



Experts in the dock

With no automatic right to call experts in family proceedings, **Dr Chris Pamplin** considers how courts balance proportionality, fairness & delay

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IN BRIEF

► Under Pt 25 of the Family Procedure Rules, expert attendance at a final hearing must be shown to be necessary in the interests of justice, with written questions the default method of challenge.

► Recent case law confirms that the test is not exceptionality or the gravity of the case, but whether oral evidence is required to ensure overall fairness.

► The drive to reduce delay and control expert evidence creates ongoing tension between procedural efficiency and a party's ability to properly test critical expert opinion.

In the Family Court, there is no automatic right for parties to hear oral evidence or cross-examine the experts. In the first instance, the appropriate way to interrogate written expert evidence is in writing under rule 25.10 of the Family Procedure Rules (FPR). With the court's permission, and where consistent with the overriding objective in Pt 1 of the FPR, written questions might extend beyond clarification of the expert report. The court might also direct discussion between the experts under rule 25.16 to define and refine areas of agreement and disagreement. Under the terms of rule 25.9(2), the test is whether the expert's attendance at the final hearing is necessary in the interests of justice. But this creates a dilemma.

Taking experts out of court

If all the parties agree that an expert should be instructed and attend the hearing, should the court exercise its powers to control and exclude such evidence?

It could be argued that to do so denies the right of parties to put the essence of their case to witnesses on those parts of their evidence that might have a significant impact on the outcome. It could further be argued that, in serious or complex cases, considerations of proportionality and fairness should be persuasive factors in the

court's decision to allow the attendance of experts.

In *Re M (Children)* [2018] EWCA Civ 607, a mother appealed against a finding of fact that she had administered sedatives to her young sons and against a judge's refusal of her application to admit new expert toxicology evidence. At the original trial, a toxicology expert had reported the presence in hair samples of various sedatives in very low quantities. The results could possibly have been indicative of a single tablet of diazepam being administered to each child. The hair samples had allegedly been obtained during a period when the child no longer had contact with the father, therefore implicating the mother and/or grandmother.

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When the judge was delivering judgment in 2017, the mother absconded with the children. When they were found, the children were put in foster care and the local authority began care proceedings. The mother did not, at that point, apply either for permission to appeal against the factual findings or for further investigation of the test results to be carried out. Neither did she make any application for further expert evidence to be admitted. However, without seeking the court's prior permission, she instructed a different expert to respond to the original toxicology report.

The new expert stated that the hair in which the substances were found could date from an earlier period. This finding supported the mother's case, making it less certain that the results were due to a single tablet taken during the period after which contact with the father had ceased. Unfortunately for the mother, she had obtained the new evidence in breach of s 13, Children and Families Act 2014, and the court refused to admit it.

Hearing the appeal, Lord Justice Peter Jackson was mindful that the mother had already called an expert who had dealt thoroughly with all relevant matters. What's more, three years after the allegations were made, the emotional cost to the children of further prolonging the fact-finding process was likely to be high.

Turning to the application of s 13, the judge said that the mother had completely flouted FPR 25 by the fact and manner of her obtaining the second opinion. The court should be slow to admit expert evidence that has been irregularly obtained. If the rules were not enforced, parties would be encouraged to ignore them, and there would be nothing to stop a litigant shopping around until they found a favourable opinion. In a case such as this, where a court was faced with expert evidence that had already been obtained in breach of s 13, it should ask itself whether it would have granted permission to seek the expert evidence if it had been asked in the proper manner. The considerations in this case weighed heavily against admission of the new evidence.

The judge had been entitled to take the view that the evidence from the hair strand tests was only one part of the evidence that led him to his finding of fact. Hair strand testing is an interpretative science, and the fact that another expert has a different view is not a reason for admitting unnecessary evidence.

Turning to the role of the experts, Peter Jackson LJ had regard to the words of Mr

Justice Wall in *Re A (Family Proceedings: Expert Witnesses)* [2001] EWHC Fam 7, where the judge had highlighted the importance of expert witnesses understanding their role in proceedings in clear terms. In particular, experts must know the terms of any court order defining their involvement, and the purpose for which they are being instructed, otherwise they cannot properly fulfil their obligations as experts. This would include, surely, seeking confirmation that permission for expert evidence has been granted.

The appeal court found that the judge had applied the correct test, had been right to refuse the application for a rehearing, and therefore it was acceptable not to admit the new evidence. This new evidence could have been obtained for trial and, taken at its highest, it would probably not have had an important influence on the result.

Rarity doesn't override the rules

In *A Local Authority v AX and others* [2025] EWFC 137, Mr Justice MacDonald said that the case of *Re M (Children)* made it clear that there was no warrant for overlaying a test of necessity in the rules with concepts of rarity or exceptionality.

The case of *AX* involved care proceedings following suspected non-accidental injuries to a child. The medical evidence in the case was complex and contentious. The first respondent mother and the second respondent father applied for a direction under FPR rule 25.9(2) that a number of medical experts should attend court to give oral evidence during the proceedings.

In his judgment, MacDonald J said that, when deciding whether an expert should be required to attend, the court had to focus closely on the content of the expert evidence in light of the issues before it. This assessment was carried out against the backdrop of the overriding objective, the requirements of FPR Pt 25, the value in some cases of testing evidence to ensure the overall fairness of the hearing, and the nature and scope of the court's responsibility in evaluating that evidence. These considerations determined whether attendance was necessary in the interests of justice, rather than broader factors such as the type of proceedings, their seriousness, the potential consequences, or the rights engaged.

The overriding objective of fairness

The overriding objective *implicitly recognises the tension between expedition and fairness*, and requires the court to adhere to both of those principles in making case management decisions.

In this case, the fact that all parties agreed to the expert's attendance did not

settle the matter. In exercising its powers to manage and, where appropriate, exclude evidence, the court had to ensure that no party was prevented from putting the core of its case to witnesses on issues that could significantly affect the outcome. That said, the general principle—that a party wishing the court to reject a material point must challenge it in cross-examination—was not absolute. Ultimately, the decisive question was whether, taken as a whole, the hearing was fair.

While relevant to evaluating the question of proportionality, the fact that the court was dealing with public law proceedings under Pt IV of the Children Act 1989 involving very serious injury to a child did not, of itself, mean that the threshold of necessity in the interests of justice was likely to be satisfied. Putting a gloss of rarity or exceptionality on the test of necessity required by the rules was undesirable.

In cases where necessity was established and directions were given for the attendance of an expert, the court said that the expert should receive advance notice of the topics to be addressed. This did not, however, require notice of specific questions. Notice should also be given of any fresh evidence. The court further stipulated that the judge may restrict cross-examination by imposing strict time limits.

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Applying these principles in the case of *AX*, MacDonald J found that the issues were such that, together with the complexity of the medical evidence, the parents' challenge to the evidence could not fairly be addressed by written questions. He was at pains to stress, however, that this did not presage a change of approach to the application of rule 25.9(2). Nor did it set any precedent with respect to the attendance of experts in cases of alleged serious or fatal non-accidental injury. The decision to direct experts to attend would turn on the individual circumstances of each case, but the gravity or seriousness of the case did not displace the requirements of Pt 25.

Expedience over fairness?

At first sight, the threshold seems somewhat harsh and restrictive, appearing to tip

the balance in favour of expedition over fairness. Notwithstanding the stated intention of the courts that this is to protect children from the trauma of examination or extended adversarial proceedings, it is worth looking back to what was said by the minister when the Children and Families Bill first came before the Public Bill Committee. He said:

‘Clause 13 will strengthen the court's control of the use of expert evidence in children's proceedings and ensure that it is not overused or misused. It is a vital step in tackling unnecessary delays—delays that can have a detrimental impact on children's welfare’.

He continued:

‘I am clear that expert evidence will continue to be needed in some cases where specialist expertise is required and cannot be obtained from another source. In cases where the judge considers that specialist expertise is appropriate and necessary, it is important that it is still available, so that a case can be dealt with justly. However, commissioning an expert should not be, as it has been too often in the past, a matter of routine. Clause 13 will redress that imbalance. We need to get away from the vicious circle that has developed, whereby the judiciary have lost confidence in the evidence supplied to them by social workers and therefore deem it necessary to rely on further evidence from independent social workers and other experts, such as child psychologists; that has, in turn, made social workers feel even less confident about their ability to convince a judge of the veracity of their evidence’.

While the welfare of the child is mentioned, it does not appear to have been the main focus. Certainly, there is an impact on children arising from delay, but it also seems to have been the intention of the legislators to reduce expert evidence and expert attendance for procedural reasons.

Is it fair to classify a case that has required expert evidence to be given as one that has been ‘delayed’? If justice requires such evidence, then should it be regarded simply as an impediment to speedy resolution? If the answer to these questions is ‘no’, it is difficult to see why it should not also be so in cases involving children. **NLJ**

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