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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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A Case of Good Deeds Not Being Punished

Donnelly v. Luman, 2025 CarswellSask 317 (K.B.) — Tochor A.C.J.

What would the practice of family law be without conflict?

This case from the Saskatchewan Court of King's Bench, however, is about a different sort of conflict — legal conflict; conflict of the "you can't be on this file" sort.

This application considered whether a lawyer could continue to act for the Respondent/Husband because the lawyer had previously met with the Petitioner/Wife at a free legal services clinic at which she volunteered. The Wife had attended the clinic to obtain information about family law issues which arose out of her separation from the Husband.

The lawyer subsequently accepted a retainer from the Husband, and the Wife objected for two reasons. First, she argued that the lawyer had received confidential information from the Wife which could be used to her disadvantage. Second, she argued that the lawyer's assistant might have information about her which could be used against her.

The case is interesting on account of two public policy points. On the one hand, solicitor-client privilege is sacrosanct, and parties must be free to openly communicate with a lawyer to get legal advice. On the other hand, there is an access to justice crisis, and the bar should be encouraged — not discouraged — from volunteering at legal clinics.

The Wife alleged that she spoke with the lawyer "multiple times" at the legal clinic, including one time for 30 - 60 minutes during which she discussed her case with the lawyer in detail. Furthermore, the lawyer's current assistant was previously the legal assistant for the lawyer who acted for the Wife's new spouse, and the legal assistant had access to the new spouse's family file.

As set out by the Supreme Court of Canada in *MacDonald Estate v. Martin*, 1990 CarswellMan 384 (S.C.C.), two questions must be answered:

(1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?

(2) If so, is there a risk that it will be used to the prejudice of the client?

A review of the evidence was required to determine whether the lawyer had obtained confidential or privileged information from the Wife in the context of a solicitor-client relationship such that the lawyer could not act against her.

The Wife swore that she first met the lawyer at the free legal clinic on September 6, 2018, and that she later emailed the lawyer on November 18, 2018, to request a consultation. A consultation was never arranged because the lawyer was not taking new clients at the time. However, the Wife swore that she thereafter met with the lawyer multiple times at the clinic.

However, the Wife acknowledged she had been sent a letter from the lawyer confirming that their meeting was a "summary service" and that the lawyer did not retain any documents.

The Wife's main complaint was with respect to the 30-60 minute meeting she says took place on March 2, 2023, during which time she swore that her case was discussed in detail, including the Wife's concerns about the case and likely outcomes, all of which could be used against her.

The lawyer responded with two arguments. Frist, the lawyer submitted that her attendance at the free clinic regularly held at the courthouse were not intended to offer specific legal advice or to create a solicitor-client relationship with any attending individual. Second, the lawyer swore that, in any case, she did not meet with the Wife on the alleged date of the lengthy meeting (and, therefore, she did not receive any information which could prevent her from acting for the Husband). The lawyer filed an affidavit from her assistant showing that the lawyer had asked someone to cover her shift at the clinic that day.

There was, therefore, persuasive evidence that the Wife had not met with the lawyer on the specified date. And, therefore, no confidential information could have been imparted on that date. There was, therefore, no basis to have the lawyer removed as counsel for the Husband.

The lawyer also made the following point. Lawyers who attend the free legal clinics offer only short-term summary legal services as described in Commentary three to Rule 3.4-2 of the Law Society of Saskatchewan, Code of Professional Conduct. Attending lawyers offer explanations of court processes and procedures, and that the free legal clinic program is carefully structured to ensure confidential or privileged information is not imparted to participating lawyers. That is, at these clinics, lawyers give legal *information*, not legal *advice*.

The lawyer also emphasized the critical policy considerations such free legal clinics are based upon in this era of access to justice concerns. This important service to litigants, particularly self-represented litigants, would be seriously jeopardized if a litigant could use an informal meeting as a reason to remove that lawyer from acting.

Indeed, there would be a serious disincentive for lawyers — especially in smaller judicial centers — to participate in such clinics and to provide needed information to self-represented individuals if the reward for volunteering was being removed from paying files.

Justice Tochor explained as follows:

> [28] The submissions of [the lawyer] on this aspect raise a variety of complex factual, legal, and policy issues. I do not understand her submissions to mean that a meeting with a lawyer at a free legal clinic could never give rise to a conflict, just as I do not understand that a meeting with a lawyer at a free legal clinic will always give rise to a conflict. There is no absolute rule in this kind of factual assessment — a careful contextual analysis is necessary to determine if the bright line rule, identified in *R v. Neil*, 2002 SCC 70 at para 29, is crossed.

Ultimately, given the evidence, the court did not have to consider the principles set out in cases such as *R. v. Neil*, 2002 CarswellAlta 1302 (S.C.C.); *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 CarswellOnt 4624 (S.C.C.) at para 56; *Strother v. 3464920 Canada Inc.*, 2007 CarswellBC 1201 (S.C.C.) at paras 34-35; and *Canadian National Railway Co. v. McKercher LLP*, 2013 CarswellSask 432 (S.C.C.) at para 41.

His Honour was also not convinced that the lawyer should be removed as counsel for the Husband because the lawyer's current assistant previously worked for the law firm that represented her new spouse in his family law matters. Although the Wife argued that this gave the Husband an unfair advantage, Justice Tochor was not convinced. There was no evidence of any privileged or confidential information that could be used against the Wife.

The Wife's application was dismissed.

And lawyers are free to volunteer their time, as they should, albeit carefully.

Dress Rehearsal is Over; Time for The Show

Bonaparte v. Opthof, 2025 CarswellOnt 12262 (S.C.J.) — Associate Justice Kamal

Bonaparte v. Opthof deals with something we seldom encounter in family law — a motion for leave to question a non-party before trial.

In Ontario, before 1999, when the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 governed all civil proceedings in Ontario — including family law — parties enjoyed an automatic right to conduct pre-trial examinations for discovery.

That regime changed with the enactment of the *Family Law Rules*, O. Reg. 114/99. First introduced at Unified Family Court sites in 1999 and then extended province-wide in 2004, the new *Rules* deliberately streamlined procedure and abolished the automatic right to examine (or "question") even an opposing *party* before trial.

Rule 20(5) now provides the sole pathway to pre-trial examinations of parties and non-parties. True to the *Family Law Rules'* preference for plain English, the drafters replaced the technical phrase "examination for discovery" with the simpler term "questioning."

The rule provides that the court may grant leave to question any person — party or non-party — only if all three of the following conditions are satisfied:

> 1. **Necessity to avoid unfairness at trial** — the moving party must demonstrate that, without the questioning, proceeding to trial would be unfair.
>
> 2. **Information not otherwise available** — the evidence sought cannot be obtained through other reasonable means.
>
> 3. **No unacceptable delay or undue expense** — the proposed questioning will not compromise the efficient and cost-effective progress of the case.

Although the *Family Law Rules* removed the previous automatic entitlement, the weight of authority holds that the threshold for questioning a party remains very low. As Justice Emery observed in *Birdi v. Birdi* (2015), 58 R.F.L. (7th) 274 (Ont. S.C.J.) at para. 20, the test for party questioning is "very low", reflecting the principle that each side should have a reasonable opportunity to discover the other's evidence before trial.

That practical reality was captured — complete with trademark wit — by Justice Quinn, in *Gordon v. Starr*, 2007 CarswellOnt 3264 (S.C.J.):

> When one considers the **fluff and pap** that comprise so much of the affidavit material in family litigation, an hour, perhaps two, of well-prepared questioning will likely be all that is needed to precisely inform astute counsel of the case that he or she has to meet and to end the posturing. As well, **bearing in mind the delay and cost involved in the "to-ing" and "fro-ing" of navigating family court at the best of times**, it is difficult to imagine how questioning could amount to "unacceptable delay" or an "undue expense," as stipulated in paragraph 3 of subrule 20(5). To so conclude underestimates the amount of time involved and how quickly costs can mount, when: **lawyer A writes to lawyer B and requests certain information; lawyer B contacts or meets with his client or otherwise obtains instructions and responds to lawyer A; lawyer A then contacts or meets with his or her client or otherwise obtains instructions; no doubt to be followed by a merry-go-round of further correspondence and communications**. I respectfully disagree with those who suggest that court-ordered questioning should be viewed as a last-resort method of obtaining information. [emphasis added]

That is, in the adversarial system, questioning allows parties to test the strengths and weaknesses of their own case, and assists with settlement and narrowing the issues: *Pizarro v. Kretschmann*, 2019 CarswellOnt 8100 (S.C.J.) at para 11. Some cases go further and suggest that it is contrary to principles of fundamental justice to permit evidence to be given but to prohibit cross-examination on it (*Copeland v. Perreault* (2006), 44 R.F.L. (6th) 225 (Ont. C.J.)) or that there is a *prima facie* right of a party to cross-examine an affiant, limited only by the right of the court to control its own process (*Beaver v. Hill*, 2018 CarswellOnt 10863 (C.A.)). After all, as Wigmore said, "cross-examination is the greatest legal engine ever invented for the discovery of truth" — and Wigmore was no slouch.

While some decisions take a different view, treating questioning as a remedy of "last resort" (see, for example, *Zafir v. Diamond* (2008), 53 R.F.L. (6th) 209 (Ont. S.C.J.) at para. 21 and *Resendes v. Maciel*, 2023 CarswellOnt 6018 (S.C.J.) at para. 29), our experience is that a request to question a party is typically granted as a matter of course at the initial case conference once basic relevance is shown.

However, the landscape changes dramatically when the proposed witness is a non-party. The same three-part test in Rule 20(5) applies, but judges demand a far more detailed record: proof that ordinary disclosure remedies have been tried and exhausted, that the information sought is genuinely material to a live trial issue, and that the proposed questioning is tightly focused and proportionate. Without that showing, leave will be refused.

That is why *Bonaparte v. Opthof* caught our eye. Associate Justice Kamal granted leave to examine the mother's psychiatric expert before trial, a procedure that is both uncommon and exacting. Reported decisions granting this relief remain relatively rare, making this decision a useful guide for counsel considering the exceptional remedy of non-party questioning.

The parties lived together from 2019 to 2024. They had a child. As their high-conflict parenting dispute moved toward trial, the mother served an independent psychiatric assessment addressing her mental health and parenting capacity.

The father took serious issue with the report. He argued it was incomplete and unreliable: it repeated inaccurate information supplied by the mother and her lawyer, relied on an incomplete prescription and medical history, and came without the underlying documents the doctor claimed to have reviewed. Not only did the report not include the evidence the doctor had allegedly considered, but contrary to the College of Physicians and Surgeons of Ontario Guidelines, the psychiatrist allegedly failed to gather key collateral information such as interviews with family and friends, CAS notes, or police reports, leaving him to rely almost entirely on the mother's self-reporting.

The father had repeatedly sought these records. Case Conference endorsements ordered the mother to produce them, but deadlines passed without full compliance. Despite follow-up letters and motions, key documents remained missing. Without access to the underlying information, and without the ability to probe the psychiatrist's methodology, the father argued he faced "trial by ambush", and was unable to prepare for cross-examination, decide whether to call his own expert, or engage in meaningful settlement discussions.

Despite the looming trial date, the father brought a motion under Rule 20(5) for leave to question the psychiatrist before trial. The mother opposed. She argued that the father already had sufficient disclosure, that any gaps could be explored in cross-examination at trial, and that a pre-trial examination would add needless cost and risk delay.

The motion was heard by Associate Justice Kamal, who began by reviewing Rule 20(5) of the *Family Law Rules*. As noted earlier, questioning may be ordered only if the moving party proves three things:

(1) It would be unfair to proceed without it;

(2) The information is not otherwise reasonably available; and

(3) The questioning will not cause unacceptable delay or undue expense.

Associate Justice Kamal applied this three-part test — unfairness, alternative availability, and delay/expense — and found that each branch was satisfied.

Regarding unfairness, in *Tsakiris v. Tsakiris* (2007), 45 R.F.L. (6th) 186 (Ont. S.C.J.) at para. 15, Justice Brown (as he then was) held that when considering a request to examine a non-party, the court should ask whether "[i]f questioning were not permitted, would the party be deprived of the opportunity to secure material evidence relating to an issue in the proceeding or that could have a material effect on the determination of an issue in the proceeding, be it on a motion or at the trial?"

Associate Justice Kamal found this standard met. The psychiatrist's evidence was plainly material to parenting and credibility issues, and blocking questioning would prejudice the father both in settlement discussions and at trial. The long disclosure record underscored the point; multiple orders for full medical disclosure had gone unfulfilled. Questioning would let counsel confirm what the psychiatrist received, relied on, and how he weighed it, and give the doctor a chance to revise his opinion once the missing records were provided.

Regarding possible alternate routes to get the information, Associate Justice Kamal accepted that the information the father sought — especially the psychiatrist's methodology and the impact of missing records — was not readily available by any other means.

Finally, with respect to delay and expense, the court noted that the father had asked for a strictly limited five-hour examination on a date the psychiatrist had already reserved. Associate Justice Kamal noted that questioning close to trial should be granted only in rare cases where key facts are in serious dispute, the information is otherwise unobtainable, the issues are complex, and questioning would narrow issues or reduce trial time. He also reminded himself that a "fishing expedition" is not appropriate. (See *Pizarro v. Kretschmann*, 2019 CarswellOnt 8100 (S.C.J.) and *Cohen v. Cohen Estate*, 2020 CarswellOnt 37 (S.C.J.).)

Here, a brief, focused examination would narrow the issues, test credibility, and prevent trial by ambush, all without delaying the trial; so all three branches of Rule 20(5) were satisfied. As a result, the motion was granted. The father was granted leave to question the psychiatrist for up to five hours on the pre-booked date, and the mother was ordered to pay $1,500 in costs.

While the outcome here is readily supportable — it does raise some strategic questions for counsel.

Rule 20.2 of the *Family Law Rules* clearly requires a litigation expert's report to set out the factual assumptions, identify the documents relied on, and include a written statement of the supporting facts with copies of all underlying materials.

If the mother's expert report failed to meet those requirements, and if the mother ignored repeated requests and orders to comply, the father arguably already had a strong basis to challenge the admissibility of the report or to seek its exclusion at trial. Even if the trial judge were inclined to admit the report and permit the expert to testify, its deficiencies would supply powerful ammunition for cross-examination.

By moving for leave to question the expert, the father may have handed the mother an unintended advantage: a chance for the psychiatrist to shore up any weaknesses in his report and to rehearse the cross-examination that awaits him at trial. What was meant as a tactical strike to expose gaps in the report could instead allow the mother to close them.

A pre-trial examination gives the witness an early look at the very questions and themes counsel will pursue in court, effectively offering a dry run of cross-examination. It also creates an opportunity — if not an obligation — for the expert to revisit the underlying records, supplement or amend the report, and bolster conclusions that might otherwise have been vulnerable to attack. If the trial judge were inclined to admit the report despite its deficiencies, those post-motion amendments could blunt the force of any later evidentiary challenge and make cross-examination less damaging.

Sometimes, less is more, and an adverse inference is better than the truth.

The lesson is that even a well-founded and successful Rule 20(5) motion can carry hidden strategic costs. Before seeking leave to question a witness before trial, whether party or non-party, counsel should weigh not only the value of locking in testimony,

but also the risk of giving the opposing party or expert an early rehearsal and an opportunity to shore up the very weaknesses that might otherwise have undermined the opinion at trial.

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