



Experts in the Family Court -

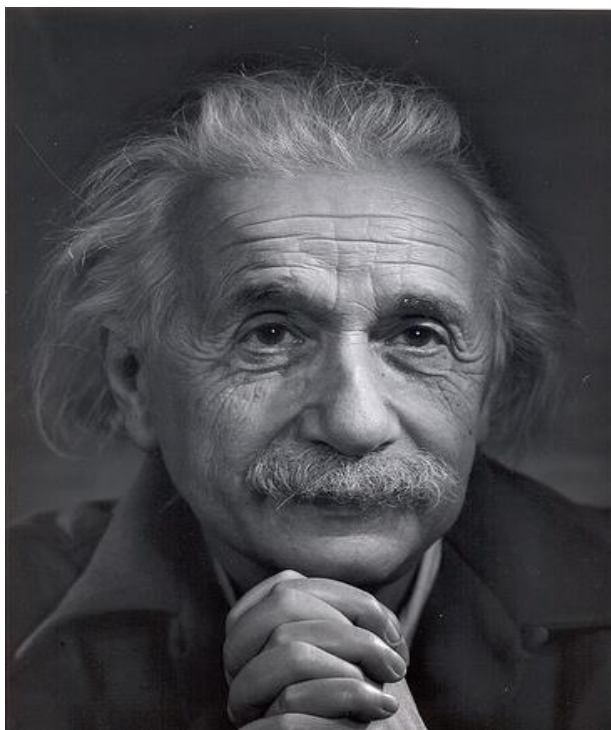
the basics

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Who is an expert ?



Who is an expert ?

- ‘Expert’ means a person who provides expert evidence for use in family proceedings – PD25B 2.1. (this goes on to set out the national standards for experts).
- In practice, an expert provides the court with specialist professional and technical knowledge not otherwise available – usually medical or social work. An expert needs to have appropriate professional qualifications, skill and experience to command confidence.
- An expert is allowed to give opinion evidence.
- The expert advises, but the judge decides.
- In family proceedings, usually a single joint expert – inquisitorial rather than adversarial proceedings BUT the court may allow a second expert e.g. if certain medical evidence is pivotal and difficult to challenge without a second opinion (e.g. medical imaging).

Who is an expert – examples of guidance

- ‘Psychologists as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations’ – FJC and BPS

<https://www.judiciary.uk/wp-content/uploads/2016/05/psychologists-as-expert-witnesses.pdf>

- General Medical Council - <https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/acting-as-a-witness/acting-as-a-witness-in-legal-proceedings>

- Social workers – NAGALRO guidance to members - https://www.nagalro.com/userfiles/pages/files/nagalro_principles_and_practice_guidance_for_members_v012020.pdf

Expert or treating professional

- An expert is appointed by, and owes a duty to, the court and reports in accordance with instructions from the parties.
- Treating professionals are not under the court's immediate control. They may have already produced reports that might be used in family proceedings, but probably as background material for a court appointed expert to consider.
- Therapeutic relationships and patient confidentiality should not be undermined.
- BUT treating professionals can be called as witnesses. If so, they are subject to the same duties to the court as an instructed expert (and should have a letter of instruction and all relevant materials).

The role of the expert

- The court can order an expert assessment only if it is '*necessary to assist the court to resolve the proceedings justly*' (Children Act 1989, s7A)
- The Family Procedure Rules 2010 (FPR) and linked practice directions set out how this works.
- Essentially, it is the duty of experts to help the court on matters within their expertise.
- This duty overrides any obligation to the person from whom experts have received instructions or by whom they are paid.

Further reading – MoJ 'The use of experts in family law' 2015

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/486770/use-experts-family-law.pdf

What do lawyers want from experts ?



What do lawyers want from experts ?

- Basics – an up to date CV, hourly rates, hours needed to do the work, and availability.
- Keeping to timescales – and saying as soon as possible if there is going to be any delay.
- Answers – ‘An expert is someone who has succeeded in making decisions and judgements simpler through knowing what to pay attention to and what to ignore’. Edward de Bono

Letter of instruction -

‘An expert knows all the answers - if you ask the right questions.’ Levi Strauss

- Standard contents (set out in FPR PD25C r4.1) - Law Society templates available, which include questions. NB are the questions generally appropriate ?
- The letter should be agreed by all parties – if not, the court will decide.
- If you are asked a question you cannot answer, alert the solicitor who has instructed you.
- Confidentiality – the media and parents’ and children’s privacy – President’s Guidance is at <https://www.judiciary.uk/wp-content/uploads/2019/10/Presidents-Guidance-reporting-restrictions-Final-Oct-2019.pdf>

What do lawyers want from the expert's report?

The expert's report should

- describe the expert's own professional process and highlight factual assumptions, deductions from factual assumptions, and any unusual features of the case
- highlight whether the opinion is a hypothesis (particularly a controversial one) or whether it is based on research accepted as a consensus within the scientific community
- where there is a range of expert opinion, summarise the range, using a 'balance sheet' approach to the factors for and against an opinion if appropriate.
- Where possible, demystify – technical language may be unavoidable but explain terms, avoid jargon, and use plain English.

After the expert's report

FPR 2010 part 25 -

- Experts can be asked written questions within 10 days of their report but only for clarification of the report - no fee can be charged.
- Experts may be directed to attend an experts' meeting – the experts are required to identify the expert issues, agree on them if possible, and provide the court with a summary of what is agreed and what is not agreed.
- Experts may ask the court for directions to assist them in carrying out their functions.

Giving evidence in court



Giving evidence

Practicalities

- You should be told the hearing date as soon as possible and make time available to attend court.
- Increasingly possible to give evidence remotely – ask well in advance if that can be arranged, and check if links need to be tested.
- The solicitor who instructed you should ensure you are fully updated in advance and have the electronic bundle.
- The parties should agree as soon as possible if you are not needed to give evidence and let you know.

Giving evidence

- Guidance is available – e.g. from the Academy of Royal Medical Colleges - <https://www.aomrc.org.uk/reports-guidance/acting-as-an-expert-or-professional-witness-guidance-for-healthcare-professionals/>
- General Medical Council - <https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/acting-as-a-witness/acting-as-a-witness-in-legal-proceedings>
- Royal College of Surgeons - <https://www.rcseng.ac.uk/news-and-events/media-centre/press-releases/expert-witness-guidance/>

Giving evidence

- Always re-read your own report before giving evidence.
- Use technology if helpful e.g. to show the court medical imaging
- Be aware that the court will always be on guard against the over-dogmatic expert, the expert whose reputation or honour proper is at stake, or the expert who has developed a scientific prejudice.
- Take your time and ask advocates to repeat their question if need be – not unknown for them to ask several questions at once, or even not manage to ask a question at all.
- Ask for a break if needed.
- Be reflective and prepared to shift your position if you have changed your opinion.

Giving evidence

Expect to be challenged – advocates are there to test your evidence, looking for mistakes about the facts, flaws in data or analysis, going beyond your expertise, etc. – aiming to cast doubt on the credibility of your expert opinion.

- What data did you rely on ?
- How up to date is your experience, e.g. of clinical practice
- Your methodology and how up to date is your expert knowledge including research ?
- Are you adult focused rather than child focused ?
- Have you given a differential diagnosis ?

For more detailed information

- The Inns of Court College of Advocacy 'Guidance on the preparation, admission and examination of expert evidence'

See - <https://www.icca.ac.uk/wp-content/uploads/2020/07/ICCA-Expert-Evidence-Guide-2020.pdf>

Funding

- Solicitors are very aware of the practical issues around legal aid rates and payment. The Legal Aid Agency has to manage the legal aid budget, but also necessary to avoid the cost and delay of overly bureaucratic processes.
- Improvements could be made – NB the Legal Aid Agency has re-introduced co-ordinated applications by the lead solicitor for prior authority to incur costs - see guidance at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/925207/Guidance_on_the_Remuneration_of_Expert_Witnessesv6.pdf
- What would make a real change – centralised payments direct from the LAA to experts ?

But what if...

... despite every effort
to manage the
process, things go
wrong ?

Over to Sharon Segal

