

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Armoyan v. Armoyan, 2011 NSSC 448

**Date:** 20111202

**Docket:** HFD 1201-065036

SFHCIV-070342

SFHMCA-068981

**Registry:** Halifax

**Between:**

Vrege Sami Armoyan

Petitioner

v.

Lisa Armoyan

Respondent

**Judge:** The Honourable Justice Douglas C. Campbell

**Heard:** Motion by Correspondence

**Written Decision:** December 2, 2011

**Counsel:** Gordon R. Kelly, for the Petitioner  
Mary Jane McGinty, for the Respondent

**By the Court:**

[1] The parties are potentially before the court on various issues brought by the Petitioner pursuant to divorce legislation, maintenance and custody legislation and matrimonial property division legislation. The Respondent contests the court's jurisdiction with respect to those matters. It is that jurisdiction dispute that is the subject of currently established court dates. That hearing began in October and did not finish and is now adjourned to later dates.

[2] Within that jurisdiction proceeding, this is a Motion by Correspondence by the Petitioner seeking an order that would allow for the cross examination and redirect examination of two witnesses to be taken out-of-court on a date and time when they are available.

[3] Counsel for the Petitioner recalls that in this case I authorized requests for procedural relief to be made by a Motion by Correspondence, while counsel for the Respondent did not share that understanding and therefore requests clarification. I do not recall with certainty the exact nature of my direction. It is however not necessary for me to review a recording of those proceedings because I am prepared to hear this motion by way of correspondence in any event. If there are future requests for matters to be heard by way of a Motion by Correspondence, a fresh request for leave should be made.

[4] The motion is supported by affidavits from Bassam Nahas and Linda Nahas. In short, those affidavits confirm that those affiants have filed affidavits in the proceeding and that they had made themselves available to be cross examined at the hearing which was held from October 24 to October 27, 2011, after having canceled plans for a lengthy visit to the Middle East for dates that conflicted with the hearing dates. The hearing was not completed during those October dates and was adjourned for dates in late February and early March 2012. Counsel later learned that these affiants had made alternative plans for their travel on dates which again conflict with the new hearing dates. I have concluded that it would be unreasonable to expect them to cancel their travel plan once again in order to testify. They are available for numerous dates between now and the hearing dates. Counsel for the Petitioner asks that I grant an order permitting their cross examination and redirect to be done out-of-court.

[5] The court is faced with several choices. The motion could be granted and the cross-examination could occur out- of- court. The motion could be denied in which case the affiants could be subpoenaed and forced to cancel their travel plans. If they choose not to appear at the hearing, the Respondent would be in a position to move to strike the affidavits. Lastly, the affiants could be given new court dates consistent with their availability to hear the cross-examination in court.

[6] The process of taking cross-examination out-of-court is authorized by the Civil Procedure Rules. Rule 53.03 (2) states that:

Cross-examination and any redirect examination must be conducted before the presiding judge unless the judge directs that cross-examination and any re-examination be conducted out-of-court.

[7] Rule 23.09 (4) states that:

The witness who provides an affidavit on which cross examination is required must be cross examined and examined in redirect in chambers, unless the parties agree or a judge orders otherwise.

[8] Counsel for the Respondent objects to the requested out-of-court process on various grounds. She argues that there may be numerous objections and there would be no Judge available to rule on the appropriateness of the objection. Given the extra leeway afforded to cross-examination, it occurs to me that the number of objections are not likely to be numerous and that counsel for the Petitioner would be naturally reluctant to trigger a motion for a ruling on the objection. Also, a ruling need not require a separate motion since it could be made at the hearing based on the transcript. In any event, if this argument were to carry, there would never be cross-examination out-of-court because the absence of a judge would always be the case.

[9] Counsel argues that her client has the right to attend to be available to confer with counsel and that because of the cost, she cannot afford to travel from Florida to Halifax for the cross-examination. I am not satisfied that she cannot afford to be here but in any event, it is her choice whether or not to attend. The Jurisdiction Motion that is the basis of the hearing is hers. Given the improbability of a direction to force the affiants to attend the scheduled jurisdiction hearing, a denial of the motion would likely result in setting separate dates for the cross-examination

in court for which they are available. This would also involve additional travel cost for the Respondent and therefore the travel cost for an out-of-court cross-examination is moot.

[10] Counsel for the Respondent argues that the affiants could have been consulted before the dates were set. As I recall, the process of adjourning the case occurred late in the day and it may be the case that the dates were not actually established until later. In any event, they were not consulted and the dates were set without the knowledge that those dates conflicted with the availability of the witnesses. Furthermore, available court time is and was scarce.

[11] Counsel for the Respondent offers a number of cases that criticize the process of out-of-court cross examinations. Without repeating each of these, I can agree that it is less than perfect to have cross-examination take place out-of-court and without the presence of the judge and that in court cross-examination is by far preferable. However, the fact that our civil procedure rules contemplate and approve of the process is reason enough for the court to conclude that such a process can be followed in appropriate circumstances.

[12] There is nothing in our rules that would guide the court as to when the circumstances are sufficiently appropriate to allow out-of-court cross-examination. Counsel for the Petitioner points, by analogy, to rule 56.03 (3) which deals with Commission Evidence. Some of those listed factors are applicable to this case and have influenced my decision.

[13] **The convenience of the person to be examined:** As mentioned above, the affiants would be extremely inconvenienced by being forced to attend because of the fact of their extensive travel plans that have already once been postponed for this matter.

[14] **The chances that the person will not be available to testify in the courtroom:** it is clear from the above noted facts that there is a very high probability that the persons will not be available in the absence of extreme inconvenience to them.

[15] **The apparent importance of having the person's testimony:** the affidavit evidence which is the subject of the cross-examination is very important for two reasons. It goes to a fundamental question at the Jurisdiction Hearing about

whether or not the Petitioner was ordinarily a resident in Nova Scotia for the required one year. In addition, there is conflicting testimony on behalf of the Respondent that conflicts with the evidence in these affidavits and the cross-examination will be important to the court in determining the reliability of these conflicting sets of testimony.

[16] In addition to these factors, I have considered the need for litigation efficiency. This is a case that already has been of exceptional duration and promises to be before the court for a very long time in the future. It has been plagued by various delays brought about, for example, by setting insufficient court time for its various stages resulting in delay. The alternative to out-of-court cross-examination will almost inevitably mean allowing additional court time beyond the currently established hearing dates. Even though the witnesses are available prior to those dates, the court has no time available. Further, as the Respondent's counsel herself contends, to do this in court before those dates is to hear those witnesses out of order.

[17] I have concluded that in all the circumstances of this case it is appropriate to allow the cross-examination and redirect on an out-of-court basis.

[18] I have not signed the draft order presented to the court by counsel for the Petitioner for various reasons. First, I would prefer that paragraph 2 be amended by adding the words "not less than two days prior to the hearing as required by rule 53.03." Second, I would not require video of the out-of-court cross-examination because viewing it would add time to the process and cause delay. Third, the dates available in November are now past and paragraph 4 should be amended accordingly. The deadline in paragraph 5 is about to pass and I would suggest it could be changed to December 15, 2011.

[19] Lastly, while I may be misunderstanding the situation, until I am convinced otherwise, I do not see the purpose of paragraph 6, which calls for a Commissioner to be appointed. I see Commission Evidence as being a separate process from out-of-court cross-examination since the former can deal with both direct evidence and cross-examination. Therefore I see no reason to take out an order under that rule. If Mr. Kelly wishes to try to convince me otherwise he may do so in writing. I suggest therefore that Mr Kelly should redraft the order with the above requested changes and send me copies with paragraph 6 included (if he wishes to argue for its inclusion) and separate copies with paragraph 6 excluded. I will then read his

explanation and sign whichever draft of the order I consider appropriate. If Ms. McGinty wishes to comment on the appropriateness of paragraph 6 in the draft order, she may do so immediately by correspondence directed to me.

CAMPBELL, J.