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**The use of experts in child care proceedings in England and  
Wales: benefits, costs and controls**

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**Abstract**

The removal of children from their parents for children's protection remains a highly contentious area of practice in England and Wales despite a strong legal framework (Children Act 1989) with accepted standards and procedures. Both the public and the judiciary have little confidence in local authority social workers, the frontline workers who identify cases for state intervention. Legal proceedings to impose protective measures, which range from supervision within the family to adoption by strangers, are heard by either lay magistrates or professional judges, combining both inquisitorial and accusatorial features, with each party (local authority, mother, father and child) represented by lawyers paid for by the state. There is heavy reliance on experts, with over 90% of cases having expert evidence. The costs to the legal aid system are very high – around 6,500 cases a year cost a total of £200 million, with experts' fees stated to be around £40 million. There has also been longstanding concern that dependence on experts delays cases – the average length of these proceedings from application to final hearing exceeds 1 year, which is a substantial period in the life of the children concerned half of whom are under the age of 5 years.

Using data from two major studies of care proceedings, one quantitative and the other qualitative, the paper explores the use of experts. Theoretically the court controls the use of experts but, in practice, this is almost always agreed by the parties and rarely limited by the court. The care proceedings system has become dependent on experts, not only for expert information in complex areas such as whether injuries were deliberately caused but also about children's needs and parent's capacity to meet them, which is often available from the local authority. The use of experts *buys time* (during which parents may make changes to their lifestyle) and supplies *independence*. Expert reports provide

the basis for parents accepting that they cannot meet their child's needs, for their lawyers advising against contesting applications and for judges avoiding having to make decisions which they find emotionally difficult. It also creates the expectation in lawyers, judges and experts that expert evidence is required. In this context, attempts to limit the use of experts by greater judicial control are being replaced by controls over fees, which are intended to reduce costs and/or reduce the supply of experts willing to do this work.

**Keywords: litigation, expert evidence, child care proceedings, empirical research, England and Wales**

## **The use of experts in child care proceedings in England and Wales: benefits, costs and controls**

### **Introduction**

This paper seeks to answer the question: *Why are there so many experts in care proceedings in England and Wales?* And through this to explore the role experts play in these proceedings. Using data from two empirical studies, one quantitative and the other qualitative, it examines the appointment of experts and the attitudes to experts held by the lawyers and judges who handle care proceedings. Although these *public law* family proceedings are not ordinary civil proceedings and differ in some respects from other family proceedings because they are brought by the state, the process of appointment and the reasons experts are used have many resonances in other areas of adversarial civil litigation.

The *Care Profiling Study* (Masson et al 2008) was funded by the (now) Ministry of Justice and Department for Education. It examined the court files in a random sample of 386 care cases brought to English courts in 2004, approximately 0.5% of the applications made. Court files for these cases are very substantial – most evidence is written and must be filed with the court. These files contained detailed chronologies of the local authority's dealings with the family, which form part of the local authority's evidence, records of the court decisions during the case, including the appointment of experts, and the final orders made. Forty three per cent of the cases involved more than one child; information was collected on the whole family with more detailed information about the case of a selected, Index Child. Collecting these data was a substantial task; a team of 6 including 3 who worked full time collected the data over 5 months, around 300 field-work days, with researchers spending up to a day recording information on each case. Additionally, for about 40% of the sample it was possible to track down the legal aid bills for each of the parties and establish how much the case had cost the Legal Services Commission in terms of fees for the lawyers for the parents, children and other private parties and for experts. This ranged from under £5,000 to £210,000. These data were then analyzed using SPSS.

The second study, the *Parents' Representation Project*, was funded by the ESRC and originally directed by my colleague Julia Pearce. My responsibilities have been limited to assisting with the research design, analysis and write up and conducting 4 focus groups with barristers, solicitors, magistrates' legal advisers and judges. The study sought to examine the way in which parents were represented in these proceedings through observations of hearings and interviews with professionals. The research team included two very experienced part-time researchers, who interviewed 62 legal professionals and observed 100 hearings including most of the hearings for 16 case studies where the progress of the representation was tracked by shadowing the parent's lawyer, attending pre-hearing discussions with other lawyers and with their client, as well as court hearings. This was a very substantial undertaking with cases lasting from 24 to 100 weeks from application to final hearing and involving up to 13 hearings, a few of which lasted for more than one day. The interviews were recorded and fully transcribed. Recording of court proceedings is not permitted in England and Wales and recording discussions would have been intrusive, a barrier to obtaining consent for the research, and impractical. The observations were therefore recorded by detailed, contemporaneous field work notes. These data were analyzed with using the Nvivo software package, applying modified grounded theory (Strauss and Corbin 1990), which pre-identified some issues for coding but generated more codes from the transcripts. The research report for this study is being finalized and should appear on the University of Bristol website in early November.

### **The nature of care proceedings**

Care proceedings are brought by the local authority, the state agency which has responsibility for child welfare, when it thinks that it is necessary to intervene in a family because a child 'is suffering, or likely to suffer significant harm' due to the failure of the parents to secure proper care for him or her, or because the child 'is beyond parental control' (Children Act 1989, s.31(2)). The court has the power to make care or supervision orders or to give care of the child to a relative. Where care orders are made in relation to very young children the most likely outcome is care and placement orders, which will result in the child being placed for adoption with a suitable family. Where the court has made a placement order the child can be adopted without the parent's consent (Adoption and Children Act 2002). Out of the 11,000 children made subject to care proceedings each year, care orders will be made for approximately 6000 and around 2000 will also be subject to placement orders (DCSF 2008). Care proceedings can thus have very serious consequences – judges frequently refer to care cases as involving 'draconian' and really harsh measures requiring exceptional justification' (*XCC v B (EPO)* [2004] EWHC 2015 (Fam), Munby J; *Re G (A Minor) (Care Proceedings)* [1994] 2 FLR 69, Wall J).

The care proceedings process is sometimes referred to as 'quasi inquisitorial' but these are really adversarial proceedings where the local authority must prove significant harm, *and* that its plan for the child is in the child's best interests. This involves satisfying the court that the parents are not able to care adequately for the child, and cannot change so that they will be able to do so within the child's timescale. Cases can be heard at all 3

levels of the English and Welsh Court system – the High Court, County Court and Family Proceedings Court (FPC). Almost all cases start in the FPC and should be ‘transferred up’ according to their complexity (Allocation and Transfer of Proceedings Order; SI 2008 No. 2836). The majority are heard in the county court but a substantial minority are heard in the FPC, where they may be decided by a panel of lay magistrates rather than a professional judge. The parents have access to legal aid without reference to their means or the merits of their case. This is not limited in anyway, although lawyers have to get permission from the Legal Services Commission for expenditure above levels which are set for each case. This is only administrative monitoring not a control of costs. The children are also parties to the proceedings. They are represented by a specialist social worker, a ‘children’s guardian’ from another state agency (cafcass), who instructs a solicitor to act according to the children’s guardian’s view of the child’s best interests. The cost of the children’s representation is also paid by the legal aid fund, on the same basis as that of the parent. Relatives, for example those who are offering to care for children, can also be parties, providing they have a sufficiently separate interest. They can get legal aid subject to means and merits tests.

The majority of care proceedings relate to children who are neglected and ill-treated by families who have been known to welfare agencies for a considerable time (Masson et al 2008). The case of *Baby Peter Connolly* which received wide publicity in the autumn of 2008 is not untypical, although the fact that he was killed before proceedings were started is exceptional (Haringey 2009). Most cases involve neglect; parents’ capacity is undermined by substance abuse, domestic violence, mental health difficulties or intellectual impairment, frequently in combination (Brophy 2006; Masson et al 2008). There are very few cases of serious injuries or illness where the cause of the harm is in dispute. In most cases the focus of the proceedings is not what *has* happened but whether the parents *will* be able to care for this child in the future. Rather than simply determining whether the local authority can prove its case at application, the proceedings have come to be used for a period of ‘court supervised assessment’ (Hunt and Macleod 1999) through which parenting capacity can be determined.

### **The problem of experts in care proceedings**

Two of the key problems of care proceedings – the time they take and the amount they cost have strong links to the substantial use of experts. Delay has been a major problem in care proceedings since before the Children Act 1989 (Murch et al 1987), at least for the cases heard in the higher courts. It was hoped when the Act was implemented that cases would be completed in 12 weeks but this was never realized. Throughout the 1990s the length of cases increased. Three separate reviews in 1995, 2001 and 2004 failed to do more than describe the problem. The use of experts was identified as a major cause of delay through difficulties identifying suitable experts, chosen experts being unable to take on cases because of their workload or not meeting the court deadline for completing the work and requests for reports being made late in the proceedings. A key factor in this was a shortage of experts but further examination of this with medical experts established that there was a very large pool of potential experts who had never been asked to take on this work (CMO 2006). It has also been suggested by social work academics that the problem

is ‘the pursuit of an unattainable level of certainty’ through repeated assessments of the parents (in)ability to care (Beckett and McKeigue 2003). There have been two attempts led by senior judiciary to streamline court procedures in 2003 and 2008 (President of the Family Division *et al* 2003; Judiciary 2008), the most recent of which also sought to improve decisions about the use of experts (Experts Practice Direction 2008). Both these attempts at speeding up care proceedings have failed, largely because they have not given any attention to the underlying reason why cases take so long – care cases are largely decided by concession, by attrition, and not by judges. Cases now take on average over 52 weeks in the county court and 45 weeks in the family proceedings court (*Hansard* written answers, June 3, 2010). Children removed at birth are likely to spend the first 18 months of their lives, a crucial period of their development in a series of different placements, sometimes with a parent being assessed, before it is finally accepted that the parent is unable to care and plans are made for the child’s adoption (DfE 2010; Ward *et al* 2006). The duration of the case also has implications for legal costs with longer cases resulting in more work for lawyers and hence greater expense for the legal aid fund (Masson 2008).

The Legal Services Commission has estimated that experts in care proceedings cost £40 million and that the costs increased by 50% between 2004/5 and 2007/8 (DCA and DfES 2006; LSC 2008). It has sought to cut the money it pays for experts in care cases by refusing to fund residential assessments in care proceedings from October 2007, and cutting the level of fees payable, first to social work experts and then to all experts, and restricting claims for matters such as waiting and travel (LSC 2007; 2008a; 2008b; 2009). Although there was considerable support amongst lawyers for controlling the costs of experts, judges and lawyers expressed concerns that courts would lack information they required to decide cases (LSC 2009a). Experts considered that the proposed fees were too low and lawyers were concerned that experts would refuse to do court work, extending the problem of a shortage of experts to the whole range of professionals providing reports for the courts and increasing delays (MoJ 2010).

Assessments pose other problems both practically and philosophically. The reliance placed on assessments raises issues about the quality and independence of experts. The problem of the ‘hired gun’, the expert who is consulted to give a desired view which a party knows will strengthen their case and which is given regardless of the evidence has largely been overcome through strict controls over the admissibility of experts’ evidence (at least where the child has to be examined). However, proceedings are occasionally derailed by reports from ‘experts’ with unconventional ideas or pet theories (*Re M, unreported* 9<sup>th</sup> May, 2008, High Court; *Re S* [2009] EWHC 2115; Squier 2010). In the 1990s, Dr Colin Paterson assisted the court with his views about temporary brittle bone disease, supported by his articles published in medical journals, but by no other evidence. The High Court eventually stated that there was no basis for his theories and that he should not be instructed as an expert witness (*Re AB (child abuse: expert witness)* [1995] 1 F.L.R.181). However, there have also been high profile cases where experts ‘have got it wrong’. The most notorious examples have been in criminal prosecutions of parents for killing their children (*R v Cannings* [2004] 1 FCR 193 CA; the Sally Clarke case), which led to a review of care cases to check whether any had been determined on the evidence

of a single medical expert's view. Even where there is evidence from a number of doctors, close examination has shown the operation of 'group think' with experts deferring to the view of one appointed specialist rather than forming their own independent view (*Re M (care proceedings: best evidence)* [2007] 2 F.L.R. 1006). Such incidents have effectively established 'a right to a second opinion' at least in cases where, for example, the diagnosis that injuries were inflicted turns on the interpretation of a single x-ray or other test.

There is also research evidence that expert assessments may be unduly positive. Farmer and Lutman followed up a sample of cases where children had been returned to their parents from care, including cases where this had happened after care proceedings. They found that in 85% of the cases in their sample where children had been returned after care proceedings, the placements broke down. The researchers concluded that experts and children's guardians were too optimistic about parents' capacity to care for their children and suggested that more account should be taken of the local authority's evidence about parenting before the proceedings (Farmer and Lutman 2010).

It can appear that the role of the judge is being displaced by that of the expert, who is effectively unaccountable. Judges may be appealed if their reasoning is faulty but where the judge adopts the expert's view, the case is decided on the evidence and the decision cannot be appealed. Ensuring that experts' reports are of high quality, for example through peer review, does not overcome the basic problem that the expert's role is to give an opinion, not to decide the case. It can be very difficult to draw the line between the expert and the judge where the expert, for example a child psychiatrist, is asked for an opinion about what the child needs for their healthy psychological development and the judge has to decide the case giving 'paramount consideration' to the child's welfare as the Children Act 1989, s.1 requires.

### **Research findings – quantitative findings**

Experts were appointed in 90.9% of the cases in the *Care Profiling Study*. The 35 cases without any expert were either withdrawn early or followed recent proceedings so that the reports in the earlier case provided assessments of the parents' problems and capacity to change. Two-fifths of the sample had only 1 (18.7%) or 2 (23.2%) experts and half the sample had 3 or 4 (33.4%) or 5 or more (15.8%). The largest number of experts in any case was 11, see Table 1.

Adult psychiatrists or psychologists were instructed in the highest proportion of cases; in almost two-thirds of cases a report was sought from an adult psychiatrist or psychologist and in nearly a fifth of cases more than one such expert was involved. Independent social workers, child psychiatrists or psychologists, paediatricians and multidisciplinary assessment teams were each used in at least 20% of cases. Residential assessments were used in 16% of cases, see Table 2. These assessments were additional to those undertaken by the local authority before or when they applied to court.

**Table 1: Numbers of experts and Stage of proceedings at which Experts were appointed**

N of Experts Appointed	N Cases where experts appointed at different stages						Overall
	1 <sup>st</sup> H FPC	Later FPC	Allocation	Later CC	FH(1)	After FH(1)	
0	290	161	164	78	357	37	35
1	58	63	50	64	8	1	72
2	12	30	28	58		2	89
3	6	17	8	25			71
4	2	3	3	18			58
5		1		4			33
6		1		2			14
7		2					10
8							1
9							1
10							1
11							1
% with appointment	21.2	42.1	36.6	68.7	2.2	5.1	90.9
	<b>368</b>	<b>278</b>	<b>243</b>	<b>249</b>	<b>365</b>	<b>39</b>	<b>386</b>

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

Type of Expert	Cases		Cases with 2 or more
	N	%	%
Social worker different LA	5	1.4	
Independent social worker	80	23.2	
Adult psychiatrist/psychologist	225	65.2	19.5
Child psychiatrist/psychologist	88	25.5	2.9
Paediatrician	71	20.6	4.7
Physician	19	5.5	
Residential assessors	58	16.8	1.3
Multidisciplinary family assessment	76	22.0	2.6
Drug/alcohol specialist	42	12.2	
Drug testing	45	13.0	1.0
DNA	50	14.5	1.1
Other experts	42	12.2	
<b>Total Experts</b>	<b>801</b>		

Experts were appointed at all stages of the proceedings. Appointments were made at the First Hearing in the FPC in 21.2% of cases which had a First Hearing there and 42.1% of the cases which were not transferred immediately to the County Court. The majority of appointments in the County Court were made at the case management conference (CMC) but 36.6% of cases had appointments made earlier at the Allocation Hearing. There were 8 cases where experts were appointed at the Final Hearing and 3 cases where appointments were made subsequently but before the court determined the case, see Table 1.

More expert appointments were made in cases transferred to the County Court (mean 3.2) than in cases completing in the FPC (mean 2). There was a statistically significant relationship between type of court and number of experts which could reflect either the transfer of cases with experts (or where expert's reports were thought necessary), or a greater reliance on expert reports in the County Court, see Table 3. Other evidence from the study showed that rates of transfer to the County Court varied substantially between Areas and was not simply related to case complexity. Some FPCs transferred almost all the cases filed with them, others kept more than a third. Also, transfer policies meant that some FPCs transferred comparatively simple cases which were likely to result in adoption whilst keeping more complicated cases. The lower rate of appointment of experts in the FPC appeared to be related both to the approach to appointing experts in the FPC which handled higher numbers of care cases and the view elsewhere that if the cases was likely to involve experts it should be transferred. The criteria for transfer in the Allocation Order applicable at the time referred to conflicts of evidence between experts, something which can occur only if more than two experts are giving evidence on the same issue. This is most likely to occur in cases involving disputed injuries.

**Table3: Percentages of cases and with experts in FPC cases and transferred cases**

Numbers of experts	FPC	Transferred to CC	N of cases
<b>0</b>	15.3%	4.9%	33
<b>1</b>	27.7%	13.6%	71
<b>2</b>	24.8%	22.2%	88
<b>3-4</b>	26.3%	37.4%	127
<b>5 or more</b>	5.8%	21.8%	61
<b>Total</b>	137	243	380

p=.0001



There did appear to be differences between courts in the proportion of cases with 5 or more experts. This ranged from 10% in Court 40 to over 30% in Courts 10, 30 and 60 (all county courts). Numbers are too small to allow comparisons between FPCs. There was also a statistically significant relationship between greater use of experts and length of case. Almost a third of cases completing in 6 months or less had either no experts or only 1. In contrast, almost half the cases with 5 or more experts lasted longer than 18 months, see Table 4. This may reflect the greater difficulty in keeping to the timetable for the proceedings where many experts are involved, or the underlying complexity of long cases.

**Table 4: Duration of case by number of experts appointed (cases completing at a Final Hearing)**

Duration of case	Number experts					Number of cases
	0	1	2	3-4	5 or more	
up to 6 months	31.9%	31.9%	23.4%	10.6%	2.1%	47
26 -40 weeks	6.3%	21.9%	32.0%	31.3%	8.6%	128
9-12 months	4.8%	19.4%	25.8%	43.5%	6.5%	62
12-18 months	4.7%	3.5%	16.3%	45.3%	30.2%	76
over 18 months	2.6%		10.3%	41.0%	46.2%	39
Total	8.6%	16.0%	23.8%	35.1%	16.6%	
	31	58	86	127	60	362

p=.0001

Thus the research indicated that some County Courts were more willing to approve the use of experts than others, and established a statistically significant relationship between the number of experts and length of cases.

Issues relating to the appointment of experts were disputed in 53 cases, 14% of the total. Disputes about assessments were not the most common disputes; there were almost twice as many cases where Interim Care Orders (ICOs) were disputed. Only 5 cases involved more than one dispute about assessment. The majority of the disputes were about whether there should be any assessment at all, or the use of residential assessments, only 10 per cent were about who should pay for the assessment – that is how the cost should be shared between the local authority and the legal aid fund. Disputes about assessment occurred more frequently in County Courts, suggesting that cases with potential disputes were transferred from the FPC, and before the final hearing. There were 28 cases where the County Court was asked to rule on a dispute about undertaking assessments prior to the final hearing. At the final hearing 84 cases were disputed but only 12 of these included a dispute about assessment.

There were marked differences between Areas in the proportion of cases where there were disputes about assessment, and in the outcomes of those disputes. Four local authorities, whose cases made up one third of the sample, accounted for two thirds of the disputes about assessments occurring before the final hearing. Just two County Courts out of eight in the sample heard the majority of the pre-final hearing disputes about ordering assessments. The outcomes of these disputes were very different. In Court 50, the court

ordered assessments in the 5 out of the 6 cases where the local authority was arguing against this, the other case resulted in a compromise. In contrast, in court 80, the local authority's argument that further assessment was unnecessary succeeded in 9 out of 11 cases. The use of experts in Court 80 was close to that for the sample as a whole but in court 50 it was higher (but not as high as in courts 30 and 60). It appeared the most likely outcome of a dispute about assessment in Court 50 was that the court would order it but in Court 80 the opposite was true, the assessment was very likely to be refused. Thus from the local authority's standpoint, the judge in Court 50 was taking a lenient approach to ordering assessments, whilst those in Court 80 were being robust in the face of excessive requests from parent's lawyers.

The qualitative study provided the means to explore the processes through which decisions were made for the appointment of experts and how and why this issue came to be disputed.

### **Research findings – qualitative findings**

In all 4 Areas where the research was conducted there was a strong commitment to the use of expert assessments in care proceedings. Judge A referred to '*a tradition*' in his Area of making substantial use of experts. Discussion about the need for experts was commonplace. Local authority lawyers appeared resigned to the fact that the court would order assessments which they considered unnecessary and limited their opposition to arguing that the local authority should not be required to contribute to the cost. Some lawyers and judges acknowledged that appointing experts had negative consequences in terms of costs and delay but they generally appeared to consider that these were matters to be accepted.

Josie's case from Area D provides illustrates attitudes and practices:

Josie and her partner both had learning difficulties. Josie had physical disabilities and had been diagnosed as an elective mute in childhood. She now spoke but said very little. Their child had been removed at birth because the local authority considered that they were unable to provide adequate care and because of the unhygienic conditions in their home. Josie's intellectual disabilities meant that she was represented by the Official Solicitor, a state official with responsibilities to represent 'patients'. The OS appointed the solicitor Josie had originally contacted (with her partner) and directed how her case should be presented. The OS has a reputation for ensuring that those he represents have every opportunity to succeed in their case. The parents' solicitors favoured an assessment by an independent organization – the C Centre, which specialized in parents with learning difficulties but the local authority thought that this was unnecessary as it could provide the court with a detailed assessment. Discussions before and in court about whether the C Centre should be appointed were spread over 3 hearings. The judge was initially dissatisfied with the information provided about the Centre's proposed assessment, so the matter had to be adjourned for a week. Even then the information was limited. The OS was initially neutral about who did the assessment but, hearing that Josie liked the C Centre staff, instructed Josie's lawyer to advocate for this. Although the only reason the lawyer could give was that Josie wanted the C Centre (an argument the judge said was inadequate) and the judge had expressed considerable dissatisfaction with both the Centre's documentation and the cost, £12,500, he ordered this assessment because the parents' had Article 6 rights to an independent assessment. Provision was made for an interim report, and to terminate the assessment early. Although both the local authority and the guardian were dissatisfied with the way the assessment proceeded and the interim report was unsatisfactory the assessment was not ended. The Centre's report, although late and poorly written, was clear that Josie and her partner could not care for their baby. Josie and her partner accepted this, and also a plan for the baby to live with Josie's brother. The OS suggested that there should be a further psychological assessment of Josie but her solicitor persuaded him that this was unnecessary. He then instructed the solicitor not to contest the final hearing and the judge made a care order. Concluding the case the judge acknowledged that the proceedings were delayed by 8 weeks because he had been *persuaded* to allow an independent assessment of the parents, noting that this was not always necessary but had helped this case to be concluded by agreement.

Parents' views about the local authority; the importance of perceived independence; parents' rights; the quality of assessments and the pivotal role of reports in providing the basis for the lawyer's advice and for avoiding disputed hearings, which were all reflected in the decision-making in Josie's case, each featured in other cases in the research.

Most parents approached their lawyers with anger and denial - anger at the local authority's intervention in their lives and denial that there was anything wrong with the way they cared for their children. As one lawyer put it, '*Parents see the local authority and the social worker as the enemy.*' This is not just true only of those who are subject to court proceedings. The 'SS', the acronym based on the former name, Social Services, which is widely used, has deeper resonance; and this general antipathy is frequently played out in the British media with stories of Social workers who 'steal' children (*Daily Mail* May 31, 2009). Within this context it was unlikely that parents would accept a court decision based solely on the local authority's assessment.

Getting permission for independent assessments to build their client's case was an important part of representing parents. Lawyers recognized that they needed to establish their client's trust. Clients did not trust the local authority and would not trust the court unless it was given an independent view.

*[N]ot necessarily my lack of trust. Certainly most of the social workers in this area, most of them, are very experienced, very good, and I have no criticisms of them ... they might get it wrong but generally ...do a good job. But my clients don't trust what they say ...*  
CCS3

Although the local authority must prove the basis for a care order, they will almost always be able to do so unless the court is given an alternative expert opinion. The parent's lawyer's role is therefore to identify what sort of expert evidence is likely to do this, to find suitable experts able and willing to take on the appointment and to get a court order for this expert to be appointed. In a case where the child has been injured this usually means one or more experts jointly instructed by all the parties to give a view on whether the injuries were caused accidentally, or indicate abuse. In neglect cases, psychological assessment of the parents and assessments of their parenting are sought.

*[W]e got our own expert report – obviously it was a joint expert, but even so it was one that we wanted to see if we could get some evidence against what the local authority expert [the original treating paediatrician] was saying, basically. And... it left us with nowhere to go. ACS5*

Getting appropriate assessments was '*only fair*' but might also be argued, if necessary, under the Human Rights Act (AO9; BB2). Assessments by the local authority were considered problematic, not only because they were not perceived to be independent but also because of concerns about the quality of their social workers. The social work profession has been in crisis in the UK for many years, with poor recruitment, inadequate training (more limited than other parts of northern Europe, the USA and Australia) and high staff turnover (Laming 2003, 2009; Department of Education 2010). Courts have repeatedly turned to psychologists for assessments of parental functioning, and this in turn has fostered a climate where social workers are scarcely considered as having expert knowledge by lawyers and the courts. Local authorities sometimes accepted the need for expert reports in court cases because they had neither the staff to do this work nor the resources to commission it. If expert assessments were ordered by the court they would

only have to pay part of the cost, the majority being funded by legal aid. One local authority lawyer commented on the pressure she felt to argue against paying for assessments that the local authority needed but could not undertake:

*[W]e're continually being told we've got to save money and cut corners and refuse to pay our share of things or pay at all – we have to object and sometimes it's clear the court can't possibly make a decision without there being an assessment. Of course the Local Authority need it – either they haven't had time to do the assessment or they haven't got the skills. ALAS*

Quality was not just an issue in the local authority's work. Despite a Practice Direction which indicates that anyone seeking permission to instruct an expert should provide the court with details of the expert's expertise, 'by way of a C.V., if possible' (President of the Family Division 2008, para 4.3), the court did not always have this. Some experts' work was obviously inadequate (AJ) or its failings became clear through oral evidence (DChS). The information provided by the C Centre in Josie's case did not appear to have satisfied the judge or the requirements of the Practice Direction yet the judge gave permission for it. If these requirements had been rigorously applied in Josie's case, the C Centre would have had to improve the information it provided, ensure timely filing and well-written reports in order to have work commissioned, otherwise it would have gone out of business.

Issues about assessment and many other aspects of proceedings were largely negotiated by the parties' lawyers, not determined by the court. The process of care proceedings was one of 'litigotiation' (Galanter 1984). Frequently there were extensive negotiations outside court, lasting for more than an hour and involving lawyers for all the parties. Whether assessments should be undertaken and who should be instructed to do them was a major topic for these discussions. Pre-hearing discussions were an essential part of the process and were formalized in the guidance to the process as Advocates' Meetings and also built into the advocates' fee structure. Advocates' Meetings were expected to be held before the key hearings for determining the appointment of experts, the CMC, and the final hearing. Lawyers were aware that lack of court time meant that disputes which required substantial hearings caused delay. There was also an expectation in most courts that the judge or magistrates would be presented with draft directions based on lawyers' discussions rather than be asked to decide between different options. Josie's case was exceptional but the judge in Area D took a very active role in all aspects of his cases. Elsewhere, the start of hearings was frequently delayed to give the parties longer for their negotiations.

Negotiation about assessments was a classic example of 'bargaining in the shadow of the law' (Mnookin and Kornauzer 1979). Courts in this study generally took 'a lenient' view of requests from a parent's lawyers for assessments, as occurred in Josie's case. There was little evidence in the qualitative study of the robustness that the figures for Court 80 (above) suggested. Rather, there was a tendency for the lawyers for other parties, the local authority the child and the other parent to accept the proposals a parent's lawyers made for assessments, even though they did not assist their client's case and were

unlikely to provide additional information for the court. A solicitor representing a mother in care proceedings reflected:

*I had a case today where we've had a parenting assessment within the proceedings and the father didn't engage with the assessment at all. It was pretty negative and now father wants an independent social work assessment and everybody seemingly is saying 'fine, off you go and do it'. We've had to advise our client, she probably really doesn't want to get involved in it. But do I think it's a complete waste of public funds? Yes. Have I voiced my concern? Yes. Is anybody bothered? Well, seemingly not. Maybe we shouldn't allow it. But I think sometimes we need to be **robust** where the evidence already exists. CCS4*

Willingness of the lawyers to agree requests for assessments in the context of severe pressure on court time which resulted in the court's reluctance to hear disputes, and the willingness of courts to approve requests from the parents explained the high number of experts used.

Observations revealed that discussions about instructing experts were sometimes unfocused (ACS2) or that a rather casual approach was taken with the mere suggestion by one party of the possibility of an assessment being taken up vigorously by another as essential (BCS1). Although lawyers suggested that 'hopeless applications' for assessments would be unsuccessful (BB2), that all depended on what was considered to be in that category and what purpose the assessment was intended to serve. Where the assessment is intended to help the parents accept their inadequacy or the court's fairness, the fact that the outcome is a forgone conclusion may be unimportant.

Legal proceedings are taken to make decisions in individual cases - cases are decided 'on their own facts' rather than by reference to statistics. This is so even though the civil rules of evidence require facts to be established on the balance of probabilities. Decisions about the hopelessness (or otherwise) of an assessment were not based on knowledge about either the client or the assessment. Indeed, even providers of residential assessments have neither maintained records nor undertaken research to establish the characteristics of those who complete a residential assessment successfully and whether those who do so subsequently manage to care for their children adequately (Doughty 2006). The so-called 'viability assessments' which residential units undertake to assist lawyers to make a case for assessment do not attempt to establish the parent's chances of success, rather they record the parent's compliance with pre-conditions for entry to the unit and willingness to be assessed. Despite the very high cost of these assessments (£2-3000 per week for 12 weeks) the (unquantified) chance that a parent might show they are able to care is sufficient to justify seeking an assessment – an example of the triumph of hope over realism, allied with a disregard for cost and an emphasis on parent's rights. A solicitor who represented parents in these cases reflected:

*There are some cases, I suppose, where you might have a mother and baby and the suggestion is that they go off to a specialist unit and you could say that in some cases "I don't really think the chances are very high here, but who knows – let's give it a go." There are some cases which are likely to lead to failure where you do spend a lot of*

money. *But some of them – occasionally – not very often – but occasionally – turn up trumps!* DO6

Another factor which contributed to judges' reluctance to refuse assessments was the consequences of such a decision. Parents might appeal either this refusal or the ultimate decision, delaying the conclusion of the case. Judges were not confident that their decisions would be upheld by the appeal court (rightly so given the recent case law: eg *D Mc G v Neath Port Talbot County Council* [2010] EWCA Civ 821 where the Court of Appeal over turned decisions to make care and placement orders where the judge had limited expert evidence to a psychologist's report on the mother and not allowed a specialist parenting assessment the mother's lawyer requested.)

*If from the judicial perspective, you are really robust and say, no, we're not going to have this, this and the other expert in this case, I think some of us feel that we are not at all confident that we would be supported by the Court of Appeal if those kind of decisions were taken upstairs. So the move to cut down on experts, I think, has to come from the top down. I think until the Court of Appeal start giving the message loud and clear that judges are going to be supported if they take **robust** decisions about experts, the likelihood is that judges are going to allow too many experts in.* Judge C

The Court of Appeal's attitude also made it more likely that parents would be advised by their lawyer to appeal any refusal of an assessment.

Within this context it is unsurprising that negotiations generally resulted in agreements to seek approval for the appointment of experts, or that high numbers of experts were appointed. Where parents had failed to co-operate with an assessment previously a further assessment might be refused. Alternatively, it might be permitted so that the parent's co-operation became the deciding factor in the case rather than the expert's assessment. In CO9, the judge dismissed the local authority's barrister's argument that it was disproportionate to allow the father another assessment where he had failed to co-operate with an earlier one and timetabled another hearing '*just in case*' he did so. This is also an example of how operating on the basis of the parents' consent has come to dominate family proceedings (Masson 2011). Deciding cases on the basis of the parent's co-operation had a cathartic effect on the professionals involved. Neither the judge nor the parent's lawyer was *responsible* for the outcome; the parent had made their own decision. Moreover, parental lack of commitment reinforced the view that the child should be brought up by others. One mother, who failed to tell the assessment unit of her pregnancy during her residential assessment and missed appointments giving spurious excuses had, according to her own lawyer, '*done herself no favours... and scuppered her own best chances*' (BChS).

Lawyers readily acknowledged that assessments were sought when the outcome was completely predictable (BCS3; DS3, CB1). However, they saw such use of experts as a way of resolving the case, particularly of avoiding a contested hearing. Some parents ceased '*to engage*' once they had seen negative reports (BCS2). If they did not, the expert's assessment gave the lawyer a firm basis from which they could advise their

client. Where the assessment was clearly negative, as in Josie's case, there was an opportunity which some lawyers took to 'counsel the client out' (DChS). It was better to help the parent come to a realistic conclusion on the basis of an expert's report than to take a hard line and refuse an assessment. This was also seen to be more just:

*Poor lad – he's living in fantasy-land, but it would be wrong, it seems to me, to say to him "Look mate, we're not going to assess you – just wise up." If he's assessed and he's told nicely – "You can't do it really – now that we've looked at all the circumstances – you can't do it..." but he'll be able I think then to emotionally to let go and perhaps to see "Well OK, I've done what I can, I've been told that sadly that's not good enough. Yes I do want the best for my child and I do release him then into the adoption process." So that's what I wanted to achieve yesterday. There's no point in the judge saying "Well how realistic is all this?" – We know it's hopeless – that's not a reason for it not to happen in this sort of case where you're dealing with a parent. DS3*

Carly's solicitor's response to her very negative psychological assessment was to obtain a viability assessment with the hope of getting the court to agree a residential parenting assessment. Carly's barrister, who was only instructed for the final hearing saw the case differently; it would be necessary (and impossible) to turn the psychologist's opinion before there was any hope of convincing the court that the local authority should fund a residential assessment. Consequently, she and the solicitor gave Carly very strong advice to persuade her to 'not consent but not contest' her baby's adoption (ACS3). Carly reluctantly agreed.

Even where the parent does not withdraw, assessments can provide the basis for a compromise. A barrister taking part in a focus group described how expert evidence was used to produce agreed solutions:

*We'll adjourn for another expert, we will have another view in the hope that they'll get to a point where, as you say, everybody will agree. Either the evidence will be so fundamentally overwhelming that they have no choice or that somebody will come up with an answer that everyone can actually sign up to, without them actually having to kind of make the difficult decisions. FGB*

Assessments not only helped resolution through parents withdrawing or agreeing, they also produced a weight of opinion which could eventually crush any opposition. The process of obtaining this evidence, through repeated assessments, took time and meant that some cases were effectively decided by attrition – with parents either finally recognizing their limitations or giving up on the assessment process. Indeed one judge talked of limiting assessments more for this reason than because they did not provide additional knowledge:

*I do try and limit the number of experts that we have for a number of reasons. 1) it limits the length of the Final Hearing; 2) it limits how much it costs – which is a not inconsiderable question; and 3) for some parents, how many assessments do they have to actually go through because, although it may look from a professional's perspective that*



*we're accumulating evidence, it means that parents are almost being assessed to the point of exhaustion when, for some parents, that's extremely difficult to keep going back to the same things, to keep being asked the same questions, and it may not add anything to the greater scheme of knowledge about the case at all. DJ*

Another judge was more than willing to permit assessments on the basis that he would, *'Take any help I can get in these difficult cases.'* (AJ)

## **Conclusions**

The high numbers of expert reports ordered can be understood largely in terms of the legal culture operating in care proceedings. Rather than providing information which the *courts* require to make decisions, the assessment process *produces* decisions. It does this in five separate ways. First, assessments show which parents have sufficient commitment to their children to co-operate with an independent expert. Secondly, assessments provide an independent source of information, which parents may accept when they would dismiss the same information emanating from the local authority. Thirdly, they give parents' lawyers a stronger basis for advising their clients on the outcome of the cases, including encouraging them to agree an outcome they did not want. Fourthly, in cases where the parent has decided to contest despite the hopelessness of their case, expert reports give judges the reassurance that their conclusion is correct and an anchor to hold their judgment fast against any appeal. The judge has not merely reached a conclusion; the decision is based on the convincing assessments. Finally, there is a small minority of cases where the expert evidence really assists *the judge* to make a decision. In these cases the expert is also someone with whom the judge can share the burden of a decision which is emotionally very difficult.

What conclusions can be drawn from the much more substantial use of experts in some county courts than others? The above analysis would suggest that this could be the consequence of a generalized belief in the value of experts held by the judge and all who practice in that court. However, barristers frequently appear in a number of different courts and get to know the foibles and preferences of the different judges they appear before. They recognize those judges who are 'lenient' towards assessments and may seek assessments, knowing that they would be unlikely to get them elsewhere. In contrast, where judges are known to be robust there is less reason to press for an assessment which is opposed by other parties. There is some anecdotal support for this analysis; a barrister who occasionally appeared in Court 50 on behalf of parents remarked, *'Judge X will always agree to assessments.'*

The overall analysis in this paper also shows how difficult it is likely to be to change the culture in a time of public spending cuts and reduce the use of expert evidence.

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