

CITATION: Debono v. Debono, 2020 ONSC 4728
COURT FILE NO.: 03-027/19
DATE: 20200806

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Joseph Debono and George Debono, Applicants

AND:

Carmen Debono, Marilyn Marchant (Debono), Elizabeth Muscat (Debono), Jennifer Nesci (Debono), David Debono, JCD Property Ltd., JCD Inc., and the Public Guardian and Trustee, Respondents

BEFORE: C. Gilmore, J.

COUNSEL: *Ian Hull* and *Katherine Mazur*, Counsel for the Applicants

Michael Statham and *Claire McNevin*, Counsel for the Respondent Carmen Debono

Kimberly Whaley, Counsel for the Respondents Elizabeth Muscat, Jennifer Nesci, and David Debono.

HEARD: July 24, 2020

ENDORSEMENT

Overview

[1] The Respondent Carmen Debono (“Carmen”) seeks to quash the Applicants’ summons to witness served on Carmen’s section 3 counsel, namely Clare Burns and Hayley Peglar on the grounds that the high materiality and necessity threshold to examine Carmen’s counsel has not been met.

[2] The Applicants defend the motion on the grounds that the evidence of Ms. Burns and Ms. Peglar is relevant and necessary with respect to Carmen’s capacity and whether she has been the victim of undue influence. The Applicants do not seek any solicitor/client privileged information.

Factual Background

[3] Carmen is a 75-year-old widow and resides in Toronto. Carmen has a hearing impairment, English is her second language and she does not drive. She depends on the assistance of others for many things.

[4] Carmen has six children, the Applicants Joseph Debono (“Joseph”) and George Debono (“George”) and the Respondents, Marilyn Marchant (“Marilyn”), Jennifer Nesci (“Jennifer”), David Debono (“David”) and Elizabeth Muscat (“Elizabeth”).

[5] This Application was commenced by Joseph and George in March 2019. They sought an Order requiring that Carmen submit to a capacity assessment with respect to her ability to manage her property and personal care, with respect to her capacity to revoke her Powers of Attorney for Property and Personal Care dated June 12, 2013 and her capacity to make her Powers of Attorney for Property and Personal Care dated October 16, 2018.

[6] The Applicants also sought an Order with respect to an assessment of Carmen's vulnerability to undue influence and a declaration she is incapable of managing her property.

[7] The Application contains affidavits sworn by Joseph, George, Marilyn and Emily Debono (a grandchild of Carmen's). The Responding Record contains affidavits sworn by David, Elizabeth and Jennifer. No affiants have been cross-examined on their affidavits in the Application.

[8] Carmen retained Ms. Burns and Ms. Peglar of WeirFoulds as counsel on May 10, 2019. Ms. Burns advised counsel for the Applicants that she intended to seek appointment of section 3 counsel for Carmen. On January 30, 2020 this Court ordered that the Office of the Public Guardian and Trustee ("the PGT") arrange for representation of Carmen pursuant to section 3 of the *Substitute Decisions Act* ("SDA"). The Applicants objected to Ms. Burns being appointed as section 3 counsel on the grounds that she would likely be a fact witness in the proceedings.

[9] The PGT's office was made aware of Mr. Hull's objection to the appointment of Ms. Burns as section 3 counsel. Notwithstanding those objections, the PGT appointed Ms. Burns as section 3 counsel on February 6, 2020. Mr. Hull's office immediately advised the PGT's office of their intention to examine Ms. Burns and Ms. Peglar prior to the hearing of the Application.

[10] The Summons was sent to Ms. Burn and Ms. Peglar on February 21, 2020 and required that they produce at the examination:

All communications...between yourself or your partners and staff and any of the Respondents, Elizabeth Muscat (Debono), Jennifer Nesci (Debono) and/or David Debono and/or anyone acting under their direction, so as to include their children, the housekeeper and anyone else assisting them to control access to Carmen Debono.

[11] On March 2, 2020, Ms. Burns and Ms. Peglar provided the parties with a 75-page tabbed brief containing the email and voicemail communication between WeirFoulds representatives and members of the Debono family from May 9, 2019 to January 10, 2020 ("the communications summary"). No solicitor-client privileged documents were contained in the communications summary.

[12] At the cross-examination on his affidavit in response to this motion, Joseph confirmed that the Applicants do not intend to cross-examine Ms. Burns or Ms. Peglar on any solicitor-client communication meaning they would not be expected to testify against their own client. His evidence was that Ms. Burns is in a unique position to attest to the manipulation and isolation that Carmen experiences based on her interactions with David, Elizabeth and Jennifer. Joseph agreed that if Ms. Burns and Ms. Peglar are ordered to give evidence in the Application, they will no longer be able to act for Carmen.

[13] Joseph's evidence was that the summary of communications is only the "tip of the iceberg" and that a full examination would be required to determine "what's out there." He also deposed that the evidence of Elizabeth, David and Jennifer would not be truthful and could only be tested through the evidence of Ms. Burns and Ms. Peglar.

[14] Some history of the current tension between family members in this case is necessary to understand why the summons is being sought by Mr. Hull's office. The Applicants allege that the Respondents, Elizabeth, Jennifer and David exert enormous control over Carmen in order to isolate her from the Applicants and her own counsel.

[15] On October 8, 2019 Ms. Burns advised the Applicant's counsel that Carmen's grandchildren could contact her directly to arrange access to their grandmother. Various correspondence then passed between Ms. Burns and Michael Debono (George's son) with respect to arranging a visit. Michael requested that a visit be arranged before Christmas 2019. Through Ms. Burns, Carmen advised that she would agree to meet the grandchildren at a tea party organized by Ms. Burns at WeirFoulds offices and suggested dates in January 2020.

[16] The tea party was arranged to take place on January 12, 2020 for 90 minutes at the WeirFoulds office. It was agreed that the visit would be on a without prejudice basis and that all 11 grandchildren would be in attendance. The party was not to be recorded or videotaped.

[17] On January 10, 2020 Ms. Burns advised Michael that she was unable to confirm the arrangements with Carmen and that the party would have to be cancelled. Shortly after this Ms. Burns advised of her intention to seek appointment of section 3 counsel.

[18] Of note is that one of the documents contained in the summary of communications is a note written by Carmen and sent to Ms. Burns via Elizabeth on January 8, 2020 which states: "Hello Clare. I am sorry that you may not have understood me proper. I don't want to see any of them at all until everything is over. Thank you."

The Law and Argument

[19] The main issue to be determined on this motion is the legal test to be applied in order to determine if the Summons should be quashed. Counsel on behalf of Ms. Burns and Ms. Peglar argues that the threshold for examining the lawyer for an adverse party requires both high materiality and necessity. Further the threshold is likely to be met only in exceptional circumstances.

[20] The lawyers for the Applicants submit that the evidence they are seeking is vital and relevant to the Application. The evidence relates to solely to any interference by the Respondent siblings with respect to access to their mother. As such undue influence and manipulation is often done in secret, the evidence of Ms. Burns and Ms. Peglar is essential for the court to understand what is really going on.

[21] Mr. Hull submits his clients are not seeking evidence related to solicitor client communication but independent, material and necessary evidence about the core issue of their case. The communications summary provided by Ms. Burns is simply insufficient.

[22] With respect to undue influence, Mr. Hull also relies on an expert opinion obtained from Dr. Sara Mitchell dated April 27, 2020. Dr. Mitchell is an Assistant Professor in the Department of Neurology at the University of Toronto. She was retained to provide an expert opinion by way of retrospective clinical assessment of Carmen to determine her capacity to make and revoke a Power of Attorney and any testamentary documents as of October 16, 2018 as well as Carmen's susceptibility to undue influence.

[23] Dr. Mitchell reviewed extensive medical documentation and found that Carmen was suffering from dementia by June of 2017 and experienced continuing cognitive decline thereafter. She concludes at page 12 of her report that;

...I would consider Ms. Debono to have been susceptible to external forces by virtue of her significantly impaired condition and psychiatric manifestations of dementia.

Given Ms. Debono's vulnerable state, it would not have required coercion or extreme pressure to cross the threshold into undue influence if anyone had wanted to take advantage of her mental state.

[24] Carmen's counsel does not view Dr. Mitchell's report as relevant to this motion as Dr. Mitchell made no formal finding as to Carmen's capacity.

[25] Turning to the legal authorities in relation to the test, the Ontario Court of Appeal has made it clear that calling a lawyer to give evidence against his or her client is to be avoided wherever possible.¹ In *R. v. 1504413 Ontario Ltd.*, a municipality summonsed counsel for an individual who was alleged to have built a deck without a building permit. The witness was apparently necessary in order to determine who caused the deck to be built. The lawyer brought a motion to quash which was dismissed by the Superior Court. The appeal of that dismissal was allowed. The court held a paragraphs 16 and 17 as follows:

Whether as a matter of custom or policy, issuing a summons to counsel for the opposite party to testify against his or her client is virtually unheard of and it should not be done absent the most exceptional circumstances.

At a minimum, such circumstances would require a showing of high materiality and necessity (assuming that the proposed evidence is otherwise admissible). Although not exhaustive, necessity in this context will involve considerations such as the importance of the issue for which the testimony is sought, the degree of controversy surrounding the issue, the availability of other witnesses to give the evidence or other means by which it may be accomplished (such as the filing of an agreed statement of fact), the potential disruption of the trial process and the overall integrity of the administration of justice.

[26] Counsel for the Applicants argues that the high materiality and necessity tests should not apply in this case because once the threshold of a witness offering evidence that is possibly relevant

¹ *R. v. 1504413 Ontario Ltd.*, 90 O.R. (3d) 122.

is met pursuant to Rule 39.03 of the *Rules of Civil Procedure*, the onus shifts to the party challenging the summons to show the examination is an abuse of process.

[27] However, the cases cited by the Applicants on the issue of relevance do not deal with the examination of counsel for an adverse party. The Applicants' cases dealt with, for example, the relevance of examining senior officials at the City of Toronto including the Mayor (*Coburn v. Barber*), or Board members (*Canada Metal Co. Ltd. v. Heap*).

[28] Rather, the Applicants take the position that the courts have not permitted legal counsel to testify against their client because of the conflict of interest and duty. Where there is no such conflict, the examination has been allowed. For example, in *Papazian v. Morris Manning QC Professional Corporation*² Master Muir allowed the examination of opposing counsel because "he was the only person who can provide the evidence."

[29] The Applicants attempt to frame their arguments on the basis that the examination of Ms. Burns and Ms. Peglar is the only possible route given the alleged lack of truthfulness of the Respondent siblings and Ms. Burns and Ms. Peglar's unique position in this case. Further, by not straying into the arena of solicitor-client privilege, the solicitor/client relationship is protected.

[30] I do not agree. First, in Joseph's cross-examination he insists that Ms. Burns' testimony is required because of the "unique position" that she holds with respect to Carmen's interaction with the Respondent siblings. However, the "unique position" relates directly to Ms. Burns' and Ms. Peglar's role as counsel.

[31] Second, the definitive statement made by the Applicants that the evidence of the Respondent siblings will be untruthful is made categorically and without any support. Indeed, witnesses in this Court are occasionally found to have given untruthful evidence but that does not mean that counsel for a related party are to be summonsed as a form of fact checking exercise.

[32] Third, the Respondent siblings have not yet been examined. Thus, while Joseph insists that the summary of communications is only the "tip of the iceberg" there is no clarity as to exactly how large the iceberg is without examining the Respondent siblings. This is not a case like *Papazian* above where the court found that the lawyer was the only witness who could give evidence on the issue. Indeed, the Respondent siblings are the ones alleged to be influencing their mother and their evidence will be significant on this core allegation.

[33] Fourth, I am concerned about the Applicants' assertion that the fact that they will refrain from asking about solicitor/client privileged communication is enough to insulate counsel for Carmen from any impairment of their solicitor/client relationship or that the end of that relationship is acceptable "collateral damage" in pursuit of Ms. Burns' evidence. The result of that argument is that the Applicants' litigation strategy trumps Carmen's choice of counsel.

[34] Finally, there are the public policy arguments which cannot be ignored. Section 3 counsel can only be appointed in situations where a person's capacity is in issue. Clearly Carmen needs assistance with her daily living and communication between her section 3 counsel and family

² [2019] ONSC 6461.

members is therefore inevitable. If such communication can be the subject of a summons to section 3 counsel in high conflict cases, there is the possibility of sidelining section 3 counsel in such cases which will increase costs and prejudice the affected party. There is also the possibility of a chilling effect on section 3 counsel which must have its own repercussions on the integrity of the administration of justice.

Order and Costs

[35] Therefore, for all of the above reasons, I allow the motion and the summons to Ms. Burns and Ms. Peglar is therefore quashed.

[36] Carmen seeks full indemnity costs of \$56,832.77. Her counsel points out that while not a legally complex case, it was of extreme importance to their client. Further, even after the delivery of the summary of communications, the Applicants insisted on pursuing the summons acknowledging in argument that the inevitable removal of Ms. Burns and Ms. Peglar as counsel was “collateral damage” to their litigation strategy.

[37] The fees in this case are significant given the volume of material and the examinations which took place.

[38] The Applicants are not seeking costs in this matter; however, they request that in the event their motion is dismissed that no costs be awarded against them. If costs are awarded against them, the amount sought by Carmen is excessive and should be no more than \$35,000 plus HST. The Applicants did not provide a costs summary.

[39] While I do not think that the costs sought by Carmen are excessive, costs on a full indemnity scale are not warranted. The issues in this case involve complicated family dynamics and an allegation by the Applicants which is admittedly difficult to prove. Costs on a lower scale and closer to what the Applicants expected to pay if unsuccessful are warranted and therefore awarded to Carmen Debono in the amount of \$35,000 plus HST plus disbursements.



C. Gilmore, J

Date: August 6, 2020