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Family

Battle of the experts

By **Ken Nathens**

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(February 26, 2021, 11:43 AM EST) -- Family law property and support cases ought to be easy to resolve in theory. There are set rules regarding property division and equalization schemes in each province. The use of Child Support Guidelines and Spousal Support Advisory Guidelines are designed to provide greater predictability of results, thus encouraging early settlement.

Theory and practice are not always the same. Litigants in family law disputes are often self-employed and may hold shares in private corporations. They may be paid through corporations in different ways, such as by dividends, salary, bonuses, consulting income, etc.

Others may have employment incentives such as options or deferred profit-sharing that must be taken into account for property division and income for support.

Courts in family law matters are increasingly reliant on expert opinions regarding the value of business interests and the calculation of income for support. Sometimes parties jointly retain a valuator to save on the substantial costs involved in hiring a professional and in order to encourage resolution out of court. However, the most disputed cases that make it to trial usually have two experts involved, each with different opinions as to values.

Experts in Ontario (and other provinces) are not supposed to be "hired guns" doing the litigation bidding of the party who hired them. They are required to sign an Acknowledgment of Expert's Duty stating that they provide opinion evidence that is fair, objective and non-partisan and that their duty to the court overrides their duty to the individual party.

The recent Saskatchewan Court of Appeal case of *Frondall v. Frondall* 2020 SKCA 135 provides clarification on two points of interest regarding the use of expert opinions in family law matters:

1. How does the court treat expert opinion that is not independent and is aligned with the position of the party who retained the expert?
2. What is the standard of review for the Court of Appeal regarding expert opinion, and what amount of deference is given to the trial judge's findings regarding the use and application of expert evidence?

A brief summary of the facts of this case are as follows. The parties were involved in a long-term marriage. On separation, it was necessary to value the husband's shares in the family holding company, Doug Frondall Group of Companies (DFGC) and to determine income available for spousal support to the wife.

Both parties provided expert opinions to the court. The wife hired "T" who certified as per the court rules that his evidence was "objective, non-partisan, and that he was aware that his duty was to the Court."

The husband's expert was "W." W did not certify that his report was independent. He was upfront that his testimony and report were advisory in nature, and that the methodology used in the reports primarily related to mathematical calculations provided by the husband.

W stated that "the calculation of the value and comments in the following advisory report do not constitute our independent calculation with respect to the Fair Market Value of the shares in the Company" (emphasis added). W and the husband were friends, former business partners and at the time of trial enjoyed a work relationship. The trial judge observed that a reasonable person may detect a "whiff of potential bias" regarding W's expert opinion.

W's opinion should not have been admitted at trial. There are four requirements for the admission of expert evidence, according to *R. v. Monahan* [1994] 2 S.C.R. 9. These are: a properly qualified expert (which includes the expert being independent), relevance, necessity and the absence of an exclusionary rule. Once the four requirements are established, the trier of fact must go to on to the second gate-keeping step and balance the "potential risks and benefits of admitting the evidence."

Counsel for the wife did not object to the opinion evidence of W being admitted at trial despite its lack of independence. Neither counsel advised the trial judge of W's failure to sign the Acknowledgment of Expert's Duty. Instead, counsel for the wife challenged the independence of W's opinion evidence during cross-examination, after his expert opinion was already admitted as evidence at trial.

The trial judge was left to wonder what use he could make of W's opinion. The evidence was already admitted into the court record on consent, closing arguments were made based on the expert opinions, but the opinion was clearly flawed as lacking independence.

The trial judge opted for a balanced approach when considering the utility of W's opinion. The trial judge opted to disregard W's opinions if based solely or primarily on assumptions or opinions that the husband provided to him. The trial judge considered parts of W's opinion when the valuation methodologies relied upon by W were sanctioned by T, the wife's expert. In the grey areas in between, where there was some but not complete agreement on the valuation method relied on by the two experts, the trial judge gave lesser weight to W's opinion than to T's.

The husband appealed the trial judge's decision regarding the reliance to be placed on W's opinion. He argued that as the wife did not object to the opinion evidence at the admissibility stage, she had no right to challenge or contest the evidence or its weight during the trial. The husband further argued that the trial judge should not have provided greater weight to T's opinion to that of W's, as both T and W were qualified experts and had access to the same documents and information.

The Saskatchewan Court of Appeal rejected the husband's arguments. According to the court, the admissibility of an expert's opinion is a question of law, and absent an error in principle, deference is owed to the trial judge in relation to their decision to admit or reject expert evidence, or in this case, to admit or reject certain parts of the opinion evidence.

Further, the result of the valuation exercise is a question of fact. Where a decision on value is premised on expert evidence of one qualified expert over another, the related findings of fact are accorded deference on appeal.

In short, once the trial judge determines that some or all of an expert opinion is admissible, it is open for the trial judge to prefer the evidence of certain experts over others and place more weight on some parts of the opinion evidence than others.

The court in *Frondall* relied on both expert opinions to a certain degree in reaching its decision, and in some instances actually preferred the valuation results provided by W over those provided by T. Notwithstanding, the lack of an independent valuation and limited use made of W's expert opinion at trial clearly prejudiced the husband's position regarding the valuations of his shares and income.

The lesson learned from *Frondall* is that in high stakes family law litigation, one should never prejudice themselves by compromising on the independence of their expert. It is best to retain a qualified, arm's length expert than to rely on the assistance of one's own accountant and business associates in the determination of values.

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