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PERSPECTIVE

For want of a nail: *In re Marriage of Lietz*

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The recent case of *In re Marriage of Lietz* ((2024) 99 Cal.App.5th 664) offers direction on the use of expert testimony in family law cases and provides some practical guidance that should be considered whenever expert testimony is presented in a trial or evidentiary hearing.

In 1758, Benjamin Franklin published the last of twenty-six editions of Poor Richard's Almanck. In that edition, Franklin included a very old poem, *"A Little Neglect May Breed Great Mischief."* That poem still resonates today:

"For the want of a nail the shoe was lost,
For want of a shoe the horse was lost,
For want of a horse the rider was lost,
For want of a rider the battle was lost,
For want of a battle the kingdom was lost,
All for the want of a horseshoe nail."

Attention to Franklin's words may have helped sort through some of the challenges that counsel faced in *Lietz*. The case provides some much-needed direction regarding the use of expert testimony by clarifying the impact of *People v. Sanchez* ((2016) 63 Cal.4th 665) on family law cases and offering guidance on the use of expert testimony.

In *Sanchez*, the California Supreme Court addressed the admissibility of hearsay evidence, holding that background information could be admitted, while case-specific facts required a hearsay exception or an appropriate witness.

Facts of the *Leitz* case

In *Lietz*, an issue arose as to the value of the family home, and each side presented reports appraising the value of the home. Wife's appraisal valued the home at $1,100,000; Husband's report valued it at $1,020,000. Both of the appraisals indicated that the home was on a 9,000-square-foot lot. The trial court found the report submitted by Husband to be more credible.

Wife appealed, contending that the trial court erred by not allowing her appraiser to testify that the lot size exceeded 9,000 square feet. Her expert had testified remotely in the trial regarding the value of the home, from her car. She had stated that she did not have her report in front of her and had "only glanced" at the other expert's report.

Husband's counsel moved to exclude Wife's expert's testimony "due to lack of preparation and lack of ability to testify in this matter." The court observed, "[e]ssentially, you're doing it from a phone in a car, and you can't use your phone to look at documents and appear in a hearing." It continued the hearing, admonishing the expert to testify in a more appropriate manner and "not on a phone."

The hearing resumed several days later. After cross-examination of the expert was completed, Wife's counsel announced that "[t]here were some things that were discovered over the weekend regarding the property" and asked for permission to introduce testimony that the expert had done further investigation. She had checked records in the "county portal" that indicated the lot size was actually larger than the two experts had reported. Husband's counsel objected that the proffered testimony was case-specific hearsay as described in *Sanchez*.

Expert testimony

Following a discussion of *Sanchez*, the court noted that Evidence Code Section 801 permits an expert to rely on evidence "that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." The court also pointed to a similar provision in Evidence Code Section 802. Both of these provisions have long been used to support the proposition that experts can rely on hearsay when forming their opinions.

The court stated, however, that while *Sanchez* allowed expert witnesses to rely on hearsay in forming an opinion, an expert may not relate case-specific facts asserted in hearsay statements unless they are independently proven by competent evidence or are covered by a hearsay exception. (*People v. Sanchez*, supra at 686.)

The court concluded that although *Sanchez* is a criminal case, its holding applies to the use of expert testimony in civil cases. (See *People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1). It also found that Wife's expert could not rely on the case-specific public record regarding the lot size, as counsel did not identify or produce the public record to make the supporting evidence admissible.

The court then addressed an argument made by Wife's counsel that the calculation of the lot size was "basic math" and "simple geometry," finding that the basic equations used by Wife's counsel to calculate the lot size, including the formula for determining the area of a parallelogram and the area of a triangle, were incorrect. The court took judicial notice of the correct formulas.

The obvious lesson from this exchange is that even though most lawyers would gladly say, "it was my understanding that there would be no math," if they decide to make a math-based argument in a case, they must check their work.

Family law cases

Lietz is helpful in the family law context as it makes clear that the *Sanchez* rule regarding the use of hearsay in expert testimony applies to family law cases, and it provides a solid example of the application of the *Sanchez* rule in expert testimony relative to real property appraisals commonly used in family law cases.

Lietz also offers a cautionary tale to lawyers. The use of expert testimony in family law cases is necessary and common. The testimony of forensic accountants is an essential element in many, if not most, family law cases where the testimony involves many transactions or elements, all of which may be subject to the proof requirements described in *Sanchez*. The requirements of *Sanchez* have long been part of the landscape, and experience has shown that the vast majority of expert forensic accountants who testify in family law cases are familiar with the requirements imposed by *Sanchez*.

However, this familiarity is only the first step. Experts must be given the data, material and resources to be able to prepare for testimony under the rigors of *Sanchez*. In many cases, this will mean that witnesses other than forensic accountant experts will be necessary to provide the foundation for the material that the experts need to fully consider the case and develop an appropriate opinion and testimony. In *Lietz*, the court noted that the best way to measure the lot would be to hire a surveyor and that Wife retained a surveyor only after the trial court had rendered a decision.

Expert testimony: considerations

The *Leitz* case illustrates many of the issues that must be addressed when preparing to present an expert witness in a family law case. These considerations include the following:

1. Experience and expertise. Does the expert have the requisite experience and expertise in the area that is the subject of the testimony? It is not uncommon in family law cases for an expert who is qualified in one area, such as forensic accounting, to be asked to render opinions about the nature of the underlying business - not the subject of the witnesses' expertise. This "opinion creep" should be avoided to ensure that the expert's testimony is admissible and persuasive.

2. Foundation. Make sure that the evidence the expert witness needs is available and the requisite foundation can be laid for admission. This is the challenge posed by *Sanchez* when it comes to case specific evidence. In many, if not most, cases, both parties will be presenting expert testimony on the same issues. In order to maximize the effectiveness of the proffered expert testimony and to ensure admissibility, counsel should consider meeting and conferring regarding the admissibility of supporting documents and evidence that both experts will need to rely on. This can be of great importance in document0heavy issues like post-separation accountings and tracings.

3. Exhibits. Before the expert is called to testify, make sure that all exhibits upon which the expert will need to rely are identified and are clearly marked. Have a plan for the admissibility of these supporting exhibits. In larger cases, consider what exhibits will come in through different witnesses and organize your exhibits accordingly. This eliminates the need for the witness and court to go through multiple notebooks or exhibits to get to those needed for each witness. Having exhibits organized by issue and/or witness makes for a much more streamlined, efficient and persuasive presentation of evidence.

4. Venue. In this age of videoconferencing and remote appearances, make sure the expert is in an environment that allows him or her to effectively present testimony. Properly used, videoconferencing platforms can be an effective way to present complex or involved expert testimony: Witnesses will have access to their materials, and the use of "share screen" can make exhibits including spreadsheets, balance sheets and documents much easier to present and more persuasive.

5. Proof. For every exhibit that will be presented to support the expert's opinion or be relied on by the expert, have a concise offer of proof prepared for the relevance of the exhibit. In this regard, if there are multiple theories of relevance, present them all. This will increase the likelihood that the court will consider the evidence and reject arguments under Evidence Code Section 352.

6. Admissibility. For every exhibit that will be presented to support the expert's opinion or be relied on by the expert, have the legal theory of admissibility ready to present to the court. In the case of novel or complex issues, consider having a short pocket brief ready to submit to the court.

Conclusion

Lietz provides guidance on the need to be prepared to present expert evidence in a family law hearing or trial. This means anticipating the admissibility of the evidence the expert needs in order to formulate the opinion that he or she intends to present in court. The consequences of getting it wrong can be extremely costly. Remember, *"for want of a nail."*

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