THE CANADIAN BAR ASSOCIATION

Thoughts on the Drawing of Children's Affidavits

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A number of years ago, I was retained to draft the affidavit of a fourteen-year-old girl for use by her father in an application to vary her parenting schedule. The child was bright, wanted to have her say and was aware of the probable impact of her affidavit on her relationship with her mother. The nature of the child's evidence made the experience unusually moving and has since caused me to ruminate on the issue of children's affidavits; this brief note summarizes some of those thoughts.

The affidavit of a child can occasionally be helpful to your client's case; as the British Columbia Supreme Court put it in *L.E.G. v. A.G.*, "a child's wishes can be a very significant consideration in a custody case," and of course the court is required by art. 12 of the UN Convention on the Rights of the Child to receive the views of children in proceedings affecting their interests. The difficulty, however, lies in making the decision to obtain the affidavit, and, having made the decision, actually having it drawn and sworn.

I. Cautionary Considerations

A child swearing an affidavit for use in litigation between his or her parents becomes involved in that litigation. The decision to elicit the child's affidavit must not be made lightly; as the Manitoba Court of Appeal commented in *Jay v. Jay*, "it can never be in the best interests of children to be placed in a position where they become a part of the adversarial dispute between parents."[1]

1. GIVING AN AFFIDAVIT FORCES THE CHILD TO TAKE A POSITION.

Although children, particularly older children, may form some degree of alignment with a parent following separation, many children manage the stress of their parents' separation by remaining noncommittal or adopting a flexible approach to the truth, providing each parent with information tailored in varying degrees to what the parent wants to hear.

> Dad: "I made your favourite pizza, sausage and pepperoni!"
>
> Child: "Awesome, my favourite! Your pizza's the best."
>
> Mum, the next day: "How was the dinner your dad made last night?"
>
> Child: "Disgusting. I hate pepperoni pizza."

Giving evidence in an affidavit forces the child to present a single statement of events and preferences. As a result, the child will no longer be able to exploit ambiguity and parental ignorance when navigating between households. This may rob the child of a valuable coping strategy and exacerbate the stress of moving between homes and the different rules and expectations they each provide.

2. GIVING AN AFFIDAVIT INCREASES THE POSSIBILITY OF THE CHILD FORMING AN ALIGNMENT OR CHOOSING SIDES.

A child's evidence will inevitably favour one parent's perspective over the other. If there is anything I have learned from preparing views of the child reports, it is this: children know *everything* about the dispute between their parents, often including the particulars of each parent's position on an issue. Depending on the gravity of the evidence, swearing an affidavit may entrench negative feelings and damage the child's relationship with the less-favoured parent, fostering a sense of allegiance toward the other parent and increasing the likelihood of estrangement from the less-favoured parent. This can be particularly problematic where the child's relationship with the less-favoured parent is already fragile or the seeds of alignment already exist.

Giving evidence in an affidavit can also empower the child to choose sides in a way rarely available in intact families. However, making such a choice carries a degree of risk that escalates depending on the importance of the issue. Liking dad's brownies over mom's peach cobbler expresses a preference to be sure, but the significance of the child's choice pales in comparison to the child's commentary on issues such as parenting schedules, perceptions of personal or parental safety, and difficult events at exchanges.

Making matters worse, affidavits create a permanent record of the child's statements. Once the child's evidence is written down, it's there for all time to be worried over, reread and fretted about. Depending on the nature of the child's evidence, the affidavit may damage the child's the relationship with the less-favoured parent well into the future and significantly impede reconciliation.

3. GIVING AN AFFIDAVIT EXPOSES THE CHILD TO THE POSSIBILITY OF A FURTHER ROLE IN THE LITIGATION.

Pursuant to s. 10 of the *Canada Evidence Act*, a person preparing a written statement is subject to cross-examination on his or her statement; rules of court also allow for the cross-examination of deponents on applications and at trial. The potential subject matter of such examinations is broad and would include not only the facts given in the affidavit but also: the child's truthfulness and credibility; the circumstances under which the affidavit was elicited and prepared; and, the extent of the parent's involvement in obtaining the affidavit and influence over its content.

However, pause for a moment and allow the scenario of cross-examining a child on his or her affidavit to sink in a bit. Even the most skilled litigator is unlikely to manage such an examination without exacerbating any estrangement between the child and a parent, never mind actually adding something of substance to the matters before the court.

4. TAKING AN AFFIDAVIT EXPOSES THE DRAFTING LAWYER TO THE POSSIBILITY OF A ROLE IN THE LITIGATION.

Legitimate areas of enquiry at trial will reasonably include the circumstances under which the drafting lawyer came to see the child, the information provided to the lawyer, and the extent to which the content of the affidavit had its origin in the mind of the child rather than another source. The drafting lawyer will be the obvious source of answers.

These uncomfortable questions raise a threshold issue: who is the client? In my view, the child isn't necessarily the drafting lawyer's client, the client is the person retaining the drafter's services, and whatever privilege is to be had likely extends to his or her communication with that party and counsel on the party's behalf, but not to the drafter's communication with the child deponent. Arguably a Wigmore sort of privilege might apply,[2] depending on the representations made to the child, but the drafting lawyer will likely be making this argument on his or her own.

II. The Evidence Act

The relevant provisions of the *Canada Evidence Act* can be found at ss. 16 and 16.1 and are instructive to both the lawyer considering obtaining the affidavit of a child and the lawyer retained to prepare one.

> 16 (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
>
> (a) whether the person understands the nature of an oath or a solemn affirmation; and
>
> (b) whether the person is able to communicate the evidence.
>
> (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation
>
> (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.
>
> (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify. …
>
> 16.1
> (1) A person under fourteen years of age is presumed to have the capacity to testify.
>
> (2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
> (3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions. …
> (6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth. …
> (8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

To boil this down somewhat, children who are fourteen and older are presumed to be competent to give evidence, including by affidavit, in the manner of adult witnesses. Counsel seeking to have the affidavit of such a child excluded must be prepared to challenge the mental capacity of the child; I cannot imagine many children who would be receptive to this line of enquiry. Children younger than fourteen are competent to give evidence as long as they can understand and answer questions, however they must not give their evidence on oath or affirmation, presumably to preserve them from the consequences of perjury.

III. Choosing the Drafter

This discussion on children's capacity raises the collateral question of who should draw the affidavit. Prudence suggests that the drafter be someone other than the lawyer seeking to obtain the affidavit, preferably independent counsel outside the lawyer's firm, for two reasons. Firstly, you will want to minimize the perception of your client's influence in obtaining the affidavit; see for example the excoriating comments of the British Columbia Provincial Court in *Director of Child Family and Community Service v. T.T.* Secondly, you will want to minimize the likelihood of becoming a witness in your own trial explaining how you assessed the child's competence to give evidence and your role in preparing the child's affidavit; there is no privilege in the relationship between counsel and witness.

IV. Deciding to Obtain the Affidavit

Notwithstanding the indulgent approach of the Evidence Act toward the receipt of children's evidence, you will want to ensure that the child's affidavit will be useful to your client and advance his or her case before taking any further steps. The evidence you hope to obtain should be relevant, critical to your case, concise, clear and unambiguous, and capable of interpretation without reference to other materials. Is the child likely able to deliver?

1. CONSIDER THE AGE AND MATURITY OF THE CHILD.

Will the child be able to express him- or herself to drafting counsel? Is the child capable of recalling and describing events in a comprehensible, ordered manner? A meandering stream of consciousness affidavit about puppies, Brussels sprouts and the new Fornite episode will be other than useful.

2. CONSIDER THE CHILD'S ABILITY TO EXPRESS A PREFERENCE.

Is the child's sense of self sufficiently developed to form an opinion? To what extent is the child likely to have formed his or her opinions through independent reasoning? Evidence that appears to be merely a regurgitation of your client's views is not likely to be helpful and may provoke uncomfortable questions about alienating behaviour and the extent to which the child's evidence may have been influenced. As the Alberta Court of Queen's Bench put it in *M.E.S. v. D.A.S.*:

> "In the case at bar, the two children's affidavits in this matter are clearly drafted by the husband in his usual offensive manner. The many points made in the two children's affidavits contain the classic pattern and trademark of the husband's voluminous other writings in this file.
>
> "To allow these two affidavits in would countenance yet another abuse of the court process by the husband. Effectively, entering the affidavits would be tantamount to allowing the husband to advance and advocate his case further in his own words under the guise of and cloak of his children's

> reflections."

The Ontario Superior Court of Justice made comments to a similar effect in *Hackett v. Leung*:

> "[The child's affidavit] was filed by the mother in these proceedings. Based on the submissions that I have received, I am satisfied that the Affidavit was not written at the request of [the child] for the purposes of her seeking to be heard independently. Rather, the Affidavit was sought by her mother, for her mother's purposes, and to support her mother's position. Clearly, this pits this child against her father in a public forum. In my view, it exhibits poor judgment and selfishness on the part of the mother, and is a clear instance of the mother putting her own self-interests ahead of her daughter. In my view, it is inappropriate, in the extreme, to involve [the child] in this conflict in this way."

3. CONSIDER THE NATURE OF THE EVIDENCE YOU WOULD LIKE TO OBTAIN RELATIVE TO THE POSITION YOU WILL BE ARGUING.

Will the child's affidavit actually add something to your client's case? Is the evidence you are hoping to obtain essential? If the answer to both questions is no, *stop*. You should not ask a child to give evidence in the dispute between his or her parents if the product will be superfluous, trivial or redundant.

4. CONSIDER THE NATURE OF THE EVIDENCE YOU WOULD LIKE TO OBTAIN RELATIVE TO THE CHILD.

Will the child be comfortable discussing the subjects about which you are hoping to obtain evidence? Will the child be comfortable expressing an opinion? In part these concerns harks back to my earlier comments about alignment (imagine, for example, the likely consequences of asking a child to describe an episode of physical conflict between his or her parents); in part, it is a matter of being sensitive to the child's comfort level and the degree of opprobrium usually attached to the subject matter the child is being asked to recount.

5. CONSIDER THE CHILD'S WILLINGNESS TO PROVIDE AN AFFIDAVIT.

Is the child interested in expressing his or views to the court? Does the child want to provide an affidavit? If the child demonstrates any reluctance to give a statement, you should either pull the pin on the proposed affidavit or, at the very least, advise drafting counsel of the child's reluctance as an issue to for him or her explore. Some children are almost chomping at the bit to have their say; others, however, are reasonably reluctant to enter the fray.

V. Drafting Children's Affidavits

In my view, you are free to accept or reject a retainer to draw a child's affidavit as you wish. Whether the parents are joint custodians or joint guardians is, I think, irrelevant to your decision; there is no property in a witness and the making of an affidavit is not a therapeutic endeavour for which consent is necessary.

Assuming you are prepared to accept the retainer, you should perform a conflict check in respect of both parents and obtain the following information:

a. the age of the child;

b. the existence of any verbal, linguistic, emotional or mental impediments which might affect the child's

capacity to express him- or herself;

c. any deadlines by which the affidavit must be prepared;

d. any particular issues which the affidavit should address; and,

e. the child's probable attitude to preparing the affidavit.

Arrangements should then be made for the child to be brought to your office, preferably, I suggest, by a third party both parties are likely to perceive as neutral.

1. ASSESS THE CHILD'S BASIC COMPETENCE.

A brief conversation with the child should suffice to satisfy yourself that the child has the emotional and intellectual capacity to give evidence. Bear in mind that you are not conducting a psychiatric assessment; your standard is your own opinion and comfort level.

Easy ways to open the conversation include explaining your role, how you expect the meeting to unfold, and asking basic questions about the child's age, school, extracurricular activities and so forth. If the child understands the questions you are asking and provides you with intelligible, relevant answers, you have established the competence of a child under fourteen.

2. CONFIRM THAT THE CHILD WANTS TO MAKE AN AFFIDAVIT AND THAT HE OR SHE UNDERSTANDS THE DIFFERENCE BETWEEN TELLING THE TRUTH AND TELLING A LIE.

The child will be aware that his or her parents are involved in a court proceeding. Confirm the child's understanding and explain the purpose of your meeting by saying something to the effect of "the judge would like to know how things are for you and what you think about things." This is neutral, true and doesn't place responsibility for the meeting on either parent.

Explain that one way of giving information to the court is by writing down what you want to say, and that these written statements are called affidavits. Adjusting for the age of the child, say something to the effect that when people make affidavits they have to tell the truth, ask whether the child understands the difference between telling the truth and telling a lie, and explain that sometimes there are penalties when someone lies in court.

Children who are younger than fourteen should be asked if they will promise to tell the truth to you. Children who are fourteen and older need to understand the difference between affirming and swearing to the truthfulness of their statements.

Emphasize to the child that if he or she is prepared to continue, you'll be writing an affidavit based on what he or she has said, and that you'll ask the child to read the affidavit when you're done to make sure that you've got everything exactly right and just the way the child wants it. Make sure that the child understands that it's not just the judge but also his or her parents who will be reading the affidavit, and ask the child to confirm that he or she wants to continue and make the affidavit.

3. Prepare the content of the affidavit by asking open-ended questions and using the child's own language to the maximum extent possible.

Asking simple questions about where the child goes to school, grade level and sports activities is an easy way of getting into the flow of the affidavit and ease into more difficult questions about the child's parenting schedule and so forth. Avoid making a beeline toward the object of the affidavit; this will likely be the most difficult part of the affidavit for the child. Head toward your goal gradually, asking questions on subjects that get slowly closer to the evidence for which the affidavit is sought. It is important to preserve the integrity of the child's evidence by asking open-ended questions that do not suggest an answer; most children can be prompted to keep talking and give additional information simply by asking "and then what happened?"

It's also important to remember that the evidence you are eliciting is the *child's evidence*, not "the truth." If the child believes that his or her parents divorced when they merely separated or that there's a monster under the bed, so be it: draw the affidavit stating the child's understanding about when his or her parents divorced or where the monsters generally live. Do not correct the child's errors or act as censor.

The text of the affidavit should be drawn using the child's own language and quirks of phrasing as much as possible.

4. GIVE THE CHILD AMPLE OPPORTUNITY TO READ THROUGH AND REVISE THE AFFIDAVIT.

I often read the affidavit I am preparing out loud as I type. This gives the child the opportunity to hear what I am writing and offer corrections, it gives me the opportunity to clarify the child's statements – "is this it, have I got that right?" – and it helps the child to take some degree of ownership of both the process and the product. Whatever method you use to draw your affidavits, the child should be given a complete draft to read, with pen in hand, and offered the unfettered opportunity to take anything out, change anything and put new information in. Avoid expressing any impatience, and encourage the child to make any changes he or she wishes, "this is your affidavit, not mine, and it needs to say exactly what *you* want it to say."

5. REMIND THE CHILD OF THE IMPORTANCE OF TELLING THE TRUTH AND EXECUTE THE AFFIDAVIT.

Finally, when the affidavit is ready to go, tell the child, with some officiousness to suggest the importance of the occasion, that you are now going to execute the affidavit. For children younger than fourteen, say something to the effect of "do you promise that the things you've said in this affidavit are true?" and take their signature. For older children, administering the standard oath or affirmation will do.

I then tell the child that the original copy of the affidavit will be going to the judge, and I always give a copy of the affidavit to the child. It is, after all, the child's affidavit.

VI. Content Requirements of Children's Affidavits

1. STATUTORY REQUIREMENTS.

The *Canada Evidence Act* provides that children fourteen or older may give evidence on oath or affirmation. Under s. 16.1(6) of the act, however, children under the age of fourteen may not give evidence on oath or affirmation but upon their promise to tell the truth. This will require amendment to both the preamble and the jurat.

2. EVIDENTIARY REQUIREMENTS.

Under s. 16.1(3) of the Act, the evidence of children under the age of fourteen may only be received if the children are able to understand and answer questions. The only person in a position to make this call at the time the affidavit is executed is, of course, the lawyer drafting the affidavit. This will require you to provide evidence on the point, either by a certificate attached to the affidavit or through a separate affidavit of your own.

In *McMurray v. McMurray*, the Manitoba Court of Queen's Bench described the nature of the evidence required from a lawyer drawing the affidavit of a child:[3]

> "Firstly, such evidence should set forth the circumstances as to the independence of counsel swearing the child's affidavit i.e. who contacted them, who drafted the subject affidavit, and how much time was spent with the child? Secondly, who paid for counsel's professional time? Thirdly, and obviously most importantly, did the child deponent in counsel's professional opinion understand the nature of an oath or affirmation and further could the child, hopefully as evidenced by the affidavit, communicate the evidence provided? In other words, did the child volunteer the material and relevant contents of the affidavit to the drafting attorney."

Although this decision was given in the context of provincial legislation establishing a presumption against the evidence of children under the age of fourteen, the first and second points are applicable to the affidavits of all minors, and the third point would also be applicable to the affidavits of younger children under s. 16.1(3) of the *Canada Evidence Act*.

VII. Conclusion

Children's affidavits can be highly persuasive in family law matters, particularly when they address matters of importance and express an unambiguous preference which is clearly that of the child. However, merely soliciting the affidavit, whether it's used in court or not, involves the child in the conflict between his or her parents and is fraught with peril as a result. There are other means of eliciting children's views and placing them before the court, including views of the child reports and judicial interviews, all of which are discussed in detail in *L.E.G. v. A.G.*, and in my view the appropriateness of these alternatives should be considered carefully before the decision to obtain a child's sworn statement is made.

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[1] *Jay v. Jay* (1978), 4 R.F.L. (2d) 157 (M.C.A.)

[2] J.H. Wigmore, *Evidence in Trials at Common Law*, vol. 8, rev'd J.T. McNaughton (Boston: Little, Brown and Company, 1961) at §2285, quoted by Spence J. in *Slavutych v. Baker*, [1976] 1 S.C.R. 254 .

[3] *McMurray v. McMurray*, 2007 MBQB 82