SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: *D.D. v M.P.*, 2023 NSSC 191

Date: 20230105
Docket: Port Hawkesbury No. 124254
Registry: Port Hawkesbury

Between:

D.D.

Applicant

v.

M.P.

Respondent

LIBRARY HEADING

Judge:	The Honourable Justice Lorne J. MacDowell
Heard:	Stage 1 – November 30, 2022 and Stage 2- December 22, 2022 in Port Hawkesbury, Nova Scotia
Oral Decision:	January 5, 2023
Written Decision:	June 19, 2023
Subject:	Child Witness
Summary:	Motion to Permit a Child Witness to Testify
Issues:	Whether to permit the issuance of a subpoena for a child under the age of majority and to have the child testify.
Result:	Child witness permitted to testify and be subpoenaed

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Counsel:	Steve Jamael for the Applicant Robyn Fougere for the Respondent

Decision on Motion to Permit a Child Witness to Testify

This is the written version of my oral decision given January 5, 2023.

The Background

[1] D.D. is the father of D.D. Jr. (the child).

[2] M.P. is the mother of the child.

[3] The mother has another child V.D. V.D. is not the biological child of the father. He is the half-sibling of the child.

[4] At the time of his swearing of his affidavit, V.D. was 16 years of age and 17 years of age at the time of the hearing.

[5] V.D. is under the age of majority.

[6] The father alleges that V.D. is a risk to the child.

[7] The allegations made by the father against V.D. are a significant focus of the father supporting his position of seeking primary care.

[8] The mother had filed with the Court, an affidavit, sworn by V.D. on July 5, 2022. That affidavit was sworn before counsel for the mother.

[9] Initially, V.D. was presented as wishing to testify voluntarily, to be called by the mother.

[10] The mother's counsel indicated V.D.'s evidence was crucial. Both counsel agreed V.D. should testify.

[11] At a pre-trial held on September 2, 2022, I reviewed the question of V.D. as a child under the age of majority testifying. I directed that the that the mother address this in her pre-hearing brief.

[12] The mother filed a brief on November 7, 2022, the brief referred the Court to *Civil Procedure Rules* 59.40(6)(7) and stressed the importance of V.D.'s evidence. A further brief was requested seeking the parties address in detail the issue of a child under the age of majority testifying. Ms. Fougere filed further submissions mainly dealing with the issue of competence.

[13] The father did not file a brief.

[14] This issue was dealt with before me on November 30, 2022, December 22, 2022, and January 5, 2023 prior to the commencement of the evidence in this matter.

The Issue

The issue before the Court was whether to permit V.D., a child under the age of majority to testify.

The Law

[15] The relevant *Civil Procedure Rules*, namely, 59.40(6)(7) state:

> (6) A child who is under the age of majority may not testify, and a prothonotary or court officer may not issue a subpoena that requires a child to appear at a hearing, unless a judge permits.
>
> (7) A judge who permits a child to be a witness may give directions for the presentation of the evidence, such as directions limiting the duration of the testimony and the types of questions that may be asked.

[16] As noted by Jollimore, J. in **John v John,** 2012 NSSC 324., these rules govern the testimony of a child in the Nova Scotia Supreme Court Family Division. In **John** (*supra*), the children were not being presented for testimony. The Court noted it was unusual for children to be permitted to testify given the loyalty conflict that may be created by the adversarial process and the effect on the child's testimony.

[17] The existence of judicial discretion to refuse to allow a child to testify is accepted common-law. As was noted in **Catholic Children's Aid Society of Toronto v S.R.M**, [2006] O.J. No. 1741 (OCJ) at paragraph 99.

> 99 If counsel seeks to have a child testify, a judge may refuse to issue a summons to a child witness. Even if a child appears in court "voluntarily", a judge may refuse to permit the child to testify. This judicial power is based on an inherent power to control the process of the court and to protect the interests of children. Dudman v. Dudman (1990), 1990 CarswellOnt 2678 [1990] O.J. No. 3246 (Ont. Prov. Ct.), per Felstiner Prov. J.

[18] I have reviewed various caselaw regarding this issue. Included in that review was the decision of MacKinnon, J. in the Ontario Supreme Court of Justice. (**CAS v C.L.**, 2018. ONSC 1565). In that case, MacKinnon, J. considered circumstances

where a motion was made to quash a summons for the testimony of a child in a child welfare proceeding. The Court notes as follows:

> [10] It is well established law that a trial judge has the discretion to quash a summons to a child. See for example *Children's Aid Society of Ottawa v. E.S.M.*, [2011] O.J. No. 1803 (S.C.J.); *Children's Aid Society of the Regional Municipality of Waterloo v. L.B.*, 2006 CanLII 32609 (S.C.J); *Catholic Children's Aid Society of Toronto v. S.R.M.*, [2006] O.J. No. 1741 (OCJ) and *Family and Children's Services (Operated by The Children's Aid Society of St. Thomas and Elgin) v. A.H.*, February 14, 2017, (OCJ).
>
> [11] Where, as here, the child is twelve years of age, the onus is on the person seeking to quash. The factors to be considered by the court are identified by Justice Linhares de Sousa in *E.S.M.* at para 9:
>
> > 9 Secondly, in exercising its discretion to compel a child to be a witness in court proceedings, the Court should consider, among other things, the following factors:
> >
> > (a) The age and maturity of the child,
> >
> > (b) The child's view with respect to testifying,
> >
> > (c) The trauma that such an experience might or would cause the child especially if it involves testifying for or against a parent,
> >
> > (d) The purpose for which the child is being called as a witness,
> >
> > (e) The reliability and probative value of the child's evidence,
> >
> > (f) The importance and relevance of the child's evidence, and
> >
> > (g) The availability of evidence from other sources to address the issue in question.

[19] An additional factor the Court noted was the consideration of the child's best interest.

[20] **CAS v C.L.** (*supra*) involved a motion to quash, however I find that these factors are pertinent to a consideration under *Civil Procedure Rule* 59.40(6)(7).

Analysis

[21] In the circumstances before me:

a. The witness, V.D., is 17 years of age.
b. The witness is being called by his mother.
c. The witness has filed an affidavit deposed before counsel for the mother.

d. The mother's counsel indicated that his evidence was "crucial."
e. Both counsel agree that V.D.'s evidence was crucial.
f. V.D. was originally presented as "voluntarily" agreeing to testify.

[22] In the case at bar, the child witness is not the child who is the subject of the litigation but nevertheless *Rule* 59.40(6)(7) must be applied.

[23] I consider that both parties identify V.D. as a key witness in the proceeding. The parties confirmed it was their expectation that I would be called upon to make a determination of fact as to whether some type of inappropriate sexual conduct occurred between V.D. and the child.

[24] I expressed concern that there was no indication that this child had received any kind of independent advice regarding his rights or any potential jeopardy that may arise from his testimony. I noted that I must make findings in any decision with respect to the alleged actions of V.D.

[25] I determined it was problematic that V.D. was being offered as a witness without such advice.

[26] I determined a two-stage process should be followed. At stage one, I considered whether V.D. required independent legal advice to protect his interests. At stage two, I would consider the issue of whether V.D. would be permitted to testify.

[27] V.D. clearly had, at a minimum, an indirect interest in the proceeding given potential findings I may make and the fact his evidence was being offered in response to allegations of inappropriate sexual behaviour with the child. As a result, V.D., in my view, must be given an opportunity, free and clear from the influence of any party, to speak with a lawyer and to obtain independent advice as to his rights and potential outcomes. I determined that must occur before further consideration by me in regard to permitting him to testify.

[28] On November 30, 2022, I directed that a solicitor be identified and provided with a copy of V.D.'s affidavit and the affidavit material setting out the allegations against V.D. made by the father. I sought confirmation from the solicitor whether V.D. was voluntarily testifying and confirmation that V.D. had been fully informed as to his legal rights and any potential outcomes arising from the various rulings which could occur on receipt of his evidence and cross-examination. I also directed

that independent counsel identify, on behalf of V.D., any accommodations sought for the purposes of giving his evidence, should he testify.

[29] A summary was prepared to provide to independent counsel which stated:

> 1. The Court directs that the proposed child witness, V.D., be given the opportunity for in-person confidential independent legal advice by a lawyer familiar with family and criminal law.
>
> 2. The lawyer, once identified, is to be provided with a copy of the child's affidavit filed in this matter and a copy of the affidavit material filed which sets out the allegations being made with respect to V.D.'s contact with the child. The Court seeks confirmation from the lawyer, in writing and if requested, by Court appearance, that the proposed child witness has had independent legal advice and has been fully informed of his legal rights and potential outcomes and consequences arising from testifying. The Court further seeks confirmation as to whether the child witness, after legal advice, intends to testify voluntarily and that the lawyer identify, on behalf of the child, any accommodations sought in the giving of evidence by the child witness.

[30] As a result of my decision at stage one (1), V.D. was provided with independent advice by two lawyers practising with Nova Scotia Legal Aid, namely Jill S. Perry, K.C., who practices mainly in the area of family law with a focus in child protection; and Matthew MacNeil, who practices exclusively in the area of criminal law.

[31] By way of letter dated December 21, 2022, I was informed that the lawyers had met jointly with V.D. on December 20, 2022, to provide independent advice. They had reviewed the affidavit material setting out the allegations made and his affidavit. He was provided with independent advice about his rights and the potential outcome(s) and consequences associated with testifying. Their availability for V.D. on an ongoing basis was confirmed.

[32] At stage two (2), after the results of the independent counsel advice were known, it was then necessary for me to determine whether to permit, in this instance, the issuance of a subpoena for the child and any direction(s) regarding V.D.'s testimony. The matter came before the Court for the stage two (2) consideration on December 22, 2022**.**

[33] V.D.'s counsel, Jill Perry, advised after discussions with their client, that V.D. was "comfortable" being served with a subpoena requiring his attendance and testimony at the upcoming hearing. It was suggested that mother's counsel would ensure certain protections of the *Canada Evidence Act* were specifically invoked. Ms. Perry also appeared before the Court on December 22, 2022, and confirmed the content of the December 21, 2022 correspondence.

[34] Upon questioning by me on December 22, 2022, it was confirmed by counsel that V.D. was prepared to proceed on this basis and to give evidence. Ms. Perry also confirmed, upon questioning by the Court, that V.D. was not seeking any special accommodations.

[35] The matter was set over to January 5, 2023 for decision on the motion.

[36] Counsel for the mother filed a written motion seeking the issuance of the subpoena on December 30, 2022. The parties did not call any evidence in respect to the Motion. There was no objection to my reliance upon the submissions of counsel in this respect. Both parties supported the issuance of the subpoena for V.D.

[37] I now turn to stage two (2) of my decision.

[38] *Civil Procedure Rules* 59.40(6)(7), in effect, confirm the inherent power of the Court to control the Court's processes and protect the interest of child witnesses.

[39] V.D. has had the benefit of Court ordered independent legal advice and his lawyer has indicated that he was comfortable testifying and proceeding in the manner suggested.

[40] The protection of his interest and understanding the potential consequence of his testimony had been laid out through legal advice from experienced lawyers involved in family and criminal law.

[41] There was no evidence placed before me to indicate that the child would suffer psychological harm nor, after speaking with experienced independent counsel, any request for accommodations relating to his testimony beyond the requirement that he be subpoenaed for that purpose.

[42] The factors I have considered are as follows:

a. <u>The age and maturity of V.D.</u>

In this case, V.D. was over 17 years of age. He is clearly an older child and it is my view this is a significant factor in these circumstances.

b. V.D.'s view with respect to testifying:
V.D. was originally presented as a voluntary witness, prepared to testify and filed an affidavit filed with the Court. After the Court ordered that he obtain independent legal advice (stage 1), V.D. indicated through learned counsel, that he was "comfortable" testifying on the basis of being subpoenaed and invoking certain protections under the *Canada Evidence Act.*

c. The effect of testifying on V.D.
The child V.D., after obtaining legal advice requested no special accommodations. No issues were raised with respect to the testifying other than invoking legislative safeguards. Counsel for the mother had submitted V.D. had no diagnosed intellectual deficiencies, was in grade 10/11 at a junior high school and was fluent in English. Counsel for the father and V.D. did not challenge these representations. I questioned whether any particular counselling has been sought for the child and was advised he was not in any type of therapy or counselling.

d. The purpose for which V.D. is being called as a witness.
In this instance, it was to refute allegations which are made by the father, specifically pertaining to the actions of the V.D., and which are set forth as a crucial reason for the father commencing the litigation and seeking primary care of the child.

e. The reliability and probative value of the proposed evidence of the child.
V.D.'s evidence, on the face of the material before me, confirmed that there was arguably probative value in his evidence, and nothing

has been put before me, to question V.D.'s ability to testify and recall.

f. The importance and relevance of the child's evidence.
In the context of this proceeding, the proposed evidence of V.D. was highly relevant and important.

g. The availability of evidence from other sources to address the issue in question.
From my review of his proposed evidence, V.D. denied any type of inappropriate interaction with the child and he would testify as to his own personal interactions with the child. There was no readily available direct evidence to fully address the issue and the evidence set out in all of the affidavits of the father other than his testimony.

h. The Court must also consider the best interest of V.D, the child witness in this matter.
The representation before me was that V.D. was timid and shy. Although no special accommodations were sought, I consider it to be in the best interest of V.D. when testifying, that the parties, their counsel, court staff, and V.D.'s counsel, be the only individuals in the Court.

[43] I further directed that counsel for V.D. be present at the commencement of his testimony to claim any protection sought under the *Canada Evidence Act* or otherwise. That was not an appropriate role for the mother's counsel.

[44] Because of the above noted, my decision in all the circumstances, having provided a mechanism for V.D. to obtain independent legal advice and given the factors as reviewed, was that the issuance of the subpoena and the testimony of V.D. be permitted with the accommodations noted in paragraph (h) above.

MacDowell, J.