

FAMILY LAW EVIDENCE Single Expert Valuation of husbands business interest where single expert appointed but husband seeks to tender report of another expert witness where significant difference in valuation and methodology substantial body of opinion contrary to opinion given by single expert leave granted to tender report. Evidence Act 1995 (Cth) s 75 Family Law Rules 2004 (Cth) rr 15.49, 15.65 Knight & Knight [2007] FamCA 263 Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705; [2001] NSWCA 305 Turnley & Turnley [2005] FamCA 584 Wilde & Wilde [2007] Fam CA 1044 APPLICANT: Mr Padnall RESPONDENT: Ms Padnall INDEPENDENT CHILDRENS LAWYER: Legal Services Commission of SA FILENUMBER: ADC 1244 of 2012 DATE DELIVERED: 23 October 2014 PLACE DELIVERED: Adelaide PLACE HEARD: Adelaide JUDGMENT OF: Berman J HEARING DATE: 17 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Jordan SOLICITOR FOR THE APPLICANT: Barnes Brinsley Shaw Lawyers COUNSEL FOR THE RESPONDENT: Mr McGinn SOLICITOR FOR THE RESPONDENT: David Burrell & Co COUNSEL FOR THE INDEPENDENT CHILDRENS LAWYER: Mrs Lindsay SOLICITOR FOR THE INDEPENDENT CHILDRENS LAWYER: Legal Services Commission of SA ORDERS (1) That leave be granted to the applicant husband to tender into evidence the reports of Mr H, Chartered Accountant dated 14 October 2013, 3 December 2013, 4 January 2014 and 26 September 2014 and to adduce further evidence from him at the final hearing of these proceedings. IT IS NOTED that publication of this judgment by this Court under the pseudonym Padnall & Padnall (No. 3) has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT ADELAIDE FILE NUMBER: ADC 1244 of 2012 Mr Padnall Applicant And Ms Padnall Respondent REASONS FOR JUDGMENT INTRODUCTION The trial in respect of property issues is listed to commence on 1 December 2014. On 4 September 2014, I delivered reasons in respect of various outstanding interim applications leaving paragraph 1 of the husband's Application in a Case filed 7 February 2014 outstanding. In that application the husband seeks the following orders:- (1) That order 1 of the orders sought in the Application in a Case filed by the husband on 16 October 2013 be varied such that leave be granted to the applicant husband pursuant to Rule 15.49 of the Family Law Rules to tender the report of [Mr H], Chartered

Accountant, dated 14 October 2013, 3 December 2013 and 4 January 2014 and adduce further evidence from [Mr H] as required throughout these proceedings as to the issue of the value to be attributed to the business currently conducted by [P] Pty Ltd, the business conducted by [B] Investments Pty Ltd and the applicant husband's interest in each of and either of those companies. I do not propose to repeat at length the background set out in my reasons for judgment delivered on 4 September 2014. What is in issue is the value of the husband's interest in the business conducted by P Pty Ltd from about 1 July 2012. Formerly the husband operated the business by K Pty Ltd as trustee of the K Padnall Family Trust. EXPERT REPORTS Ms J from F Accountants was ultimately engaged as a single expert forensic accountant to undertake the valuation of the husband's interest in his tradesman business. The order was made on 15 May 2013. The first valuation report was published by Ms J on 26 August 2013 with a value of the K Padnall Family Trust at \$183,210. It is not controversial that the husband thereafter instructed a shadow accountant namely Mr H. By letter dated 16 September 2013, the husband's solicitors forwarded questions to the single expert in accordance with Rule 15.65 (1) (2) and (3) of the Family Law Rules 2004 (Cth) (the Rules). In particular the following questions have some enduring relevance:- (1) Paragraph 2.3 You state that the business has no good will yet you attribute a value to the business. Goodwill is usually defined as the difference between the value of the business as a whole and the net tangible business employed in the business. How do you reach the conclusion that there is no goodwill and then attribute a value to the business? (2) Valuation You have assessed the value of the business to be \$183,210. Of this sum, how much relates to the tangible assets employed in the business and how much to other intangible assets. If there is no goodwill, what does the sum of \$183,210 represent? (5) Adjusted earnings calculation wages The wage expense in 2013 relates to the husband. This has been added back but no amount has been allowed to reflect the notional salary of the husband in any of the years in respect of which the adjusted earnings have been calculated. Do you agree that the valuation of an enterprise/business should be based on adjusted earnings after allowing for a notional or commercial salary for the duties performed by the husband. If you do, do you then agree the valuation assessment as incorrect in that an allowance should have been made. If you do not

agree a notional salary should be allowed for in-value in the business, then why not? By letter dated 20 September 2013, the single expert answered the questions and as a result made two adjustments namely, the removal of a proportional depreciation allowance on the basis that the motor vehicle was used 100 per cent for the business and an add-back of hire purchase expenses. This had the effect of reducing the maintainable earnings from \$183,210 to \$177,282. Thereby reflects an assertion by the single expert that:- The business does however have the capacity to generate maintainable earnings of \$177,282 (adjusted from \$183,210) based on an assessment of net profits from 2010 to the cessation of [K] Pty Ltd as trustee for the K Padnall Family Trusts at 30 June 2012. Furthermore, it is asserted that:- The sum of \$183,210 (adjusted from \$177,282) is the maintainable earnings of the business. It is said by the single expert that:- This amount represents the value of the business with no associated goodwill. It is purely the amount that can be generated in annual maintainable earnings. This is in essence the owner's wage. Under the heading of Adjusted Earnings Calculation Wages the following is recorded:- The 2010-2012 financial statements were not adjusted for a notional salary as there is no goodwill in the business and hence any profit would effectively would be a notional salary to the owner. It should be noted that in our opinion the 2013 financial statements present an unrealistic view of maintainable earnings as outlined in section 2.2 of the valuation report. Finally, under the heading of Balance Sheet the following is recorded:- Net assets on the balance sheet as at 30 June 2012 were \$20. As outlined in the valuation report, given that the business is not complex and is largely in business to supply few customers and is run by one owner we have determined the goodwill of the business is nil. The net asset method is primarily used to value businesses where the business is asset intensive. As this business is not capital intensive and the value of the balance sheet was \$20, we considered other valuation methods to be inappropriate. In our professional opinion, the maintainable earnings methodology is the most accurate means to value the business, as outlined in section 5.4 of the valuation report. The first report of Mr H was published on 14 October 2013. The report purports to be a critique of the report of Ms J at paragraph 3.4 the following is recorded by Mr H:- What is being valued while [F Accountants] were instructed to value the business, at paragraph 2.1 of their report, they state they were instructed to value

the goodwill. In my opinion, goodwill may only form a part of the value of the business. A business generally comprises tangible and intangible assets the intangible assets are usually encapsulated into a value referred to as goodwill with the balance of the net assets of the business being the net tangible business assets. The value of the entity then brings to account surplus or non-operating assets and liabilities. Then under the heading of Value of Goodwill, the following is recorded [F Accountants] state they were instructed to value the goodwill (paragraph 2.1). At paragraph 2.3 [F Accountants] state they have determined there is no goodwill in the [tradesman] business due to the reliance of the business on the personal efforts of the owner to generate the revenue. 3.1.4 Despite having concluded that they were instructed to value the goodwill of the business and having concluded that the business has no goodwill, they conclude the business has a value of \$183,210. 3.1.5 In their response to a question seeking a reconciliation between the value of the business and the value of the goodwill (refer annexure 5) [F Accountants] state that the maintainable earnings of the business represents the value of the business with no associated goodwill. In section 2 of their responding letter they go on to say that the annual maintainable earnings is in essence the owners wage. 3.1.6 In my opinion an owners wage does not represent the value of the business. 3.1.7 An owners wage represents the return from personal exertion and reflects what the person would earn if employed on an arms-length basis. The value of an income stream is based on maintainable earnings after allowing for an owners wage. It is the extra income that flows from the business and its structure, gearing off staff and return on other assets (as applicable). Further, [Mr H] argues that in his opinion it is unlikely the business is saleable presumably because there is no goodwill, a negligible balance sheet and by necessary implication no return on investment. On 27 August 2014, Ms J published a further report as to the value of the husband's interest in his business with a slightly revised valuation outcome of \$154,908 up to and including the financial year ending 30 June 2013. Further questions were forwarded to the single expert arising out of a fourth report by Mr H dated 26 September 2014. Questions put to the single expert have not been answered arising from the husband's unwillingness to provide the further disbursement cost as requested. It is argued on behalf of the husband that the methodology adopted by the single expert in the three reports as

published by her and in the four reports as provided by Mr H to the husband has remained consistent. In summary, the questions raised and the answers given at first instance maintain their relevance in terms of the differing views of the single expert and Mr H to the present. SUBMISSIONS MADE BY THE PARTIES Counsel for each of the parties have prepared concise and well-crafted submission documents. It is argued on behalf of the husband that:- The fundamental dispute between the valuers is methodology the writer again refers to Smith where the application was refused primarily because there was no dispute as to methodology. It is submitted that Mr H adopts a methodology which can be categorised as value to the owner. It is argued that the methodology of Ms J is unheard of in that it is not able to be reconciled with the five basic valuation methodologies as referred to in Wilde & Wilde [2007] Fam CA 1044. In summary, the principal criticism appears to be that a future maintainable earnings based valuation should account for a proprietor's wage on the basis that it is the surplus which then properly represents the potential return for an investor and is the basis for goodwill. Where there is no goodwill evident or where it might be considered that the business was only marginally commercially viable, a default position is to consider a valuation by reference to the net asset position of the business. The wife argues that Mr H does not identify a substantial body of opinion contrary to the opinion given by the single expert, nor does he disclose matters which are not known to the single expert and therefore necessary to determine the question of value of the interest the husband has in the business. It is said that there is nothing special or different in respect of the method and manner by which the single expert has approached the valuation exercise and that in any event it is not simply a matter of a different ultimate result which satisfies the necessary criteria. It is for the Court to determine matters of value notwithstanding it may be assisted by the evidence of a single expert. Further, even if I were to be satisfied that one of the grounds under Rule 15.49 (2) (a) (c) was established, that I should not exercise my discretion taking into account the potential for prejudice to the wife arising from the husband's behaviour, but in particular his initial non-disclosure and the resultant consequence to the proceedings. It is strongly argued on behalf of the wife that the present case is not one of different methodologies but different outcome. RELEVANT LAW The Rules dealing with expert evidence to be found in Part 15.5 of the

Rules, and in particular Rule 15.41 to 15.70. Part 15 has as its core purpose to ensure that the parties obtain expert evidence only in relation to a significant issue in dispute, to restrict expert evidence to that which is necessary to resolve or determine a case and to ensure that if practicable and without compromising the interests of justice, expert evidence is given on an issue by a single expert witness and to avoid unnecessary costs from the appointment of more than one witness. Rule 15.43 of the Family Law Rules sets out the relevant definitions. In particular an expert is defined to be an independent person who has relevant specialized knowledge, based upon the person's training, study or experience. Heydon JA in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305 provided an analysis of the authorities in respect of expert evidence as follows:-

In short, if evidence tendered as expert opinion is to be admissible, it must be agreed or demonstrated that there is a field of specialised knowledge, there must be an identified aspect of the field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be wholly or substantially based on the witness's expert knowledge; so far as the opinion is based on facts observed by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on assumed or accepted facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached, that the expert's evidence must explain how the field of specialised knowledge in which the witness is expert by reason of training, study or experience and on which the opinion is wholly or substantially based applies to the facts assumed or observed so as to produce the opinion propounded. Rule 15.59 requires that the expert witness be independent and that the duty of the proposed witness is a duty to the Court and goes beyond any duty to a party. I am satisfied that to the extent there is any issue as to the appropriate level of qualification, experience or knowledge of Ms Jor Mr H, they are both qualified to give expert evidence. The most contentious area in respect of expert evidence arises from the inability of a party to tender a report or adduce evidence from another expert witness if a single expert witness has been appointed whether jointly by the parties or order of

the Court. Such separate adversarial evidence can be called only with the Courts permission as provided for in Rule 15.49. Rule 15.49 (2) provides three exceptions to the tendering of further evidence from another expert witness on an issue already addressed by a single expert witness:- If there is a substantial body of opinion contrary to any opinion given by the single expert witness and that the contrary opinion is or may be necessary for determining the issue. If another expert witness knows of matters not known to the single expert witness, that may be necessary for determining the issue. If there is another special reason for adducing evidence from another expert witness. A difficulty arises in respect of how the substantial body of contrary opinion is established before the Court. It cannot be the evidence of the second expert (which is what the application is seeking leave to adduce) and so can only be on the basis of information and belief taking into account Section 75 of the Evidence Act 1995 (Cth). A substantial body of contrary opinion cannot be satisfied by reliance on the information, belief or the view of a second expert but must be held by multiple experts. There has been a level of judicial discord in respect of the requirements of Rule 15.49 (2). In the unreported decision of *Turnley & Turnley* [2005] FamCA 584 being a decision of Dawe J delivered 20 June 2005, her Honour found when considering the affidavit material presented that:- There is nothing in the affidavit material before me nor in the submissions before me that could possibly fall within Sub-Rules (a) or (b) of Rule 15.49 (2). The question remains whether there is any other special reason for adducing evidence from another expert witness. It is often the case that a party does not like the valuation of the single expert and has obtained a valuation which is different in its outcome. If that alone establishes a special reason then it would make the actual provisions of Rule 15.49 meaningless in relation to real estate and other valuations. Indeed, it is argued on behalf of the wife that there is effectively no difference between the methodology adopted by Ms J and Mr H and that what is at issue is the husband's displeasure with the valuation of the single expert, hence he seeks to rely upon a valuation that produces a more palatable outcome. In *Knight & Knight* [2007] FamCA 263 Bryant CJ took into account the fact that the parties had spent a large amount on legal fees and accounting fees and having regard to the size of the asset pool, Her Honour held that permission should be granted to adduce separate adversarial evidence on the basis that:- The

costs of the expert witness for the wife would initially be borne by her and the husband was not at risk in costs unless the wife's evidence materially affected the valuation of the single expert. The wife's proposed expert had already done a good deal of work as a shadow expert and so there would be no great delay in the wife obtaining a report from him; and The case had not been reached and would therefore not be heard for the next few weeks. There were significant issues in dispute which might impact upon the valuation and her Honour considered that there would be a miscarriage of justice if the wife was not given an opportunity to explore those issues. It is argued that this is not a case of differing methodology but rather one of technical difference and application. Obviously, whether there is goodwill that attaches to the business is a factor that can dramatically alter the valuation outcome. The fact that there is no goodwill as a finding by each of the valuers is not indicative of similarity but rather, an indicator of the divergent approach of each of them. The position of the single expert is that there is no goodwill component in the business valuation and that therefore a different valuation approach is to be adopted which is based upon the ability of the business to generate an income for the owner, presumably from one year to the next. It is not suggested that it is a future income based approach but rather, a recitation of the objective fact that in any particular financial year under consideration, the business has generated income. Mr H determines that the business has no goodwill arising out of an assessment that the business having effectively a single or sole source of income, is not conducive to a finding that goodwill exists. He also argues that the lack of regard to a proprietor's wage is a fundamental flaw. The position then adopted by Mr H is to consider a net tangible asset valuation approach. There are clear differences in the methodology adopted by each of the experts. It could not be said that the methodology proposed by Mr H is unusual or not at least open for consideration. It could not be said that the single expert has in effect covered the field by the approach she has adopted leaving no room for other considerations.

EXERCISE OF DISCRETION It is submitted on behalf of the wife that even if I were to find that there is a substantial body of opinion contrary to any opinion given by the single expert witness that I should not exercise my discretion to do so. It is clear from the Court file that the husband initially proceeded by way of non-disclosure in respect of the manner in which he operated the business.

Whilst ultimately it may well be argued that significant delay and costs have been incurred as a result of the husband's non-disclosure, it would appear that neither the single expert nor Mr H would have reached a different outcome in particular in respect of their respective methodologies as adopted by each of them, if the husband had made all necessary disclosures. Each of the experts have provided multiple reports and whilst there has been some adjustment to the final outcome, it could not be said that there has been any substantial deviation from the underlying approach adopted by each of them. The wife argues that there will be no delay in the reporting process given that both valuers have already completed their reports, that the trial will have little impact on the extra evidence likely to be adduced from Mr H and it is unlikely that either of the parties will seek further or other valuation evidence. It may be argued that the husband did not properly exhaust his remedies pursuant to the Rules in respect of questions to be asked and answered of the single expert. Whilst I accept that the last round of questions whilst formulated were not answered (with no criticism of the single expert) I am satisfied that questions previously administered and answered represent a consistent position that the single expert has adopted. In short, if the single expert had been invited to provide an answer to the questions as currently formulated, her answers would not have been significantly different from her earlier response. It is also a relevant factor that over and above the former matrimonial home, the issue of the valuation of the business is central to the proceedings.

CONCLUSION In all the circumstances I consider that this is not a case where there is simply a holding of different opinions but rather, there are clear and obvious differences in the methodology to be adopted by each of the valuers and that the Court would be significantly assisted by the evidence both from the single expert Ms J and Mr H. It is acknowledged that it is always open to a trial judge to hear the evidence and if still left unassisted at the conclusion of cross examination, the trial can be adjourned and another expert report ordered. That option in this case has significant disadvantages, particularly where the consequential effect of following the proposed evidence on the proceedings is benign. I make orders as set out at the commencement of these reasons. I certify that the preceding fifty six (56) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Bermand delivered on 23 October 2014.

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