



# NEW COURT NEWS

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## New Court Blog

[newcourtchambers.com/blog](http://newcourtchambers.com/blog)

The New Court Blog is regularly updated with the latest family law and COP news. To visit our blog go to [newcourtchambers.com/blog](http://newcourtchambers.com/blog)

## New Court News: Issue 10

"A very warm welcome to you all to our 10th online newsletter.

As you will read we are delighted to welcome Julia Feely to Chambers. She strengthens our team and has certainly 'hit the ground running'.

The cycle of Chambers' life continues and whilst it seems no time since Chantelle and Jemimah started their pupillage, they will be on their feet in just a few weeks time. Having supervised each of the pupils, we are confident in their ability and are sure that they will do well in court.

Nicola has welcomed a new arrival to her family and we wish them all well.

Giuseppe has recently celebrated a 'significant' birthday. Very best wishes to GC and we look forward to celebrating with him when he next returns from Rome.

We trust you find the articles below both interesting and informative. Thanks to the authors, and all who have contributed to this newsletter, for all their hard work.

Whilst March is fast approaching it does not seem too late to wish to all very best wishes for the rest of 2017."



Christopher Poole & Giles Bain  
Joint Heads of Chambers



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# New Court News

*by Robert Wilkinson*

## Welcome to Julia Feely

We are delighted that Julia Feely has joined us as our newest tenant.

Julia was formerly a member of 1 Gray's Inn Square Chambers and practises in all areas of Family Law, with a particular focus on matrimonial finance and private law Children Act matters.

Prior to the Bar, Julia worked for a Magic Circle law firm and a boutique litigation firm, through which she gained broad experience of many aspects of commercial litigation, which compliments her growing practice in financial remedies. Julia is a fluent French speaker, lived in France for an extended period of time, and has also worked for a French law firm.

We wish Julia the very best for her future career with us at New Court Chambers.

## Christmas Party 2016

We welcomed friends and colleagues to our annual Christmas Party on 25 November at The Pepys pub by the Millennium Bridge. As always, it was fantastic to catch up with clients over an informal drink or two and enjoy the fantastic views of the Thames.



## Chambers & Partners

Chambers is once again ranked in the Chambers & Partners directory as a leading family set, with Giles Bain, Chris Poole and Sally Jackson receiving individual rankings.

Congratulations to all members and staff for this deserved recognition.

## Pupils

Jemimah Hendrick and Chantelle Barker, who commenced their pupillages with us at the beginning of October, will be completing their first 6 months of pupillage at the end of March and ready to accept instructions under supervision from the beginning of April 2017.

## Chambers & Partners 2017



*Giles Bain*

*"He's a very calm, measured and intuitive advocate. He's very easy to work with in a high-pressure environment and his technical ability and client manner are very good. He's enormously well respected by judges"*



*Sally Jackson*

*"She has a meticulous mind and her advice is second to none. She's ver clear with the clients when explaining quite technical stuff relating to the law. She goes above and beyond her brief."*



*Christopher Poole*

*"A supremely confident advocate who certainly knows his stuff in public law. He has a quiet, authoritative manner that gets to the heart of things."*

# SPOTLIGHT ON FINANCE

*by Elissa Da Costa-Waldman*

Traditionally New Court Chambers has been known for its specialist child care work. However, for the last three years, as we have grown in size, so too have our skills and we now also field a formidable team of specialists in matrimonial finance and TOLATA (Trusts of Land and Appointment of Trustees Act) Claims. Our specialist team comprises [Elissa Da Costa-Waldman](#), [Sally Jackson](#) and [Julia Feely](#), all of whom are dedicated finance and property practitioners and whose detailed profiles appear on Chambers' website. Whilst these barristers are the hub of the team, there is much more support from other members of chambers who also engage in finance work though not as their only area of practice and who are available for the more modest money cases.

Elissa's quirky TOLATA cases are often in the national press and demonstrate the success she has in dealing with these matters, although as a trained arbitrator, mediator and collaborative lawyer, Elissa brings these skills to her litigation practice in ensuring that settlement is always at the forefront of the client's mind if it is at all possible. Sally, like Elissa, is very experienced in high net worth matrimonial finance cases as well as TOLATA, demonstrating that she can easily switch between family and civil jurisdictions. They have recently been joined by Julia Feely who is a very able practitioner in both these fields and with great attention to detail as well as being an excellent advocate. The team provides a range of experience and expertise to financial cases of all levels as well as the TOLATA expertise, an area of law often considered very complex by solicitors.

Those who already regularly instruct Chambers will know that our barristers and clerks will always go that extra mile to provide service to our clients. Carrying on from that fine New Court tradition, the Finance and TOLATA team are more than happy to answer questions and queries and invite you to telephone at any time if you have a question about a finance or TOLATA case. ■

# The Effective Participation of 'P' in Court of Protection Proceedings

*by Jemimah Hendrick*

'Effective participation' has become the buzzword for many areas of family law. There have been discussions around the 'voice of the child' and now too in the Court of Protection (COP) the voice of P and their participation in proceedings has become an increasingly important consideration. On 3 November 2016 Charles J released practical guidance as to how 'practitioners might consider enhancing the participation of P in proceedings in the Court of Protection'.

Charles J makes it clear that this is not a standardised checklist, which is required for all COP cases, but rather a suggested list of considerations. His Lordship further highlights that any participation will be case specific and as such consideration of this guidance should also be very closely linked to the facts of each case and the position of P within them.

Charles J's suggested starting point is the 'identification of the person's needs within the court process'. This is the consideration of what would be 'necessary for their [P's] effective participation within the court proceedings'. His Lordship points out that these needs can range from the self-evident to the more 'subtle cognitive or other impairments' and this determination will also affect the level of support required.

His Lordship further considers that this evaluation should 'start at the earliest possible stage'.

P's participation in proceedings can then be broadly split into two different but intrinsically linked categories:

1. P's communication of their wishes and feelings on the issue(s) to be determined; and
2. P's actual participation in any court hearings:
  - a. P's attendance at a hearing or hearings;
  - b. P meeting with the Judge;
  - c. P giving 'information' to the court; and
  - d. P giving evidence to the court.

## **P's communication of their wishes and feelings on the issue(s) to be determined**

The guidance advises that 'in order for P to be placed at the centre of the proceedings, P's wishes and feelings on the issues to be determined by the Court are of vital importance'. Charles J suggests that this can be done, not only by obtaining third party reports from a number of sources, but also by those representing P taking steps to 'elicit P's wishes and feelings about the issues'.

P's ability to do this will obviously vary based on their specific needs and Charles J suggests a number of considerations that might be taken into account including how P's ability to communicate might be enhanced and how the court process can be best explained to P.

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## **P's actual participation in any court hearings**

### **a. P's attendance at a hearing or hearings**

Charles J emphasises the need for this to be discussed with P and their views sought at an early stage. His Lordship sets out a comprehensive list of practical considerations which should be taken into account when considering the attendance of P at any hearing, whilst also highlighting the fact that different factors may apply to different types of hearings for instance interim as opposed to final.

*“In the Court of Protection the voice of P and their participation in proceedings has become an increasingly important consideration”*

Charles J

These considerations include such steps as liaising with the court staff as to the practicalities of physical attendance, the use of a video link, P's understanding of the court process including what a court room looks like, who will support P, whether breaks will be needed, how any decisions will be communicated to P and so on.

The first important consideration in the list, especially considering the current COP pilot, is the 'impact on P of the hearing being [held] in public and what directions about this should be sought'. As both the COP and Family courts are becoming more open to the public and press this is going to be an increasingly important issue when considering the participation of any vulnerable party or witness.

### **b. P meeting with the Judge**

In common with when a Judge meets with a child in private or public law proceedings, Charles J indicates that it must 'first be determined what the purpose of such a meeting would serve' and all parties, including the court, should be clear what this is.

Charles J sets out the procedure that ought to be followed in order to facilitate this - it is one that practitioners, Judges, and court staff are familiar with because it is similar to arranging a child meeting with a Judge. The differences are principally; assessment of any risk, whether the meeting should take place at the court or at a care home/hospital and the consideration of how best to maximise P's participation in this meeting.

### **a. P giving 'information' to the Court**

Charles J refers to rule 95 (e) COP Rules 2007 which provides 'for the Court to admit, accept and act upon such information whether or not P is competent to give evidence'.

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This affords the court great flexibility. With this in mind Charles J sets out what should be considered in advance, including how this information is to be imparted to the court and parties, how any questions should be drafted and posed and what other work might be done in advance with P. His Lordship further highlights the necessity of considering the impact on P of the hearing and judgments being made public and, therefore, potentially the information provided by P themselves.

### **b. P giving evidence to the Court**

Charles J does acknowledge that this situation, although rare, may arise. His Lordship suggests in these circumstances the Court and parties should consider:

1. A Ground Rules Hearing to determine the arrangements. These hearings, as Charles J points out, are regularly used in criminal and family hearings and as such the guidance relating to these hearings are likely, with modifications, to be applicable;
2. Whether P needs an intermediary and the funding of such. Again these are used in criminal and family hearings and the guidance will be useful. Charles J does emphasise that this is an impartial role and is not a substitute for a representative for P; and
3. Advanced preparation of questions to be posed to P and if possible agreed.

Finally, Charles J links the above guidance to any vulnerable parties and witnesses and highlights that much of what is considered above should also apply. His Lordship sets out

which type of support will need to be considered in order to allow any vulnerable party or witness to participate effectively, and give evidence, in proceedings.

Something Charles J does not touch on in his guidance, but which has been the subject of recent case law, is the question of who should make the decision as to whether, and if so how, P should participate in proceedings. HHJ Mark Rogers in the case of *A County Council v AB and others* [2016] EWCOP 41 sets out fully the legal considerations which must be taken into account when deciding P's participation and

in particular highlights the flexibility of such participation. At paragraph 46 of this judgment His Honour states:

*“It is clear that the effective participation of P is something that will now have to be considered very carefully at the start of every COP case.”*

‘Accordingly, on the question of his attendance and the provision of evidence or information, I take the view that the Litigation Friend has generally an unrestricted power to

conduct the proceedings albeit subject to the Rules and that the Court's powers to intervene or overrule the Litigation Friend are limited to extremities. Rather than create a general case management power, I prefer to characterise the Court's role as dealing with specific best interests decisions as they arise, and they *do* arise in many different circumstances.’

It is clear that the effective participation of P is something that will now have to be considered very carefully at the start of every COP case. The guidance, provided by Charles J, is an incredibly useful resource to be used as a starting point for these discussions. ■



## Care Proceedings Involving the Child of a Deaf Parent: Guidance for Practitioners

*by Sam Wallace*

In this article I would like to share some insights gained and some lessons learned last year whilst representing a local authority at a final hearing in which the respondent mother was deaf.

### **The Background**

The local authority became involved as a Section 7 reporter and, subsequently, as a result of emerging concerns about the neglectful and emotionally abusive parenting that the child was receiving in the care of her mother, the local authority was directed to undertake a Section 37 investigation which in turn resulted in public law proceedings being issued.

The child's mother was not born deaf and acquired her deafness following a physical

injury at the age of 5 as a result of an accident. As a result, she retained a level of speech in her native tongue (Bengali) and she was able, for some time, to disguise the full extent of her deafness from the professionals working with the family. She had been resistant to making use of the BSL sign language interpreters offered to her for key appointments, as she herself was struggling to come to terms with her own identity as a deaf person. A psychological assessment undertaken during the course of the proceedings by a deaf-specialist psychologist also established that the mother was also suffering from a mild learning disability which, in partnership with her deafness, significantly impaired her ability to acquire new information, knowledge and skills without specialist support.

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My first involvement in the case began late in the proceedings at a pre-trial review ahead of what was intended to be a five-day final hearing. By this stage, the timetable for the proceedings was already well outside of the statutory 26 weeks as a result of a successful (albeit not timely)

application mid-way through the proceedings by the mother's legal team to instruct a deaf-specialist psychologist and a deaf-specialist independent social worker to assess the mother. This in turn had led to recommendations for a bespoke programme of parenting work undertaken by the organisation Deaf Parenting UK.

The local authority's final plan for the child, who had already been removed into foster care at an earlier interim hearing, was for her to be placed in long-term foster care. The mother contested the local authority's plan. At the PTR, the trial judge was highly critical of the mother's legal team for failing to fully grapple with how the mother's vulnerability as a witness and her additional communication needs were to be catered for at the final hearing, including investigating whether an intermediary would be required to facilitate the giving of oral evidence by the mother, and to ensure that she was able to fully participate in and understand the court process. Without this further investigation, the fairness of the proceedings was likely to be significantly undermined.

*“Without further investigation, the fairness of the proceedings was likely to be significantly undermined”*

The court gave permission for an assessment of the mother by a deaf-specialist intermediary. This resulted in the adjournment of the final hearing and, following a 'ground rules' hearing attended by the intermediary, the court determined

that the final hearing should be re-listed with a revised time estimate of ten days, based on the guidance given by the intermediary around the mother's need for regular breaks. The intermediary also assisted counsel in planning and framing questions to be put to the mother in cross-examination to ensure that the questions were capable of being properly understood by the mother

once relayed to her in BSL, with the assistance of a deaf-relay interpreter.

The ultimate outcome of the hearing was that the judge approved the local authority's plan for A to be placed in long-term foster care. It is likely however that a realistic view about the mother's parenting capability could have been reached at a much earlier stage of the proceedings had there been specialist assessment of the mother at the outset.

Similarly, an early assessment by a deaf-specialist intermediary could have avoided the need for the final hearing to be vacated and re-listed and ensured that the parties and the court arrived at a realistic time estimate for the trial taking into account the mother's considerable difficulties. 

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## Discussion

This case served as a real learning curve for me and, I'm sure, for all of the professionals involved in it. In the hope that it may be of assistance to practitioners, I have set out in bullet points below some of the key lessons learned and some tips for those involved in similar cases. What I set out below is of particular significance where a parent is deaf, but much of what I set out will also be of wider application in any case where a parent is likely to be considered as a vulnerable witness and has additional learning/communication needs.

- Local authorities working in a child-protection context with parents who have a hearing disability are required to work within the terms of the *Equality Act 2010*. Social workers and local authority lawyers should be astute to ensure that appropriate measures are put in place to facilitate effective communication/participation in any key meetings (child protection case conferences/PLO meetings), social work assessments and social work visits. This will usually include provision of a BSL interpreter for any key meetings or discussions. Where a parent has additional communication needs (e.g. a level of learning disability), it may also be appropriate to consider engaging the services of a deaf-relay interpreter in addition to a BSL interpreter. Without appropriate measures being put in place, the reliability of any evidence gathered during the assessment process, and the weight that a court is able to attach to it risks being substantially undermined.
- “Without appropriate measures being put in place, the reliability of any evidence gathered during the assessment process, and the weight that a court is able to attach to it risks being substantially undermined”*
- Practitioners should be aware of the guidance given by the Court of Appeal in *Re C (Care Proceedings: Parents with Disabilities) [2015] 1 FLR 521*. It is the duty of the legal representatives acting for a parent who has a hearing disability to identify this as a feature of the case at the earliest possible opportunity. Consider at an early stage in the case (i.e. the first case management hearing) obtaining an expert opinion from a suitably qualified professional as to the impact of the deaf parents' disability on their ability to parent, the impact upon that parent's ability to participate fully in the court process, and any specialist support that they may require;

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- Any specific recommendations made by the instructed experts as to how best to work with the parent should be distilled into a concise document and, with the court's permission, and the parents' consent, that document should be disclosed to any key professionals working with the family;
- Practitioners should also be aware of the recent decision of the President in *Re D (A Child)* [2016] EWFC 1, a decision which focused on parents with a learning disability, and in which the President endorsed guidance given by Gillen J in the Northern Irish case of *Re G and A (Care Order: Freeing Order: Parents with a Learning Disability)* [2006] NIFam 8. The President emphasises the point that *"parents with learning difficulties can often be "good enough" parents when provided with the ongoing emotional and practical 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. The extended family can be a valuable source of support to parents and their children and the courts must anxiously scrutinise the possibilities of assistance from the extended family. Moreover the court must also view multi-agency working as critical if parents are to be supported effectively."* Annexed to the judgment are eight key paragraphs from Gillen J's judgment which make essential reading for any advocate representing a parent with a learning disability
- Where it is likely that a parent who is deaf will be required to give oral evidence at the final hearing, legal representatives for the parent should, at an early stage in the proceedings, consider obtaining an assessment of their client by a registered intermediary to determine whether the assistance of the intermediary will be needed to ensure the parent's effective participation in the court hearing. This may include the intermediary providing support throughout the court hearing, and not just during the parents' evidence itself, so that the court's attention is alerted to any concepts that are not being properly understood, and to ensure that breaks are taken at appropriate intervals.
- In cases involving the oral evidence of a vulnerable witness, including the evidence of a parent who is deaf, the toolkits included in the Advocates Gateway ([www.advocatesgateway.org](http://www.advocatesgateway.org)) are also an essential point of reference for all practitioners. Included within the gateway is a specific toolkit with guidance for the conduct of 'ground rules' hearings, a toolkit with guidance on preparing to question a witness who is deaf and a toolkit with guidance on preparing to question a witness with a learning disability.
- Consider, in every case, and especially where a party is to be assisted at the final hearing by an intermediary, the need for the court to list a separate 'ground rules' hearing (GRH) ahead of the main fixture. As set out above, Advocates' Gateway provides a helpful toolkit with a checklist of matters to consider at the GRH. 

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- In broad summary, consideration should be given to each of the following issues; (i) facilitating the role of the intermediary at the final hearing; (ii) measures to ensure the full participation of the vulnerable parent at the hearing and (iii) fair questioning of the vulnerable parents.
- The representative for any party seeking to challenge the evidence of a vulnerable parent at trial will need to be sufficiently prepared so that, if required to do so by the Court, they are in a position to provide the parties, the Court and the intermediary with an outline of their proposed cross-examination of that parent at the GRH. Practitioners should be aware that many phrases in everyday speech do not have an equivalent direct translation into BSL (by way of example, there is no direct translation of the question 'are you single?' into BSL, and the question will instead be re-interpreted as 'are you married?' with the obvious potential for confusion and misunderstanding when the witness answers with a 'No!'). For this reason, in cases involving deaf parents, it will often be necessary to go even further and to draft the questions themselves to be shown to the intermediary in advance of the GRH so that the intermediary may give advice where necessary as to any re-framing or re-phrasing of the question to ensure that it is properly understood by the witness. ■

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### Useful links

**Action on Hearing Loss** - formerly the Royal National Institute for Deaf People. This charity provides a range of support and services for deaf people living in the UK. [www.actionhearingloss.org.uk](http://www.actionhearingloss.org.uk)

**The Advocates' Gateway** - an essential resource for any practitioners involved in cases involving vulnerable witnesses. [www.advocatesgateway.org](http://www.advocatesgateway.org)

**Communicourt** - a private company offering the services of a wide range of registered intermediaries. [www.communicourt.co.uk](http://www.communicourt.co.uk)

**Deaf Parenting UK** - an agency that provides specialist parenting skills and support work for deaf parents. [www.deafparent.org.uk](http://www.deafparent.org.uk)

**Re C (A Child)** <http://www.bailii.org/ew/cases/EWCA/Civ/2014/128.html>

**Re D (A Child)** <http://www.bailii.org/ew/cases/EWFC/H CJ/2016/1.html>

**Signing Enabling Access** - a private company offering a range of services for deaf people, including Ministry of Justice registered deaf intermediaries. [www.searecruitment.co.uk](http://www.searecruitment.co.uk)

**Triangle** - a private company offering the services of a range of registered intermediaries. [www.triangle.org.uk](http://www.triangle.org.uk)

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