

SUPREME COURT OF NOVA SCOTIA
(Family Division)

Citation: Irwin v. Irwin, 2018 NSSC 48

Date: 20180309
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 29, 2017 and February 21, 2018, in Halifax, Nova Scotia

Issues: Should parts of the Respondent's affidavit be struck as required by Rule 39?, Rule 5? and Rule 59.

Summary: The Court struck some sentences and paragraphs as irrelevant. Other paragraphs were not struck because they were relevant and/or were evidence of the state of belief of Ms. Irwin.

Keywords: Relevance; hearsay.

Legislation: *Civil Procedure Rules*, Rule 39; Rule 5.17; and Rule 59.40

Cases Considered: *Moore v. Moore*, 2013 NSSC 175
Waverly (Village Commissioners v. Nova Scotia (Minister of Municipal Affairs)) [1993] N.S.J. 151
Halifax (Regional Municipality) v. Nova Scotia Union of Public and Private Employees, Local 13, 2009 N.S.J. 61, 2009 NSCA 18

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Counsel: Janet M. Stevenson, Counsel for Gerald Irwin
Kimberly Irwin, Self-Represented

By the Court:

Introduction

[1] The parties are the parents of two children born April 14, 2007 and December 26, 2008.

[2] This separated and divorced family has been characterized as high conflict. The parties have been regularly before the Court. In January 2015, Justice MacDonald changed custody (primary care) of the children because of the difficulties the family was managing. Several Judges have been involved in this file, notwithstanding the Court’s efforts to have the file remain with one Judge. Scheduling challenges have made that impossible.

[3] The current matter was first before me on November 29, 2017. A Conference Memorandum details the reasons for the appearance and the outcome of the conference.

[4] Paragraphs 6-8 of that Memorandum read as follows:

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.

[5] In addition, an order flowed from discussions initiated on November 29, 2017. Clauses 1, 3 and 4 of that order varied the parties' 2016 Corollary Relief Order 'CRO' and provide 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.

[6] 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.

[7] As a result of discussions on February 21, 2018 the Court learned the application was essentially to set aside the consent order which followed the November 29, 2017 appearance before me.

[8] On February 21, 2018, all agreed the order would remain as is. Ms. Irwin gained an appreciation of the limited legal effect of the subject 'new' order on the parties' Corollary Relief Order dated 2016.

[9] Even if I am mistaken as to Ms. Irwin having abandoned her argument, I am satisfied there is no basis upon which to set aside the January 8, 2018 order amending the 'CRO'. I have considered Ms. Irwin's submissions and the caselaw submitted before coming to this conclusion.

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] In support of his application, Mr. Irwin cites Rule 39 governing the use of an affidavit and a Judge's authority to strike an affidavit. He also relies upon Rule 5.17 which governs the use/admissibility of hearsay as part of an affidavit. Finally, Mr. Irwin cites Rule 59.40 which incorporates by reference the two preceding rules dealing with evidence into the procedures of the Supreme Court (Family Division) unless Rule 59 provides differently.

[12] I have reviewed these Rules and associated caselaw including the decisions of Justice Jollimore in *Moore v. Moore*, 2013 NSSC 175; the decision of Justice Davison in *Waverly (Village Commissioners v. Nova Scotia (Minister of Municipal Affairs))* [1993] N.S.J. 151 and *Halifax (Regional Municipality) v. Nova Scotia Union of Public and Private Employees, Local 13*, 2009 N.S.J. 61, 2009 NSCA 18.

[13] Mr. Irwin has challenged the admissibility of a significant number of paragraphs making up Ms. Irwin's affidavit filed September 5, 2017.

Caselaw Discussed

[14] In plain language, Justice Jollimore, at paragraph 10 in *Moore, supra* concisely outlined the obligation of the Court when reviewing affidavits:

[10] Affidavits are governed by Civil Procedure Rule 39. Rule 39.04(1) says that I may strike an affidavit containing information that isn't admissible, or evidence that isn't appropriate to the affidavit. Rule 39.04(2) states that I must strike a part of an affidavit containing either of the following:

(a) information that isn't admissible, such as an irrelevant statement or a submission or plea;

(b) information that may be admissible but for which the grounds of admission have not been provided in the affidavit, such as hearsay admissible on a motion but not supported by evidence of the source and belief in the truth of the information.

The Objections

[15] Mr. Irwin provided a chart in which he detailed, in numerical order, his objections to the contents of the paragraphs and/or accompanying exhibits of Ms. Irwin's September 5, 2017 affidavit. Ms. Irwin prepared a similar chart in response.

[16] Mr. Irwin's chart is headed: "Paragraphs, Sentences and Exhibits to be struck Related to Change of Circumstances, parenting Issues and Conflict, Emotional Well-Being of the Children". This goes to the issue of the relevance of the paragraphs or parts thereof.

[17] The affidavit of Ms. Irwin has an unusual numbering system. Page numbers have been added by hand to the Court copy by me because paragraph numbers on these pages are repeated. As a result, to find a referenced paragraph, one needs both the paragraph number and the page on which it appears.

[18] The following is my decision in response to Mr. Irwin's application to strike parts of Ms. Irwin's affidavit:

1. **Paragraph 1, page 5**

Ms. Irwin essentially complains that Mr. Irwin frustrated her efforts to have attachment based therapy with the children since the 2016 CRO and the children and her relationship with them has suffered.

To the extent that the ‘post’ CRO evidence goes to this point, it is relevant and admissible. In other respects, it will not be considered.

2. **Paragraph 2, page 6**

Ms. Irwin expresses the conclusion and her belief that the children were not permitted to speak to the counsellor alone and the children were guided by Mr. Irwin. The objection is that there is no basis offered for these conclusions. That is a matter for cross-examination and goes to weight. The statement of belief itself is admissible.

3. **Paragraph 3, page 6**

Ms. Irwin says she was denied access to the counsellor in violation of the CRO. The objection of Mr. Irwin is that this evidence does not reflect the provisions of the CRO and is lay opinion. The objection does not go to admissibility but to weight. The statement itself, if true, is relevant. The truth of the statement is a matter for the trial.

4. **Paragraph 4, page 6**

Ms. Irwin says Mr. Irwin unilaterally chose a counsellor, one whose cost is not covered by insurance and this was an obstacle to her increasing her parenting time. Mr. Irwin objects to this evidence on the basis that there is no evidentiary basis for the charge of unilateral action and whether the service was covered by insurance is a matter of hearsay.

Conclusion: Ms. Irwin’s belief is admissible and the basis for that belief is a matter for cross-examination and goes to weight. The issue being addressed is relevant.

5. **Paragraph 5, page 6**

Ms. Irwin complains that the counsellor did not contact her for 18 months and further that Mr. Irwin misrepresented the recommendations of the counsellor. Mr. Irwin says the events complained of pre-dated the CRO and certain exhibit B referenced, being text messages that are not relevant.

Conclusion: To the extent the evidence is from a period before the CRO, it will not be considered.

6. **Paragraph 6, page 6**

Ms. Irwin says Mr. Irwin has ignored the pickup arrangement in the CRO and the 2015 decision of the Court. Mr. Irwin asks to strike this because the evidence does not reflect the CRO.

Conclusion: This observation of Ms. Irwin may stay. The truth of it is a matter for trial and or submission following the trial.

7. **Paragraph 7, page 6**

Ms. Irwin says Mr. Irwin unilaterally changed the pick-up of the children from the sitter contrary to the parties' agreement. Mr. Irwin objects to this evidence on the basis that it does not reflect the CRO.

Conclusion: This observation of Ms. Irwin may stay. The truth of it is a matter for trial and or submission following the trial.

8. **Paragraph 8, page 6**

Ms. Irwin says Mr. Irwin denied her the opportunity to contact third parties serving the children contrary to the CRO. Mr. Irwin says this paragraph and the associated 46 unnumbered pages contains inaccurate assertions, lay opinion and hearsay.

Conclusion: This observation of Ms. Irwin may stay. The truth of it is a matter for trial and or submission following the trial.

9. **Paragraph 9, page 7**

Ms. Irwin says Mr. Irwin and Ms. Slack made certain reports about Ms. Irwin to the IWK staff.

Mr. Irwin objects to this evidence because it is hearsay.

Conclusion: This paragraph will be struck in its entirety. It is a matter that is permissible for cross-examination by Ms. Irwin, however.

10. **Paragraph 10, page 7**

Ms. Irwin says she was not included by Mr. Irwin in certain meetings concerning the placement of their son at school.

Mr. Irwin objects to this evidence because it is hearsay and not supported by the evidence.

Conclusion: It is permissible as evidence of Ms. Irwin's belief and will not be considered for other purposes. However, it is potentially a matter permissible for cross-examination by Ms. Irwin.

11. **Paragraph 11, page 7**

Ms. Irwin says she was not notified of a number of times the children attended the emergency department at the IWK.

Mr. Irwin objects to this evidence because it contradicts Ms. Irwin's other evidence and contains assertions not supported by the evidence.

Conclusion: Whether the evidence supports the conclusions put forward is a matter for the hearing. This paragraph will not be struck.

12. **Paragraph 12, page 7**

Ms. Irwin says Mr. Irwin has spoken negatively of her to the children and Mr. Irwin shared adult issues with the children or in circumstances where the children would become informed of same.

Mr. Irwin objects to this evidence because it is vexatious and frivolous, contains hearsay.

Conclusion: To the extent the paragraph offers direct knowledge of Ms. Irwin that Mr. Irwin has spoken negatively of her and exposed the children of adult issues, the text will remain. Matters outside Ms. Irwin's knowledge will not be considered.

13. **Paragraph 13, page 7**

Ms. Irwin says Mr. Irwin prevented communication between their two sons between January 2015 and August 2015.

Mr. Irwin objects to this evidence because it pertains to events that pre-date the CRO.

Conclusion: The court strikes paragraph 13, page 7 and the accompanying exhibit R which is 60 pages long.

14. **Paragraph 14, page 7**

Ms. Irwin says Mr. Irwin continues to make accusations of misconduct against Brett and accuses him of mistreating the children.

Mr. Irwin objects to this evidence because it is lay opinion and he says the assertions are not supported by the evidence.

Conclusion: Her direct knowledge of accusations by Mr. Irwin is admissible. Her reliance on the report of Dr. Holt is not, given Dr. Holt will not be a witness.

15. **Paragraph 15, page 7**

Ms. Irwin says Brett has suffered from certain accusations and she purports to explain Brett's behaviour.

Mr. Irwin objects to this evidence because it is lay opinion.

Conclusion: Dr. Holt's views and opinions are not before the Court and will not be considered. A certain level of lay opinion is permitted when it concerns a parent's observation of a child's behaviours. This latter evidence will be permitted.

16. **Paragraph 16, page 8**

Ms. Irwin says Mr. Irwin has a criminal record for a number of offences and she includes police records.

Mr. Irwin objects to this evidence because it pertains to events that pre-date the CRO, contains irrelevant assertions and the accompanying exhibit comprises 30 unnumbered pages.

Conclusion: The objection is supported. This paragraph is struck in its entirety.

Parenting Issues and Conflict

17. **Paragraph 1-8, pages 8-9**

Ms. Irwin in paragraphs 1-8 on pages 8-9 purports to offer evidence of the parenting issues and the parents conflicts and efforts to minimize that conflict. She does offer numerous negative observations of Mr. Irwin in the course of doing so.

Mr. Irwin objects to the evidence contained on pages 8 and 9 and in paragraphs 1-8 inclusive as containing hearsay, lay opinion, as being vexatious and frivolous.

Conclusion: Those parts of these paragraphs describing her parenting approach and efforts to minimize conflict and to enhance a relationship between the parents are permissible provided they are not hearsay and are matters about which she has personal knowledge.

18. **Paragraph 9, page 9**

Ms. Irwin says Brett is hurt by accusations of poor behavior of him and she says he is unable to work and focuses on school and becomes depressed.

Mr. Irwin objects to this evidence because it is not relevant, contains lay opinion and is vexatious.

Conclusion: Ms. Irwin's observations of Brett's reaction to accusations against him is permissible.

Emotional Well-Being of the Children

19. **Paragraph 1 & 2, page 9**

Ms. Irwin says Mr. Irwin advised the school, the children's time with their mother was negatively impacting the children.

Mr. Irwin objects to this evidence because he says it is not factual, correct and contains lay opinion.

Conclusion: She may present associated e-mails to Mr. Irwin as proof. Her views of the child's medical condition is lay opinion and of no weight.

20. **Paragraph 3, 4 & 5, page 10**

Ms. Irwin says these three paragraphs describe her observations of the behavior of the two children Kristen and Jackson.

Mr. Irwin objects to this evidence because it contains lay opinion, is vexatious, frivolous and largely irrelevant.

Conclusions: Ms. Irwin's observations of the children are permissible. However, her speculation about what they are experiencing is nothing more than lay opinion and a matter of weight. The evidence will be considered subject to these limitations.

21. **Paragraphs 6-9, pages 10-11**

Ms. Irwin says in paragraph 6, page 10 that a number of false accusations against her have been made by Mr. Irwin.

Mr. Irwin objects to this evidence because it is hearsay.

Conclusion: The evidence is not admissible because it represents a collateral attack on the credibility of Mr. Irwin and contains accusations not relevant to this proceeding.

22. **Paragraph 10, page 11**

Ms. Irwin says Mr. Irwin's e-mail following police involvement failed to reveal an understanding of the distress caused to the children as a result of that involvement.

Mr. Irwin objects to this evidence because it is lay opinion.

Conclusion: Subject to being proven as an e-mail of Mr. Irwin, this statement is admissible as a statement of Mr. Irwin.

23. **Paragraphs 11-12, page 11**

Ms. Irwin says she was told by Mr. Irwin's lawyer weapons were found on Ms. Irwin's property and he filed other false reports to the police.

Mr. Irwin objects to this evidence because it is inaccurate.

Conclusion: The evidence is not relevant and will not be considered.

24. **Paragraphs 13-18, pages 11-12**

Ms. Irwin says the children have displayed fear about being with her, that her access has been blocked, the children have been told negative things about her and know Court related information.

Mr. Irwin objects to this evidence because it is lay opinion, contains hearsay.

Conclusion: The details supporting Ms. Irwin's belief the children are afraid of her may be considered. However, to the extent she is relying on the evidence of others, it is not. I will permit her to offer the evidence of the children to the extent that it goes to this issue. The concerns raised by Mr. Irwin are relevant to the weight to be attached to it.

Substantial Change in Financial Circumstances

25. **Paragraphs 1-7, page 12**

Ms. Irwin says in these paragraphs that she has experienced a substantial change in financial circumstances.

Mr. Irwin objects to this evidence because it is irrelevant, contains lay opinion and hearsay.

Conclusion: These paragraphs to the extent they go to Ms. Irwin's financial circumstances are relevant to an undue hardship claim. However, they are not relevant to the parenting issue and will not be considered for that purpose. Ms. Irwin's accusations against Mr. Irwin, which are contained therein, will not be considered.

Request for Specific Variations of the CRO

26. **Paragraphs 1-4, page 13**

Ms. Irwin purports to outline her request for specific variations of the CRO. She says the CRO is not working because her role in the lives of the children is restricted and sabotaged by Mr. Irwin. She seeks more time with the children. She expresses an opinion as to how well the children did in her care.

Mr. Irwin objects to this evidence because the paragraphs do not set in greater detail what changes Ms. Irwin is seeking in the parenting arrangement.

Conclusion: The paragraphs will remain. They capture the essence of Ms. Irwin's request. Hearsay argument and expressions of opinion will be disregarded by the Court.