

Applications Under FPR Part 25

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What is an application under Part 25?

- ▶ It is an application to instruct an expert or for expert evidence to be put before the court. In children proceedings, it includes a request for permission that a child be examined or assessed.
- ▶ It applies to the use of a single joint expert (SJE) or expert instructed by one party.
- ▶ Permission is required to put expert evidence before the court” (FPR 25.4(3)).
- ▶ An expert is a person who provides expert evidence for use in proceedings (FPR 25.2) (but note that certain categories of witnesses are excluded from the definition of ‘experts’ by s.13(8) Children and Families Act 2014, i.e. social worker and Cafcass officer).

'Necessity' of expert evidence

- ▶ "The court may give permission [to put expert evidence before the court] only if the court is of the opinion that the expert evidence is **necessary to assist the court to resolve the proceedings**" (FPR 25.4(3)) (see also s.13(6) Children and Families Act 2014).
- ▶ *Re H-L (Expert Evidence: Test For Permission)* [2013] EWCA Civ 655, [2013] 2 FLR 1434
 - ▶ 'necessary' should be construed as lying 'somewhere between "indispensable" on the one hand and "useful", or "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**'.

When should an application be made?

FPR 25.6 “Unless the court directs otherwise, parties must apply for the court’s permission [...] as soon as possible and –

- (a) in Part 4 proceedings referred to in rule and in so far as practicable other public law proceedings referred to in that rule [(ICO, CO, SO, education supervision order, secure accommodation, SGO)], **no later than a Case Management Hearing**;
- (b) in private law proceedings referred to in rule 12.2 [(CAO, SGO, name change, PR, enforcement)], **no later than the First Hearing Dispute Resolution Appointment**;
- (c) in adoption proceedings and placement proceedings, **no later than the first directions hearing**;
- (d) in proceedings for a financial remedy, **no later than the first appointment**; and
- (e) In a defended case referred to in rule 7.1(3) [(defended matrimonial or civil partnership proceedings)], no later than any Case Management Hearing directed by the court under rule 7.20”

When should an application be made? - Continued

- In an application for the court's permission for an expert to be instructed, a child to be examined or otherwise assessed or expert evidence to be put before the court **should be made as soon as it becomes apparent that it is necessary** to make it (PD25C, para 3.7, PD25D, para 3.6).
- In financial remedy proceedings the parties must apply for permission before the first appointment, unless the court directs otherwise (FPR 25.6(d), PD25D, para 3.9).
- The court will give directions to extend the time for permission to be obtained **where there is a good reason** for the parties to delay the decision whether to use expert evidence (PD25D, para 3.9), for example:
 - Until replies to questionnaire have been fully considered; or
 - Property valuations agreed at FDR but not agreed to resolve the proceedings at the FDR.

When should an application be made? - Continued

- Applications should, **wherever possible, be made so that they are considered at any directions hearing or other hearing for which a date has been fixed** or for which a date is about to be fixed (PD25C, para 3.8, PD25D, para 3.7).
- Where a date for a hearing has been fixed, a party who wishes to **make an application at that hearing but does not have sufficient time to file an application notice should, as soon as possible, inform the court** (if possible in writing) and, if possible, the other parties of the nature of the application and the reason for it. The party should **provide the court and the other party with as much as possible of the information** referred to in FPR 25.7 and PD25C, para 3.10. **That party should then make the application orally at the hearing.** An oral application of this kind **should be the exception** and reserved for genuine case where circumstances are such that it has only become apparent shortly before the hearing that an expert opinion is necessary. (PD25C, para 3.9, PD25D, para 3.8)

Procedure for making an application

- ▶ Application made under Part 18.
- ▶ In children proceedings, the application should be made using Form C2.
- ▶ In financial remedy proceedings, the application should be made using Form D11.
- ▶ The application should be served on all parties (consider giving advanced notice to the parties of the application with a view to it being agreed).

What must an application include?

- Any proceedings

- The application notice must state –
 1. the **field** in which the expert evidence is required;
 2. where **practicable, the name** of the proposed expert;
 3. the **issues** to which the expert evidence is to relate;
 4. Whether the expert evidence could be **obtained from a single joint expert**;
 5. The other matters set out in PD25C or 25D, as the case may be.
- A draft order must be attached to the application (FPR 18.7(2)).



What must an application include?

- Applications in children proceedings

- An application within children proceedings for an expert to be instructed, a child to be examined or otherwise assessed or expert evidence to be put before the court, must state (PD25C, para 3.10)-
 1. the **discipline, qualifications and expertise** of the expert (by way of CV where possible);
 2. the expert's **availability** to undertake the work;
 3. the **timetable for the report**;
 4. the **responsibility for instruction**;
 5. whether the evidence can be properly **obtained by only one party**;
 6. **why the expert evidence proposed cannot properly be given** by an officer of the service or the local authority in accordance with their respective statutory duties or any other party to the proceedings or an expert already instructed in the proceedings;
 7. the **likely cost** of the report on an hourly or other charging basis;
 8. the **proposed apportionment** of any jointly instructed expert's fee, when it is to be paid and whether public funding has been approved.

What must an application include?

- Applications in children proceedings – draft order

- A draft order must be attached to the application. The draft order must set out the following (PD25C, para 3.1)-
 1. **the issues** in the proceedings to which the expert evidence is to relate and which the court is to identify;
 2. **the questions** relating to the issues in the case which the expert is to answer and which the court is to approve ensuring that: (i) within the ambit of the expert's area of expertise, (ii) do not contain unnecessary or irrelevant detail, and (iii) are kept to a manageable number, clear focused & direct;
 3. **the party who is responsible** for drafting the letter of instruction and providing the documents to the expert;
 4. **the timetable** within which the report is to be prepared, filed and served;
 5. **the disclosure of the report** to the parties and any other expert;
 6. the organisation of, preparation for and conduct of any **expert's discussion and statement of agreement/disagreement**;
 7. making available to the court at an early opportunity the expert reports in electronic form;
 8. **the attendance of the expert at court** to give oral evidence (or attending via video link).
- And include provision for **written questions** to be asked of the expert by the parties (FPR 25.10).

What must an application include?

- financial remedy proceedings

- The application must state (PD25D, para 3.11) –
 1. the **discipline, qualifications and expertise** of the expert (by way of CV where possible);
 2. the expert's **ability to undertake** the work;
 3. the **timetable** for the report;
 4. the **responsibility for instruction**;
 5. whether the expert evidence can be properly **obtained by only one party**;
 6. **why the expert evidence proposed cannot properly be given** by an expert already instructed in the proceedings;
 7. the **likely cost** of the report on an hourly or other charging basis;
 8. the **proposed apportionment** of any jointly instructed expert's fee, when it is to be paid and whether public funding has been approved.

What must an application include?

- financial remedy proceedings – draft order

- ▶ A draft order must be attached to the application. The draft order must set out the following (PD25C, para 3.1)-
 1. the **issues** in the proceedings to which the evidence is to relate;
 2. the **party who is to be responsible** for drafting the letter of instruction and providing the documents to the expert;
 3. the **timetable** within which the report is to be prepared, filed and served;
 4. the **disclosure of the report** to the parties and to any other expert;
 5. the organisation of any **expert's discussion** and preparation of **statement of agreement/disagreement**;
 6. making the expert's report available to the court in electronic form at an early opportunity;
 7. the **attendance of the expert at court** to give oral evidence (or via video link).
- ▶ And include provision for **written questions** to be asked of the expert by the parties (FPR 25.10).

Costs

- ▶ The costs of a SJE will generally be equally apportioned equally between the parties but the court can depart from this rule. This is particularly relevant where:
 - ▶ a party is in receipt of legal aid and the expert's fees exceed that which would otherwise be covered (prior authority is not guaranteed and can cause significant delays);
 - ▶ a party has very limited financial resources.
- ▶ The court can limit the costs to be paid to an expert.
- ▶ Parties are jointly and severally liable for the costs unless the court directs otherwise (FPR 25.12(6)).

General considerations

- Wherever possible, include a draft letter of instruction to the expert with any application, including a list of the questions for the expert. In children proceedings the court is required to be prescriptive about the questions to the expert. It can save time and expense to have these ready ahead of any hearing in the event of any disagreement about the questions.
- Ensure that you have confirmed with any proposed expert:
 - the date the proposed expert must receive papers and the letter of instruction by and their reporting date/window;
 - any dates to avoid, particularly where the expert may be required to give evidence at a hearing (but note that the court will not direct that an expert attend court unless it is necessary to do so in the interests of justice (FPR 25.9(2))));
 - Their hourly rate for the completion of work and how many hours they require to complete the report.
- Ensure that a proposed expert is appropriate to the issue(s) and that they have the relevant experience and are active in that area of work. If this is not clearly outlined in their CV, ask for confirmation/further information from the proposed expert.
- Consider what documents the expert will need to be provided to complete their report and whether any redactions may be required before the documents are sent to the expert.
- In children proceedings, where it is necessary for a child to be assessed or examined, ensure that the order confirms that permission has been given for the expert to see/assess the child.

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