

Appointing and challenging experts in the Family Court

A short talk by
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36 Family

Experts - Overview

Why do we need experts?

What distinguishes an expert witness from other witnesses?

The power to control expert evidence

Appointing experts

Challenging experts

Relevant Statutory Provisions

s.13 Children and Families Act 2014

Part 25 – FPR 2010 – Experts and Assessors

Civil Evidence Act 1972

s.38 (6) Children Act 1989

The status of expert evidence

Expert evidence is opinion evidence

General rule – a witness may only give evidence in relation to factual matters which they have seen themselves

Expert evidence - an exception to this general rule.

As an exception the court's permission is required before expert evidence may be given

Civil Evidence Act 1972 – Admissibility and status – an example

s.3 Admissibility of expert opinion and certain expressions of non-expert opinion

(1) Subject to any rules of court made in pursuance of this Act, where a person is called as a witness in any civil proceedings, his opinion on any relevant matter on which he is qualified to give expert evidence shall be admissible in evidence.

(2) It is hereby declared that where a person is called as a witness in any civil proceedings, a statement of opinion by him on any relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

(3) In this section 'relevant matter' includes an issue in the proceedings in question.

Experts – The power to appoint

The court's power to appoint experts is derived from:

- (i) The common law;
- (ii) Statute;
- (iii) The Family Procedure Rules 2010

Experts – the common law, statute and the FPR 2010.

Already noted - the common law principle is that expert evidence can only be given with the permission of the court.

This rule is reiterated in statute and FRP – e.g. r.25.4 (2)

‘A person may not without the permission of the court put expert evidence (in any form) before the court.’

Fundamental aspects of Expert evidence

- (i) Assisting the court
- (ii) The expert's knowledge and expertise;
- (iii) Impartiality;
- (iv) Reliable body of knowledge or experience

See President's Memorandum: experts in the family court and *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6.

Appointment is ‘Necessary’ - not simply to assist

Expert evidence is required ‘*to assist the court with matters within the experts’ expertise*

see e.g. President’s Memorandum: experts in the family court (4.10.21)

Necessity – more than ‘*merely reasonable, desirable or of assistance*’
(see *Re H-L (A Child)* [2013] EWCA Civ 655)

‘Necessity sets a higher threshold than the standard of “assisting the court”’

Appointment - Necessity, delay and judicial scrutiny

'The instruction of an expert is the primary reason for delay in Family Court proceedings relating to children. The recent statistics show that an application for the instruction of an expert is almost invariably granted. To avoid delay, courts should continue to consider each application for expert instruction with care so that an application is granted only when it is necessary to do so.'

President's Memorandum: experts in the family court

Appointment and instruction – statutory checklists

Statute and the FPR provide the bases for the uses of experts in all family proceedings based on the following hierarchy and the following lists of statutory and other factors:

- (i) Opinion evidence in children proceedings: list at s 13(7); (other than s.38(6) assessments)
- (ii) Medical, psychiatric or other assessment of a child (see Children Act 1989 s.38(6) and checklist at s.38(7B)).
- (iii) All other forms of family proceedings covered by the list at r.25.5(2).

Experts – the court’s power to control – all forms of Children proceedings

Children and Families Act 2014 –

s.13(7) *When deciding whether to give permission as mentioned in subsection (1), (3) or (5) the court is to have regard in particular to –*

- (a) any impact which giving permission would be likely to have on the welfare of the children concerned, including in the case of permission as mentioned in subsection (3) any impact which any examination or other assessment would be likely to have on the welfare of the child who would be examined or otherwise assessed,*
- (b) the issues to which the expert evidence would relate,*

Experts – the court’s power to control – all forms of children proceedings

- (c) the questions which the court would require the expert to answer,*
- (d) what other expert evidence is available (whether obtained before or after the start of proceedings),*
- (e) whether evidence could be given by another person on the matters on which the expert would give evidence,*
- (f) the impact which giving permission would be likely to have on the timetable for, and duration and conduct of, the proceedings,*
- (g) the cost of the expert evidence, and*
- (h) any matters prescribed by Family Procedure Rules.*

Experts – the court’s power to control – s.38(6) Children Act 1989

s.38 (7B) When deciding whether to give a direction under subsection (6) to that effect the court is to have regard in particular to –

- (a) any impact which any examination or other assessment would be likely to have on the welfare of the child, and any other impact which giving the direction would be likely to have on the welfare of the child,*

- (b) the issues with which the examination or other assessment would assist the court,*

Experts – the court’s power to control – s.38(6) Children Act 1989

- (c) the questions which the examination or other assessment would enable the court to answer,*
- (d) the evidence otherwise available,*
- (e) the impact which the direction would be likely to have on the timetable, duration and conduct of the proceedings,*
- (f) the cost of the examination or other assessment, and*
- (g) any matters prescribed by Family Procedure Rules.*

Experts – the court’s power to control – proceedings other than children proceedings

See r.25.5

(2) When deciding whether to give permission as mentioned in rule 25.4(1) in proceedings other than children proceedings, the court is to have regard in particular to –

(a) the issues to which the expert evidence would relate;

(b) the questions which the court would require the expert to answer;

(c) the impact which giving permission would be likely to have on the timetable, duration and conduct of the proceedings;

*(d) any failure to comply with rule 25.6 or any direction of the court about expert evidence;
and*

(e) the cost of the expert evidence.

Challenging experts - Impartiality

Impartiality is ‘the essence of an expert’s opinion’

‘If a party proffers an expert report which on its face does not comply with the recognised duties of a skilled witness to be independent and impartial, the court may exclude the evidence as inadmissible:’

See The Ikarian Reefer [1993] 2 Lloyd’s Rep 68 as cited in Kennedy v Cordia LLP [2016] UKSC 6 per Lord Reed

Challenging experts - Assessing impartiality

Non-compliance with the recognised duties of an expert witness

See – PD25B – specifically – PD25B r.4.1 (note: see FPR 2010, rr 25.4, 25.5 – the below factors are simply of *assistance*)

4.1 An expert shall have regard to the following, among other, duties:

(a) to assist the court in accordance with the overriding duty;

(b) in children proceedings, to comply with the Standards for Expert Witnesses in Children Proceedings in the Family Court which are set out in the Annex to this Practice Direction;

Challenging experts - Assessing impartiality

(c) to provide advice to the court that conforms to the best practice of the expert's profession;

(d) to answer the questions about which the expert is required to give an opinion (in children proceedings, those questions will be set out in the order of the court giving permission for an expert to be instructed, a child to be examined or otherwise assessed or expert evidence to be put before the court);

Challenging experts - Assessing impartiality

- (e) to provide an opinion that is independent of the party or parties instructing the expert;*
- (f) to confine the opinion to matters material to the issues in the case and in relation only to the questions that are within the expert's expertise (skill and experience);*
- (g) where a question has been put which falls outside the expert's expertise, to state this at the earliest opportunity and to volunteer an opinion as to whether another expert is required to bring expertise not possessed by those already involved or, in the rare case, as to whether a second opinion is required on a key issue and, if possible, what questions should be asked of the second expert;*

Challenging experts - Assessing impartiality

(b) in expressing an opinion, to take into consideration all of the material facts including any relevant factors arising from ethnic, cultural, religious or linguistic contexts at the time the opinion is expressed;

(i) to inform those instructing the expert without delay of any change in the opinion and of the reason for the change.

Challenging experts - The contents of the report – PD25B

r.9 Content of the expert's report

(f) in expressing an opinion to the court –

.....

(iii) indicate whether any proposition in the report is an hypothesis (in particular a controversial hypothesis), or an opinion deduced in accordance with peer-reviewed and tested technique, research and experience accepted as a consensus in the scientific community;

(iv) indicate whether the opinion is provisional (or qualified, as the case may be), stating the qualification and the reason for it, and identifying what further information is required to give an opinion without qualification;

Challenging experts -The contents of the report – PD25B

(g) where there is a range of opinion on any question to be answered by the expert –

(i) summarise the range of opinion;

(ii) identify and explain, within the range of opinions, any ‘unknown cause’, whether arising from the facts of the case (for example, because there is too little information to form a scientific opinion) or from limited experience or lack of research, peer review or support in the relevant field of expertise;

(iii) give reasons for any opinion expressed: the use of a balance sheet approach to the factors that support or undermine an opinion can be of great assistance to the court;

Challenging expert - The Contents of the report – key issues

The expert should:

- (i) indicate whether an opinion is an hypothesis or controversial

- (ii) Summarise the range of opinion

- (iii) Give reasons for the opinions expressed – use of a balance sheet approach

Challenging the report -Knowledge and Expertise

Two strands –

- (i) The expert's knowledge and expertise; and
- (ii) A reliable body of knowledge or experience

Challenging the report - Knowledge and Expertise

(i) The expert's knowledge and expertise

(a) Subjective: focused on the specific expert.

(b) The expert must be able to demonstrate to the court relevant knowledge and experience to give either (both?) opinion evidence or factual evidence not based solely on personal observation.

(c) Once demonstrated, the expert can then draw on the 'general body of knowledge and understanding of the relevant expertise'

Challenging the report - Knowledge and Expertise

(ii) A reliable body of knowledge or experience

‘The Family Court adopts a rigorous approach to the admission of expert evidence. As the references in this memorandum make plain, pseudo-science, which is not based on any established body of knowledge, will be inadmissible in the Family Court’

(a) If the subject matter of the proposed expert evidence is within a recognised scientific discipline, it will be easy for the court to be satisfied about the reliability of the relevant body of knowledge’

(b) Not so where the ‘science or body of knowledge is not widely recognised’

(c) *‘the court will refuse to authorise or admit the evidence of an expert whose methodology is not based on any established body of knowledge’*