

# Applications to Strike Affidavit Evidence

What We Do and When We Don't

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Scharfstein | Gibbings | Walen | Fisher LLP

BARRISTERS & SOLICITORS



# Presentation Outline

1. Rules Respecting Affidavit Evidence
2. Notice of Objection - Family Practice Direction #3
3. But should the application be brought?

# The Rules Respecting Affidavit Evidence

- ▶ Why are there rules?
- ▶ What are the rules?
- ▶ Examples of rule breaches

# The Rules Respecting Affidavit Evidence

Why are there rules?

- ▶ An affidavit is a written sworn statement of fact voluntarily made by an affiant.
  - ▶ It is difficult to assess credibility from an affidavit, especially when the affidavit was prepared by a third party (e.g. lawyer).
  - ▶ The evidence in the affidavit is not to be tested by cross-examination.
- ▶ By limiting the content of affidavits (e.g. facts only, relevant information only, no opinion, no statements of belief, limited hearsay, etc.), the likelihood of their truthfulness is enhanced.

What are the rules?

# The Rules Respecting Affidavit Evidence

## 1. Formal Rules/Technical Rules

- ▶ Part 13 of the Queen's Bench Rules - Subdivision 2 - Form and Contents of Affidavits and Exhibits
- ▶ Rule 13-31(1) - an affidavit must:
  - ▶ be in Form 13-31;
  - ▶ state, on the front page, the style of cause of full name of the person swearing/affirming the affidavit;
  - ▶ state the place of residence of the deponent;
  - ▶ be written in the first person;
  - ▶ be divided into paragraphs, consecutively numbered, and as nearly as may be, each paragraph must be confined to a distinct portion of the subject;
  - ▶ subject to rule 13-35, be signed or acknowledged and sworn/affirmed before a person empowered to administer oaths and affirmations, whether that person prepared the affidavit or not;
  - ▶ contain a statement of when, where and before whom the affidavit was sworn/affirmed;
  - ▶ be signed by the person administering the oath or taking the affirmation [see Rule 13-31(2)]

COURT FILE NUMBER \_\_\_\_\_

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN  
(FAMILY LAW DIVISION)

JUDICIAL CENTRE \_\_\_\_\_

PETITIONER \_\_\_\_\_

RESPONDENT \_\_\_\_\_

**AFFIDAVIT**

AFFIDAVIT OF \_\_\_\_\_

I, \_\_\_\_\_, of, in the Province of \_\_\_\_\_, MAKE OATH AND SAY/ AFFIRM AS FOLLOWS:

1. That I am the petitioner/respondent herein and, as such, have personal knowledge of the matters and facts herein deposed to, except where stated to be on information and belief, and where so stated I verily believe the same to be true.

SWORN BEFORE ME at, \_\_\_\_\_ )  
in the Province of Saskatchewan, this )  
\_\_\_\_\_ day of , 2019. ) \_\_\_\_\_ )  
\_\_\_\_\_ )

Commissioner for Oaths for Saskatchewan  
My Commission expires:  
OR Being a Solicitor.

**CONTACT INFORMATION AND ADDRESS FOR SERVICE:**

Name of firm:  
Name of lawyer in charge of file:  
Address of legal firm:

Telephone number:  
Fax number:  
E-mail address:  
File Number:

# The Rules Respecting Affidavit Evidence

## 1. Formal Rules/Technical Rules

### Example:

1. In early 2018, Dianna was diagnosed as bipolar and placed on the medication Seroquel. Following her diagnosis Dianna took time off work in order to give the medication time to take effect. After Dianna began taking this medication our relationship improved, and she was a different person. Her anger subsided and she was calmer. Dianna is employed as an assembly technician. She works shift work. Dianna was not happy about returning to work and she started drinking while still taking her Seroquel. On July 3, 2018, our son Isaac and I were asleep in the master bedroom in the family home. Dianna drank to the point of intoxication. At 5:00 a.m., she turned on all the lights, turned on the television, and started playing a movie as loud as it would go on the surround sound. This woke up Isaac and the father. Dianna then left the parties' home again and returned an hour later. At this point she ...

# The Rules Respecting Affidavit Evidence

## 1. Formal Rules/Technical Rules cont.

- ▶ Part 13 of the Queen's Bench Rules - Subdivision 2 - Form and Contents of Affidavits and Exhibits
  - ▶ Rule 13-32 - Alterations in affidavits
  - ▶ Rule 13-35 - Affidavits by the visually impaired or those unable to read
  - ▶ Rule 13-36 - Understanding an affidavit
    - ▶ Specifically, when the affiant does not understand the language in which the affidavit is written
  - ▶ Rule 13-37 - More than one individual swearing or affirming an affidavit

# The Rules Respecting Affidavit Evidence

## 2. Rule 15-20 - Affidavit Evidence In Family Law

### ▶ Hearsay

- ▶ Hearsay evidence is evidence based on information received from a third party, as opposed to information of which a witness has personal knowledge. Such evidence is not generally accepted for its truth, as the person providing the information is not a witness.

Rule 15-20(1) - An affidavit must be confined to the statement of facts within the personal knowledge of the affiant, except where this rule provides otherwise

Examples:

1. My neighbour Sarah told me that she often sees the children locked out of the house, sitting on the front step, waiting for the respondent to get home from work.
2. I was advised by my cousin, who is a fire fighter, that this is a fire hazard and that it should be remedied immediately.
3. Yesterday, I called the administrators at Blue Cross who confirmed that the petitioner's benefits have been terminated.

# The Rules Respecting Affidavit Evidence

## 2. Rule 15-20 - Affidavit Evidence In Family Law cont.

### ▶ Hearsay Exceptions (see also Rule 13-30)

- ▶ Rule 15-20(3) - An affidavit may, in special circumstances, contain information that the person learned from someone else if:
  - a) the application on which the affidavit will be used is for an interim order, or for a matter that will not determine the final outcome of the family law proceed; and
  - a) the sources of the information is identified by name, the affidavit states that the person signing it believes the information is true and the circumstances that justify the use of information learned from someone else are stated.

#### Example:

1. I am advised by our daughter's teacher, Jane Smith, and verily believe to be true, that our daughter arrived at school that day without her back pack or boots. I have not asked Ms. Smith to swear an affidavit in this matter given its interlocutory nature, and because it is my understanding that the Saskatoon Public Schools have a policy against teachers swearing affidavits.

# The Rules Respecting Affidavit Evidence

## 2. Rule 15-20 - Affidavit Evidence In Family Law cont.

### ▶ Hearsay Exceptions cont.

- ▶ BUT hearsay evidence is admissible if it is provided as part of the narrative, rather than for the truth of its contents.

Example:

1. On Tuesday morning, I was contacted by our daughter's teacher, Jane Smith, who advised that our daughter arrived at school that day without her back pack or boots. Following that phone call, I attended at the school with an extra pair of boots and socks, as well as some lunch for our daughter. As her socks were soaked through, I observed that she was sitting on the carpet barefoot and her toes were red.

# The Rules Respecting Affidavit Evidence

## 2. Rule 15-20 - Affidavit Evidence In Family Law cont.

### ▶ Hearsay Exceptions

#### ▶ Evidence of Children

- ▶ As a statement by a non-party, this is technically hearsay. However, it is usually admissible if, in the opinion of the court, the evidence is credible and trustworthy, and if it would not be in the best interests of a child for the child to testify (though without corroboration, it may be given little weight).

Example:

1. The children have told me that when they are at their mother's home, they do not have a set bedtime or limits on screen time and junk food.

# The Rules Respecting Affidavit Evidence

## 2. Rule 15-20 - Affidavit Evidence In Family Law cont.

### ▶ Argument or Speculation

- ▶ Rule 15-20(2) - An affidavit must not contain argument or speculation.

#### Examples:

1. The petitioner should not be allowed to move with the children to Regina. That is not in their best interests.
2. I deny the respondent's allegation that I am working under the table for cash. The respondent cannot be allowed to continue with these kinds of hurtful allegations.
3. After visits with his father, Joe is often rude to me and confrontational. I believe his father is encouraging him to act this way.
4. Except during seeding and harvest, the petitioner does not work at all. This is likely the reason why his credit card debt is out of control. I suspect the petitioner would be able to live within his means if he picked up work during the off season.

# The Rules Respecting Affidavit Evidence

## 2. Rule 15-20 - Affidavit Evidence In Family Law cont.

### ▶ Irrelevant, Delay, Unnecessary, Abuse of Process

- ▶ Rule 15-20(5) - If an affidavit contains material that is irrelevant, that may delay the trial or make it difficult to have a fair trial or that is unnecessary or an abuse of the Court process, the Court may, on application by a party or on its own application:
  - a) strike out all or part of that affidavit; and
  - b) award double costs against the party filing the affidavit.
- ▶ (6) If an affidavit or part of an affidavit has been struck pursuant to this rule, an opposing party who has filed an affidavit in response to the offending material may be awarded double costs of filing that affidavit.

# The Rules Respecting Affidavit Evidence

## 3. General Rules

### ▶ Scandalous

- ▶ Rule 13-33 - The Court may order any matter that is scandalous to be struck out from any affidavit.
  - ▶ Scandalous matter improperly casts a derogatory light on someone, usually a party to the action, with respect to moral character or uses repulsive language.
  - ▶ This rule is intended to apply to matters which are irrelevant to the proceedings and are included for an improper purpose.
  - ▶ The test to be applied is whether the matter alleged to be scandalous would be admissible to show the truth of any allegation material to the relief claimed. (*R v Bank of Nova Scotia* (1983), 24 Sask R 312)

### Examples:

1. Two years before we had children, the respondent infected me with chlamydia.
2. [In an application for an interim distribution of property] Throughout the marriage, my husband was physically and emotionally abusive.

# The Rules Respecting Affidavit Evidence

## ▶ Scandalous

▶ Note Rule 15-19(3) - Parties:

▶ (3) A person alleged to have committed adultery with a party must not be named in the Petition or any other document, unless the Court orders otherwise on an application which may be made without notice.

# The Rules Respecting Affidavit Evidence

## 4. Reply Affidavits

### ▶ Reply Only to New Matters

- ▶ Rule 15-19(8) - The party bringing the application may then serve an affidavit replying only to any new matters raised by the opposite party ...
- ▶ Rule 15-19(11) - If any new matters are raised by the party bringing the application in the affidavit in reply without the leave of the Court:
  - a) those matters may be disregarded; and
  - b) costs may be awarded against the party filing the affidavit.

### Examples:

1. I deny the petitioner's allegation at paragraph 4 that I called her derogatory names in front of the children. The petitioner frequently yells at me in front of the children and, on February 13th, she threw her cell phone at me and punched a hole in the wall, while the children were watching.
2. John's statement at paragraph 7 about the payment of daycare expenses is untrue. As I stated in my previous affidavit, I pay my share of the daycare costs directly to the daycare provider. Attached and collectively marked as Exhibit "B" are receipts of the daycare.

# The Rules Respecting Affidavit Evidence

## 5. Expert Opinion

- ▶ **Only a qualified expert can provide opinion evidence**
  - ▶ Rule 5-39 (1) - An expert's report must contain, at a minimum:
    - ▶ the expert's name, address and qualifications
    - ▶ the information and assumptions on which the expert's opinion is based; and
    - ▶ a summary of the expert's opinion
  - ▶ (2) Must be accompanied by a Notice of Expert Witness in Form 5-39.

### Examples:

1. I have been on sick leave since September and am unable to work. Attached and marked as Exhibit "A" is a doctors' note to my employer explaining my absence.
2. I disagree with Mark's comments about our daughter's health. Anxiety is a feeling of fear or apprehension about what's to come. Medication is not always necessary. Psychotherapy, such as cognitive behavioral therapy or a combination of therapy and counseling, is an appropriate treatment for anxiety.

# The Rules Respecting Affidavit Evidence

## 6. Rules from Case Law

### ▶ Settlement Privilege - Without Prejudice Communications:

*Tucker-Lester v Lester*, 2012 SKQB 443 - Dufour J.

[6] ... A party is entitled to waive some types of privilege, such as solicitor-client privilege or litigation privilege, because they are his own to waive. Not so with settlement privilege. It is a jointly held privilege. A party cannot unilaterally waive privilege even on the proposal he made because it is not his to waive. That this must be so becomes clear on a review of the reasons for the privilege.

...

[12] Only rarely should the Court be advised of settlement negotiations and such will be even more rare in chambers applications. Yes, the matter of costs is at issue in interim applications but arguments for enhanced costs will seldom override the policy of promoting settlement. Costs can be pursued with vigour after trial if either of the parties is of such a mind.

# The Rules Respecting Affidavit Evidence

## 6. Rules from Case Law cont.

### ▶ Settlement Privilege - Without Prejudice Communications:

Examples:

1. Joanne has told me in the past that if I discontinue my client for child support, she will not pursue equal shared parenting.
2. I am not opposed to paying spousal support, and in fact offered to begin paying support in the amount of \$500/month last fall. My lawyer's letter to the respondent's lawyer, dated September 3, 2019, is attached and marked as Exhibit "C".

However, if an agreement was reached, the evidence on without prejudice communication is relevant to the enforcement of the agreement.

# Notices of Objection / Applications to Strike

Rule 15-20(4) - If an affidavit does not comply with this rule, the Court may:

- a) strike out all or part of that affidavit; and
- b) award costs against the party filing the affidavit or that party's lawyer

Family Practice Direction #3 - Objections to Affidavit Evidence in Family Matters -

[https://sasklawcourts.ca/images/documents/Queens\\_Bench/QB\\_FAM\\_PD3amended2014.pdf](https://sasklawcourts.ca/images/documents/Queens_Bench/QB_FAM_PD3amended2014.pdf)

# Notices of Objection / Applications to Strike

## Family Practice Direction #3 - Objections to Affidavit Evidence in Family Matters

1. Objections to affidavits shall be raised by filing a notice of objection in the form attached hereto.
2. A copy of the affidavit objected to is to be attached to the notice of objection with those portions to which objection is taken highlighted or otherwise identified, such as by underscoring, and a notation in the margin as to the Rule upon which objection is taken and the grounds for the objection (example: hearsay, argument, opinion, irrelevant, etc.).
3. A notice of objection shall be served and filed: (i) when objecting to the affidavit(s) filed in support of the substantive motion: at least seven days before the return date; (ii) when objecting to the affidavit(s) filed in response to the substantive motion: at least one clear day before the return date; (iii) when objecting to a reply affidavit: by noon the day before the return date.
4. A response to the notice of objection shall be filed in the form attached hereto.
5. The response to the notice of objection shall be served and filed as follows: (i) in reply to the objection to the affidavit(s) filed in support of the substantive motion: at least two clear days prior to the return date; (ii) in reply to the objection to the affidavit(s) filed in response to the substantive motion: 12:00 noon of the day before the return date; (iii) in reply to the objection to the reply affidavit: at the hearing on the return date.
6. There will be no argument in chambers on the objection unless the chamber judge requests further comment.



COURT FILE NUMBER **DIV No. 0000 of 2020**

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN  
(FAMILY LAW DIVISION)

JUDICIAL CENTRE **SASKATOON**

PETITIONER **JANE DOE**

RESPONDENT **JOHN DOE**

**AFFIDAVIT OF JANE DOE**

I, Jane Doe, of the City of Sasakatoon, in the Province of Saskatchewan, MAKE OATH AND SAY/ AFFIRM AS FOLLOWS:

1 That I am the petitioner herein and, as such, have personal knowledge of the matters and facts herein deposed to, except where stated to be on information and belief, and where so stated I verily believe the same to be true.

2 The respondent, John Doe, and I were married on June 14, 2008. We have two children: Judy Doe, born May 2, 2011 (age 8) and Jaqueline Doe, born September 12, 2014.

3 In 2009, two years before we had children, the respondent infected me with chlamydia. He had contracted the disease from another woman he met on a work trip. This was a scary and shameful experience for me. The respondent and I separated for a few weeks, then reconciled.

4 The respondent and I separated on November 1, 2019, and the children have been residing primarily with me in the family home since that date.

5 The respondent is living in a two-bedroom apartment near the children's school. His neighbour Sarah told me that she often sees the children locked out of the house, sitting on the front step, waiting for the respondent to get home from work.

6 The children have told me that when they are at the respondent's home, they do not have a set bedtime or limits on screen time and junk food. This lack of discipline and lack of a routine is not in their best interests. There is a significant amount of research

*Rule 15-20(1) +  
Rule 5-39 - providing opinion  
evidence, not qualified as  
expert*

7 that shows how children need structure and healthy food to thrive.

*Tucker-Lester v Lester,  
2012 SKQB 443,  
settlement privilege*

7 Rather than week-on/week-off parenting, I propose that the respondent have parenting time from Thursday afterschool through to Monday morning at school every second weekend. In fact, on October 10, 2019, on my instructions, my lawyer wrote a letter to the respondent's lawyer offering that schedule. A copy of my lawyer's letter is attached hereto and marked as Exhibit "A".

*Rule 15-20(2)  
argument +  
speculation*

8 I believe the reason the children want to spend more time at the respondent's home is because he is the "fun dad" that does not enforce rules. They probably enjoy his easy-going parenting style.

9 I make this affidavit in response to the respondent's application for shared parenting and in support of my application for primary residence of the children.

SWORN BEFORE ME at Saskatoon, )  
in the Province of Saskatchewan, this )  
15<sup>th</sup> day of January, 2020. )  
*R.T. Esquire* )  
Commissioner for Oaths for Saskatchewan )  
My Commission expires: *March 21, 2021*  
~~OR Being a Solicitor.~~

*Jane Doe*  
Jane Doe

Document delivered by:  
Name of firm: Law Firm  
Name of lawyer in charge of file: Lawyer A. Esquire  
Address of legal firm: 123 - 4<sup>th</sup> Street North  
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*Rule 15-20(5)  
irrelevant  
Rule 13-33  
scandalous*

*Rule 15-20(1)  
hearsay*

*Rule 15-20(2)  
argument*

# Notices of Objection/ Applications to Strike

## Procedure

1. The Notice of Objection is served and filed in accordance with the schedule set out in the Practice Directive in the prescribed form.
2. A brief response to the notice of objection may then be served and filed in the prescribed form.
3. In Chambers, the objections are dealt with as a preliminary matter.
  - ▶ The judge's decision to strike or not strike determines what facts are properly before the court and capable of being referenced in argument.

# But *should* the application be brought?

- ▶ Some breaches are minor or obvious
- ▶ Adds to the already large workload of judges
- ▶ Potentially annoys the judge
- ▶ Invites opposing party to reciprocate

## Examples:

1. Tom contacted me about the car loan on three occasions. Each time, I told him that I was unable to contribute. I believe he is afraid of the impact this would have on his credit rating.
2. In response to the petitioner's application for an equal sharing of school holidays, I can advise that, in my view, that is not in the best interests of the children for the following reasons:
  - a) ...
  - b) ...

# But *should* the application be brought?

There was - for a year or two - a trend for Queen's Bench judges to refuse to rule on Notices of Objection, with direction to counsel to simply hint at the offending paragraphs in argument

- ▶ Notwithstanding the direction in the Practice Directive that there will be no argument in chambers on the objection
- ▶ It was common for judges to say that they were capable of disregarding improper evidence

# But *should* the application be brought?

- ▶ However, in *Wongstedt v Wonstedt*, 2017 SKCA 100, the Court of Appeal criticized that practice.
  - ▶ This was an appeal of an interim decision relating to lump sum spousal support.
  - ▶ The wife's affidavits included speculation which the husband sought to have struck through a notice of objection. In response, the Chambers judge stated:

[5] Firstly, the court will deal with the two notices of objection. The court reviewed the portions which counsel for the petitioner requests be struck from the two affidavits of the respondent. The court accepts that some of the objections are appropriate in each affidavit. The court will ignore the portions which are in non-compliance with *The Queen's Bench Rules*.

- ▶ The Chambers judge did not identify the portions/paragraphs of the affidavit that were not in compliance with the Rules or explain why that was so.

# But *should* the application be brought?

*Wongstedt v Wonstedt*, 2017 SKCA 100, continued:

- ▶ Though he stated he would “ignore” the improper passages, he then appeared to rely upon the information in those passages in making his order.

The Court of appeal stated:

[38] It is plain that the Chambers judge’s decision (quoted above) is an insufficient answer to the notices of objection, because it does not address the issues raised by those notices or permit functional appellate review. Bluntly, the answer given is so ambiguous and unhelpful to the parties as to amount to a non-decision. Where objections are taken to affidavit evidence, the judge who hears them should briefly articulate which portions of a contested affidavit are not in conformance with *The Queen’s Bench Rules* and what has been struck from the record. There are many ways this could be done effectively [...] but the key is to plainly identify what is or is not in evidence, giving a very short reason for striking any material that has been struck from the record (i.e., argument, speculation, opinion, irrelevant, rhetoric, hearsay, etc.). Indeed, a judge may simply strike out offending material by hand, noting the reason therefor, on the affidavit itself.

# But *should* the application be brought?

*Wongstedt v Wonstedt*, 2017 SKCA 100, continued:

[39] Regardless of how it is done, the parties, counsel and judges who hear subsequent applications (particularly, those requiring an applicant to establish a material change in circumstances) must know what evidence was properly before the court or what evidence was struck from the record. Lastly, the practice of clearly identifying evidence that has been struck and briefly stating why it was struck provides an appellate court with the foundation for meaningful review of that decision, if it should be appealed.

[40] Therefore, to clarify the record of the evidence in this matter, I would strike the material identified in Appendix A to these reasons from Ms. Wongstedt's August 5 and September 25, 2016, affidavits.

[Emphasis added]

# But *should* the application be brought?

What is the preferred practice Post-*Wonstedt*?

- ▶ General rule = Proportionality
  - ▶ Consider the severity of the rule breaches
  - ▶ Consider whether the rule breaches are so obvious that the Court does not need you to point them out (e.g. with Self-Represented Litigants)
  - ▶ Consider whether this has been a recurring issue, which your client wants to try to curtail
  - ▶ Consider whether the added costs to your client outweigh the need to correct the record and/or the desire to have costs awarded in your client's favour
  - ▶ Consider the impeachability of your client's materials

# Questions?



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