IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: H.M.Y. v. T.G.Y., 2006 NSSC 185

Date: 20060614
Docket: SFH D 044114, 1201-060389
Registry: Halifax

Between:

H. M. Y.

Applicant

v.

T. G Y.

Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: April 12, 2006, in Halifax, Nova Scotia

Written Decision: June 14, 2006

Counsel: Ritchie Wheeler, for H. Y.
Janet Stevenson, for T. Y.

By the Court:

[1] This matter involves a preliminary motion on behalf of Ms. Y. to have certain paragraphs and attachments struck from the affidavit Mr. Y. filed in this proceeding.

[2] Ms. Y. commenced a petition for divorce by document filed with this Court on January 24, 2006. On that same date she also filed an interim application seeking interim primary care of the parties' two children with reasonable access to Mr. Y. and interim child support.

[3] Mr. Y. replied to Ms. Y.'s application and he cross applied for interim primary care of the children with supervised access to Ms. Y.. Among other material attached to Mr. Y.'s affidavit were:

- the entire transcript of a discovery examination of Ms. Y.,

- the entire transcript of a discovery examination of a social worker employed with the Department of Community Services regarding an investigation involving Ms. Y. and her children,

- the entire Department of Community Services case file notes concerning Ms. Y. and her children including letters received from a lawyer acting on behalf of a person who was alleged to have lived with Ms. Y.,

- interrogatories and the answers supplied by two potential witnesses.

[4] Ms. Y. requests that these documents be struck from Mr. Y.'s affidavit. She also seeks that certain paragraphs of Mr. Y.'s affidavit be struck.

[5] Civil Procedure Rule 70.13 (7) provides that evidence on an interim hearing may be given by an affidavit and by any evidence obtained on discovery and admissible under any applicable rule. (my emphasis)

[6] Civil Procedure Rule 18.4 (1) does permit all or any part of a discovery disposition of a party so far as admissible under the rules of evidence to be used against that party for any purpose. (my emphasis)

[7] The discovery transcript of a party or portions of that transcript, have been considered admissible under the rules of evidence as an exception to the hearsay rule because the transcript constitutes “an admission” of a party. There is disagreement about whether a party’s statements contained in a transcript constitute hearsay. However, regardless of the categorization, there is acceptance that these transcripts are admissible under the rules of evidence provided that the portions of the transcript to be introduced are relevant. If a statement made by a party at discovery is relevant, Civil Procedure Rule 18.4(1) permits its use by an opposing party for any purpose. [*Burton v. Howlett, 2001 Carswell NS 65 (N.S.C.A.)]*

[8] At a trial counsel will either use a discovery transcript in cross-examination of a party or file it at the close of his or her case and explain in submissions the evidentiary purpose requiring the consideration of the transcript. *[Burton v. Howlett, 2001 Carswell NS 65 (N.S.C.A.)]*

[9] This proceeding is not a trial. It is a hearing of an application at which only affidavit evidence is considered in addition to any evidence given in cross-examination of the person swearing the affidavit. May a discovery transcript be attached to a responding party’s affidavit for the purpose of a hearing upon application?

[10] The rules provide that a discovery transcript may be evidence at an interim hearing but they do not clarify all the means by which that transcript is to be properly placed before the court. Use in cross examination is one appropriate method. Use in summation is another. Mr. Y. attached Ms. Y.’s discovery transcript to his affidavit for several purposes two of which appear to be, to support his application for primary care of the children and to substantiate the contradiction between statements made by Ms. Y. in discovery from those she provided to a social worker, a key witness for Mr. Y.’s case. I can find no reason to suggest that attaching the transcript for these purposes is irrelevant to Mr. Y.’s case nor that it is procedurally inappropriate to do so. Ms. Y.’s counsel agrees and has accepted the submissions made by Mr. Y. on this issue.

[11] Ms. Y.’s counsel does not agree that the transcript of the discovery of the social worker may properly be attached to Mr. Y.’s affidavit. The social worker is a

witness, not a party to this proceeding. The rule regarding the admissibility of the discovery transcript of a witness provides that the transcript may be used to contradict or impeach the testimony of that witness at trial or for any purpose if that witness is dead, unable to attend to testify because of age, infirmity, sickness, imprisonment, is out of the jurisdiction, cannot be subpoenaed or there are exceptional circumstances that exist making it desirable in the interest of justice to allow the deposition to be used. *[Civil Procedure Rule 18.14(1)]*
This social worker has not yet given testimony and is available either to swear an affidavit or to attend a hearing. As a result, the transcript of the discovery of the social worker is not properly attached to the respondent's affidavit and must be struck.

[12] In reference to the information to be supplied by the social worker, where this appears in Mr. Y. 's affidavit, there is frequently no compliance with the required format, "I have been informed by _____ , who is a social worker employed by the Department of Community Services, and I verily believe that _____". Those sections not in compliance with this format are struck. If Mr. Y. chooses to have the social worker file an affidavit, and if that is permissible at this late a date (a question I have not considered) he may wish to review the comment I make later in this decision in respect to the attachment of Department of Community Services file notes and documents.

[13] Mr. Y. has attached to his affidavit all documents in the custody and possession of the Department of Community Services regarding Ms. Y. and the parties children. These documents are often referred to as "Agency file notes" and I will use this term in reference to these documents. Some of these notes consist of recordings of conversations between the applicant and employees of the Department of Community Services. Some consist of conversations with other persons. Some consist of information given to other persons by different persons and then to the social worker. Some consist of information not necessarily within the personal knowledge of the social worker directly involved in the file. Some consist of letters from and to lawyers. Some consist of opinions expressed by third parties. As a result many of these agency notes consist of irrelevant material, hearsay, multiple hearsay, opinions and other information that, unless this material can properly be admitted as part of a "business record", would require the maker of the statements to be present as a witness available to be cross-examined.

[14] Mr. Y. argues that these materials are properly attached to his affidavit as business records.

[15] Section 22 of the Evidence Act permits the admission of records into evidence provided the prerequisites of that section are met. This is generally achieved by producing a witness, or affidavit from a person who can testify or swear that :

- 1) the file is a record of a business as defined in s. 22(1)(*a*) of the Evidence Act;

- 2) the entries on the record were made in the usual and ordinary course of the business;

- 3) it was in the usual and ordinary course of the business to make such a record;

- 4) the record or writing was made at the time of the event or within a reasonable time thereafter.

[16] These perquisites are not met in Mr. Y.'s affidavit.

[17] Mr. Y. argued that the failure to meet the perquisites of Section 22 of the Evidence Act may be saved by Civil Procedure Rule 31.05 which provides that the Court by order may permit the evidence of a particular fact to be given by affidavit or by the production of documents or entries in books or of true copies of those documents. (my emphasis) Mr. Y. argues that the attaching of the Agency file notes to his affidavit was required so that he could effectively respond to Ms. Y.'s application. He suggests that a consideration of the best interest of these children would indicate these documents should be attachable to his affidavit. He argues that business records may be conditionally admissible and in support quotes from The Law of Evidence in Canada, 2nd ed. (Markham: LexisNexis Canada Inc, 1999 at p. 43:

> ".....Evidence may not only be conditionally relevant, but more generally, conditionally admissible. Facts which establish the

> admissibility of evidence may not yet be proved when the evidence is presented to the court. For example, a business record might be referred to in a witness' evidence before the record is admitted into evidence as an exception to the hearsay rule. It is a matter for the court's discretion whether to allow such evidence before the preliminary facts are proven. "

[18] I understand this comment about conditional admissibility to refer to the process, in the course of a trial, where a witness might need to make reference to a business record before that record has been formally admitted into evidence. Perhaps for convenience the maker of the record will appear later in the day to prove the record. I do not understand this comment to approve the attaching of a complete record to the affidavit of a witness who knows nothing about the record other than that it exists. I am not prepared to permit these agency file notes to be introduced as evidence in this proceeding by way of mere attachment to Mr. Y.'s affidavit. The findings Mr. Y. will seek from the court at the interim hearing may be based in large measure upon information contained in the agency file. Ms. Y. has a right to request that this information be properly placed before the court. No prejudice will be suffered by Mr. Y. nor risk occasioned to the children's well being by requiring that the rules of evidence and procedure are followed.

[19] If Mr. Y. may file an affidavit of the social worker and if there is an intent to attach the agency file notes to that affidavit I suggest, as guidance, that the parties review the decisions in Re Maloney (1971), 12 R.F.L.167; H. (L.T.) v. Children's Aid Society of Halifax (City), 1988 CarswellNS 40 (N.S.F.C.); and C.A.S., Halifax v. H. (L.T.) 1988 CarswellNS 56 (N.S.C.C.) to determine which of the agency notes may properly be attached to the social worker's affidavit. There appears to be uncertainty in Nova Scotian jurisprudence whether information received from persons other than the parties and whether irrelevant material contained in agency file notes may be admitted as part of the "business record". It does appear that opinions of the type that must be given by a qualified expert, contained in an agency record, cannot be accepted into evidence unless the expert is to be called as a witness.

[20] Civil Procedure Rule 19.06 (1) permits the same use of answers to interrogatories at a trial or hearing as are dispositions pursuant to rule 18.14. The interrogatories and answers attached to Mr. Y.'s affidavit are from persons who may be witnesses. For the same reason I have decided to strike from Mr. Y.'s

affidavit the discovery transcript of the social worker, a witness, I strike all of the interrogatories and answers provided by non-parties that are attached to Mr. Y.'s affidavit.

[21] Mr. Y.'s affidavit is also deficient in respect to the content of paragraphs 13,14,19 and 20.

[22] Paragraphs 13 and 14 do not consist of facts based on Mr. Y.'s personal knowledge. They contain information from the agency file notes. This information is not properly in his affidavit. These paragraphs are struck. Paragraphs 19 and 20, for the most part, consist, not of facts, but of Mr. Y.'s feelings, suspicions, conclusions and argument. These paragraphs are struck.

[23] As a result of this decision significant portions of Mr. Y.'s affidavit have been struck. I direct him to prepare, file and exchange with Ms. Y. a new affidavit drafted in compliance with this decision. The previous affidavit will be placed in a sealed envelope only to be opened in the event of an appeal of this decision.

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Beryl MacDonald, J.