

**DRAFT FAMILY LAW RULES 2004 (PART 15.5 - EXPERT EVIDENCE)
AND THE EXPERT ACCOUNTANT**

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Introduction

Part 15.5 of the Draft Family Law Rules 2004 deals with Expert Evidence ¹.

The proposed rules provide for significant change to the manner in which expert evidence will be brought before the Family Court. The draft rules, if adopted, provide a solution to many of the Court's concerns regarding experts.

The introduction of the new rules, including the Family Court's code of conduct for expert witnesses², together with new regulations promulgated by the Institute of Chartered Accountants and CPA Australia (APS 11 – Statement of Forensic Accounting Standards and Guidance Notes N2 ³), should allow for a significant improvement in the objectivity and quality of evidence given by accounting experts. It is my experience that the cost and delay issues associated with the use of experts in larger property cases is in certain circumstances largely attributable to a lack of objectivity and lack of independence of one of the expert accountants.

The accounting profession, other professional groups and interested parties, including the Family Law Section of the Law Council of Australia, made significant representation to the Court following the release of the discussion paper “The Changing Face of the Expert Witness” (“the discussion paper”) and the Consultation Draft of the rules.

¹ Refer appendix to the paper by The Hon Justice Graham Mullane “Expert Evidence in Australian Family Law”, November 2003

² Family Court of Australia Practice Direction No.2 of 2003

³ See attached appendix

There was considerable concern raised regarding the proposed introduction of a “single expert” regime, however the Court has pressed on with these proposals. It is the writer’s opinion that it will be disappointing if the expert witness guidelines and accounting standards are not given the opportunity to improve the quality of expert evidence by the accounting profession prior to the introduction of a single expert regime.

This paper briefly examines my concerns regarding the use of single experts, which mirror those put forward by the wider profession. The paper also examines the new accounting standards dealing with Forensic Accounting.

The Single Expert Regime

The purpose of the expert evidence rules is defined in part 15.41 of the draft rules as follows:

15.41 Purpose of Part 15.5

The purpose of this Part is to:

- (a) ensure that parties obtain expert evidence only in relation to a significant issue in dispute;
- (b) restrict expert evidence to that which is necessary to resolve or determine a case;
- (c) **require that wherever practicable, expert evidence is given on an issue by a single expert agreed to by the parties or appointed by the court;**
- (d) avoid unnecessary costs arising from the appointment of more than one expert;
- (e) enable a party to apply for permission to tender a report or adduce evidence from an expert witness appointed by that party, where this is necessary in the interests of justice.

I understand that following the release of the discussion paper issued at the preliminary stage of this reform process, O’Ryan J clarified the intention in relation to the single expert rule to have application in “straight forward” property cases. What is “*straight forward*”? It is with greater concern therefore that the proposed rules require “wherever practicable” the appointment of a single expert. What does “*wherever practicable*” mean?

The restrictions placed on the use of expert evidence are set out in the draft rules at Part 15.42 as follows:

15.42 Restriction on reports and evidence from experts

- (1) A party must apply for the court's permission to tender a report or adduce evidence from an expert witness.
- (2) A child's representative may tender a report or adduce evidence from one expert witness on an issue without the court's permission.

15.43 Application for permission

- (1) A party may seek permission to tender a report or adduce evidence from an expert witness by filing an Application in a Case (Form 2).

Note: The court may allow a party to make an oral application see Rule 11.01.

- (2) A party seeking permission under sub rule (1) must identify:
 - (a) whether the party has attempted to agree on the appointment of a single expert with the other party, and if not, why not;
 - (b) the name of the proposed expert witness;
 - (c) the issue about which the expert's evidence is to be given;
 - (d) the field in which the person is an expert;
 - (e) the expert's training, study or experience that qualifies the expert as having specialised knowledge on the issue;
 - (f) whether there is any previous connection between the named expert and the party.
- (3) When considering whether to permit a party to tender a report or adduce evidence from an expert witness, the court may take into account:
 - (a) the purpose of this Part (Rule15.41);
 - (b) the impact of the appointment of an expert on the costs of the case;
 - (c) the likelihood of such appointment expediting or delaying the case;
 - (d) the complexity of the issues;
 - (e) whether the evidence should be given by a single expert rather than by an expert appointed by the party;
 - (f) whether the expert witness has expertise that is relevant to the issue on which the evidence is to be given; and
 - (g) whether the expert witness has the experience, expertise and training appropriate to the value, complexity and importance of the case.

- (4) If the court grants permission to a party to tender a report or adduce evidence from an expert witness, the permission is limited to the expert named or the field of expertise identified in the order.

The single expert witness rules are detailed in Division 15.5.3 of the draft rules as follows:

Division 15.5.3 Single expert witness

15.44 Order for single expert witness

- (1) The court may on application, or its own initiative order that expert evidence is to be given by a single expert witness, if the court is satisfied that:
 - (a) expert evidence is necessary on a particular issue; and
 - (b) it is not appropriate for each party to appoint an expert for the issue because:
 - (i) the nature of the issue in dispute makes the appointment of an expert by each party unwarranted;
 - (ii) on the information then available the issue falls within a substantially established area of knowledge; or
 - (iii) it is not necessary for the court to have a range of opinion.
- (2) The court may appoint a person as a single expert witness only if the person consents to the appointment.

15.45 Orders the court may make

The court, when appointing a single expert, may:

- (a) require the parties to confer for the purpose of agreeing on the person to be appointed as single expert;
- (b) order that, if the parties cannot agree on who should be the single expert, the parties give the court a list of:
 - (i) people who are experts on an issue and who have consented to being appointed as an expert;
 - (ii) the fee each expert will accept for preparing a report and attending court to give evidence;
- (c) appoint the single expert from the list prepared by the parties or in some other way,
- (d) order that the parties:
 - (i) confer for the purpose of preparing an agreed letter of instructions to the expert; and
 - (ii) submit a draft letter of instructions for settling by the court;
- (e) settle the instructions to the expert;
- (f) determine any issue in dispute between the parties to ensure that clear instructions are given to the expert;
- (g) authorise and give instructions about any inspection, test or experiment for the purposes of the report;

15.46 Single expert witness' fees and expenses

(1) The parties are equally liable to pay a single expert witness' reasonable fees and expenses incurred in preparing a report.

(2) A single expert witness is not required to do that which the court has appointed the witness to do until the expert's fees and expenses are paid or secured.

Note These Rules apply unless the court orders otherwise (see rule 1.12). If there is a dispute about fees, a party or the expert can request the court to determine the dispute (see rule 15.45(f)).

15.48 Appointing another expert

(1) If a single expert witness has been appointed in relation to an issue, a party must not adduce evidence from another expert on the same issue without the court's permission.

(2) The court may allow a party to adduce evidence from another expert on the same issue if satisfied that:

- (a) there is a substantial body of opinion contrary to any opinion given by the single expert witness and that the contrary opinion is or may be material to the determination of the issue;
- (b) another expert knows of matters, not known to the first expert, which may be material to the determination of the issue;
- (c) there is another special reason.

The draft rules, in my opinion, contain little guidance as to when it will be appropriate to apply the single expert rule. I suspect that there may be significant discrepancy between registries and judges as to when the rule will be used. I also note that as the rules do not apply to the Federal Magistrates Service there will again be a variation in approach when matters are run in that jurisdiction.

As noted above, during the discussion phase O'Ryan J clarified the application of the rule to be appropriate in "straight forward" matters. Is a straight forward matter determined by reference to some predetermined property pool value, the number of entities in a corporate group, the number of businesses conducted by a company, a first glance look at the balance sheet, or some other arbitrary measure? It is my experience that a matter which at first instance may appear straightforward may ultimately involve the resolution of many valuation issues, not necessarily uncomplicated in nature or amount.

Furthermore, it is my experience that even straight forward property matters can be mishandled by accountants who hold themselves out to be expert in the area of valuation, yet have little, if any, experience in the complexity of valuations for Family Court purposes. Without the involvement of a second expert to question the validity of the evidence put forward by the single expert, there may be instances where the result is unjust to at least one of the parties involved.

When applied in a perfect world, the new rules, together with the new accounting standards, could produce an acceptable single expert outcome. The dilemma of course is that we are not operating in a perfect world. My specific concerns in relation to the use of single experts are as follows:

- Cost

It would normally be reasonable to assume that the cost of one expert would be less than two. A party who wishes to challenge the expert's report may seek the permission of the Court to call further expert evidence. Similarly, while not calling for additional evidence, the parties may engage shadow experts (as opposed to additional expert witnesses) to review the report prepared by the single expert. In these situations the costs incurred by the parties may well be more than those incurred under the current dual expert system.

A party may choose to engage their own expert in addition to the single expert to provide comfort that the opinion is reasonable, to ensure the report is mathematically and logically correct, to ensure that the correct valuation methodologies have been considered, to determine the value if an alternate methodology was adopted, to highlight the assumptions adopted that would have the greatest financial impact, to assist with cross examination of the single expert and to assist with presenting submissions to the Court.

The single expert system will favor the party with funds, who can afford to meet half of the cost of the single expert plus the cost of a shadow expert.

There are many effective ways of reducing the cost of expert accounting evidence without resorting to a single expert regime⁴.

- Lack of understanding of valuation issues specific to the Family Court

It is not uncommon for an accountant appropriately experienced and qualified to value a business or entity for day to day purposes to accept instructions to perform a valuation for Family Law purposes. However, they may not be fully aware of the valuation issues that must be considered in the Family Court. The result is that their opinion of value, which might be appropriate for other purposes, may not provide a just and equitable result in a Family Law matter.

Further, an accountant not experienced in valuations for Family Law purposes will often provide only the value of the entity and fail to highlight issues such as loans to or from an entity and the effect on the overall property pool. The distinction between property and financial resources may also not be made. If such matters are not brought to the attention of the Court by the single expert it will be necessary for the parties to bring these issues to the Court's attention themselves. This will only be done if the legal representatives of the party have the financial expertise to identify the issues (which is often not the case) or if another expert is engaged thereby mitigating any possible cost savings of a single expert.

- Adoption of appropriate valuation methods

An accountant providing an expert valuation opinion for a Family Law matter may not adopt what would normally be considered the most appropriate valuation method, may only consider one valuation method when more than one might be appropriate or, especially when considering more uncommon financial assets, may adopt an incorrect valuation method.

⁴ See Australian Family Lawyer, Winter 2003 Vol 16 No 4, article by Wayne Lonergan page 20

If this was to occur where a single expert is used, it is likely that an incorrect opinion of value would be provided to the Court. Mullane J⁵ makes reference to a matter where the accountant for the wife made two serious errors that overstated the value of a particular company, the result being that the appeal of the husband was successful. Had this particular accountant been a single expert in this case, these errors (which were fundamental flaws in valuation approach) may have gone unnoticed.

- Human error

From time to time an expert may make an honest and unintentional error in their report, sometimes as simple as an addition or mathematical error. A single expert system does not have the same underlying checks and balances that allow such errors to be identified and corrected.

I also note that a more comprehensive list of issues was included in the submission made by the Family Law Section of the Law Council of Australia in response to the discussion paper, and I commend this submission to the readers of this paper. The issues raised were as follows:

- (a) Loss of expert's role as investigator
- (b) Increased cost
- (c) Favours well-resourced parties
- (d) No check and no alternative source of evidence
- (e) Settlement will be assisted by an expert in whom a party has confidence
- (f) Eliminates conference of experts
- (g) Not suitable for interim applications
- (h) Rural and regional area difficulties
- (i) Limited use in property matters
- (j) Briefing the expert and the increased cost and care required
- (k) List of experts unavailable
- (l) Single experts should not be seen as a short cut to judicial determination

⁵ See page 16 of paper by The Hon Justice Graham Mullane – “Expert Evidence in Australian Family Law”

Statement of Forensic Accounting Standards

The Institute of Chartered Accountants in Australia (ICAA) and CPA Australia issue joint mandatory accounting standards and other professional statements. In July 2002, Statement of Forensic Accounting Standards – APS 11 and Joint Guidance Notes GN2 – Forensic Accounting were issued. These professional statements represent the culmination of a significant effort by the ICAA Forensic Accounting Special Interest Group (FASIG) to bring about significant reform to this sector of our profession. The standards encompass both the spirit and guidelines provided by the various expert witness codes of conduct issued by the Courts⁶, with a clear statement regarding the “overriding duty to assist the Court”.

I have annexed a copy of APS 11 and GN2 to this paper, and suggest that interested practitioners familiarise themselves with the rules which are mandatory for all members of the ICAA or CPA Australia. I would hold concerns if the “expert” accountant engaged in a matter was not a member of either of these peak accounting bodies. The statement of accounting standards and guidance notes should be read together to gain a proper understanding of the intent of the rules. I have reproduced below the areas which are, in my opinion, of highest importance, however I recommend that the statements should be read in their entirety.

Importantly, where properly applied, the standards should ensure a marked improvement in the quality and objectivity of expert evidence, not only in the Family Court, but wherever forensic accounting services are engaged. When combined with the new Practice Direction of the Family Court, the advocate expert should no longer be found attempting to give evidence before the Court.

APS 11 paragraphs 6 and 7 regarding **professional independence**, state

6. A member must not accept or continue to carry out an engagement to undertake forensic accounting services where the engagement would give rise to a conflict of interest for the member or the member’s firm.

⁶ For example, Family Court Practice Direction No 2 of 2003, Supreme Court Rules Schedule K

7. A member may assist and advise a client in resolving a dispute but must take all possible steps to ensure that such a role does not place the member, or the member's firm, in a position of conflict arising from a retainer as an independent expert witness.

The provision of valuation evidence by the Husband's accountant should no longer be seen in Family Court.

The **skill and competence** of the member must be carefully considered and paragraphs 11 and 12 detail the following standards:

11. Before accepting an engagement to provide forensic accounting services, the member must exercise professional judgment to determine if he or she is qualified to offer the requested expert advice. Matters to be considered include:
 - (a) whether the member has been trained or practised in this area of professional practice; and
 - (b) the member's knowledge, experience and expertise in the type of work requested.
12. Engagements may require the consideration of matters that are outside a member's professional expertise. In such cases, the member should either refuse to accept the engagement or seek expert assistance or advice from a suitably qualified third party. The member should disclose in any reports or other relevant communications the extent of the reliance upon the advice of such a third party.

A member must exercise **reasonable care**, with paragraph 14 stating:

14. The exercise of reasonable care requires a critical review at every level of supervision of the work done, and the judgment exercised, by those assisting in the assignment. Where the expert has utilised the services of partners, consultants or professional staff, it should be made clear that the work has been carried out by personnel acting under the control and direction of the expert.

Importantly, no part of any fee charged or received, whether directly or indirectly, when acting as an independent accounting expert is to be related to the outcome of a matter or the amount of damages, or settlement, awarded.

Conclusion

The proposed rules, if adopted, will have a significant effect on the way in which expert evidence is brought before the Family Court. I am not convinced that the application of a single expert regime for accounting evidence has a place in any but the simplest property matters, providing also that the expert is familiar with the issues to be considered in a matter before the Family Court. It is my opinion that the new Practice Direction and accounting statements will bring about greater beneficial change than the introduction of the single expert regime.