

mother used to prove the truth of the matter asserted” and that it “is not asserting that [J.A.W.’s] mother made statements of support, merely his opinion that she supports him.” (Response to Motion to Strike (“Strike Response”), p. 3). Alternatively, Plaintiff argues that even if an affirmative statement was made on the part of J.A.W.’s mother, it was only offered to show its effect on J.A.W. *Id.*

Disregarding for a moment that this interpretation of this sentence has no basis in logic or reason, Plaintiff does rely on this statement to prove the truth of the matter asserted by elsewhere asserting, “[h]is mother supports his efforts to use the male restrooms within EVSC.” (Response to Motion to Dismiss (“Dismiss Response”), p. 6). Similarly, Plaintiff argues that appointing him as next friend would not interfere with J.A.W.’s mother’s right to the care and control of her child because “the facts demonstrate that this is not a situation where J.A.W.’s mother opposes his litigation.” *Id.* at 9). At no point prior to the Strike Response has Plaintiff characterized J.A.W.’s mother’s support of this suit as merely an opinion that J.A.W. holds. Quite the contrary, Plaintiff has expressly referred to J.A.W.’s mother’s support as a purported fact.

The second sentence of this paragraph reads, “[h]owever, she [Mom]is involved in a dissolution of marriage case with her current husband and does not want to be involved in any other court proceedings at this point.” Plaintiff argues that “[i]f this is viewed only as J.A.W.’s opinion, it is simply not hearsay as it is based on J.A.W.’s perception.” (Strike Response, p. 3). If it is only an opinion, then it obviously cannot support the factual assertion that J.A.W.’s mother is not a sufficient next friend. In fact, Plaintiff presents this statement as a fact:

As noted in J.A.W.’s declaration, his mother, who is his legal custodian, is unable to serve as his next friend at this time and he has no other adult relatives who can serve in that capacity. In such a case it is appropriate to allow a non-relative to proceed as a next friend.

(Dismiss Response, p. 8).

Plaintiff also argues that the second sentence is “a statement of her present motive and mental state and therefore is admissible as a present sense impression, an exception to the rule against hearsay provided by Fed. R. Evid. 803(3).” (Strike Response, p. 3).¹ However, a statement will not fall within Fed. R. Evid. 803(3)’s exception unless it is a declaration of intention casting light on the future. *Oberman v. Dun & Bradstreet, Inc.*, 507 F.2d 349, 352 (7th Cir. 1974)(citing *Shepard v. United States*, 290 U.S. 96, 105-06 (1933)). Statements of motive are only admissible “to prove that the declarant thereafter acted in accordance with the stated intent.” *United States v. Best*, 219 F.3d 192, 198 (2nd Cir. 2000).

Here, J.A.W.’s mother’s purported refusal, or inability, or disinterest to act as next friend has not been proven. Indeed, this allegation is key to Plaintiff’s argument that he is a proper next friend in this case. Plaintiff’s statement that J.A.W.’s mother does not want to be involved in this case is not a statement of her intention to refuse to be involved but the actual act of refusing to be involved. It is presented to prove the truth of what it asserts. Thus, this hearsay statement is inadmissible.

The third and final sentence of this paragraph reads, “[s]he did indicate that when her current divorce is over she will be willing to serve as next friend in this matter.” Plaintiff asserts that this statement is also a statement of motive covered by the exception in Fed. R. Evid. 803(3). However, as previously noted, “statements of motive are only admissible “to prove that the declarant thereafter acted in accordance with the stated intent.” *Best, supra*. Here there is no allegation or argument that J.A.W.’s mother has attempted to or is acting as J.A.W.’s next friend,

¹ It should be noted that statements of motive or mental state are covered by Fed. R. Evid. 803(3), while present sense impressions are covered by Fed. R. Evid. 803(1). Plaintiff focuses on motive and intent and makes no argument that the statement in the second sentence is actually a present sense impression. As such, Defendant will only respond to the arguments made under Fed. R. Evid. 803(3).

so this statement does not fall with the Fed. R. Evid. 803(3) exception. As a result, the third sentence is inadmissible hearsay.

B. Paragraph 41 of the Declaration of J.A.W.

Paragraph 41 of the Declaration of J.A.W. reads, “[m]y mother specifically noted that she agreed that in her absence Mr. Squires should serve as my next friend in this litigation.” Plaintiff admits that this statement is hearsay but argues that it should be admissible because it is only used to show notice. (Strike Response, p. 4). This statement, however, is not only used to show notice. Rather, it is presented to purportedly prove that J.A.W.’s mother approves of Plaintiff acting as next friend. (Dismiss Response, p. 7). This is a critical point for Plaintiff’s argument that he “is an appropriate person to represent [J.A.W.] in this litigation as his next friend.” (*Id.* at 6). Obviously, this statement is not merely presented to prove that it was made, but to prove that it was made *and is truthful*. It is inadmissible hearsay.

C. Paragraph 8 of the Declaration of Wyatt Squires

Paragraph 8 of the Declaration of Wyatt Squires states, “I understand that his mother is not willing at this point, due to her personal situation, to be his next friend although she may wish to be his next friend in the future.” Plaintiff admits that “[t]o the extent that this statement would be offered to prove the truth of any matter asserted by J.A.W.’s mother, it is hearsay.” (Strike Response, p. 5). Plaintiff argues that it is only offered to show “understanding of why he is being called upon to serve as next friend.” *Id.* In the Dismiss Response, however, Plaintiff makes no assertion as to his understanding of why he is being called upon to act as next friend. Instead, Plaintiff repeatedly argues that J.A.W.’s mother supports his efforts and does not oppose the current litigation. (Dismiss Response, pp. 6, 9). In fact, Plaintiff’s understanding of why he is serving as next friend is not relevant to whether he is a proper next friend. As such, this

statement can only serve as an attempt to prove the purported truth of a statement by J.A.W.'s mother. In such case, Plaintiff concedes, "it is hearsay." (Strike Response, p. 5).

Conclusion

J.A.W.'s mother has chosen not to bring this action as next friend or to offer testimony in support of it. This should give the Court great pause – and Plaintiff should not be allowed to offer unsworn testimony of the mother under the guise of inapplicable hearsay exceptions. Defendant's Motion to Strike should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 15th day of May, 2018, a copy of the foregoing document was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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