# RE G AND E (VULNERABLE WITNESS)
# [2011] EWHC 4063 (Fam)

Family Division

Pauffley J

16 June 2011

*Fact-finding hearing – Vulnerable witness alleged sexual abuse – Whether the witness was competent for purposes of s 96(2) of the Children Act 1989 – Whether she should be required to give evidence*

Care proceedings were on going in relation to the 17-year-old girl and her 8-year-old brother. The girl, who had significant learning difficulties and, according to experts, functioned at around the level of an 8-year-old child made allegations of sexual abuse against the father. She was represented by the Official Solicitor who formed the provisional view that there was a real issue as to whether she should be called to give evidence. The girl had given an achieving best evidence (ABE) interview and passed the truth and lies tests posed by the interviewing police officers notwithstanding her communication difficulties. A report from a clinical psychologist included nothing to suggest that she was incapable of giving evidence and concluded that with a number of special measures in place she would be able to cope with the court experience. On the application of the Official Solicitor permission was granted to instruct an independent consultant psychiatrist whose conclusions were in line with the psychologist report. The Official Solicitor nevertheless maintained that the girl should not give evidence but if she had to, it ought to be through a witness intermediary.

**Held** – ruling that the girl should give evidence –

(1) Given the lack of ambiguity in the evidence, the unity of opinion on the part of the experts, and the girl's performance at the ABE interview, there was no room for doubt or hesitancy that she was competent to give evidence (see para [12]).

(2) It was highly significant that the local authority's case upon threshold, the only permissible basis upon which the court would have the jurisdiction to make any orders about the girl's brother, was founded upon her allegations. They were at the heart of the exercise at this hearing, not at the periphery or some part of a wider raft of allegations about parental shortcomings. The case against the parents rested upon what the girl had alleged against her father and the mother's apparent inability to protect her from sexual harm. It was not only necessary but crucial to the outcome of the care proceedings that findings were made one way or the other. The most appropriate, fair and just way of determining the truth or otherwise of the claims was to hear her and then her parents give evidence (see para [17]).

(3) The length of time over which the girl gave evidence, interspersed with adequate breaks, was a matter which the judge would keep under constant review. In addition she would assess and make constant judgments as to the utility, fairness and impact upon the witness of continuing. A balance had to be sought between on the one hand enabling a fair process and on the other protecting the vulnerable witness. The judge's role was inquisitorial and also paternalistic (see para [26]).

(4) The Bar would be permitted to initially question in the usual way but whether or not that continued would depend upon the quality of evidence, given the extent to which the girl was demonstrating signs of discomfort by reason of the switches in the identity of questioner (see para [35]).

**Per curiam (1):** It was surprising that the Official Solicitor maintained such an extreme position which was not supported by the evidence (see para [36]).

**(2)** There had been a shocking lack of client care in circumstances where the girl had not been introduced to her counsel. Part of the reason put forward for that was that legal aid had only recently been extended. It was urgent for counsel to establish an

appropriate rapport with the girl so as to facilitate the process of guiding her through one of the most important parts of her involvement, namely, her evidence in chief (see para [40]).

**Statutory provisions considered**
Children Act 1989, s 96(2)
Mental Capacity Act 2005

**Cases referred to in judgment**
*W (Children) (Abuse: Oral Evidence), Re* [2010] UKSC 12, [2010] 1 WLR 701, [2010] 1 FLR 1485, [2010] 2 All ER 418, SC

*Damian Stuart* for the local authority
*Richard Alomo* for the mother
*Paul Storey QC* and *Camille Habboo* for the father
*Rachel Langdale QC* and *Gina Allwood* for the older brother of G and E
*Jennifer Richards QC* and *Nicola Greaney* for the vulnerable witness G by her litigation friend the Official Solicitor
*Sarah Morgan QC* for E by his children's guardian

*Cur adv vult*

**PAUFFLEY J:**

**[1]** This is my ruling in the preliminary application as to whether G should give oral evidence in public law proceedings relating both to herself and her younger brother, E. In the event I decide she should, it will also be necessary to consider the practicalities as to how that should be achieved and, in particular, who should be permitted to ask questions of her.

**[2]** G is 17, born in 1994; her younger brother is 7. Formerly, both children as well as their guardian, Carol Vicarage, were represented by Mrs Janice Kaufman of Steel and Shamash and Miss Sarah Morgan QC. Now, and as the result of the local authority's application in the Court of Protection, G is represented by her litigation friend the Official Solicitor.

**[3]** G has quite significant learning difficulties, functioning according to both of the experts who have assessed her for the purposes of these proceedings at around the level of an 8-year-old child. It may be that in due course 'best interests' decisions will be necessary though the history thus far suggests conflict is extremely unlikely.

**[4]** At earlier stages in the court process, particularly in January of this year at an important hearing which dealt with case management issues, there was no dispute as between the then arrayed legal teams about G's involvement as a witness. There was implicit if not explicit acceptance, on all sides, that conscientious application of the guidelines provided by the Supreme Court in the case of *Re W (Children) (Abuse: Oral Evidence)* [2010] UKSC 12, [2010] 1 WLR 701, [2010] 1 FLR 1485 would result in a conclusion that G, a willing witness, should indeed give evidence.

**[5]** On 6 May 2011 Mrs Kaufman, who continues to act for G now on the instructions of the Official Solicitor, wrote to me saying that the Official Solicitor had formed the provisional view that 'there is a real issue as to whether G should be called to give evidence at (this hearing)'. Mrs Kaufman indicated that the Official Solicitor would, 'of course review his provisional view in the light of Dr Gratton's (third) report' (not expected until 18 May)

but it appeared that the issue would have to be determined by the court. Dr Gratton is a chartered clinical psychologist with experience of this case and of assessing G dating back to March 2010. She has special expertise in evaluating individuals with learning difficulties and is a member of the National and Specialist CAHMS Developmental Neuropsychology and Neuropsychiatry Service – as well as the Mental Health in Learning Disability Team, based at the Maudsley Hospital in London. At all events, in Mrs Kaufman's letter it was indicated that counsel instructed by the Official Solicitor had indicated that the time estimate for the preliminary issue, given its importance, was likely to be in the region of 2 days and the Legal Services Commission had authorised the instruction of leading counsel.

**[6]** Dr Gratton's report was duly filed on 18 May 2011. Nothing within that report suggested G would be incapable of giving evidence, quite the reverse; moreover it was Dr Gratton's view that with special measures in place (as had been considered in detail during the course of evidence given on 17 January by Naomi Mason, a highly experienced intermediary) G would be able to cope with the court experience.

**[7]** Miss Richards QC on behalf of the Official Solicitor assures me that he did reconsider his original position in the light of Dr Gratton's report. The Official Solicitor nonetheless made an application on 26 May to Wood J, the urgent applications' judge, for permission to instruct an independent psychiatrist contending amongst other things that the most recent assessment undertaken by Dr Gratton was 'inadequate' and that because, before this hearing, Dr Gratton would be unable to answer a series of additional questions, it was necessary to go elsewhere. Wood J duly and unsurprisingly gave leave for Dr Thomas, a consultant psychiatrist and a specialist in the psychiatry of learning disability, to assess G's competence to give oral evidence, the possible impact upon her of so doing as well as her capacity to make decisions about residence, care and contact with family members.

**[8]** Dr Thomas assessed G and reported on 10 June. His conclusions accord very largely with those of Dr Gratton on all of the matters of substance about which they had been asked to give an opinion. If there was reconsideration of the Official Solicitor's position, and I assume there was, it did not result in any difference to the stance first outlined on 6 May.

**[9]** Miss Richards QC and Miss Greaney filed their 21-page skeleton argument during the afternoon of the first day of the hearing, a reading day. As to G's ability as a witness, 'on balance and with some hesitation' the Official Solicitor considers that G 'is competent to give evidence'. He has 'very real concerns that the potential detrimental impact to G of giving evidence is (or would not be) justified by the likely benefits of her providing oral testimony'. Thus, the Official Solicitor's primary position is that I should rule against hearing her oral evidence. If she is to be called as a witness, then in order to alleviate the potential for psychological harm and distress, it is suggested that questions be put by a single individual, perhaps the witness intermediary.

**[10]** On behalf of the local authority, Mr Stuart invites me to conclude that with appropriate support and safeguards, G ought to give live evidence. The mother's position, described with commendable economy by Mr Alomo on her behalf, is that she would not be averse to G giving evidence. Mr Storey QC on behalf of the father initially expressed his neutrality on the

issue and latterly his contentment with the indications I had given during the course of argument yesterday morning as to the structures I'd be inclined to apply if persuaded that G should give evidence. Miss Langdale QC, on behalf of G's older brother, likewise adopts a position of neutrality. Miss Morgan QC on behalf of the guardian against the background of the reports of Dr Gratton and Dr Thomas supports the local authority's stance, highlighting the fact that no interference in E's life would or could be possible unless G's allegations against her father in particular are proved.

*Competence*

**[11]** The first matter for comment is as to whether G is competent in accordance with the provisions of s 96(2) of the Children Act 1989 (the 1989 Act). In order to reach the discretionary stage, first I must be satisfied G understands it is her duty to speak the truth and she has sufficient understanding to justify her evidence being heard.

**[12]** I altogether fail to understand the hesitancy and obvious reticence of the Official Solicitor on this issue given (i) the lack of ambiguity in the evidence and (ii) the unity of opinion on the part of the experts. Dr Thomas and Dr Gratton are in complete agreement. There is no room for doubt or hesitancy, as I see it, not just because of the expert evidence but also because of G's performance at an achieving best evidence (ABE) interview. She passed the 'truth and lies' tests posed by the interviewing police officers with flying colours and notwithstanding her communication difficulties of which I'm keenly aware. She is, as I find, undeniably competent.

*Discretionary exercise*

**[13]** I turn then to the discretionary exercise and the guidance which flows from the decision in *Re W (Children) (Abuse: Oral Evidence)* behind which it is unnecessary to go, notwithstanding the extensive recital of the development of the jurisprudence provided by Miss Richards as well as her bundle of authorities comprising no fewer than seven reported cases. If he will permit me to say so, Mr Stuart's analysis of the content of the judgment in *Re W (Children) (Abuse: Oral Evidence)* as well as the key matters for consideration when decisions of this kind are confronted (between paras 10 and 20 of his skeleton) could not be improved upon. I have no difficulty in adopting his admirable summary; and there is no need, therefore, to here relate lengthy passages from the judgment of Baroness Hale of Richmond.

**[14]** There are two considerations to be weighed in deciding whether G should be called as a witness. First, the advantages that her evidence will/may bring to the determination of the truth and secondly the damage that the evidence giving process may do to G's welfare. I bear in mind all of those factors identified by Baroness Hale of Richmond which may favour the child giving evidence as well as the various relevant considerations outlined by her when evaluating the potential for causing damage. In similar vein, I'm very aware of the suggestions made as to the ways in which questions of the child might be fairly put.

**[15]** I have considered the matter afresh, quite obviously, since the January hearing and assimilated all of the recent expert evidence as well as

Miss Richards' written and oral arguments. I emphatically conclude that the only sensible conclusion arising out of the balancing exercise is that G should indeed give oral evidence.

**[16]** I now intend to describe my reasons for that decision and why it is that I profoundly disagree with the Official Solicitor's judgment on the issue.

**[17]** It is highly significant as Miss Morgan suggests that the local authority's case upon threshold, the only permissible basis upon which the court would have the jurisdiction to make any orders about E, is founded upon G's allegations. They are at the heart of the exercise at this hearing, not at the periphery or some part of a wider raft of allegations about parental shortcomings. The case against the parents rests upon what G has alleged against her father and the mother's apparent inability to protect her from sexual harm. Accordingly, it is not only necessary in this instance but crucial to the outcome of the care proceedings that findings are made one way or the other. And the most appropriate, fair and just way of determining the truth or otherwise of G's claims, for sure, is to hear her and then her parents give evidence.

**[18]** Thus far, there has been no test or challenge to the accounts G has given. It may and probably will be of considerable assistance in determining the truth or otherwise of her allegations to hear, for example, what she has to say about her father's alibi for the last occasion upon which she maintains he abused her as well as her response to the suggestion that she has been influenced by and colluded with her sister to make false claims.

**[19]** Miss Richards argues that the ABE interviews are much closer in time to the matters complained of and are likely to be a more reliable source of evidence than anything said by G in 2011 having regard to her learning and memory difficulties. Miss Richards invites my attention to the fact that at various points during the course of the May 2009 and March 2010 interviews, G says she cannot remember particular details and submits that questioning in 2011 is unlikely to elicit additional, reliable information.

**[20]** Whilst I altogether accept in the ordinary run of cases propositions of that kind might hold good, in this instance there is evidence which runs in the contrary direction. In her January testimony, Miss Mason gently and very moderately identified various shortcomings with the manner in which the ABE interviews were conducted. Dr Gratton said that during her recent interviews with G she often answered 'don't know' to questions. Sometimes this reflected not having an answer to the questions, but she also gave that answer when she was finding the topic hard or did not want to talk about it … When G was reminded of the possible outcomes of the assessment she then began to give fuller answers. Naomi Mason said almost exactly the same on the eighth page of her 16 January 2011 report.

**[21]** Dr Thomas gained the distinct impression G often says she's forgotten information as a means of avoiding demands and not necessarily because she has forgotten. A sensation with which G agreed when it was put to her by Dr Thomas.

**[22]** All three of the experts agree that various measures would be appropriate so as to enable G to make the best of her opportunity to tell her story. Dr Thomas says that the quite significant impairments in her receptive and expressive communication skills will affect the way in which she perceives information/questions put to her and how she responds to those

questions. He ventures that her communication difficulties have been very thoroughly assessed by Naomi Mason and is in agreement with the recommendations she makes including the need for short sessions, regular breaks and careful assistance with the phrasing of questions. As for events in the past, Dr Thomas's opinion is that G's working memory and ability to recall past events is an area of relative strength for her … Her recall will be much better for autobiographical information, eg events in her life rather than for random information like a list of tasks or items to purchase.

**[23]** Dr Gratton said in evidence that it was difficult to say if G would now be able to say more. It would depend on the setting and her rapport with the person interviewing her as well as her understanding of the seriousness of the situation. It may be that she will provide detail she didn't report previously but Dr Gratton would not expect there to be substantially more than previously. As to that she may be right, she may not – there is no way of knowing. Nonetheless, I conclude there is very good reason to support rather than reject the application for oral evidence.

**[24]** Much is made by Miss Richards about the list of areas of interest about which Mr Storey would wish to cross-examine G. Miss Richards argues essentially that little assistance would emerge from questions about certain of the subject areas, particularly G's sexual knowledge and history including her relationship with another young man as well as her MSN communications on the internet. She might be right, she might not. There's no way of telling until the cross-examination process is underway. Any number of possible explanations might be given as to how it is that G had sexual knowledge at such a young age. In any event, Mr Storey's list can only be aspirational, nothing more at this stage. He, like everyone else, will be subject to my directions as to what and how questions are put. It's my job to ensure a fair process for everyone involved and to seek to protect any vulnerable witness from inappropriate questioning. I would not shrink from stopping cross-examination altogether if it became too onerous for G or, indeed, if the process ceased to have value. I have done so in other cases because the needs of the young person plainly required swift, decisive and radical intervention. Limiting the subject areas for questioning likewise may become necessary according to G's responses; and I would react as the needs of the situation demanded.

**[25]** It is also of significance to relate that G is, as Dr Thomas sets out, 'very keen to give evidence before the court'. Were the situation otherwise, I need hardly say there would be no question of requiring her to provide an oral account. Miss Richards argues that G's willingness is based upon a mistaken and/or inadequate understanding of the purpose of the proceedings, the risk that her evidence will not be believed and what the process will involve. Whilst there is substance in much of that, I struggle to accept it would have been appropriate to provide G, given her limitations, with an accurate explanation of the purpose or possible determinations at the end of the proceedings. The concepts involved would be far too complicated for her to grasp or come to terms with. As to the potential for her evidence being rejected and the intricacies of the process, G will be in the same position as every other young person who has had familiarisation visits to court, explanation as to the processes involved as well as the additional support Naomi Mason has already provided and will continue to provide.

**[26]** The length of time over which G gives evidence, interspersed as it is planned to be by adequate breaks, is a matter which – along with everything else – I intend to keep under constant review. That is my job. I watch, assess and make constant judgments as to the utility, fairness and impact upon the witness of continuing. I seek to strike a balance between on the one hand enabling a fair process and on the other protecting the vulnerable. My role is inquisitorial and also paternalistic. I have never found the combination in the least difficult to manage.

**[27]** Next I turn to consider the Official Solicitor's concern that the process of being cross-examined may well have a detrimental effect upon G's health and trigger further thoughts of self harm. Miss Richards asserts there is 'a real issue as to whether G's mental health and wellbeing will be significantly adversely affected' by the evidence-giving process. The Official Solicitor, says Miss Richards, has real concerns that if G is not believed and/or the allegations are not proved there could be serious consequences for her mental health.

**[28]** The evidence relating to this part of the equation stems most usefully, in my assessment, from Dr Gratton. In her reports of 18 May and 9 June she said that if the judgment is that the events G reported are unlikely to have taken place this may have a detrimental effect upon her mental health, but she does not consider this will be significantly greater whether she gives evidence in person or not … G may perceive not giving evidence to mean that others do not believe her story and do not think her capable of being a witness. Thinking that others do not believe her has been previously linked with thoughts of self harm and these may reoccur. Dr Gratton considers it a dilemma as to whether G gives evidence or not as both courses of action carry risks to her mental health. However, and this is of central importance as I see it, according to Dr Gratton this dilemma is inherent to the court case rather than being specific to G giving evidence in person.

**[29]** Dr Thomas considers G to be at considerable risk of deterioration in her mental state if she were to give and defend her evidence under cross-examination without adequate and appropriate support. He agrees with Dr Gratton that perceived rejection by the family will further increase the likelihood of deterioration in her mental state. He is also of the opinion that if she does not have the opportunity to give her evidence this is likely to have an adverse effect on her mental state although he would not expect it to be as severe. The impact of such a decision can be lessened if she has the opportunity, Dr Thomas suggests, to give her key evidence again with adequate and appropriate support. Perhaps 'very intrusive cross-examination' should be avoided. He also says that it would be very distressing to G to have very intimate matters dissected by several cross-examining barristers who may also 'challenge the veracity of her evidence'. He would expect her reaction to 'an adversarial line of questioning' and the 'robust testing of her evidence' to be considerable, negative and to trigger a reactive dip in her mood which may be mild or more severe.

**[30]** Dr Thomas lends his full support to Naomi Mason's recommendations and suggests additional measures for consideration – (i) questions put by a single person, perhaps a female with whom G has a rapport although he appreciates that may be objectionable to the legal teams of the accused, unable as they would be to 'press home an advantage'; and (ii) the

opportunity for G to give her key evidence again with intermediary support so as to provide her with the chance of doing so outside the high pressure environment of the hearing room.

**[31]** It is unnecessary for me to repeat what I have already said about my intentions to manage the process of evidence giving so as to eliminate to the best of my ability the potential for harm. No family judge would permit 'very intrusive cross-examination,' 'adversarial lines of questioning' or 'robust testing of evidence' of any vulnerable witness, still less a 17 year old who functions at a considerably younger level. I'm surprised Dr Thomas believed there was potential for any such activity. Perhaps he has only slight experience of the way the family courts operate.

**[32]** G is in an invidious situation. For 2 years her allegations have been untested and untried. She has lived away from home although she would have dearly loved to return if her father had not been part of the family unit. She has suffered the effects of disruption in the contact relationships from which she derives comfort with her mother and E, albeit fairly briefly last October when the mother refused to see her. I suspect that she may find giving evidence rather more challenging than she expects. Paradoxically though, her levels of functioning may serve to protect her to an extent, less alert I would surmise than an average 17 year old to some of the nuances of the cross-examination process.

**[33]** In the context of the potential for harm, it is very relevant to consider the available support for G from a whole variety of sources. She derives comfort and reassurance from a number of individuals – her foster mother, with whom she has a close relationship; her social worker, Miss Duroe; the teachers and particularly the learning support assistants at her school. In addition, should it be needed, there is an extant referral to CAMHS so that G might receive emergency treatment from that service so as to alleviate any slide into ill health.

**[34]** The last matter for determination is as to whether, at this stage, I should delineate the way in which G's testimony should be managed following on from the Official Solicitor's three suggestions. The first – a further pre-recorded videoed interview – may be swiftly despatched as impractical given the time constraints of the hearing. G is due to give evidence next Wednesday. There is simply no time to prepare for, conduct and transcribe such an interview consistent with the court's timetable. The second suggestion, strongly favoured by the Official Solicitor, is that G should give live evidence but be questioned only by the intermediary. Both Dr Gratton and Dr Thomas, albeit at different times, have suggested such a course and it was one of the potential arrangements floated in *Re W (Children) (Abuse: Oral Evidence)* (above) by Baroness Hale of Richmond. The third proposal mentioned but opposed by Miss Richards is that the barristers should be permitted to cross-examine G, albeit that she would have the advantage of Miss Mason to assist her in the process.

**[35]** I intend, as I said during the course of argument, to permit the Bar initially to ask questions in the usual way. Whether or not I allow that to continue will depend upon at least two factors – the quality of the evidence given and the extent to which G is demonstrating signs of discomfort by reason of the switches in the identity of questioner.

*Finally – two observations*

**[36]** Two things remain for comment. First, that I am personally saddened to find myself so severely at odds with the Official Solicitor's judgment upon an issue of such importance. As is clear from the content of this ruling, the single most significant reason for my overall conclusion is that the evidence simply does not and could not support the extreme position to which the Official Solicitor has single-mindedly held since the early days of his involvement.

**[37]** I wholly reject the assertion made to Wood J on 26 May that Dr Gratton's evaluations were either inadequate or insufficient. Her assessments, formulations and conclusions have been entirely vindicated by Dr Thomas. When I read his report on Monday afternoon, before Miss Richards' skeleton argument arrived, I assumed the Official Solicitor's position would undergo an about turn. I was wrong but remain bewildered as to how it was thought the application could conceivably succeed against the backdrop of the expert evidence.

**[38]** I had the great privilege to represent the Official Solicitor regularly throughout my 25 years or so in practice at the Bar. I appeared for him in wardship and latterly Children Act proceedings on literally hundreds, maybe even thousands, of occasions. Accordingly, I feel qualified to observe that, in times past, the knowledge, expertise and skill in the arena of cases about children within the Official Solicitor's department were unrivalled. His reputation for exercising wise judgment and making sensible recommendations rightly attracted the respect of the judiciary and family law practitioners alike.

**[39]** Somehow along the way, the Official Solicitor's concentration of effort and interest would seem to have shifted to cases brought under the Mental Capacity Act 2005. Expertise in children cases, seen by some lawyers I've no doubt as less interesting, less glamorous, less high profile has seemingly been depleted. I for one regret that situation very greatly.

**[40]** The second matter upon which I feel constrained to comment because I find the situation both incredible and alarming is that, thus far, there has been no meeting of any kind between G and her counsel, either of them. Part of the reason for that, according to Miss Richards, is that legal aid for leading counsel was only extended last week. I said at the time and continue to believe there has been a shocking lack of appropriate client care. I know not why that state of affairs has been allowed to develop. It must be a real possibility that the concentration has been upon this legal issue rather than G's needs. Now it is urgent for counsel to establish an appropriate rapport with her so as to facilitate the process of guiding G through one of the most important parts of her involvement, namely her evidence in chief.

*Order accordingly.*

Solicitors: *A local authority solicitor*
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*Charles Allotey* for the father
*Steel & Shamash* for G and E

SAMANTHA BANGHAM
*Law Reporter*