
The Instruction of Expert Witnesses within Section 31 Care Applications

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Executive Summary

Background

This study was commissioned in response to the need identified by the Family Justice Review (2011) for more information about the use of experts in local authority section 31 (Children Act 1989) applications to the family courts (commonly known as, and referred to in this report as, 'care applications') and the recommendations made by the Review and accepted by the Government (February 2012) regarding the control of expert evidence in family proceedings. The study builds upon the information collected as part of the Cafcass Care Application Study 2012 (referred to hereafter as 'Care Application Study'), which collected Children's Guardians¹ (referred to hereafter as 'Guardians') views in relation to care applications made in November 2011 on areas including: the local authority's pre-proceedings work; delay within the proceedings; factors underpinning the continuing rise in care applications.

Aims

To establish:

1. The use of expert witnesses within care applications: how many; from which discipline; when they were instructed; and which parties proposed their instruction.
2. Guardians' views regarding the effect of the expert witness contribution on the quality of the court's determination.
3. Whether there appear to be any associations between the number of experts instructed and the duration of the proceedings.
4. Whether, with reference to the Care Application Study, there are associations between the use of expert witnesses and the work undertaken by the local authority.

Survey sample and response rate

This descriptive research, builds upon the information collected as part of the Care Application Study. That study was based on a sample of 343 (61 per cent) of the 562 care applications received from 83 local authorities during the period 11th-30th November 2011. In the present study, 179 out of the 203 Guardians who had responded to the 2012 study replied to the online survey in relation to 211 cases. Twenty seven incomplete or inconsistent responses were removed from the sample, leaving 184 valid responses.

Results and key findings

Number and type of experts instructed

Experts were instructed in 129 (70 per cent) of the 184 sample cases², with a total of 245 experts being instructed. The majority (54 per cent) of the 129 cases with an expert instructed featured more than one such expert, the mean number being 1.9 and the range of experts per case being between one and four, with the exception of one case, which had seven experts. Adult psychiatrists and adult psychologists were the most frequently instructed experts, being instructed in 25 per cent and 38 per cent of all cases respectively.

Timing of instruction

Sixty two per cent of experts were instructed between November 2011 and January 2012 and therefore within the first three months of the proceedings.

¹ Cafcass' Children's Guardians are appointed by the court, pursuant to s41 of the Children Act 1989, to act on behalf of children in specified proceedings including section 31 care applications to "safeguard the interests of the child" and "provide the court with such other assistance as it may require" (Family Procedure Rules 2010: 16.20)

² The figure increases to 74 per cent when including the 27 cases which were excluded from the main survey sample due to Guardians indicating that there was an expert but providing no responses or inconsistent responses to the remaining survey questions.

Parties involved in proposing the expert's instruction

The local authority, the Guardian and one or both parents were jointly involved in proposing the instruction of 55 per cent of experts. One or both parents were the sole party/parties involved in proposing 11 per cent of the experts and the Guardian or local authority were the sole party involved in proposing the instruction of a further 11 per cent of the experts. The remaining 22 per cent³ of instructions were proposed by other combinations of the parties.

Expert instruction and case duration

The instruction of experts was associated with a longer case duration; with the mean duration of those cases with at least one expert being 12 weeks longer than that of cases without any expert instructed⁴. However, on the basis of the information collected in this study it is not possible to establish whether the instruction of experts in itself was a causal factor of longer durations.

Expert instruction and Guardians' opinions of the quality of local authority pre-proceedings work

No association was found between the Guardian's assessment of the quality of the pre-proceedings work carried out by the local authority and the likelihood that any given case would have had one or more experts instructed.

Expert instruction and prior local authority involvement with children

No association was found between the local authority providing services to the children subject to the proceedings prior to the application and the likelihood that any given case would have had one or more experts instructed.

Guardians' opinions of the contribution made by the expert to the court's determination of the case

Guardians considered that 88 per cent of the experts instructed in the sample cases were beneficial in terms of the quality of the court's determination of the application before it.

³ Percentages do not add up to 100 due to rounding

⁴ These figures are for the 156 cases which had concluded by 14th February 2013 only

Introduction and Background

The Family Justice Review (FJR) Final Report (2011: 117) acknowledged the positive contribution that expert evidence could make to a fair and complete court process, but identified 'a trend towards an increasing and, we believe, unjustified use of expert witness reports, with consequent delay for children'. The Report recommended that primary legislation should be introduced to require that expert evidence may be commissioned only where it is necessary to do so in order to resolve the case. The Report further recommended that the Family Procedure Rules 2010 be amended to reflect this.

The Government accepted these recommendations in its response to the FJR (Ministry of Justice and Department for Education, 2012) and Clause 13 of the Children and Families Bill 2013, (which, at the time of writing, is still before Parliament), sets out provisions relating to the control of expert evidence. Changes to Part 25 of the Family Procedure Rules 2010 relating to the control of expert evidence have been made prior to the completion of Parliament's consideration of the Children and Families Bill, and were introduced on 31st January 2013. The changes included:

- Restricting expert evidence to where it is 'necessary', rather than 'reasonably required'.
- The addition of a list of specific factors that the court must consider in deciding whether to give permission regarding expert evidence. These factors include: the availability of other expert evidence; whether the evidence could be obtained from another source; and any impact that giving permission may have on the welfare of the child and/or the timetable and duration of the proceedings.
- In family proceedings, any application for the court's permission to instruct an expert must include the questions that the expert will be required to answer.

The exact meaning of the word 'necessary' in this context has not yet been determined. However, as the President of the Family Division, Sir James Munby, indicated in his judgement in *Re TG (a child)* [2013] EWCA Civ 5, this is a significantly higher hurdle than that set by the previous test of an expert being 'reasonably required'. It is therefore anticipated that the changes to the Family Procedure Rules 2010 will have a marked effect on the instruction of experts.

Another change relevant to the instruction of expert witnesses that has taken place in recent years is the introduction of codified hourly rates for expert witnesses in legally aided cases (including care applications), which were introduced by the Community Legal Service (funding) (amendment no.2) Order 2011. These changes meant that, from October 2011, prior authority had to be sought from the Legal Services Commission (now the Legal Aid Agency) before instructing an expert at a rate exceeding that set out in Schedule 6 of the Order. New maximum rates were introduced in April 2013 by the Civil Legal Aid (Remuneration) Regulations 2013.

Cafcass 'officers of the Service' are appointed as Guardians by the court under s.41 of the Children Act 1989 to act on behalf of children in specified proceedings, including s.31 applications (commonly known as and referred to hereafter as 'care applications') to 'safeguard the interests of the child' and 'provide the court with such other assistance as it may require' (Family Procedure Rules 2010: 16.20).

This descriptive research builds upon the information collected as part of the Care Application Study, which surveyed Guardians' views in relation to care applications made in November 2011 on areas including: the local authority's pre-proceedings work; delay within the proceedings; and factors that may have underpinned the continuing rise in care applications in some authorities. The cases that make up the sample of this study therefore span the period from the publication of the FJR's Final Report in November 2011, up until, and in some cases beyond, the changes made to the Family Procedure Rules in January 2013. The FJR marked the beginning of a time of much change within the family justice system and this study seeks to describe one element of practice that has been the focus of efforts to bring about change.

Two previous studies collected information about the instruction of experts in public law proceedings and will be used for comparative purposes within this report: Masson et al's 2008 Care Profiling Study; and Cassidy and Davey's 2011 Review of Public and Private Law Case Files. The former study was a case file review of a sample of 385 care applications from 16 local authorities made in 2004 and the latter was a case file review of 402 private law cases and 376 public law cases, including 320 care cases, which closed in 2009. The results of these two studies will be used for comparative purposes throughout the present study.

Aims of the study

The aims of the study were to establish:

1. The use of expert witnesses within care applications: how many; from which discipline; when they were instructed; and which parties proposed their instruction.
2. Guardians' views regarding the effect of the expert witness contribution on the quality of the court's determination.
3. Whether there appeared to be an association between the number of experts instructed and the duration of the proceedings.
4. Whether, with reference to the Care Application Study, there are associations between the use of expert witnesses and the work undertaken by the local authority.

Methodology

Sample selection

The Care Application Study was based on a sample of 343 of the 562 care applications received by Cafcass during the period 11th-30th November 2011. The cases involved 600 children and had been allocated to 263 Guardians. The original 2011 sample included cases from 11 of Cafcass' 17 service areas and from 83 local authorities, spread throughout England, including rural and urban authorities. 203 Guardians responded to the Care Application Study in respect of 247 cases. These cases formed the sample for the present study.

Response rate

A number of the 203 Guardians who had responded to the Care Application Study were unable to complete the present survey as they had left Cafcass or were on long term leave at the point at which the survey was administered. Where another Guardian had been appointed in their place, we asked the new Guardian to complete the survey. However, we were unable to collect responses from 16 Guardians in respect of 20 cases, as these cases had closed prior to the Guardian becoming unavailable, with the result that no new Guardian was available to complete the survey.

Recruitment of respondents

The surveys were sent out in monthly batches, from the beginning of September 2012, to the Guardians appointed to those cases that had a final legal output recorded on the Cafcass Case Management System (CMS)⁵. The exception was in the last month (January 2013), where surveys were sent out in respect of all remaining cases, including those cases for which no final legal output was recorded. This staggered approach was intended to minimise the time between each case concluding and the Guardian completing the survey, with the intention that this would allow the Guardians to complete the survey from memory, without having to consult the case file. Whilst a number of Guardians commented that they did need to refer to the case file in order to complete the survey, the majority of those cases were in the first batch of surveys in September 2012, where many cases had finished some months before the survey was administered.

Responses were received from 179 Guardians in respect of 211 cases. However, following data validation, 27 responses had to be excluded from the sample due to Guardians having indicated that there was an expert witness, but providing no responses or inconsistent responses to the remaining survey questions⁶, leaving valid responses for 184 cases⁷. This sample is 54 per cent of the original sample from the 2012 Care Application Study and represents 33 per cent of the total 562 applications issued in the three week period, 11th to 30th November 2011, from which the Care Application Study sample was drawn. Thirty three of these valid responses related to cases for which there was no final recorded output at the time the survey was completed and therefore these cases were likely to have still been before the courts at the time the responses were collected. This acted as a limitation to the study in that the exact durations of these 33 cases were unknown and it is possible that experts were instructed in the cases after the survey concluded.

Design of questionnaire

The questionnaire sent to all Guardians in the sample is at Appendix A. In order to maximise the response rate, the survey was limited to a small number of closed, factual questions, with only one optional, open-text opinion-seeking question. As the research was carried out by survey, the quality of the information collected is reliant to a significant extent on the recollection of the Guardians and, where they referred to the case file in completing the survey, the quality of case recording.

⁵ Final output dates for care applications are recorded on Cafcass' Case Management System (CMS) upon receipt of this information from the court. It should be noted that in some cases there is a delay between the final output of a case and the date of that output being added to CMS.

⁶ The questionnaire can be found at appendix A

⁷ This refers to responses to the survey as a whole; in respect of question 1 we have deemed all 211 responses to be valid.

The categories of expert type used in the study are based on those used in the HMCTS Care Monitoring System (CMS)⁸ (the unified record management system for public law proceedings, piloted by HMCTS from April 2012), to record information about requests for expert reports in care proceedings. The categories are also similar to those used in Masson et al's (2008) Care Profiling Study. Data used in the analysis about local authority engagement with the family and the Guardian's opinions of the quality of the local authority pre-proceedings work is drawn from the Care Application Study.

⁸ Not to be confused with the Cafcass Case Management System (CMS) referred to elsewhere in this study.

Results

Number and type of experts instructed

Table 1: Numbers and percentages of applications with experts by number of experts

Number of experts	Percentage of applications	Percentage of applications in case file review (2011) ⁹	Percentage of applications in Care Profiling Study (2008)
0	30	13	9.1
1	32	13	18.7
2	21	14	23.2
3	11	16	33.4
4	5	18	
5	0	11	15.8
6	0	7	
7+	1	9	
Total	100	100	100

Experts were instructed in 129 (70 per cent) of the 184 cases¹⁰. This is considerably lower than the figure established by Masson et al (2008: 49) and Cassidy and Davey (2011: 4)¹¹, both of which found that experts were instructed in more than 90 per cent of the care cases in their samples¹².

A total of 245 experts were instructed in the 184 cases in respect of which responses were received. Table 1 shows the number of experts instructed in the sample cases alongside information from the Care Profiling Study (Masson et al, 2008: 49) and Family Justice Children's Proceedings Review of Public and Private Law Case Files in England and Wales (Cassidy and Davey, 2011: 5). The results of the present study differ from the results of the previous two studies, with a higher proportion of cases having low numbers of experts. In this study, only one case had more than four experts; in Masson et al's (2008: 49) study, 15.8 per cent of cases had more than four experts and in Cassidy and Davey's (2011: 5) study, 27 per cent of cases had more than four experts.

The mean number of experts instructed in cases which did have at least one expert appointed was 1.9. Again, this figure is lower than that found by Cassidy and Davey (2011: 4), who found that an average of 3.9 expert reports were ordered in those cases with at least one such report ordered¹³.

⁹ These figures relate to the number of expert reports rather than the number of experts. Twenty-five per cent of the cases in the sample for this study were public law cases, which did not involve a care application.

¹⁰ The figure increases to 74 per cent when including the 27 cases which were excluded from the main survey sample due to Guardians indicating that there was an expert but providing no responses or inconsistent responses to the remaining survey questions.

¹¹ The sample for these studies consisted of applications made in 2004 and applications concluded in 2009, respectively.

¹² Note that in respect of Cassidy and Davey (2011) this figure relates specifically to the care cases in their sample, unlike the information in table 1, which relates to all the cases in their sample, including the 25 per cent which did not include a care application.

¹³ Part of the difference between these figures can be attributed to the differing methodology in the present study, which was concerned with the number of experts rather than the number of expert reports. The latter is likely to be higher due to addendum reports being completed, by the same expert, in some cases.

Table 2: Numbers and percentages of sample cases with experts by type of expert

Expert type	Total number of experts	Expert type as percentage of all experts ¹⁴	Number of cases with expert type	Percentage of cases with expert type (all cases)	Percentage of cases with expert type (cases with experts)
Paediatrician	15	6	11	6	9
Parenting Skills Assessor – Residential	9	4	9	5	7
Parenting Skills Assessor – Non-residential	19	8	19	10	15
Child Psychiatrist	12	5	11	6	9
Adult Psychiatrist	49	20	46	25	36
Psychologist – Child	12	5	12	7	9
Psychologist – Adult	73	30	70	38	54
Multi-disciplinary Assessment	3	1	3	2	2
Independent Social Worker	17	7	17	9	13
Drug/Alcohol Tester	16	7	16	9	12
Risk Assessor	6	2	6	3	5
Other expert	14	6	12	7	9
Total	245	100			

Table 2 shows the number of experts instructed by expert type. Adult psychologists were the most commonly instructed expert, accounting for 30 per cent of all the experts instructed, and instructed in 38 per cent of all cases (including those with no expert). Adult psychiatrists were the next most commonly instructed expert, making up 20 per cent of all experts instructed and being instructed in a quarter of all cases. Together, adult psychologists and psychiatrists comprised 50 per cent of all experts. Child psychologists and psychiatrists were only instructed in a small number of cases, seven and six per cent respectively, and, together, accounted for only ten per cent of the total experts instructed.

Masson et al (2008) and Cassidy and Davey (2011) found that adult psychologists and psychiatrists were instructed in a similar percentage of cases as the present study. In the former study, adult psychiatrists and/or psychologists were instructed in 65 per cent of cases, whilst in the latter, adult psychiatrists and psychologists were instructed in 35 per cent and 33 per cent of cases respectively. Both of these studies also found that child psychiatrists and psychologists were instructed in fewer cases than adult psychiatrists and psychologists: in Masson et al's study (2008: 99) in 20.6 per cent of cases and in Cassidy and Davey's (2011: 5) study in 12 and nine per cent¹⁵ of cases respectively. Whilst the present study did not make an explicit distinction between 'adult focused' and 'child focused' experts, its findings, particularly regarding psychologists and psychiatrists, suggest that experts continue to be instructed primarily in relation to parenting capacity.

Paediatricians constituted only six per cent of all experts and were instructed in only six per cent of cases, a smaller percentage than that found by Cassidy and Davey (2011: 5) and Masson et al (2008: 99), who found that paediatricians were instructed in 17¹⁶ and 20.6 per cent of cases respectively.

Independent social workers accounted for seven per cent of all experts and were instructed in nine per cent of all cases. This suggests that there has been a substantial reduction in the extent of instruction of independent social workers since Masson et al (2008: 99) and Cassidy and Davey's (2011: 5) studies, which found that independent social workers were instructed in 23 per cent and 33 per cent of cases respectively. This reduction chimes with the FJR's (2011:18) recommendation that "independent social workers should be employed only exceptionally".

¹⁴ Percentages do not add to 100 due to rounding.

¹⁵ The categories used in Cassidy and Davey's study differed from the categories in the present study; this reference is to their category of 'child clinical psychological' report.

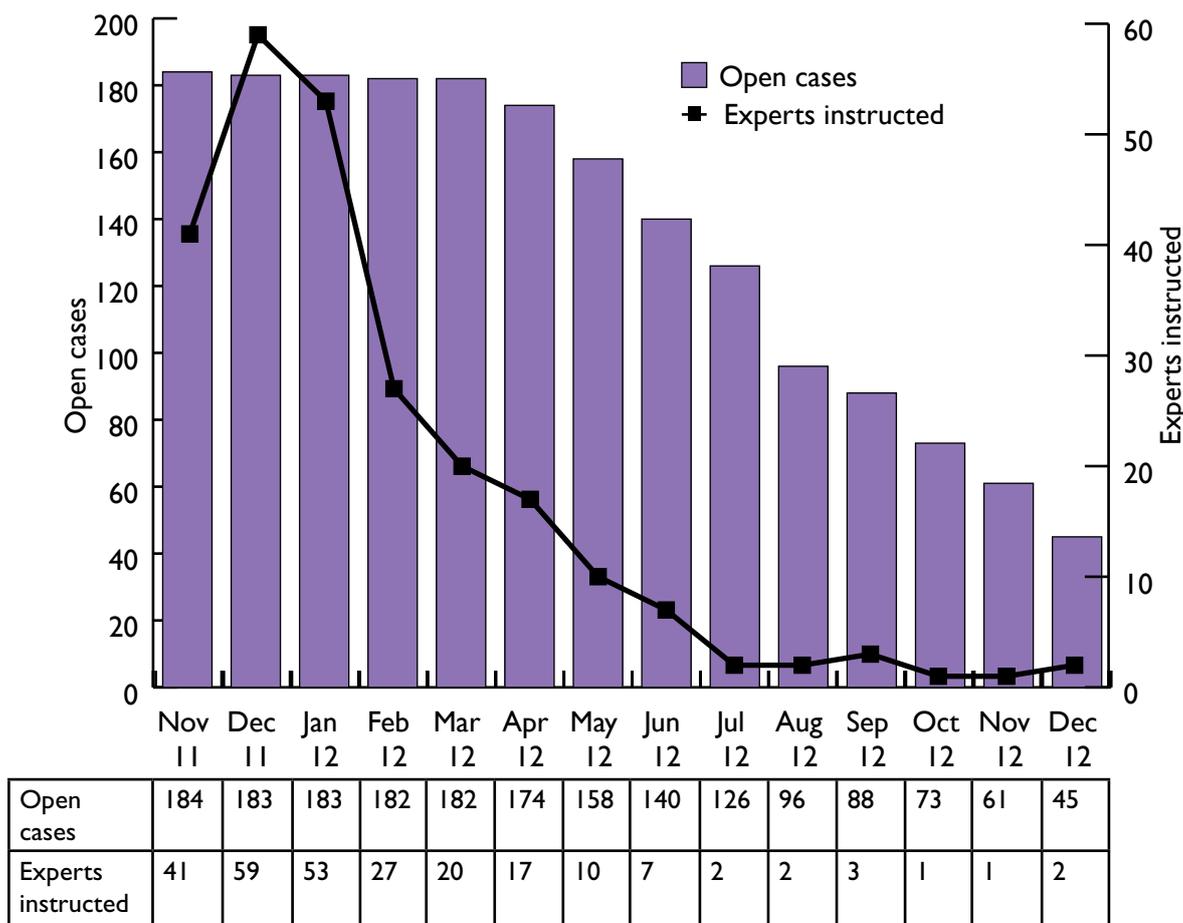
¹⁶ This study differed to the present study in that it had two relevant categories: 'paediatric' and 'paediatric radiologist', the figure cited here is for the former category.

Residential parenting assessments, the value of which was also questioned by the FJR (2011: 18), featured in a lower proportion of cases within our sample than in previous studies. Residential parenting skills assessors were instructed in five per cent of the cases in our sample, in comparison with 16 per cent of the cases in Cassidy and Davies' study (2011: 5) and 16.8 per cent of the cases in Masson's Care Profiling Study (2008: 99).

Assessments conducted by multidisciplinary teams made up only one per cent of experts instructed and were instructed in only two per cent of all cases; a slightly lower figure than that found by Cassidy and Davey (2011), who found that seven per cent of the cases in their sample had a multi-disciplinary assessment. This suggests that there has been some reduction in the frequency of the instruction of multi-disciplinary teams, despite the FJR Final Report's (2011: 18) positive estimation of their potential to provide a better service of expert assessment to the courts.

Timing of instruction

Figure 1: Number of experts instructed each month and number of cases remaining open each month



Guardians were asked in which month each expert was instructed. The data shows that 153 experts, 62 per cent of the 245 experts instructed in total, were instructed between November 2011 and January 2012 and therefore within the first three months of the proceedings¹⁷. While, as is shown in figure 1 above, this to some extent reflects the profile of open cases, it does indicate that experts are generally instructed towards the beginning of cases. Although 33 cases remained open after the survey had concluded, after the first six months of proceedings commencing, very few experts were being instructed each month in relation to the number of open cases in those months; by the end of April 2012, 217 of the 245 experts (89 per cent) had been instructed. This suggests that missing information about experts that may have been instructed in these 33 cases following survey completion is likely to have resulted in only minimal under-representation of the instruction of experts in the sample cases as a whole.

¹⁷ This percentage will be lower than the actual percentage of experts instructed in the first three months of proceedings; as we collected data only on the month the expert was instructed and not the specific date we are unable to establish the exact figure.

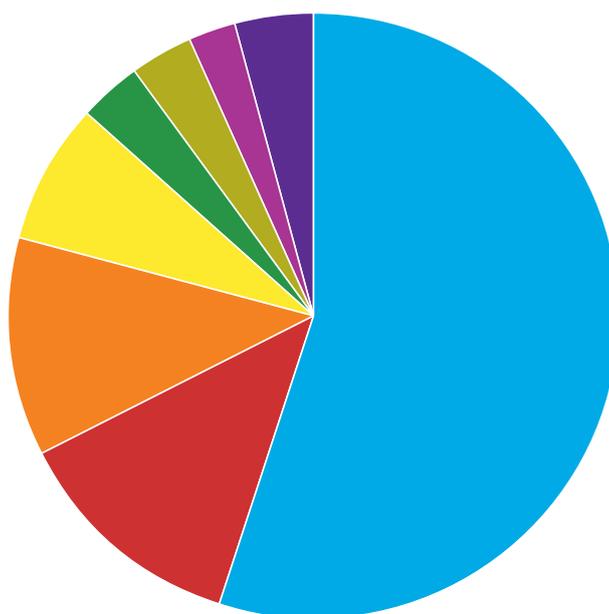
Parties involved in proposing the expert’s instruction

Guardians were asked which parties were involved in proposing the instruction of the expert. The local authority (denoted as LA in figure 2 below), Guardian (CG) and one or both parents were involved in jointly proposing the instruction of 55 per cent of experts. One or both parents were involved in proposing the instruction of 75 per cent of experts. Eleven per cent of the experts were reported as one or both parents having been the sole party/parties involved in proposing their instruction. The local authority was one of the parties involved in proposing the instruction of 81 per cent of experts and the Guardian was one of the parties involved in proposing the instruction of 78 per cent of experts. The profile of the parties involved in the instruction of the experts is shown in figure 2 below.

Figure 2: Parties involved in proposing the expert’s instruction

	Parties	Number	Percentage
	Parent and LA and CG	135	55
	LA and CG	31	13
	Parent only	28	11
	LA only	19	8
	CG only	8	3
	Parent and CG	8	3
	Parent and LA	6	2
	Parent and LA and CG and other	3	1
	Parent, LA, CG, and other person with parental responsibility (PR)	3	1
	All ¹⁸	2	1
	LA and CG and other	1	0
	CG and other with PR	1	0
	Total experts	245	100

(Percentages do not add up to 100 due to rounding)



Expert appointment and case duration

Using those cases in the sample for which a final output date was known on 14th February 2013, the mean duration for cases with experts was 39 weeks and for those without experts was 27 weeks. It should be noted that this excludes 33 cases for which a final legal output date was not known as of 14th February 2013. When these cases are also included in the sample, taking the final output date for these cases to be 14th February 2013, the average duration for those cases with experts was 44 weeks and for those without was 29 weeks. As these 33 cases are likely to have still been ongoing as of 14th February 2013 and therefore represent the cases with the longest durations, by including them in the sample, a more accurate mean duration is achieved. It was hoped that by using the final hearing date information that was available for 15 of these 33 cases to estimate their duration, more accurate figures could be obtained, however, doing so made negligible difference to the mean durations.

Table 3, shows the number and percentages of cases with and without experts by duration of case. By grouping the data in this manner, the problem caused by the cases without a final outcome is overcome, as it is reasonable to assume that such cases will have durations of more than 26 weeks. Only 32 per cent of the cases with durations of fewer than 26 weeks had one or more expert instructed, in contrast, 81 per cent of the cases which took more than 26 weeks had at least one expert instructed. Overall, 22 per cent of our sample had durations of fewer than 26 weeks and 78 per cent of more than 26 weeks. This is similar to the percentages of all 884 cases issued in November 2011 with durations of fewer than and more than 26 weeks: 18 per cent had a duration of fewer than 26 weeks and 82 per cent had a duration of more than 26 weeks. The average duration for all 884 applications issued in November 2011 was slightly higher than that of the sample, at 37 weeks compared to 34, possibly owing to the 33 cases which lacked a final output at the conclusion of the survey.

¹⁸ Parent, LA, CG, other with PR, other

Table 3: Numbers and percentages of cases with experts by case duration

Case duration	Number of cases with expert	Percentage of cases with expert	Number of cases without expert	Percentage of cases without expert	Total
Fewer than 26 weeks	13	32	28	68	41
More than 26 weeks	116	81	27	19	143
Total	129	70	55	30	184

Whilst an association was found between the instruction of experts and case duration, there was no association between the number of experts appointed and case duration. Although Cassidy and Davey (2011) did find such an association, this was most evident in their study when comparing the average duration of those cases with one to three experts against the average duration of cases with seven or more experts; there was a difference of only two weeks between the average duration of cases with between one and three experts and the average duration of those cases with between four and six experts. In the present study, the maximum number of experts instructed in any case in the sample was four, with the exception of one case, where seven experts were instructed. It is therefore not possible to compare the results of the present study with those of Cassidy and Davey in respect of the relationship between the number of experts instructed and case durations.

Expert instruction and Guardians' opinions of the quality of local authority pre-proceedings work

As is shown in table 4 below, there was little difference between the percentage of experts instructed in those cases where the Guardians in the Care Application Study had considered that the quality of the local authority's pre-proceedings work was adequate and those cases where, in the opinion of the Guardian, the pre-proceedings work was inadequate. Moreover, given the relatively small number of cases where pre-proceedings work was considered to be inadequate, it is not certain that this result would be repeated in a larger sample.

Table 4: Numbers and percentages of cases with experts by Guardians' opinions of quality of local authority pre-proceedings work

	Number of cases with expert(s)	Percentage of cases with expert(s)	Number of cases without expert	Percentage of cases without expert	Total
Adequate	81	67	40	33	121
Not adequate	29	71	12	29	41
I don't know/question not answered	19	86	3	14	22
Total	129	70	55	30	184

Expert instruction and prior local authority involvement with children

This study also looked at whether there was a relationship between the instruction of experts and the length of time that the local authority had been continuously providing services to the children prior to the application¹⁹. When the cases were broken down into the number of years of local authority service provision prior to the application, the numbers of cases within each category were too small for meaningful analysis. There was a small difference between the percentage of experts instructed in those cases where the local authority had previously been providing a service to the child(ren) and those cases where they had not. However, again, due to the small numbers of cases within these categories, it is not certain that this result would be repeated in a larger sample.

¹⁹ Information about prior local authority involvement was collected by child as part of the Care Application Study; here we have taken the period of prior involvement for each case to be the longest period of involvement with any of the children subject to the proceedings.

Table 5: Numbers and percentages of cases with experts instructed by prior local authority service provision to child subject to application

	Number of cases with expert(s)	Percentage of cases with expert(s)	Number of cases without expert	Percentage of cases without expert	Total
LA providing service	97	72	37	28	134
LA not providing service	26	62	16	38	42
Unknown/question not answered by CG	6	75	2	25	8
Total	129	70	55	30	184

Guardians' opinions of the effect of the expert's contribution on the quality of the court's determination

Guardians were asked: 'In your opinion, what effect did this expert witness contribution have on the quality of the court's determination?' The responses to this question are shown in table 6 below.

Table 6: Guardians' opinions of the effect of the expert witness' contribution on the quality of the court's determination

Effect of expert witness' contribution on the quality of the court's determination	Number of experts	Percentage of experts
Overall beneficial	215	88
Overall neither beneficial nor not beneficial	14	6
Overall not beneficial	6	2
Don't know	10	4
Total	245	100

Guardians consider that 215 (88 per cent) of the 245 experts instructed had a beneficial effect on the quality of the court's determination. A breakdown of these figures by expert type is included at Appendix B, however, the total numbers of experts considered by Guardians to be either "overall not beneficial" or "overall neither beneficial nor not beneficial" is too small for meaningful analysis of this data by expert type. This generally positive assessment of the experts' effect on the court's determination is in accordance with the finding, discussed earlier in this report, that Guardians were involved in proposing to the court the instruction of 78 per cent of the 245 experts.

The importance of the expert's evidence in the court's determination

Guardians provided additional comments in response to this question in respect of 105 experts. The majority of these comments emphasised the importance of the expert's evidence in the court's determination. Comments included:

"I would like to stress that the medical experts were very crucial in this case, and the case could not have been concluded (either way) without this information."

"The psychological report was critical in this case and was the determining piece of evidence regarding outcomes for the children."

"Absolutely invaluable evidence in a very complex case."

"The expert provided a very insightful and detailed report for the court and greatly assisted in determining the best outcome for the child, in terms of her safety and well being."

"Both experts were crucial, allowing the child to be placed with parents by highlighting what changes the parents needed to make for this to happen."

Four Guardians commented that the expert was required to establish whether one of the parties lacked capacity to conduct the proceedings and, therefore, whether the appointment of the Official Solicitor was required. Guardians also commented that the expert's evidence was necessary in establishing the facts regarding suspected non-accidental injuries in respect of eight experts. As would be expected, given that adult psychologists and psychiatrists represented half of the experts instructed and the prevalence of mental health problems in parents responding to care applications (Masson et al 2008: 80-81)²⁰, in 11 of the 105 comments provided, Guardians referred to experts being required due to the mental health problems of one or both parents.

The instruction of experts and the quality of the local authority's evidence

Although, as has been discussed above, there did not appear to be a relationship between the quality or duration of the local authority's pre-proceedings work/service provision and the instruction of experts, in one case, a Guardian commented that the instruction of an independent social worker was necessary in order to "fill gaps" in the local authority's assessments. Similarly, in another case, a Guardian commented that "the evidence of the local authority was poor" and that the instruction of an adult psychologist was necessary to conclude the proceedings. In a third case, the Guardian explained that a report completed by an independent social worker prompted the local authority to change the care plan for the child from adoption to a Special Guardianship Order in favour of the maternal aunt, despite a previous negative assessment of the aunt by the local authority.

Termination of the expert's instruction and quality of the expert's evidence

In six cases, Guardians reported that the expert's instruction was terminated; in all but one of these cases this was due to a lack of engagement or support of the instruction by the parent subject to the assessment, or because the parent had withdrawn altogether from the proceedings. In the remaining case, the instruction of the expert was terminated because of "a lack of confidence in her ability to assess adequately and appropriately". Parties' failure to engage with the expert's assessment was commented on by Guardians in respect of seven experts: however, in two of those cases Guardians commented that the instruction was still of some benefit, in one case in highlighting the parent's lack of commitment, and in the other because the assessment centre was still able to provide a useful report.

Five Guardians indicated that the evidence provided by the expert instructed was inadequate or of poor quality. Comments included:

"Adult-centred and optimistic in the face of the evidence filed in the proceedings."

"The expert's live evidence was unstructured and confusing."

The impact of the expert's instruction on the duration of the proceedings

In the Care Application Study, the instruction of experts witnesses and independent assessment was mentioned as a factor that caused delay in ten per cent of responses to the question 'What, if any, post application delay factors have arisen in the three months since proceedings began?'. Guardians identified factors such as early appointment of experts, good availability of experts and judges limiting the time allowed for expert witness assessments as preventing such delay. Although Guardians were not specifically asked about delay in the present study, it is interesting that in the comments about the impact of the expert's contribution on the quality of the court's determination, only three Guardians commented on the impact of the expert's instruction on the duration of the proceedings. Moreover, all of these comments were positive, in that the Guardians felt that the instruction of the expert allowed the case to be concluded in a timely manner.

²⁰ 31.5 per cent of the 381 mothers in Masson's sample were experiencing mental health problems

Conclusion

The findings of this study suggest that, prior to the changes made to the Family Procedure Rules 2010 in January 2013, regarding the instruction of experts, even in late 2011 experts were being appointed in a smaller proportion of care cases (and, in those cases, fewer experts were being appointed) compared to earlier studies whose samples consisted of applications made in 2004 (Masson et al 2008) and proceedings where an order was made in 2009 (Cassidy and Davey 2011). This study has also found changes in the profile of the types of experts appointed in the sample cases, in comparison with previous studies (Masson et al 2008, Cassidy and Davey 2011); notably, a reduction in the proportion of cases where independent social workers were instructed.

Concerns have been raised about the impact of the instruction of experts on the duration of care cases and it has been suggested that the instruction of experts can be a contributory factor to unnecessary delay in some care cases (FJR 2011: 117). This study did find an association between the instruction of experts and case duration, but it was not possible to establish whether there is a causal link between the two factors on the basis of the information collected.

The HMCTS Care Monitoring System (CMS) collects information on the number and type of expert reports being requested in care cases and the dates those reports are requested and submitted. It is hoped that the system will assist case management judges and case managers in their case management decisions by giving them a better understanding of the implications of those decisions in terms of case duration and the reasons why delay occurs in care cases (Ryder LJ 2012: 2). The system could also be used to facilitate monitoring of the impact, on an aggregate level, of the amendments to Part 25 of the Family Procedure Rules 2010 on the instruction of experts in care proceedings.

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Appendix A: The instruction of experts in s31 proceedings survey questions

Practitioner name:

Case name:

Case CMS number:

1. Were there any experts in this case?

- Yes No

2. Please select all the expert type(s) and the number of them instructed in this case:

	Number of experts of this type requested in total
Paediatrician	
Parenting skills assessor - Residential	
Parenting skills assessor - Non-residential	
Child Psychiatrist	
Adult Psychiatrist	
Psychologist - Child	
Psychologist - Adult	
Multi-disciplinary Assessment	
Independent Social Worker	
Drug/Alcohol Tester	
Risk Assessor	
Other expert	

On the following page(s) you are asked to enter details about each expert(s) and their instruction

3. Indicate the type of expert agreed by the court. If more than one expert of this type was requested please add individual entries for each of them.

- | | |
|--|--|
| <input type="checkbox"/> Paediatrician | <input type="checkbox"/> Psychologist – Adult |
| <input type="checkbox"/> Parenting Skills Assessor – Residential | <input type="checkbox"/> Multi-disciplinary Assessment |
| <input type="checkbox"/> Parenting Skills Assessor – Non-residential | <input type="checkbox"/> Independent Social Worker |
| <input type="checkbox"/> Child Psychiatrist | <input type="checkbox"/> Drug/Alcohol Tester |
| <input type="checkbox"/> Adult Psychiatrist | <input type="checkbox"/> Risk Assessor |
| <input type="checkbox"/> Psychologist – Child | <input type="checkbox"/> Other expert (please specify) |

4. Which one or more of parties were involved in proposing to the court the instruction of the expert?
(Select all that apply)

- | | |
|--|---|
| <input type="checkbox"/> Mother | <input type="checkbox"/> Local Authority |
| <input type="checkbox"/> Father | <input type="checkbox"/> Children’s Guardian |
| <input type="checkbox"/> Other person with parental responsibility | <input type="checkbox"/> Other (please specify) |

5. In which month was this expert appointed?

6. In your opinion, what effect did this expert witness contribution have on the quality of the court's determination?

Overall beneficial Overall not beneficial

Overall neither beneficial nor not beneficial

Any additional comments on the expert's contribution:

Guardians were then given the option to finish the survey or to answer questions above in respect of the next expert.

Appendix B: Guardians' assessments of the effect of the expert witness' contribution on the quality of the courts determination by expert type

Expert type	Total experts	Percentage overall beneficial	Number	Percentage either beneficial nor not beneficial	Number	Percentage not beneficial	Number	Percentage don't know	Number
Paediatrician	15	100	15	0	0	0	0	0	0
Parenting Skills Assessor – Residential	9	89	8	0	0	0	0	11	1
Parenting Skills Assessor – Non-Residential	19	84	16	11	2	0	0	5	1
Child Psychiatrist	12	92	11	8	1	0	0	0	0
Adult Psychiatrist	49	82	40	4	2	4	2	8	4
Psychologist – Child	12	75	9	17	2	8	1	0	0
Psychologist – Adult	73	88	64	5	4	4	3	4	3
Multi-disciplinary Assessment	3	100	3	0	0	0	0	0	0
Independent Social Worker	17	82	14	12	2	0	0	6	1
Drug/Alcohol Tester	16	100	16	0	0	0	0	0	0
Risk Assessor	6	83	5	17	1	0	0	0	0
Other expert	14	100	14	0	0	0	0	0	0
Total	245		215		14		6		10