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Family Law Newsletters

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

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Documents, Documents, Who's Got the Documents: Third Party Disclosure

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Both these cases address the issue of third-party disclosure, which seems to be an increasingly common and important issue across the country.

La France v. Saroli

In *La France*, the wife sought to question three third parties: her former doctor and her former friends (Edward and his wife, Sladiana). The husband had listed all three individuals as witnesses for trial. The wife served all three of the third parties with the Notice of Motion, Summons to Witness and Witness fee as required by Rule 20(9) of the *Family Law Rules*, O. Reg. 114/99 (the "*Family Law Rules*").

The doctor took no position on the motion.

The friends did not respond to the Notice of Motion prior to the hearing, however at the motion they indicated they would cooperate.

The husband opposed the request.

The parties had a relationship — but there was no agreement as to duration. The wife said that the parties had been cohabiting since December 14, 2018, and that they separated on August 23, 2023. The husband claimed that the wife had moved in with him only in September 2020 and had left in 2022. Consequently, it was the husband's argument that the parties had not lived together continuously for three years and that the wife was not his (common law) "spouse." There were no children.

The husband was wealthy. He had a net worth of hundreds of millions of dollars. The wife was a lawyer who had not worked since 2014.

The wife was claiming in her Application:

- 50% beneficial ownership of a property in Oakville;
- spousal support; and
- damages for pain, suffering and the infliction of emotional harm due to, among other things, coercive control.

The Former Doctor

At some point, the wife's former doctor had become friends with the husband. The husband was not calling the doctor as a participant expert, but rather he wished for him to testify as to his presence at an event in 2022 when the husband told the wife to leave his home. The husband also stated that he intended for the doctor to testify about his observations on the "quality" of the parties' relationship.

The wife claimed that she had told her doctor that the husband was abusing her, but those complaints were not present in his medical notes. She requested an order to compel him to release the complete file to her. Counsel for the doctor advised that the complete office chart had been produced the week before the motion.

The wife claimed that the doctor had been "inappropriately influenced" by the husband. In support of this claim she stated that the husband had taken the doctor to Las Vegas on an all-expenses paid trip and had returned on a private jet with over \$2,000,000 in cash. She also said that the doctor had given the husband gifts, including a bulletproof vest and a firearm. She also claimed that the doctor had discussed her medical information with the husband during the litigation.

She sought "an opportunity to obtain oral and documentary evidence from [the doctor] in advance of trial, confirming the extent of missing documents in her medical file, the extent of [the doctor's] relationship and communications with [the husband] since separation, his intended evidence at trial; and [the husband's] influence and benefits conferred upon [the doctor] before and since separation."

The Friends

The wife stated that Edward and Sladiana had been her best friends. She'd gotten to know the couple in the winter of 2021. The wife admitted to having had a sexual encounter with Edward in 2023 — though she claimed to have been under the influence of medication at the time. The husband argued that the relationship was much more involved.

In the summer of 2024, Edward had provided the husband with sexually explicit text messages between Edward, Sladiana and the wife. The wife had been questioned about the text messages, and she deposed that after the single sexual encounter, she'd agreed with the couple that they would each delete their texts. As a result, she did not have a copy of the texts and believes the ones provided by the husband had been altered.

The wife claimed that the couple — her former best friends — had "betrayed" her because of the husband's wealth and that they were now aligned with him.

The couple had not responded to prior requests from the wife to preserve documents and electronic records or to voluntarily submit for questioning.

Under Rule 20(5) of the *Family Law Rules*, a court may order that *any* person submit to questioning about any issue in a case if the following conditions are met:

- a. It would be unfair to the party who wants the questioning to carry on with the case without it;
- b. The information is not easily available by any other method; and
- c. The questioning will not cause unacceptable delay or undue expense

Rule 19(11) deals with compelling a third party to provide disclosure and has the same conditions.

In *Weber v. Merritt* (2018), 11 R.F.L. (8th) 177 (Ont. S.C.J.), the court helpfully set out the applicable law and principles relating to third party questioning:

29. The onus on a motion for non-party disclosure and/or questioning is on the moving party. *Ontario (Attorney General) v. Ballard Estate*, 1995 CanLII 3509 (ON CA), 1995 CarswellOnt 1332 (Ont. C.A.) at 16.
30. The starting point is to consider the context, and the purpose for which the Rule is invoked. *Ireland v. Ireland*, 2011 ONCA 623 (Ont. C.A. [In Chambers]) at 28.
31. The Court has held that the test under rule 19(11) is an objective test which requires an analysis outside the litigant's belief system: "suspicion and conjecture will not suffice." See *Santilli v. Piselli*, 2010 Carswell Ont 3317 (Ont. S.C.J.) at paragraph 12. There is no reason that the test would not be the same under rule 20(5).
32. In *Ontario (Attorney General) v. Ballard Estate*, *supra* at 15, in the context of the *Rules of Civil Procedure*, the Ontario Court of Appeal set out six factors to be considered by the Motions judge when faced with a motion for non-party disclosure:
- a. The importance of the documents in the litigation;
 - b. Whether production at the discovery stage of the process as opposed to production at Trial is necessary to avoid unfairness to the Applicant;
 - c. Whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and if not, whether the responsibility for that inadequacy rests with the defendants;
 - d. The position of the non-parties with respect to production;
 - e. The availability of the documents or their informational equivalent from some other source which is available to the moving party;
 - f. The relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have an interest in the subject matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation.
33. Rule 20(5) has been held to be more permissive than the comparable Rule in the *Rules of Civil Procedure*, and to give judges more liberal and generous discretion. As noted by Justice Turnbull in *Hagey-Holmes v. Hagey*, 2005 CarswellOnt 2840 (Ont. S.C.J.) at 32:
- That makes eminent sense when one considers that in matrimonial litigation, spouses and family members may be "used" to shield income or other assets that might be relevant in the assessment of spousal support, child support, or net family equalization issues.
34. So too in *Loeb v. Loeb*, 2013 CarswellOnt 3247 (Ont. S.C.J.) at 42, the Court noted that it is not uncommon in the family law context for family members and their businesses to align themselves to support and protect a family member defending a property or support claim.
35. At the same time, as set out in *Boyd v. Fields*, 2006 CarswellOnt 8675 (Ont. S.C.J.) at 12, as with all disclosure requests in the family law context, whether from parties or non-parties, while full and frank disclosure is a fundamental tenet of the Family Law Rules, "there is also an element of proportionality, common sense, and fairness built into these rules." . . .
36. As stressed by Justice Kristjanson in *Politis v. Politis*, 2018 ONSC 323 (Ont. S.C.J.), in the family law context, the test for compelling third party disclosure set out in *Ontario (Attorney General) v. Ballard Estate*, *supra*, "must be supplemented to take into account two critical values, privacy and proportionality." She notes, in the context of new partners, that privacy interests of third parties must be carefully balanced against the interests of the parties in the proceeding.

37. Non-parties are generally protected from potentially intrusive, costly, and time-consuming processes of discovery *except in circumstances specifically addressed by the Rules*. See *Santilli v. Piselli*, *supra*. As Justice McGee noted therein at paragraph 13: "The discovery process must be kept within reasonable bounds."

38. There must be an evidentiary basis to show that the documents sought or the questioning requested is relevant. The request for disclosure from a non-party and the request for questioning should not amount to a fishing expedition. *Campbell v. Wentzell*, 2015 CarswellOnt 15086 (Ont. S.C.J.) at 47. Disclosure is not a weapon and is not intended to overreach. *Saunders v. Saunders*, 2015 CarswellOnt 2209 (Ont. S.C.J.) at para. 13.

The wife emphasized that none of the third-party witnesses opposed the motion outright. Justice Mathen set out that the position of third parties is a factor, but it is not determinative. The court retains an independent duty to oversee family litigation. Regardless of the position of the third parties, the court must ensure that questioning and disclosure do not amount to "fishing expeditions." An order under Rule 20(5) or Rule 19(11) cannot be made unless the conditions are met.

The wife argued that it would be unfair for her to proceed without questioning and disclosure from the third parties. She claimed that the case "hinged" on credibility and the evidence of the third parties, and the extent to which the husband tampered with their evidence, must be determined in advance of trial through oral and documentary evidence.

Justice Mathen described the wife's argument as resting on the following premises:

- a) The husband's tremendous wealth created a "gross power imbalance" between the parties.
- b) The husband's wealth permitted him to exercise undue influence over the witnesses — to bribe them to testify in his favour.
- c) The doctor breached his professional obligations towards the wife.
- d) The couple have "turned" on the wife.
- e) If the three witnesses are truthful, their evidence will corroborate important aspects of the wife's case, including her experience of abuse.
- f) Without pre-trial questioning, the witnesses will simply lie with no meaningful way to challenge them.

Justice Mathen was not persuaded that it would be unfair to the wife to proceed to trial without pre-trial questioning and disclosure. Her Honour focused on what the case was about: Whether the wife was entitled to spousal support, whether she had a beneficial interest in a property (which was not connected to any of the third parties) and whether the husband caused the wife compensable pain and suffering.

The most probative evidence regarding those issues would come from the parties themselves. The third parties had nothing to say about the beneficial ownership claim. They could not speak to entitlement to support. At best, they could provide evidence about the time-period they observed the parties to be cohabiting, but, since they were not living with the parties, such evidence was likely to be "tangential" at best.

The only issue the third parties could provide evidence about was evidence of corroboration regarding the wife's abuse allegations.

While the third parties may have relevant evidence, they were already listed as trial witnesses. The *Family Law Rules* do not provide a right to cross-examine a witness before trial; this ain't the United States where everyone under the sun gets deposed. The wife had the burden to show why she needed questioning and disclosure *before* trial and that it would be unfair for her to proceed to trial without the information from the third parties.

While the Wife argued that the third party witnesses could have probative evidence regarding family violence, she was unable to set out why it would be unfair for her to have to wait until trial to question the third parties about her own abuse. If she required more precise information as to the witnesses' testimony, she could ask for a "will-say" statement.

The wealth disparity between the parties did not change the test under the *Rules*.

The wife's claims that the husband had "tainted" the witnesses through his wealth also did not assist her. The wife was, without directly saying it, arguing that witness tampering was occurring. There was insufficient evidence for the court to make such a factual inference. The husband refuted all of the wife's claims that he had manipulated the witnesses.

Finally, the wife claimed that the third parties had "involved themselves in the litigation." Justice Mathen also set out that while a witness may be willing to be called as a witness, even if they support one party over the other, that does not mean that they are involved in the litigation.

The wife's argument, at best, was that she needed pre-trial questioning to test the credibility of the third party witnesses. Justice Mathen stated that Rule 19 or Rule 20 has never been used to compel pre-trial questioning or disclosure simply because one party is convinced that a third party is not credible. Such an order would encompass virtually *any* witness in family law proceedings.

Move along . . . nothing to see here . . . no third-party disclosure or pre-trial Questioning allowed here.

Gratton v. Gratton

Gratton is a bit different. *Gratton* is a case about disclosure from resistant third parties in the context of a family business and group of corporations. The case involved the Wife's claim for child support, spousal support and equalization of property in the face of a marriage contract that removed the family structure from the calculation of the Husband's Net Family Property.

The Husband worked for his father's companies, was a beneficiary of a family trust set up by his father and held shares personally and corporately in his Father's companies. The Husband's father was the majority shareholder of the operating companies. The father, the Husband's mother, the Husband's sister and the Husband himself were the trustees of the Family Trust. The beneficiaries included the Father, the Husband's mother, the Husband and the Husband's siblings.

The Husband and Wife were married for a little over 17 years. They had three children together. During the marriage, the parties had executed a domestic contract which excluded the Husband's interest in the Family Trust and any shares in his father's companies from the Husband's net family property.

The Wife brought an application on June 2, 2022. She sought, among other things, to set aside the domestic contract, spousal support, child support and an equalization of net family property.

The Wife asserted that she had signed the domestic contract under duress, that she had been subject to intimate partner violence throughout her marriage, and that she was afraid of the Husband. She also made claims that she had not received independent legal advice as the Husband and his father were also clients of the lawyer who advised her, and she never received financial disclosure.

The Husband vigorously denied the allegation of intimate partner violence. And he was of the position that there was no reason to discount the Marriage Contract.

However, on April 28, 2023, the Husband had pled guilty to uttering a threat against the Wife and to four counts of assault against her that occurred between 2012 and 2021. He received a sentence of imprisonment for six months, served in the community, and two years of probation. The Husband subsequently claimed that the assaults to which he pled guilty occurred *after* the Marriage Contract was signed, such that they had no impact. Perhaps this was the only argument available. But it was not a good one.

The Husband was the manager at one of the family companies. He claimed that his income drastically declined after separation. He claimed that this reduction to his income was due to his performance at work suffering due to the separation. He relied on a letter from his father that indicated he would not be receiving bonuses for the years post-separation. In total, the Husband claimed that his income had declined by 40% since separation. To quote the Church Lady (for those that remember her): Well isn't that special.

In October 2022, the Husband and Wife consented to an interim child and spousal support amount based on the Husband's claimed income of \$116,000.00.

The Wife brought a disclosure motion against the Husband and a separate disclosure motion against the Husband's Father, the family companies and the Family Trust seeking:

1. Corporate financial statements for the fiscal years ended 2019 to date;
2. Corporate income tax returns for the fiscal years ended from 2018 to date; and
3. Details of non-arm's length expenses such as salaries, or fees to related parties, charged as business expenses in any company in which the Husband and/or the Trust have or had a direct or indirect interest for the years ended from 2020 to date.

There was also an issue relating to the Trust's tax returns which was resolved prior to the motion.

The Husband took the position prior to the motion that he could not produce the requested disclosure:

1. For the companies in which he had no ownership, he stated that he could not be required to produce financial statements;
2. For the companies in which he held non-voting shares, he stated that he had no control and was unable and not required to produce financial statements; and
3. His father had clearly indicated that he was not prepared to release any financial statements and he was not required to do so.

The Wife had retained a Chartered Business Valuator, to assist her in preparing an income report and valuation of the Husband's interest in the various corporate entities. The CBV set out in several letters and in an affidavit that he required the information in order to prepare his reports.

The third-party respondents first argued that the motion for disclosure from third parties was premature on two bases:

1. The disclosure motion should not be heard until a determination as to the validity of the domestic contract was completed. If the domestic contract was upheld; then the disclosure sought would be irrelevant.
2. The disclosure motion against the third parties should not be heard until the disclosure motion against the Husband had been determined.

Justice Stothart rejected these arguments. First, the issue of the Husband's income would be relevant regardless of whether or not the domestic contract was upheld, as the domestic contract only dealt with the issue of equalization of property — not child or spousal support.

Second, the motion in this case was not premature. The third-party respondents had already made it clear that the Husband did not have the items that were being sought and they were not prepared to give the items to him. It would be a waste of time and judicial resources to require the Wife to first seek the materials from the Husband only to then have to bring a motion against the third parties when the Husband took the position that he did not have them, could not produce them and did not

have the right to get them. The evidence regarding the corporations, the Trust and the Husband's connection to them would not change on either motion.

The third-party respondents also argued that the court was being asked to make prejudicial findings about the Husband prior to the disclosure motion against him being heard. Justice Stothart disagreed; the issue of whether the materials should be disclosed did not require making any prejudicial findings against the Husband. The motion simply required the court to determine whether there was an evidentiary basis on which the requested items should be disclosed.

Justice Stothart then set out the applicable analysis for a third-party disclosure motion.

Rule 19(11) of the *Family Law Rules*, O. Reg. 114/99 (the "*Family Law Rules*"), provides that if a document is in a non-party's control, or is available only to the non-party, and it is *not* protected by legal privilege a court can order it to be produced if it would be unfair to a party to go on with the case without the documents.

Third-party (or non-party) disclosure in family proceedings is generally more permissible than under the *Rules of Civil Procedure*. Judges are expected to exercise "liberal and generous" discretion in ordering third party disclosure in family law matters. This is because it is common in family law cases for individuals to use family members to conceal income or assets. (See; *Weber v. Merritt* (2018), 11 R.F.L. (8th) 177 (Ont. S.C.J.) at para. 33; *Hohl v. Hohl*, 2021 CarswellOnt 4660 (S.C.J.) at para. 25; *Loeb v. Loeb* (2013), 34 R.F.L. (7th) 149 (Ont. S.C.J.) at para. 42; and *Leitch v. Novac* (2020), 38 R.F.L. (8th) 1 (Ont. C.A.).

The test under Rule 19(11) is an objective test which requires evidence outside of the applicant's own subjective belief system. Suspicion and conjecture will not suffice. There must be an evidentiary basis to establish that the sought documents are relevant. Motions for disclosure from third parties should not amount to a "fishing expedition" and courts must be cautious against overreach: *Weber v. Merritt* (2018), 11 R.F.L. (8th) 177 (Ont. S.C.J.) at paras. 31 and 38.

The court also set out that while full and frank disclosure is fundamental in family proceedings, these obligations must be proportional and align with common sense and fairness. The discovery process is not limitless and must be kept within reasonable bounds.

Justice Stothart cited the leading case of *Ontario (Attorney General) v. Ballard Estate*, 1995 CarswellOnt 1332 (C.A.) at para. 15 wherein the Ontario Court of Appeal set out six factors to be considered by a motions judge in ordering third-party disclosure in *civil* proceedings:

1. The importance of the documents in the litigation;
2. Whether production at the discovery stage of the process as opposed to production at Trial is necessary to avoid unfairness to the applicant;
3. Whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate, and if not, whether the responsibility for that inadequacy rests with the defendants;
4. The position of the non-parties with respect to production;
5. The availability of the documents or their informational equivalent from some other source which is available to the moving party; and
6. The relationship of the non-parties from whom production is sought, to the litigation and the parties to the litigation. Non-parties who have an interest in the subject matter of the litigation and whose interests are allied with the party opposing production should be more susceptible to a production order than a true "stranger" to the litigation.

The Wife, as the individual seeking the information from the third parties, had the onus of satisfying the court that the requirements under Rule 19(11) had been met.

Justice Stothart found that the Wife had met her onus.

None of the third parties had asserted that the information was protected by any form of privilege.

It would be unfair for the Wife to continue on her case, including the upcoming motion for disclosure against the Husband, without the requested information. The information requested by the Wife was clearly relevant. One of the reasons provided for the reduction in the Husband's income was that the corporations had suffered a drastic decline in its profitability. Without the corporate information, it would not be possible to assess the veracity of the Husband's claim.

In addition, all of the companies and the Trust were closely held by the family and the Husband's role and level of control was somewhat opaque or ambiguous. The Husband had various roles in the corporations and there were inter-corporate transactions to which he (or his holding company) was a party. The companies and Trust were so closely tangled and interconnected it would be unfair for the Wife to try and advance her claims without being able to explore what, if any, financial benefit the Husband received from the family companies — either directly or indirectly. The more tangled and interconnected the pieces of a web — the more strings move when one strand is pulled.

The corporate disclosure was relevant to the Husband's income pursuant to s. 18 of the *Federal Child Support Guidelines*, SOR/97-175. The court set out that s. 18 provides that where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's income as determined under s. 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in s. 17 and determine the spouse's income to include (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

In *Boucher v. Boucher* (2025), 16 R.F.L. (9th) 50 (Man. C.A.), the Manitoba Court of Appeal reminds us that the issue under s. 18 is not whether the payor owns or controls the closely held family corporations. Rather, the question is whether s/he receives income from them, directly or indirectly.

Justice Stothart relied on the decision of *Laushway v. Messervey*, 2014 CarswellNS 45 (C.A.) wherein Justice Saunders observed that relevance involves an inquiry into the connection or link between people, events or things and it does not occur in a "pristine sealed vacuum." This is particularly important in family law matters where there may be a motive to hide or obfuscate income through a complicated labyrinth of family corporations.

The Wife had adduced evidence to show that the Husband had access to income over and above that which he was formally paid from the companies and/or reported on his income tax returns. She showed much greater income flowing into the joint account during the marriage than he was reporting.

The court then opined that the information being sought was not easily available by any other method or from any other source. The third parties had already conceded that the Husband did not have the ability to access this information and that they were not prepared to provide it to him or the Wife. While the Husband was likely entitled to examine much of the information from companies in which he held shares pursuant to s. 154 of the *Business Corporations Act*, R.S.O. 1990, c. B16 and as a Trustee of the Family Trust, it would be a waste of time to require the Wife to obtain an order that the Husband first obtain these materials.

There was no indication from the third parties that production of the materials sought would cause unacceptable delay or undue expense. There would be some cost relating to producing copies of the materials, but it would not be "undue."

The third parties were closely related to the Husband and the issues in the litigation. The family corporations and Trust were not true "strangers" to the litigation. The request was not a fishing expedition and was grounded in evidence substantiating the Wife's concerns.

The disclosure requested was proportional. The Wife was seeking financial statements and tax records from the companies and those documents should be readily available and capable of being produced. There was no claim by third parties that there would be unacceptable delay or expense in providing the requested records.

Any concerns regarding confidentiality could be addressed by way of a standard confidentiality agreement. The court noted that it should be something that the parties can "easily agree on."

Finally, the court considered the "floodgates" argument asserted by the third-party respondents. They expressed concern that the CBV had indicated that he might need more records once he received and reviewed the financial records the Wife was seeking. The court dismissed this concern noting that any further request would require the same principles to be applied and the issues could be balanced and determined at that time.

The court ordered the information sought by the Wife be provided by the third parties.

And there you have it. Two requests for information from third parties. Two different results.

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