

# Children's Court of New South Wales

## Practice Note No. 9

### Joint Conference of Expert Witnesses in Care Proceedings

#### 1. Commencement

1.1 This Practice Note commences on 28 May 2012.

#### 2. Introduction

2.1 In any care proceedings in the Children's Court where two or more parties intend to rely upon a report of an expert witness about the same (or a similar) issue, the court may make a direction that a joint conference of expert witnesses ('an experts' conference') be convened.

2.2 A direction that an experts' conference be convened is a direction by the court that the expert witnesses:

- confer, either generally or in relation to specified matters;
- endeavour to reach agreement on any matters in issue;
- prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, and
- base any joint report on specified facts or assumptions of fact.

2.3 The purpose of this Practice Note is to facilitate compliance with any such direction given by the court.

2.4 For the purposes of this Practice Note, "expert witness" has the same meaning as is contained in rule 31.18 of the *Uniform Civil Procedure Rules 2005*.

#### 3. Objectives of an experts' conference

3.1 The objectives of an experts' conference include the following:

- the just, quick and cost effective disposal of the proceedings to which the conference relates;
- identifying and narrowing of issues for determination by the court;
- shortening the hearing and enhancing the prospects of settlement;
- requiring the expert witnesses to reach a conclusion on the evidence (a joint report of the expert witnesses may be used in cross-examination of an expert witness at the hearing), and
- avoiding or reducing the need for the expert witnesses to attend court to give evidence.

## 4. Making a direction for an experts' conference

- 4.1 As soon as it becomes apparent to the parties that an experts' conference may be of assistance to the court in resolving any issue in dispute in the proceedings, the parties should raise with the court, as soon as is practicable, whether a direction that an experts' conference be convened should be made.
- 4.2 The court may make a direction that an experts' conference be convened on the application of a party or of its own motion.
- 4.3 Prior to the court making a direction that an experts' conference be convened, the parties are to agree on the following matters:
- the experts to attend;
  - the questions to be answered, and
  - the documents to be placed before the experts.
- 4.4 In reaching agreement as to the questions to be answered by the expert witnesses, the parties may circulate draft questions among the expert witnesses for their comment.
- 4.5 In determining whether to make a direction that an experts' conference be convened, the court will have regard to the objectives of an expert conference as stated in paragraph 3.1 above.
- 4.6 The court may, in relation to an experts' conference, direct:
- which expert witnesses are to attend;
  - a place and time convenient to all the expert witnesses for the experts' conference to take place;
  - which issues the expert witnesses must discuss;
  - the questions to be answered by the expert witnesses, and
  - the documents to be given to the expert witnesses prior to the conference, including:
    - (i) this Practice Note;
    - (ii) an agreed chronology (if appropriate);
    - (iii) relevant affidavits or statements of witnesses or, preferably, a joint statement of factual assumptions to be made by the experts, including any competing factual assumptions to be made by them in the alternative (which should be specified clearly as such);
    - (iv) copies of all relevant expert opinions already exchanged between the parties and all other relevant expert opinions and reports upon which a party intends to rely;
    - (v) such records and other documents as may be agreed between the parties or ordered by the court;
    - (vi) a list of all documents provided to the experts, and

(vii) a copy of the *Expert Code of Conduct* as set out in Schedule 7 to the *Uniform Civil Procedure Rules 2005*.

- 4.7 The questions to be answered by the expert witnesses at the experts' conference should be:
- questions specified by the court as agreed to by the parties, and
  - framed to resolve an issue or issues in dispute in the case.
- 4.8 If possible, questions should be capable of being answered with a 'yes' or 'no' response or, if not, by a very brief response.
- 4.9 The questions and documents referred to in paragraph 4.6 above should be given to the expert witnesses no later than **7 working days** before the experts' conference.
- 4.10 Any additional questions or documents may only be provided to the experts with the consent of all parties or, in the absence of such consent, by direction of the court.
- 4.11 Unless the court orders otherwise, the independent legal representative for a child is to provide the expert witnesses with the questions and documents referred to in paragraph 4.6 above and any additional questions or documents.
- 4.12 In the event that a Children's Court Authorised Clinician is to attend an experts' conference, one of the parties is to file within **2 working days** after the experts' conference date has been fixed, a *Notice to Authorised Clinician to attend a Joint Conference of Expert Witnesses*.

## **5. Convening an experts' conference**

- 5.1 If the court has not fixed a place and date for an experts' conference, the parties should fix, in consultation with the Senior Children's Registrar, a time and place convenient to all the expert witnesses for the conference to take place.
- 5.2 An experts' conference should take the form of a personal meeting. Alternatively, the participants may choose to hold the conference by teleconference, audio-visual link or similar means if a personal meeting is not practicable.
- 5.3 The experts should be given a reasonable opportunity to prepare for the experts' conference by ensuring that before the conference the experts have:
- an opportunity to seek clarification from the instructing lawyers or the court concerning any question put to them, and
  - access to any additional materials which the experts consider to be relevant and are able to be provided by the parties. Any such additional material can only be provided to the experts with the consent

of all parties or, in the absence of such consent, by direction of the court.

- 5.4 The costs of an expert witness participating in a joint conference are to be borne by the party seeking to rely upon the report of that expert witness.

## **6. The role of experts at a conference**

- 6.1 The experts should provide their respective responses to the questions asked based on the facts in the witness statements or affidavits or factual assumptions provided. The responses should set out the factual assumptions upon which they are based.
- 6.2 The experts should accept as fact the matters stated in witness statements or affidavits or factual assumptions submitted to them. It is not their role to decide any disputed question of fact or the credibility of any witness. Where there are competing assumptions to be made in the alternative, alternative answers may have to be provided to a question or questions, specifying which of the assumptions are adopted for each answer.
- 6.3 An expert witness both in attending an experts' conference and in preparing a joint report must comply with the *Expert Witness Code of Conduct* as set out in Schedule 7 to the *Uniform Civil Procedure Rules 2005*. In particular, the expert witness must:
- exercise his or her independent, professional judgment in relation to issues raised at an experts' conference and in a joint report;
  - endeavour to reach agreement with the other expert witness or witnesses on those issues, and
  - not act on any instruction or request to withhold or avoid agreement with another expert witness.

(Note: see paragraphs 4 and 6 of the *Expert Witness Code of Conduct*).

- 6.4 If, for whatever reason, an expert is unable to reach agreement with other experts on any issue, that expert should be free to express his or her disagreement with the other experts on that issue.

## **7. Conduct of the experts' conference**

- 7.1 At the experts' conference, the expert witnesses must:
- (a) identify the issues that are agreed and not agreed;
  - (b) if practicable, reach agreement on any outstanding issue;
  - (c) identify the reason for disagreement on any issue;
  - (d) identify what action (if any) may be taken to resolve any outstanding issues, and
  - (e) prepare a joint report specifying the matters mentioned in paragraphs (a) to (d) above.

- 7.2 The experts' conference should be conducted in a manner that is flexible, free from undue complexity and fair to all parties.
- 7.3 The participating experts may appoint one of their number as a chairperson. If one of them so requests, some other person may be appointed to facilitate the conference including a Children's Registrar nominated by the Senior Children's Registrar.
- 7.4 The participating experts may request secretarial or administrative assistance in the conduct of the experts' conference and preparation of a joint report. Any such request should be directed to the Senior Children's Registrar.
- 7.5 If the participating experts agree, one of them or a secretarial assistant may be appointed to make a note at the conference of matters agreed, matters not agreed and reasons for disagreement.
- 7.6 An experts' conference may be adjourned and reconvened as may be thought necessary by those participating.

## **8. The joint report**

- 8.1 In their joint report the respective experts are to respond to the questions asked of them. The joint report should specify:
- the matters agreed and matters not agreed and short reasons for any disagreement, and
  - the factual assumptions (and any alternative factual assumptions) upon which the responses are based (see paragraphs 6.1 and 6.2 above).
- 8.2 The joint report should be composed by the experts and not the representatives of the parties.
- 8.3 A joint report may state:
- (i) that with respect to a particular matter, no opinion can be given. A short statement of the reason or reasons why no opinion can be given should be stated in the report;
  - (ii) that the experts believe that further specified questions could usefully be submitted to them for their opinion.
- 8.4 The joint report should, if possible, be signed by all participating experts immediately at the conclusion of the conference, or otherwise, as soon as practicable thereafter. In the report each of the participating experts should expressly state that he or she has complied with the *Expert Witness Code of Conduct* as set out in Schedule 7 to the *Uniform Civil Procedure Rules 2005*.
- 8.5 Prior to signing their joint report, the participating experts should not seek advice or guidance from the parties or their legal representatives except as

provided for in this Practice Note. Thereafter, the experts may provide a copy of the report to a party or his or her legal representative and may communicate what transpired at the meeting in detail if they wish.

- 8.6 The joint report, when signed by all participating experts, should be immediately forwarded to the Senior Children's Registrar who will distribute a copy of the report to each of the parties.
- 8.7 The joint report may be tendered by consent as evidence of matters agreed on and to identify the issues on which evidence will be called.
- 8.8 If the expert witnesses reach agreement on an issue, the agreement does not bind the parties unless the parties expressly agree to be bound by it.

## **9. Role of legal representatives**

9.1 Legal representatives of the parties or an unrepresented party may only attend an experts' conference pursuant to an order of the court. If the court makes such an order, legal representatives and any unrepresented party may only attend for the purpose of providing advice or guidance to the participating experts if requested to do so by the participating experts. Any such advice or guidance may only be provided jointly and not individually, unless authorised to do so by the legal representatives for all other parties and any unrepresented party. Such advice or guidance may only be provided by:

- responding to any questions in relation to the legal process applicable to the case and the conduct of the experts' conference;
- identifying relevant documents;
- providing further materials on request, and
- correcting any misapprehensions of fact or any misunderstanding concerning the experts' conference process.

9.2 The legal representatives of the parties shall perform any other role the court may direct.

## **10. Further directions**

10.1 An expert directed to confer may apply to the court for further directions. That may be done, at the expert's election, by arrangement with the Senior Children's Registrar. A party may also apply for further directions in relation to an experts' conference.

Judge Mark Marien SC  
**PRESIDENT**  
25 May 2012