DISCLOSURE, HIDDEN ASSETS AND WORKING WITH FORENSIC ACCOUNTANTS TO LOCATE THEM

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The first step in financial proceedings is to identify and value the wealth of the parties or as lawyers put it, to identify the property pool. In financial cases we are often charged by our clients with "finding the money". Often this is not an easy task. Sometimes assets are actively concealed by a party or not "discovered". The onus is on the discovering party to reveal their true financial circumstances however this process relies on the veracity of the party disclosing and often it is necessary for the other party to go further to reveal the true financial picture.

Problems arising in relation to identifying the pool of assets and liabilities vary according to the factual circumstances of each case. Regrettably there are situations where the true facts in relation to the financial circumstances are never uncovered but there are steps which a party can take to maximize their opportunity for uncovering the assets and "finding the money". The engagement of a forensic accountant to assist the party's lawyer is an essential element of this. Furthermore, expert Accountants are often engaged by parties or their lawyers to provide an independent expert's viewpoint and report on family law matters.

The process of locating hidden assets is a component of forensic accounting. Forensic accountants are in a unique position to assist lawyers in these aspects through their knowledge and experience in analyzing financial documents, accounting principles and auditing techniques and their awareness of common methods of secreting property.

Through diligence and careful, thoughtful preparation and instruction and close cooperation between lawyer and accountant it is possible to discover assets not disclosed or acknowledged by the other party.

Adequate planning of the assignment and appropriate briefing is required to ensure that the accounting expert's report is produced in an efficient and timely manner.

DUTY OF DISCLOSURE

In proceedings for property settlement each party has an obligation to make a full and frank disclosure of his or her financial position.

In ***Oriolo and Oriolo (1985) FLC 91-653*** the Full Family Court referred with approval to the words of Smithers J in ***Briese and Briese (1986) FLC 91-713*** (delivered June 1985) that in financial proceedings each party must make a full and frank disclosure of all material facts and that such obligation is fundamental to the whole operation of the Family Law Act in financial cases and furthermore that mere compliance with Rules of Court or Practice Directions does not alter the basic principle of the need for full and frank disclosure by the parties.

Rule 13.01 of the Family Court Rules sets out a general duty of disclosure.

Each party is said to have "a duty to the court and to each other party to give full and frank disclosure of all information relevant to the case, in a timely manner."

Failure to comply with such duty may result in the court excluding evidence that is not disclosed or imposing a consequence, including punishment for contempt of court.

Rule 13.01(2) states that the duty of disclosure starts with the pre-action procedure for a case and continues until the case is finalized.

Chapter 13 sets out a number of ways that a party is either required, or can be called upon, to discharge the party's duty of disclosure and these include:

(a) disclosure of financial circumstances (Division 13.1.2)

(b) disclosure and production of documents (Division 13.2.1); and

(c) disclosure by answering specific questions in certain circumstances (Division 13.3)

Rule 13.04 details what is required in terms of full and frank disclosure of the party's financial circumstances including inter alia, a party's earnings; vested or contingent interests in property (including interests in property owned by a legal entity fully or partially owned or controlled by a party); other financial resources of a party; trusts over which the party has any direct or indirect power or control; certain disposals of property in the twelve months immediately before or since separation and liabilities and contingent liabilities.

The starting point for disclosure is usually the Financial Statement (Form 13) required to be filed by a party (see Division 13.05).

The court may order a party to file an affidavit giving further particulars in relation to the party's financial affairs.

Division 13.06 requires an updated Form 13 to be filed before certain specified events such as a conciliation conference, pre-trial conference or trial if a party's financial circumstances "have changed significantly" since the initial Form 13 was filed.

Division 13.2.1 details the responsibility of parties to disclose documents which are or have been in the possession, or under the control, of the party disclosing the document; and are relevant to an issue in the case.

Division 13.13 provides for objection to production of a document including where a party claims privilege from production.

Division 13.14 sets out the consequences of non disclosure of a document including the possibility that the court may stay or dismiss all or part of the party's case.

Division 13.15 requires a party to file a written undertaking that to the best of the party's knowledge and ability, the party has complied with, and will continue to comply with, the duty of disclosure; and acknowledging that a breach of the undertaking may be contempt of court.

Division 13.26 makes provision for service of specific questions under certain conditions.

Division 13.4.2 sets out the procedure for obtaining the production of documents by a person who is not a party to a case.

Division 13.33 provides that a requesting party may serve a Notice of Non-Party Production of Documents (Form 12) on a non-party, requiring the non-party to produce to the requesting party a document or documents relevant to an issue in the case; in the possession, or under the control, of the non-party and that the non-party may be required to produce at the trial. However it should be noted that a Form 12 may be served only if there is no other reasonably simple and inexpensive way of proving the issue sought to be proved by the document.

Division 13.39 makes provision for objection to production of some or all of the documents by the non-party, for instance on the grounds of privilege, confidentiality or insufficient particularity.

EXAMPLES OF NON-DISCLOSURE FROM THE CASES

In ***Kannis and Kannis (2003) FLC 93-135*** the husband had transferred some funds to a woman he had been involved with for many years.

The husband was an optometrist by profession and the parties established a number of very successful optical businesses which generated substantial profits which the parties invested in real estate. By the time of the trial they had acquired 23 properties and at first instance Chief

Judge Holden in the Family Court of Western Australia determined identifiable property of the parties exceeding $33M.

A very significant issue in the proceedings was whether in addition to monies undisclosed in foreign accounts the husband also held significant assets by way of cash, jewellry and gold bullion which he had failed to discover.

The Trial Judge made an adjustment of 10 per cent of the ascertained pool to make allowance for the findings related to undisclosed assets.

An interesting aspect related to the appointment of the parties son as next friend for the husband on the basis of his diminished mental capacity. The wife was suspicious that the husband's asserted dementia was a ruse to avoid him having to given evidence as to the whereabouts of the alleged missing assets.

The court also held that whether the non-disclosure is wilful or accidental is beside the point.

In ***Efthimiadis and Efthimiadis (1993) FLC 92-361***, the Trial Judge, Cohen J, found that the wife's evidence about her business records and her income from the business should be rejected. The Full Court found that the evidence of her earnings was quite inconsistent with her outgoings and the business records she produced were virtually useless.

The Trial Judge also held that the husband understated his income. He also concluded that the husband had $5,000 in a safe and rejected the husband's claim that he had loaned his brother $10,000.

The Trial Judge used statements made by the wife to her bank in relation to the takings and value of her business to discredit her evidence. He also found an alleged unregistered mortgage purportedly entered into by the wife to be a sham, holding that no loan had been made.

In ***Weir and Weir (1993) FLC 92-338*** it was alleged by the wife that her accountant in valuing a relevant company had discovered what he considered to be discrepancies in the accounts of the company involving understatement as to sales which might have impacted on the valuation of the business.

The case also involved evidence being given by the parties' son that it was the husband's practice to pocket cash payments without recording them in the normal course of events.

The wife's counsel submitted that the husband as an ongoing process, deliberately incorrectly coded entries in order to, in effect, mask his misappropriation of cash from cash sales. In the particular facts of the case the Trial Judge was not prepared to make a positive finding on that aspect. However the full Court held that where as in this case there is clear evidence of non-disclosure, "the court should not be unduly cautious about making findings in favour of the other party."

Suiker and Suiker (1993) FLC 92-463. The husband applied for redundancy without informing the wife. The redundancy entitled him to benefits of approximately $160,000. The Full court held that in the circumstances applying the husband was under a duty to disclose to the wife before the Consent Order was made that he had applied for redundancy and what his prospective benefits would be.

Morrison and Morrison (1995) FLC 92-573. The Full court held that there was wilful non-disclosure by the husband of the true nature of his arrangements with a third party in relation to the sale of an abalone licence and that the failure of the husband to disclose the true position robbed the wife of the opportunity of litigating the issue of the true value of the licence and that the non disclosure was of such magnitude as to amount to a miscarriage of justice.

Mitchell (1995) FLC 92-601. The husband embarked on a financial restructuring involving establishment of a family trust and superannuation fund. The effect of the restructuring was to reduce the net value of the net assets by borrowing funds against the matrimonial home and

moving the borrowed funds into superannuation which could (at that stage) only be taken into account as a resource. The Full Court while acknowledging the apparent unfairness that the rearrangement presented to the wife felt that the Trial Judge had gotten around the difficulty by applying s.75(2) to give the wife a substantial adjustment in her favour.

Malpass and Mayson (2000) FLC 93-061. The Trial Judge, Mullane J, found that the husband had significantly understated the income of a number of his companies. He also rejected the husband's evidence that a number of his financial records were stolen from his accountant and was not satisfied that the 1997/98 records provided by the husband were reliable. The husband failed to call the accountant as a witness and the Full Court held that such failure of the husband to call the accountant was an appropriate matter for the Trial Judge to rely upon when drawing adverse inferences against the husband. The Full Court noted that the findings of the Trial Judge in respect of substantiated undisclosed income were based on an acceptance of the wife's evidence of the husband's statements, a rejection of the husband's denials, the husband's history in cash dealings, the discrepancy between details provided to the court as compared to the details provided to the lending institution, and the views of the husband's valuer and held that there was clearly evidence upon which the Trial Judge could properly make such findings.

The husband's valuer had given evidence that caravan park occupancy rates disclosed in the books of account of the husband were "less than one would expect to achieve with fair or average management".

SOME NON-DISCLOSURE TYPES

- The blatant deceiver
- The secretive business owner
- The person of straw (with the benevolent relative/partner)
- The hopeful investor (all the capital has been applied but the results are not yet apparent)
- The small business operator with the big contract pending
- The international money mover

- The warehouser (the assets are safely parked and maintained)
- The obstructive procrastinator
- The puppet, sham or alter ego (the party is the defacto owner directing another on a day to day basis)
- The money launderer

These and other non-disclosure types will be discussed further at the seminar.

CHECK-LIST IN RESPECT OF HIDDEN ASSETS

Listed below are some examples of how assets may be hidden or undervalued:

- Failure to disclose or acknowledge cash takings or skimming cash from a business owned. This may give rise to a false impression as to the value of the business or the party may actually have money physically hidden in cash in some unknown place or in an inaccessible overseas bank account.

- Assets simply "hidden". Whilst generally all efforts to hide assets are secretive not all are sophisticated. A colleague recently related a situation where a party had secreted approximately $200,000 in cash by burying it in the backyard. This of course was not an uncommon method of hiding money in eras gone by.

- Failure to disclose assets or resources held overseas. These may include hidden bank accounts. One example of this involved an international pilot who on each trip overseas would make a cash deposit to a secret bank account well beyond the reach of his partner. Others may choose to hide assets in "blind trusts" where there are no appointors and no specified beneficiaries.

- Undervaluing assets. For example, see below re undervaluing assets in self-managed superannuation funds.

- Purchasing or registering assets in the name of "friendly" parties such as a new partner, family members or close friends.

- Sale or transfer of business assets or shares at an undervalue to friendly parties or with the intention of **warehousing** them until the dust settles.

- Provision of a benefit to a related party. For example a new partner might have become involved in or employed by the business at an attractive remuneration and/or with other benefits conferred.

- Failure to include goodwill value of a business or undervaluing of the goodwill factor.

- Failure to disclose assets acquired post separation. Sometimes a party will assume that the other party has no knowledge of an asset acquired after separation and simply choose not to disclose it. I recall one case where a party failed to disclose an investment property bought after separation possibly being blind to how easy it is for a party to search for all real estate held. Needless to say, it was most embarrassing for the client to stick to her story in her affidavit and then be confronted with the facts in the witness box with a finding of "lying" the result.

- Failure by a party to disclose all superannuation interests held.

- Postponing payments due to accrue to a party until matters are resolved.

- Delay in preparing up to date information. It is not unusual for a party to delay instructing accountants to prepare up to date financial statements which when prepared may indicate a better financial position than is being portrayed. Certainly if you are acting for the other party you should endeavour to obtain access to the most recent financial information and it may be necessary to delay proceedings until up to date

financial information is available or have a forensic accountant attend at the business and inspect source financial records which may indicate the true position.

- Omission of loan accounts in the balance sheet of companies or partnerships as assets due to parties and the inventive creation of loan accounts and debts and inclusion as liabilities.

- Advances made to a party or a couple by a party's family during the marriage may suddenly become a loan repayable to the family and even where the advance is clearly documented as a loan, it may have been the intention of the party never to seek repayment and suddenly it becomes repayable and recovery is sought.

- Omission of work in progress in a business or partnership.

- Prepayments of Tax or credits arising from previous losses carried forward.

  The parties may be entitled to credit previous tax losses against future income and to carry these losses forward at significant financial benefit. Such credit may be an asset of the parties as may any prepayment of taxation.

- Contracts not yet performed. A party may be a party to a contract which has not yet been performed and which may be of substantial value.

- Share options. Share options which have been included for instance in someone's employment package but not yet allocated could have substantial value. (See comment under bonuses below).

- Bonuses. Bonuses could be based on performance in a particular year with payment deferred to a subsequent year. For example, a company deriving the benefit of a substantial government contract may choose to allocate bonuses on completion of the

contract in a later year. Whilst such bonuses may be entirely discretionary there may be more than a reasonable expectation by a party that a bonus is to be paid.

An extreme but very public example of this is contained in payout arrangements for Commonwealth Bank CEO David Murray on his forthcoming retirement from the bank. In addition to very substantial superannuation, annual and long-service leave entitlements, final contractual payments and incentive payments deferred from previous years, Mr Murray will reportedly potentially derive the benefit of 268,000 shares that might come his way in the coming years as performance bonuses which at the current share price would be worth in excess of $10M.

- Diversion of Funds. For example, a testator may choose to protect an inheritance from divorce proceedings by leaving a party's share to someone else, perhaps a sibling. The downside is that on the death of the testator the sibling will actually be entitled to that share and may not want to return any part of it when you want it.

- Collusion with an employer to delay raises or bonuses until after the divorce.

- Salary paid by a business to a non-existent employee or money paid from the business to someone close such as a parent or girlfriend for services never in fact rendered.

- Debt repayment to a friend for a debt that doesn't exist.

- Delay in signing long-term business contracts or renewing leases until after the divorce.

- Similarly arrangements may be underway for a private company to be bought out by a public company at a substantial premium on share values. In such circumstances the party controlling the private company may have more than an inkling that the deal will come off further down the track and knowledge of the likely value per share based on the price to be paid for the company by the predator or white knight. In such case that party

could be expected to hurry property settlement negotiations along so as to have a settlement in place prior to the windfall occurring. The advantage to the party lies in the knowledge that party has as to the likelihood of the takeover occurring, knowledge which is most likely denied to the other party.

- A failure to cooperate in relation to disclosure may in itself be a strong indication that a party has something to hide. Such failure to cooperate may be part of a strategy to exhaust the resources of the other party by delaying and obstructing the proceedings. In ***Briese (1986) FLC 91-713*** the Trial Judge held that the husband's attitude was one of basic lack of co-operation and assistance in relation to the ascertainment of the financial facts and that the husband acted upon the basis that he was under no positive duty to endeavour to clarify his position so as to reduce or limit the expenditure of money by the wife in making the investigations.

- Manipulation of doubtful debts and write offs. The write offs might simply be cover ups for moneys deposited to an account other than the business account.

- Manipulation of stock figures.

- The second receipt book. Sometimes a second receipt book is held to acknowledge cash receipts which are not then processed through the accounting system.

- The holding of assets including cash in unidentified safe custody boxes.

- Sometimes people openly admit they usually have large cash holdings on their premises and then feign a robbery. Going through the steps of reporting the incident to police or lodging claims with insurance companies give the alleged loss an air of authenticity.

Whether assets can be easily hidden often depends on the type of asset you are talking about. For example, a small amount held in a cheque account can be easily hidden by making a few ATM

withdrawals. Similarly, assets like furniture, clothing and jewelry can be hidden or moved by one spouse and the other spouse may be unable to establish their whereabouts or prove they were wrongfully taken. Investments like shares, businesses and real estate are harder to hide as there is usually a paper trail which can be identified and followed.

- Lifestyle is often an indicator of funds being available which may not have been disclosed or acknowledged. This is particularly so where discretionary items are purchased in a manner which is out of character for the party. The lifestyle of the party should be contrasted with the income which is being reported to see if there are discrepancies which require closer examination and which may indicate that unreported income is funding the lifestyle. Inquiry into unexplained lifestyle or extravagant expenditure could leave it open to a judge to draw inferences of undisclosed income. Disparity between lifestyle and declared income is commonly used by taxation authorities as a basis for conducting audits particularly in the case of "high flyers".

WHERE DO YOU LOOK

- The search for possible hidden assets begins with the initial client interview. Financial circumstances and intrigue within families differ and the starting point is often the client's perception and knowledge of how the parties lived financially and of changes or events that may have occurred.

- Establishing the client's perception of when serious matrimonial problems arose indicates the time when there was motivation for a party to change financial patterns.

- Subtle changes picked up by the client such as the manner in which the family's finances were being handled or when the atmosphere in the household altered may provide the lawyer and forensic accountant with a starting point for the investigation.

Jane's Story:

Among the other emotional accusations made during her divorce, Jane informed her attorney that throughout the year immediately before her separation, she had noticed that her husband, John, had changed the way he handled their finances. Bank account balances were depleted, John's paychecks were no longer deposited regularly into their joint accounts and creditors began to demand payment on delinquent accounts. As Jane described other unusual occurrences, such as more frequent business trips for John during this time, her attorney recognized the probability that John had hidden significant assets from his soon-to-be ex-wife. Unless they are located, these assets cannot be included in the divorce settlement. (Michaelson, William M, 'Divorce: a game of hide and seek?', *Journal of Accountancy* Vol 181 (3), p 67).

There can be obvious signs such as for example where you have been used to living a high lifestyle without money being short and suddenly the other party tells you that funds are tight and you will have to cut back on necessaries.

- As stated above, the starting point in terms of documents is usually the party's sworn statement of financial circumstances (Form 13) which details a party's income sources, liabilities, expenditure, nature and value of property owned, superannuation entitlements and financial resources. Once such statement is provided, the details contained in it can be readily compared with information available from other sources such as
  a) Tax returns
  b) Real property searches
  c) ASIC searches of shareholdings, directorships, register of charges etc
  d) Balance sheets and profit and loss accounts of companies, partnerships, trusts and superannuation funds
  e) Bank statements
  f) Quarterly BAS statements.

- Income tax returns - These should provide details of the source of all of a party's income whether derived from employment, or investment. The return could also help identify

sources of income such as interest from bank accounts. Dividend income indicates the ownership of shares and income and capital distributions from trusts and partnerships suggest the person is an eligible beneficiary in a trust or a partner in a partnership. A claim for superannuation contributions in the tax return could lead you to a self managed superannuation fund. Tax returns from prior years should be analysed to determine the existence of prior tax refunds. These may be significant and their disposition should be traced.

- Pay slips - These may reveal items such as fringe benefits, voluntary contributions to superannuation and other voluntary deductions. Similarly, Income Tax Assessment Notices should be accessed.

- Depreciation schedules may reveal an undervaluing of certain assets. One should look at the present value of an asset acquired at an earlier time and subsequently depreciated.

  In similar vein, a business may carry assets on a balance sheet which have been depreciated over time to a value far below what they might bring on the current market. Furthermore, assets which have been fully depreciated may have been written off the books entirely even though the assets may still exist and be of significant value. A physical inspection of the business by a suitably qualified person would be the best way of revealing the true position.

  Similarly with assets in a self managed superannuation fund. One needs to be very careful of self managed superannuation funds where assets may be significantly undervalued. For example, a property held by the fund may not have been revalued over time and may still be noted at the original purchase price. To obtain a true account of an interest in the fund you need to ensure that assets such as real estate are taken into account at their current value. You may also need to take account of any CGT liability arising for the fund, if it is necessary to roll out one party's entitlement, as the sale of an asset to roll out an entitlement may trigger a CGT liability.

- Bench marks – Takings of a particular business can be measured against bench marks in that particular industry.

- Personal financial statements or loan applications – These are often powerful discovery tools in divorce. Such statements often reveal a party's financial situation in an uncomplicated form. Furthermore, the person applying for the loan is generally likely to portray his or her financial situation in the most beneficial light to maximize the chances of securing the advance and thus the tendency is to include, rather than omit, assets or interests and possibly insert inflated values. While one now retired Family Court Judge was heard to utter from the bench some years ago "everyone knows that people exaggerate their financial position in loan applications", it is for this very reason that the documents can be powerful in the divorce context, and may contrast significantly with the values stated in the client's Statement of Financial Circumstances raising significant credibility issues. Because the would-be borrower wants the funds the loan officer is likely to see the rosiest picture.

  It is not unusual for a party to not be paying child support and yet be able to convince a bank to make substantial advances on the basis of a loan application.

- Credit card statements are of great assistance in establishing lifestyle issues and discretionary spending and often provide a wealth of information when subpoenaed. Unusually large amounts either credited or debited or unusual expenditures could arouse suspicion or warrant further investigation. If a party's spending is unusually high then this could be a sign of hidden assets. Credit card statements could provide details of travel and overseas expenditure, extravagant lifestyle including gifts (to a possible love interest).

- It is usually prudent to look at financial statements for a business over several years to assess and demonstrate changes over time and to obtain an understanding of the trends in an entity's finances.

- Quarterly BAS statements should be accessed for businesses. They should provide a mud map of how the business is travelling for the relevant period.

- Databases and registries should be fully utilized and most are now easily accessible through technology. Public records often provide substantive evidence of assets and transactions. Real property searches can be readily conducted as can searches of ASIC records and motor vehicle details.

- Telephone accounts may also be telling and indicate overseas interests.

- Websites can also reveal significant information about a party including other businesses with which he or she may be linked.

- Passports would indicate travel history of the party as would frequent flyer information.

- It is usually easier to obtain information before separation than after so if your client suspects that his or her spouse may attempt to hide assets then it may be best to start investigating the household and business finances either before or around the time of separation. Clients in these circumstances may be well advised to make copies of important documents such as past tax returns, company or business financial statements, bank statements, pay slips and other documents reflecting joint or sole assets and financial circumstances.

  If the client is concerned that his or her detective work may be discovered then the copies of documents could be left with their solicitor or outside the home just in case they are required at a later date. I recall one client who had very little knowledge of her husband's

financial circumstances and was surprised to find at around the time of separation that he had a very substantial share portfolio which he had managed to keep entirely hidden over many years.

WORKING WITH FORENSIC ACCOUNTANTS

- A forensic accountant in Family Law has special expertise or experience in unravelling complex financial structures and valuing differing business entities or pinpointing discrepancies in financial statements requiring further clarification and then carefully framing questions or requesting particular documents or pursuing lines of inquiry that might assist in clarifying these discrepancies.

- The forensic accountant then usually encompasses his or her rationale and findings in a report or reports which are prepared to assist the parties in resolving matters or to assist the court in making findings or reaching conclusions on matters for determination under the Family Law Act.

- The report will not only contain the opinion of the forensic expert but should refer to the information, assumptions and references upon which that opinion is based.

- While the notion of following paper trails and locating hidden assets appears more romantic or exciting, one suspects that far more of a forensic accountant's time is spent unravelling and clarifying transactions and valuing entities than in exploring rabbit holes and locating assets, although no doubt careful sifting and assessment of financial information often leads to further information and possibly assets being revealed.

  The Family Law Rules 2004 made dramatic changes to the provision of expert accounting evidence in the Family court. In most cases expert accounting evidence will be provided by a single accounting expert and this brings with it significant

changes to how parties and their lawyers are to deal with joint or court appointed experts including a requirement that instructions to experts must be in writing and must, inter alia, provide a full and frank disclosure of information and documents that will help the expert witness perform the expert witness' function (Rule 15.54(2)(e)).

I do not propose to deal in any detail with the provisions for appointment of joint or court appointed experts or dealings with them. However, shadow experts may be retained by each of the parties to review the opinions of the single accounting expert and forensic accountants retain a role in assisting parties and their lawyers to locate hidden assets and define the extent of the pool of property and my interest in this paper is primarily restricted to those aspects.

- It is of the utmost importance that there is a good working relationship between the lawyer and forensic accountant in a particular case. The lawyer needs to ensure that the accountant is properly briefed on the issues requiring analysis or investigation and it is likely that there will be regular ongoing communication between accountant and lawyer as the matter proceeds.

- In utilizing the services of forensic accountants I have found the following aspects to be of particular importance but not necessarily in order:
    - Obviously an essential prerequisite is competence and experience. While credentials and experience can be gleaned from a CV it often pays to speak to other practitioners in the field to ascertain how they have found dealings with a particular forensic accountant that you are considering engaging. This should provide you with an idea of strengths and weaknesses that you will more than likely not be able to extract from a CV.

    - The accountant needs to be able to communicate at a number of different levels. He or she will interact with the party or parties in the course of the investigation, with the lawyer or lawyers in the case of a court or joint

appointed single expert and ultimately with the court itself, providing testimony and answering questions as an expert witness (either single or alternate expert where the court's permission is obtained).

- The accountant needs to have a confident and articulate but not aggressive demeanour, be used to meeting and dealing with people at all levels and experienced in writing reports and giving evidence and have the necessary resilience to withstand cross examination. There are two different types of reports, the first being a confidential report to the client and or lawyer and secondly an expert witness report for production to the court. The second report is usually filed under affidavit and is prepared on a "stand alone" basis in that it will not only include the expert's opinion but also refer to the information and assumptions on which the opinion is based. The report needs to be easy to follow and so far as practicable, written in clean readily understood English.

- In a case where the accountant is engaged to assist in locating assets, it is important that a meeting be arranged between client and accountant at an early stage of the process. This will assist in developing a rapport and further, by appropriate questioning the accountant may be able to glean significant information from the party which may assist greatly in achieving a result. It is also important that the accountant have confidence in the client's integrity and in the instructions given.

- The accountant needs to comply with practice directions and rules of court pertaining to experts. If a single or joint appointed expert or as an alternate expert, then the accountant needs to adhere to strict impartiality and ensure dealings with the parties, lawyers and the court are conducted with the utmost fairness and integrity.

- The Family Law Rules 2004 details what a single or court appointed expert's report must contain (Rule 15.63) and how questions may be put to the single expert prior to trial (Rule 15.65).

- In any case, for the accountant's opinion to be sustainable it is vital that it does not rest on either inaccurate or biased information or unlikely assumptions. A balanced view of the evidence is essential.

- Similarly with a shadow expert, integrity, impartiality and objectivity are essential if his or her opinion and report are to be of value although the shadow expert can also assist in devising tactics and responses for use by the party in the course of settlement negotiations.

- The expert also needs common sense, knowledge of life and the ways and means of people and the creative methods they can devise to hide assets. Such knowledge is undoubtedly of assistance.

- Not every separation requires a forensic examination.

- Generally you just know from experience when to engage a forensic accountant.

  Clearly in complex cases involving a number of corporate entitles or trusts, a forensic accountant may be required to assist in unravelling the financial structure and lifting the veil to identify the true financial position of the party.

  Similarly where there is specific knowledge of non disclosure or a high degree of suspicion that all income and/or all assets of the other party have not been discovered then a forensic examination should be undertaken.

- Regardless of whether the accountant is engaged as a single or alternate expert or simply to conduct forensic investigation, it is essential that the accountant is provided with full and detailed instructions and appropriately briefed.

- The lawyer should determine and define the precise purpose for which the report is to be prepared and provide as much relevant information as possible to assist the expert accountant, including copies of affidavits, financial statements and all relevant material held including details of material subpoenaed and copies of same if available.

- It is also important that clear and definite arrangements be made and communicated in relation to payment of fees to the expert accountant for his retainer. There is nothing worse than for an expert to find after carrying out the work required, that proper arrangements have not been put in place to ensure his or her fees are paid in a timely manner.

- The expert accountant must also be available, as during the course of the litigation it will be necessary for the lawyer to communicate with the accountant about developments in the case or requirements of the process and this is facilitated by clear and accessible communication.

- The role of the forensic accountant as shadow expert goes beyond simply giving expert evidence (where permitted by the court) as the expert may be required to assess and advise in relation to the strengths and weaknesses of the other party's case, assist in devising strategies to deal with the other party's arguments and assess and respond to the strengths and weaknesses of the other expert's report.

  Forensic accountants may also be used to comment on proposed terms of settlement including taxation and capital gains issues and business break up.

Proper use of discovery is a critical aspect of assessing these strengths and weaknesses.

PRE-EMPTIVE STRIKES – USE OF SUBPOENAE, ANTON PILLER ORDERS AND MAREVA INJUNCTIONS

- The issue of subpoenae and the obtaining of Anton Piller orders and Mareva injunctions are tools available to parties and their lawyers to assist in locating and identifying or preventing dissipation of the asset or removal from the court's jurisdiction.

- An Anton Piller order is a mandatory injunction requiring the respondent to permit the applicant to enter the respondent's premises to search for, inspect and remove documents or things specified in the order.

- Effectively, an Anton Piller order is one for the seizure of evidence to enable a party to be able to prove the existence of an undisclosed asset.

- The Anton Piller order derives from the decision in ***Anton Piller KG v Manufacturing Processing Ltd*** **[1976] Ch 55 at p 62**, where Ormrod LJ specified three essential pre-conditions:-

    1) There musts be an extremely strong prima facie case;
    2) The damage, potential or actual, must be very serious for the applicant;
    3) There must be clear evidence that the defendants have in their possession incriminating documents or things and there is a real possibility that the defendants may destroy such material before any application inter partes can be made.

Division 14.04 of the Family Law Rules provides for a party to apply for an Anton Piller order.

The order may

(a) require a respondent to permit the applicant either alone or with another person, to enter the respondent's premises and inspect or seize documents or other property;
(b) require the respondent to disclose specific information relevant to the case; and
(c) restrain the respondent for a period from informing anyone other than his lawyer that the order has been made.

The applicant may apply for an Anton Piller order without notice to the respondent (and it is invariably made on this basis).

Division 14.04(3) sets out the requirements of the affidavit to be filed in support of an application for an Anton Piller order including the reason the applicant believes the respondent may remove, destroy or alter the document or property unless the order is made and a statement about the damage the applicant is likely to suffer if the order is not made.

Otherwise the affidavit should include a description of the document/property to be seized/inspected; the address of the premises where the order is to be carried out; a statement about the value of the property to be seized and if permission is granted, the name of the person who the applicant wishes to accompany them to the respondent's premises.

If an order is made, the applicant must serve a copy of the order on the respondent when the order is acted upon (Division 14.04(4)).

General conditions/undertakings which might be required or imposed when an order is made include:

1. Execution during business hours;
2. Service and execution or order supervised by a solicitor other than a member of the firm of the solicitors for the applicant;

3. Applicant may be required to give an undertaking that independent legal advice will be made available to the occupier;
4. Solicitor supervising execution to prepare a written report about the execution and serve it on the respondent and present it to the court as soon as possible;
5. Inventories of items seized should be prepared and occupant given permission to check inventory and given a signed copy of the inventory before items are removed;
6. Material seized may be required to be kept by independent person to be held without disclosure to the applicant until inter partes hearing of the matters in issue.
7. Safeguards should be included in the order that will prevent applicants in person searching for and examining the documents of a trade rival.

(These conditions and undertakings are extracted from a Federal Court Practice Note issued 8 April 1994).

The application should include the orders proposed in detail and in relation to this and Anton Piller orders generally reference is made to a paper entitled "Searching for Gold etc" prepared by The Honourable Justice C E Martin of the Family Court of Western Australia to the 9th National Family Law Conference in Sydney 2000 where additional points noted include the following:

- The applicant must give a written undertaking as to damages.

- Because the orders are sought ex parte, the applicant is required to disclose to the court all matters which are material to the court's decision whether or not to grant the relief sought.

- The court should be advised who will actually attended the execution of the order and it is suggested that if a forensic accountant is involved then he or she should attend.

- Upon providing the order to the other party, it should be explained in the presence of a witness, and the party invited to contact his or her solicitor to invite their attendance. If the solicitor elects to attend, the inspection ought not to proceed until the solicitor arrives.

- The other party's solicitor should be allowed to identify privileged documents which should be set aside and not inspected.

- All documents to be removed should be squarely caught by the order and itemized in an inventory which, when complete, should be signed by both solicitors as a correct record.

- The other party's solicitors should be present at court when the documents are lodged.

- After the order has been executed, an affidavit should be filed setting out the details of the inspection, and annexing a copy of the inventory.

- In regard to execution, in the Anton Piller case, Lord Ormrod said at p 62:-

  "Great responsibility clearly rests on the solicitors for the plaintiff to ensure that the carrying out of such an order is meticulously and carefully done with the fullest respect for the defendant's right of applying to the court, should he feel it necessary to do so, before permitting the inspection."

  Examples from the cases of ***Anton Piller*** orders being made include the following:

  Mazur v Mazur (1992) FLC 92-305

  An Order was made in circumstances where the only property was a briefcase containing $20,000 in a closet in the former matrimonial home. The husband denied the existence of the briefcase and money. The wife applied for an order and what tipped the scales in favour of making the order was evidence that the husband had previously disclosed in a statement to the Housing Commission that the parties had around $20,000 in savings and the fact that this amount of money was the entire property pool of the parties. The court held that it is essential for the court to take steps, when it is necessary, to permit property to be ascertained and to be retained.

Talbot v Talbot (1995) FLC 92-586

The wife made an application for an order against the husband and 3 companies and against his solicitor (and fellow director/shareholder of the 3 companies). The wife had been fraudulently induced to enter into consent orders. It was found, based on the elements of the Anton Piller test, that they were made out in relation to the husband and one corporation but not the solicitor or the others. It was held by His Honour Justice Lindenmayer that to grant an order against someone who is not, and will not be a defendant in an inter partes application would be "to introduce an unwarranted extension of the field of operation of what is, in any event, a very draconian procedure."

A Mareva injunction is an order which temporarily freezes assets to prevent dissipation of the asset within the jurisdiction of the court, or removal of the asset from the court's jurisdiction.

Division 14.05 of the Family Law Rules sets out circumstances where a party may apply for a Mareva order restraining another person from removing property from Australia, or dealing with property in or outside Australia.

- Under Division 14.05(1) a party may apply for a Mareva order if:
  (a) the order will be incidental to an existing or prospective order made in favour of the applicant; or
  (b) the applicant has an existing or prospective claim that is able to be decided in Australia.

- Division 14.05(2) makes it obligatory for the applicant to file an affidavit in support of the application which includes the following:
  (a) A description of the nature and value of the respondent's property both inside and outside Australia;
  (b) The reason the applicant believes the respondent's property may be removed from Australia and why dealing with the property should be restrained.

(c) A statement of damage likely to result if an order is not made.
(d) A statement identifying anyone other than the respondent who may be affected by the order and how they may be affected.
(e) The amount and basis of the substantive claim and if the application is made ex parte details of a possible response to the claim.

In ***Waugh and Waugh (2000) FLC 93-052*** the Full Family Court held that before the Family Court can make an interlocutory injunction, it must be satisfied that a risk of disposal of property in order to defeat a judgment is evident.

The Full Court relied on the principles of Mareva injunctions adopted by the High Court in ***Jackson v Sterling Industries Ltd (1987) 162 CLR 612*** where in his majority judgment Deane J relying on an earlier statement of principle by Lord Denning MR stated that:

"As a general proposal, it should now be accepted in this country that a Mareva injunction can be granted …if the circumstances are such that there is a danger of [the defendant] absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied."

The usual undertaking as to damages is required.

A useful guide to applications for Mareva injunctions can be found in Sullivan QC, "Mareva Injunctions – Prevention and Conduct of Applications for (and opposition to) a Mareva Injunction" (1992) 8 Aust Bar Review 205.

The service of a subpoena to produce documents and/or give evidence is a process with which practitioners are familiar.

In ***Lucas Industries v Hewitt (1978) 18 ALR 555*** it was stated (at p 570) that:

"The purpose of the process of subpoena is to facilitate the proper administration of justice between parties. For that purpose it is the policy of the law that strangers who have documents may be put to certain trouble in searching for and gathering together relevant documents and bringing them to court. It is according to the same principle that persons who have knowledge of facts are put to the inconvenience of being brought to court and are required to give evidence."

Part 15.3 of the Family Law Rules details the requirements in relation to the issuing of subpoenae some of which have changed significantly with the introduction of the 2004 rules. If the subpoena properly complies with the rules including in relation to service then it must be complied with and Part 15.36 provides that non compliance may result in the issue of a warrant for the arrest of a person who fails to comply.

Part 15.19 imposes certain limitations as to time for issuing a subpoena and in the case of an application for Final Orders a party may only ask the court to issue a subpoena after the issue of a trial notice.

Part 15.21 limits the number of subpoenae that a party (other than the Child Representative) may seek to issue to 3 for an Application in a Case or a Child Support or Maintenance Application.

Subpoenae then are a most useful tool available to parties or practitioners to assist in production of records which may divulge hidden assets.

Practical examples of where service of a subpoena may be useful include the following:

- **Bankers or financial institutions used by a party** (bank statements, loan applications, bank officers' diary notes, correspondence, internal memoranda, supporting documents and files).

- **Accountants** – the accountant's file is generally not subject to professional privilege so the entire file including working papers and memos can be subpoenaed. Information can be sought on files regarding the party and anyone having dealings with him or her. Where the respondent alleges he is managing an asset on behalf of friends or family, telephone attendance records and details as to whom the account issues could be interesting. Other information such as minutes of meetings, changes to structure or significant changes to loan accounts or treatment of assets can be helpful.

- **Defacto spouse or partner** – records may show details of moneys or property received or paid on behalf of the partner by the party and moneys held on behalf of the party by the partner. Attempts at avoiding the Family Court can involve resources being transferred to the new partner or the partner becoming involved in the business at an attractive salary and with other benefits conferred. The forensic accountant may wish to examine information back over several years from this person.

- **The compliant family member** – records of value may include details of day to day operators of entities which the party is controlling even if not the legal owner, evidence of loan agreements and gifts over a period of time or trust distributions allocated but not paid may be helpful.

- **Credit card provider** – these are invaluable in providing evidence of lifestyle and revealing payments for the benefit of third parties, overseas travel etc.

- **Solicitors** – trust and office ledger records may be revealing and together with non family law files such as conveyancing, tax planning and commercial files may be relevant. Commercial files may reveal advice as to structuring and sales and purchases of assets.

- **Business organizations and employers** – particularly for employment and contractual arrangements including details of any changes in salary package or salary sacrifice.

Note – Part 13.30 enables a party to request the employer of another party to give particulars about:

- the employer's indebtedness to the employee.
- The employee's present rate of earnings, or of all the earnings of the employee that became payable during a specified period, or
- The employee's conditions of employment.

An order for compliance can be obtained if the employer refuses, or fails to respond to the requesting party's request.

As stated above, Division 13.4.2 of the Family Law Rules sets out the procedure for obtaining the production of documents by a person who is not a party to a case.

This is a procedure for requesting production of documents which may otherwise be sought under a subpoena.

Under part 13.38 a requesting party must pay the reasonable costs incurred by a non-party in producing a document with such costs to be ordered or agreed.

In this paper I have examined the duty of disclosure as it applies in family law matters and looked at methods used to hide assets including tell tale signs and steps which can be taken to uncover a party's true financial position.

While one cannot be certain in any matrimonial matter that all assets and relevant transactions have been revealed, steps can be taken to maximize the opportunity for this possibility to be achieved.

One such step is for the lawyer to engage a competent and experienced forensic accountant who can apply his or her skills in identifying the asset pool and by careful analysis of financial

transactions and patterns invariably provides valuable assistance in ensuring that the clearest possible understanding of the true financial position of the party or parties is achieved.

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