

Marmer Penner Inc. Newsletter

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DISCLOSURE FROM THIRD PARTIES

There are many occasions in matrimonial litigation when certain disclosure may be required from persons who are not party to the litigation. In financial matters, more often than not, third party disclosure often needs to be sought from corporate accountants or lawyers who may have acted in the past. Recently, we have found that requests for third party disclosure are being met with resistance, citing various reasons including privacy issues, ownership (i.e. the working papers are the property of a third party, not the client who is party to the litigation) or confidentiality.

This issue was dealt with recently on a motion on the *Elgner v. Elgner* matter (2011 ONSC 1674). In *Elgner*, certain disclosure was sought by the applicant wife in order to substantiate a claim for an exclusion claimed by the respondent husband. The exclusion totaling over \$86 million, arose from estate freezes which were purported to be effected in the past. The applicant wife made third party disclosure requests of the husband's accountant and lawyer for various information, including working papers in connection with tax and estate planning, which would support the exclusion claimed by the husband. The accounting firm resisted the provision of its working papers on the grounds that:

1. The working papers of auditors and accountants are documents prepared for their own assistance in carrying out their work and are

- their own property, not the property of the client, and as such, the client has no right to insist on access to the working papers;
2. Its working papers may contain confidential information of its other clients, whose consent to disclose is required; and
 3. The request for access to [the accountant's] working papers does not meet the relevance and fairness test for disclosure from non-parties.

Ultimately the Court found that the requested disclosure did meet the fairness and relevance test, and in so doing, permitted the wife to have the full disclosure concerning the exclusion the husband was seeking. The Court stated:

“The [claimant of an exclusion] bares the onus of proof and the wife is entitled to fully examine the validity of that claimed exclusion.”

On occasion, we have also obtained information from Canada Revenue Agency (“CRA”), as a third party, although this requires special steps and a formal application process, because CRA has stringent rules about confidentiality and will not release documents to third parties without that party’s consent. Typically, the party is required to request the needed information under the *Access to Information Act*, at which point it then can be provided by the party.