VIEW FROM THE PRESIDENT'S CHAMBERS (3)

The process of reform : expert evidence

Sir James Munby, President of the Family Division

In my first 'View from the President's Chambers' ([2013] Family Law 548), I said that getting a grip on what I called the 'expert problem' was "crucial to our meeting what the reforms demand of us." I outlined my thinking on what was needed. I returned to the point in my second 'View' ([2013] Family Law 680). I make no apologies for returning to it again, nor for repeating some of what I have already said.

My focus here is on the use of experts in care cases. My starting point is the proposed statutory requirement that care cases are to be concluded within 26 weeks and that expert evidence is to be restricted to what is "necessary". My call to everyone in the family justice system is simple and clear. We can and must reduce the excessive length of far too many care cases. In order to achieve this we must get a grip on our excessive and in many instances unnecessary use of experts.

I emphasise a point I have previously made: The problem does not lie with the experts themselves. It lies in the use we make of them.

Experts – the process of reform

Reform of the use of experts in family cases is a process which although well under way is still ongoing.

The process started on 31 January 2013 when amendments to Part 1 and Part 25 of the Family Procedure Rules 2010 (FPR) came into force together with Practice Directions 25A-25F. For present purposes the most important of these are PD25A, PD25B and PD25C.

On 16 May 2013 the Ministry of Justice and the Family Justice Council published a Consultation Paper, on proposed draft 'Standards for Expert Witnesses in the Family Courts in England and Wales.'

On 1 July 2013 the revised PLO comes into force.

Further developments can be expected.

Experts – the way ahead

What is required is a major change of culture. Three things are needed: first, a reduction in the use of experts; second, a more focussed approach in the cases where experts are still needed; and, third, a reduction in the length of expert reports. Let me take these in turn.

Reducing the use of experts

With effect from 31 January 2013, FPR 25.1 was amended. The old test – whether expert evidence was "reasonably required" – was replaced with a significantly stiffer test – is the expert "necessary"? That change raises the bar significantly: *Re TG (Care Proceedings: Case Management: Expert Evidence)* [2013] EWCA Civ 5, [2013] 1 FLR 1250, para [30].

What is meant by the word "necessary"? The answer is to be found in *Re H-L (A Child)* [2013] EWCA Civ 655, para [3]:

> "The short answer is that 'necessary' means necessary … If elaboration is required … it "has a meaning lying somewhere between 'indispensable' on the one hand and 'useful', 'reasonable' or 'desirable' on the other hand", having "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable.""

So, in every case we must consider the reasons behind the request for an expert's report. Why is this additional evidence necessary? How will it add to the information the court already has? Is there not already an expert in the case who can provide that information – the social worker or the children's guardian?

Social workers are experts. In just the same way, I might add, CAFCASS officers are experts. In every care case we have at least two experts – a social worker and a guardian – yet we have grown up with a culture of believing that they are not really experts and that we therefore need experts with a capital E. The plain fact is that much of the time we do not.

Social workers may not be experts for the purposes of FPR Part 25, but that does not mean that they are not experts in every other sense of the word. They are, and we must recognise them and treat them as such.

One of the problems is that in recent years too many social workers have come to feel undervalued, disempowered and de-skilled. In part at least this is an unhappy consequence of the way in which care proceedings have come to be dealt with by the courts. If the revised PLO is properly implemented one of its outcomes will, I hope, be to re-position social workers as trusted professionals playing the central role in care proceedings which too often of late has been overshadowed by our unnecessary use of and reliance upon other experts.

So there are two aspects to the central question, Is this expert necessary?

First we have to ask, Is this a matter on which expert assistance is necessary? We do not need an expert to tell us what is already familiar to us as family justice professionals. Secondly, if the answer to the first question is in the affirmative, we have to ask, Is this a matter on which it is necessary to have as an expert someone other than the social worker or the CAFCASS officer? For if the social worker or the CAFCASS officer can provide the relevant expertise the employment of some other expert will not be necessary.

In addressing these questions, we must always having regard, as required by FPR 1.1, to the overriding objective: that the court deal with the case "justly, having regard to any welfare issues involved", "expeditiously and fairly", "in ways which are proportionate to the nature, importance and complexity of the issues" and "allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

The case management judge may not direct an expert report unless judicially satisfied that the report is "necessary". In considering that question the case management judge will have regard in particular to FPR 25.5. If not so satisfied, then the judge will not direct the report. So, 'if in doubt do without'.

A more focused approach

The new rules, the new approach, need to be robustly enforced by case management judges. The role of the judges will be crucial. Robust and vigorous case management is essential. Can I remind you of what I said in *Re TG* and more recently in *Re H-L*.

Some experts will no longer be required at all. Robust case management also requires that those experts who are needed have to deliver their reports more promptly and in a shorter and more focused fashion.

FPR 1.4(2) was recast with effect from 31 January 2013 to provide (paragraph (e)) that active case management includes "controlling the use of expert evidence." How is this to be done?

At this point we need to focus on the revised PLO which comes into force on 1 July 2013. There are two crucial documents. The first is a new *Practice Direction 36C – Pilot Scheme: Care and Supervision Proceedings and other proceedings under Part 4 of the Children Act 1989*. The other, annexed to PD36C, is the revised PLO itself: *Pilot Practice Direction 12A – Care, Supervision and other Part 4 proceedings: Guide to Case Management. under Part 4*

In my previous 'View', I explained how the revised PLO is going to put a much greater emphasis than hitherto on the first hearing. It has been re-named the Case Management Hearing (CMH) to bring out the key fact that it is to be *the* effective case management hearing. The CMH will take place on Day 12. It is vital to the entire process of reform in dealing with care cases. At the CMH the case management judge will set the timetable for the case. And critically, having decided what expert evidence is necessary and, equally important, decided what expert evidence is *not* necessary,

the judge will give appropriate directions for expert evidence (see the PLO, Stage 2). One of the most vitally important functions of the case management judge at the CMH is to ensure proper implementation of the new arrangements in relation to experts. It is at the CMH, and not at some later stage in the proceedings, that the necessary directions in relation to experts must be given in every case from now on.

The new arrangements include work to be done before the issue of proceedings.

The revised PLO requires the local authority (see the PLO, Pre-proceedings checklist) to attach a social work statement to its application form. The social work statement is required (see the definition in the PLO, paragraph 7.1) to include details of any necessary evidence and assessments that are outstanding and the local authority's case management proposals. So the local authority on Day 1 must set out its thinking in relation to expert evidence. The local authority, and indeed the other prospective parties, will need to consider PD25A, paragraph 3, which deals with pre-application instruction of experts.

Following the issue of proceedings, the court on Day 2 (see the PLO, Stage 1) will consider allocation and give standard directions, including directions for the filing and serving of any application for permission relating to experts under FPR Part 25.

PD25C, paragraphs 3.2-3.5, set out the process for making preliminary enquiries of the expert "in good time for the information requested to be available" for the CMH

No later than 2 clear days before the CMH there must be an advocates' meeting at which (see the PLO, Stage 2) the advocates must identify any proposed experts and draft questions in accordance with FPR Part 25.

PD36C, paragraph 7.1, substitutes a new FPR 25.6, which requires the parties to apply for permission under FPR 25.4 "as soon as possible and … no later than the Case Management Hearing"; see also PD25C, paragraphs 3.7-3.9.

FPR 25.7(2)(a) sets out what the application notice "must" include; amongst other things the matters set out in PD25C, paragraph 3.10:

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

(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."

PD25C, paragraph 3.11, requires a draft order to be attached to the application setting out various matters, including the following:

"(a) the issues in the proceedings to which the expert evidence is to relate and which the court is to identify;

(b) the questions relating to the issues in the case which the expert is to answer and which the court is to approve ensuring that they –

(i) are within the ambit of the expert's area of expertise;

(ii) do not contain unnecessary or irrelevant detail;

(iii) are kept to a manageable number and are clear, focused and direct;

(c) the party who is responsible for drafting the letter of instruction and providing the documents to the expert;

(d) the timetable within which the report is to be prepared, filed and served".

PD25C, paragraph 4.1, specifies what must be included in the draft letter of instruction.

The requirements of the PLO, FPR Part 25 and PD25C must be complied with and, I emphasise, in time for the CMH. It is no longer acceptable for advocates to arrive at the CMH without a properly drafted application which complies with FPR 25.7 and PD25C, paragraph 3.10, or without a draft order which complies with PD25C, paragraph 3.11, or without a draft letter of instruction which complies with P25C, paragraph 4.1. Those who fail without good cause may expect to be criticised.

If these requirements are met, the CMH will be effective. If they are not, the CMH will not be effective and the timetable may be irretrievably prejudiced. The case management judge must be rigorous in ensuring that parties comply with the PLO, with FPR Part 25 and with PD25C. If they have not, the case management judge must ensure that any non-compliance is noted at the end of the CMH in the Case Management Order (see the PLO, Stage 2, and the definition in paragraph 7.1) and recorded on the court's electronic Care Monitoring System. Non-compliance which necessitates a Further Case Management Hearing (see the PLO, paragraph 1.2, and Stage 2) is a serious matter. It may, where appropriate, be penalised in costs.

Assuming that all the requirements of the PLO, FPR Part 25 and PD25C are met in time, the case management judge will be able to decide at the CMH what expert evidence is necessary and able to give directions accordingly. The case management judge must adopt a probing and questioning stance. The mere fact that all the parties are agreed that an expert is necessary does not absolve the judge of personal responsibility for deciding whether or not the expert is indeed necessary. Nor does it of itself provide a ground of appeal if the judge nonetheless decides that the expert is not necessary: *Re F (A Child)* [2013] EWCA Civ 656.

The case management judge's approach should be: 'give me three good reasons why you say this expert is necessary'. At the same time the judge must encourage the other parties in their turn to state their views robustly as to whether the proposed expert evidence is necessary. They should no longer sit on the fence or adopt a position of neutrality, whether benevolent or otherwise. If in their view the expert is not necessary the other parties should say so and explain why.

Reducing the length of expert reports

Too many expert reports are unnecessarily and unhelpfully long, sometimes far too long. There are two reasons for this.

First, in too many cases the expert is asked far too many questions, questions which are either unnecessary or repetitive or both. The responsibility for putting a stop to this rests with the case management judge. PD25C, paragraphs 3.11 and 4.1, throw on the parties the obligation to provide the court with drafts of the letter of instruction and of the questions proposed to be put to the expert. But the case management judge must adopt a more 'hands on' approach in approving the final form of both the letter of instruction and, in particular, the questions the expert is to answer. There must in future be fewer and more focused questions. As PD25C, paragraph 3.11(b), stipulates, the questions must *not* contain "unnecessary or irrelevant detail", they must be "kept to a manageable number" and they must be "clear, focused and direct." This is not a task to be delegated to the parties' legal representatives, nor should they be allowed time after the CMH to finalise their suggestions. If the form of the letter of instruction and the formulation of the questions has not been fixed by the end of the CMH, then I

would encourage the case management judge to direct that the parties' legal representatives are not to leave the court precincts until they have prepared a final draft which has been approved by the judge. These vital documents, whose timely production is so important if the timetable is to be maintained, must be finalised on the day of the CMH.

The second problem is that too many expert reports, like too many local authority documents, are simply too long, largely because they contain too much history and too much factual narrative. I repeat what I have previously said. I want to send out a clear message: expert reports can in many cases be much shorter than hitherto, and they should be more focused on *analysis* and *opinion* than on history and narrative. In short, expert reports must be *succinct*, *focused* and *analytical*. But they must also of course be *evidence based*.

PD25B, paragraph 4.1(e), requires the expert to confine himself to "matters material to the issues in the case". PD25B, paragraph 9.1, sets out the required content of the expert's report. Paragraph 9.1(b) provides that the expert must *summarise* the facts and instructions which are material to the conclusions and opinions expressed in the report, but only as far as is *necessary* to explain them. Paragraph 9.1(h) provides that the report must contain a *summary* of the expert's conclusions and opinions. The emphasis on summary is apparent.

Case management judges must take appropriate steps to encourage compliance by experts with these requirements. Judges cannot of course tell experts what they are to say; but they can require compliance with PD25B. And there is no reason why case management judges should not, if appropriate, specify the maximum length of an expert's report. The courts have for some time been doing say in relation to witness statements and skeleton arguments. So, why not for expert's reports? Many expert's reports, I suspect, require no more than (say) 25 or perhaps 50 pages, if that. Here, as elsewhere, the case management judge must have regard to the overriding objective and must confine the expert to what is necessary.