



JUDICIARY OF  
ENGLAND AND WALES

PRESIDENT OF THE FAMILY DIVISION

## President's Memorandum: Experts in the Family Court

### 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) whether the proposed expert evidence will assist the court in its task;
- (ii) whether the witness has the necessary knowledge and experience;
- (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and
- (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).

### **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 Dependents) 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.

The Rt Hon Sir Andrew McFarlane  
President of the Family Division  
4<sup>th</sup> October 2021