court's decision in *Re W*, the Family Justice Council issued *Guidelines in Relation to Children Giving Evidence in Family Proceedings* in December 2011 to be used when the court is considering the possible advantages of calling the child, when balanced against the possible damage to the child's welfare from giving evidence (paras 8–11).

https://www.judiciary.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Children+Giving+Evidence+Guidelines+-+Final+Version.pdf

The court should carry out a balancing exercise between the following primary considerations:

i) the possible advantages that the child being called will bring to the determination of truth balanced against;

ii) the possible damage to the child's welfare from giving evidence i.e. the risk of harm to the child from giving evidence; having regard to:

a. the child's wishes and feelings; in particular their willingness to give evidence; as an unwilling child should rarely if ever be obliged to give evidence;
b. the child's particular needs and abilities;
c. the issues that need to be determined;
d. the nature and gravity of the allegations;
e. the source of the allegations;
f. whether the case depends on the child's allegations alone;
g. corroborative evidence;
h. the quality and reliability of the existing evidence;
i. the quality and reliability of any ABE interview;
j. whether the child has retracted allegations;
k. the nature of any challenge a party wishes to make;
l. the age of the child; generally the older the child the better;
m. the maturity, vulnerability and understanding, capacity and competence of the child; this may be apparent from the ABE or from professionals discussions with the child;
n. the length of time since the events in question;
o. the support or lack of support the child has;
p. the quality and importance of the child's evidence;
q. the right to challenge evidence;
r. whether justice can be done without further questioning;
s. the risk of further delay;
t. the views of the guardian who is expected to have discussed the issue with the child concerned if appropriate and those with parental responsibility;
u. specific risks arising from the possibility of the child giving evidence twice in criminal or other and family proceedings taking into account that normally the family proceedings will be heard before the criminal; and
v. the serious consequences of the allegations i.e. whether the findings impact upon care and contact decisions
w. Under these guidelines the court's principal objective is to achieve a fair trial. To that end an application must be made for the child to give evidence. One parent cannot

simply bring the child to court. Any such application should be made to the court at an early stage in the proceedings, not left to the last minute. The trial judge should then list a hearing to determine whether or not the child should give evidence, and if yes, set out the practical steps to be taken to enable him/her to do so.

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Practical considerations and guidance in relation to the examination of a child are suggested. Finally, the court is reminded of its overriding duty to ensure that proceedings are dealt with fairly. Whilst advocates have a responsibility to ensure the questioning of a child is dealt with fairly, the ultimate responsibility lies with the tribunal.

**Other key authorities:**

1. In ***Re B (Private Law Proceedings: Child's Evidence)*** *[2015] 1 FLR 1381, CA*, the Court of Appeal repeated the *Re W* point (above) that it was not expected to become routine for children to give evidence in family cases.
2. Finally further useful guidance was provided in **Re E (A Child) (evidence)** [2017] 1 FR 1675, from paras 57 – 63.

   Summary: The court gave guidance on the issue of children giving live evidence in family proceedings and on the professional responsibilities of a solicitor in upholding legal professional privilege and the ECHR art.6 rights of a child victim/perpetrator.

   Key Passages:

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

**[57]** In any case where the issue of children giving oral evidence is raised it is necessary for the court to engage with the factors identified by Baroness Hale in *Re W*, together with any other factors that are relevant to the particular child or the individual case, before coming to a reasoned and considered conclusion on the issue.

**[58]** It is crucial that any issue as to a child giving evidence is raised and determined at the earliest stage, and in any event well before the planned trial date. The court will not, however, be in a position to come to a conclusion on that issue unless it has undertaken an evaluation of the evidence which is otherwise available. Where there has been an ABE interview, and the quality and/or content of that interview are to be challenged, it is likely that the judge will have to view the DVD before being in a position to decide the *Re W* issue.

**[59]** The court should also have regard to the Working Party of the Family Justice Council *Guidelines on the issue of Children Giving Evidence in Family Proceedings* issued in December 2011 [2012] Fam Law 79. The Guidelines, which were specifically developed to assist courts following the decision in *Re W*, contain a list of no less than 21 factors to which the court should have regard when determining whether a child should give oral evidence in the context of the principal objective of achieving a fair trial (para 9(a)–(v)). The Guidelines require the court to carry out a balancing exercise:

'between the following primary considerations:

(i) the possible advantages that the child being called will bring to the determination of truth balanced against;

(ii) the possible damage to the child's welfare from giving evidence ie the risk of harm to the child from giving evidence.

**[60]** Whilst not all of the elements described by Baroness Hale in *Re W* or in para 9 of the Guidelines will be relevant in every case, it is plain that the court undertaking a *Re W* determination will need to engage in a relatively full and sophisticated evaluation of the relevant factors; simply paying lip-service to *Re W* is not acceptable. By 'full' I do not wish to suggest that a lengthy judgment is required, but simply that the judge must consider each of the relevant points with that process recorded in short form in a judgment. Such a detailed process is in my view justified given the importance of the decision for the welfare of the child and for the fairness of hearing.

**[61]** It is plainly good practice for the court to be furnished with a written report from the children's guardian and submissions on behalf of the child before deciding whether that child should be called as a witness. This court understands that it is, however, commonplace for guardians to advise that the child should not be called to give evidence on the basis that they will or may suffer emotional harm as a result of doing so. Where

such advice is based upon the consideration of harm alone, it is unlikely to be of great assistance to the court which is required to consider not only 'harm' but also the other side of the balance described in the Guidelines, namely the possible advantages that the child's testimony will bring to the determination of truth.

**[62]** Part of any consideration of the overall welfare of a child must be that decisions as to his or her future, or the future of other children, are based, so far as is possible, upon a true understanding of important past events. Whilst the process of giving oral evidence in relation to allegations of past harmful experiences will almost always be an unwelcome one for any child, and for some that process itself may be positively harmful, those negative factors, to which full and proper weight should be given, are but one half of the balancing equation. In some cases, despite the negative factors, it may nevertheless be in accordance with the wider welfare interests of the child for him or her to be called to give evidence. Each case will be different, but even where the child may suffer some emotional harm from the process, if such harm is likely to be temporary and where the quality and potential reliability of the other evidence in the case is weak, it may (in addition to any fair trial issues) nevertheless be in the child's best interests to give oral evidence. If the ABE interview process is poor, and there is little or no other evidence, then it may be that no findings of fact in accordance with allegations made by a child can properly be made unless the child is called to give evidence. The *Re W* exercise must plainly take account of such a situation.

**[63]** The observations made in the previous paragraph are intended only to make the point there made; they are not intended to establish any new test or template for decision making over and above what is said in *Re W* and the Guidelines to which recourse should be had as a matter of routine in every case where there is a *Re W* application.

***3.*** In the case of ***Re X [2012] 2 FLR 456*** the lack of a scheme for the provision and funding of intermediaries to assist child witnesses to give evidence in family cases was found to require urgent attention. The balancing exercise required to be carried out in accordance with the guidance issued in *Re W (Children) (Family Proceedings: Evidence) [2010] UKSC 12, [2010] 1 W.L.R. 701, [2010] 3 WLUK 75* justified the conclusion that J should not give evidence, whether orally, through a written statement or in a pre-recorded interview, Re W applied.

Key Passages:

*[32] In considering how I should exercise my discretion it is important that I remind myself that it is being considered against the backdrop of the court's objective to achieve a fair trial of the issues in dispute between the parties as to the threshold criteria (see Baroness Hale Re W (Children) UKSC 12 paragraph 23:*

> *"The object of the proceedings is to achieve a fair trial in the determination of the rights of all of the people involved. Children are harmed if they are taken away from their families for no good reason. Children are harmed if they are left in abusive families. This means that the court must admit all the evidence which bears upon the relevant questions; whether the threshold criteria justifying state intervention have been proved; if they have what action if any will be in the best interests of the child? The court cannot ignore relevant evidence just because other evidence might have been better. It will have to do the best it can on what it has."*

**Procedure including intermediary assessments and Ground Rules Hearings**

1. If a party wants a child to give evidence, an application must be made to the court on Form C2. The court will list the application for a hearing and direct the parties to file skeleton arguments.
2. There will need to be a preliminary inquiry as to the child's wishes and feelings about giving evidence, usually conducted by CAFCASS.
3. There will need to be consideration of an intermediary assessment and directions given for the commissioning of such an assessment.
4. Any intermediary (or expert) assessment report is likely to form the bedrock of a ground rules hearing.
5. The requirement to hold a GRH is now contained in FPR PD3AA para 5.2, and I include sections 5 and 6 from PD3AA here for completeness:

**5. Participation directions: the giving of evidence by a vulnerable party, vulnerable witness or protected party**

**5.1** This section of the Practice Direction applies where a court has concluded that a vulnerable party, vulnerable witness or protected party (including those deemed vulnerable by virtue of the assumption at rule 3A.2A FPR should give evidence. In reaching its conclusion as to whether a child should give evidence to the court, the court must apply the guidance from relevant case law and the guidance of the Family Justice Council in relation to children giving evidence in family proceedings.

Ground rules hearings

**5.2** When the court has decided that a vulnerable party, vulnerable witness or protected party should give evidence there shall be a "ground rules hearing" prior to any hearing at which evidence is to be heard, at which any necessary participation directions will be given-

a) as to the conduct of the advocates and the parties in respect of the evidence of that person, including the need to address the matters referred to in paragraphs 5.3 to 5.7, and

b) to put any necessary support in place for that person.

The ground rules hearing does not need to be a separate hearing to any other hearing in the proceedings.

**5.3** If the court decides that a vulnerable party, vulnerable witness or protected party should give evidence to the court, consideration should be given to the form of such evidence, for example whether it should be oral or other physical evidence, such as through sign language or another form of direct physical communication.

**5.4** The court must consider the best way in which the person should give evidence, including considering whether the person's oral evidence should be given at a point before the hearing, recorded and, if the court so directs, transcribed, or given at the hearing with, if appropriate, participation directions being made.

**5.5** In all cases in which it is proposed that a vulnerable party, vulnerable witness or protected party is to be cross-examined (whether before or during a hearing) the court must consider whether to make participation directions, including prescribing the manner in which the person is to be cross-examined. The court must consider whether to direct that-

a) any questions that can be asked by one advocate should not be repeated by another without the permission of the court;

b) questions or topics to be put in cross-examination should be agreed prior to the hearing;

c) questions to be put in cross-examination should be put by one legal representative or advocate alone, or, if appropriate, by the judge; and

d) the taking of evidence should be managed in any other way.

**5.6** The court must also consider whether a vulnerable party, vulnerable witness or protected party has previously-

a) given evidence, and been cross-examined, in criminal proceedings and whether that evidence and cross-examination has been pre-recorded (see sections 27 and 28 of the Youth Justice and Criminal Evidence Act 1999); or

b) given an interview which was recorded but not used in previous criminal or family proceedings. If so, and if any such recordings are available, the court should consider their being used in the family proceedings.

**5.7** All advocates (including those who are litigants in person) are expected to be familiar with and to use the techniques employed by the toolkits and approach of the Advocacy Training Council. The toolkits are available at www.theadvocatesgateway.org/toolkits. Further guidance for advocates is available from the Ministry of Justice at http://www.justice.gov.uk/guidance.htm.

6**. Matters to be included in an application form for directions: rule 3A.10(2) FPR**

**6.1** An application for directions under Part 3A FPR should contain the following information, as applicable:

a) why the party or witness would benefit from assistance;

aa) whether the party or witness falls within the assumption at rule 3A.2A FPR 177057

b) the measure or measures that would be likely to maximise as far as practicable the quality of that evidence;

c) why the measure or measures sought would be likely to improve the person's ability to participate in the proceedings; and

d) why the measure or measures sought would be likely to improve the quality of the person's evidence.

6. There are a number of ways in which to assist at a ground rules hearing. The court may direct topic areas to be provided to the witness in advance, or written questions. The court may make specific provision as to who will ask the questions of the child. The court will also consider the full menu of special measures and any other matters that will assist the child to give their best evidence. As per the practice direction, the expectation is that an

application is made in advance, the representatives having considered which special measures would best assist.

7. Please familiarise yourself with the Advocate's Gateway Toolkit 13 (https://www.theadvocatesgateway.org/_files/ugd/1074f0_48a0c6b6fca942fc819255e4104ac9de.pdf) 'Vulnerable Witnesses and Parties in the Family Courts'. This is an invaluable resource and contains a useful GRH checklist. Please see pages 29 – 33. There is also a useful special measures checklist within this Toolkit, from page 34.
8. I do not deal with the topics of obtaining evidence and instruction of experts within this seminar but please note these issues within the Toolkit. This will be case specific.

**Credibility:**

Assessments to see how reliable a child's evidence is should be avoided. The judge is best placed to assess credibility (see *Wigan Council v M and others [2015] EWFC 8* and Legal update, Veracity assessments of children's evidence are not usually necessary (High Court)).

**Recent case law:**

1. Several of these cases involve a lack of compliance with the Achieving Best Evidence Guidance.
2. Please note that there is new ABE guidance, issued 31.1.22. (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1051269/achieving-best-evidence-criminal-proceedings.pdf)
3. It is impossible to overstate the importance of adherence to this guidance and the need to scrutinise that adherence when analysing the evidential value of the ABE interview and the role it will play in any case where the child then goes on to give live evidence.
4. See for example, ***Re T (Children) [2020] EWCA Civ 507:***

*[45] […] There were a number of features of those interviews which demonstrated a failure to comply with the applicable Guidance. They will be apparent from what I have said already. Of course, failure to comply with the Guidance will not always render evidence obtained incapable of establishing acts of sexual abuse: see Re B (Allegation of Sexual Abuse: Child's Evidence) [2006] EWCA Civ 773 , per Hughes LJ (as he then was) at [34] – [35] and [40] –[42], cited by McFarlane LJ (as he then was) in Re J (A Child) [2014] EWCA Civ 875 at [73] – [75]. However, deficiencies of this type can be very significant and, in this case, in my judgment, they were just too numerous to be overcome in order to sustain this single finding in the context of the serial sexual abuse that had been*

*perpetrated by W and the Mother against all these children in the immediately preceding 11 week period. For my part, I accept Mr Roche's submission that the value of the evidence about this single alleged act of abuse, elicited at a very late stage of a long interview and only as a result of a distinct prompt about a conversation with S, was also reduced to vanishing point.*

*[47] I would add that in Re E (A Child) [2016] EWCA Civ 473 at [37], McFarlane LJ said:*

> *"The departures from the ABE guidance required the judge to engage with a thorough analysis of the process in order to evaluate whether any of the allegations that the children made to the police could be relied upon."*

*That process did not happen in the judge's consideration of the slender allegations made against the Father, in the context of a case where concentration was heavily focused on the allegations against the Mother and W. As a result, the very weak statements of X were simply not capable of establishing the allegation to the necessary standard.*

### ***Re A, B and C [2021] EWCA Civ 451***

*[38]The Local Authority defends the Recorder's assessment of D. Miss Gilliatt argues that appropriate allowance was made for D's age and maturity and the guidance to be derived from in Re W [2010] UKSC 12 at [27], the Advocacy Gateway and the FJC 2011 Guidance on Children Giving Evidence was applied. Whilst she does concede in written submissions that, with regards to the intermediary's report the Recorder, 'could perhaps have said a little more…it does not seem that there was anything much more she needed to say…She gave herself a perfectly appropriate Lucas direction'.*

*[50] It is pertinent to observe that there can be a significant difference between fact finding hearings in the civil and family courts. In the former, the tribunal determines the dispute upon an assessment of the witnesses' evidence which, if challenged, is subject to oral cross examination. It is possible in such circumstances for the judge to decide the issue on the basis of their assessment of the witnesses and the evidence they prefer, subject to the burden and standard of proof. In the family jurisdiction, there are many cases which involve challenge to a child complainant's allegations of sexual abuse, but in which the child is rarely, and too rarely in my view, called to give evidence despite their competence and in light of the decision in Re W [2010] UKSC 12. In these cases, there is often an absence of independent direct or forensic evidence that supports the case.*

### ***Re JB (A Child) (Sexual Abuse Allegations) [2021] EWCA Civ 46***

*[2] This is regrettably another case in which the guidance set out in "Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses and guidance on using special measures" ("ABE")*

*was not followed by those investigating the allegations. Notwithstanding those failures, which were in many respects recognised and accepted by the judge, he proceeded to make the findings against the mother. The issue for this Court is whether he was right to do so.*

*[11] The importance of complying with the ABE guidance, which is directed at both criminal and family proceedings, has been reiterated by this Court in a series of cases including TW v A City Council [2011] EWCA Civ 17 , Re W, Re F [2015] EWCA Civ 1300 , Re E (A Child) [2016] EWCA Civ 473 , Re Y and F (Children) Sexual Abuse Allegations) [2019] EWCA Civ 206 and in the judgments of MacDonald J in AS v TH and others [2016] EWHC 532 (Fam) and Re P (Sexual Abuse: Finding of Fact Hearing) [2019] EWFC 27 . It is unnecessary to repeat at any length the extensive comments set out in some of those judgments. For the purposes of this appeal, the following points are of particular relevance. (Save where indicated, the paragraphs cited are from the ABE guidance.)*

*[40] The most important part of any ABE interview is the free narrative phase. The interview on 22 December did not include any free narrative at all. Instead, it consisted of the officer reading through E's four notes and asking questions about the contents. There could not be a more blatant example of the practice deplored by Sir Nicholas Wall P in TW v A City Council when he stressed that "the object of the exercise is not simply to get the child to repeat on camera what she has said earlier to somebody else". In submissions to this Court, Mr Tughan submitted that the use of notes in this way was permitted under the category of "props" discussed in paragraphs 3.103 to 3.112 of the ABE guidance. I do not read that section of the guidance as endorsing the practice of using pre-prepared notes to prompt the child's account. On the contrary, the use of such notes in an interview should be avoided if the interview is to have any forensic value. They are certainly not an acceptable alternative to initiating an uninterrupted free narrative account.*

*[41] In those circumstances, the weight which could be attached to what E said during the interview is extremely limited. I do not agree with the judge's observation (at paragraph 33) that, "once the notes had been used to help E say what she wanted to say, E then went on to confirm and elaborate." His further observation (at paragraph 51) that E's conduct during the interview had "an air of authenticity" was made without any reference to Mrs W's evidence that E was a habitual liar who cried on cue, dramatised injuries for attention and "would do or say anything to get a reaction". He did not consider whether the E he was observing on the video was the "Fake E" described by Mrs W. His discussion and dismissal (at paragraph 58) of a possible motive for E to fabricate the allegations is to my mind not sufficient to address the evidence about E's extensive dishonesty. The detail to which the judge referred at paragraph 52 as supporting the authenticity of the allegations (the mother pulling a funny face when E inserted her fingers in her vagina) was never mentioned in the interview but only emerged in an email from Mrs W seven months later.*

**Conclusions:**

1. The question of whether or not a child should give oral evidence to a court will be case and child specific. I have set out above the key resources, the legal framework, the guidance in the case law and an analysis of the balancing exercise required of the court. I have also collated the most recent case law on this topic.
2. Of its very nature, the thorny question of whether a child ought to be called, whether one is representing the party who wishes to cross examine the child, the child who might be cross examined or any other party, requires careful consideration of the factors I have set out above, but should you have any questions at all on this difficult topic, please do not hesitate to contact me in Chambers.

Cleo Perry QC

8.2.22