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How Not to Present Evidence in a Family Law Case

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1. Waiver of Privilege

DON'T inadvertently waive solicitor-client privilege through the content of pleadings or an affidavit.

- By pleading that the terms of an agreement were not understood, that it was signed under duress, or that there was not proper ILA, a party puts at issue the nature and scope of the legal advice received and therefore waives solicitor-client privilege.
- The waiver may be either implied or explicit.
- It is the exception rather than the rule that solicitor-client privilege will be upheld when dealing with setting aside a Separation Agreement based on circumstances that existed at time of signing
- See for example:
    - *S & K Processors Ltd. V. Campbell Ave. Herring Producers Ltd.,* [1983] 4 W.W.R. 762 (B.C.S.C.). This case discusses the general principles of waiver of privilege. A waiver is established where the possessor of the privilege (1) knows of the existence of privilege and (2) voluntarily evinces an intention to waive, where fairness and consistency so require.
    - *Griffore v. Adsett* (2001), 18 R.F. L. (5th) 63 (S.C.J.): In this case, the Husband sought to set aside a marriage contract. In doing so, he made the claim that the marriage contract was never negotiated. The Court stated:

[1] We are grateful to our articling student, Brittany Twiss, for her research assistance with this paper.

> *The applicant had testified as to specific issues that related to the negotiation and formation of the contract. In respect to those specific issues, I ruled that he had waived solicitor/client privilege. For example, the applicant stated that the contract was not negotiated. In my view, that constitutes an implicit waiver of solicitor/client privilege on the issue of whether negotiations took place.*

- *Leopold v. Leopold* (1999), 48 R.F.L. (4th) 388 (C.A.). This case confirms that not every case involving the setting aside of a contract or agreement will result in waiver of privilege. The court in this case found that the Appellant did not take issue with the terms of the agreement, didn't suggest he didn't understand or suggest that he received anything other than full and proper legal advice. The Appellant therefore did not put in issue the advice he received from his lawyer.
- *Mantella v. Mantella* (2008) 55 R.F.L. (6th) 72 (S.C.J.). This case involves a Wife's claim to set aside separation agreement based on undue influence, unconscionability and inadequate financial disclosure. Initially the court was hesitant about ordering disclosure of previous solicitor's file but ultimately found that privilege had been waived after questioning of the Wife occurred where she answered specific questions relating to privileged communications.

2. Affidavit Evidence

DON'T rely on Affidavits that contain hearsay evidence inconsistent with the Rules.

- Don't rely on sworn affidavits that contain information beyond the personal knowledge of the deponent or that rely on hearsay evidence in a manner not consistent with the *Family Law Rules* and the *Rules of Civil Procedure*.
- Rule 14.(18) of the *Family Law Rules* provides "An affidavit for use on a motion shall, as much as possible, contain only information within the personal knowledge of the person signing the affidavit."
- Rule 14.(19) of the Family Law Rules provides "The affidavit may also contain information that the person learned from someone else, but only if, (a) the source of the information is identified by name and the affidavit states that the person signing it believes the information to be true; and (b) in addition, if the motion is a contempt motion under rule 31, the information is not likely to be disputed.

- The *Rules of Civil Procedure* provide similar limits on affidavit evidence. (For a more detailed discussion of these issues, see 'Don't Strike Out: Affidavit Evidence on Motions and Applications', Laura B. Stewart, Adam Patenaude and Marion Van de Wetering, The Advocates Quarterly, Vol. 37, 2010)
    - The content of affidavits must be limited to facts within the personal knowledge of the deponent (see 4.06(2) of the *Rules of Civil Procedure*)
    - If hearsay evidence is included in an affidavit, you must ensure it complies with requirements for admissibility (Similar to the *Family Law Rules*, rule 39.01 (4) and (5) of the *Rules of Civil Procedure* permit hearsay evidence so long as there is compliance with the requirement to identify the source of the information and belief.)
    - Even if hearsay evidence is properly pleaded in an affidavit, the court may still take into account the hearsay nature of the evidence in deciding how much weight to give it (See *Makou v. Sada* [1994] O. Jo. No. 2538 (Gen. Div.) at para 6.)
        - Note: a failure to comply with hearsay exception requirements of rule 39.01(4) and (5) may be saved if the evidence at issue is not contentious and is provable by documents that are before the court and otherwise admissible. See rule 1.04 of the *Rules of Civil Procedure* and *Cameron v. Taylor* (1992), 10 O.R. (3d) 277 (Gen. Div.)
            - See also *1721789 Ontario Inc. v. 985091 Ontario Ltd*. [2009] O.J. No. 3049 (S.C.J.) where the court struck portions of an affidavit where the deponent had not clearly stated the source of the hearsay evidence and the fact of his or her belief of the evidence. It is clear that this requirement must be met where evidence is contentious.
        - Courts may be less likely to strike hearsay evidence on the basis that the deponent has not stated the fact of his or her belief than where they have failed to state the source of the evidence. (See *ITN Corporation v. ACC Long Distance Ltd.* [1996] O.J. No. 1066 (C.A.))
    - Failure to comply with rules regarding the content of affidavits can lead to cost consequences, affidavits being struck, evidence being given little weight or adverse inferences being drawn.
        - An adverse inference may be drawn against a party for failure to call a relevant witness or submit relevant evidence which would be suspected to support the party's case. The court may infer reasons for the evidence not being included (See *Prodigy Graphics Group Inc. v. Fitz-Andrews*, [2000]

O.J. No. 1203 (S.C.J.) at para 47.) Also rule 20.02 of the *Rules of Civil Procedure* provides that the court may draw an adverse inference from the failure of a party to provide the evidence of persons having personal knowledge of contested facts.

<u>DON'T</u> use inflammatory language

- In *Rosen v. Rosen* [2005] O.J. No. 62 (S.C.J.), Justice Wildman commented on the Husband's decision to include inflammatory language about the Wife in an Affidavit sworn in support of relief sought on an urgent basis. Among other things, the Husband made statements about the Wife hating the parties' son, included an email supposedly sent to the Wife by her lover and a letter from former counsel setting out a settlement proposal and statement from the Mediator working with the parties in closed mediation. Justice Wildman found all of the material to be "objectionable".
    - She notes at para 30: "the husband's affidavits are unnecessarily inflammatory. His one-sided version of facts, his failure to acknowledge any responsibility for the climate in which the children are living and, particularly, for Jessica's state last Friday night, cause me to question his motives and his approach to this litigation. I urge him and his counsel to reconsider how they are proceeding and come to the case conference with several proposals for resolution that might allow the parties to create some semblance of peace for their children once a physical separation is achieved."
- Other cases have confirmed that statements contained in an affidavit that only serve the purpose of putting the other party in a bad light for no reason are not proper evidence and should be struck out (See *Csak v. Mokos*, [1995] O.J. No. 4027 (Master)). Affidavits that contain only argument and include unfounded and inflammatory attacks on the integrity of a party may be struck out as scandalous and vexatious (See *Senechal v. Muskoka* (District Municipality) [2003] O.J. No. 885 (S.C.J.)).

<u>DON'T</u> attach letters to affidavit

- Instead, where possible, you should have the author of the letter swear an affidavit containing the information you want to include in evidence before the court.

<u>DON'T</u> attach expert report to affidavit of your client, law clerk etc

- Instead, you should have your expert swear an affidavit which attaches as an exhibit their own report

<u>DON'T</u> forget to include affidavit evidence supporting request for disclosure

- If it is not self-evident from the disclosure request letter itself, on a motion for production of disclosure, it is advisable to have the expert swear an affidavit explaining why the information/disclosure requested is relevant.

<u>3. Children's Evidence</u>

<u>DON'T</u> submit a letter from a child by attaching it to an affidavit.

- Instead, may consider including the information from the child in an affidavit of one of the parties. Although the Family Law Rules permit an affidavit to contain information that the affiant learned from someone else and believes to be true, the circumstances and context in which the child has made the statements will be crucial the its reliability and the weight given to it by the court.

- In Evidence in Family Law, Chapter 4: Children's Evidence, Alfred Mamo and Joanna Harris confirm that if the court is to seriously consider statements made by a child based on a parent's affidavit, "*it is also important that information with respect to the child's age, level of maturity and experiences on which the child's opinion is based be before the court".* (at 4:20.20)

<u>DON'T</u> meet with a child and have them swear an affidavit.

- Courts have taken into consideration affidavits sworn by children in some, limited circumstances. It appears that where an affidavit of a child has been considered or admitted by the court, the child is typically an older teenager. (See for example, *Holmes v. Holmes* [2009] O.J. no. 94 (S.C.J.), *Preece v. Preece*, (1991), 30 A.C.W.S. (3d) 226 (Gen. Div.) and *Jhuman v. Moakhan* (2007), 161 A.C.W.S. (3d) 600 (S.C.J.)

- As an alternative to having the child swear an affidavit, particularly with younger children, consider having the OCL involved or asking for a judicial interview.

- The *Children's Law Reform Act* provides:

> 64 (1) In considering an application under this Part, a court where possible shall take into consideration the views and preferences of the child to the extent that the child is able to express them.
>
> (2) The Court may interview the child to determine the views and preferences of the child.
>
> (3) The interview shall be recorded.

(4) The child is entitled to be advised by and to have his or her counsel, if any, present during the interview.

- In Evidence in Family Law, Chapter 4: Children's Evidence, Alfred Mamo and Joanna Harris opine that a child's right to participate in proceedings that directly involves him or her is increasingly becoming an accepted approach in family law.

- See*: B.J.G. v. D.L.*G [2010] Y.J. No. 119 (Y.T.S.C.). In this case, at para 2, the court stated "all children in Canada have legal rights to be heard in all matters affecting them, including custody cases". The case also comments on the rights of children to be heard during all parts of the judicial process including conferences, hearings and trials, on the importance of meaningful participation of children and an inquiry at the start of the process to assess the ability and desire of the children to participate, the possible methods of presenting evidence about the children's views and the role of judicial interviews.

- See: *L.E.G. v. A.G.I.* [2002] BCSC 1455. In this case, Justice Martinson confirmed that the court has discretionary jurisdiction to interview a child even without the consent of parents (para 4)

- For a detailed discussion of introducing statements made by children and issues relating to the hearsay rule, particularly in the context of child protection proceedings, see Evidence in Family Law: Chapter 11: Child Protection Proceedings, Donna Wowk and John Schuman

- Note: See also *S.G.B. v. S.J.L.* [2010] O.J. No. 3738 (C.A.) where the Ontario Court of Appeal permitted a Motion by a 16 year old child for leave to intervene in the father's appeal from a custody order. In permitting the child intervenor status on certain limited terms, the court noted that permitting a child who is the subject of a custody dispute to be added as a party to a case is rare. The Court of Appeal allowed the child's motion however, in light of the child's age, his maturity and the effect that the proceedings would potentially have on his life given the circumstances of the case. The court noted at para 17: *"the trial judge's order raises important and difficult issues. We think it would benefit the panel to hear J.B.'s perspective on these issues through the submission of his own counsel".*

4. Electronic Evidence

DON'T read emails produced by your client between the other party and their lawyer.

- When your client brings you emails between the other party and their lawyer, don't read them and don't attach them to an affidavit.

- If your client has taken a computer, or copied documents from the other party's computer, be careful about how documents are treated.

    - See *Autosurvey Inc. v. Prevost* [2005] O.J. No. 4291 (S.C.J.) where Justice Quigley dealt with the unauthorized seizure of the contents of the defendants computer and confirmed that individuals have the right to privacy which is not to be intruded upon by others "without appropriate authorization or the presence of an urgent need".

        - At para 48, Justice Quigley further noted: "In referring in this case to these modern commentaries on the privacy entitlement of persons, I merely seek to emphasize what should be a self-evident principle. It is a principle of application not only in the context of public law matters, but also in relationships between people in a private law context. That principle, which lies at the heart of this motion, is the right of parties such as the defendants to be free and secure from encroachment upon their reasonable expectations of confidentiality and privacy in a free and democratic society, whether at the instance of government, or at the instance of non-governmental parties or a litigation adversary, such as Autosurvey."

    - See *Eizenshtein v. Eizenshtein* [2008] O.J. No. 2600 (S.C.J.) a case where Justice Wildman addressed the issue of emails illegally obtained by a wife that were then included in her Affidavit material. Justice Wildman refused to admit the documents included in the Affidavit material and stated:

        > "There is no compelling fairness of policy reason to justify admitting them. They do not disclose any crime, intent to commit a crime, or solicitation of advice about the commission of a crime not any intent to mislead or withhold evidence from the Court. Even if Mr. Eizenshtein did disclose the documents to Ms. Saffer, as she claims, he had a reasonable expectation they would not be disclosed to anyone else because of their intimate relationship at the time. It was improper of her to make copies of them and provide them to Ms. Eizenshtein and it would be unfair to admit them under these circumstances.
        >
        > Having viewed the documents, I find that they would be of marginal assistance in assessing Mr. Eizenshtein's credibility and the prejudice of

admission far outweighs their probative value, not only for this case but also for the protection of solicitor-client privilege in general.

The documents will not be admitted. Counsel have agreed everything from tab 9 onwards, except the notice of this motion found at tab 24, is to be removed from the record. The material should be placed in a sealed envelope in the file, with a reference to this decision on the cover. It is not to be opened by anyone without a further Court Order.

The more difficult part of the motion would have been the claim that Mr. Moldaver should be removed as Ms. Eizenshtein's solicitor because he saw privileged communications. However, Mr. Moldaver, exhibiting his usual high standards of professionalism, has agreed that as the communications are not going to be admitted, he will voluntarily remove himself."

- With respect to the policy considerations regarding illegally obtained documents, , in *Eizenshtein*, Justice Wildman further stated:

> *"The law must evolve to protect solicitor-client communication in an electric world. It is important to take a firm stand on this issue. Solicitor-client privilege is important to our justice system.*
>
> *It is also important to respect family relationships and other relationships of trust. To allow the admission of evidence, even if disclosed to others with whom a person has a close business, family or intimate relationship, would encourage troubling scenarios, such as was suspected initially in this case… The message would be "if you can get your hands on it, we'll take a look at it". That is not what our courts should be saying…"*

5. Recorded Conversations

DON'T expect to rely on audio tapes of conversations between the parties (and the children) at trial if recorded without the other party's knowledge

- See: *Sordi v. Sordi* 2011 Carswell Ont 11272 (C.A.) affirming *Sordi v. Sordi* 2010 Carswell Ont 10942 (S.C.J.): where the Court of Appeal stated at paras 10 - 12:

> *"Specifically, the appellant submits that the trial judge erred in refusing to admit audio tapes of recordings of conversations between himself, the respondent, and the children – tapes that he recorded without the respondent's knowledge.*

… In my view there was nothing unfair or improper about the conduct of the trial. Specifically, there is no reason to question the exercise of the trial judge's discretion not to admit the proposed evidence about which the appellant complains.

With respect to the taped conversations, the trial judge relied on solid principles that took into account not only the sound public policy of trying to discourage the use of secretly recorded conversations in family proceedings but also his assessment of the probative value of the tapes in relation to the issue before him."

- Courts have clearly established that tape-recorded evidence is highly susceptible to manipulation, highly unreliable, and may therefore given little weight, particularly when the conversations involve children. In *Norland v. Norland* [2006] O.J. No.5126 (S.C.J.) Justice Smith stated at para 63: "*It does not take much imagination to see how an adult could manipulate a conversation, particularly with a child, to make it appear that the child is unhappy living in the home of the other parent and wishes to live with them. Nor would it be difficult to orchestrate a conversation with a spouse to make that person appear aggressive and unreasonable*".

- In family law, and in particular in cases involving children, courts have frowned upon the surreptitious gathering of potential evidence via tape recordings and have refused to admit the recordings into evidence. (See, for example, *Bauer v. Bauer* [2006] O.J. No. 5109 (S.C.J.), *Fattali v. Fattali* [1996] O.J. No. 1207 (Gen. Div.) and *J.F. v. V.C.* [2000] O.J. No. 3978 (S.C.J.))

- But see also, *Behrens v. Stoodley* [1999] O.J. No. 4838 (C.A.) where contrary to what was stated in *Sordi v. Sordi*, the Court of Appeal found that a trial judge had properly admitted into evidence a conversation between the child and the mother which was secretly tape recorded by the father. The court stated at para 42: *"In my view, the trial judge was perfectly entitled to conclude that the tape constituted "graphic and distressing evidence of venom directed towards the father and pressure exerted upon the child" and that these statements to the child "were extremely distressing" and "harmful to her emotional well-being"."*

6. The rule in Browne and Dunn

- In *Browne v. Dunn* (1893), 6 R 67 (H.L.), the House of Lords confirmed that if the cross-examiner intends to impeach the credibility of a witness by means of extrinsic evidence, notice must be given of this intention to the witness. Before confronting the witness by calling independent evidence, the witness must be "confronted with this evidence in cross-

examination while he or she is still in the witness box". (See Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 3rd Ed., chapter 16 – the Examination of Witnesses).

- The rule in *Browne and Dunn* is designed to accord fairness to witnesses and to the parties and the extent and manner of its application is to be determined by the trial judge given all of the circumstances of the case. Factors to be considered include:
    - Whether notice is given beforehand to the witness that his or her credibility is in issue.
    - The testimony is of such a nature that it is obvious that credibility is in issue.
    - Failure to cross-examine is based on concern for the witness, as in the case of children of tender years.

    (See Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 3rd Ed., chapter 16 – the Examination of Witnesses, paragraph 16.181)

- It is clear that the rule still applies. In 2002, in *R. v. Lyttle*, [2002] 1 S.C.R. 205, the Supreme Court of Canada confirmed that the rule in *Browne v. Dunn* remains applicable, but that it is not absolute and is grounded in common sense and fairness to the witness and to the parties. The Court confirmed that it is a matter of discretion how at trial judge deals with the failure on the part of counsel to confront a witness in cross-examination before impeaching the witness by contradictory evidence.

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