SUPREME COURT OF NOVA SCOTIA
(Family Division)
Citation: Irwin v. Irwin, 2018 NSSC 261

Date: 20181130
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
Heard:	September 10, 11 and 12, 2018 in Halifax, Nova Scotia
Issues:	1. Has a change of circumstances as that term is used in s.17(5) of the *Divorce Act* been established, i.e. does this Court have jurisdiction to consider the subject application? 2. Have the conditions of the review clause in the Corollary Relief Order been met? If so, does the review justify a change in the parenting arrangement?
Summary:	Ms. Irwin sought to vary the parties 'CRO'. Mr. Irwin argued there had not been a change of circumstance as that phrase is used in the Divorce Act and further, that the conditions in the 'review' clause in the 'CRO' had not been met because the family conflict had not been significantly reduced and the children had not normalized their relationship with each parent. The Court found no change of circumstances had occurred. It also concluded the review clause of the CRO did not permit a change in the parenting arrangement.
Keywords:	Best interests; change of circumstances; review; CRO; variation
Legislation:	*Divorce Act, R.S.C. 1985, c.3 (2nd Supp.)*
Cases Considered:	*Salah v. Salah, 2013 NSSC 308 [affirmed 2014 NSCA 36]* *L.M.P. v. L.S., 2011 SCC 64* *Dedes v. Dedes, 2015 BCCA 194* *S.A.F. v. M.H.M., 2016 BCCA 503* *Gibney v. Conohan, 2011 NSSC 268*

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Counsel: Janet M. Stevenson, Counsel for Gerald Irwin
Pavel Boubnov, Counsel for Kimberly Irwin

By the Court:

Introduction

[1] The parties are the parents of two children born April 14, 2007 and December 26, 2008. The Court is asked to vary the parenting clauses of their Corollary Relief Order 'CRO'.

[2] The parties separated in 2011 and divorced in December 2015. This family has been characterized as high conflict. The parties have been regularly before the Court. In January 2015 following a hearing, Justice MacDonald changed custody (primary care) of the children because of the difficulties the family was managing. Justice MacDonald placed the children in the sole custody of the father. The mother was granted supervised parenting time.

[3] The final hearing scheduled for December 2015 was converted to a settlement conference. A consent 'CRO' resulted from that conference and has governed the parties' parenting arrangement since.

[4] This variation application was first before me on November 29, 2017. A Conference Memorandum details the reasons for the appearance and the outcome of the conference.

[5] Paragraphs 6-8 of the Conference Memorandum detail the most recent legal history of this proceeding:

> 6. In 2017, Mr. Irwin filed an application seeking to have the child support obligation of Ms. Irwin changed to reflect what he believed to be a higher income level than referenced in the order flowing from the 2015 settlement conference. In response, Ms. Irwin filed an application claiming undue hardship and asked that she be relieved of the obligation to pay the child support quantified in the December 2015 order. In addition, Ms. Irwin sought a change in the parenting arrangement, increasing that arrangement by three days per month in her favour, which she believes would result in a 50/50 parenting schedule and a reduction in her child support obligation.
>
> 7. On November 29, 2017, the Court directed that the matter proceed in stages. The first stage is scheduled for February 21, 2018, from 10:00 a.m. to 12:30 p.m. One half day has been set aside for an application by Mr. Irwin to strike portions of an affidavit filed by Ms. Irwin on or about September 5, 2017.
>
> 8. A second half day has been set aside, April 11, 2018, from 10:00 a.m. to 12:30 p.m. The purpose of the second half day is to determine if there is a change of circumstances that would permit the Court to consider the application by Ms. Irwin to vary the parenting arrangement and secondly, whether or not a change of circumstances is necessary and also to permit the Court to consider an undue hardship application of Ms. Irwin.

[6] In addition, an order varying child support obligations flowed from discussions on November 29, 2017. Clauses 1, 3 and 4 of the parties' 2016 Corollary Relief Order 'CRO' were varied by consent. The CRO now provides as follows:

> 1. Commencing on January 1, 2018 and each month thereafter as long as the current parenting arrangement is in place, Kimberly Irwin shall pay to Scott Irwin in accordance with the Nova Scotia table of the Federal Child Support guidelines the amount of $1,150 per month in child support.
>
> 3. Kimberly Irwin shall pay to Scott Irwin directly by certified cheque, bank draft or email transfer no later than December 31, 2017 the amount of $2,000 in full and final satisfaction of Scott Irwin's claim for a contribution to retroactive s.7 expenses for the cost of children's extracurricular activities. Upon this payment being made, Kimberly

> Irwin shall have no obligation to contribute to the cost of the children's extracurricular activities.
>
> 4. Scott Irwin's application for retroactive contribution by Kimberly Irwin to s.7 expenses for the cost of the children's counselling shall proceed.

[7] In advance of the February 21, 2018 appearance, Ms. Irwin filed a Notice of Application on February 16, 2018 purportedly seeking an order to set aside the 'settlement agreement' signed January 8, 2018 (reflecting the in Court discussions on November 29, 2017).

[8] On February 21, 2018 the Court learned the application was essentially to set aside the consent order which flowed from the November 29, 2017 appearance before me, which order issued January 8, 2018.

[9] On February 21, 2018, all agreed the amended order flowing from November 29, 2017 would remain unchanged. Ms. Irwin gained an appreciation of the limited legal effect of the subject 'new' order on the parties' Corollary Relief Order dated 2016 (flowing from the December 2015 Settlement Conference).

Striking Affidavit

[10] On February 21, 2018, the parties supplemented their written submissions with oral submissions relevant to the application of Mr. Irwin to strike paragraphs of Ms. Irwin's affidavit filed September 5, 2017.

[11] By written decision dated March 9, 2018, the Court ruled on the application to strike parts of Ms. Irwin's September 5, 2017 affidavit (2018 NSSC 48).

[12] The parties appeared for a further conference on March 20, 2018. Ms. Irwin confirmed at that time that an application to seek relief from the payment of child support on the basis of an undue hardship claim was being abandoned.

[13] On March 20, 2018, Ms. Irwin further confirmed that the essence of her argument is that changes of circumstances have occurred, which changes warrant the Court revisiting the parenting arrangement with respect to the two children. The circumstances of those changes are summarized in her affidavit filed September 5, 2017, on the last page, being page 13. A hearing on that issue was set for April 11, 2018 for one-half day. For a variety of reasons, it did not occur until September 10 and 11, 2018.

[14] As stated, the parenting order which Ms. Irwin now seeks to vary flows from a December 2015 settlement conference with Justice MacDonald. Although the parties agreed to have the December 2015 settlement conference proceed as a binding settlement conference, that was not necessary. A consent 'CRO' was achieved and issued in early 2016.

[15] In December 2015 the parties agreed the parenting arrangement outlined in the January 2015 interim order would be changed and the revised arrangement would be incorporated in the 'CRO'. The 'CRO' provides for regular parenting time as follows:

> 6. Commencing January 15, 2016, Kimberly Irwin shall have access with the children every second weekend from Friday afternoon until Monday morning at times (depending on the children's circumstances) to be determined as follows:
>
> - Beginning on Friday with pickup at the sitters at the time when Kimberly Irwin is finished for the day or the children's attendance at a summer camp or other holiday program is finished for the day, or
>
> - At the time agreed by the parents, to be no later than 4:00 p.m., if the children are not in school or in attendance at a summer camp, or other holiday program, or
>
> - Ending on Monday at the commencement time of the children's school day, or, when school is not in session, the commencement time required for the children's attendance at a summer camp or other holiday program or at the facility or residence of the child care provider generally at 8:30 a.m.
>
> 7. Commencing Wednesday, January 6, 2016, and then every second Wednesday until Thursday morning, Kimberly Irwin shall have access with the children at times (depending on the children's circumstances) to be determined as follows:
>
> - Beginning on Wednesday with pickup at the sitters at the time when Kimberly Irwin is finished for the day or the children's attendance at a summer camp or other holiday program is finished for the day, or
>
> - At a time agreed by the parents, to be no later than 4:00 p.m., if the child is not in school or in attendance at a summer camp, or other holiday program or with the children's care provider, or
>
> - Ending on Thursday at the commencement of the children's school day, or, when school is not in session, the commencement time required for the children's attendance at a summer camp or other holiday program or at the facility or residence of the child care provider generally at 8:30 a.m.

- Unless the children's counsellor expresses a concern, Kimberly Irwin's parenting time shall increase to every Wednesday night overnight commencing the first week of February 2016.

- Unless the children's counsellor expresses a concern, Kimberly Irwin shall have an additional overnight per month to occur on the last Thursday the week before the last weekend the children are in Kimberly Irwin's care commencing April 28, 2016.

8. Neither parent shall video or audio record the children except for recreational purposes.

[16] There are numerous additional clauses in the 'CRO' that address parenting issues that may arise but for the purpose of this decision, do not need to be reproduced herein.

Court's Jurisdiction to Vary the Final 'CRO'

[17] Ms. Irwin wishes to restructure the parenting plan and to have equal parenting time with the children on a week about basis. Mr. Irwin is opposed to changing the existing parenting plan and argues there has not been a change of circumstances conferring jurisdiction on this Court to consider Ms. Irwin's application. One issue to be decided is whether this Court has jurisdiction to consider Ms. Irwin's application to vary the parenting arrangement pursuant to s.17 of the *Divorce Act*.

[18] At the commencement of this hearing, the Court drew the parties' attention to clause 43 of the 'CRO' and all agreed the effect of this clause would be considered as part of this hearing

[19] Clause 43 of the final 'CRO' provides for a review as follows:

43. The parties shall appear no sooner than October 1, 2016 for a review. The purpose of the review is to determine:

(a) Whether the children have normalized their relationship with each parent;
(b) Whether the conflict between the parties has been eliminated or substantially reduced so that they can move to a shared parenting arrangement; and
(c) The appropriate amount of child support based on the parenting plan.

44. The parties shall not be required to file an application or a motion in order to have the review set down.

[20] The significance of this clause of the 'CRO' when determining the jurisdiction of the Court to vary the final 'CRO' is the subject of commentary in the following. Clause 43 of the 'CRO' will be discussed in the context of whether the Court has jurisdiction to consider the application to vary the final Corollary Relief Order within the scope of a review agreed to and provided for by the 'CRO' itself.

[21] The initial focus of the parties' attention had been whether a change of circumstances as defined by the *Divorce Act* was shown.

[22] The *Divorce Act*, R.S.C. 1985, c.3 (2nd Supp.) s.17(5) and s.17(9) provide:

> Factors for custody order
>
> 17(5) Before the Court makes a variation order in respect of a custody order, the Court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the Court shall take into consideration only the best interests of the child as determined by reference to that change.
>
> . . . . .
>
> Maximum Contact
>
> 17(9) In making a variation order varying a custody order, the Court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the Court shall take into consideration the willingness of that person to facilitate such contact.

[23] Justice Beaton had occasion to discuss the legal effect of these provisions when the Court is asked to vary the parenting arrangement outlined in a final 'CRO' or a 'CRO' already varied. Her review of the law is a thorough and concise overview of the meaning of s.17(5) and (9) of the Divorce Act. Beginning at paragraph 15 she said in *Salah v. Salah*, (2013 NSSC 308) [affirmed 2014 NSCA 36]:

> [15] The Court must be satisfied that there has been a material change in the condition, means, needs, or other circumstances since the making of the May 2011 order. That change must be in relation to the child, not the parents. And if such a change is found to

exist, any changes I might make to the order must be done only through the lens of what is in the best interests of Joseph as opposed to what either party might perceive as being in their own best interests.

[16] What does it mean to speak of a material change in circumstances? Guidance about that is found in any number of decisions, including the Supreme Court of Canada's decision in Gordon v. Goertz. Recently in this court, Justice Jollimore provided a helpful summary of Justice McLachlin's instructions in Gordon v. Goertz., found at paragraphs five, six, and seven of Legace v. Mannett, reported at 2012 NSSC 320 (CanLII) wherein Justice Jollimore stated, and I quote:

> (5) In an application to vary a parenting order, I am governed by Gordon v. Goertz., 1996 CanLII 191 (SCC). At paragraph 10 of the majority reasons in Gordon v. Goertz, then Justice McLachlin instructs me that before I can consider the merits of a variation application, I must be satisfied there has been a material change in the child's circumstances that has occurred since the last custody order was made.
>
> (6) At paragraph 13, Justice McLaughlin was more specific in identifying the three requirements that must be satisfied before I can consider an application to vary a parenting order. The requirements are (1) There must be a change in the condition, means, needs, or circumstances of the child or the ability of the parents to meet the child's needs (2) The change must materially affect the child; and (3) The change was either not foreseen or could not have been reasonably contemplated by the judge who made the initial order.
>
> . . . . .

[24] Justice Beaton continued:

[17] The Court's reflection on that observation by Justice Jollimore of course then leads to the next question which is: what does it mean to talk about the best interests of a child? The concept of "best interests" was discussed at some length by the Supreme Court of Canada in Young v. Young. In a decision by my colleague, Justice Dellapinna in Tamlyn v. Wilcox, 2010 NSSC 266 (CanLII) he referenced the Young case and said as follows:

> In Young v. Young, (1993) 4 S.C.R.3 the Supreme Court elaborated on the best interests' test. At paragraph 17, the Court stated:
>
> > "The test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules designed to resolve certain types of disputes in advance may not be useful. Like all legal tests, the best interests test is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and

> prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do."

[25] A preliminary question which must be answered is what is the change following the issuance of the order sought to be varied? Does the change qualify as a change in circumstances for the purpose of s.17 of the *Divorce Act*? If the parties contemplated that change when the order sought to be varied issued, can it nevertheless be a material change of circumstances? What if the change was only objectively foreseeable but not considered at the time of the issuance of the order sought to be varied?

[26] In the view of Professor Rollie Thompson, caselaw dealing with the meaning of 'material change' is described as blurring the distinction between an objective test and a subjective one. The Court in *Dedes v. Dedes*, 2015 BCCA 194 and *S.A.F. v. M.H.M.*, 2016 BCCA 503 discussed the distinction between whether a claimed material change is actually a material change within the meaning of s.17 of the *Divorce Act*. The answer often turns on whether the alleged change was actually contemplated as opposed to reasonably foreseeable.

[27] The Supreme Court in *L.M.P. v. L.S.*, 2011 SCC 64 described a material change as change that if known, would have likely resulted in different terms. I am satisfied I must decide if the change(s) identified occurred and were contemplated. The Supreme Court in *L.M.P.* summarized the threshold for variation:

> [32] That "change of circumstances", the majority of the Court concluded in Willick, had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" (p. 688). G. (L.) confirmed that this threshold also applied to spousal support variations.
>
> [33] The focus of the analysis is on the prior order and the circumstances in which it was made. Willick clarifies that a court ought not to consider the correctness of that order, nor is it to be departed from lightly (p. 687). The test is whether any given change "would likely have resulted in different terms" to the order. It is presumed that the judge who granted the initial order knew and applied the law, and that, accordingly, the prior support order met the objectives set out in s. 15.2(6). In this way, the Willick approach to variation applications requires appropriate deference to the terms of the prior order, whether or not that order incorporates an agreement.
>
> [34] The decisions in Willick and G. (L.) also make it clear that what amounts to a material change will depend on the actual circumstances of the parties at the time of the order.

> [35] In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances (see Marinangeli v. Marinangeli (2003), 2003 CanLII 27673 (ON CA), 66 O.R. (3d) 40, at para. 49). Certain other factors can assist a court in determining whether a particular change is material. The subsequent conduct of the parties, for example, may provide indications as to whether they considered a particular change to be material (see MacPherson J.A., dissenting in part, in P. (S.) v. P. (R.), 2011 ONCA 336 (CanLII), 332 D.L.R. (4th) 385, at paras. 54 and 63).

[28] Once a material change is found, the Court should determine what, if any, change is warranted. When the order sought to be varied is a parenting order, an assessment of the best interests of the subject child must be undertaken as part of the analysis to determine the impact of a change of circumstance once found to exist.

[29] The analysis herein is influenced by clause 43 of the final 'CRO' which provided for the Court to have jurisdiction to consider Ms. Irwin's application to vary the parenting arrangement within the ambit of a review should the stated preconditions of clause 43 be met. Parties may identify a certain type of change which will give rise to jurisdiction to vary a Court order. The Court in *L.M.P.* approved of such an approach:

> [39] Parties may either contemplate that a specific type of change will or will not give rise to variation. When a given change is specified in the agreement incorporated into the order as giving rise to, or not giving rise to, variation (either expressly or by necessary implication), the answer to the Willick question may well be found in the terms of the order itself. That is, the parties, through their agreement, which has already received prior judicial approval, have provided the answer to the Willick inquiry required to determine if a material change has occurred under s. 17(4.1). Even significant changes may not be material for the purposes of s. 17(4.1) if they were actually contemplated by the parties by the terms of the order at the time of the order. The degree of specificity with which the terms of the order provide for a particular change is evidence of whether the parties or court contemplated the situation raised on an application for variation, and whether the order was intended to capture the particular changed circumstances. Courts should give effect to these intentions, bearing in mind that the agreement was incorporated into a court order, and that the terms can therefore be presumed, as of that time, to have been in compliance with the objectives of the Divorce Act when the order was made.

[30] Should the Court not otherwise find a material change of circumstance upon which to base jurisdiction to consider an application to vary the parenting order, clause 43 may be available to support Ms. Irwin's claim that this Court has jurisdiction to consider her application to vary the parenting arrangement.

Evidence

[31] It is necessary to review the circumstances that existed or were known or contemplated at the time the parties entered the December 2015 consent order, 'CRO'.

[32] As of December 2015, Mr. Irwin was nearing the end of a one-year period during which he had sole custody of the children. He and Ms. Irwin continued to be in a state of high conflict and the children had over the preceding year shown some recovery from the effects of 'marital' conflict in their lives. Both parties agree the conflict between them has had significant negative effects on the children.

[33] In December 2015 the parties contemplated a further recovery in the well-being of the children as a result of the parenting plan in the 'CRO'.

[34] As stated, clause 43 of the consent 'CRO', after October 1, 2016 the parenting provision of the 'CRO' could be reviewed. In the event the family conflict decreased significantly, and the children had normalized their relationship with each parent, the parenting arrangement could be reviewed with a view to determining if shared parenting was appropriate.

[35] In her affidavit filed September 5, 2017 (exhibit 1), Ms. Irwin details the then ongoing conflict with Mr. Irwin. Within a month of concluding the final 'CRO' in December 2015, the parties were in conflict and the police became involved. Throughout (exhibit 1), Ms. Irwin provides a detailed list of complaints about Mr. Irwin. She accuses him of not involving her in decisions about the children; of not keeping her informed of their ongoing circumstances and not supporting their relationship with her. The police were once again involved in August of 2016. The last page of her September 5, 2017 affidavit contains the following:

> 1. The status quo is not working for the children. The provision of the 'CRO' have not been met. My ability to participate in the children's lives is being severely restricted. My input into decision making is being blocked or ignored. I am being told that I cannot adequately care for the children where there are no grounds for this. All professionals involved with the children have encouraged my time and relationship with the children, stressing the importance of my contribution to their development. Conversely, Mr. Irwin has lied to professionals and misrepresented what they have said. My family is being treated as unimportant and time with us is not being supported but rather, discouraged. Inappropriate conversations and materials are

being shared with the children, affecting their emotional health.

[36] Mr. Irwin denies the charges made by Ms. Irwin. He detailed his efforts to do the opposite to what has been alleged by Ms. Irwin. He testified any restrictions placed on Ms. Irwin's contact with the children flowed from the Court orders. He testified that he supports the children having a good relationship with their mother.

[37] In his thorough summary, on behalf of Ms. Irwin, of the case for finding a change of circumstances, Mr. Boubnov detailed what, in my view, are the major points to be made in favour of finding that such a change has occurred. Mr. Boubnov contrasts the circumstances that existed in December 2015 and earlier to those which exist today.

[38] Mr. Boubnov offers the following narrative for the period before the 'CRO':

He points to the following:

- both children were caught in a conflictual divorce
- access was supervised at some point for each parent
- the children required counselling and a significant involvement in attachment-based therapy
- the children had therapy
- prior to January 2016, the family had significant involvement with the police and DCS as a result of numerous referrals by both
- communication issues prevailed
- parenting time was much less

[39] Mr. Boubnov says these are some of the points that emerge from the evidence and then asks, what has changed? He says changes include the following:

- there was tremendous conflict in 2015 but not now
- there have been changes in custodial arrangements, Ms. Irwin now has more time with the children
- multiple referrals to professionals are not occurring
- the degree of conflict is less – police and DCS have not been involved in two (2) years
- parenting time has increased for Ms. Irwin
- both parents have re-partnered
- both parents have attended counselling
- the children are under less stress
- access is not supervised

- the children are more settled
- both parties recognize they have to co-parent
- Ms. Irwin is very close to 40% currently, the children are benefiting

[40] Mr. Boubnov says the three (3) part test of *Gordon v. Goertz* (supra paragraph 23) is satisfied and a change in the circumstances of the children has been shown. He says there has been both a change in the condition, means, needs and circumstances of the children and in the ability of the parents to meet the children's needs. Mr. Boubnov says the change has materially affected the children and the change was not foreseen or reasonably contemplated at the time of the initial order.

[41] Finally, Mr. Boubnov says the review provided by clause 43 of the 'CRO' establishes the children did normalize their relationship with each parent and the parents have eliminated or substantially reduced conflict between them.

[42] In response, Ms. Stevenson on behalf of Mr. Irwin, points out that Ms. Irwin wants week on, week off parenting and says she also wants final decision making.

[43] Ms. Stevenson correctly points out that pursuant to the *Divorce Act*, the onus is on Ms. Irwin to show a material change of circumstance. In examining whether Ms. Irwin has done so, Ms. Stevenson says it is important to look at the timeline since 2015.

[44] She reviews the various contested issues that the Court has been required to resolve since 2015.

[45] Turning to the evidence, Ms. Stevenson states the following:

- Ms. Irwin believes Mr. Irwin guides what children say and clearly does not trust him
- Ms. Irwin claims Mr. Irwin prevented Mr. Belgrade, a counsellor, from having contact with her
- given the last page of Ms. Irwin's September 2017 affidavit it is difficult to conclude the conflict has reduced substantially
- Ms. Irwin has not been able to move on
- the information on the children's well-being is minimal
- in September 2017 Ms. Irwin expressed the view the children were being alienated and on cross examination confirmed this belief – this is inconsistent with a view that her relationship with the children has normalized, and conflict has been reduced
- in her evidence, Ms. Irwin attacked Mr. Irwin at every opportunity – including blaming Mr. Irwin for the fact J. got on the wrong bus

- in her more recent evidence, that is her June 2018 affidavit, Ms. Irwin says she is terrified of the power Mr. Irwin holds over the children
- as for children doing better because they have more time with Ms. Irwin, it is Mr. Irwin's view this is because of Mr. Irwin's parenting
- in June 2018 Ms. Irwin says her relationship has suffered because of comments by Mr. Irwin and his partner
- these parties communicate only in writing
- despite evidence to the contrary, Ms. Irwin says conflict has diminished
- in the final paragraph of her affidavit, Ms. Irwin says the only solution is that they not have contact
- in August 12, 2018, Ms. Irwin wrote Mr. Irwin "K. is experiencing stress when with you"
- Ms. Irwin's communication is full of accusations, and her focus is on equal parenting time, not the children's best interests
- Ms. Irwin makes the most negative conclusions about Mr. Irwin
- Ms. Irwin has had complete access to the schools after the settlement conference
- In May 2018 Ms. Irwin blamed him for not knowing the soccer schedule
- immediately after the settlement conference, Ms. Irwin knew she had access to professionals but denied knowing this
- Ms. Irwin has not requested they attend counselling

[46] Ms. Stevenson argues Ms. Irwin has not shown a change of circumstances. She says the clause 43 review of the 'CRO' has a narrow focus and on the evidence, its application is not triggered. Conflict is not eliminated or substantially reduced nor has the relationship of the children with the parents been normalized

[47] Finally, turning to the children's circumstances today, Ms. Stevenson says the children are stabilized. The oldest child was involved with professionals but is not currently. She argues the children have memories of rotating parents and interviews and have been subjected to utter chaos for five years and it is not in their best interests for their parenting structure to be changed.

Conclusion

[48] Turning to whether there has been a change in circumstances within the meaning of s.17 of the *Divorce Act*, I am satisfied that there has not been.

[49] I am satisfied there has been some lessening of the involvement of the police and child protection authorities. Safeguards are now in place to minimize conflict as contemplated by the December 2015 order and to a significant degree,

the futility of involving the police and child protection authorities is now well known by the parties.

[50] The positive change in the parties' relationship has not been significant. Ms. Irwin, in the final page of her September 5, 2017 affidavit said as much. Over the past year to September 2018, Ms. Irwin continued to interpret all events involving the children through a distorted narrative that casts Mr. Irwin as a villain. An example is her blaming Mr. Irwin for her claimed lack of knowledge of the 2018 game schedule for one of the children's soccer team. She did, if fact, have access to the information she complained Mr. Irwin did not provide.

[51] Her September 2017 affidavit contains a narrative which is significantly consistent with how she views her relationship with Mr. Irwin even today.

[52] For the same reasons, I am satisfied that the clause 43 review provided for in the 'CRO' does not permit the Court to vary the parenting arrangement for the children as requested.

[53] In the language of clause 43, the Court must ask:

> Have the children normalized their relationship with each parent? Has the conflict between the parties been eliminated or substantially reduced so that they can move to a shared parenting arrangement?

[54] I must answer this question with the conclusion that the children's relationship with each parent has not normalized. The conflict between the parents has not been substantially reduced.

[55] I am not satisfied the children's circumstances meet the threshold requirement as a change in circumstances forming a basis of the Court's jurisdiction to consider an application to vary the parenting arrangement provided for in the 'CRO'.

[56] An improvement in the children's well-being was contemplated by the order itself. The parenting structure mandated by the 'CRO' was meant to accomplish an improved situation for the children. In my view, the decision of Justice MacDonald in January 2015 to change custody and the December 2015 decision of the parties themselves to continue primary care of the children with Mr. Irwin and to provide for the same in the final 'CRO', was premised on the contemplated improvement in the children's well-being that would follow.

[57] This improvement cannot now be the basis of an application to vary pursuant to s.17(5) of the *Divorce Act* on the basis that the children's circumstances have changed, and the improvement was not contemplated. I have already stated the review clause does not justify a change.

[58] As stated, Section 17(5) of the *Divorce Act* requires that in making a variation order, the Court shall take into consideration only the best interests of the child as determined by reference to that change.

[59] Even if I am mistaken in my conclusion that no material change of circumstance has been made out as required by s.17(5) of the *Divorce Act*, the evidence does not justify a change in the parenting structure. Shared parenting on the basis of week about parenting is sought by Ms. Irwin. I have considered the principles discussed in *Gibney v. Conohan*, 2011 NSSC 268 in concluding the children's best interests are not served by changing the parenting structure. The ongoing conflict between the parents weighs strongly against a shared parenting arrangement.

[60] I am satisfied that an assessment of the best interests of the children requires that this Court not change the parenting regime now in place. For the first time since 2011 these children have seen some reduction in the stress in their lives. The 'CRO' is accomplishing what was hoped for.

ACJ