Expert Evidence

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4PB Family

How do you effectively challenge psychiatric, psychological or other complex medical evidence and choose the right expert to report?

In essence, when looking at the question of expert evidence, the aims ought to be obtaining the best evidence for your client and to obtain expert evidence that will facilitate a just, and swift outcome of the case in hand, bearing in mind what we know about the impact of delay in children's cases. Much will turn on the facts of the individual case, however, you will be hugely assisted if you adhere to some key elements of the guidance and hold in mind a number of key principles. This short seminar falls within a public law series of seminars but much of this talk is of general application when instructing experts to give evidence in cases involving children. I will deal with this question by looking at the following topics in turn building in some of the relevant guidance and setting out some key principles. I will not touch on the issues of costs and funding.

(a) Selection and instruction of an expert
(b) Selection of Experts – some recent case law
(c) Procedure for an application for permission to instruct an expert
(d) Challenge using procedural powers
(e) Forensic challenge
(f) Relevant recent guidance/publications which might be of assistance, included for your ease of reference
(g) Concluding points

Selection and instruction of an expert

1. The aim of this short seminar is not to pull together all of the guidance and a full list of each relevant case. Instead I will point towards the key tools which I find the most useful, whilst pulling together key recent cases on the topic.
2. The rules as to expert evidence are based in the common law (essentially that opinion evidence can only be given with court's permission) and mostly now set out in statute and rules. In respect of children proceedings these are the CFA 2014 and FPR 2010, Pt25.
3. Of course, the foundation lies within FPR 2010 r.25 and the associated practice directions, which I will go into in some detail. These provide guidance on the instruction and role of experts in the Family Court.

4. Do bear in mind the foundational propositions. An expert gives evidence only to assist the court and therefore it is the court and not the parties that decides whether evidence can be adduced.
5. The principles set out in The President's Memorandum: Experts in the Family Court, ought to be borne in mind and I insert the memorandum here, in full:

"President's Memorandum: Experts in the Family Court 4.10.21

Introduction

This memorandum seeks to explain the principles applied by the Family Court when it considers whether to authorise or admit expert evidence. It also repeats the reminder that experts should only be instructed when to do so is 'necessary' to assist the court in resolving issues justly.

Admissibility

First, the court will consider whether the expert evidence is admissible. Here, the Family Court will follow the guidance of Lord Reed PSC in the Supreme Court in Kennedy v Cordia (Services) LLP (Scotland) [2016] UKSC 6.

Scope of expert evidence

Unlike other witnesses, experts may give evidence of their opinions (Kennedy at para 39). Further, experts can, and often do, give evidence of fact (para 40). Experts may give factual or opinion evidence based on their knowledge and experience of a subject matter, drawing on the work of others, such as the findings of published research or the pooled knowledge of a team of people with whom they work (para 41).

Governing criteria

There are four criteria which govern the admissibility of opinion evidence of an expert. They also govern the admissibility of expert evidence of fact, where the witness draws on the knowledge and experience of others rather than, or in addition to, personal observation. They are (para 44):

i (i) whether the proposed expert evidence will assist the court in its task;
ii (ii) whether the witness has the necessary knowledge and experience;
iii (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and
iv (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.

These criteria are considered below.

Assisting the court

Lord Reed adopts at para 46 the standard in Daubert v Merrell Dow Pharmaceuticals Inc (1993) 509 US 579 at 588 per Blackmun J:

"If scientific, technical or other specialised knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

But see "Necessity" below.

The expert's knowledge and expertise

The expert must demonstrate to the court that he or she has the relevant knowledge and experience to give either opinion evidence, or factual evidence which is not based exclusively on personal observation or sensation. Where the expert witness establishes such knowledge and experience, he or she can draw on the general body of knowledge and understanding of the relevant expertise (para 50). [My emphasis]

Impartiality

If a party adduces a report which on its face does not comply with the recognised duties of an expert witness to be independent and impartial, the court may exclude the evidence as inadmissible (para 51).

Reliable body of knowledge or experience

Where 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. There is more difficulty where the science or body of knowledge is not widely recognised. The court will refuse to authorise or admit the evidence of an expert whose methodology is not based on any established body of knowledge (paras 54 – 56).

Necessity

In family proceedings governed by the FPR there is a further requirement. An order authorising expert evidence will only be made where it is "necessary" to assist the court to resolve the proceedings justly (see FPR 25.4(3) for non-children proceedings; section 13(6) of the Children and Families Act 2014 for children proceedings). Such expert evidence will only be "necessary" where it is demanded by the contested issues rather than being merely reasonable, desirable or of assistance (Re H-L (A Child) [2013] EWCA Civ 655). This requirement sets a higher threshold than the standard of "assisting the court" set out above.

This additional requirement does not apply to family proceedings governed by the CPR such as TOLATA proceedings, or proceedings under the Inheritance (Provision for Family and Dependants) Act 1975, or proceedings under the High Court's inherent jurisdiction concerning a vulnerable but capacitous adult.

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.

Duties to the Court and Professional Standards

FPR PD25B sets out the duties of the expert to the court. PD25B para 4.1(b) requires an expert to comply with the Standards set out in the Annex. These include requirements to have been active in the area of work; to have sufficient experience of the issues; to have familiarity with the breadth of current practice or opinion; and if their professional practice is regulated by a UK statutory body (see Table 1) that they are in possession of a current licence, are up to date with CPD and have received appropriate training on the role of an expert in the family courts. Psychologists are mainly regulated by the Health and Care Professions Council. The Family Justice Council has issued guidance jointly with the British Psychological Society on providing expert reports in the family courts: https://www.judiciary.uk/wp-content/uploads/2016/05/psychologists-as-expert-witnesses.pdf.

Where the expert is not subject to statutory registration (i.e. child psychotherapists) para 6 of the Annex identifies alternative obligations to ensure compliance with appropriate professional standards.

Conclusion

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."

6. The Memorandum is an important re-statement of the function of an expert; to assist the court and to do so on matters within their expertise.
7. There is also an overriding duty of impartiality.
8. The duties of an expert are set out within PD25A. I set them out in full below, in the context of some important recent case law.
9. Bear in mind the need to persuade a court that expert instruction is necessary within the context of your specific case. Do you really need expert evidence?
10. Every listener will be aware that the President of the Family Division re-launched the Public Law Outline (PLO) on 16 January 2023. It is highly relevant to this topic. The PLO provides a template for case management of proceedings with a view to reducing delay and bringing cases within the statutory 26 week time limit. The focus is on making the case 'smaller' by reducing the number of hearings per case and by making 'every hearing count'.

"A view from the President's Chambers 29.11.22:

"Since 2016/7 there has been a 33% rise in the number of experts instructed. Experts should only be instructed where to do so is 'necessary to assist the court to resolve the proceedings justly', rather than where it is merely desirable or helpful [C+FA 2014, s 13(6)]"

11. The aim is to obtain the best evidence from the outset, obviating or minimising the need for challenge to expert evidence further down the line. Expert instruction is a he delaying factor within our work.

Selection of Experts – some recent case law:

- **<u>Re N (A Child) (Instruction of Expert) [2022] EWCA Civ 1588 –</u>**
  - Proceedings under s.8 Children Act 1989
  - M and F raised in Hassidic Haredi Orthodox community. F sought the instruction of a male ISW after initially advocating for a female ISW (and instructing a female barrister and solicitor). When a female ISW was appointed, F appealed asserting the decision to appoint a female ISW breached his Article 6 and 9 human rights but providing no explanation as to how these rights were being breached.
  - The Court of Appeal concluded that in the circumstances of this case it was not necessary to say whether it could ever be right to specify an expert of a particular gender. Such a possibility was not ruled out, depending on the circumstances. However, in this case the court rejected the appeal concluding that on the evidence before him the judge had been entitled to appointment a female ISW. There was no reference before the judge at first instance on how F's Article 6 rights might be infringed, nor had F referenced Article 9 in any of the documents before the judge.
  - Should a party seek to instruct an expert of a specific gender, the application should be fully explained and supported by evidence demonstrating why the request is being made. It is likely to be a high hurdle to cross.
  - The evidence should identify the relevant religious belief and how the manifestation of the belief would be interfered with by the proposed action.

- **<u>Re C (Parental Alienation: Instruction of Expert) [2023] EWHC 345 (Fam)</u>**
  - Appeal against refusal to reopen a first instance children act matter was refused. The appeal was grounded in the contention that the assessing expert was not properly qualified to do the work they had been instructed to do and therefore proceedings must begin again, and that the first instance judge had been wrong to refuse the application to re-open.

- Whilst the experts' qualifications were the subject of submission the court of appeal did not adjudicate upon them. Please see paragraph 8 of the judgment.
- The President did set out guidance concerning the instruction of unregulated psychologists as experts in the Family Court.
- The court must work within a potentially confusing regulatory scheme, with eyes wide open to the need for clarity over the expertise of those who present as a psychologist who are neither registered nor chartered.
- The general label "psychologist" may be used by any individual and a report by them may be called a "psychological report". Certain categories of psychologist have a protected title which may only be used by those registered under the relevant regulations.
- It is unhelpful that the general labels "psychologist" and "psychological report" can be used by any individual, but it was noted that this is a matter for the psychological profession and Parliament as to whether a tighter regime is required, not for the court.
- Publishers of psychological assessment tools restrict access to valuable tools to those with HCPC registration. The President invited the Family Justice Council to investigate this issue and consider revising its guidance to refer to this factor.
- Courts need clarity about an expert's qualifications and experience. HCPC registration or chartered status with the British Psychological Society provide a reliable method of authentication.
- A psychologist's CV should highlight whether they are HCPC registered. An unregistered psychologist must assist the court by providing a short and clear statement of their expertise.
- It is not for the CofA to prohibit the instruction of an unregulated psychologist.
- Where the expert is unregistered, the court should indicate in a short judgment why it is appropriate to instruct them.
- Whether a proposed expert is entitled to be regarded as an expert is a question for the individual court, applying the principles reiterated in *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6.
- McFarlane P suggested use of a template when choosing an expert, recording the basic qualifications of any 'psychologist' (including whether HSPC registered or a chartered BPS psychologist). The court could still instruct any individual it considers capable but the template would assist when considering evidence of a proposed expert's expertise.

- <u>General guidance points made about unregulated experts –</u>

- The instruction and role of experts in family proceedings is already extensively covered within FPR 2010.
- No definition exists of an 'expert', only that an expert 'means a person who provides expert evidence for use in proceedings' and some statutory exceptions in s.13(8) of CFA 2014.
- Expert evidence in children proceedings will only be permitted when the court is satisfied that it is necessary.
- Expert opinion evidence will only be admissible 'on any relevant matter on which s/he is qualified to give expert evidence' – but there is no definition of 'qualified'.

Parental Alienation:

- Also of note is the following section of the judgment concerning the label 'parental alienation'

103. Before leaving this part of the appeal, one particular paragraph in the ACP skeleton argument deserves to be widely understood and, I would strongly urge, accepted:

'Much like an allegation of domestic abuse; the decision about whether or not a parent has alienated a child is a question of fact for the Court to resolve and not a diagnosis that can or should be offered by a psychologist. For these purposes, the ACP-UK wishes to emphasise that "parental alienation" is not a syndrome capable of being diagnosed, but a process of manipulation of children perpetrated by one parent against the other through, what are termed as, "alienating behaviours". It is, fundamentally, a question of fact.'

It is not the purpose of this judgment to go further into the topic of alienation. Most Family judges have, for some time, regarded the label of 'parental alienation', and the suggestion that there may be a diagnosable syndrome of that name, as being unhelpful. What is important, as with domestic abuse, is the particular behaviour that is found to have taken place within the individual family before the court, and the impact that that behaviour may have had on the relationship of a child with either or both of his/her parents. In this regard, the identification of 'alienating behaviour' should be the court's focus, rather than any quest to determine whether the label 'parental alienation' can be applied.

Procedure for an application for permission to instruct an expert

12. It is very important to properly plan a Part 25 application.
13. The timing of any application must be compliant with r25.6, with the required content of the application set out in r25.7. In public law proceedings this should be no later than the Case Management Hearing. Include a fully argued application, a CV, draft letter of instruction and a draft order. Adherence to this guidance, and that set out above, referencing the relevant criteria in any Part 25 application, is likely to result in the court

granting your application. Please refer to PD25C in full. It is an incredibly clear roadmap. It even includes a set of suggested questions in letters of instruction to adult psychiatrists and applied psychologists.

14. This is as important a part of your case as any ensuing forensic challenge. Arguably of greater importance.
15. Where permission is granted then the general requirement is that evidence is given by a written report. (r25.9) In public law proceedings the court is likely to make an order for a single joint expert, where two or more parties wish to put expert evidence before the court on a particular issue. (r25.11)
16. Exercise care when instructing an expert or a SJE. Take into account all the key guidance, and bear in mind recent case law. Also note the specific guidance in respect of such an instruction.

Challenge using procedural powers:

17. The first port of call is the ability to challenge the expert by written questions. (r25.10)
18. This is an important route of challenge and one that ought to be kept under review by your team, whenever an expert is instructed.
19. What of the single joint expert? What if your client is dissatisfied with the SJE's report? The court has a discretion to order another report, in appropriate circumstances and for reasons "not fanciful". This route is rarely used, probably for reasons of delay, with advocates often moving to cross examine but it is a discretion that exists and so I include it here for ease of reference. (See *Daniels v Walker (Practice Note) [2000] 1 WLR 1382, CA*, Lord Woolf MR and *Hinson v Hare Realizations Ltd (2) [2020] EWHC 2386 (QB)*.) The steps to be taken before objection is taken to a report are:

(1) Joint instruction of the expert.

(2) If a joint letter is not agreed, then in civil cases each party sends separate instructions, but see above for the consequences of FPR 2010, r 25.8(2).

(3) If a party is dissatisfied with the report, then within 10 days of service of the report (r 25.6(2)(b)) that party can raise questions of the expert (FPR 2010, r 25.10(1)(b)).

(4) If both parties seek expert evidence and the court agrees then the experts should discuss their reports before a decision as to whether either, or both, should be called to give evidence is made.

(5) Calling both to be cross-examined should be a 'last resort'.

20. I would like anyone who makes such an application to get in touch with me and let me know how it went, please! (Or even better, call me to discuss beforehand!).
21. Make sure the expert is properly instructed. Full team input is required to the letter of instruction. This is really important. (r25.12) Then make sure that the contents of the experts report complies with the requirements of PD25B. Frequently the contents does not marry up. This, again is an important point of challenge. I would suggest cross referencing PD25B with the report, when received, and I include the relevant section for reference:

9.1

The expert's report shall be addressed to the court and prepared and filed **in accordance with the court's timetabl**e and must –

(a) give details of the expert's qualifications and experience;

(b) include a statement identifying the document(s) containing the material instructions and the substance of any oral instructions and, as far as necessary to explain any opinions or conclusions expressed in the report, summarising the facts and instructions which are material to the conclusions and opinions expressed;

(c) state who carried out any test, examination or interview which the expert has used for the report and whether or not the test, examination or interview has been carried out under the expert's supervision;

(d) give details of the qualifications of any person who carried out the test, examination or interview;

(e) answer the questions about which the expert is to give an opinion and which relate to the issues in the case;

(f) in expressing an opinion to the court –

(i) 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, identifying the facts, literature and any other material, including research material, that the expert has relied upon in forming an opinion;

(ii) describe the expert's own professional risk assessment process and process of differential diagnosis, highlighting factual assumptions, deductions from the factual assumptions, and any unusual, contradictory or inconsistent features of the case;

(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;

(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;

(h) contain a summary of the expert's conclusions and opinions;

(i) contain a statement that the expert–

(i) has no conflict of interest of any kind, other than any conflict disclosed in his or her report;

(ii) does not consider that any interest disclosed affects his or her suitability as an expert witness on any issue on which he or she has given evidence;

(iii) will advise the instructing party if, between the date of the expert's report and the final hearing, there is any change in circumstances which affects the expert's answers to (i) or (ii) above;

(iv) understands their duty to the court and has complied with that duty; and

(v) is aware of the requirements of FPR Part 25 and this practice direction;

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

(j) be verified by a statement of truth in the following form –

"I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer."

Where the report relates to children proceedings the form of statement of truth must include -

"I also confirm that I have complied with the Standards for Expert Witnesses in Children Proceedings in the Family Court which are set out in the Annex to Practice Direction 25B- The Duties of an Expert, the Expert's Report and Arrangements for an Expert to Attend Court"

(FPR Part 17deals with statements of truth. Rule 17.6 sets out the consequences of verifying a document containing a false statement without an honest belief in its truth.)

22. This list is especially important when challenging complex medical evidence.
23. Remember also the power for the court to direct a discussion between experts and reach an agreed position where possible or delineate areas of disagreement (r25.16). This may reduce the number of points in issue and in turn the number of issues that you are instructed to challenge. PD25E provides, again, an extremely useful and clear step by step roadmap of how to arrange and manage these conferences.

Forensic challenge

24. All the procedural steps have been taken. The position remains disputed and the matter has been listed for hearing. Again, the tools you need to prepare are set out within the guidance.
25. Bear in mind the duties of an expert, and analyse whether they have been complied with. They are set out in PD25B, 4.1:

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

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

    (aa) 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;

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

    (c) 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);

(d) to provide an opinion that is independent of the party or parties instructing the expert;

(e) 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);

(f) 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;

(g) 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;

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

26. Have they strayed beyond the ambit of their expertise? Have the found fact? Have they made false assumptions?
27. Have they met the standards for expert witnesses in children proceedings in the family court? See the Annex to PD25B:

Standards for Expert Witnesses in Children Proceedings in the Family Court

Subject to any order made by the court, expert witnesses involved in family proceedings (involving children) in England and Wales, whatever their field of practice or country of origin, must comply with the standards (1-11).

1. The expert's area of competence is appropriate to the issue(s) upon which the court has identified that an opinion is required, and relevant experience is evidenced in their CV.

2. The expert has been active in the area of work or practice, (as a practitioner or an academic who is subject to peer appraisal), has sufficient experience of the issues relevant to the instant case, and is familiar with the breadth of current practice or opinion.

3. The expert has working knowledge of the social, developmental, cultural norms and accepted legal principles applicable to the case presented at initial enquiry, and has the cultural competence skills to deal with the circumstances of the case.

4. The expert is up-to-date with Continuing Professional Development appropriate to their discipline and expertise, and is in continued engagement with accepted supervisory mechanisms relevant to their practice.

5. If the expert's current professional practice is regulated by a UK statutory body (See Appendix 1) they are in possession of a current licence to practise or equivalent.

6. If the expert's area of professional practice is not subject to statutory registration (e.g. child psychotherapy, systemic family therapy, mediation, and experts in exclusively academic appointments) the expert should demonstrate appropriate qualifications and/ or registration with a relevant professional body on a case by case basis. Registering bodies usually provide a code of conduct and professional standards and should be accredited by the Professional Standards Authority for Health and Social Care (See Appendix 2). If the expertise is academic in nature (e.g. regarding evidence of cultural influences) then no statutory registration is required (even if this includes direct contact or interviews with individuals) but consideration should be given to appropriate professional accountability.

7. The expert is compliant with any necessary safeguarding requirements, information security expectations, and carries professional indemnity insurance.

8. If the expert's current professional practice is outside the UK they can demonstrate that they are compliant with the FJC 'Guidelines for the instruction of medical experts from overseas in family cases'.[1]

9. The expert has undertaken appropriate training, updating or quality assurance activity – including actively seeking feedback from cases in which they have provided evidence- relevant to the role of expert in the family courts in England and Wales within the last year.

10. The expert has a working knowledge of, and complies with, the requirements of Practice Directions relevant to providing reports for and giving evidence to the family courts in England and Wales. This includes compliance with the requirement to identify where their opinion on the

instant case lies in relation to other accepted mainstream views and the overall spectrum of opinion in the UK.

An example of this guidance note being followed arises in two reported judgments in respect of one case:

- **M v F and another [2022] EWFC 186 –**
  - The court was considering applications as to whether a 14 year old girl (S) should continue to live with her M in England close to where F also lived, or relocate with M to another country.
  - F's concerns were that M wished to live close to her family, and he feared that their cultural practices could amount to abuse, and that S could be coerced into an arranged marriage.
  - An application was made under FPR 25 for a psychological assessment of the family to assist in the decision making. Dr X was approved by the court and duly instructed.
  - The letter of instruction directed Dr X to FPR 25 and PD25B.
  - Recorder Reed raised concerns about Dr X and their evidence in the judgment – Dr X was an academic psychologist not a clinical psychologist and was not HCPC registered, but was a chartered psychologist. The task at hand encompassed questions that would usually be addressed to a practitioner psychologist.
  - Dr X's report also did not comply with the relevant rules and PDs. Dr X stated that she was not familiar with PD25B.
  - Held that despite the issues with Dr X's report, Recorder Reed could still reach 'sound decisions' in the case. Warned however 'in another case the collective failure to identify what the report did not provide could have led to poor decision making or further delay in reaching a decision'.
  - Drew particular attention to para 4.1 of PD 25B on the duty of an expert in children proceedings:
    - i) 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
    - ii) to answer the questions about which the expert is required to give an opinion
    - iii) 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);
    - iv) 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.

- The decision emphasises the importance of instructing an appropriately qualified expert, checking their CV to scrutinise their credentials, and ensuring that the expert knows, and has complied with, the rules and guidance on expert evidence.

- **M v F and another [2023] EWFC 53 –**
  - The judgment in M v F and another [2022] EWFC 186 highlighted several issues with the appointment of Dr X, her evidence and her failure to comply with PD 25B (as outlined above).
  - Dr X raised written objections to being named in the judgment and sought anonymisation / failing that, the entitlement to respond publicly and be released from her duty of confidentiality.
  - She cited her reasons as:
    - Due to the risk of her physical safety based on the nature of the case.
    - Due to the risk of being vilified, targeted and harassed.
    - The judgment containing errors, omissions, misunderstandings, misrepresentations and ambiguities.
    - There being no significant public interest in publishing her name.
  - **Held –** both judgments should be published. Generally an expert criticised by the court should be named because there is a public interest in awareness of those criticisms.
  - In this case the letter of instruction and attachments did not contain the standard warning and the appended PD 25B had not been read by Dr X. Anonymisation was granted and held not to disproportionately interfere with open justice. But note the reasoning from §82,

"82. I have reached the conclusion that although there is a clear public interest in publishing both judgments, and in doing so in naming the expert, there is a countervailing need to protect the expert from harassment and / or harm. I have concluded that anonymity will not materially or at any rate will not disproportionately interfere with the court's responsibility to work openly in accordance with the open justice principle. The workings of the court, it's rationale and conclusions will all be made clear, the granular detail of the facts and process laid out. The aspects of the case which have exercised the court and Dr X in different ways are fully articulated and insofar as there are learning points for the court, for Dr X or for lawyers and experts more generally they are there to be seen. I have decided therefore, that in order to balance the competing demands of this case, I should publish both judgments and that I should anonymise the expert.

This has the advantage of

i)enabling the public to read the substantive details of the case, which involves the interplay between child arrangements and the risk of honour based abuse,

ii) enabling the public to consider the issues which arose in relation to the expert instruction and how they were ultimately dealt with, in particular to see the difficulties that may arise where proper attention is not had to the terms of PD25B and associated guidance (whether by experts or professionals) and when the template letter of instruction is not used,

iii)
Albeit that their identity will not be known, demonstrating that the criticisms made and concerns raised by Dr X have been thoroughly considered before publication, and any reader who reads my judgment will see alongside it the criticism made of it and my response. They will be free to form their own view of both perspectives,

iv)
Protecting Dr X from unwarranted harassment, abuse or harm.

84. It has the disadvantage of preventing the public (including litigants, lawyers and judges) from knowing the identity of an expert who has been criticised via my second judgment, in rather more serious ways than they were in the first. That does mean that there is potential for others to unknowingly instruct Dr X in future cases and for them to encounter similar issues, but as I have indicated above I anticipate that Dr X is highly likely to pay close attention to PD25B in any future cases in which they are instructed.

85. Had Dr X complied with PD25B and notified the lead solicitor at the outset of the safety issues, much of the contention involved in resolving the issue of publication might have been avoided. I venture to suggest that in cases involving experts in this field it would be prudent for close attention to be paid by experts and lawyers to these issues at the outset, so that there are clear parameters of engagement from the outset.

86. Were it not for the potential safety issues, I would potentially have published the judgment and identified Dr X, but ultimately I have concluded that would represent a disproportionate interference with Dr X's Article 8 rights (incorporating their safety and wellbeing). The public interest in publication was not so acute as to demand identification (as opposed to anonymised publication), but Dr X's Article 8 rights would be potentially significantly compromised if I were to name them. Accordingly, I have removed references in both judgments to Dr X's name and sex, and the academic institution where they work."

28. This case also provides a good summary of the key authorities on the issue of naming experts in published judgments.
29. Finally, research the topic. Speak to your team. Don't be afraid to ask the obvious question. Never be afraid to highlight aspects of evidence that are not clear to you. It is for the expert to explain their opinion evidence.

<u>Relevant recent guidance/publications which might be of assistance, included for your ease of reference:</u>

- **<u>Judiciary UK: Family Reporting Pilot extended to private law (15 May 2023) -</u>**
  - If a pilot reporter wishes to publish an article about a hearing, an **ISW should be named if they are a court instructed expert.**

- If an ISW is working in place of the local authority to undertake assessments or work with the child, they should not be named.

- **<u>FJC interim in relation to expert witnesses in cases where there are allegations of alienating behaviours – conflicts of interest.</u>**
  - Focused on the limited issue of expert assessment in cases involving alienating behaviours.
  - Full guidance re allegations of alienating behaviours to be released in 2023 and is intended to cover:
    - The use of expert witnesses;
    - The timing and scope of expert witness evidence
    - The types of expert required; and
    - How the court can ensure that the expert has the necessary qualifications/experience to assist in potential findings about harmful parenting practices.
  - The interim guidance draws together accepted practice within the field of expert witnesses and previous guidance issued by the PFD and contained in the FPR, focusing on conflicts of interest.
    - FJC and British Psychological Society guidance (May 2022) - emphasises the importance of the expert being alert to potential conflicts of interest. In particular, "*if the psychologist has a view that is controversial as between experts or that might be derived from partiality, she or he must declare the extent of that interest. This is particularly relevant when a psychologist expert recommends an intervention or therapy that they or an associate would benefit financially from delivering. Whilst this may be experienced as helpful and facilitative to the court, this would be a clear conflict of interest and threat to the independence of their expert evidence".*
    - PFD Memorandum on the use of experts in the Family Court (October 2021) emphasises the rigorous approach to be taken by the family courts in admitting expert evidence and the need for a "*reliable body of knowledge or experience to underpin the expert's evidence".*
    - The importance of robust psychological approaches consistent with this memorandum is highlighted in the FJC/BPS guidance. This includes assessments drawing on a range of different sources and methods (to combat biases inherent in any single approach) in order to inform therapeutic recommendations in the opinion given. Recommendations should be consistent with typical current psychological practice and evidence base and flow from a rationale based on recognised assessment methodology. This is a marker of a good quality psychological report

- PD25B para 9.1 requires four declarations, including a declaration that the expert has no conflict of interest of any kind.

Concluding points:

Remember – the expert evidence is only one part of the jigsaw that the court evaluates:

1. If a judge is to differ from the view of an expert, especially with a unanimous body of exerts, he must give good reasons for doing so, e.g. *Re W (A Child) [2005] EWCA Civ 649*.
2. Please see also ***Re: M-W (Care Proceedings: Expert Evidence) (2010) EWCA Civ 12*** para 39[1] and ***Re BR (Proof of facts) (2015) EWFC 41 Jackson J para 9*** [2].
3. It is a wide canvas that must be surveyed.

And don't forget the requirement to inform the expert of the outcome! (r25.19)

Cleo Perry KC

4PB Family

8.6.23

[1] 39. I regard the following as trite propositions of law:-

(1) Experts do not decide cases. Judges do. The expert's function is to advise the judge;
(2) The judge is fully entitled to accept or reject expert opinion;
(3) If the judge decides to reject an expert's advice, he or she;

(a) must have a sound basis upon which to do so; and
(b) must explain why the advice is being rejected.

(4) Similar considerations arise when a judge prefers one expert's evidence to that of another. Judges must explain why they prefer the evidence of A to that of B.

40. If authority for any of these propositions is required, it is to be found (inter alia) in the judgments of Ward and Butler-Sloss LJJ in *Re E (Care: Expert)* [1996] 1 FLR at 570D-E and v 674-5 respectively.

[2] "When assessing alternative possible explanations for a medical finding, the court will consider each possibility on its merits. There is no hierarchy of possibilities to be taken in sequence as part of a process of elimination. If there are three possibilities, possibility C is not proved merely because possibilities A and B are unlikely, nor because C is less unlikely than A and/or B. Possibility C is only proved if, on consideration of all the evidence, it is more likely than not to be the true explanation for the medical findings. So, in a case of this kind, the court will not conclude that an injury has been inflicted merely because known or unknown medical conditions are improbable: that conclusion will only be reached if the entire evidence shows that inflicted injury is more likely than not to be the explanation for the medical findings."