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Hearing Children's Voices in Family Court: Evidentiary Considerations When Dealing with a Child's Out-of-Court Statements

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The importance of considering the views and preferences of children in cases that affect them is taking on more, not less, significance in Ontario. This can be seen not only in the case law, but also in the very clear directives flowing from the inquest into the murder of 7-year old Katelynn Sampson and the resulting changes to Ontario's child welfare legislation that now explicitly require that the views and preferences of children be considered under any best interest analysis.[1]

Canada is also a signatory to the United Nations *Convention on the Rights of the Child*.[2] Article 12 of the Convention expressly states that Canada has an obligation to ensure that the child who is capable of forming his/her own views has a right to express them and to place due weight on these views once expressed.

The point is simple. Children must be heard in cases that affect them. End of story.

It is of fundamental importance that family law lawyers involved in custody/access or child welfare cases turn their attention to the issue of how children's evidence can be admitted at the outset of proceedings to avoid any future evidentiary problems. A common way for the views and preferences of a child to be placed before the court is through the child's out-of-court statements. These statements constitute hearsay and their admissibility is far from guaranteed.[3] More recently, these out-of-court statements may be presented to the court in the form of a Voice/Views of the Child Report.

This article provides a refresher on the legal test that governs admissibility of a child's hearsay statements to a third party and discusses whether Voice/Views of the Child Reports should be subject to the same legal analysis.[4]

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[1] See ss. 74(3), 179(2) of the *Child Youth Family Services Act*, 2017, S.O. 2017, C. 14, SCHED. 1.
[2] *Convention on the Rights of the Child*, 1989, C.T.S. 1992/3. See *B.J.G. v. D.L.G*, 2010 YKSC 44 as a helpful example of the importance of the Convention in cases dealing with the care and custody of a child.
[3] There are of course other ways to place a child's views and preferences before the court, including but not limited to a child's direct testimony, a lawyer for the child, an investigation and report of the Children's Lawyer under s. 112 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, or an assessment under s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C. 12, as am. See A. Mamo and J. Harris, "*Children's Evidence*" in H. Niman, *Evidence in Family Law* (Toronto: Thomson Reuters, 2010) (loose-leaf updated 2016, release 19) vol. 1 at ch. 4 ("*Niman*"); N. Bala, V. Talwar & J. Harris, "The Voice of Children in Canadian Family Law Cases" (2005), 24 CFLQ 221.
[4] We do not cover the issue of video or audio recordings of a child's out-of-court statements. For a useful resource on this issue, please see *Niman, ibid.*, at 4:50.

Legal Framework for Admissibility of Hearsay Statements of a Child

On a motion, the *Family Law Rules* permit a deponent to swear an affidavit that contains information learned from another person, so long as the source of the information is identified and the person signing the affidavit believes it to be true.[5]

Even with this subrule in place, admissibility issues concerning a child's out-of-court statements may still arise on a motion and will undoubtedly arise at trial. Assuming relevance and materiality, the out-of-court statements of a child to a third party can be admitted as evidence through certain exceptions to hearsay evidence.

When dealing with children's out-of-court statements at trial, it should be noted that a *voir dire* is often held before the statements by the child are admitted.[6]

Principled Approach to Admission of Hearsay

Often, arguments are made about admissibility of hearsay evidence under the principled approach to hearsay set out by the Supreme Court of Canada in *R. v. Khan*.[7] Under this approach, statements can be introduced for the truth of their contents. In *Khan*, the Supreme Court of Canada recognized the need for a flexible approach to hearsay evidence in cases involving children. This test requires that the evidence be both reasonably necessary[8] and reliable.[9]

In some cases, the two-pronged analysis from *Khan* has been found to apply to all out-of-court statements made by a child, regardless of whether they were made to a fact or an expert witness.[10] The case law is not united on this issue, with many judges allowing an assessor or a clinical investigator from the Office of the Children's Lawyer to testify about the basis for their recommendations, including statements made to them by children.[11]

1) <u>Necessity</u>

A review of the case law on children's evidence suggests that the necessity requirement may be easier to establish in family law cases where it is paramount to consider the best interests of the child.[12] There is often good reason to keep children out of the witness box. Whether

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[5] *Family Law Rules*, O. Reg. 114/99, as am., r. 14(19)(a).
[6] Harold Niman , "Evidence in Family Law", *supra* note 3 at 9:10:10 (Hearsay and Exceptions to Hearsay Rule) at 9-24.
[7] *R. v. Khan*, [1990] 2 S.C.R. 531 ("*Khan*"). Also see *R. v. Rockey*, 1996 CarswellOnt 4284 (S.C.C.).
[8] *Khan*, *ibid*. at para. 32. "The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as 'reasonably necessary'".
[9] *Khan*, *ibid*. at para. 32, the court explained that "Many considerations, such as timing, demeanor, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement, may be relevant on the issue of reliability. The matters relevant to reliability will vary with the child and with the circumstances and are best left to the trial judge."
[10] See *Ward v. Swan*, *supra* at para. 20.
[11] E.g. see *George v. Nguyen*, 2017 ONCJ 161 at paras 11-13, which speaks to the ambiguity in *Ward v. Swan, ibid.*, on this issue; see also N. Bala, V. Talwar & J. Harris, *supra* note 3 at p. 17.
[12] *E.g. Collins v. Petric*, 41 RFL (5th) 250, [2003] O.J. No. 2744 (Ont. S.C.J.) at para. 32.

necessity becomes an issue may depend on the judge and whether one of the parties wishes to call the child as a witness.

Necessity may be met in circumstances where the child may suffer emotional harm if forced to testify. Expert evidence speaking to this harm may not be necessary, but evidence about a child's emotional fragility may be required to convince a court that there is a risk of adverse harm from testifying.[13] Necessity may also be met in circumstances where there is an issue of a child's competency to testify.[14]

What is clear in the case law is that the necessity requirement should be treated flexibly, capable of covering a range of issues.[15]

2) Reliability

The real battle over the admissibility of a child's statements tends to occur over the issue of reliability.[16] On the threshold test of reliability in these cases, it is not necessary that the judge be satisfied that every potential indicator of reliability is met. Weaknesses of the statement in some areas may be compensated for by strengths in others.[17]

First-hand hearsay should be accepted upon the court being satisfied that: 1) the statements have been accurately and objectively reported, and 2) there is an absence of factors which would undermine the reliability of the statement.[18] The court will examine the circumstances surrounding the making of the statement in order to satisfy itself that the child had not been manipulated, coerced or pressured.[19]

The court employs a functional approach to reliability by first identifying the dangers posed by the hearsay and then considering whether those dangers may be adequately overcome. The dangers when dealing with an out-of-court statement are the inability to contemporaneously cross-examine the child and the difficulty faced by the trier of fact in assessing factors such as the child's perception, memory, narration or sincerity.[20] In general, the dangers can be overcome and threshold reliability can be established in one of two ways:

(1) there are adequate substitutes for testing truth and accuracy (procedural reliability); or

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[13] For a recent case and helpful analysis of the necessity requirement in such circumstances, see *CAS v. CL*, 2018 ONSC 1241 at paras 26-28.
[14] *Khan, supra* note 7 at paras. 29, 30 and 33.
[15] See *R. v. Smith*, [1992] 2 S.C.R. 915 (S.C.C.) at para. 37.
[16] Often the parties concede on the issue of necessity.
[17] *Children's Aid Society of Ottawa-Carleton v. L. (L.),* (2001), 22 R.F.L. (5th) 24 (Ont. S.C.J.) see paras. 16-23. For an example of where the children's statements of physical harm made to the foster parent and the CAS worker were admitted after *voir dires* were held, see *Children's Aid Society of Ottawa v. S. (M.),* 2005 CarswellOnt 6649 at paras 52-59. The statements were recorded in detail at the time or shortly thereafter and were made spontaneously without prompting by the children (para. 59).
[18] *Children's Aid Society of Metropolitan Toronto v. M. (R.),* [1992] O.J. No. 1097 (Ont. Prov. Div.).
[19] *Children's Aid Society of Ottawa-Carleton v. L. (L.)* (2001), 22 R.F.L. (5th) 24 (Ont. S.C.J.) at paras. 22-23.
[20] *Children's Aid Society of Toronto v. G.S.*, 2018 ONCJ 124 at para. 26.

(2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (substantive reliability). Under substantive reliability, the court will consider the circumstances in which the statement was made and any evidence that corroborates or conflicts with the statement.[21]

These two categories of threshold reliability are not mutually exclusive.[22]

It is important to remember that the source of the evidence relating to the child's out-of-court statement is important. For instance, in *Y. v. F.-T.*, the court did not admit statements made by the young child to the mother, but admitted the child's statements to specially trained professionals with no personal interest in the case who had recorded the statements (detectives, nurse and pediatrician).[23]

Based on the case law, determinations about the threshold reliability (procedural and substantive) of children's out-of-court statements may depend on some of the following factors:

a) The identity of the informant (e.g. is the informant a trained professional with special qualifications in terms of interviewing children?);
b) The reliability, demeanour and personality of the informant;
c) The relationship of the informant to the parties in the proceeding (e.g. are they independent? Do they have any motivation to fabricate or inaccurately portray the child's statements?);
d) The relationship of the informant to the child (e.g. is the child familiar and comfortable with the informant?);
e) Whether the statement is first-hand hearsay;
f) Whether the informant recorded the statements in writing at the time the statements were made (or shortly thereafter);
g) The timing and circumstances surrounding the statement (e.g. was the statement spontaneous? Was the statement in the context of leading questions? Was there the possibility for suggestion or manipulation?);
h) The presence of any corroborating evidence;
i) Whether the statements of the child are consistent over time;
j) Whether the informants evidence of the statement is consistent over time; and
k) Whether there is another plausible explanation for the child making the statement.[24]

Introducing a child's out-of-court statements through the testimony or affidavit of a parent is certainly not best practice and the statements may not be admitted. If the child has made

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[21] *R v. Brtadshaw*, 2017 SCC 35 (S.C.C.) at para. 27; *R. v. Khelawon*, [2006] S.C.J. No. 57 (S.C.C.) at paras. 62-63.
[22] *R. v. Khelawon*, *ibid.* at para. 66; *R. v. Bradshaw*, *ibid.* at para. 111.
[23] *Y. v. F.-T.*, 2017 ONSC 4395 at paras. 144-145. See also *Avakian v. Natiotis*, 2012 ONCJ 584 at paras. 34-38 where the court did not admit the child's out-of-court statements made to the father under the reliability analysis.
[24] Factors taken from *T Y. v. F.-T.*, 2017 ONSC 4395 at paras. 141-143, referencing *Catholic Children's Aid Society of Metropolitan Toronto v. B. (S.)*., 1998 CarswellOnt 5962, [1998] O.J. No. 6445 (Ont. Prov. Div.); N. Bala, V. Talwar & J. Harris, *supra* note 3 at 18-19; *Children's Aid Society of Toronto v. G.S.*, *supra* note 20 at paras 28-33; *Avakian v. Natiotis*, *supra* note 23 at paras 34-38.

statements to a doctor, teacher or other professional, you should consider calling this third party as a witness or asking them to swear an affidavit.

State of Mind Exception to Hearsay[25]

More limited admissibility of a child's out-of-court statements can occur under the mental state exception to the hearsay rule. Under this categorical exception, the statement can be admitted for the limited purpose of showing the state of mind of the child, but not for the truth of the contents.[26] The test for admissibility under this category is as follows:

(i) the statement asserts a condition or state;
(ii) the statement describes the contemporaneous physical, mental or emotional state of the declarant;
(iii) the statement does not describe the cause of the state, whether it be past or present events (i.e. the reason for the statement);
(iv) the mental state can include a person's present intention to do a future act; and
(v) the statement must not be made under circumstances of suspicion.[27]

The final factor adds an element of threshold reliability as a requirement for admissibility under the categorical exception.

This exception was recently addressed by the Honourable Justice Sherr in *Children's Aid Society of Toronto v. G.S.*, in which he admitted various statements by the child to the Society workers under this category, including statements as to the child's views and preferences.[28] In admitting these statements, Justice Sherr considered some of the following factors:

a) the child's statements were made contemporaneously to independent professionals;
b) the independent professionals had a duty to record their interviews with the child and recorded them within 24 hours;
c) the professionals were entirely independent and had no agenda to fabricate the evidence or mislead the court;
d) the statements asserted a contemporaneous mental or emotional state of the child;
e) the society did not attempt to introduce statements that set out the "why" of the child's feelings as part of this exception;
f) the child's statements were consistent across professionals; and
g) there was no evidence to suggest that the statements were made under circumstances of suspicion.[29]

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[25] For a few Ontario examples using this exception and distinguishing it clearly from the *Khan* exception, see *C.A.S. of Ottawa v. M.S.*, [2005] O.J. No. 4885 (Ont. S.C.J.); *N.L. v. S.L.*, [2007] O.J. No. 4262, 46 R.F.L. (6th) 266 (Ont. S.C.J.) at para. 26, and most recently, *Children's Aid Society of Toronto v. G.S.*, *supra* note 20.
[26] For a recent decision admitting these statements under the state of mind exception see *Children's Aid Society of Algoma (Elliot Lake) v, P.C.-F*, 2017 ONCJ 898.
[27] See *R v. Starr*, [2000] 2 S.C.R. 144 (SCC), *R v. Griffin*, 2009 SCC 28.
[28] *Children's Aid Society of Toronto v. G.S.*, *supra* note 20 at para. 19.
[29] *Ibid.* at paras. 22-24.

Business Record Exception to Hearsay under s. 35 of the *Evidence Act*

It is important to note the business record exception to hearsay evidence given the frequency with which lawyers come across hospital records or CAS records that include statements made by a child. Under the *Evidence Act*, a record can be admitted as evidence where it was made in the usual and ordinary course of any business and it was in the usual or ordinary course of business to make such a recording at the time of the act, transaction, occurrence or event as described therein.[30] The rationale for this provision is that the circumstances surrounding the making of certain types of records provide sufficient guarantees of reliability.[31]

Common law criteria for admissibility under this exception have developed and have been summarized as follows:

a) The record must be made in the usual and ordinary course of business and it must be in the usual and ordinary course of business to make such a writing or record;
b) The record must be made contemporaneously with the transaction recorded or within a reasonable time thereafter;
c) Only records of "facts" can be admitted — "an act, transaction, occurrence or event"; and
d) The person who makes the record must be acting under a business duty and the informant must be acting under a business duty, or the informant's statements must be otherwise admissible under the hearsay exceptions.[32]

As made clear by the final criteria for admission, if the record contains otherwise inadmissible hearsay evidence, it must meet the test for admission under another exception to the hearsay rule. This means that we cannot escape the *Khan* or state of mind analysis simply because a child's statement is recorded in a business record.

There is some indication in the case law that a court may take a more flexible approach to hearsay as contained in a business record on a temporary motion when the interests of a child are at play. For instance, in *Ganie v. Ganie*, the court admitted CAS records that contained hearsay statements recorded by CAS workers from their interviews with the child and other third parties.[33] The Honourable Justice Price found that the records met the business record exception as well as the test of necessity and reliability stemming from *Khan*. Justice Price relied on the court's *parens patriae* jurisdiction in advocating for a more flexible approach to hearsay in circumstances involving the care of a child, particularly where there are allegations of abuse or alienation.[34]

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[30] *Evidence Act*, R.S.O. 1990, c. E. 23 at s. 35.
[31] *Catholic Children's Aid Society of Toronto v. L(J),* 2003 CarswellOnt 1685, [2003] O.J. No. 1722 (OCJ) at para. 7.
[32] *Ibid.*, referencing *Setak Computer Services Corp. v. Burroughs Business Machines Ltd.*, 1977 CarswellOnt 626 (Ont. S.C.).
[33] *Ganie v. Ganie,* 2014 ONSC 7500 at para. 143.
[34] *Ibid.* at para. 144. Again, this was an order made on a temporary motion where allegations of abuse and domestic violence had been made. Although there was no cross-examination on affidavit evidence for the purposes of the motion, the court expected to hear directly from the Society workers as witnesses at trial.

You should consider whether the notes of a third party, if any, would meet the test for a business record under the business record exception to the hearsay rule. Although the hearsay statements as found in these records may not be admissible on their own, the records may help to corroborate the direct evidence of the third-party record keeper and assist in meeting the threshold reliability test required under *Khan*.

Voice/Views of the Child Reports as a Vehicle to Present Out-of-Court Statements at Trial

The use of a Voice/Views of the Child Report has been on the rise in family court proceedings. These reports are a relatively new phenomenon in Ontario. Rachel Birnbaum and Nicholas Bala recently conducted a pilot project in Ontario to examine the use of these reports in Ontario. Their paper entitled "Views of the Child Reports: The Ontario Pilot Project – Research Findings and Recommendations" is a must read for family law lawyers.[35]

Essentially these reports involve a third-party professional, often a lawyer or mental health professional, meeting with the child for the purpose of eliciting and presenting their views on the issues that affect them in the proceeding. These reports can, if requested, include the opinion of the author about certain indicia of reliability, such as maturity of the child and/or the strength, consistency or independence of the child's expressed views.

At present, there is no statutory authority explicitly providing for these reports apart from the best interests test and the obligation on the court to consider the views and preferences of children in cases that affect them.[36] Until there is statutory authority for these reports, Birnbaum and Bala suggest that reports should only be prepared if both parties consent, though the authors note that s. 30 of the *Children's Law Reform Act* ("CLRA")[37] and s. 112 of the *Courts of Justice Act* ("CJA")[38] are arguably broad enough to permit the court or the Children's Lawyer to direct that these reports be prepared without the parents' consent.[39] However, even if viewed under the lens of existing legislation, there may still be a question as to the admissibility of the child's out-of-court statements requiring reliance under the hearsay exceptions.

What is clear in the case law is that these reports are starting to appear more frequently in Ontario. What is less clear is how they are to be treated by the court when it comes to the admissibility for the truth of the child's statements contained therein.

When these reports are non-evaluative in nature, they are simply another vehicle for admitting the out-of-court statements of a child as evidence at trial. As such, the report and any testimony from the author may be subject to the laws of hearsay evidence outlined above. When these reports are evaluative in nature, lawyers should consider the relevant provisions of

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[35] R. Birnbaum and N. Bala, "Views of the Child Reports: The Ontario Pilot Project – Research Findings and Recommendations," June 2017.
[36] *Supra* note 35 at page 40.
[37] *Children's Law Reform Act*, R.S.O. 1990, c. C.12.
[38] *Courts of Justice Act*, R.S.O. 1990, c. C.43.
[39] The authors reference *V.F. v. Halton Children's Aid Society*, 2016 ONCJ 111 where a Views of the Child Report that was prepared without the father being informed was given almost no weight by the court in the context of a high conflict separation.

the *Evidence Act*,[40] *Family Law Rules*,[41] and the common law dealing with expert reports, as applicable. The child's out-of-court statements as contained in the report and as relied on by the expert may be subject to the laws of hearsay.

Despite some potential uncertainty around these reports when it comes to their admissibility as evidence, there are clear benefits that warrant their continued use. In many cases, these reports may be a cost-effective and sensitive way to ensure that children's voices are heard.[42] They are less expensive than custody and access assessment and more efficient in that they can be prepared quickly.[43] The benefit of these reports over simply having the parties present their own version of the child's out-of-court statements was alluded to by the Honourable Justice Mackinnon in *Martin v. Hanoski*. Justice Mackinnon refused to admit the hearsay statements attributed to the children in the affidavits of both parties and commented that they could have sought a more appropriate way to obtain and present the views and preferences of the children to the court, such as a Voice of the Child Report.[44]

Conclusion

The importance of ensuring that children's voices are heard loudly and clearly in family court proceedings cannot be overstated. It is prudent for lawyers to be intimately familiar with the different options for admitting children's evidence, including the rise of the Voice/Views of the Child Reports and considering the admissibility of a child's hearsay statements. While this article only touched on hearsay, there are a number of other evidentiary options available and each one should be considered in the context of the particular case and the issues therein. We, as lawyers, have an obligation to ensure that the child's views and preferences are put before the court in such a way that conforms with the rules of evidence and promotes the fairness of the court process.

[40] *Evidence Act*, *supra* note 30 at s.52.
[41] *Family Law Rules*, *supra* note 5 at r. 20.1.
[42] Birnbaum and Bala, *supra* note 35 at page 37
[43] *Ibid*.
[44] *Martin v. Hanoski*, 2016 ONSC 1625 at para. 34.