

SUPREME COURT OF NOVA SCOTIA
(Family Division)
Citation: *Irwin v. Irwin*, 2019 NSSC 397

Date: 20191219
Docket: 1201-066753
Registry: Halifax

Between:

Gerald Scott Irwin

Petitioner

and

Kimberly Joan Irwin

Respondent

LIBRARY HEADING

Judge: The Honourable Associate Chief Justice Lawrence I. O'Neil

Hearing: November 28, 2019 and December 12, 2019

Oral Decision: December 19, 2019

Issue: Should a Voice of the Child Report be ordered?

Summary: The parties have a history of marital litigation. Less than a year after a decision finding no change of circumstances existed granting the Court jurisdiction to consider a variation application, the unsuccessful party sought an order requiring a Voice of the Child Report.

The application was dismissed.

The Court found an order requiring a Voice of the Child Report was not appropriate because it would place the children in the middle and because of a concern about the maturity level of the children.

Keywords: Voice of the Child; child in the middle; change of circumstances

Legislation: *Judicature Act*, R.S.N.S., c.240, s.1, s.32F

Cases Considered: *Irwin v. Irwin*, 2018 NSSC 261
E.P. v. S.P., 2016 NSSC 173

**THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.
QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.**

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: *Irwin v. Irwin*, 2019 NSSC 397

Date: 20191219

Docket: 1201-066753

Registry: Halifax

Between:

Gerald Scott Irwin

Petitioner

and

Kimberly Joan Irwin

Respondent

Judge: Associate Chief Justice Lawrence I. O’Neil

Heard: November 28, 2019 and December 12, 2019

Oral Decision: December 19, 2019

Counsel: Kenzie MacKinnon QC, Counsel for Gerald Irwin
Pavel Boubnov, Counsel for Kimberly Irwin

By the Court (Oral Decision):

Introduction

[1] Let me first assure the parties I have considered all the evidence offered and I have considered the submissions including statements of the governing legal principles. In the course of communicating my conclusion, I will not refer to all of the evidence.

[2] The need for a timely response to the application before the Court necessitates the Court delivering an Oral Decision.

[3] The parties are the parents of two children currently twelve and one-half (12 ½) and eleven (11) years of age.

[4] One year ago, I ruled no change of circumstances for the subject children had been established and I had no jurisdiction to hear Ms. Irwin's application for a change in the parenting arrangement agreed to by the parties in December 2015 (2018 NSSC 261).

[5] On September 25, 2019 Ms. Irwin filed a Notice of Variation Application seeking an order requiring the preparation of a 'Voice of the Child' Report for both children. Mr. Irwin opposes that request and responded by seeking a change in the parties' parenting arrangement.

[6] As a result, neither party challenges the Court's jurisdiction to hear the matter because of an absence of jurisdiction. On that basis, I will consider the applications and counter applications. I need not rely on previous pleadings to assume jurisdiction to hear the respective requests. I am treating this matter as a variation sought by each party.

[7] This decision follows a hearing and submissions on the narrow issue of whether a 'Voice of the Child' report should be ordered.

Legal Principles

[8] The *Judicature Act*, R.S.N.S., c. 240, s. 1, s.32F provides that the Court may order a 'Voice of the Child' report:

32F (1) Upon application or on the judge's own motion, a judge of the Supreme Court (Family Division) may direct a family counsellor, social worker, probation officer or other person to make a report concerning any matter that, in the opinion of the judge, is a subject of the proceeding.

[9] A thorough discussion of the principles guiding the interpretation and application of this authority has been provided by Justice Jesudason of this Court in *E.P. v. S.P.*, 2016 NSSC 173.

[10] At paragraphs 24-26 he states the following:

[24] A number of authorities provide helpful guidance on the approach to be followed

when faced with a request for a Voice of the Child Report. These include *Farmakoulas v. McInnis*, (1996) 1996 CanLII 5447 (NS SC), 152 N.S.R. (2d) 52, *Jarvis v. Landry*, 2011 NSSC 116 (CanLII), *MacLean v. Boylan*, 2011 NSSC 314 (CanLII), *John v. John*, 2012 NSSC 324 (CanLII) and *Moore v. Moore*, 2013 NSSC 252 (CanLII).

[25] In addition, the recent Voice of the Child Report Guidelines (the “Guidelines”) released by the Nova Scotia Department of Justice Court Services in 2015, provides further guidance on the purpose and scope of Voice of the Child Reports. These Guidelines were developed by an advisory committee comprised of mental health professionals, members of the judiciary, senior legal counsel and policy makers involved in family law matters.

[26] When I consider the above sources, the following principles emerge:

A Voice of the Child Report should be ordered when it is necessary and appropriate to the determination of the best interests of the child;

- Given that assessments are, by their very nature intrusive, they should not simply be ordered as a matter of course or as part of a “fishing expedition”;
- The burden is on the party requesting the report to demonstrate that a professional opinion is needed;
- Reports should be ordered where there is a specific need for the type of information they generate, and the information would not otherwise be available because it falls within the special knowledge of the expert; and
- Special information and knowledge of the expert referred to above could include, but is not limited to, situations where there are clinical issues to be determined and/or situations where the conflict between parents makes it unlikely that the court would receive objective evidence upon which to determine the views and preferences of the child.

[11] It is not necessary to expand upon the principles outlined by Justice Jesudason.

The Evidence

[12] The parties agree the older child had his schedule of parenting time with his father interrupted for weeks in the early part of the school year beginning in September 2019 until this Court’s intervention in November 2019.

[13] The child did not visit his father over the period September to November 2019. Visits to his father's home restarted following the Court's intervention on November 4 and November 26, 2019. The former status quo was restarted as a result and the 'CRO' parenting schedule is now being followed.

[14] Ms. Irwin explains the interruption of the parenting schedule for more than two months in the early fall of 2019 on the basis of her son's refusal to attend his father's home. She tells the Court her son has reported mistreatment in the home of his father. The mistreatment she says is by both his father and stepmother, Ms. Slack.

[15] Ms. Irwin passionately argues that the children have a right to be heard on the issue of the parenting schedule and they should be heard so that their views are known. She says they will reveal the negative experiences they have in the home of Mr. Irwin and Ms. Slack if they are interviewed. Over the summer of 2019, the Department of Community Services did investigate the circumstances of the family. No Court application has resulted from their involvement.

[16] Ms. Slack testified and denied any mistreatment of the subject children (exhibit 4). She painted a very different picture of life in her home than that offered by Ms. Irwin. She testified the older child is being regularly informed of Court proceedings by Ms. Irwin and placed in the middle. She said as recently as the morning of the day of her testimony, the older child reported to her that Ms. Irwin had the evening before discussed the next day's Court proceeding.

[17] Ms. Slack's affidavit contains a list of what she claims are false allegations made by Ms. Irwin against her.

[18] She detailed her concerns that Ms. Irwin's behaviour had become less stable and more emotional. She says the children reported their mother being angry, crying and sad over the summer of 2019. She said she was threatened by Ms. Irwin in late August of 2019 at the conclusion of a swim meet in Bridgewater.

[19] Applications for peace bonds were subsequently made by both Ms. Irwin and Ms. Slack. The related hearings in Provincial Court resulted in both applications being dismissed.

[20] Ms. Irwin is also charged with uttering threats and is now subject to an undertaking. The trial is scheduled for some time in mid-winter 2020.

[21] Mr. Irwin's evidence was similar to that of Ms. Slack. He painted Ms. Irwin as untruthful and uncontrollable when it comes to issues of parenting of their children.

[22] In his affidavit (exhibit 3) Mr. Irwin says a Voice of the Child report for the children would be unreliable; would be tainted by Ms. Irwin's influence and participation in the preparation of the report is not in the best interests of the children. He repeated and expanded upon these concerns when he testified on December 12, 2019

[23] In his pre-hearing brief, Mr. MacKinnon, on behalf of Mr. Irwin, submits the "intense history of this case makes a standard Voice of the Child Report inappropriate". As an alternative, he argues that the mandate of the counsellors retained to provide attachment based therapy to the children be expanded to include a stated request that any reports of abuse by either parent or exposure of the children to domestic violence would result in both parents being so advised.

[24] The older child is scheduled to begin attachment therapy counselling in January 2020.

[25] Both Ms. Slack and Mr. Irwin have offered evidence that the older child's presentation from August to his return to his father's home on November 4, 2019 had changed dramatically and was concerning. Mr. Irwin says his son is returning to his former self but relapses to negative behavior after time with his mother.

[26] I need not comment on each of the allegations and concerns outlined by all parties to this proceeding. It is common ground that these children are the subject of significant stress with the older child exhibiting negative manifestations of his life's circumstances.

[27] Clearly, the Court is being told blatant falsehoods by Ms. Irwin or Mr. Irwin/Ms. Slack. The parties' descriptions of circumstances in their respective homes and involving the children are dramatically different and cannot both be true.

[28] Misleading the Court is concerning in and of itself. However, what is also very concerning is what the dishonesty may reveal about the emotional health of any of the parties and the negative impact a parent or step-parents' unhealthy state can have on a child's well-being.

Conclusion

[29] I am not satisfied this is an appropriate case for ordering a Voice of the Child Report.

[30] Given the extent to which these children have already been placed in the middle, I am satisfied an order requiring such a report will undoubtedly result in the children being subjected to pressure with a view to influencing their reports to an assessor. They must be spared that circumstance.

[31] For the same reason, the children's report would be unreliable.

[32] The older of the children is on the lower end of the age and maturity level when I would consider ordering a Voice of the Child Report because of the typical development and maturity of a child of that age.

[33] Ms. Irwin has not met the onus on her to persuade the Court that a Voice of the Child Report should be ordered. Her application is therefore dismissed.

[34] As stated, the attachment-based therapy is scheduled for the older child with the older child's intake appointment scheduled for late January 2020.

[35] I have considered the suggestion offered on behalf of Mr. Irwin that as a compromised response or as an alternative to a Voice of the Child Report, this counsellor explore whether circumstances in each home are negative.

[36] I have decided against making such a request of the counsellor because I do not wish to influence the therapeutic process that would otherwise occur.

[37] In addition, I believe a direction of this nature would also represent an invitation for the child to be subjected to parental influences and pressure and continue his 'life in the middle'.

[38] Finally, I am confident a professional providing the service identified will, when deemed necessary, explore a wide range of circumstances influencing a child, of which mistreatment of the child by an adult in his life would be an obvious area of inquiry.

[39] To the extent that it is achievable, it is recommended all three adults engage in a process that permits the dynamics between the homes to improve. This is a recommendation of staff employed by the Department of Community Services and one this Court strongly endorses (exhibit 6).

[40] Given the current trajectory of the older child's emotional health and the inability of the adults to achieve a state of functional interaction, the Court may be ultimately faced with the otherwise undesirable prospect of significantly limiting the time the older child has with one parent or the other.

[41] This matter is adjourned without a date. Mr. Irwin's 'application' to change the parenting regime will be addressed if such a request of the Court is made on or before the last business day of January 2020. Failing such a request, it is dismissed.

[42] A Cost Decision will follow this application if such is requested by either party provided the request is received on or before the last business day of January 2020. In the absence of a request, the parties are deemed to accept that each should bear their own costs.

ACJ