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Marmer Penner Inc. Newsletter

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"Know Your Stones" – The Final Chapter

The May/June 2014 edition of the *Marmer Penner Inc. Newsletter* titled "Know Your Stones" addressed the importance of applying common sense and sound judgement in relation to cost versus benefit when engaged in matrimonial litigation. At the time, we had a bee in our bonnet about an earlier article written by a particular expert, who appeared to stereotype all "spouses who are very wealthy" who are engaged in matrimonial proceedings as deceptive cheaters, "who can and will find ways to divert and hide their income producing assets from their spouses". Our view was that this sort of generalization may lead to reckless spending. The Courts caught up with this expert in *Wakeley v Wakeley*, 2015 ONSC 3561.

In *Wakeley*, the expert testified that she was initially retained to determine the income of a business owner for support purposes, however, once it appeared that the wealthy spouse's lifestyle could not be reconciled with what he reported as his income, her role changed to a "forensic investigation". The Court however, found that her involvement "evolved into something much more. After she issued her first report, [she] followed up her involvement by swearing six affidavits in support of motions for disclosure and one to defend against a motion to remove her for bias." The expert testified that her approach was to look for "concealment and diversion of income and assets" (because that is what all "wealthy spouses" do, right?) In this case, the wealthy spouse remarried, and commenced new businesses with his new partner, who owned (on paper at least), 50% of the shares. A major

issue in this case was the extent of the wealthy spouse's beneficial ownership, i.e. did he own 50% or 100% of the group of companies? Justice Harper expressed the same concerns that we voiced in our May/June 2014 Newsletter:

> *"in family law matters especially, every professional owes a duty to their clients to conduct themselves in a manner that is proportionate to the potential outcome. The costs of experts cannot be out of proportion to the potential gains that might be realized…I find that [the expert] started with a hypothesis that [the wealthy spouse] owned and operated all of the companies and she sought to confirm that with her investigation. She did not adjust when facts that supported an alternate conclusion presented themselves…Her advocacy placed a continuous fog on what was a valid opinion versus what was an unshakable position while advocating. I am of the view that this attitude is a continuing extension of her litigious and "forensic" approach that exacerbated the conflict and made it more difficult to determine what evidence supported an opinion or an inference that I must draw. [Her] rigid opinion that the [wealthy spouse] should be declared the beneficial owner of the companies is not supported on the evidence."*

On any engagement, a healthy degree of skepticism is required. However, one must use common sense in order not to cross the line into advocacy. The fallout, as *Wakeley* demonstrates, can be significant as the opinions expressed and testimony presented will lose their validity in Court. One must approach each engagement case-by-case and adjust the initial hypothesis accordingly when alternate conclusions present themselves. In the end, the evidence must support the conclusion. It is equally important for an expert to remember that the trial judge is the trial arbiter for matters that are legal. In *Wakeley*, the expert maintained a rigid opinion that the husband should be declared the beneficial owner of the entire group of companies even when the evidence did not support this theory. The opposing expert presented two scenarios: one assuming 50% ownership and one assuming 100% ownership and indicated that it was not proper for him to assess whether the wealthy spouse's new partner worked in the business and therefore should be considered a *bona fide* owner. By providing two scenarios, the opposing expert's evidence and testimony was seen to be fair, objective and non-

partisan. Ultimately, Justice Harper concluded that the wealthy spouse was only a 50 percent owner and issued a declaration to that effect.

As *Wakeley* demonstrates, the onus is on experts to conduct themselves properly and proportionately to what is at stake. Also, the Court echoed our musings about the importance of not having strong initial convictions at the outset of an engagement. Being a "wealthy spouse" doesn't automatically make you deceptive, nor does it automatically make you a cheater. It is neither practical nor possible to turn over every stone, so you must "Know your Stones".