

Unregulated Experts FPRC Update

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Requirement for experts to be regulated in children proceedings

25.5A –

(1) Subject to paragraph (3), the court may only give permission under section 13(1), (3) or (5) of the 2014 Act if the expert evidence is from a regulated expert.

(2) The requirement set out in paragraph (1) does not apply to international social workers.

(3) The court may give permission under section 13(1), (3) or (5) of the 2014 Act to any expert where there is no regulated expert available.

(4) For the purposes of paragraph (3), no regulated expert is available where –

(a) the issue to which the expert evidence relates may only be resolved with the expertise of an expert who is not a regulated expert; or

(b) the instruction of a regulated expert would cause significant delay in the proceedings which would not be in the best interests of the child.

(5) If permission is given under paragraph (3), the court must give reasons for reaching its decision, including –

(a) the steps taken by the parties to identify a regulated expert and

(b) the reasons why the expert instructed meets the standards set out in the annex to Practice Direction 25B.

Amendment to FPR 25.2 (in red and underlined)

Interpretation

25.2

(1) In this Part–

‘children proceedings’ means –

(a) proceedings referred to in rules 12.1 and 14.1 and any other proceedings which relate wholly or mainly to the maintenance or upbringing of a minor;

(b) applications for permission to start proceedings mentioned in paragraph (a); and

(c) applications made in the course of proceedings mentioned in paragraph (a);

‘expert’ means a person who provides expert evidence for use in proceedings;

(Section 13(8) of the 2014 Act provides for what is not included in reference to providing expert evidence or putting expert evidence before the court in children proceedings)

‘regulated expert’ means an expert who is:

(a) regulated by a UK statutory body; or

(b) on a register accredited by the Professional Standards Authority for Health and Social Care; or

(c) regulated by an approved regulator under the Legal Services Act 2007.

‘single joint expert’ means a person who provides expert evidence for use in proceedings on behalf of two or more of the parties (including the applicant) to the proceedings.

(2) The meaning of ‘children proceedings’ in paragraph (1) is the prescribed meaning for the purposes of section 13(9) of the 2014 Act.

(Regulation 3 of the Restriction on the Preparation of Adoption Reports Regulations 2005 (S.I.2005/1711) sets out which persons are within a prescribed description for the purposes of section 94(1) of the 2002 Act.)

Amendments to Practice Direction 25B (in red and underlined)

The requirement for the court's permission

5.1

The general rule in family proceedings is that the court's permission is required to put expert evidence (in any form) before the court (see section 13(5) of the 2014 Act for children proceedings and FPR 25.4(2) for other family proceedings.). The court is under a duty to restrict expert evidence to that which in the opinion of the court is necessary to assist the court to resolve the proceedings. The overriding objective in FPR1.1 applies when the court is exercising this duty. In children proceedings, the court's permission is required to instruct an expert and for a child to be medically or psychiatrically examined or otherwise assessed for the purposes of the provision of expert evidence in the proceedings (section 13(1) and (3) of the 2014 Act). In children proceedings, the court may only give permission to instruct a regulated expert. This is subject to the exception found in FPR 25.5A(4).

Preliminary enquiries which the expert should expect to receive

6.2

The details of the information to be given to the expert are set out in Practice Direction 25C, paragraph 3.2 and Practice Direction 25D paragraph 3.3 and include the nature of the proceedings, the questions for the expert, the time when the expert's report is likely to be required, the timing of any hearing at which the expert may have to give evidence and how the expert's fees will be funded. In children proceedings, if applicable, the expert will also be asked to confirm and provide evidence that they are a regulated expert.

The expert's response to preliminary enquiries

8.1

In good time for the court hearing when the court will decide whether or not to give permission for the expert evidence to be put before the court (or also in children proceedings, for the expert to be instructed or the child to be examined or otherwise assessed) or for the advocates' meeting or discussion

where one takes place before that hearing, the party or parties intending to instruct the expert will need confirmation from the expert –

(a) that acceptance of the proposed instructions will not involve the expert in any conflict of interest;

(b) that the work required is within the expert's expertise;

(c) that the expert is available to do the relevant work within the suggested time scale;

(d) when the expert is available to give evidence, of the dates and times to avoid and, where a hearing date has not been fixed, of the amount of notice the expert will require to make arrangements to come to court (or to give evidence by telephone conference or video link) without undue disruption to his or her normal professional routines;

(e) of the cost, including hourly or other charging rates, and likely hours to be spent attending experts' meetings, attending court and writing the report (to include any examinations and interviews);

(f) of any representations which the expert wishes to make to the court about being named or otherwise identified in any public judgment given by the court.

(g) (if applicable) that the expert is a regulated expert, accompanied by evidence to that effect.

Content of the expert's report

9.1

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

(a) give details of the expert's qualifications, and experience and (if applicable) confirmation that they are a regulated expert.

(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 17 deals 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.)

Amendments to Practice Direction 25C (in red and underlined)

Preparation for the permission hearing

3.1

Paragraphs 3.2 to 3.11 give guidance on how to prepare for the hearing at which the court will consider whether to give permission for an expert to be instructed, a child to be examined or otherwise assessed or expert evidence to be put before the court. The purpose of the preparation is to ensure that the court has the information required to enable it to exercise its powers under section 13(1), (3), (5) and (7) of the 2014 Act, ~~and FPR 25.5~~ and FPR 25.5A.

Preliminary enquiries of the expert

3.2

In good time for the information requested to be available for the hearing at which the court will consider whether to give permission for an expert to be instructed, a child to be examined or otherwise assessed or expert evidence to be put before the court or for the advocates' meeting or discussion where one takes place before that hearing, the party or parties intending to instruct the expert shall approach the expert with the following information –

- (a) the nature of the proceedings and the issues likely to require determination by the court;
- (b) the issues in the proceedings to which the expert evidence is to relate;
- (c) the questions about which the expert is to be asked to give an opinion (including any ethnic, cultural, religious or linguistic contexts) and which relate to the issues in the case;
- (d) the date when the court is to be asked to give permission for the instruction (or if – unusually – permission has already been given, the date and details of that permission);
- (e) whether permission is to be asked of the court for the instruction of another expert in the same or any related field (that is, to give an opinion on the same or related questions);

- (f) the volume of reading which the expert will need to undertake;
- (g) whether or not permission has been applied for or given for the expert to examine the child;
- (h) whether or not it will be necessary for the expert to conduct interviews – and, if so, with whom;
- (i) the likely timetable of legal and social work steps;
- (j) in care and supervision proceedings, any dates in the Timetable for the Child which would be relevant to the proposed timetable for the assessment;
- (k) when the expert's report is likely to be required;
- (l) whether and, if so, what date has been fixed by the court for any hearing at which the expert may be required to give evidence (in particular the Final Hearing); and whether it may be possible for the expert to give evidence by telephone conference or video link: see paragraphs 10.1 and 10.2 (Arrangements for experts to give evidence) of Practice Direction 25B;
- (m) the possibility of making, through their instructing solicitors, representations to the court about being named or otherwise identified in any public judgment given by the court;
- (n) whether the instructing party has public funding and the legal aid rates of payment which are applicable.

Expert's response to preliminary enquiries

3.5

In good time for the hearing at which the court will consider whether to give permission for an expert to be instructed, a child to be examined or otherwise assessed or expert evidence to be put before the court, **the party or parties** intending to instruct the expert must obtain the confirmations from the expert referred to in paragraph 8.1 of Practice Direction 25B. These confirmations include that, the work is within the expert's expertise, the expert is available to do the work within the relevant timescale and the expert's costs. If applicable, the party or parties

must also obtain confirmation and evidence of whether the expert is a regulated expert.

The application

3.10

In addition to the matters specified in FPR 25.7(2)(a) and (3), an application for the court's permission for an expert to be instructed, a child to be examined or otherwise assessed or expert evidence to be put before the court, must state –

(a) the discipline, qualifications and expertise of the expert (by way of C.V. where possible);

(aa) whether the expert is a regulated expert;

(ab) where an applicant asserts that FPR 25.5A(4) applies, why no person who falls within FPR 25.5A(2) is available to give expert evidence;

(b) the expert's availability to undertake the work;

(c) the timetable for the report;

(d) the responsibility for instruction;

(e) whether the expert evidence can properly be obtained by only one party (for example, on behalf of the child);

(f) why the expert evidence proposed cannot properly be given by an officer of the service, Welsh family proceedings officer or the local authority (social services undertaking a core assessment) in accordance with their respective statutory duties or any other party to the proceedings or an expert already instructed in the proceedings;

(g) the likely cost of the report on an hourly or other charging basis;

(h) the proposed apportionment (at least in the first instance) of any jointly instructed expert's fee; when it is to be paid; and, if applicable, whether public funding has been approved.