

Challenging Expert Valuation Opinions in Divorce Cases: An Oasis or Mirage in the Trial Desert?

by
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I. Introduction

Challenges to the admissibility of reports, testimony, and opinions of valuation experts in divorce cases occur infrequently. With no uniform national standard to apply to these challenges, and the propensity of trial courts to admit testimony and allow challenges to go to the weight of the evidence as opposed to barring admissibility, divorce practitioners often do not avail themselves of the opportunity to prevent consideration of flawed financial information. Additionally, many lawyers are unaware of or have not sought to exclude expert opinions. Important questions emerge from this paucity of authority and experience. For example, should there be a singular national standard for admissibility of expert valuation opinions in divorce cases? What, if any, mandatory qualifications for financial experts should be required? Should trial courts intervene and be proactive in involving neutral valuation experts? Since each state has separate family law statutory regimes, how are these issues to be addressed? Are valuations the lodestar for finally implementing the twenty-first century nationalization of some or all aspects of family law, as has been suggested for decades? If so, what does that mean for federalism and state jurisdictional primacy over domestic relations cases? These questions are vexing and, in part, well beyond the scope of expert valuation challenges. However, the notion that divorce cases are subject to different rules or practice is anathema to civil litigation constructs. The answers begin with divorce lawyers developing complex business litigation skills, understanding civil litigation principles, and applying

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evidentiary rules to divorce cases in the same manner as any other type of civil litigation. Armed with this background, counsel can master current admissibility standards and challenge valuation experts who are lacking in qualifications and methodological support for conclusions. To assist in the development of these skills, Part II of this article identifies general federal evidentiary principles that either directly or indirectly impact state standards for admissibility of expert testimony. Part III then gives an overview of varying state perspectives. Part IV assesses principal financial expert challenge areas and canvasses selected federal authorities to give context to financial expert challenges. Part V takes this background and reviews a select group of the small number of divorce opinions that consider challenges to valuations. Part VI presents a suggested approach to divorce court consideration of financial experts that would bring clarity and consistency to this underdeveloped, important issue. Finally, Part VII concludes that bringing due diligence and uniformity to the standard for admissibility of expert financial opinions in divorce cases will increase the quality and reliability of evidence, improve trial presentations, result in more equitable outcomes in divorce cases involving valuation issues, and lead to litigants having more confidence in family law courts.

II. General Federal Evidentiary Principles

The path to attorneys and divorce courts bringing discipline to financial evidence and testimony begins with an understanding of general federal evidentiary principles regardless of application in a particular jurisdiction. Historically, courts applied a long-recognized test for determining the admissibility of expert opinions on scientific matters. Under the test enunciated in *Frye v. United States*,¹ expert opinion testimony employing a particular scientific method or technique was admissible only if there was “general acceptance” of the reliability of the methodology or technique in the relevant scientific community.²

The approach to admissibility established in *Frye* dominated the legal landscape through the mid-1970s adoption of the Federal Rules of Evidence, despite questions as to the reliability and

¹ 293 F. 1013 (D.C. Cir. 1923).

² *Id.* at 1014.

vitality of the “general acceptance test.”³ Specifically, questions abounded as to whether the Federal Rules of Evidence superseded *Frye*.⁴ The highest court in the land answered these questions.

In the first of three landmark U.S. Supreme Court decisions in the 1990s, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁵ the Court held that Rule 702 of the Federal Rules of Evidence superseded the *Frye* “general acceptance” test. Rule 702 at that time provided in relevant part: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”⁶

Daubert declared that the “austere” *Frye* general acceptance standard—absent from and incompatible with the Federal Rules of Evidence—did not apply in federal trials.⁷ However, federal trial judges were directed to ensure that any and all scientific testimony or evidence was relevant and reliable.⁸ Rule 702 required the expert testimony to be grounded in scientific methods and procedures derived by the scientific method, and supported by appropriate validation to establish a standard of evidentiary reliability.⁹ To that end, Rule 702 further required that the evidence or testimony assist the trier of fact in understanding the evidence or determining a fact in issue, with a valid scientific connection to the pertinent inquiry as a precondition to admissibility.¹⁰ To assist the trier of fact in making this assessment, trial judges were, at the outset, to determine pursuant to Rule 104(a) of the Federal Rules of Evidence whether the expert was proposing to testify to scientific knowledge that would assist the trier of fact to understand or determine a fact in issue.¹¹ A key question to be answered in assessing whether a theory or technique comports with the criteria of scientific inquiry that would assist the trier of

³ 509 U.S. 579, 586-87 (1993).

⁴ *Id.* at 587.

⁵ 509 U.S. 579.

⁶ *Id.* at 588.

⁷ *Id.* at 589.

⁸ *Id.*

⁹ *Id.* at 589-91.

¹⁰ *Id.* at 591.

¹¹ *Id.* at 592.

fact was whether the theory or technique could be, or had been, tested.¹² Another pertinent factor was whether the theory or technique had been subjected to prior review and publication.¹³ Harkening back to *Frye*, *Daubert* indicated that “general acceptance” could have a bearing on the inquiry.¹⁴ In vacating a summary judgment in favor of a drug manufacturer in a birth defect case, the Court emphasized that the inquiry envisioned by Rule 702 was a “flexible one” with the focus solely on principles and methodology, rather than on the conclusions generated.¹⁵ *Daubert* defined the “gatekeeping role” for judges in considering the admissibility of expert opinion and testimony and summarized that “general acceptance” is not a necessary precondition to admissibility of scientific evidence under the Federal Rules of Evidence.¹⁶

*General Electric Co. v. Joiner*¹⁷ followed *Daubert* in the U.S. Supreme Court and provided trial judges greater latitude in considering expert opinion admissibility. The Court held that abuse of discretion was the appropriate standard in reviewing a trial court’s decision to admit or exclude expert testimony under *Daubert*.¹⁸ *Joiner* recognized that the Federal Rules of Evidence allow trial courts to admit a broader range of scientific testimony than under *Frye*, but left in place the “gatekeeper” role of the trial judges in screening this type of evidence.¹⁹ The trial court in *Joiner* properly considered four studies and acted within its discretion in excluding experts’ testimony related to PCB exposure and cancer causation.²⁰ *Joiner* reinforced, and arguably standardized, the discretion accorded triers of fact by *Daubert*.

*Kumho Tire Co. v. Carmichael*²¹ addressed whether the *Daubert* “gatekeeping” function applied to non-scientific experts and whether the *Daubert* list of factors a trier of fact must consider to determine the relevance and reliability of proposed ex-

¹² *Id.* at 592.

¹³ *Id.* at 593.

¹⁴ *Id.* at 594.

¹⁵ *Id.* at 594-95.

¹⁶ *Id.* at 597.

¹⁷ 522 U.S. 136 (1997).

¹⁸ *Id.* at 138-39.

¹⁹ *Id.* at 142.

²⁰ *Id.* at 146-47.

²¹ 526 U.S. 137 (1999).

pert testimony was exclusive or non-exclusive. The U.S. Supreme Court began its opinion by noting that Rule 702 of the Federal Rules of Evidence specifically references “scientific, technical, or other specialized knowledge.”²² Accordingly, the reliability standard applied to all scientific, technical, or other specialized matters, including the testimony of the engineer in issue in *Kumho*.²³ Reiterating the *Daubert* “gatekeeping” questions, the Court concluded that trial courts must have latitude in determining how to test an expert’s reliability beyond the questions posed in *Daubert*.²⁴ Rule 702 grants triers of fact discretionary authority to determine reliability in light of the particular facts and circumstances of a particular case.²⁵ *Kumho* reinstated the trial court’s grant of summary judgment in favor of the defendants, and concluded that the trial court acted within its discretion under *Daubert* in excluding the plaintiffs’ tire failure analyst’s expert testimony because the expert’s methodology was dubious.²⁶

As a result of these three opinions, Rule 702 of the Federal Rules of Evidence was amended to codify key components of *Daubert*, *Joiner*, and *Kumho*:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on scientific facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.²⁷

This trio of cases and the amendment to Rule 702 clarifies the application of *Daubert* and its progeny to financial experts in federal courts and provides useful general guidance. It is fundamental that divorce practitioners master these holdings in order to analyze and execute challenges to valuation experts’ opinions. These opinions and the Federal Rules of Evidence do not, however, have automatic application to state courts in which there

²² *Id.* at 147.

²³ *Id.*

²⁴ *Id.* at 151-53.

²⁵ *Id.* at 158.

²⁶ *Id.*

²⁷ FED. R. EVID. 702.

are varying standards of admissibility for expert opinions. That is part of the confusion and trepidation that attorneys face when considering challenging financial experts in divorce cases.

III. Varying State Perspectives

While the U.S. Supreme Court and Federal Rules of Evidence bring greater clarity to the standard for admissibility of expert opinions in federal courts, there exists a wide range of standards for admissibility among the states. Some states continue to follow *Frye*. Some states have adopted *Daubert*. Some states have combined the two standards or have variations. One survey indicates that, as of April 2017, thirty-nine states have adopted the *Daubert* standard, eight states and the District of Columbia hew to *Frye*, and three states apply a combined or other standard.²⁸ Another survey indicates that thirty-seven states have adopted *Daubert*.²⁹ The fact that a majority of states focus on the *Daubert* approach offers a glimmer of hope for uniformity. However, that glimmer may only be a mirage when examined for details.

A closer inspection reveals that these surveys are not dispositive of the multiple variations of approaches within each general category. For example, the Alabama Code was amended in 2012 to conform to both *Daubert* and the Alabama Rules of Evidence.³⁰ *State v. Montalbo*³¹ precedes *Daubert* and, although it adopts the *Frye* “general acceptance” test, it also directs the weighing of other *Daubert*-like factors. Idaho adopted only a portion of the *Daubert* standard, focusing on whether the expert’s knowledge would assist the trier of fact rather than whether the evidence upon which the expert’s opinion is based is commonly agreed upon.³² The Indiana Rules of Evidence provide a standard that recites *Daubert* language but adds that expert scientific testimony is admissible only if trial courts are

²⁸ *Daubert v. Frye* – A State-by-State Comparison, THE EXPERT INSTITUTE (Apr. 3, 2017), <https://www.theexpertinstitute.com/daubert-v-frye-a-state-by-state-comparison/>.

²⁹ American Bar Association, 42 LITIG. NEWS 4 (Summer 2017).

³⁰ ALA. CODE § 12-21-160 (2017); ALA. R. EVID. 702.

³¹ 828 P.2d 1274, 1281-82 (Haw. 1992); see also HAW. R. EVID. 702.

³² *State v. Merwin*, 962 P.2d 1026, 1030 (Idaho 1998); see also IDAHO R. EVID. 702.

satisfied that the underlying scientific principles are reliable.³³ Iowa has an evidence rule that adopts a portion of federal Rule 702.³⁴ Maryland evidence rules establish a variation on *Frye*.³⁵ Nevada provides for a flexible approach to considering the admissibility of expert testimony that expressly does not adopt the *Daubert* approach.³⁶ Oregon has adopted some of the *Daubert* factors in a statute having language identical to the first sentence of the Hawaii rule,³⁷ with case authority finding *Daubert* helpful to the inquiry.³⁸ The Virginia Code indicates that expert testimony is generally admissible if there is adequate foundation and the testimony will assist the trier of fact in understanding the evidence.³⁹ These examples are merely representative of the lack of precision of surveys or other compilations. Nevertheless, there is no dispute that states have different standards governing the admissibility of expert testimony and consideration of expert opinions. This lack of uniformity and lawyer unfamiliarity with the statutes, rules, and opinions are key factors in the lack of challenges to valuation experts in divorce cases. At a more basic level, even with knowledge of the applicable standard, a large number of attorneys do not know how to identify, develop, and execute potential areas of challenge. This paradox compounds the evidentiary problem and leads to non-experts expressing valuation opinions far too often in divorce cases.

IV. Potential Challenge Areas and Representative Federal Authorities

The divorce lawyer *must* know the applicable state standard for admissibility of expert valuation opinions. Yet, regardless of the applicable standard, there are a variety of areas in which a divorce practitioner may inquire when considering a challenge to

³³ IND. R. EVID. 702; *see also* *Person v. Shipley*, 962 N.E.2d 1192 (Ind. 2012).

³⁴ IOWA R. EVID. 5.702; *see also* *Ganrud v. Smith*, 206 N.W.2d 311 (Iowa 1973) (pre-*Daubert* opinion upon which the Iowa Rule of Evidence is, in part, based).

³⁵ MD. R. EVID. 5-702.

³⁶ *Higgs v. State*, 222 P.3d 648 (Nev. 2010).

³⁷ OR. REV. STAT. § 40.410 (2017); *c.f.* HAW. R. EVID. 702.

³⁸ *State v. O'Key*, 899 P.2d 663 (Or. 1995).

³⁹ VA. CODE § 8.01-401.3 (2017).

a purported divorce valuation expert. In *Oddi v. Commonwealth of Pennsylvania*, the U.S. Court of Appeals for the Third Circuit succinctly set forth the following factors that trial courts should consider when confronted with *Daubert* challenges:

1. Testable hypothesis;
2. Peer review;
3. Error rate;
4. Existence of standards;
5. General acceptance;
6. Whether reliability has been evaluated;
7. Qualifications of the expert; and
8. Non-judicial uses to which the method has been put.⁴⁰

While not exclusive, the *Oddi* list offers a synthesized template for evaluation of the work of experts. These factors focus largely on validity and reliability. And rightly so. According to a study by PricewaterhouseCoopers, lack of reliability is the leading reason for the exclusion of expert financial testimony.⁴¹ As of 2016, and for the sixteenth consecutive year, lack of reliability was the leading reason financial expert opinions were excluded in federal courts.⁴² Exclusions arose more frequently from the misuse of accepted methodologies rather than from the use of novel or untested analytical methods.⁴³ Other areas of potential inquiry for exclusion include: qualifications, experience, overreliance on others, relevance, speculation, and lack of understanding of facts. These trends continue today, with underutilization of *Daubert* or *Daubert*-type challenges to valuation experts. Myriad federal opinions are instructive examples of potential areas of challenge in divorce cases, and are helpful in determining how and whether to challenge a valuation expert.

⁴⁰ 234 F.3d 136, 145 (3d Cir. 2000).

⁴¹ PricewaterhouseCoopers, *Daubert Challenges to Financial Experts* 14 (May 2016), <https://www.pwc.com/us/en/forensic-services/publications/daubert-study-2016.html>.

⁴² *Id.* The authors of the study do note that they “have seen, on average, approximately 53% of financial experts admitted by courts after being challenged.” *Id.*

⁴³ *Id.* at 13.

*Faulkner v. Arista Records, LLC*⁴⁴ involved the testimony of the founder and co-owner of a firm that provided auditing, royalty examination, valuation, expert witnesses, and other related services. *Faulkner's* potential expert, Wayne Coleman, had performed or supervised thousands of examinations and testified as an expert thirty-six times.⁴⁵ Coleman was asked to review Arista's royalties records for overall reliability.⁴⁶ Arista proffered Tom Nilsen, a music industry veteran for more than thirty years, as a rebuttal expert.⁴⁷ Considering challenges to each purported expert, the trial court first concluded that Coleman's opinion that Arista's records were "abysmal" was inadmissible due to his lack of consideration of certain documents and insufficient facts and data – specifically his review of records that were not representative of Arista's production and his forming opinions about Arista's records prior to reviewing documents.⁴⁸ Coleman was qualified to testify as an expert as to Arista's minimum royalties-owed estimate since his analysis was based on estimates Arista had conceded, documents Arista has produced, and application of a deduction taken by Arista's own expert.⁴⁹ However, the trial court barred Coleman's release-based royalties estimate due to inconsistencies, result-driven methodology, and refusal to use historical data or request documents necessary to verify historical data.⁵⁰ Coleman's disregard of the voluminous production of historical sales and royalty records provided by Arista gave the appearance of a result-oriented methodology that was unreliable.⁵¹ Finally, the trial court declared Coleman's interpolation method of calculating royalties inadmissible due to his overreliance on another person who designed the model, chose the points, and constructed the model based on her own expertise.⁵² Nilsen was permitted to testify as a rebuttal expert to Coleman's minimum damages estimate.⁵³ *Faulkner* illustrates

⁴⁴ 46 F. Supp. 3d 365 (S.D.N.Y. 2014).

⁴⁵ *Id.* at 380.

⁴⁶ *Id.* at 369.

⁴⁷ *Id.* at 372.

⁴⁸ *Id.* at 381.

⁴⁹ *Id.* at 382.

⁵⁰ *Id.* at 382-84.

⁵¹ *Id.* at 383-84.

⁵² *Id.* at 384-86.

⁵³ *Id.* at 386.

a precise application of the *Daubert* standard in a complex economic setting. The opinion also demonstrates how application of many of the factors set forth in *Oddi* can produce a compelling attack on valuation opinion and testimony.

Unreliable economic testing is also exemplified in *Good v. American Water Works Co.*⁵⁴ In this case, the trial court recognized its “gatekeeping” function and flexibility in applying the Rule 702 reliability test.⁵⁵ On January 9, 2014, approximately 300,000 residents of Charleston, West Virginia and the surrounding area allegedly suffered an interruption in their water supply.⁵⁶ Plaintiffs offered Harvey Rosen, a Ph.D. who had taught economics for more than 46 years, as an expert in economics.⁵⁷ Rosen presented models measuring the economic impact of water supply interruption on residential and business putative class members.⁵⁸ His estimate for class-wide damages for businesses and hourly wage earners involved a two-step calculation: (1) use of regional economic data to estimate gross regional product or “value added” in the affected area, and (2) estimate of the incremental decline in value added resulting from interruption in water service.⁵⁹ Rosen’s model for losses incurred by residential class members was based on the class members’ willingness to pay to avoid the risk of being without water for a certain duration.⁶⁰ The trial court rejected each of Rosen’s steps of analysis based on the data inputs and methodologies employed.⁶¹ *Good* demonstrates the effective critique of both economic data and valuation methods. Rather than attacking qualifications that were largely unassailable, the defendants assessed the weaknesses in Rosen’s data and methodology and successfully mounted a challenge to his testimony.

Economic experts must proceed with precision when offering expert opinion testimony, as is illustrated in *System Development Integration, LLC v. Computer Sciences Corp.*⁶² The

⁵⁴ 310 F.R.D. 274 (D. W. Va. 2015).

⁵⁵ *Id.* at 282-83.

⁵⁶ *Id.* at 280.

⁵⁷ *Id.* at 286-87.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 288-89.

⁶¹ *Id.* at 290-93.

⁶² 886 F. Supp. 2d 873 (N.D. Ill. 2012).

plaintiff filed suit alleging the breach of a subcontract agreement, tortious interference with prospective business advantage, breach of fiduciary duty under a partnership agreement, *quantum meruit*, and equitable estoppel arising from replacement of the defendant subcontractor.⁶³ The plaintiff sought to offer Michael G. Mayer as a damages expert, and the defendant sought to exclude his testimony.⁶⁴ The defendant did not challenge Mayer's qualifications.⁶⁵ Mayer's testimony as to damages incurred as a result of the alleged breach of the partnership agreement was excluded by agreement since that claim was dismissed by the trial court.⁶⁶ Mayer's *quantum meruit* opinions also were excluded since his analysis of "lost opportunity costs" was not a legally cognizable claim under applicable law *and* his "economic enrichment" conclusion had no analysis or citation to any reliable basis.⁶⁷ Conversely, Mayer's opinion that the plaintiff's damages for the alleged breach of the subcontract agreement was its lost incremental profits was based on reliable computations and met the Rule 702 standard for admissibility of expert testimony.⁶⁸ The use of the volume and rate information provided in the subcontract agreement appropriately reflected the parties' best understanding and could be challenged on cross-examination.⁶⁹ Although Mayer used the incorrect date to calculate the present value of the plaintiff's damages, that error did not result in the exclusion of his testimony since he had provided a reliable basis and methodology for his present value analysis and a recalculation as of a new date could easily occur.⁷⁰ *System Development Integration* exemplifies a careful critique of each approach and method employed by a valuation expert and the inherent tension between rote application of the *Daubert* standard and the discretion for admissibility accorded triers of fact. That tension is even more pronounced in divorce cases with trial courts repeatedly re-

⁶³ *Id.* at 876.

⁶⁴ *Id.*

⁶⁵ *Id.* at 877.

⁶⁶ *Id.* at 877-78.

⁶⁷ *Id.* at 878-79.

⁶⁸ *Id.* at 870-83.

⁶⁹ *Id.* at 883.

⁷⁰ *Id.* at 887.

citing: “I’ll let it in; objections go to the weight.”⁷¹ But that refrain is not a reason to discard challenges as to faulty opinion testimony inputs and methodology.

Expert challenges are not confined to narrow disputes; they can arise on a large stage. In *In re Polypropylene Carpet Antitrust Litigation*⁷² is an example of how expert challenges can arise on a large stage. In a multidistrict class action, the plaintiffs alleged that the defendants engaged in a scheme to fix and maintain the price of polypropylene carpet and sought to introduce the testimony of two experts.⁷³ David Kamerschen was an industrial economist retained to analyze whether the conditions in the polypropylene carpet market during a particular period of time were consistent with competitive or collusive activity.⁷⁴ His analysis focused on the structure of the industry, the behavior of firms in the market, and the performance of the firms.⁷⁵ James T. McClave was an econometrician retained to ascertain damages.⁷⁶ To calculate damages, he developed a model of polypropylene carpet prices using a multiple regression analysis.⁷⁷ The defendants raised a *Daubert* challenge to each proffered expert.⁷⁸ The trial court concluded that much of Kamerschen’s testimony and all of McClave’s testimony were admissible.⁷⁹ The defendants did not challenge Kamerschen’s qualifications or the general reliability of his approach.⁸⁰ Kamerschen attempted to analyze changes in the defendants’ market shares based on pricing differentials from the time the price-fixing conspiracy allegedly existed with those during the time after the alleged conspiracy ended, and

⁷¹ See, e.g., *Koch v. Koch Indus., Inc.*, 2 F. Supp. 2d 1385, 1405-08 (D. Kan. 1998) (admitting a plaintiffs’ expert’s refinery valuation testimony that employed a discounted cash flow analysis even though the assumptions were skewed to yield a high valuation, and noting that the defendants’ criticisms of the underpinning of the expert’s opinion “go to its weight and not its admissibility”). *Koch* is one of the earliest opinions explaining the analysis required under *Daubert* and *Joiner*.

⁷² 93 F. Supp. 2d 1348 (N.D. Ga. 2000).

⁷³ *Id.* at 1351.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 1353-54.

considered McClave's analysis of the ratio of price over the polypropylene fiber producer price index.⁸¹ The trial court found that portion of Kamerschen's testimony unreliable, as well as his testimony based on the existence of litigation involving allegations of price-fixing of nylon carpet products, and excluded both of these portions of his testimony as overly prejudicial under Federal Rule of Evidence 403.⁸² The trial court did not exclude the balance of Kamerschen's testimony, rejecting claims that his opinion that a conspiracy may have existed, use of census data, use of and reliance on McClave's analysis, and application of various methodologies were unreliable and outside of normal methodologies.⁸³ McClave had a doctorate in statistics, held undergraduate and graduate teaching positions, and authored five statistics textbooks which emphasized multiple regression analysis.⁸⁴ McClave disclaimed expertise in economics or market behavior, but was qualified as an expert in the area of econometrics to provide testimony regarding an estimate of damages.⁸⁵ McClave's model sufficiently supported the idea that changes in fiber cost reflected changes in the variable costs of producing polypropylene carpet, and that the ratio of price to fiber cost as the dependent variable in McClave's model was appropriate.⁸⁶ McClave also was within his econometrics expertise in using the defendants' report of internal costs or the Producer Price Index for the cost of polypropylene fiber.⁸⁷ *Polypropylene* is an exemplar of how the strategic challenge to one expert (Kamerschen) led to the partial exclusion of opinion testimony, while a wholesale attack on another expert (McClave) led to a completely unsuccessful challenge. Thoughtful consideration of what challenges to make at the inception of an exclusionary hearing is essential for the practitioner.

The importance of initial tactical considerations, particularly when challenging qualifications, is borne out in *In re Commercial*

⁸¹ *Id.* at 1354.

⁸² *Id.*

⁸³ *Id.* at 1354-58.

⁸⁴ *Id.* at 1358-59.

⁸⁵ *Id.* at 1359.

⁸⁶ *Id.* at 1363.

⁸⁷ *Id.* at 1370.

*Financial Services, Inc.*⁸⁸ The defendants filed a motion *in limine* to exclude the testimony of the plaintiffs' expert Carmen R. Eggleston.⁸⁹ Eggleston was retained to provide testimony in support of the plaintiffs' contention in this fraudulent transfer action that the debtors had unreasonably small capital as of the dates of insolvency and were unable to pay debts as they came due.⁹⁰ Eggleston was a vice president of an economic, valuation, and strategy consulting firm, a public accountant, and a certified fraud examiner.⁹¹ She also was accredited in business valuation by the American Institute of Certified Public Accountants and had more than twenty-five years of business consulting and restructuring experience.⁹² Eggleston also had published articles and book chapters and spoken at national conventions on the subjects of business valuation, asset valuation, and insolvency analysis.⁹³ She also had been retained as an expert in bankruptcy and civil litigation to opine on methodology, solvency, valuation, damages, and other matters similar to those at issue in this proceeding.⁹⁴ The trial court easily concluded over unfounded criticisms of due diligence that Eggleston had the specialized knowledge, skill, practical experience, training, and education necessary to render a complex solvency opinion, and that she accessed relevant information over many years to render an informed opinion on solvency.⁹⁵ *Commercial Financial Services* illustrates how challenging recognized experts on the basis of qualifications can fail. Unsuccessful efforts such as these may actually enhance the status of the expert by highlighting experience

⁸⁸ 350 B.R. 520 (Bankr. N.D. Okla. 2005).

⁸⁹ *Id.* at 524.

⁹⁰ *Id.* at 525-26.

⁹¹ *Id.* at 529.

⁹² *Id.* at 529-30.

⁹³ *Id.* at 530.

⁹⁴ *Id.*

⁹⁵ *Id.* at 531. For a state court example of the initial analysis required for qualification challenges, see *Carver v. Quality Inspection and Testing, Inc.*, 946 P.2d 450, 453-54 (Alaska 1997) (rejecting a challenge to a valuation expert who had personally valued eight to ten businesses during his twenty-year accounting career and had been involved in fifteen to twenty business valuations with his accounting firm, and deciding that any alleged issues in the expert's financial information reviewed and used and his conclusions went to the weight and credibility of the evidence and not admissibility).

and credentials, and intimating desperation on the part of a party attempting to preclude reliable testimony and opinion. These types of improvident challenges can also enhance the impact of the expert's valuation opinion. That is particularly true in divorce cases where lawyers may be less informed about evidentiary rules and how proper formal objections to experts are made. Targeted *Daubert* or *Daubert*-type challenges are far more credible than challenges to every aspect of an expert's experience, qualifications, work, and conclusions.

Blanket attacks on qualified experts can be an enormous waste of time and effort. In *Tuf Racing Products, Inc. v. American Suzuki Motor Corp.*,⁹⁶ the plaintiff sought damages for alleged wrongful termination of a franchise agreement and was awarded \$137,000.00 in damages and \$391,318.00 in attorneys' fees.⁹⁷ The plaintiff sought \$1,200,000.00 in damages and presented its theory of damages through its accountant.⁹⁸ The defendant argued that the court should not have permitted the accountant to testify as an expert witness because he did not have a degree in economics, statistics, mathematics, or some other "academic" field that might bear on the calculation of damages.⁹⁹ The U.S. Court of Appeals for the Seventh Circuit affirmed the trial court's admission of this expert testimony, noting that the Federal Rules of Evidence, as interpreted by *Daubert*, do not require expert witnesses to be academics or offer testimony that is "scientific" in character.¹⁰⁰ Anyone with relevant expertise that allows for the contribution of responsible opinion testimony helpful to a judge or jury may qualify as an expert witness under Federal Rule of Evidence 702.¹⁰¹ *Daubert* merely requires that, if an expert witness is to offer an opinion based on science, it must be real science and not junk science.¹⁰² The accountant did not purport to be doing science, and was doing accounting well within his competence in calculating the discounted present value of the lost future earnings from the termination of a franchise

⁹⁶ 223 F.3d 585 (7th Cir. 2000).

⁹⁷ *Id.* at 588.

⁹⁸ *Id.* at 591.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

agreement.¹⁰³ *Tuf Racing* is a stark reminder that logic should prevail when challenging expert credentials. To suggest that an accountant was not qualified to perform a present value calculation is illogical. These types of challenges smack of desperation and can send an unintended and unhelpful message to a trier of fact that the challenging party is desperate to prevent probative information from being received.

In focusing on an expert's methodologies and conclusions, an overall assessment of the timing of the work in the context of the procedural posture of a case is imperative. *Andrade Garcia v. Columbia Medical Center of Sherman*¹⁰⁴ makes this point abundantly clear. The defendant sought to strike the testimony of multiple experts, including that of Daniel J. Slottje.¹⁰⁵ Slottje, the plaintiffs' expert economist as to past and future lost wages, was challenged on the basis that his opinions were premised solely on lay testimony by another person as to Garcia's personal wealth or net worth and not supported by scientific reasoning, methodology, or reliable data.¹⁰⁶ His expert report opined on the past and future lost earnings and services suffered as a result of Garcia's death.¹⁰⁷ Slottje based his opinions on the Bank of Mexico's growth and discount rate tables for wages and interest, life expectancy tables for Mexico, United States worklife expectancy tables, and Carrera's testimony.¹⁰⁸ The trial court found that Slottje's methods and principles had a sound basis in the field of economics, and that his use of United States worklife expectancy in light of unavailable Mexican data went to the weight, not the admissibility, of the evidence.¹⁰⁹ Slottje could also base his opinions on lay or inadmissible evidence if that evidence is reasonably relied on by experts in the field pursuant to Federal Rule of Evidence 703.¹¹⁰ The defendant could challenge the data relied upon by Slottje through its own expert and in cross-examination.¹¹¹ *Andrade Garcia* expresses the prevalent attitude of

¹⁰³ *Id.*

¹⁰⁴ 996 F. Supp. 617 (E.D. Tex. 1998).

¹⁰⁵ *Id.* at 620.

¹⁰⁶ *Id.* at 622.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 623.

¹¹⁰ *Id.*

¹¹¹ *Id.*

trial courts to allow expert testimony in the face of challenges, even when conducting a *Daubert* analysis. Yet that outcome should not dissuade divorce lawyers from making challenges based on methodologies and reliability, since those challenges preview the weaknesses in opposing experts' opinions and inform the trier of fact to the opposing case theory in advance of trial. The value of this exercise cannot be overestimated.

At the opposite end of the spectrum from *Tuf Racing*, the earlier opinion from the same court in *Frymire-Brinati v. KPMG Peat Marwick*¹¹² shows that there are limits to the admissibility of expert opinion testimony when *Daubert* is properly applied. The plaintiffs contended that the defendant aided and abetted securities and common law fraud by certifying a company's financial statements.¹¹³ Accountant William Hassett testified that the defendant "violated seven of the ten Generally Accepted Auditing Standards."¹¹⁴ Hassett testified that investments in real estate limited partnerships were worthless using a discounted cash flow analysis.¹¹⁵ At trial, Hassett conceded that his valuations were not "market valuations" but were "a fairly simple pass at what the magnitude of the problem was."¹¹⁶ Applying a *Daubert* analysis, the U.S. Court of Appeals for the Seventh Circuit reversed and identified that Hassett conceded at trial that he did not employ the methodology that experts in valuation find essential.¹¹⁷ Specifically, Hassett considered only historical cash flows and not also potential cash flows as required in a discounted cash flow analysis.¹¹⁸ Although trial courts have considerable discretion in admitting expert testimony, on the record the trial court could not properly have admitted Hassett's valuation.¹¹⁹ *Frymire-Brinati* is a prime example of how a focused deconstruction of the methodology used by a valuation expert can lead to exclusion and the case is instructive when challenging divorce valuation experts.

¹¹² 2 F.3d 183 (7th Cir. 1993).

¹¹³ *Id.* 184-86.

¹¹⁴ *Id.* at 186.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 187.

Putting all of these principles together, two federal bankruptcy court opinions in the same case demonstrate the rigor contemplated by *Daubert*. *In re Med Diversified, Inc.* (“*Med Diversified I*”)¹²⁰ involved a bankruptcy adversary proceeding in which the plaintiffs attempted to recover an alleged constructive fraudulent transfer of \$7,500,000.¹²¹ The issues before the trial court were whether the defendants’ proposed expert witness, Scott P. Peltz, was qualified as a business valuation expert and whether his expertise met the *Daubert* relevance and reliability standard.¹²² The defendants sought to call Peltz to testify as to the value of one hundred percent of the shares of stock of the defendant Addus Healthcare, Inc., and the reasonably equivalent value of an alleged \$7,500,000.00 option payment by the plaintiffs’ predecessor in interest, Med Diversified, Inc., for a six and one-half month extension to close on the purchase of Addus.¹²³ The plaintiffs filed a motion *in limine* in the bankruptcy adversary proceeding attempting to exclude Peltz’s testimony.¹²⁴ The trial court recited in detail the test enunciated in *Daubert* for admission of expert opinion testimony and noted that Peltz (1) had no formal education or training in business valuation, (2) had no peer-granted certifications as an expert in business valuations, (3) did not produce a certified business valuation report, and (4) did not personally issue business valuation reports.¹²⁵ Moreover, Peltz’s report did not meet the Uniform Standards for Professional Appraisal Practice generally accepted by professional business appraisers.¹²⁶ Peltz not only lacked qualifications, he did not employ the intellectual rigor typically followed by a business valuation expert.¹²⁷ Additionally, Peltz’s testimony was unreliable due to his negligence in purportedly applying professional standards and techniques published in practical treatises.¹²⁸ The trial court granted the plaintiffs’ motion in part, excluding Peltz’s report and direct and cross-examination testimony, but allowing

¹²⁰ 334 B.R.89 (Bankr. E.D.N.Y. 2005).

¹²¹ *Id.* at 91-92.

¹²² *Id.* at 92.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 94-96.

¹²⁶ *Id.* at 96.

¹²⁷ *Id.* at 97.

¹²⁸ *Id.* at 98.

rebuttal testimony.¹²⁹ *Med Diversified I* offers a textbook primer as to how to conduct a *Daubert* analysis that carefully considers multiple areas of challenges.

While *Med Diversified I* may have emboldened plaintiffs, their elation did not last long. *In re Med Diversified, Inc. (“Med. Diversified II”)*¹³⁰ subsequently involved a motion *in limine* by the defendants to exclude the plaintiffs’ valuation expert Robert Cimasi’s report and testimony.¹³¹ The plaintiffs’ expert Peltz had valued Addus at \$89,000,000.00, and Cimasi had valued Addus at \$21,000,000.000.¹³² Cimasi used three different methods under the income approach in determining the value of Addus.¹³³ However, Cimasi’s benchmarking analysis relied heavily on a small database of publicly-held companies and was skewed to yield unreliable results.¹³⁴ The trial court expressed skepticism at comparing data from public companies with that of a closely-held private business, and determined that Cimasi’s analysis did not comport with peer-reviewed literature.¹³⁵ Upon review in detail of each of the methods that Cimasi employed, the trial court concluded that there was deliberate, manifest, pervasive, and systematic bias on Cimasi’s part in applying standard methodologies.¹³⁶ As a result, the trial court struck in its entirety Cimasi’s report and testimony as unreliable and inadmissible.¹³⁷ *Med Diversified II* effectively leveled the playing field in excluding a competing expert’s opinion, cautioned against result-oriented conclusions by hired experts, and displayed a principled and uniform application of the *Daubert* standard to business valuation experts.

Yet even with the careful application of *Daubert* and its progeny, there may be a back door around Rule 702 exclusions as elucidated in *Lightning Lube, Inc. v. Witco Corp.*¹³⁸ In 1986, Ralph Venuto became the sole owner of Lightning Lube.¹³⁹

¹²⁹ *Id.* at 103.

¹³⁰ 346 B.R. 621 (Bankr. E.D.N.Y. 2006).

¹³¹ *Id.* at 625-26.

¹³² *Id.* at 629.

¹³³ *Id.* at 630.

¹³⁴ *Id.* at 630-31.

¹³⁵ *Id.* at 631-32.

¹³⁶ *Id.* at 642.

¹³⁷ *Id.*

¹³⁸ 4 F.3d 1153 (3d Cir. 1993).

¹³⁹ *Id.* at 1162.

Lightning Lube sought compensatory and punitive damages from a competitor, Witco, for breach of a supply agreement and destruction of Lightning Lube's relationship with its franchises.¹⁴⁰ As to the issue of compensatory damages, Lightning Lube sought to qualify Venuto as an expert in the quick-lube business.¹⁴¹ The trial court ruled that Venuto could not testify as an expert, but could offer lay opinion evidence under Rule 701 if a sufficient foundation for the testimony could be laid.¹⁴² Venuto calculated future profits in two ways: (1) the profits on franchise contracts he actually sold, and (2) the lost profits as the franchises he expected to have sold.¹⁴³ Venuto estimated the aggregate of these calculations in excess of \$7,100,000.00.¹⁴⁴ The jury apportioned \$2,500,000.00 as past damages under breach of contract and \$7,000,000.00 as future damages under tortious interference.¹⁴⁵ The U.S. Court of Appeals for the Third Circuit determined that the trial court acted within its broad discretion in admitting Venuto's testimony.¹⁴⁶ Venuto did not qualify as an expert under Rule 702, but was permitted to offer lay testimony based on foundation from his owner-acquired knowledge. Although Venuto had the advantage of being an owner and knowing the financial aspects of the business, and while the prerequisite for establishing a foundation for lay opinion testimony is subject to vigorous dispute, Rule 701 offers a potential escape value for expert witnesses caught in a *Daubert*-type cross-fire.

As is evident from the representative authorities, even with the *Daubert*, *Joiner*, and *Kumho* decisions, amplification on the Federal Rules of Evidence, the topic of expert valuation opinion admissibility is far from settled. Trial courts retain a wide range of discretion in considering whether the qualifications, methodology, relevance, and reliability of financial testimony and reports assist the trier of fact or jury in understanding the evidence or reaching a conclusion. States lack this type of uniform guidance and generally have far less authority in their appellate courts.

¹⁴⁰ *Id.* at 1161.

¹⁴¹ *Id.* at 1174.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1174-75.

¹⁴⁵ *Id.* at 1175.

¹⁴⁶ *Id.* at 1175-76.

That dearth of guidance is even more pronounced in the divorce arena.

V. State Divorce Case Applications

Although states do not uniformly apply *Daubert* and challenges to valuation experts in divorce cases are underutilized, several opinions demonstrate the efficacy of making these types of challenges. These challenges, even in the face of lack of experience and understanding by divorce counsel, can pay dividends regardless of whether the opinion is excluded.

A. Broad Traditional Admissibility

The traditional “let it in” approach taken by many trial courts in divorce cases is illustrated in *Popham v. Popham*.¹⁴⁷ The trial court did not err in permitting the wife’s financial expert to refer to certain securities when testifying about the methodology he used to place a fair market value on the husband’s business.¹⁴⁸ The expert testified that the capitalization method was a generally accepted method for valuing a business, and stated that one of the capitalization method’s components considered the rate of return and risk factors connected with a closely-held corporation as compared to the rate of a certificate of deposit or the yield on a Treasury Bill.¹⁴⁹ In affirming, the Georgia Court of Appeals indicated that the facts upon which an expert bases an opinion are admissible on either direct or cross-examination, and the bases go to the weight given the testimony rather than admissibility.¹⁵⁰ *Popham* provides the classic formulation of divorce courts that limiting their own “gatekeeping” function, and the case holds a clue as to why motions *in limine* or other challenges to expert opinions occur relatively infrequently in divorce cases.

A pre-*Daubert* opinion, *Foley v. Foley*,¹⁵¹ is another example of how divorce cases treat expert testimony differently from other areas of litigation. The trial court allowed testimony by the

¹⁴⁷ 607 S.E.2d 575 (Ga. 2005).

¹⁴⁸ *Id.* at 576.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ 537 N.E.2d 158 (Mass. App. Ct. 1989).

wife's business valuation expert but, after cross-examination, barred the husband's experts and the husband from testifying as to value.¹⁵² The Massachusetts Court of Appeals reversed, declaring that the husband should have been permitted to testify as to value as should his experts.¹⁵³ While the husband did not initially object to the qualifications of the wife's expert and did so only after his testimony concluded, the husband's experts were subjected to extensive cross-examination and were disqualified prior to their testimony.¹⁵⁴ A comparison of the credentials of the wife's expert and the two experts the husband proffered were significantly similar.¹⁵⁵ The same "significant criteria" supporting the admissibility of the wife's expert's testimony supported the admissibility of the husband's expert's testimony.¹⁵⁶ It was error not to treat witnesses with similar qualifications the same way, or to allow the husband to testify as to value.¹⁵⁷ Although there was no indication of bias, on remand it was appropriate for a different judge to hear the case.¹⁵⁸ Pangs of the equitable nature of divorce proceedings reverberate through this opinion. *Foley* also imparts why it is vital to seek a ruling *in limine* and before the presentation of evidence, lest litigants risk disparate treatment of experts. While the equitable sentiment may reduce the likelihood of a successful challenge to financial experts in divorce cases, it should not dissuade counsel from applying all the litigation resources available to bar unqualified expert testimony.¹⁵⁹

The assessment of expert opinions becomes even more dicey when novel approaches are in issue. *In re Marriage of Alexander*¹⁶⁰ implicates both a potential novel theory and a non-

¹⁵² *Id.* at 159-60.

¹⁵³ *Id.* at 160.

¹⁵⁴ *Id.* at 160.

¹⁵⁵ *Id.* at 159.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 160.

¹⁵⁸ *Id.* at 161.

¹⁵⁹ In assessing the qualifications of experts, certification from a governing organization is a good starting point. See *infra* Part VI. Biographical information is much more easily obtained in the computer age. Court records indicating whether a proffered expert has qualified, and on what topics and in what types of cases, are also accessible in most jurisdictions.

¹⁶⁰ 857 N.E.2d 766 (Ill. Ct. App. 2006).

Daubert challenge. The husband was a family physician.¹⁶¹ The wife's expert, David Wood, testified that the husband's medical practice had \$350,000.00 total in goodwill, of which \$245,000.00 was enterprise goodwill.¹⁶² He used an approach called "multiattributable utility theory" to segregate enterprise goodwill from personal goodwill in the husband's medical practice.¹⁶³ The husband contended that this theory was a novel scientific methodology that was not generally accepted in the relevant scientific community, and was inadmissible under the *Frye* standard.¹⁶⁴ The husband did not challenge the expert's credentials or the fact that the expert's testimony would aid the trier of fact in understanding the evidence; he simply argued that his novel scientific methodology was not generally accepted and the opinion derived inadmissible.¹⁶⁵ The expert testified that he believed he was the first person to use this approach in reaching his conclusion, and that his approach was scientific.¹⁶⁶ This approach set forth the objective of determining enterprise and personal goodwill, and chose five alternatives, or range of percentages, that would segregate personal and enterprise goodwill.¹⁶⁷ After the objective and alternatives were set, the expert then defined the attributes, or elements of goodwill, to which a value was assigned.¹⁶⁸ Recognizing Illinois as a *Frye* state, the Illinois Court of Appeals concluded that the expert's method was not scientific evidence subject to a *Frye* hearing.¹⁶⁹ The court ordered that, even if a *Frye* hearing were required, the evidence would pass the general acceptance test because elementary mathematics was accepted in

¹⁶¹ *Id.* at 767.

¹⁶² *Id.* at 768.

¹⁶³ *Id.*

¹⁶⁴ *Id.* For another *Frye* state opinion in a non-divorce context that involves non-novel methodologies, see *Reading Radio, Inc. v. Fink*, 833 A.2d 199, 207-08 (Pa. Super. Ct. 2003) (rejecting an attempt to exclude testimony of a radio station appraisal expert and determining that his testimony regarding the diminution of the radio station's value was not novel scientific evidence subject to a *Frye* analysis).

¹⁶⁵ *Alexander*, 857 N.E.2d at 769.

¹⁶⁶ *Id.* at 771.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 773.

all fields of science and engineering.¹⁷⁰ *Alexander* illustrates how difficult outcomes can occur when different standards apply. A valuation expert is arguably exempt from a certain scope of challenges if a *Frye*-based scientific standard is used as opposed to a broader *Daubert*-based threshold. Accordingly, whether an expert is permitted to testify and opine depends on the jurisdiction and applicable legal standard and creates the potential for divorce forum-shopping.

B. *Standard of Value*

These issues are amplified since there is a different standard of value applied jurisdiction to jurisdiction. As a result, the expert may be preemptorily challenged on both compliance with the *Daubert/Frye* standard and on the standard of value. According to one survey, only Arkansas and Louisiana provide statutory guidance as to the standard of value.¹⁷¹ Case law provides guidance in twenty-four additional states.¹⁷² The standard of value in the remaining twenty-four states and the District of Columbia must be inferred from valuation concepts that are used and applied.¹⁷³ Applying a conceptual analysis, the list can be refined so that from this review, thirty-five states and the District of Columbia use a fair market value standard, three states use a fair value standard, five states use an investment value standard, and seven states use a hybrid standard.¹⁷⁴ Given the vagaries as to the legal standard for valuations from state to state, and the lack of uniformity regarding expert witness challenge standards, it is no wonder that divorce practitioners do not avail themselves of efforts to exclude valuation opinions.

C. *Principled State Court Review*

Despite the variances among the standards applied to expert testimony and opinion admissibility, a disciplined, principled review of valuation expert qualifications does exist in some jurisdictions and can be applied to state divorce cases.

¹⁷⁰ *Id.*

¹⁷¹ JAY FISHMAN, SHANNON PRATT, & WILLIAM MORRISON, STANDARDS OF VALUE – THEORY AND APPLICATION 265 (2d ed. 2013).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 268-71.

Vol. 30, 2018 Expert Valuation Opinions in Divorce Cases 479

New York offers a prime example. *Wells v. Wells*,¹⁷⁵ another pre-*Daubert* opinion, provides a glimpse as to why qualifications matter. The New York Supreme Court reversed the trial court's acceptance of valuation testimony when the purported expert (1) had never valued a law practice, (2) had valued only one professional practice (an accounting practice), and (3) had never visited the husband's law office or reviewed the books of the office.¹⁷⁶ That lack of experience coupled with the major deficiency in methodology disqualified the purported expert and his opinion.¹⁷⁷ *Wells* makes clear that training, experience, and following recognized valuation processes matter, and are proper subjects of inquiry when challenging divorce valuation experts. While lack of experience and qualifications must be carefully reviewed in the context of admissibility challenges, they sometimes can lead to disqualification if the emphasis is on the areas that are lacking.

An unpublished Ohio Court of Appeals opinion is part of the small number of divorce decisions in this arena and further illustrates the need for care in challenges based on the lack of qualifications. *Biro v. Biro*¹⁷⁸ involved a motion *in limine* filed by the husband to bar the wife's financial expert, Keith W. Martinet, from testifying due to the alleged untimeliness of delivery of his report and lack of qualifications.¹⁷⁹ The court quickly affirmed the trial court's admission of Martinet's report as timely, and turned its attention to Martinet's qualifications.¹⁸⁰ Referencing *Daubert* in affirming the trial court's admission of Martinet as an expert, the court noted that Martinet (1) had nineteen years of experience advising and valuing closely-held businesses and corporations, (2) was a certified public accountant and certified valuation analyst, (3) had conducted seventy-five business valuations, including sixty-five business valuations related to divorce proceedings, and (4) previously had been accepted as an expert in Ohio courts.¹⁸¹ The court then completed the reliability analy-

¹⁷⁵ 576 N.Y.S.2d 390 (1991), *abrogated on other grounds* by *McSparron v. McSparron*, 87 N.Y.2d 75 (1995).

¹⁷⁶ *Id.* at 391.

¹⁷⁷ *Id.*

¹⁷⁸ Nos. 2006-2-068, 2006-2-236 2007 WL 1810478 (Ohio Ct. App. June 22, 2007).

¹⁷⁹ *Id.* at *1-2.

¹⁸⁰ *Id.* at *2-4.

¹⁸¹ *Id.* at *5.

sis mandated by *Daubert*, affirming that Martinet's use of a four-year average in his capitalization of excess earnings analysis rather than a five-year average under an Internal Revenue Service rule was not fatal to his valuation.¹⁸² Martinet complied with the standards set forth by the National Association of Certified Valuation Analysts and testified that his report was valid based on the four-year averaging method that he used.¹⁸³ The trial court did not abuse its discretion in allowing Martinet's testimony, since he was cross-examined and matters of credibility were within the province of the trier of fact to decide.¹⁸⁴ *Biro* reinforces the need to be logical when challenging expert qualifications. To the extent that the issue of reliability might have caught the trial court's attention, the qualifications distraction in light of the expert's obvious substantial experience did not advance the reliability challenge. A "kitchen sink" approach to attempts to bar expert opinion is rarely successful.

Courts can apply a classic *Daubert* analysis while at the same time revealing the inherent tension in applying that approach. For example, in *Rhodes v. Rhodes*¹⁸⁵ the husband owned a carpet and drapery business that had been in his family since 1947, as well as two other related companies.¹⁸⁶ The wife proffered James Angle, a certified public accountant, as an expert in business valuation.¹⁸⁷ The chancellor determined that Angle's testimony was unreliable in part because his methodology considered goodwill which was not recognized as a marital asset under Mississippi law.¹⁸⁸ In affirming the exclusion of the expert's testimony, the Mississippi Court of Appeals initially recognized that Mississippi had adopted the *Daubert* standard.¹⁸⁹ The court then turned its attention to the fact that Angle had not performed a business valuation except as was required for a case study for one of his certifications, and noted that this lack of prior experience was not a valid reason for exclusion and was error since the expert

182 *Id.* at *6.

183 *Id.*

184 *Id.*

185 52 So. 3d 430 (Miss. Ct. App. 2011).

186 *Id.* at 434.

187 *Id.* at 445.

188 *Id.*

189 *Id.*

possessed particular knowledge not possessed by a layman.¹⁹⁰ However, the court then reasoned that Angle's inclusion of goodwill in his analysis led to the chancellor properly exercising his discretion and excluding the expert's testimony despite the error in assessing qualifications.¹⁹¹ One of several partial or full dissenting opinions posited that Mississippi law was unclear as to application to a business as opposed to a professional service, and would have reversed the chancellor's decision excluding the wife's valuation expert.¹⁹² *Rhodes* painstakingly illustrates the difficulties divorce practitioners face when considering a challenge to expert valuation testimony. Divorce counsel must understand the precise valuation issue, master the state valuation standard (including how goodwill is treated), be well versed in civil litigation procedure as to challenges, know with precision the state standard for exclusion, determine the ground or grounds for challenge, and strategically consider how to frame and when to make the challenge.

Despite this multitude of seemingly difficult considerations, the trends in state authorities tend to converge into a finite number of topical areas. Much the same as with federal authorities, a framework for challenging divorce valuation experts begins to emerge. That paradigm offers insight into how trial courts can properly assess whether to admit expert opinions in divorce cases.

Two cases from the Texas Court of Appeals illuminate how expert challenges are properly conducted in divorce cases. The first case, *Bufkin v. Bufkin*,¹⁹³ considered the exclusion of a real estate appraiser's testimony. Texas Rule of Evidence 702 governed the admissibility of expert testimony and effectively parallels *Daubert*.¹⁹⁴ That rule provides: "[I]f scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or other-

¹⁹⁰ *Id.* at 445-46.

¹⁹¹ *Id.* at 446.

¹⁹² *Id.* at 452-55.

¹⁹³ 259 S.W.3d 343 (Tex. App. 2008).

¹⁹⁴ *Id.* at 351.

wise.”¹⁹⁵ The trial court noted: “If the foundational data underlying an expert’s opinion testimony is unreliable, the expert will not be permitted to base an opinion on that data because any opinion drawn from that data is likewise unreliable.”¹⁹⁶ The trial court conducted a hearing on the admissibility of the real estate appraiser’s testimony at which the expert testified that he was not instructed by the husband’s counsel to ignore timber on the land in his appraisal, and only later included a dated timber appraisal in his values.¹⁹⁷ The real estate appraiser further testified that the method directed by the husband’s counsel did not conform to marketing provisions of the Uniform Standards of Professional Appraisal Practice and that he had never valued real estate “that way” previously.¹⁹⁸ The real estate appraiser offered no evidence of the reliability or methodology of the third-party timber appraisal that he was instructed to include in his total values, and failed to establish the reliability of the underlying data for his expert opinion.¹⁹⁹ Accordingly, the real estate appraiser’s methodology was unreliable and his testimony properly excluded.²⁰⁰

The second Texas opinion directly addressed the admissibility of a professional practice valuation expert’s opinion. *Von Hohn v. Von Hohn*²⁰¹ involved an attempt by an expert to value a law firm interest. The Texas Court of Appeals again noted Texas Rule of Evidence 702 and its common law adherence to *Daubert* principles.²⁰² The husband filed a pre-trial motion to exclude the wife’s valuation expert.²⁰³ The trial court held a hearing, partially granted the husband’s motion, but allowed the wife’s expert to testify regarding his valuation based on withdrawal value, the asset approach, and/or the income approach (limited to income reasonably expected to be collected within two years from the valuation date).²⁰⁴ The expert testified that

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 351-52.

¹⁹⁹ *Id.* at 352.

²⁰⁰ *Id.*

²⁰¹ 260 S.W.3d 631 (Tex. App. 2008).

²⁰² *Id.* at 635-36.

²⁰³ *Id.* at 636.

²⁰⁴ *Id.*

he had never used information from patent cases in the valuation of law firms.²⁰⁵ The expert also testified that he had been performing business valuations for approximately fifteen years and had been an expert witness for a professional business valuation about seventy-five to one hundred times.²⁰⁶ The trial court did not abuse its discretion in allowing the expert testimony, because the expert had performed business valuations, had valued a partnership interest using the income approach, and had valued a contingency fee practice by relying on the same type of projections he used in this case.²⁰⁷ Although the expert had never used information from a patent case in valuing a law firm interest, his specialized knowledge, skill, experience, training, or education as to valuing a law firm interest was sufficient to qualify as an expert.²⁰⁸ *Von Hohn* considered material elements of *Daubert* expert challenges, conducted an intellectually-sophisticated analysis along the lines of federal courts, and assessed expert qualifications, experience, and methodology in a fulsome way. While not exhaustive, *Bufkin*, *VonHohn*, and the Texas approach²⁰⁹ demonstrate careful consideration of important factors mandated by a *Daubert* or *Daubert*-type analysis and suggest elements of a more uniform approach that states could apply in critiquing valuation experts in divorce cases.

VI. A Recommended Approach

As demonstrated above, the diversity in state standards and methods of vetting valuation experts in divorce cases is problematic. Divorce attorneys often do not know the standards for valuation and exclusions, and are ill-suited to make challenges.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 637.

²⁰⁸ *Id.*

²⁰⁹ Texas applies this same disciplined approach to non-valuation experts. *See In re K.L.R.*, 162 S.W.3d 291, 302-04 (Tex. App. 2005)(finding that the trial court erred in admitting a licensed counselor's opinion testimony as to custody because she did not testify that (a) counseling was a legitimate field, (b) her testimony was within the scope of her field, and (c) her testimony properly relied upon and/or utilized principles involved in her field, but concluding that the error was harmless since the trial court did not rely upon or follow the counselor's recommendations).

When coupled with practitioner inexperience and reticence to challenge purported experts, and trial courts' propensity to "let it all in," the result is a bevy of unqualified valuation witnesses offering unreliable, methodologically unsound testimony. That, in turn, reinforces the view that divorce cases somehow differ from other types of commercial litigation and are inferior judicial proceedings. While federalism and state sovereignty in the family law arena pose obstacles to a uniform standard, and while the nationalization of family law is in the distance if at all in the offing, there are improvements that can be made within each state's statutory, rule, and common law framework. These improvements will enhance divorce practice, process, and outcomes nationwide without asking trial courts to improperly *sua sponte* intervene in the adversarial process. To that end, a recommended approach consists of:

1. Require business valuation experts in divorce cases to have met certain minimum accreditation standards or be subject to a mandatory *in limine* hearing. The American Institute of Certified Public Accountants provides for an Accredited in Business Valuation certification (ABV).²¹⁰ This certification requires an accountant seeking certification to pass an eight-hour comprehensive multiple-choice examination, have substantial involvement in at least ten business valuation engagements, and provide evidence of at least seventy-five hours of continuing professional education related to business valuations.²¹¹ The American Society of Appraisers has three certifications: Accredited Member, Accredited Senior Appraiser, and Fellow of American Society of Appraisers.²¹² The Accredited Member certification requires a four-year college degree or equivalent, the completion of four three-day courses, passage of a one-half day examination following each course *or* completion of one all-day challenge examination and the Uniform Standard of Professional Appraisal Services examination.²¹³ This certification also requires the submission of two actual reports from within the last two years to

²¹⁰ DAVID LARO & SHANNON PRATT, *BUSINESS VALUATION AND TAXES* 43 (2005).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

the satisfaction of board examiners.²¹⁴ Finally, this certification requires two years of full-time or equivalent experience (with one full year of the requirement granted to anyone who has a CPA, CFA, or CBI designation within five years of practice).²¹⁵ An Accredited Senior Appraiser is required to meet all Accredited Member requirements and have five years of full-time or equivalent experience, including the two years required for the Accredited Member certification.²¹⁶ A Fellow of the American Society of Appraisers must meet the American Society of Appraisers requirements, plus be voted into the College of Fellows on the basis of technical leadership and contribution to the profession of the American Society of Appraisers.²¹⁷ The Institute of Business Appraisers has five certifications: the Accredited by the Institute of Business Appraisers, Certified Business Appraiser, and Business Valuator Accredited for Litigation, Master Certified Business Appraiser, and Fellow of the Institute of Business Appraisers.²¹⁸ The Accredited by the Institute of Business Appraisers certification requires completion of a four-year college degree or equivalent, and the applicant must possess a Business Appraisal certification from the American Institute of Certified Public Accountants, American Society of Appraisers, or National Association of Certified Valuation Analysts or complete an Institute of Business Appraiser eight-day appraisal workshop.²¹⁹ This certification also requires the completion of a comprehensive written examination, the submission of one report for peer review, and four references as to character and fitness.²²⁰ The Certified Business Appraisers certification requires completion of a four-year college degree or equivalent, completion of the Institute of Business Appraisers sixteen-hour course on report writing, passage of a six-hour examination, the submission of two business appraisal reports showing professional competence, and successful completion of ninety hours of upper-level business valuation course work or five years of full-time active

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

experience as a business appraiser with four references provided.²²¹ The Business Valuator Accredited for Litigation certification requires a business appraisal certification from the Institute of Business Appraisers, American Institute of Certified Public Accountants, American Society of Appraisers, or National Association of Certified Valuation Analysts, or that the applicant be a Certified Valuation Analyst candidate who has passed the related examination, completion of a five-days expert witness skills workshop and four-hour examination, and letters of reference from two attorneys or completion of sixteen hours of education in the area of law in which the appraiser will testify.²²² The Master Certified Business Appraiser certification requires a four-year college degree and two-year post-graduate degree or equivalent, the holding of a Certified Valuation Analyst certification for at least five years, the holding of at least one other certification, ten years of full-time practice, and three references from Master Certified Business Appraisers.²²³ The Fellow of the Institute of Business Appraisers certification requires the meeting of all Master Certified Business Appraiser requirements, plus being voted into the College of Fellows on the basis of technical leadership and contribution to the profession and the Institute.²²⁴ The National Association of Certified Valuation Analysts has three certifications: Accredited Valuation Analyst, Certified Valuation Analyst, and Certified Financial Forensic Analyst.²²⁵ The Accredited Valuation Analyst certification requires a business degree and/or an MBA or higher, good standing as a member of the National Association of Certified Valuation Analysts, the completion of a five-day course, the completion of a four-hour examination, the completion of an additional eight-hour examination for applicants without accounting fundamentals background, the providing of a case study for examination, two years full-time or equivalent business valuation or related experience or ten or more business valuations, three personal references, three business references, and a minimum of one letter of recommendation

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 44.

²²⁴ *Id.*

²²⁵ *Id.*

from an employer or another Certified Public Accountant.²²⁶ The Certified Valuation Analyst certification requires a college degree, unrevoked CPA license, membership in good standing in the National Association of Certified Valuation Analysts, the completion of a five-day course, passage of a two-part examination, passage of a four-hour proctored examination plus a take-home examination with a case study, passage of the case study, two years' experience as a CPA, three personal references, and three business references.²²⁷ The Certified Financial Forensic Analyst designation requires the holding of a recognized certification, the holding of an advanced degree in economics, accounting or finance, or undergraduate degree and MBA, completion of a two-week course and eight days of training at the National Association of Certified Valuation Analysts' Forensic Institute, passage of a two-part examination, passage of a four-hour proctored examination plus a take-home examination with case study, the submission of a case study report under Rule 26 of the Federal Rules of Civil Procedure or a report admitted in evidence within the last three years, one business reference, two legal references, and substantial experience in ten litigation matters (including five matters in which a deposition or testimony was given).²²⁸ If none of these certifications are applicable, the proffered expert should be subject to a mandatory *in limine* hearing.

2. Require business valuation experts in divorce cases to have conducted a minimum of ten business or professional practice valuations in divorce cases after five years of licensure or be subject to a mandatory *in limine* hearing.

3. Urge states to adopt the *Daubert* standard for admissibility. Federal Rule of Evidence 702, as construed by *Daubert*, provides a comprehensive framework for assessment of *Daubert* and related factors for admission of expert testimony.

4. Conduct a mandatory *in limine* hearing for any proffered expert who does not meet the criteria set forth in 1. and 2. at least ninety days prior to trial. At this hearing, review and

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

conclude as to whether the expert meets all of the requirements and offer an opportunity to cure defects. Trial courts, if vested with authority, should not impose court-appointed experts on divorce litigants except in the most extreme cases.

5. Require innate industry and business/practice specific knowledge in order to present lay testimony that resembles or is expert-type testimony.

6. Conduct a case management conference within sixty days of the date of filing of a divorce case that sets out minimum guidelines and expectations in addition to those set forth above, and develops a complete case management order with applicable mandates and deadlines.

7. Require lawyers certified as family law specialists to demonstrate proficiency in and knowledge of rules of evidence, valuation standards, standards for exclusion of expert opinions, and the process of seeking exclusion by passing a mandatory test and being re-certified every five years after initial passage.

This collection of approaches is likely to improve the knowledge of the family law bar, quality of expert testimony, and confidence of divorce litigants. It is also probable that the quality of expert information presented to courts will improve and be more reliable, leading to more assistance in educating triers of fact and more consistent and equitable outcomes.

VII. Conclusion

Having trial courts apply a more uniform standard and process for considering the admissibility of valuation expert reports, opinions, and testimony in divorce cases is not a mirage. Change will not happen overnight with both practitioners and the judiciary, and bringing states into conformity with *Daubert* and Federal Rule of Evidence 702 cannot trample the Tenth Amendment to the U.S. Constitution and fundamental federalism concepts. However, improving the quality of evidence presented in divorce cases undoubtedly would improve the quality of outcomes. And that is a goal that transcends jurisdictional priority. With consistency in divorce court outcomes and quality of expert testimony severely lacking, these improvements cannot come soon enough.

Vol. 30, 2018 Expert Valuation Opinions in Divorce Cases 489

The advent of these systematic changes will propel financial divorce litigation to where it should be – a varietal of complex commercial litigation that follows and is subject to the same rules. At that point, the mirage will become an oasis that will improve the administration of justice for all involved throughout the United States and make a generally unpleasant experience for divorce litigants much more tolerable.

