

This Practice Direction is made by the President of the Family Division under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and is approved by the Parliamentary Under Secretary of State, by authority of the Lord Chancellor and comes into force on xxx 2012

PRACTICE DIRECTION 25C

CHILDREN PROCEEDINGS – THE USE OF SINGLE JOINT EXPERTS AND THE PROCESS LEADING TO AN EXPERT BEING INSTRUCTED OR EXPERT EVIDENCE BEING USED

This Practice Direction supplements FPR Part 25

Scope of this Practice Direction

1.1 This Practice Direction applies to children proceedings and contains guidance on –

- (a) the use of single joint experts;
- (b) how to prepare for the hearing at which the court will consider whether or not to give permission for an expert to be instructed, a child to be medically or psychiatrically examined or otherwise assessed for the purpose of obtaining expert evidence for use in the proceedings or expert evidence to be used including–
 - (i) preliminary enquiries of experts;
 - (ii) the content of application for the court’s permission in addition to matters mentioned in FPR25.7;
 - (iii) matters to be set out in the draft order to be attached to the application for permission; and
- (c) the letter of instruction to the expert.

1.2 “Children proceedings” includes proceedings under Schedule 1 of the 1989 Act as those proceedings are proceedings which relate wholly or mainly to the maintenance or upbringing of a minor referred to in FPR 25.2(a)(i).

Single joint experts

2.1 Wherever possible, expert evidence should be obtained from a single joint expert instructed by both or all the parties (“SJE”). To that end, a party wishing to instruct an expert should as soon as possible after the start of the proceedings first give the other party or parties a list of the names of one or more experts in the relevant speciality whom they consider suitable to be instructed.(*paragraph 5.1 of PD25A*).

2.2 Within 5 business days after receipt of the list of proposed experts, the other party or parties should indicate any objection to one or more of the named experts and, if so, supply the name(s) of one or more experts whom they consider suitable.*(paragraph 5.2 of PD25A)*

2.3 Each party should disclose whether they have already consulted any of the proposed experts about the issue(s) in question.*(paragraph 5.3 of PD25A)*

2.4 Where the parties cannot agree on the identity of the expert, each party should think carefully before instructing their own expert because of the costs implications. Disagreements about the use and identity of an expert may be better managed by the court in the context of an application for directions. (see paragraphs 2.8 and 2.9 below).*(paragraph 5.4 of PD25A)*

Agreement to instruct separate experts

2.5 If the parties agree to instruct separate experts,-

- (a) they should agree in advance that the reports will be disclosed; and
- (b) the instructions to each expert should comply, so far as appropriate, with paragraphs 4.1 and 6.1 below (*Letter of instruction*).

(paragraph 5.5 of PD25A)

Agreement to instruct an SJE

2.6 If there is agreement to instruct an SJE, **before instructions are given** the parties should-

- (a) so far as appropriate, comply with the guidance in paragraphs 3.2 (Preliminary enquiries of the expert) and receive (Expert's confirmation in response to preliminary enquiries) referred to in paragraph 8.1 of Practice Direction 25B;
- (b) have agreed in what proportion the SJE's fee is to be shared between them (at least in the first instance) and when it is to be paid; and
- (c) if applicable, have obtained agreement for public funding.

(paragraph 5.6 of PD25A)

2.7 The instructions to the SJE should comply, so far as appropriate, with paragraphs 4.1 and 6.1 below (*Letter of instruction*).

(paragraph 5.7 of PD25A)

Seeking the court's directions for the use of an SJE

2.8 Where the parties seek the court's directions for the use of an SJE, they should comply, so far as appropriate, with paragraphs 3.2, 3.7 and 3.8 below.*(paragraph 5.8 of PD25A)*

2.9 The instructions to the SJE should comply, so far as appropriate, with paragraphs 4.1 and 6.1 below (*Letter of instruction*).*(paragraph 5.9 of PD25A)*

Preparation for the permission hearing

3.1 This section gives guidance on how to prepare for the hearing at which the court will consider whether or not to give permission for expert evidence to be obtained or used. The purpose of the preparation is to ensure that the court has the information required to enable it to exercise its powers under FPR 25.4 and 25.5. *(based on new paragraph 4.1A)*

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 or not to give permission for expert evidence to be obtained or used **or for the advocates' meeting or discussion where one takes place before that hearing**, the solicitor for the party proposing to instruct the expert (or party responsible for instructing the expert or solicitor for the child if the instruction proposed is joint) 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.

(paragraph 4.1 of Pd25A)

Confidentiality of children proceedings and making preliminary enquiries of an expert

3.3 For the purposes of the law of contempt of court, information relating to children proceedings (whether or not contained in a document filed with the court or recorded in any form) may be communicated only to an expert whose instruction by a party has been permitted by the court (see FPR 12.73(1)(vii) and 14.14) as children proceedings are confidential.

3.4 Before permission is obtained from the court to instruct an expert in children proceedings, the party seeking permission needs to make the enquiries of the expert referred to above in order to provide the court with information to enable it to decide whether to give permission. In practice, enquiries may need to be made of more than one expert for this purpose. This will in turn require each expert to be given sufficient information about the case to decide whether or not he or she is in a position to accept instructions. Such preliminary enquiries, and the disclosure of information about the case which is a necessary part of such enquiries, will not require the court's permission and will not amount to a contempt of court.

(part paragraph 1.10 and all of paragraph 1.11)

Expert's response to preliminary enquiries

3.5 In good time for the hearing at which the court will consider whether or not to give permission for expert evidence to be obtained or used, the solicitors or party 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. *(based on paragraph 4.2 of PD25A)*

3.6 Where parties have not agreed on the appointment of a single joint expert before the hearing at which the court will consider whether or not to give permission for expert evidence to be obtained or used, they should obtain the above confirmations in respect of all experts whom they intend to put to the court for the purposes of rule 25.11(2)(a) as candidates for the appointment. *(based on part paragraph 4.2 of PD25A)*

The application for the court's permission mentioned in FPR 25.4

3.7 In addition to the to the matters specified in FPR 25.7(1)(a) and (2), an application or the court's permission to call an expert or put in evidence an expert's report, for an expert to be instructed or for the child to be medically or psychiatrically examined or otherwise assessed for the purpose of obtaining expert evidence for use in the proceedings must state—

- (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.

(paragraph 4.3 of PD25A adjusted in line with FPR 25.7)

The terms of the draft order to be attached to the application for the court's permission

3.8 FPR 25.7 provides that a draft of the order giving the court's permission mentioned in FPR 25.4 is to be attached to the application for the court's permission. That draft order must set out the following matters—

- 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;*(moved from paragraph 4.5(b) of PD25A)*;
- 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;
- e) the disclosure of the report to the parties and to any other expert;
- f) the organisation of, preparation for and conduct of any experts' discussion (*see Practice Direction 25E – Discussions between Experts in Family Proceedings*);
- g) the preparation of a statement of agreement and disagreement by the experts following an experts' discussion;
- h) making available to the court at an early opportunity the expert reports in electronic form;
- i) the attendance of the expert at court to give oral evidence (alternatively, the expert giving his or her evidence in writing or remotely by video link), whether at or for the Final Hearing or another hearing; unless agreement about the opinions given by the expert is reached at or before the Issues

Resolution Hearing (“IRH”) or, if no IRH is to be held, by a date specified by the court prior to the hearing at which the expert is to give oral evidence.

(based on paragraph 4.4 of PD25A)

Letter of instruction

4.1 The party responsible for instructing the expert shall prepare (in agreement with the other parties where appropriate), a letter of instruction to the expert and shall —

- (a) set out the context in which the expert’s opinion is sought (including any ethnic, cultural, religious or linguistic contexts);
- (b) set out the questions approved by the court and which the expert is required to answer and any other linked questions 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; and
 - (iv) reflect what the expert has been requested to do by the court(Annex A to this *Practice Direction* sets out suggested questions in letters of instruction to (1) child mental health professionals or paediatricians, and (2) adult psychiatrists and applied psychologists, in Children Act 1989 proceedings);
- (c) list the documentation provided, or provide for the expert an indexed and paginated bundle which shall include—
 - (i) an agreed list of essential reading; and
 - (ii) a copy of this Practice Direction and Practice Directions 25B and E and where appropriate Practice Direction 15B.
- (d) identify any materials provided to the expert which have not been produced either as original medical (or other professional) records or in response to an instruction from a party, and state the source of that material (such materials may contain an assumption as to the standard of proof, the admissibility or otherwise of hearsay evidence, and other important procedural and substantive questions relating to the different purposes of other enquiries, for example, criminal or disciplinary proceedings);
- (e) identify all requests to third parties for disclosure and their responses in order to avoid partial disclosure, which tends only to prove a case rather than give full and frank information;
- (f) identify the relevant people concerned with the proceedings (for example, the treating clinicians) and inform the expert of his or her right to talk to them provided that an accurate record is made of the discussions;
- (g) identify any other expert instructed in the proceedings and advise the expert of their right to talk to the other experts provided that an accurate record is made of the discussions;
- (h) subject to any public funding requirement for prior authority, define the contractual basis upon which the expert is retained and in particular the funding mechanism including how much the expert will be paid (an hourly rate and overall estimate should already have been obtained), when the expert will be paid, and

what limitation there might be on the amount the expert can charge for the work which they will have to do. In cases where the parties are publicly funded, there may also be a brief explanation of the costs and expenses excluded from public funding by Funding Code criterion 1.3 and the detailed assessment process.

(based on paragraph 4.5 of PD25A)

Adult who is a protected party

5.1 Where the adult is a protected party, that party's representative shall be involved in any instruction of an expert, including the instruction of an expert to assess whether the adult, although a protected party, is competent to give evidence (*see Practice Direction 15B-Adults who May Be Protected Parties and Children Who May Become Protected Parties in Family Proceedings*).

(based on part of paragraph 2.6 of PD25A)

Asking the court to settle the letter of instruction to a single joint expert

6.1 Where possible, the written request for the court to consider the letter of instruction referred to in rule 25.12(2) should be set out in an e-mail to the court and copied by e-mail to the other instructing parties. The request should be sent to the relevant court or (by prior arrangement only) directly to the judge dealing with the proceedings; in the magistrates' court, the request should be sent to the legal adviser who will refer it to the appropriate judge or justices, if necessary. The court will settle the letter of instruction, usually without a hearing to avoid delay; and will send (where practicable, by e-mail) the settled letter to the lead solicitor for transmission forthwith to the expert, and copy it to the other instructing parties for information.

ANNEX A

(drafted by the Family Justice Council)

Suggested questions in letters of instruction to child mental health professional or paediatrician in Children Act 1989 proceedings

A. The Child(ren)

1. Please describe the child(ren)'s current health, development and functioning (according to your area of expertise), and identify the nature of any significant changes which have occurred

- Behavioural
- Emotional

- Attachment organisation
- Social/peer/sibling relationships
- Cognitive/educational
- Physical
 - Growth, eating, sleep
 - Non-organic physical problems (including wetting and soiling)
 - Injuries
 - Paediatric conditions

2. Please comment on the likely explanation for/aetiology of the child(ren)'s problems/difficulties/injuries

- History/experiences (including intrauterine influences, and abuse and neglect)
- Genetic/innate/developmental difficulties
- Paediatric/psychiatric disorders

3. Please provide a prognosis and risk if difficulties not addressed above.

4. Please describe the child(ren)'s needs in the light of the above

- Nature of care-giving
- Education
- Treatment

in the short and long term (subject, where appropriate, to further assessment later).

B. The parents/primary carers

5. Please describe the factors and mechanisms which would explain the parents' (or primary carers) harmful or neglectful interactions with the child(ren) (if relevant).

6. What interventions have been tried and what has been the result?

7. Please assess the ability of the parents or primary carers to fulfil the child(ren)'s identified needs now.

8. What other assessments of the parents or primary carers are indicated?

- Adult mental health assessment
- Forensic risk assessment
- Physical assessment
- Cognitive assessment

9. What, if anything, is needed to assist the parents or primary carers now, within the child(ren)'s time scales and what is the prognosis for change?

- Parenting work
- Support
- Treatment/therapy

C. Alternatives

10. Please consider the alternative possibilities for the fulfilment of the child(ren)'s needs

- What sort of placement
- Contact arrangements

Please consider the advantages, disadvantages and implications of each for the child(ren).

Suggested questions in letters of instruction to adult psychiatrists and applied psychologists in Children Act 1989 proceedings

1. Does the parent/adult have - whether in his/her history or presentation - a mental illness/disorder (including substance abuse) or other psychological/emotional difficulty and, if so, what is the diagnosis?
2. How do any/all of the above (and their current treatment if applicable) affect his/her functioning, including interpersonal relationships?
3. If the answer to Q1 is yes, are there any features of either the mental illness or psychological/emotional difficulty or personality disorder which could be associated with risk to others, based on the available evidence base (whether published studies or evidence from clinical experience)?
4. What are the experiences/antecedents/aetiology which would explain his/her difficulties, if any, (taking into account any available evidence base or other clinical experience)?
5. What treatment is indicated, what is its nature and the likely duration?
6. What is his/her capacity to engage in/partake of the treatment/therapy?
7. Are you able to indicate the prognosis for, time scales for achieving, and likely durability of, change?
8. What other factors might indicate positive change?

(It is assumed that this opinion will be based on collateral information as well as interviewing the adult).

The Right Honourable

Sir Nicholas Wall

The President of the Family Division

Signed by authority of the Lord Chancellor:

[]
Parliamentary Under Secretary of State
Ministry of Justice