SUPREME COURT OF NOVA SCOTIA
Citation: *King v. Gary Shaw Alter Ego Trust*, 2020 NSSC 288

Date: 20201015
Docket: Pic. No.492705
Registry: Pictou

Between:
Jacquelin King in her personal capacity, Jacqueline as LG of Harrison J.G. King, Jacqueline King as LG of Hayden R.L. King

Applicants

v.

Lillian Shaw trustee Gary Shaw Alter Ego Trust, Tyler Wilson trustee of Gary Shaw Family Trust, Lillian Shaw Trustee of Gary Shaw Family Trust, Lillian Shaw in her personal capacity, Agnes MacPherson Trustee of Gary Shaw Family

Respondents

DECISION ON ADMISSIBILITY

Judge: The Honourable Justice Scott C. Norton

Oral Decision: October 13, 2020

Written Decision: October 15, 2020

Counsel: Jacqueline King, on behalf of the Applicants

Brian Awad, Q.C. for the Respondents

By the Court:

Introduction

[1] This proceeding involves the determination of the validity of the last will and testament of, and certain trusts established by, the late Gary Shaw. The proceeding is brought by his daughter Jacqueline King and her children. The respondent Lillian Shaw is the testator's wife and executor of his estate.

[2] Ms. King filed an application to Probate Court for a determination that the will dated January 29, 2009 and the will dated January 20, 2003 are invalid as having been obtained by undue influence and were executed when the testator lacked the mental capacity to understand the nature and effect of the will. The argument is made in Ms. King's Application in Court challenging a family trust dated July 12, 2007 and an alter ego trust executed January 29, 2008 by the late Gary Shaw. The parties have agreed that both applications involve the same issues and evidence and that they be heard and determined together.

[3] The matter was scheduled for hearing on October 26, 2020 but was adjourned by my order following a motion by correspondence (permitted by me) for the applicant to have additional time to obtain expert evidence. The hearing has been rescheduled to be heard by me in 2021.

[4] This decision responds to a motion by correspondence (permitted by me) filed by the respondent in the proceeding, Lillian Shaw, to address objections to the admissibility of affidavit evidence filed by the applicants. I have received written briefs from the parties and have reviewed each affidavit entry objected to by the moving party Lillian Shaw (the respondent in the proceeding).

[5] I will address the categories of objection in the body of this decision and have attached as Appendix A my specific ruling to strike certain paragraphs, or parts of paragraphs, in each of the affidavits filed by the applicants.

[6] The categories of objection can be conveniently stated as follows:

1. Hearsay
2. Opinion
3. Prejudicial effect outweighs probative value

Civil Procedure Rules

[7] Rule 5.17 of the *Civil Procedure Rules* provides as follows:

Rules of evidence on an application

5.17 The rules of evidence, including the rules about hearsay, apply on the hearing of an application and to affidavits filed for the hearing except a judge may, in an ex parte application, accept hearsay presented by affidavit prepared in accordance with Rule 39 - Affidavit.

[8] Rule 39.04 provides:

Striking part or all of affidavit

39.04 (1) A judge may strike an affidavit containing information that is not admissible evidence, or evidence that is not appropriate to the affidavit.

(2) A judge must strike a part of an affidavit containing either of the following:

(a) information that is not 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.

(3) If the parts of the affidavit to be struck cannot readily be separated from the rest, or if striking the parts leaves the rest difficult to understand, the judge may strike the whole affidavit.

(4) A judge who orders that the whole of an affidavit be struck may direct the prothonotary to remove the affidavit from the court file and maintain it, for the record, in a sealed envelope kept separate from the file.

(5) A judge who strikes parts, or the whole, of an affidavit must consider ordering the party who filed the affidavit to indemnify another party for the expense of the motion to strike and any adjournment caused by it.

Law

[9] The leading decision in this province on the appropriate contents of affidavits is *Waverly (Village) v. Nova Scotia (Municipal Affairs)*, 1993 NSSC 71. Therein, Justice Davison made the following observation and set out in summary form the guidelines for admissible affidavit evidence (I note here that his reference to "application" was to a Chambers Application in the former Rules, now a Motion in Chambers in our present Rules):

14 Too often affidavits are submitted before the court which consist of rambling narratives. Some are opinions and inadmissible as evidence to determine the issues before the court. In my respectful view the type of affidavits which are being attacked in this proceeding are all too common in proceedings before our court and it would appear the concerns I express are shared by judges in other provinces…

> 20 It would [be] helpful to segregate principles which are apparent from consideration of the foregoing authorities and I would enumerate these principles as follows:
>
> > 1.Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea or a summation.
> >
> > 2. The facts should be, for the most part, based on the personal knowledge of the affiant with the exception being an affidavit used in an application [a motion under the present Rules]. Affidavits should stipulate at the outset that the affiant has personal knowledge of the matters deposed to except where stated to be based on information and belief.
> >
> > 3. Affidavits used in applications [motions] may refer to facts based on information and belief but the source of the information should be referred to in the affidavit. It is insufficient to say simply that "I am advised".
> >
> > 4. The information as to the source must be sufficient to permit the court to conclude that the information comes from a sound source and preferably the original source.
> >
> > 5. The affidavit must state that the affiant believes the information received from the source.

[10] In *Sopinka*, *The Law of Evidence in Canada*, 5th ed. (Toronto: Lexis Nexis, 2018), the authors introduce the law of evidence as follows (p. 12):

> The law of evidence controls the presentation of facts before the court and is made up of common law principles, statutory provisions and constitutional principles. Its purpose is to facilitate the introduction of all logically relevant facts without sacrificing any fundamental policy of the law which may be of more importance than the ascertainment of the truth.

[11] There is a discretion for a judge to exclude evidence that meets the test of relevancy if the judge considers that the probative value is outweighed by its prejudicial effect. This discretion is most often considered in the context of criminal trials before juries. It has also been used to limit certain evidence in civil cases, again primarily before juries. The discretion has been recognized as broad: *R v. B. (C.R.)*, [1990] 1 S.C.R. 717.

Hearsay

[12] Hearsay is one of the most common objections made to the introduction of evidence. It has been defined by the Supreme Court of Canada as follows:

> Written or oral statements, or communicative conduct mad by persons otherwise than in testimony at the proceeding in which it is offered, are inadmissible, if such

> statements or conduct are tendered as proof of their truth or as proof of assertions implicit therein.[1]

[13] *Sopinka* says:

> The usual hearsay circumstance covered by the rule is where the witness testifies as to what someone else, who is not before the court, said. However, the modern interpretation of hearsay also encompasses prior out-of-court statements made by the very witness who is testifying in court when such earlier statements of the witness are tendered to prove the truth of their contents.[2]

[14] The defining features of the rule are that the purpose of adducing the evidence is to prove the truth of its contents and the absence of the contemporaneous opportunity to cross-examine the declarant. It is the inability to test the reliability of the evidence by cross-examination of the declarant that makes the admission of such evidence unfair and inadmissible. The rule recognizes the difficulty of the trier of fact assessing the probative value, if any, to be given to a statement made by a person who has not been seen or heard and who has not been subject to cross-examination.[3]

[15] In the present case, the respondent's objections made on the basis of hearsay are primarily, but not exclusively, in respect of statements attributed to the applicant Ms. King by the various affiants. In response, the applicant says that these averments are not adduced for the truth of their contents, but rather:

> "they are recollections of conversations the respective Affiants has with the Responding Party (Ms. King). They are adduced to show that at various times throughout the years, concerns were expressed to friends and family about the Respondent's gatekeeping of access to Gary."[4]

To the extent that they are said not to be adduced for the truth of their contents, it is questionable as to what probative value they have. It would appear from the applicants' brief that they are offered as corroboration as required by statute. I will address that issue separately. In this case the declarant is Ms. King who is certainly going to be available for cross-examination. This removes one of the principal reasons upon which hearsay evidence is excluded.

Evidence Act and Corroboration

[16] The applicants in their brief refer to "Section 13 of the Evidence Act and corroboration". I presume her reference is to the Ontario Evidence Act which has

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[1] R. v. Bradshaw 2017 SCC 35, at para. 1 and 20
[2] *Supra*, at p. 249
[3] R. v. Khelawon [2006] 2 S.C.R. 787
[4] Brief at pp. 3-4

no application in this proceeding. The applicant says that her evidence is corroborated by the sworn affidavit evidence of other witnesses, specifically Rose Shaw, Jim Lynds, Robert King, Joan Connor, Robin Archibald and Kent Williams.

[17] The general rule is that the testimony of a single witness, if believed to the requisite degree of certainty, is sufficient to found a civil judgment. From early times however, certain types of cases or categories of witnesses have required confirmatory evidence of a particular kind. [5]

[18] The Nova Scotia *Evidence Act*, RSNS 1989, c.154 contains the following provision:

> **Competency and compellability at trial**
>
> 45 On the trial of any action, matter or proceeding in any court, the parties thereto, and the persons in whose behalf any such action, matter or proceeding is brought or instituted, or opposed, or defended, and the husbands and wives of such parties and persons, shall, except as hereinafter provided, be competent and compellable to give evidence, according to the practice of the court, on behalf of either or any of the parties to the action, matter or proceeding, provided *that in any action or proceeding in any court, by or against the heirs, executors, administrators or assigns of a deceased person,* ***an opposite or interested party*** to *the action shall not obtain a verdict, judgment, award or decision therein on his own testimony, or that of his wife, or of both of them, with respect to any dealing, transaction or agreement* ***with the deceased****, or with respect to any act, statement, acknowledgement or admission* ***of the deceased****, unless such testimony is corroborated by other material evidence.* [Emphasis added]

[19] It is to be noted that this provision is confined to testimony about a "dealing, transaction, or agreement with the deceased" or "an act, statement, acknowledgement or admission of the deceased."

[20] As to what "material evidence" is required, the case law summarized in *Sopinka* establishes that "there must be evidence that 'appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to.'" [6]

[21] The Supreme Court of Canada in *R. v. B. (G.) (No. 1)*[7], in the context of a charge of sexual assault of a five year old, held that corroboration is:

> …additional evidence that renders it probable that the complainant's story is true and may be safely acted upon.

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[5] Sopinka, supra, p 1275.
[6] Ibid., p.1293
[7] [1990] 2 S.C.R 3, at 27

[22] The applicant says that her evidence is corroborated by the statements of other witnesses which is admissible pursuant to the requirements of the *Evidence Act*. I disagree. The applicants are certainly an "opposite or interested party". However, the fact that the proceeding involves the estate of a deceased does not mean that every statement from the opposite or interested party must be corroborated. The corroboration is in respect of the alleged interaction with the deceased. So, for example, if the applicants allege that the deceased said something of relevance to them, that that cannot support a verdict, judgment, award or decision in their favour without corroborating evidence.

[23] In my view it is not corroborating evidence for the party alleging the interaction with the deceased to have a witness, who was not present for the interaction, testify that the party alleging the interaction told them of the interaction as proof that the interaction happened. That is hearsay and a prior consistent statement (also known as oath helping). That type of evidence is not admissible in this type of proceeding unless it is permitted by the *Evidence Act* as corroboration. For such testimony to be corroborative, the affiant must have personally witnessed the interaction or by reference to some other admissible evidence they can provide "renders it probable that the [applicants'] story is true and may be safely acted upon".

[24] There is a general exclusionary rule against the admission of self-serving evidence to support the credibility of a witness. A witness may not repeat her own previous statements to other persons concerning the matter before the court and may not call other persons to testify to those statements.[8]

[25] In conclusion on this issue, the evidence of affiants recalling statements made by Ms. King about interactions with her late father, the respondent and other witnesses is not admissible and will be struck.

Opinion

[26] As a general rule a witness may not give opinion evidence but may only testify as to facts within her knowledge, observation and experience. It is for the trier of fact to draw inferences from the proven facts. An exception is made for expert witnesses who may assist the trier of fact by providing an opinion on a subject matter that is technical and not within the knowledge of the average person. The expert witness must be qualified by the court to give opinion evidence due to their special knowledge, skill or experience.

[27] However, the Supreme Court of Canada has recognized that the line between fact and opinion is not always clear and has held that a non-expert witness may give

[8] Sopinka, Ibid., p. 429

an opinion or draw inferences from facts where no special knowledge is required and in circumstances where it is virtually impossible to separate facts from inferences based on those facts.[9]

[28] The court in *Graat* developed a helpfulness standard for the admission of lay opinion. If the opinion is based on the witness' perceptions and is helpful to the trier of fact it should be admitted. Common examples of permissible non-expert opinion are that a person is drunk, handwriting, the identity of a person or place, and, ironically in the context of this case, testamentary capacity. It is up to the trier of fact to determine the weight of the evidence.

[29] I have applied this principled approach to the admissibility of the opinion evidence contained in the applicants' affidavits as set out in Appendix A.

Prejudicial Effect Outweighs Probative Value

[30] In the civil context, there is a judicial discretion to exclude otherwise admissible evidence if, in the judge's view, its prejudicial effect outweighs its probative value. The discretion usually arises in jury trials in the context of the admission of demonstrative evidence such as explicit photographs of injuries or corpses. The concern is that the trier of fact will be unfairly influenced by seeing graphic evidence.

[31] The respondent argues that one example of this discretion is with regard to character evidence and the court's distaste for the prejudicial "forbidden chain of reasoning". The respondent recognizes that character based attacks are not a new approach in will-challenge litigation. However, my observation is that this very type of evidence is as much apparent in the respondent's affidavits as it is in the applicants'. Accordingly, I consider it most efficient and practical to deal with this type of averment in the context of the hearing and with the benefit of cross-examination. I exercise my discretion not to try to parse any offending passages from the balance of the affidavits and instead will accord such passages the weight they deserve at the conclusion of the matter[10]. I am confident that none of the impugned passages in the affidavits will unfairly influence me in making findings of fact and applying the law. Accordingly, I deny the motion to strike any affidavit evidence on this ground alone.

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[9] Sopinka, Ibid., p. 815; *R. v. Graat* [1982] 2 S.C.R. 819

[10] They are probative of nothing – Penny J. in *Orfus Estate v Samuel & Bessie Orfus Family Foundation*, 2011 ONSC 3043.

Conclusion

[32] Appendix A summarizes my specific rulings on the impugned paragraphs in the applicants' affidavits.

[33] I have not conducted a similar review of the respondent's affidavits. The respondent in her brief acknowledged that the same standards should apply to the affidavits filed on her behalf. Accordingly, in the interests of fairness, I invite the applicants to file a further brief setting out, in a summary chart, the passages within the respondent's affidavits they argue should be struck on the same legal bases addressed in this decision. Any such brief shall be filed, with a copy to the respondent, on or before October 30, 2020 and the respondent shall have until November 15, 2020 to file any reply brief.

[34] If the parties are unable to agree on costs in relation to this motion I will accept written briefs from each party to be filed on or before November 15, 2020.

Norton, J.

APPENDIX A

	AFFIANT & DATE OF AFFIDAVIT	ORDER / DIRECTION	
	Advisors to Gary Shaw		
1.	Archibald, Robin July 16, 2020	None	
2.	Williams, Kent June 24, 2020	Paragraph 13 will be struck as inadmissible opinion.	
	Friends, colleagues and clients of the applicant		
3.	Carlton, Nina April 17, 2020	Paras. 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 32, 33, 39, 42,43, 44, 46, 47, 48 are struck as hearsay, oath helping and not corroborative. Paras. 49, 50 are struck as inadmissible opinion	
4.	Connor, Joan April 17, 2020	Paragraph 9 is struck as inadmissible opinion.	
5.	Long, Natalie March 29, 2019	Para. 16 is struck as hearsay, oath helping and not corroborative Paras. 9, 13 and 17 are struck as inadmissible opinion.	
6.	Meynell, Andreas July 15, 2020	The entire affidavit is struck as irrelevant, inadmissible opinion.	
7.	Skrzek, Geraldine July 8, 2020	The following paragraphs are struck as inadmissible opinion: 14. Paras. 18, 19, 20 are struck as inadmissible hearsay, oath helping and not corroborative.	
	Applicant and her immediate family		
8.	King, Jacqueline September 4, 2018	None	
9.	King, Jacqueline June 25, 2020	Paragraph 5 is struck as argument.	
10.	King, Jacqueline July 8, 2020	None	

11	King, Jacqueline August 12, 2020	None	
12	King, Robert April 17, 2020	1. The first sentence of para. 10 is struck as inadmissible opinion. 2. Inadmissible opinion: Paras. 61 strike words: "and I do not believe was his own doing". Para 63 strike first sentence Para 68	
13	King, Robert July 7, 2020	1. Struck as opinion: Para 15 first sentence Para 33 first sentence and last sentence Para 35 last sentence 2. Para. 36 struck as argument.	
14	Lynds, James April 17, 2020	1. Opinion struck: Para 12 second sentence strike words: "unless told to say them". Para 17 2. Para 15 strike sentence 3 and 4 as hearsay.	
15	Shaw, Rose April 17, 2020	1. Struck as opinion: Para 9 Para 52 first sentence from: "Gary … frankly" 59 first sentence 62,63,64 2. Struck as hearsay: Para 14 last sentence Para 17 last sentence Para 18,19,20,21,22,24,26,32, Exhibits A and B, 44, 58 last sentence.	
16	Shaw, Rose June 25, 2020	1. Struck as opinion : Para 6 second sentence Paras 8 second sentence	
17	Shaw, Rose July 7, 2020	1. Struck as opinion/ argument: Para. 69, 42, 59	