

FOURTEEN

Experts

How do you control (and overcome) the difficulties arising out of Part 25 expert evidence - appointing them, challenging them, paying for them?



Christopher Miller
Recorded 18 November 2021

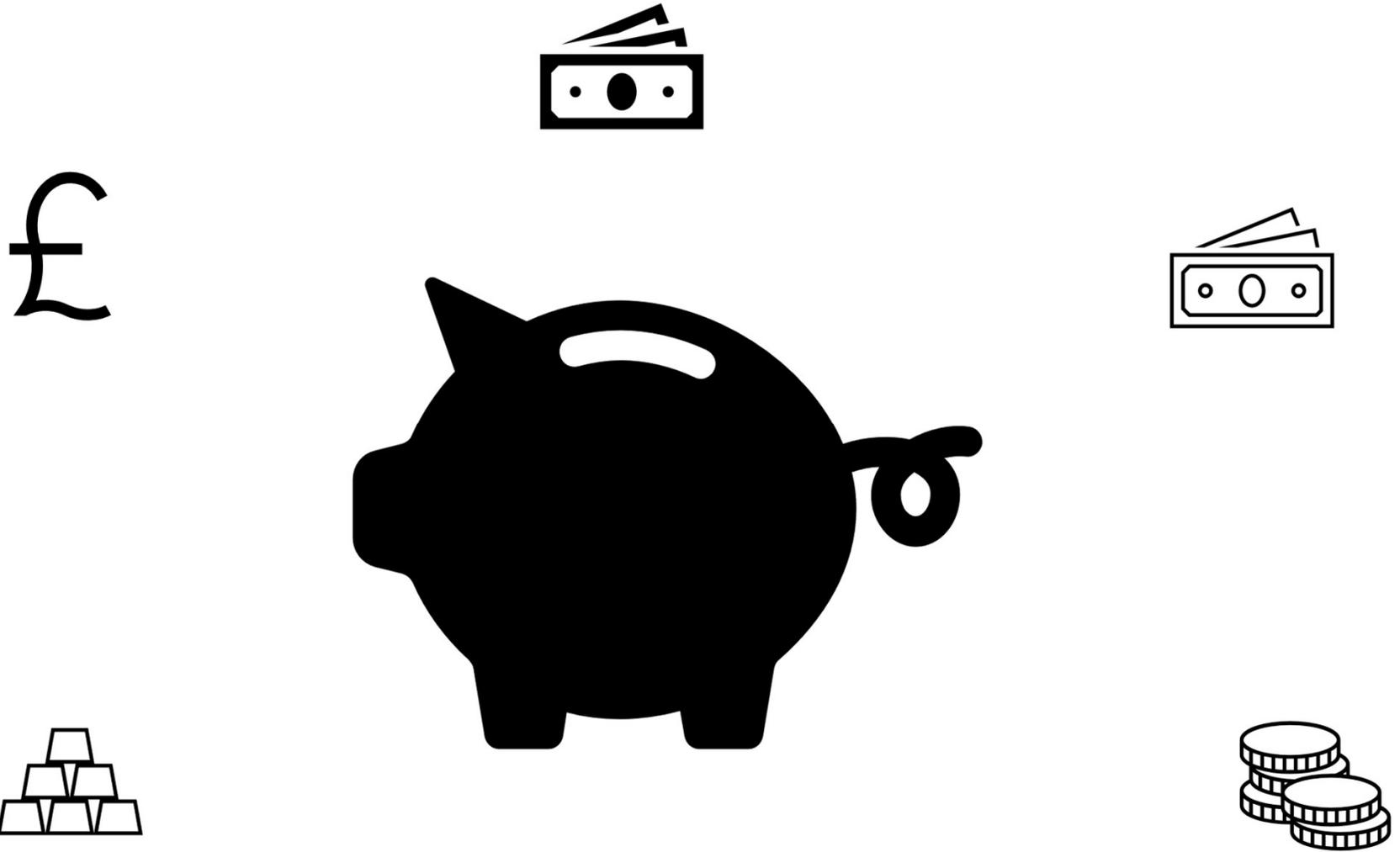
Overview

- A. Historical perspective
- B. Appointing experts
- C. Paying for experts
- D. Challenging experts

A. Historical perspective

- The general rule is that witnesses are witnesses of fact only. This rule is only overridden in the case of a person whose expertise justifies the court receiving his opinion; Civil Evidence Act 1972 s3
- Consequently, an authorised provider of opinion evidence can only do so as a court-acknowledged expert

- Our fellow lawyers who practice in civil law only have to show that such opinion evidence is “reasonably required to resolve proceedings”; CPR 1998 r35.1
- This was exactly the same test as we used to have in FPR 2010 r 25.1
- So why do we now have the well-known test of ‘necessary to resolve proceedings justly’ (CFA 2014 s13)?



- Family Justice Review 2011 suggested there was an unwarranted and 'routine' use of experts and further pointed to the costs and delays that this can occasion
- Significant proportion of litigation publicly funded
- Move to restrict expert evidence was approaching its zenith

- Then in 2015 came the MoJ research by S. Brown et al 'The use of experts in family law'
- https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/486770/use-experts-family-law.pdf
- It created a change in what was then a developing trend against the use of experts

- The thrust of the research was that with proper preparation, procedure and expectations, expert evidence could benefit (and indeed be vital) to the Court processes.
- A number of recommendations were made to optimise the use of experts:
 - Scrutinise CVs in advance
 - Make sure LOIs are clear and non-directive
 - Make sure that timescales are clear
 - Try to maintain an adequate pool of experts willing to report

B. Appointing Experts

1. The Basics
2. The President's memorandum
3. Preliminary enquiries
4. CVs
5. Letters of instruction
6. Timescales and availability

1. The basics

- Necessity test
- Definition of necessity; Re H-L (A Child) [2013] EWCA Civ 655 ‘the connotation of the imperative’ more than ‘useful’ but less than ‘indispensable’
- Proportionality
- Over-riding objective FPR 2010 r1 includes:
 - Parties on an equal footing
 - Saving expense
 - Avoiding delay
 - Justice

2. The President's memorandum

- 04 October 2021
- <https://www.judiciary.uk/wp-content/uploads/2021/10/PFD-Memo-Experts.pdf>
- Useful summary of role and duties of expert and where the source of those expectations derive
- *“...pseudo-science, which is not based on any established body of knowledge, will be inadmissible in the Family Court”*

3. Preliminary enquiries

- Make sure you disclose enough information for the expert to make an informed view of their ability to report and the timescales and costs for doing so
- Such advance disclosure is permitted automatically by the rules; FPR 2010 PD52C 3.4

4. CVs

- Look very carefully at the CVs
- Not just what type of expert you are getting but what their sub-specialisms are
- What research have they undertaken (and what perspective does this reveal, if any)?
- Are there different schools of thought amongst experts and, if so, which school does the expert subscribe (e.g attachment theory)

4. Letters of instruction

- This is a crucial element to securing an optimal expert report; Brown et al 2015
- Ensure compliance with FPR 2010 PD25C 4.1
- Avoid generic questions where possible
- Do not draft questions which suggest an answer
- Do not draft questions which encourage an expert to step outside their field

5. Timescales and availability

- This is a fundamental problem
- Plan ahead (pre-action is not too early!)
- The difficulties have been recognised and steps are being attempted to reduce delay
- <https://www.judiciary.uk/wp-content/uploads/2020/11/Working-Group-on-Medical-Experts-Final-Report-v.7.pdf>

C: Paying for experts

1. General considerations
2. Where one or more parties have public funding
3. Where no parties have public funding

1. General considerations

- Usually experts will be SJE's and usually those costs will be shared equally. BUT there is no presumption or 'general rule'; Re JG [2014] EWCA Civ 656
- Some principles which apply to apportionment of costs are set out in Calderdale MBC v S and the LSC [2005] 1 FLR 751

- In summary the Court retains an overall discretion to apportion costs and will usually take the following into account
 - What is reasonable and fair
 - The nature of the expert and what issue the report goes to
 - (on rare occasions) the extent to which the need for the report arises from the action or inaction of a party

2. Where one or more parties have public funding

- The Legal Aid Agency publish a list of hourly rates per expert type
- They also publish a list of the maximum hours which any expert may spend in preparing a report
- Anything beyond that requires an application for prior authority to instruct the expert
- Prior authority is routinely refused by the LAA
- The LAA do not acknowledge any jurisdiction by the Court to order them to pay more costs than they have authorised

- So therefore:
 - Try to identify an expert who reports at LAA rates and within specified hours
 - Try to ensure costs are apportioned equally between parties
 - If the above is not possible build time to apply for prior authority into the timetable
 - The only remedy if prior authority is not granted (and not appealed successfully) is judicial review or a different apportionment of costs

3. Where no parties have public funding

- If one party is in a superior financial position, then the prospect of an unequal apportionment looms large
- If neither party can pay what can be done?
- r16.4 appointment and prior authority?
 - This strategy is probably optimised if the Part 25 application is made by the child's solicitor after child being joined

D. Challenging experts

1. Methodology/ procedure
2. Underlying science/research
3. Inherent limitations
4. Shadow experts?
5. Second experts
6. Indirect challenge

1. Methodology/ procedure

- Has the expert complied with requirements in FPR 2010 PD 25?
- There is a useful list of expectations from experts in the Inns Of Court College of Advocacy: <https://www.icca.ac.uk/wp-content/uploads/2020/07/ICCA-Expert-Evidence-Guide-2020.pdf>

- Is there a range of opinion in the profession on a particular issue. Have they explained that that range of opinion exists? Have they explained why they settle on a particular 'point' within that range of opinion?
- Is their view mainstream or on the periphery?
- Have they expressed their opinion on and alternate basis where there are key disputed facts?

- Have they stayed within their expertise? The dangers of not doing so were illustrated graphically in Meadows v GMC [2006] EWCA 1390
- Be alert for dogmatism; Re U [2004] EWCA Civ 567
- Have they pointed to research to support their opinion. If not, what is their opinion based on?

2. Underlying science/research

- The expert may be basing opinion on research. That is not the end of the potential for challenge
- Is it peer reviewed; ACC v A [2018] EWHC 3283
- Is it mainstream?
- What are the sample sizes?
- Were there controlled studies?
- To see fundamental problems with the use of research see; ACC v A [2018] EWHC 3283

3. Inherent limitations

- There may be nothing wrong with the work done by the expert or the underlying research and experience giving rise to the opinion
- Nonetheless, there may be limitations to the evidence e.g.:
 - forensic testing
 - Attachment theory
 - Other available evidence

4. Shadow experts

- You have an expert that does not support your client's case. You want to challenge technical aspects of the report. You do not have a) endless amounts of time to carry out research or b) a scientific degree
- Can you instruct a shadow expert to help?
- Almost certainly not; *Re J (Application for a shadow expert)* [2018] 1 FLR 1501
- You may be able to instruct an expert to give general advice as long as no details of the case are shared

5. Second experts

- Same scenario as previous slide. You are in real difficulties right? Not necessarily. In a limited number of cases a second expert may be instructed
- *Daniels v Walker* [2000] CPLR 462
- *W v Oldham Metropolitan Borough Council* [2005] EWCA Civ 1247 if expert evidence has become pivotal and is difficult to challenge, then court will be slow to refuse a second expert

- This application may still succeed even where it will cause significant disruption to the timetable Re SK [2007] EWHC 3289

6. Indirect challenge

- Challenge can take many forms. Written and oral questions are well-known, but sometimes it will be better or more proportionate not to challenge a report directly
- Consider adducing evidence (research? factual evidence?) which might undermine the expert without direct challenge
- *Griffiths v TUI UK Ltd* [2021] EWCA Civ 1442

Contact information

Christopher Miller

cmiller@fourteen.co.uk

020 7242 0858

FOURTEEN

14 Gray's Inn Square

London, WC1R 5JP