SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Moore v. Moore*, 2013 NSSC 175

Date: 20130614
Docket: 1201-062239; SFH-D 055919
Registry: Halifax

Between:

Barry Allan Moore

Petitioner/ Respondent herein

v.

Christine Anne Moore

Respondent/Applicant herein

LIBRARY HEADING

Judge: The Honourable Justice Elizabeth Jollimore

Heard: January 30 and 31, 2013
(Oral Decision: January 30, 2013
Amended: September 28, 2022)

Summary: Motion to strike affidavits granted.

Key words: affidavits, motion to strike affidavit, CPR 39.04

Legislation: Civil Procedure Rule 39.04

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Judge: The Honourable Justice Elizabeth Jollimore

Heard: January 30 and 31, 2013, in Halifax, Nova Scotia
(Oral Decision: January 30, 2013
Amended Decision: September 27, 2022)

Counsel: Jane Lenehan, for Allan Moore
Christine Anne Moore, on her own

The original text of this decision has been corrected according to the erratum dated November 1, 2022

By the Court:

Introduction

[1] In the context of Christine Moore's application to vary the parenting terms of a 2009 Corollary Relief Judgment and a 2011 Variation Order, I heard Allan Moore's motions, pursuant to Civil Procedure Rule 39.04, to strike all or some of the affidavits of Dr. David Mensink and Susan Coldwell. Additionally, Mr. Moore sought costs.

[2] Mr. Moore's motions were granted and I deferred my decision on his request for costs until the conclusion of the hearing.

Background

[3] Christine and Allan Moore separated in late 2007. Divorce proceedings began shortly thereafter. The couple has spent much time in Court. Through most of this time, Ms. Moore has been unrepresented.

[4] In my experience, almost one-half of the private litigation in the Family Division involves at least one unrepresented party. By private litigation, I mean litigation in which the Minister of Community Services, the Minister of Health and Wellness, or the Director of Maintenance Enforcement is not involved.

[5] The Family Division has many resources: a Family Law Information Centre, conciliation services, mediation services and on-site summary advice counsel. These resources are particularly important for those who represent themselves. Litigation is not intuitive: informed guidance is worthwhile where significant matters are at stake. Our Civil Procedure Rules govern civil litigation regardless of whether a party is represented.

[6] Of course, in addition to the resources unique to the Family Division which assist unrepresented parties, I offered direction to Ms. Moore as the Court of Appeal requires me to do, pursuant to its decisions in *Family and Children's Services of Cumberland County* v. *M.(D.M.)*, 2006 NSCA 75 and *Murray* v. *MacKay*, 2006 NSCA 84.

[7] The parties were before me for conferences on November 9 and December 20, 2012. I directed Ms. Moore to the resources of the Family Law Information Centre during a pre-hearing conference on November 9, 2012 and again in the memorandum following that conference.

[8] There are two documents available in the Family Law Information Centre to Family Division litigants that are relevant to Mr. Moore's motion: "Affidavits for Family Law Matters: *What do I say?*" and "Affidavits for Family Law Matters: an explanation in plain English". These documents make clear that an affidavit is a statement of facts within the affiant's personal knowledge. Litigants are referred to the specific rules that govern the admissibility of information that isn't within the affiant's personal knowledge and how to introduce this information. An example is provided. Litigants are explicitly told, "Personal opinions should not be included in affidavits" and that judges may not allow an affidavit to be used if it contains inadmissible evidence.

The motions

[9] Mr. Moore's motions were filed on January 21, 2013. I heard them at the commencement of the variation application on January 30, 2013. The variation application wasn't concluded during the time scheduled for it and it remains outstanding.

[10] Affidavits are governed by Civil Procedure Rule 39. Rule 39.04(1) says that I *may* strike an affidavit containing information that isn't admissible, or evidence that isn't appropriate to the affidavit. Rule 39.04(2) states that I *must* strike a part of an affidavit containing either of the following:

> (a) information that isn't admissible, such as an irrelevant statement or a submission or plea;
>
> (b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.

Dr. Mensink's affidavit

[11] Dr. Mensink is Christine Moore's fiancé. His affidavit is twelve sentences long, with each sentence a separate paragraph, as required by Civil Procedure Rule 39.08(c).

[12] Mr. Moore objected to every single sentence of Dr. Mensink's affidavit. Sustaining his objection would result in disallowing all of Dr. Mensink's evidence.

[13] Mr. Moore objected to Dr. Mensink's expression of personal opinions, his assertion of argument and his repetition of remarks which he attributes to

Angeline, without having proven the necessity and reliability of these remarks so that they may be admitted, though they are hearsay. The specific objections were noted in Schedule A of Mr. Moore's notice of motion.

[14] In paragraphs 1, 5, 7, 8 and 10 of his affidavit, Dr. Mensink either asserts argument or offers personal opinions. For example, he says "I think Angeline's school should be changed to John W. MacLeod Fleming Tower School" in paragraph 1, and "I think that when her father is away for more than 24 hours, that Angeline should be with her mother" in paragraph 5. In paragraph 7, he offers his belief about what is best for Angeline, and in paragraph 8, he says, "I think Angeline should live with her mother." These statements, and his statement in paragraph 10, that he thinks it would be best for Angeline to live with her mother and visit with her father, are statements of personal opinion.

[15] Ms. Moore argued that to grant Mr. Moore's motion is to "silence pertinent information".

[16] Affidavits are to be confined to facts. Facts provide me with reasons upon which I may make a decision about what is in Angeline's best interests. The challenged paragraphs don't contain factual information.

[17] In some cases, opinions can be pertinent. Opinion evidence is limited to witnesses who have been qualified to offer their views in specified and recognized areas of expertise. Dr. Mensink's opinions don't fall within any recognized area of expertise where he is qualified.

[18] Paragraphs 1, 5, 7, 8 and 10 of Dr. Mensink's affidavit are struck.

[19] Mr. Moore objected to paragraphs 2, 3, 6 and 9, arguing that Dr. Mensink is repeating remarks that he attributes to Angeline and asking me to accept these remarks as true without having first demonstrated the necessity and reliability of introducing this hearsay evidence.

[20] Civil Procedure Rule 5.13 makes clear that the rules about hearsay apply to applications. Hearsay is admissible in limited circumstances. The admissibility of these remarks is determined after applying the analysis in *R. v. Khan* 1990 CanLII 77 (SCC).

[21] In summary, then-Justice McLachlin (who wrote the decision on behalf of the unanimous court) said that there were two requirements for the admission of hearsay repetition of a child's statement: necessity and reliability. Necessity refers to whether it is reasonably necessary to admit the hearsay statement. The

inadmissibility of the child's evidence may be one basis for determining there is necessity. Reliability refers to relevant considerations including the timing of the statement; the child's demeanour, personality, intelligence and understanding; the absence of any reason to expect fabrication of the statement. There's no strict list and there is no area of evidence that should always be regarded as inherently reliable.

[22] There's been no determination that Angeline's evidence wouldn't be admissible and, as a result, that hearsay is necessary to put her comments before me. In this case, the issue of necessity hasn't been addressed at all.

[23] Reliability requires a "circumstantial guarantee of trustworthiness" around the statement before the statement may be admitted into evidence. Chief Justice Lamer explained reliability in *R. v. Smith* 1992 CanLII 79 (SCC) at paragraph 31 where he said that the word "guarantee" when "used in the phrase 'circumstantial guarantee of trustworthiness' does not require the reliability by established with absolute certainty." Instead, if the circumstances don't create the concerns that are usually associated with hearsay evidence, the evidence should be admissible, even though cross-examination isn't possible.

[24] In *R. v. Khan* 1990 CanLII 77 (SCC), the Supreme Court of Canada identified different matters I can consider in deciding if there is a circumstantial guarantee of trustworthiness. These include matters such as: the timing of the statement; Angeline's demeanour, her personality, her intelligence and her understanding; and the absence of any reason to expect fabrication of the statement. There's no absolute list of circumstances to be considered in determining reliability.

[25] To decide whether these remarks would be admissible hearsay, I would need to look to the remainder of Dr. Mensink's evidence to see what it offers me. Dr. Mensink's affidavit does not detail any circumstances in which Angeline is alleged to have made these statements. As a result, I lack evidence to determine whether there's a circumstantial guarantee of the trustworthiness of the attributed remarks.

[26] Ms. Moore doesn't respond to the argument that these remarks are hearsay.

[27] I sustain Mr. Moore's objection to paragraphs 2, 3, 6 and 9 of Dr. Mensink's affidavit and strike these paragraphs.

[28] The final paragraphs (4, 10, 11 and 12) are objected to on the basis that they are argument. These statements are expressed as opinions. In some

paragraphs (such as paragraph 11 and 12) the objection is that Dr. Mensink has characterized a situation rather than described it, and stated a conclusion which is based on his characterization of the circumstances: for example, Mr. Moore's "scheduling inflexibility" causes Angeline to miss important activities and events. Dr. Mensink's failure to offer factual evidence deprives me of the ability to assess events.

[29] Ms. Moore argues that Dr. Mensink has personal knowledge of matters relating to Angeline and was present while certain events occurred. That may be so, but this information is not detailed in his affidavit, which is required to contain all his evidence. Paragraphs 4, 10, 11 and 12 are struck.

Susan Coldwell's affidavit

[30] Susan Coldwell's affidavit is comprised of twenty-one paragraphs which follow the four initial paragraphs provided on the court's form. Each paragraph is comprised of a single sentence. Her affidavit opens with the assertion that she has personal knowledge of the evidence she's sworn. Alternately, she says that where she lacks personal knowledge, the evidence is based on her information and belief and that she has stated the basis of information when the basis is not her personal knowledge. Despite this latter remark, Ms. Coldwell offers evidence that is not within her knowledge without stating its source.

[31] If accepted, Mr. Moore's objections would reduce Ms. Coldwell's affidavit to the single sentence, "I have known Angeline Moore since her birth on October 31, 2004 and I have known her mother Christine Moore approximately 11 years."

[32] The fourth preliminary paragraph of her affidavit (which is taken from the forms contained in the Civil Procedure Rules) directs, "Confine affidavit to the facts, do not state any opinion, plea, view, or submission."

[33] In general, Mr. Moore objected to Ms. Coldwell's affidavit because it is oath-helping and not based in Ms. Coldwell's personal knowledge. In some cases (paragraphs 2, 3, 6, 15, 17, 18 and 20), his objection is that the statement is argument. Elsewhere (paragraphs 11 and 17), he objects to double hearsay: Ms. Coldwell offers, as evidence, what an unnamed person has told her of certain events. It is not clear whether the unnamed person who reported the events to Ms. Coldwell was present at them.

[34] Most of the information in Ms. Coldwell's affidavit is not based on her own observation, but on her "numerous" conversations and "daily communication" with Ms. Moore and Ms. Moore's sharing with Ms. Caldwell "e-mails, texts and details of conversations [with Mr. Moore]". Ms. Coldwell alleges that Mr. Moore and his partner have made inappropriate comments and inaccurate statements to Angeline's teachers and other officials. She speculates that "comments of a belittling and disparaging natures regarding her mother **may** have been heard by Angeline": I have added the emphasis.

[35] Where she does state the basis of her evidence, Ms. Coldwell attributes it to Ms. Moore. These remarks are oath-helping.

[36] I am satisfied that Ms. Coldwell's affidavit, with the exception of the first paragraph of original text on the second page, should be struck. The affidavit contains almost no factual information that is personally known to Ms. Caldwell.

[37] Costs will be addressed in the context of the application overall.

_____

Elizabeth Jollimore, J.S.C. (F.D.)

Halifax, Nova Scotia

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ERRATUM

Judge:	The Honourable Justice Elizabeth Jollimore
Heard:	January 30 and 31, 2013, in Halifax, Nova Scotia
Final Written	October 20, 2022
Counsel:	Jane Lenehan, for the Barry Allan Moore Christine Anne Moore, on her own
Erratum Date	November 1, 2022 **Paragraph 29 is amended to add the sentence: "Paragraphs 4, 10, 11 and 12 are struck."**