

Disclosure, Hidden Assets & Working with Accountants to Locate Them

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INTRODUCTION

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, and one is often enlisted by parties or their lawyers to provide an independent expert’s viewpoint and report on family financial 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 analysing 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 co-operation 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, timely and comprehensive manner.

OBLIGATION TO DISCLOSE

In proceedings for property settlement, each party has an obligation to make a full and frank disclosure of his or her financial position and all information relevant to an issue in the case.

In *Oriolo and Oriolo (1985) FLC 91-653* the Full Family Court referred with approval to the words of **Smithers, J** in *Briese (1986) FLC 91-713* 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.

Disclosure is a complex area of the law and in this paper I am not purporting to do other than touch on some of the important provisions.

Rule 13.01 of the Family Court Rules sets out the 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 (see **Jansen** – “*Negotiating the Labyrinth of Hidden Assets in Order to Uncover and Recover Them*” – presentation to Family Law Masterclass May 2005).

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.

Under rule 13.15 (2); a party commits an offence if the party makes a statement or signs an undertaking which the party knows, or should reasonably have known, is false or misleading in a material particular.

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.

Reference should also be made to the Federal Magistrates Court Rules 2001 and particularly Part 24 relating to Disclosure and Production of Documents in Financial Matters together with Parts 14 and 15.

EXAMPLES OF NON-DISCLOSURE FROM THE CASES:

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

A 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, jewellery 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 give 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 (1993) FLC 92-361***, The Full Court found that the evidence of the wife's 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 (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 (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 (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".

A more recent case of interest was *Nyles and Nyles [2011] Fam CA 565* where the parties signed terms of consent and a Binding Financial Agreement however the wife's company was in the process of converting from a private company to a public company. The company floated on the stockmarket less than two months after the agreement was signed with the wife selling her shares and making a large profit. The husband sought to set aside the Binding Financial Agreement by bringing a s79A Application for reason of non-disclosure of relevant information and the fact that he relied on the wife's assertion as to the value of the assets in making the agreement. A complicating factor was that the wife's shares were subject to strict confidentiality obligations however this was not considered a bar to the requirement for full and frank disclosure.

The husband was advised by his solicitors that it was not in his best interest to enter into the Binding Financial Agreement until further disclosure was to hand. The husband therefore failed in his Application to set aside the consent orders and the BFA as it could not be said that he was induced to enter into the BFA by the misconduct of the wife and had made an informed decision. This was despite the fact that the court actually found that the wife had failed to make full and frank financial disclosure and to some degree acted fraudulently.

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

WARNING SIGNS THAT A PARTY IS HIDING ASSETS – A CHECK LIST

Following 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 as cash in some undisclosed place or an inaccessible overseas bank account.
- **Assets simply “hidden”.** Whilst generally all efforts to hide assets are secretive, not all are sophisticated. For instance, burying money was not an uncommon method of hiding it in eras gone by (and no doubt still is).
- **Failure to disclose assets or resources held overseas.** An 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. Similarly assets including cash can be held in unidentified safe custody boxes. Others may hide assets in offshore tax havens in “blind trusts” where there are no appointors and no specified beneficiaries.
- **Undervaluing assets** - For example, undervaluing assets in balance sheets or in self-managed superannuation funds or having outdated valuations which distort the value of a party's interest.
- **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. Alternatively, a salary may be paid by the business or debt repaid to a non-existent employee or money paid from the business to others for services not actually rendered.
- **Failure to include a goodwill value for a business or undervaluing 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. Needless to say, this can cause grave embarrassment if the asset comes to light.
- **Postponing contractual payments or benefits due to accrue to a party until matters are resolved.**
- **Delay in preparing 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 acting for the other party, you should endeavour to obtain access to the most recent financial information and if necessary delay proceedings until such information is available or have a forensic accountant attend at the business and inspect source financial records to ascertain 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. A further example might be the creation of a loan account by the transfer of assets to an entity at a grossly inflated value.
- **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 or undervaluing stock on hand which affects not only profit but asset value.
- **Prepayments of Tax** or non disclosure of credits arising from previous tax losses carried forward.
- **Contracts not yet performed.** A party may be a party to a contract which has yet to be performed, but be of substantial value.
- **Share options** - which have been included for instance in someone's employment package but not yet allocated, could have substantial value. (These particularly relate to company executives).
- **Bonuses** - could be based on performance in a particular year with payment deferred to a subsequent 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. Similarly a party may collude with an employer to delay pay rises or bonuses until after the divorce.

- **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 decline to return any part of it when the party seeks its return.
- **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. 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.
- **The second receipt book.** Sometimes a second receipt book is held to acknowledge cash receipts which are not then processed through the accounting system.
- Sometimes people purport to have large cash holdings on their premises and then **feign a robbery**. Reporting the incident to police and lodging an insurance claim gives the alleged loss an air of authenticity.

Whether assets can be easily hidden often depends on the type of asset you are talking about. A small amount in an everyday account is easily hidden by a few ATM withdrawals. Similarly, assets like furniture, clothing and jewellery can be hidden or moved by one spouse with the other spouse unable to locate them or prove they were taken. Investments like shares, businesses and real estate however are harder to hide as there is usually a paper trail which can be identified and followed.

IDENTIFYING AND LOCATING ASSETS

TRACING ASSETS – WHAT DO YOU LOOK FOR AND WHERE?

- **The search for possible hidden assets begins with the initial client interview.** Financial circumstances and intrigue within families differ and a 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 pay cheques 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 necessities.

- **Lifestyle is also 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 uncharacteristic 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”.
- **The starting point in terms of documents** is usually the party’s sworn statement of financial circumstances (Form 13). The details in the form 13 can be readily compared with information available from other sources such as
 - Tax returns
 - Real property searches
 - ASIC searches of shareholdings, directorships, register of charges etc
 - Balance sheets and profit and loss accounts of companies, partnerships, trusts and superannuation funds
 - Bank statements
 - Quarterly BAS statements.

Public databases are now easily accessible through technology and provide evidence of assets and transactions.

In relation to the available searches and avenues for investigating generally, see **Jansen, 2005**.

- **Income tax returns** - should provide source details of a party’s income whether derived from employment, or investment. 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 traced. Interest claims may point to geared investments.

- **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.
- Similarly, a business may carry **assets on a balance sheet which have been depreciated** over time far below their current value. 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. 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.** (Despite requirements for trustees to regularly update valuations). 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.
- **Benchmarks** – The financial performance of a particular business can be measured against benchmarks for that particular industry. The forensic accountant if sufficiently experienced would be aware of and have access to these benchmarks.
- **Personal financial statements or loan applications** – These are often powerful discovery tools in divorce. 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, the tendency being to include, rather than omit, assets or interests and insert the most favourable values. The loan application will

often prove fruitful for cross examination and production may often be strenuously resisted.

- **Credit card statements** assist greatly in establishing lifestyle issues and discretionary spending and often provide a wealth of information when subpoenaed. Large payments or debits could warrant further investigation. Unusually high spending could be a sign of hidden assets. Statements could also provide details of travel and overseas expenditure and extravagant lifestyle including gifts (to a possible love interest).
- It is prudent to analyse **financial statements for a business over several years** to assess and demonstrate changes over time and obtain an understanding of the trends in an entity's finances.
- **Quarterly BAS statements in the current financial year should be accessed for businesses.** They should provide a mud map of how the business is travelling in the current year since the preparation of the previous year's financial statements.
- **Telephone accounts** may be telling and indicate overseas interests.
- **Websites** can provide material information including details of other businesses with which a party may be linked.
- **Passports** will show travel history of the party - as would frequent flyer information.
- **The court file** in respect of a party's previous separation may be helpful in revealing assets available to a party. It is hard for instance for a party to deny the beneficial ownership of an asset or trust property if he confirmed it in the earlier proceedings. (See Walls and Walls [2011] FMCA fam 882 where the court found from the documents the husband himself provided to the court in his previous property settlement proceedings "that there is a wealth of information not disclosed in the present proceedings").
- **It is trite but true that it is usually easier to obtain information before separation** than after. Clients may be well advised to make copies of important financial documents, if suspicious of financial misconduct.

WORKING WITH THE FORENSIC EXPERTS

WHAT IS A FORENSIC ACCOUNTANT?

A forensic accountant is an expert (in terms of qualification and experience) who has mastered accounting and who is able to apply such expertise to assist lawyers, clients and the courts to understand and apply accounting and financial issues to the law and matters in dispute.

A forensic accountant also has "extensive experience in investigations to determine solutions to disputed accounting matters, to write expert reports on their investigation, and to appear in court as expert witness" (**Telpner and Mostek, 2003**)

The forensic accountant is also able to value corporate and business entities of whatever size and complexity.

WHEN DO YOU NEED A FORENSIC ACCOUNTANT?

- Clearly not every separation requires a forensic examination.
- Generally you just know from experience when to engage a forensic accountant.
- When litigation revolves around facts that require interpretation and discovery of accounting matters, development of accounting issues, accounting opinions or expert opinion on accounting issues, then the engagement of such an expert is signalled (**Telpner and Mostek, 2003**).
- In complex cases involving a number of corporate entities or trusts, a forensic accountant may be required to assist in unravelling the financial structure, lifting the veil to identify the true financial position of a party or parties and to value such interests.
- 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.
- The early engagement of a forensic accountant may, in the right circumstances, save the lawyer time and the client money.
- 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.

WHAT SKILLS DO FORENSIC ACCOUNTANTS OFFER?

- A forensic or investigative 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 issues and discrepancies.
- The forensic accountant then usually encompasses his or her rationale and conclusions 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*.

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 experience and knowledge of a Forensic Accountant in financial analysis is often invaluable in terms of general advice and structuring a settlement.

WHAT QUALITIES OR ATTRIBUTES SHOULD A FORENSIC ACCOUNTANT HAVE?

- An essential prerequisite is competence and experience. This, of course, includes a thorough understanding of the issues raised in family law proceedings and valuation issues together with knowledge of and experience with the subject matter and knowledge of court processes and procedures. Stature and a good reputation are also important (**Bartfeld, 2002**).

- Forensic accountants “*must have command of and access to business information, financial reporting systems, accounting and auditing standards and procedures, evidence gathering and investigative techniques and litigation processes and procedures*” and “*they need to pragmatically deal with the reality underlying a broad range of facts, figures, books of account and business records*” (**Davidson and English, 2005**).
- 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 have access to all relevant documentation.
- 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 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).
- Communication skills also include the ability to give evidence without recourse to jargon and to explain complex principles in an understandable way.
- 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, assumptions and references on which the opinion is based. The report needs to be easy to follow and so far as practicable, written in clear readily understood English.
- Notwithstanding his or her appointment by one or both of the parties (in a single expert appointment), the primary duty of the forensic expert is to assist the Court.

- 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 expert needs to maintain true independence from the parties and not be an advocate for the case of the person who engaged the expert.
- The Family Law Rules 2004 detail 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. **(Bartfeld, 2002)** notes that experts must also have the ability to contemplate the possibility that they are wrong on some issues and to make appropriate concessions when confronted with contradictory evidence and furthermore that "*an ability to think on their feet is a prized commodity*".
- 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, perception, a healthy scepticism and knowledge of life and the ways and means of people and the creative methods they can devise to hide assets.

WORKING WITH THE FORENSIC ACCOUNTANT:

- Regardless of whether the accountant is engaged as a single or alternate expert or simply to conduct a forensic investigation, it is essential that the accountant be provided with full and detailed instructions and be 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 material subpoenaed and copies of same if available.

- 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.
- 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.

ETHICS AND STANDARDS:

APS II '*Statement of Forensic Accounting Standards*' and the related guidance note GN2 '*Forensic Accounting*' have been approved by both the Institute of Chartered Accountants in Australia and CPA Australia. APS II addresses issues of independence, skills and competence, reasonable care, confidentiality, professional behaviour and incorrect or misleading information and also deals with matters of quality control, the use of estimates, court imposed standards and remuneration whilst the guidance note provides guidance to forensic accountants in their undertakings as consultant accounting experts, issues of engagement, communications and meetings and reports (**Davidson and English, 2005**).

OTHER TOOLS AND APPLICATIONS TO THE COURT TO RECOVER ASSETS DISCOVERY AND INSPECTION

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

Forensic accountants with their expert knowledge and experience can be of invaluable assistance in uncovering accounting, tax and financial facts and issues in the discovery process.

SPECIFIC QUESTIONS

Forensic accountants can also be of great assistance in relation to framing specific questions as part of the discovery process.

SUBPOENAE

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.
- **De-facto 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 operations 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.

MAREVA INJUNCTIONS

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 (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, 1992**.

ANTON PILLER ORDERS

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 must 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:

- “2. Execution during business hours;
3. Service and execution of order supervised by a solicitor other than a member of the firm of the solicitors for the applicant;
4. Applicant may be required to give an undertaking that independent legal advice will be made available to the occupier;
5. 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;
6. 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;
7. Material seized may be required to be kept by an independent person to be held without disclosure to the applicant until inter partes hearing of the matters in issue.
8. 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 attend 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 cited above, **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 (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 (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.”

PREVENTION AND ASSET PROTECTION STRATEGIES

DIFFERENTIATING BETWEEN LEGITIMATE ASSET PROTECTION STRATEGIES AND ATTEMPTS TO AVOID THE COURT’S JURISDICTION:

- Each of the methods of colouring, distorting or avoiding disclosure referred to above involves an element of manipulation or dishonesty and an attempt to defeat the Court’s jurisdiction by hiding assets or falling short of the standard of disclosure required of parties.

- On the other hand, there are advisers who understandably see a legitimate role in minimizing the impact of separation on family businesses and dealing as effectively as possible with the consequences of separation.
- Furthermore, the *Family Law Act* itself provides some means of protecting assets in the event of marital separation.
- Dealing firstly with business arrangements, the use of trusts has been prolific in the context of family business over the years, both for tax reasons primarily and as a device to harbour family assets from creditors.
- The Family Court “has substantial power to effect the assets and activities of a trust in circumstances where one of the parties to the marriage, the husband or the wife, has effective control of the trust”. (**Kennedy, 1996**).
- Part VIIIA of the *Family Law Act* introduced in December 2000 enabled parties to an intended marriage or who are married, or even after divorce, to enter into a binding financial agreement, the effect of which was to exclude the jurisdiction of the Family Court to make orders for property settlement and/or spouse maintenance for so long as the agreement remains in force.
- Included in the categories of those who would most benefit from a prenuptial agreement (**Doolan, 2001**) were the following:
 - Where one party brings substantial assets to the marriage which outweigh those of the intended spouse;
 - Where there is an ongoing business enterprise or farm which might otherwise have to be sold or divided if the marriage breaks down;
 - For parties entering into second marriages, and/or who may have adult children from a prior relationship they wish to protect financially;
 - Where there are significant superannuation, employee share/option schemes or trust entitlements to be protected;
 - Where there is a potential for one party to inherit significant wealth from a parent or parents;
 - Where there is a particular family asset which both parties agree should be excluded from the divisible pool.

Other reasons might include to protect assets which have been in a family for generations or to offer a party or parties the 'certainty' of a formal agreement rather than to expose them to the discretion of the Court.

- Section 90F of the *Family Law Act* specifically retains the power of the Court to disregard agreements if a party is unable to support himself or herself without an income tested pension, allowance or benefit.
- Binding financial agreements offer certain advantages as noted by **Hearl and Lucs, 2005** including the following:
 - no court appearance is required;
 - they can be used at any stage of a relationship;
 - they can be used after separation to effect an interim distribution of property;
 - parties may be able to use binding financial agreements to rearrange their affairs without incurring stamp duty;
 - parties may be able to protect assets if one party is taking on or increasing the risk of a business failure;
 - binding financial agreements in respect of spousal maintenance can be a useful device particularly for high income earners seeking to exclude future payments of spousal maintenance.
- A binding financial agreement can also bind an estate.
- There are also of course certain disadvantages including the fact that they do not have to be considered "just and equitable" or scrutinised by the court which may at least in theory make them easier to set aside than consent orders and increase the potential exposure for lawyers in drafting financial agreements after separation.
- Following the well-publicised case of **ASIC v Rich** amendments were made to the *Family Law Act* in April 2005 designed to prevent people using binding financial agreements to defeat the claims of creditors.
- It is beyond the scope of this paper to further explore the intricacies of binding financial agreements but suffice it is to say that provided the agreements meet the requirements of the *Family Law Act* then parties theoretically can effectively "contract out" of the Act in so far as it deals with property and/or spouse maintenance rights.

- Binding Financial Agreements have attracted considerable comment in the media in recent times with some senior lawyers suggesting that they are too risky for lawyers to advise upon. In the Weekend Australian Financial Review of January 28-29 2012, Melbourne barrister Martin Bartfield QC was quoted as saying that pre-nups were “unsuitable for the purpose for which they were intended” and that advising on binding financial agreements was “too dangerous” for many barristers, while prominent Sydney family lawyer Paul Doolan was quoted as saying that many financial agreements were “not worth the paper they are written on” because the law still imposed such a high degree of technicality about how they should be agreed and drafted.
- Prenuptial agreements are an area of particular concern because there is a widespread view that they have become increasingly contestable and this is causing many lawyers to steer away from them altogether.
- A gift by a parent of a party to their son or daughter prior to or during the marriage can be best protected by means of a formal loan document accompanied by appropriate security or by a binding financial agreement being entered into by the parties noting the contribution and excluding it from the pool of assets available for division on separation.

Complex accounting and financial issues will always pose problems and issues for lawyers dealing with property settlement on separation. Forensic accountants have a real role to play in assisting lawyers, not only in unravelling complex business structures and arrangements, but in determining the true extent of the asset pool, valuing the interest of a party in an entity, providing advice in relation to structuring a settlement and generally providing advice to lawyers based on a broad understanding of human nature and the business world. Their engagement is often a sound investment in achieving an acceptable outcome.

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REFERENCES:

Federal Court Practice Note issued 8 April 1994.

Bartfeld, M, QC, *An Expert in the Box: Expert Evidence in Family Court Litigation*, 2nd Annual Family Law Intensive in Sydney 2002

Calabro, N C, and Wilson, G, *Unravelling Complex Corporate Structures*, Family Law Practitioners Association Conference in Brisbane 1995

Davidson, A and English, D, *Forensic Accounting*, Proctor, October 2005 41

Doolan, P, *Protecting the Family Assets*, LAAMS Seminar: Family Law and The Family Business in Sydney March 2001

Hearl, G and Lucs, L, *Financial Agreements under the Family Law Act and the Property (Relationships) Act*, presented by the CLE Centre, Sydney on 11 November 2005

Hey-Cunningham, D, *Financial Statements Demystified*, 2002 3rd edition, Allen & Unwin, Sydney

Jansen, B, *Negotiating the Labyrinth of Hidden Assets in Order to Uncover and Recover Them*, presented to the Family Law Masterclass in May 2005

Kennedy, I, *Family Trusts*, presented to the Family Law Masterclass BCC 1996

Martin, C E, The Honourable Justice, *Searching for Gold etc*, 9th National Family Law Conference in Sydney 2000

Michaelson, W M, *Divorce: a game of hide and seek?*, Journal of Accountancy Vol 181(3) 67.

Sullivan, QC, 1992, *Mareva Injunctions – Prevention and Conduct of Applications for (and opposition to) a Mareva Injunction*, Australian Bar Review 1992 8 205.

Telpner, Z and Mostek, M M, *Expert witnessing in Forensic Accounting – A handbook for lawyers and Accountants* 2003 1st edition, CRC Press LLC, Florida