

IN THE FAMILY COURT

AND IN THE COURT OF PROTECTION

Before His Honour Clifford Bellamy

sitting as a Deputy Circuit Judge

Re X and Y (Delay: Professional Conduct of Expert)

(judgment handed down on 11th March 2019)

Miss Clare Jordan, solicitor for the local authority

Mr Vince Beckworth, solicitor for the mother

Miss Jacqui Thomas, counsel for the father

Mr Daniel Woodthorpe, solicitor for X

Miss Ariana Kelly, counsel for Y

This judgment was delivered in private. The judge has given leave for it to be reported on the strict understanding that (irrespective of what is contained in the judgment) in any report no person other than the advocates or the solicitors instructing them and any other persons identified by name in the judgment itself may be identified by name or location and that in particular the anonymity of the young people, the adult members of their family and their location must be strictly preserved.

Judge Bellamy:

1. In 2018 a local authority issued care proceedings in respect of two children, X, now aged 10, and Y, now aged 17. The proceedings relating to Y have been transferred to the Court of Protection. The two cases are proceeding together.
2. The purpose of this short judgment is to address concerns relating to the professional conduct of the medico-legal expert instructed, with the leave of the court, to prepare reports in respect of both X and Y. Before I deal with that issue it is appropriate to set out some brief background history in order to put the court's concerns into context.

Background

3. X and Y have complex physical disabilities and also complex learning needs. They have both been diagnosed as suffering from hereditary hypomyelination syndrome causing severe spastic diplegia. The conditions will be life-long. Both young people will need full-time care throughout their lives.
4. Children's Services have been involved with this family for several years. Y was made the subject of a child protection plan in 2013, the main concern at that time being that the parents and other family members were giving Y inappropriate food putting him at risk of choking to death.
5. In 2016 a pre-proceedings meeting was convened as a result of ongoing concerns about the parents' ability to care for X and Y. There remained concerns about the parents giving Y inappropriate food. Those concerns also now extended to X.
6. In 2017 X had surgery on his hip to avoid complete displacement. He was discharged into the care of family members (not his parents). It is alleged that his carers failed to follow the recommended post-operative exercises as a result of which X is now in constant pain and has a distorted body shape.
7. The relationship between the parents and social workers has been difficult.
8. In June 2018 the court granted interim care orders in respect of X and Y. The application was not opposed. X was placed in foster care. Y was subsequently made the subject of a deprivation of liberty order. He now lives in a residential home.

Expert medical evidence

9. It was clear that there needed to be an expert medical assessment of X by a consultant paediatrician. On 17th July permission was granted to the parties jointly to instruct Dr Kathryn Ward. It was ordered that she should report by 26th October.

10. It was subsequently agreed that there also needed to be an expert medical assessment of Y. On 18th October 2018 the court gave the parties jointly permission to instruct Dr Ward.
11. Dr Kathryn Ward is the Designated Doctor for Safeguarding for Bradford, Airedale, Wharfedale and Craven Clinical Commissioning Groups. Previously she was a Consultant Paediatrician at Airedale General Hospital and had held that post for 32 years. For many years, Dr Ward has regularly been instructed as a medical expert witness in cases proceeding in the Family Court. She has had a distinguished career. As a consultant paediatrician, she is held in high regard. It is particularly sad, therefore, that at the end of her career she should face the kind of criticisms from the court that I am about to set out in this judgment. Put shortly, the problem is one of delay and failing to honour commitments and promises made to the parties and, through them, to the Family Court. It is appropriate that I should consider separately Dr Ward's failings with respect to X and Y.

Chronology relating to X

12. As I have noted, it was on 17th July 2018 that the court gave permission for Dr Ward to be instructed to undertake a paediatric assessment of X. The letter of instructions to Dr Ward is dated 2nd August. Initially Dr Ward was ordered to file her report by 26th October. That date was subsequently extended, by agreement, to 30th November.
13. On 4th December, having not received Dr Ward's report, X's solicitor tried to speak to her. He was not successful. He followed that up by sending a letter to her on 12th December asking her to contact him 'as a matter of urgency'. He received no response. On 20th December he tried to telephone her again. Again he was unsuccessful.
14. The solicitor received an email from Dr Ward on 2nd January 2019. She informed him that she was off work because her son had been involved in a serious accident and that there had also been a bereavement. She said, 'I am now back in work and will complete this weekend'. She didn't.
15. The solicitor sent an email to Dr Ward on 14th January reminding her that her report was overdue and saying that he 'would be most grateful if you could confirm by return of email when your report will be available'.
16. Dr Ward responded by email the next day. She said that she had 'been unwell with a protracted illness'. She referred to her son's serious cycling accident. She said that she was 'working on [the report] this week' and that she hoped 'to have it typed up over the weekend'.

17. The next day, 16th January, the solicitor contacted the court with a request that the case be listed for a case management hearing. A hearing was listed to take place on 4th February.
18. On 31st January the solicitor had a further telephone conversation with Dr Ward. According to his note of that call, Dr Ward assured him ‘that the report would be available by the end of next week’.
19. By agreement with the other parties, the hearing listed on 4th February was vacated and relisted to take place on 21st February. The consent order contained a recital making it clear that if Dr Ward had not delivered her report by 20th February then she must attend before me on 21st February.
20. The solicitor spoke to Dr Ward on 5th February and informed her of the terms of the order made on 4th February.
21. The solicitor next spoke to Dr Ward on 15th February. She said she had been suffering from gastroenteritis. She confirmed that she would have the report ready by 21st February, in time for today’s hearing. She was aware that she was required to attend before me on 21st February if her report was not completed. She told the solicitor that she had another report that had to be completed urgently in a different matter.
22. The original letter of instructions, sent in August 2018, made it clear that Dr Ward was expected to examine X for the purpose of preparing her report. The letter said,

‘Please provide a paediatric assessment of X. this should include undertaking a full review of his medical records, liaising with medical professionals involved with X’s care and meeting with X.’
23. In light of all the promises Dr Ward had made to him X’s solicitor assumed (understandably, though wrongly as he now accepts) that Dr Ward had examined X. On 20th February it became clear that Dr Ward had not examined X. At the time this case last came before me on 21st February Dr Ward said that she would be able to see X ‘one day next week’.
24. In October 2018 X’s medical records were sent to Dr Ward at her home address.
25. On 7th January 2019 X’s current GP records were sent to Dr Ward electronically by Cryptshare. The records were password protected. Dr Ward was provided with the password. The password remained valid for 10 days. If not used within 10 days the password would expire. This was made clear to Dr Ward at the time the encrypted records were forwarded to her. In the event the password was not used within 10 days and did expire.

26. On 18th January 2019 the local authority sent to Dr Ward, at her home address, a disc containing the GP records of X's previous GP.
27. Dr Ward's report relating to X was not available at the hearing before me on 21st February. X's solicitor spoke to Dr Ward on 20th February. Given that she had not examined X (as requested) and had not considered all of the medical records that had been sent to her, it is clear that she was not in any position to complete her report. She did not attend court on 21st February. In her telephone conversation with X's solicitor she said that she had to give evidence at a court hearing in Wales on 21st February.

Chronology relating to Y

28. Y is represented by the Official Solicitor. The Official Solicitor has been dealing with Dr Ward with respect to the preparation of a medical assessment of Y.
29. On 18th October 2018 the court gave permission for the Official Solicitor to instruct Dr Ward. The order required her report to be filed by 11th January 2019. This was based on her own indication that she could complete the report by the beginning of January.
30. On 30th November a letter of instruction was sent to Dr Ward. The letter asked her to,

'Provide a paediatric assessment of Y. This should include undertaking a full review of his medical records, liaising with medical professionals involved in his care and meeting with Y himself.'
31. Dr Ward was asked how she would like to receive the bundle and health care records to be sent to her. She did not respond.
32. On 8th January the Y's solicitor tried to call Dr Ward to ask for an update on her progress and to ask again about the format in which she required the medical records. There was no response.
33. On 21st January Y's solicitor sent an email to Dr Ward asking for an update. Her email said,

'I write to ask whether the report on Y is underway and if so, how much time you will now need. A hearing is due to take place on 4 February and it would be useful to have this information in advance.'
34. On 22nd January Dr Ward responded by email. The email reads: 'I will complete by 15th February. Regards Kate Ward.'
35. On 14th February Y's solicitor sent an email to Dr Ward asking for an update with respect to the date when they could expect to receive the report. The next day they received a

message from X's solicitor informing them that Dr Ward had gastroenteritis and that her reports would be further delayed but that they would be completed by 21st February.

36. On 19th February Y's solicitor sent an email to Dr Ward saying,

'I understand that your report on Y will not be available ahead of the upcoming hearing on 21 February. Can you please advise as a matter of urgency when your report will be ready as we need to amend the court timetable in terms of future directions and hearings.'

37. An hour later Dr Ward replied by email saying, 'I am working on it now. I would hope to finish in 72 hours. Regards Kate Ward.'

38. At 10.04am on 20th February Y's solicitor had a discussion with Dr Ward. Dr Ward explained how behind she was with her work, the issues she had had to contend with as a result of her son's cycling accident and the fact that she had been suffering from gastroenteritis. The solicitor's note of the telephone conversation continues,

'Said she does not have med records for Y - that's because we have asked her multiple time where to send them and been ignored! She wants them to her home address...asked me whether she needs to see Y!! said most certainly does. Told her I would call back in 10 mins as I can't believe – the impression is she has not even started work.'

The solicitor said that she would send the medical records that day by special delivery. Dr Ward said that in view of where Y is now living it would take her some time to be able to visit him.

39. At 10.35am that same morning Y's solicitor had a second telephone conversation with Dr Ward. It was agreed that the medical records would be sent to her by special delivery that day. Dr Ward said she could not give a timescale for completing her report until she had seen the medical records. Dr Ward was reminded that I had ordered that if her report was not provided by 20th February then she must appear before me at the case management hearing the next day. The solicitor notes,

'I asked her if she was aware she is meant to be at court tomorrow and she said she had spoken to X's solicitor who will tell the judge she can't – has another case in Wales? And lots of appointments etc.'

Case management

40. So it is that six months after Dr Ward was instructed to prepare a report in respect of X and four months after she was asked to prepare a report in respect of Y, neither report has been written. Neither X nor Y has been seen by Dr Ward. It very much appears to be

the case that Dr Ward has thus far spent little, if any, time reading the medical records that have been made available to her.

41. The parties have come to the conclusion that in terms of both time and cost it would be appropriate for Dr Ward's instructions to be terminated and an alternative expert instructed. I agree.
42. That leaves an outstanding issue concerning Dr Ward's fees in respect of any work she can prove she has undertaken since she was instructed. Without hearing argument on the point I am unable to resolve that issue. However, in light of the history set out above it is at this stage difficult to see how any fee could be justified.

The duties of an expert

43. The duties of an expert are to be found in Family Procedure Rules 2010 (FPR) Practice Direction 25B. The following paragraphs of that Practice Direction are of particular relevance in this case:

'The expert's overriding duty

3.1 An expert in family proceedings has an overriding duty to the court that takes precedence over any obligation to the person from whom the expert has received instructions or by whom the expert is paid.

Balancing the needs of the court and those of the expert

7.1 It is essential that there should be proper co-ordination between the court and the expert when drawing up the case management timetable: the needs of the court should be balanced with the needs of the expert whose forensic work is undertaken as an adjunct to his or her main professional duties.

The expert's response to preliminary enquiries

8.1 In good time for the court hearing when the court will decide whether or not to give permission for the expert evidence to be put before the court (or also in children proceedings, for the expert to be instructed or the child to be examined or otherwise assessed) or for the advocates' meeting or discussion where one takes place before that hearing, the party or parties intending to instruct the expert will need confirmation from the expert –

- (a) that acceptance of the proposed instructions will not involve the expert in any conflict of interest;
- (b) that the work required is within the expert's expertise;
- (c) that the expert is available to do the relevant work within the suggested time scale;
- (d) when the expert is available to give evidence, of the dates and times to avoid and, where a hearing date has not been fixed, of the amount of notice the expert will require to make arrangements to come to court (or to give evidence by telephone conference or video link) without undue disruption to his or her normal professional routines;

(e) of the cost, including hourly or other charging rates, and likely hours to be spent attending experts' meetings, attending court and writing the report (to include any examinations and interviews);

(f) of any representations which the expert wishes to make to the court about being named or otherwise identified in any public judgment given by the court.'

44. It is clear from, in particular, paragraphs 7.1 and 8.1(c) that time is important. As paragraph 7.1 states, 'the needs of the court must be balanced with the needs of the expert whose forensic work is undertaken as an adjunct to his or her main professional duties'. This is qualified, to an extent, by paragraph 8.1(c) which requires confirmation from the expert that he or she 'is available to do the relevant work within the suggested time scale'.
45. If an expert is unable to complete the work within the time proposed by the court then the expert must say so at the time he or she is approached to accept instructions. The parties and the court then have a choice. Either they accept that the preparation of the report will take longer than hoped for and a later filing date must then be set or, alternatively, an approach must be made to another expert. What is not acceptable in the Family Court is the kind of conduct displayed by Dr Ward in this case.
46. In August 2018 the Family Justice Council and the Royal College of Paediatrics and Child Health jointly published *Paediatricians as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations*. So far as concerns the issues with which I am concerned, the following passages from that guidance are relevant:

'1.2 This guidance is a companion document to the generic expert witness standards set out in Part 25 of the Family Procedure Rules (FPR) and focuses on a specific discipline, namely paediatricians....The guidance provides information to all stakeholders regarding the use of paediatricians as expert witnesses and directs the reader to discipline specific information in relation to regulation, codes of conduct, competencies, supervision and quality of service...

1.8 It should be noted that the timetable for public law applications is 26 weeks and whilst the court has the discretion to extend time limits, the expectation is that this will be in the minority of cases and only if the extension is required to resolve the proceedings justly (Children Act 1989 s.32(5))...The court appointed expert must comply with the time limits imposed by the court and ensure that the lead solicitor is kept fully informed of any unforeseen developments that may put the filing date in jeopardy...'

'5.1 Paediatricians in the UK are subject to statutory regulation, ethical principles and codes of conduct of the General Medical Council and take guidance on the clinical standards and training programmes and requirements published by RCPCH. Allied clinical specialties have their own child protection guidelines.'

47. Section 8 of the guidance is headed 'Quality of Service'. The following two paragraphs are relevant to the issue with which I am concerned:

‘8.12 The paediatrician will transparently and clearly set out fees, hours of work and timeframe, and communicate any variation without delay over the duration of the assessment process.

8.13 The paediatrician will present and deliver his or her evidence as directed by the court and comply with all relevant court orders and directions.’

48. The duties set out in Practice Direction 25B are duties imposed upon the expert by the court. They are in addition to and not in substitution for any duties imposed by the expert's own professional body. They are, therefore, minimum standards.

Conclusion

49. The Family Court is heavily dependent upon medical experts from a wide range of specialties to assist it in dealing with some of the cases that come before the court. Experts are required to assist the court in determining threshold issues – for example, in determining whether a child's injuries have been sustained accidentally or whether they are inflicted injuries, in identifying the likely mechanism by which injuries were caused, in identifying the likely window of time within which the injuries were sustained. Experts are also required to assist the court in making welfare decision – for example, as to whether the child is suffering from any mental or psychological difficulties and as to her treatment or therapeutic needs. The Family Court simply could not operate without the assistance of medical expert witnesses.
50. However, it is also the case that although the Family Court needs the assistance of medical experts it also owes a duty to the child concerned to determine the proceedings without delay. That is a statutory obligation clearly set out in s.32 of the Children Act 1989. As *Paediatricians as expert witnesses in the Family Courts in England and Wales: Standards, competencies and expectations* makes clear, it is also an obligation that is placed on medical expert witnesses.
51. There will always be occasions when, despite an expert having genuinely believed that he or she could complete a report by the date set by the court, circumstances change and that is no longer possible. Where that happens, the expert should let his or her instructing solicitor know promptly, giving reasons for the delay and indicating the new date by which the report can be completed. An application should be made to the court for the

timetable to be varied. Where there are justifiable reasons for adjusting the timetable it is unlikely that the court would refuse. What is not acceptable is what has happened in this case where the expert has given a succession of dates by which her reports would be delivered but, as is patently obvious, with no genuine or realistic expectation that any of the dates suggested could, in fact, be met. Courts and experts must work together in a co-operative co-ordinated way. That simply has not happened in this case.

52. A draft of this judgment was provided to Dr Ward in advance of today's hearing. She was invited to attend court today to make representations before the judgment is handed down. Dr Ward did attend. She handed in a letter explaining the personal difficulties she has faced in recent months. The explanation she gave was much the same as the explanation she has previously given to the parties' solicitors. She was profusely apologetic for her failings in this case. She indicated that she has decided not to accept any further instructions in cases in the Family Court.
53. I am deeply concerned about the way Dr Ward has behaved in this case. It does not meet the standards expected of an expert witness or the expectations of the court in this particular case. It cannot be allowed to pass without comment. That comment should be placed in the public domain.
54. I have decided to publish this judgment on Bailii. In arriving at that decision I have consulted with both the President of the Family Division and the Family Division Liaison Judge for the Midland Region.