

## **Overview of Expert Reports in Family Law**

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Originally published for the Trial Lawyers Association of BC's *Family Law Practice and Procedure 2015*

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The coming into force of the *Family Law Act*, S.B.C. 2011, c. 25 (“FLA”) has opened the door to new types of expert opinion while also refining opinion commonly seen in the days of the now repealed *Family Relations Act*, R.S.B.C. 1996 c. 128 (“FRA”). This paper will overview expert opinion commonly prepared in family law cases – reports on financial issues and child assessments – and focus on practical considerations and current trends in respect of these reports. Prior to addressing these topics, a refresher on first principles governing the use of expert opinion is provided.

## First Principles

While it is often the case that “the technical leads to the practical and the strict rules of evidence are often ignored or accorded only slight deference,”<sup>1</sup> the issues of admissibility and weight of evidence – including opinion evidence by experts – ought to be continuously considered by counsel. There is no better time than now to pause and consider first principles, as we are forming a body of jurisprudence under the FLA.

Expert opinion ought to be admitted only where warranted on a case-by-case basis, after considering the following criteria set out in *R. v. Mohan* [1994] 2 S.C.R. 9, (1994), 29 C.R. (4<sup>th</sup>) 243 at 255 (S.C.C.) [*Mohan*]:

1. **Necessity in assisting the trier of fact**, in that the evidence provides information likely to be outside the experience and knowledge of the court and the “expert deals with a subject-matter that ordinary people are unlikely to form a correct judgment about without assistance;”<sup>2</sup>
2. **Relevance**, in that the evidence is “related to a fact in issue” and has some “tendency as a matter of human experience and logic to make the existence of a fact in issue more or less likely than it would be without that evidence;”<sup>3</sup>
3. **A properly qualified expert**, who possesses “special knowledge and experience going beyond that of the [court]” and can offer an opinion in the relevant area;<sup>4</sup> and
4. **The absence of an exclusionary rule**, that prohibits the admission of the evidence.<sup>5</sup>

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<sup>1</sup> *Walker v. Maxwell*, 2014 BCSC 2357 at para. 65.

<sup>2</sup> David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 7<sup>th</sup> ed. (Toronto: Irwin Law Inc., 2015) at 208 and 212-213.

<sup>3</sup> Paciocco, *supra* note 2 at 208 and 214.

<sup>4</sup> *Ibid.* at 215.

*Mohan, supra* also confirms that the court retains a “gate-keeping function during which the trial judge determines whether the benefits of admissibility outweighs its costs.”<sup>6</sup> The court is to determine whether the probative value of the evidence outweighs its prejudicial effect. More specifically, do the:

benefits of the evidence in terms of materiality, weight, and reliability, outweigh its costs in terms of the risk that it may be accepted uncritically by the [court], its potential prejudicial effect, and the practical costs associated with its presentation, ... such as undue consumption of time and the prospect that the [court] will become confused.<sup>7</sup>

The principles governing the admission and weight of expert reports are long standing, and can be summarized as follows:

1. Regarding the necessity criterion identified above, “[o]pinion evidence is admissible only where it would be of assistance to the court in deciding a question requiring long study or experience. Conversely, such evidence is not admissible with respect to matters that lie within the ordinary experience of the [court].”<sup>8</sup> If on the proven facts the court can form its own “conclusions without help” from the expert, then the “opinion of an expert is unnecessary;”<sup>9</sup>
2. Statements of the obvious are of no assistance to the court, and will not be admitted;<sup>10</sup>

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<sup>5</sup> *Ibid.* at 217.

<sup>6</sup> *Ibid.* at 218.

<sup>7</sup> David M. Paciocco & Lee Stuesser, *The Law of Evidence*, 5<sup>th</sup> ed. (Toronto: Irwin Law Inc., 2008) at 192 and 202.

<sup>8</sup> *Yewdale v. Insurance Corporation of British Columbia*, 3 B.C.L.R. (3d) 240, [1995] B.C.J. No. 76 (S.C.) at para. 4 [*Yewdale*]; *Neudorf v. Netzwerk Productions Ltd.*, 83 A.C.W.S. (3d) 786, [1998] B.C.J. No. 2690 (S.C.) at paras. 2 and 3 [*Neudorf*].

<sup>9</sup> *R. v. Turner*, [1975] 2 W.L.R. 56 (C.A.), cited in *R. v. Abbey*, [1982] 2 S.C.R. 24 cited in *Neudorf, supra* note 8 at para. 3.

<sup>10</sup> *Yewdale, supra* note 8 at para. 10.

3. “If expert opinion is permitted, the expert must stay within his or her stated area of expertise;”<sup>11</sup>
4. “The expert must not be permitted to displace the role of the trier of fact. Because of this, courts in the past resisted expert testimony going to the ‘ultimate issue.’ That clear rule has long since fallen by the wayside, but it still remains essential for the expert to state the facts he or she has assumed in the course of reaching the opinion, and if possible, to avoid making findings [or inferences] of fact on issues in dispute. Thus if the court does not find such facts or finds different facts, the weight of the expert's opinion can be assessed accordingly.”<sup>12</sup> It is now required by Rule 13-6(1)(f) of the *Supreme Court Family Rules*, B.C. Reg. 169/2009 (the “*Rules*”) that the expert’s report contain a “description of the factual assumptions on which the opinion is based;”
5. It is inappropriate for experts to reach legal conclusions in the same manner as the court is required to do;<sup>13</sup>
6. “Given the special privilege accorded to experts to testify as to their opinions, they must not become advocates.<sup>14</sup> They must express their opinions as opinions and must leave for the court the required conclusions of law. In theory at least, the court ‘knows the law’ --- in practise it has the responsibility of finding and applying it. Thus the expert should express his or her opinion in an objective and impartial manner, and must not present argument in the guise of expert evidence;”<sup>15</sup> and

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<sup>11</sup> *Ibid.* at para. 4.

<sup>12</sup> *Yewdale*, *supra* note 8 at para. 4.

<sup>13</sup> *Ibid.* at paras. 7 and 8.

<sup>14</sup> This duty is now codified in Rule 13-2 of the *Supreme Court Family Rules*.

<sup>15</sup> *Yewdale*, *supra* note 8 at para. 4.

7. Editorial comments that amount to arguments in the guise of opinion will not be admitted.<sup>16</sup>

***Do Income Determination Reports Meet the Criteria for Admission as Expert Opinion?***

Counsel often present reports of accountants and business valuers that compile information about a party's income, as set out in income tax returns and corporate financial records, and summarize a party's income under ss. 16 to 19 of the *Federal Child Support Guidelines*, S.O.R. 1997-175. In light of the principles articulated above, are such reports properly considered expert opinion?

Is the court unlikely to form a correct judgment without such reports? Is it not counsel's role to lead evidence through a party and summarize the sources of income available to that party? While income determination reports may be helpful evidentiary aids, are they properly expert opinion?<sup>17</sup> Aren't these reports really instances of experts providing factual evidence, rather than opinion evidence? Is it appropriate for the court to potentially be persuaded by the expert's credentials, with the result that the evidence is given more weight and deference than if presented through the party?

On the other hand, does the expert not apply specialized knowledge and experience when reviewing and summarizing documents relating to income? Is it appropriate to lead evidence through clients who do not necessarily understand the contents of the income documents?

Moreover, do the challenges of leading evidence through clients create delay and inefficiency

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<sup>16</sup> *Neudorf*, *supra* note 8 at para. 16.

<sup>17</sup> At least one Alberta decision has held that a report prepared by a chartered accountant estimating the payor's income for Guideline purposes is "not an expert opinion so much as a calculation." *Wilm v. Wilm*, 2007 ABQB 65, 155 A.C.W.S. (3d) 146 at para. 27. The court held at para. 27 that "the definition of income under Guidelines is essentially a legal question." This supports the proposition that accountants can provide calculations, or fact summaries, but cannot provide opinion about what constitutes income under the *Federal Child Support Guidelines*, S.O.R. 1997-175.

that can largely be overcome by the use of reports prepared by those who specialize in quantifying income?

### **Expert Opinion on Financial Issues**

The formal requirements for expert reports are set out in Rule 13-2 and 13-6 of the *Rules*. Rather than address these requirements in detail, this section will focus on how to challenge the evidence of a jointly-appointed expert.

#### ***Requirement for Jointly-Appointed Expert***

Under Rule 13-3(2) of the *Rules*, parties are required to produce expert opinion evidence on a financial issue by means of a jointly-appointed expert, unless the court otherwise orders or the parties otherwise agree. Rule 13-1(1) defines “financial issues” as:

1. An issue arising out of a claim under Part 5 or 6 of the FLA or out of an application for an order made under the *Family Homes on Reserves and Matrimonial Interests or Rights Act* (Canada), S.C. 2013, c. 20 or under a First Nation's law made under that Act;
2. A claim for an interest in property based on unjust enrichment or other trust claims; or
3. A claim for compensation based on unjust enrichment.

There is no option to unilaterally appoint one party’s own expert to opine on financial issues.<sup>18</sup>

The court has held that separate experts on financial issues is the exception to the norm. The court will exercise its discretion to relieve “the parties of the requirement to present evidence

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<sup>18</sup> *Aquilini v. Aquilini*, 2012 BCSC 1616, 39 B.C.L.R. (5th) 392 at para. 19 [*Aquilini*].

through a joint expert” if satisfied that the circumstances of the case “make the use of a joint expert inappropriate or impracticable.”<sup>19</sup>

If the parties cannot agree on a joint expert and the court will not order separate experts, the court may appoint a joint expert under Rule 13-4(3). On an application to appoint a joint expert, the court will likely consider the following factors:

1. Is the financial issue one on which the court is likely to require expert evidence?
2. If so, is there evidence of a properly qualified expert who is available and who the parties, or either of them, can afford to retain?
3. Is appointment of a joint expert consistent with the purpose and intent of the *Rules*?<sup>20</sup>

Rule 13-4(5) provides that once a joint expert is appointed (by agreement of the parties or by court order), he or she is the only expert who may give evidence on the financial issue, unless the court otherwise orders or the parties otherwise agree.

### ***Additional Expert***

When a joint expert has been appointed, the court may grant leave for the evidence of an additional expert to be introduced if the court is satisfied that the evidence of that additional expert is “necessary to ensure a fair trial” and the party serves the application materials within 21 days after receipt of the joint expert’s report, pursuant to Rule 13-4(6 and 7). When assessing whether to grant leave for expert opinion in addition to the joint expert, the court may consider, pursuant to Rule 13-4(8):

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<sup>19</sup> *Aquilini*, *supra* note 14 at para. 35.

<sup>20</sup> *Ibid.* at para. 43.

1. Whether the parties have fully cooperated with the joint expert and have made full and timely disclosure of all relevant information and documents to the joint expert;
2. Whether the dispute about the opinions of the joint expert may be resolved by requesting clarification or further opinions from that expert; and
3. Any other factor the court considers relevant.

### ***Challenging the Evidence of a Jointly-Appointed Expert***

In *Jensen v. Jensen*, 2013 BCSC 297, 45 B.C.L.R. (5th) 372 [*Jensen*], the wife applied before trial under Rule 13-4(8) for leave to introduce at trial an additional expert report. The parties had jointly appointed a business valuator to provide an estimate of the value of the shares in a company. The valuator provided a draft report to both parties.

The wife questioned the validity of the draft report and retained another valuator to prepare a second report.<sup>21</sup> At no point had the wife's lawyer contacted the first valuator to ask for clarification about the draft report, propose amendments to or reconsideration of the draft report, or provide criticism or comments of the draft report.<sup>22</sup>

The husband's lawyer objected to the admission of the second report, and provided the second report to the first valuator for comment. The first valuator would not provide comment unless he had permission to do so from the wife, given that he was jointly retained.<sup>23</sup> This permission was not provided.<sup>24</sup>

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<sup>21</sup> *Jensen v. Jensen*, 2013 BCSC 297, 45 B.C.L.R. (5th) 372 at paras. 25 and 26 [*Jensen*].

<sup>22</sup> *Jensen*, *supra* note 21 at para 28.

<sup>23</sup> *Ibid.* at para. 30.

<sup>24</sup> *Ibid.* at para. 36.

The court confirmed that the *Rules* do not prohibit a party from obtaining evidence from an additional expert; instead, the *Rules* prohibit the introduction at trial of such evidence without leave of the court or agreement of the parties.<sup>25</sup> The court set a high threshold for leave under Rule 13-4(8) to adduce the opinion of an additional expert, holding that:

it cannot be the case that the mere fact that an additional expert retained by one of the parties disagrees with the opinion of the jointly-appointed expert, either as to quantum or methodology, will generally justify the granting of leave to introduce the evidence of an additional expert at trial.<sup>26</sup> ... Too readily granting leave for the introduction of the evidence of an additional expert will also, in my view, eventually undermine the purpose of Rule 13-3. If a party who is dissatisfied with the views of a jointly-appointed expert can simply go out and shop for an opinion more favourable to his or her position; parties will see little benefit in the Rule.<sup>27</sup>

The court considered the factors listed in Rule 13-4(8) and dismissed the application, ultimately finding that:

1. The wife had not provided all relevant information about the grounds on which the second valuator disagreed with the first valuator's methodology, as she did not provide her permission for the first valuator to respond to the second report;<sup>28</sup> and
2. The wife had not demonstrated that the dispute about the first valuator's opinion may not be resolved by requesting clarification or further opinion from the first valuator, given that the first valuator may reconsider his opinions in light of information or views expressed by the second valuator.<sup>29</sup>

The court allowed responding opinion evidence in *Janis v. Janis*, 2013 BCSC 116, a prior decision of Master Caldwell that was not brought to the attention of the court in *Jensen, supra*. In

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<sup>25</sup> *Ibid.* at para. 43.

<sup>26</sup> *Ibid.* at para. 44.

<sup>27</sup> *Ibid.* at para. 46.

<sup>28</sup> *Ibid.* at para. 48.

<sup>29</sup> *Ibid.* at paras. 49 and 51.

*Janis, supra*, the parties jointly appointed a business valuator. The wife then hired a second valuator to review and critique the jointly-appointed expert's report. The wife sought leave for the second expert's report to be used at trial.<sup>30</sup> While the court dismissed the wife's application, the court stated in *obiter* that Rule 13-6(4) allows "any of the parties affected by a joint report to commission a purely responsive or rebuttal report which critiques the report of the joint expert," and there is no requirement that such a report be done by a jointly-appointed expert or an expert authorized by court order.<sup>31</sup> In other words, it appears that a party can file a purely responsive report by right, without seeking leave.

*Janis, supra* and *Jensen, supra* are not inconsistent; the distinction is that in *Jensen, supra* the wife's application was treated as an application under Rule 13-4(8) for leave to introduce an additional expert report, and the court did not consider whether the second report was in fact a responding report for which leave is not necessary under Rule 13-6(4).

From a practical perspective, the following lessons emerge from *Jensen, supra* and *Janis, supra*:

1. Before bringing an application under Rule 13-4(8) for leave to file additional expert opinion, seek consent from opposing counsel to ask the jointly-appointed expert to consider different information or views and assess whether or not the different information leads to a change in their opinion. Keep in mind, however, that in presenting this information, you are likely to disclose your strategy for cross examination;
2. Discuss with opposing counsel and the jointly-appointed expert whether a party's concerns about the opinion can be resolved by further clarification or further opinion from the joint expert; and

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<sup>30</sup> *Janis v. Janis*, 2013 BCSC 116 at para. 10 [*Janis*].

<sup>31</sup> *Janis, supra* at note 31 at para. 21.

3. Be clear with the solely-retained expert that their task is limited to responding and critiquing the jointly-appointed expert's opinion. Recall the court's caution in *Janis*, *supra*:

[t]he decision as to whether the tendered report is limited to response and critique will ultimately be a decision for the trial judge and the party tendering such report runs the very real risk that it may be excluded in whole or in part if it strays beyond such limited purpose” [emphasis added].<sup>32</sup>

The court in *Janis*, *supra* did not determine whether the second expert's report constituted a rebuttal opinion.

### ***Historical Valuations***

Under the new regime of excluded and family property, historical valuations may be necessary to determine the increase in value of excluded property (to be included in family property) and quantify the value of a party's excluded property claim.

Unfortunately, there have been few cases addressing how best to present evidence of historical values. Parties have agreed as to historical values of assets and the increase in value of excluded property in some cases.<sup>33</sup> In other cases, the parties did not present historical values, and the court estimated the value of excluded property.<sup>34</sup> In *Walburger v. Lindsay*, 2015 BCSC 341, the parties jointly-appointed three property appraisers to value real property owned at the date of

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<sup>32</sup> *Ibid.* at para. 22.

<sup>33</sup> See for instance *Remmen v. Remmem*, 2014 BCSC 1552 at para. 9; *Williams v. Killey*, 2014 BCSC 1846, 52 R.F.L. (7th) 213 at para. 64; and *Wells. v. Campbell*, 2015 BCSC 3 at para. 12.

<sup>34</sup> See for instance *Asselin v. Roy*, 2013 BCSC 1681 at paras. 197-99 and 201-02 [*Asselin*]; and *Slavenova v. Ranguelov*, 2015 BCSC 79 at para. 43.

cohabitation. The difference in these experts' opinions was "too big to ignore."<sup>35</sup> The court accepted the opinion of the appraiser who relied on sales in the relevant time frame – namely around the time of cohabitation – of properties on the same street as the property at issue.<sup>36</sup>

It appears then that counsel should present historical appraisals of real property that consider direct comparable sales. We are also guided by the reasons in *Asselin v. Roy*, 2013 BCSC 1681, which indicate that historical appraisals and other evidence as to the value of excluded property at the date of cohabitation or the date of acquisition are normally required to assess claims for exclusions.<sup>37</sup>

### **Needs of the Child Assessments: s. 211 Reports**

High conflict cases involving parents who are diametrically opposed to each other about parenting arrangements are all too common, with the result that the court is required to make significant determinations in the face of contradictory evidence. The court has commented that it is difficult to know where the truth rests in such disagreements.

One tool available to assist in making determinations is a needs of the child assessment. The court retains the discretion<sup>38</sup> under s. 211(1) of the FLA to appoint a person to assess:

1. The needs of a child;
2. The views of a child; and
3. The ability and willingness of a party (and commonly both parties) to a family law dispute to satisfy the needs of a child.

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<sup>35</sup> *Walburger v. Lindsay*, 2015 BCSC 341 at para 37 [*Walburger*].

<sup>36</sup> *Walburger*, *supra* at note 36 at paras. 37-38 and 44.

<sup>37</sup> *Asselin*, *supra* at note 35 at paras. 196, 201, and 213-14.

<sup>38</sup> It is also common practice for the parties to consent to a s. 211 report.

Needs of the child assessments are not new. Under the FRA, the court could order a ‘custody and access report.’ In particular, s. 15 of the FRA allowed the court to “direct an investigation into a family matter.” Section 211 of the FLA now focuses the report on the child’s circumstances, consistent with the overarching objective of the FLA to focus on the child’s best interests. On this basis, the FLA has refined the focus of custody and access reports commonly used under the FRA.

### ***Purpose & Content of s. 211 Reports***

The purpose of a s. 211 report is to provide the court with useful information about guardianship and parenting issues, prepared by a qualified and neutral person.<sup>39</sup> The assessor is typically a family justice counsellor, social worker, psychologist or psychiatrist. As explained by John Paul Boyd:

Ordinarily, the assessor will meet each of the parents separately and meet them each again in the presence of the [child]. If the [child] is old enough, the assessor may speak to the [child] separately. The assessor may also speak to other people who know the parents and their [child], such as friends, family and neighbours, the [child]’s teachers, and any counsellors or therapists.

Once the assessment is finished, a process that can take anywhere from two months to five months, the assessor sends the assessment to the parties and to the court, if the assessment was court ordered. These assessments can be used in two ways: to encourage settlement; and, at trial, to persuade the court that the parenting proposal of one parent or guardian is to be preferred over that of the other. The person who prepared the assessment can be called to testify at the trial and will be subject to cross-examination as to how he or she conducted the assessment and reached his or her conclusions and recommendations.<sup>40</sup>

If a s. 211 report is ordered, the court can direct that the assessor consider particular issues, such as exploring the possibility of parental alienation, and can impose conditions about the matters to

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<sup>39</sup> *D.S. v. P.S.*, 2011 BCSC 1102 at para 55.

<sup>40</sup> John Paul Boyd, “Children in Family Law Matters,” *JP Boyd on Family Law: Resolving Family Law Disputes in British Columbia*, online: Clicklaw <[http://wiki.clicklaw.bc.ca/index.php/Children\\_in\\_Family\\_Law\\_Matters](http://wiki.clicklaw.bc.ca/index.php/Children_in_Family_Law_Matters)>.

be raised with the child.<sup>41</sup> If the court determines that it would be appropriate to hear the views of the child, it can order that the assessor present the child's views, which is consistent with the directive in s. 37(2)(b) of the FLA to consider the child's views where appropriate. As a general matter, the court will be inclined to give considerable weight to the child's views if there is evidence that the child is capable of accounting for his own best interests.<sup>42</sup>

The court can also impose conditions about the assessor's expertise.<sup>43</sup> In addition, the person appointed to prepare a s. 211 report "must not have had any previous connection with the parties," unless the parties agree otherwise, pursuant to s. 211(2)(b). The court has not appointed someone previously retained by one party to critique an earlier report to prepare an updated s. 211 report.<sup>44</sup>

### ***Test for Ordering a s. 211 Report***

The onus rests with the party seeking the s. 211 report to satisfy the court that it should be ordered. A s. 211 report will be ordered if the court determines that the objective opinion of a s. 211 assessor will be of assistance to the court in the onerous task of making fundamentally important decisions about the welfare of a child given the subject matter, the evidence and the

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<sup>41</sup> See for instance, *H.D.L. v. L.M.F.*, 2013 BCSC 1301 at paras. 13-20 [*H.D.L.*], wherein Madam Justice Holmes ordered that the assessment is not to involve the child discussing matters concerning allegations or reports he made about sexually inappropriate conduct or threats. In *H.D.L.*, the child disclosed that his father engaged in sexually inappropriate conduct and threats during the parties' marriage (para. 5). The father denied the allegations and alleged parental alienation (para. 5). The child was being treated and the allegations had been canvassed by the child's treating professionals (para. 9). There was also evidence that it would be harmful to the child to involve him in further assessment of the allegations (para. 8).

<sup>42</sup> *L.I.W. v. T.R.W.*, 2014 BCSC 1748 at paras. 103-104.

<sup>43</sup> See for instance, *H.D.L.*, *supra* at note 42 at paras. 13-20, wherein Holmes J. ordered that counsel for the child would agree to the appointment of the author of the s. 211 report, who is to be a person experienced in issues concerning family violence and is to be reasonably knowledgeable in issues concerning parental alienation.

<sup>44</sup> *L.C.T. v. R.K.*, 2013 BCSC 1438.

assertions of the parties.<sup>45</sup> The threshold for ordering a report is “quite low,”<sup>46</sup> and the court has confirmed that a broad and general approach should be taken to applications for s. 211 reports.<sup>47</sup>

### ***Reasons Not to Order s. 211 Report***

As with all decisions involving children, the court must consider whether a s. 211 report would be in the best interests of the child in the particular circumstances of the matter. As held in *Symington v. Simor*, [2000] BCJ No. 2688 (S.C.), a “psychological assessment of a child is an intrusive process”<sup>48</sup> – it is intrusive to the parties and more importantly, to the child. A s. 211 report may be disruptive to the child’s life. It is these potential negative consequences that are to be weighed against the potential probative value of the opinion.<sup>49</sup> This balancing exercise is tempered by the principle that the court is required to give paramount consideration to a child’s best interest in the long-term, and not the short-term.<sup>50</sup>

Given the intrusive nature of an assessment, a s. 211 report should not be ordered simply to find evidence or make a case, nor should it be used to force settlement on a party.<sup>51</sup>

Further, the court may decline to order a s. 211 report in circumstances where one party seeks to vary a guardianship order, but has failed to establish a material change in circumstances.<sup>52</sup>

In addition, the costs of preparing a s. 211 report may be prohibitive, and are a countervailing concern weighing against the appointment of a s. 211 author. To address the costs, the court has

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<sup>45</sup> *Marsden v. Bercovitz*, unreported cited in *T.N. v. J.C.N.*, 2013 BCSC 1870 at para. 15 [*T.N.*]; *Keith v. MacMillan*, 2014 BCSC 1352 at para. 68 [*Keith*].

<sup>46</sup> *Keith*, *supra* at note 46 at para. 67. See also *T.N.*, *supra* at note 46 at para. 14.

<sup>47</sup> *Keith*, *supra* at note 46 at para. 67.

<sup>48</sup> *Symington v. Simor*, [2000] BCJ No. 2688 (S.C.) at para. 12.

<sup>49</sup> *Marsden v. Bercovitz*, unreported, cited in *Keith*, *supra* at note 46 at para. 67; *J.D. v. Y.P.*, 2015 BCSC 321 at para. 104.

<sup>50</sup> *A.A. v. S.N.A.*, 2007 BCCA 363, 243 B.C.A.C. 301, at paras. 27-28.

<sup>51</sup> Professor McLeod, annotation to *Saffin v. Saffin* (1991), 123 A.R. 350, 35 R.F.L. (3d) 250.

<sup>52</sup> *Fox v. Fox*, 2013 BCSC 691 at paras. 39 and 65.

required the party seeking the report to pay the expert's fees up front, leaving for the trial judge the question of the allocation of the expert's fees between the parties. To reduce costs, the court may also direct that the report be prepared by a family justice counsellor. While there are no fees payable by the parties to the family justice counsellor, the delay in obtaining a report from a family justice counsellor is generally significant.

### ***Weight of s. 211 Report***

The court will not blindly follow the recommendations contained in a s. 211 report. As held by the Ontario District Court:

[i]t is not intended that the assessment usurp the trial process where the parties do not agree with the assessor's assessment and recommendations. It is obvious that where assessor[s'] reports are consistent with the facts established at trial and the law pertaining to those facts, they will be given considerable weight. The [c]ourts, however, will not routinely accept them. They have been successfully challenged in the past.<sup>53</sup>

### ***Caution regarding Critique Reports***

The court has scorned the practice of presenting critique reports prepared by an expert who was hired by a party to provide "psychological consulting" to prepare that party for his or her assessment.<sup>54</sup> For instance, in *B.T.R. v. U.A.*, 2014 BCSC 1012, the mother received consulting services from a psychologist (the "Consulting Psychologist") regarding the "nature and process of s. 15 reports" under the FRA, to help prepare the mother for her assessment by another psychologist.<sup>55</sup> After the assessment and the release of the s. 15 report, the Consulting Psychologist prepared a critique of the s. 15 report. The court held that the Consulting Psychologist was advancing the mother's interests, both in providing consulting services and in

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<sup>53</sup> *Boody v. Boody* [1983] O.J. No. 911, 32 R.F.L. (3d) 396 at para. 15.

<sup>54</sup> *B.T.R. v. U.A.*, 2014 BCSC 1012 at para. 56 [*B.T.R.*].

<sup>55</sup> *B.T.R.*, *supra* at note 55 at para. 36.

preparing the critique, and found that “[t]here is no semblance of independence,” contrary to an expert’s duty under Rule 13-2(1) to assist the court and not be an advocate for a party.<sup>56</sup>

### ***Presenting a case of Alienation through s. 211 Reports***

One issue that is appearing more frequently in family cases is alienation or estrangement. Generally, alienation arises when one parent alleges that the other has caused, whether intentionally or not, the child to resist seeing the first parent or reject ““a previously acceptable and meaningful relationship”” with the first parent.<sup>57</sup> There is no identifiable event that can explain the change in attitudes of the child.<sup>58</sup> While there is no singularly accepted definition of alienation, one definition of “alienated child” is as follows:

[A] child “who expresses, freely and persistently, unreasonable negative feelings and beliefs (such as anger, hatred, rejection and/or fear) toward a parent that are significantly disproportion (sic) to the child’s actual experience with that parent.”<sup>59</sup>

Alienation by one parent of the other has been recognized by the court as a form of emotional abuse.<sup>60</sup>

Section 211 reports can assist the court by providing objective and neutral opinion evidence about whether the child is alienated from one parent, and recommendations made in the child’s best interest about how to address the alienation.<sup>61</sup> In *L.D.K. v. M.A.K.*, 2015 BCSC 226 and *J.C.W. v. J.K.R.W.*, 2014 BCSC 488, two alienation cases, the s. 211 assessors interviewed both parents, the children (the children were 11, 13, 15, and 17 years of age), and the new partners of

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<sup>56</sup> *Ibid.* at para 56.

<sup>57</sup> *J.C.W. v. J.K.R.W.*, 2014 BCSC 488 at para. 55 [*J.C.W.*].

<sup>58</sup> *L.D.K. v. M.A.K.*, 2015 BCSC 226 at para. 32.

<sup>59</sup> Joan Kelly & Janet Johnson, “The Alienated Child: A Reformulation of parental alienated syndrome” (2001) *Family Courts Review*, cited in *J.C.W.*, *supra* at note 58 at para. 33.

<sup>60</sup> *L.D.K.*, *supra* at note 59 at para. 98.

<sup>61</sup> See for instance *J.C.W.*, *supra*, *supra* at note 58 and *L.D.K.*, *supra* at note 59, wherein the court in both cases found alienation, reversed the custody and guardianship arrangements, suspended parenting time with the alienating parent, and ordered participation in the Family Reflections Reunification Program.

the parents.<sup>62</sup> Where appropriate, the assessors observed the children in the parents' homes.<sup>63</sup> This process enabled both assessors to make recommendations designed to promote the children's long-term best interest.

Prior to alleging alienation, counsel should ensure that there is an air of reality to the allegation. The following is a non-exhaustive list of factors considered in past cases, which may assist in identifying the possibility that alienation is present:

1. **Biological factors**, including the parents' mental health issues and potentially inherited predisposition of the child towards emotional and mental health issues;
2. **Marital conflict**, including how the conflict is perceived by the child and how the child relates to the conflict;
3. **Differences in parenting styles and parenting history**, including whether the parental conflict causes the parents to become more entrenched in their respective parenting styles and polarized, and how the child relates to the polarized parenting styles;
4. **Enmeshment**, which is described as "a dynamic where the nature of a bond between a parent and child becomes diffuse such that the child may suffer a loss of individual autonomous development." Enmeshment is an abstract concept, but indicators include the child continuing to sleep with a parent when they are capable of sleeping alone; the parent electing to continue sleeping with the child rather than an intimate partner; the language a parent uses when she/he links her/his experience to the children, and a child's attentiveness to a parent's emotional state;
5. **Transitions**, and the manner in which transitions have been handled, including prolonged goodbyes and unnecessary contact with the alienating parent, which make transitions even more difficult for the child;
6. **Empowerment of the children to make choices beyond those normally available to a child of similar age**, including whether the child is lead to believe that they can chose whether or not they have parenting time with the alienated parent;
7. **New partners**, which may create a loyalty conflict for the child between the alienated parent and the new partner of the alienating parent;
8. **Strong sibling relationship** between children;<sup>64</sup>

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<sup>62</sup> *L.D.K.*, *supra* at note 59 at para.51; *J.C.W.*, *supra* at note 58 at para. 29.

<sup>63</sup> *J.C.W.*, *supra* at note 58 at para. 29.

9. **How the child relates to the alienated parent**, including consideration of whether the child remains distant from the alienated parent even though they are spending more time with that parent;<sup>65</sup>
10. **Limitation of contact** between the child and the alienated parent;
11. **Interfering with communication**, including the alienating parent directing that communications between the child and the alienated parent go through the alienating parent;
12. **Confiding in the child**;
13. **Sharing inappropriate information**, including telling the child about financial and other details of the litigation;
14. **Withholding of medical, academic or other important information from the alienated parent**;
15. **Goadng the alienated parent into arguments about the child in the presence of the child**;<sup>66</sup>
16. **Assertion of control over the child by one parent to the detriment of the other**;
17. **Fostering by one parent in the child's belief that the other parent is unnecessary**;  
and
18. **One parent believing that the child's rejection of the other parent is justified**.<sup>67</sup>

## **Conclusion**

The implementation of the FLA has not resulted in significant changes to the admission and nature of expert opinion at this time. As we wait (patiently) for the development of case law addressing opinion in property disputes and monitor the further development of cases dealing with parenting arrangements, it is important to remain critical about expert opinion: whether the opinion is necessary, can its admission be opposed, and how best can it be challenged.

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<sup>64</sup> Factors 1 – 8 were identified by the s. 211 author in *J.C.W.*, *supra* at note 58 at para. 33.

<sup>65</sup> This was a factor considered by Madam Justice Loo in *J.C.W.*, *supra* at note 58 at para. 75.

<sup>66</sup> Factors 10-15 were considered by Mr. Justice Harvey in *L.D.K.*, *supra* at note 59 at paras. 89-91 and 93.

<sup>67</sup> Factors 16-17 were identified by Harvey J. in *L.D.K.*, *supra* at note 59 at paras. 103-105.