**SUPREME COURT OF NOVA SCOTIA**
**(FAMILY DIVISION)**
**Citation:** *C*.N. v. W.N., 2019 NSSC 299

**Date:** 20191001
**Docket:** 1206-7206
**Registry:** Sydney

**Between:**

C.N.

Applicant

v.

W.N.

Respondent

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**LIBRARY HEADING**

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| **Judge:** | The Honourable Justice Lee Anne MacLeod-Archer |
| **Heard:** | October 18, 2018; June 17, and 18, 2019 in Sydney, Nova Scotia |
| **Final Written Submissions:** | August 14, 2019 |
| **Written Decision:** | October 1, 2019 |
| **Issues:** | (1) Divorce<br>(2) Custody/Access |

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| Written Release: | October 1, 2019 |
| Counsel: | Charys Payne, Counsel for the Petitioner<br>W.N., Self-Represented |

**By the Court:**

**Facts**

[1] After living together for a period of time, the parties were married on May 18, 2007 and separated on November 13, 2010. They have three children, H.N. age 12, A.N. age 11, and T.N. age 9.

**Divorce**

[2] I am satisfied that the requirements have been met for granting a divorce. The marriage has permanently broken down and there is no prospect of reconciliation. The divorce is granted, and C.N.'s name will be changed to the name shown on her birth certificate.

**Corollary Relief**

[3] Neither party sought a division of assets or support, so no orders will be made in that respect.

**Parenting**

[4] The parties have a lengthy history of involvement with the Minister of Community Services, largely arising from mental health issues and drug abuse. A psychological assessment of custody and access was ordered in 2011. That report wasn't completed until April 25, 2017, but in the meantime, the parties agreed on a shared parenting arrangement, which was incorporated in a consent order issued on August 29, 2011.

[5] A variation of that order was granted in 2014, placing the children in joint custody, but in the primary care of C.N. C.N. was permitted to relocate to Cape Breton. W.N. was granted supervised access under a specified schedule. The court also directed that the Minister of Community Services must be provided with written notice of any application to vary the custody and/or access provisions of the order.

[6] C.N. subsequently relocated to Cape Breton. An interim consent order was issued in March, 2016 providing that W.N. was to have access under the Department of Justice Supervised Access and Exchange Program, which continued until August, 2016. As part of that consent order, W.N. agreed to develop a therapeutic plan to address his mental health, and to provide C.N. with information regarding his progress with that plan. He never did so.

[7] W.N.'s counsel withdrew in November, 2016, at which time the supervised access order was rescinded, as W.N. wasn't willing to attend further supervised visits.

[8] Justice Gregan then granted a final variation order on March 21, 2017. It provided as follows:

1. The children will remain in the care and custody of their mother.
2. W.N. is not permitted to have further access unless ordered by a court of competent jurisdiction.
3. W.N. shall provide the court with evidence of a completed mental health assessment prior to being permitted to vary this court order.
4. Should W.N. complete such an assessment it must be served on C.N. and a representative of the Minister of Community Services.

[9] C.N. petitioned for divorce on August 18, 2017. W.N. did not file an Answer, but contested the parenting arrangements sought by C.N.

[10] The Minister of Community Services was notified of the hearing dates, but declined to take part. Counsel for the Minister advised C.N.'s counsel that if access is granted to W.N., the Minister will review the decision and determine whether it still has concerns.

[11] Two child protection social workers were called to give evidence on behalf of C.N.. Confusion arose because they had not disclosed the complete file when subpoenaed, so an adjournment was required to ensure that both parties and the court had the complete file, including medical reports.

[12] On resuming the evidence, social worker Turner testified that she wrote to W.N. to set out the Minister's expectations when the Minister closed the file on May 26, 2017. That letter advised that the Minister expected him to follow up with mental health treatment, and in particular, cognitive behavioural therapy in accordance with Dr. Landry's recommendations. The letter made no reference to access restrictions.

[13] However, Ms. Turner advised W.N. and his girlfriend verbally that W.N.'s contact with his girlfriend's child and their son must be supervised. She told them that if W.N. was under the influence of drugs, access must be stopped. She could not be sure whether she told W.N. that his contact with his and C.N.'s children should continue to be supervised as well.

[14] W.N. has a long history of mental health illness, going back to age twelve. He has been seen by a number of mental health professionals, and he's been diagnosed with a variety of disorders including borderline personality disorder, bipolar disorder, anti-social personality disorder, social anxiety, depression, substance abuse disorder, and various physical ailments.

[15] Dr. Reginald Landry's psychological assessment report provided a number of recommendations, based on his conclusion that W.N. presents with personality disorder, social anxiety and periods of depression.

[16] Dr. Landry was asked specifically to address the question of whether W.N. is a risk to himself or others. An October, 2013 report from Dr. Garland concluded that "Without his

mental health issues treated Mr. N. could potentially be a risk to self and others." It was that conclusion that caused concern for unsupervised access with his children.

[17] Dr. Landry concluded that, while predicting violence is very challenging, there are a few risk factors at the present time to indicate that W.N. would be a threat to himself or others. He considered that W.N. was involved in a supportive relationship with no reports of violence, he was able to overcome his social anxiety to the point where he was able to participate in the trial, and his psychological testing results did not cause concerns for harm to self or others.

[18] It's important to note that mental illness in itself does not preclude a parent from exercising access. However, Dr. Landry testified that some mental illnesses create significant risks in parenting children. He identified the goals of treatment as learning more active coping skills, learning to interpret situations less negatively, reacting more proportionately to the event, and learning to regulate one's feelings. He testified that because of W.N.'s personality style, he may find it hard to engage in cognitive behavioural therapy.

[19] Irrespective of the diagnosis or the "label" used, I must consider the implications for W.N.'s ability to exercise healthy access with his children. W.N.'s tendency to avoid difficult situations has led to fewer episodes of anger or negativism. But in limiting his exposure to a small circle of people, W.N. has artificially lowered his exposure to adverse situations. It's uncertain how he'd cope with parenting three children cooperatively with C.N., for example. It's not clear that he'd cope any better now with his children's special needs than he's done in the past.

[20] Dr. Landry's recommendations include:

1. Regular psychotherapy to help W.N. deal with his mental health needs, and in particular a cognitive behavioural approach focusing on his maladaptive cognitions.
2. Interventions such as behavioural activation.
3. Explicit coaching on strategies to regulate his feelings, in addition to the use of pharmacotherapy.
4. Mindfulness based interventions.
5. Relaxation strategies.
6. Reading suggestions to learn to manage and reduce stress.

[21] W.N. was seen by clinical social worker Michael Bungay three times. Mr. Bungay closed his file on May 18, 2017. In those three sessions, he was able to offer cognitive behavioural therapy to help W.N. reduce stress and lower his social anxiety. W.N. points to the fact that he was able to represent himself through this trial as evidence of his success with this counselling. This is an improvement in his functioning.

[22] W.N. did not provide Dr. Landry's report to Mr. Bungay, even though it was completed before the file was closed. Nor did he make any self-referrals to other mental health

professionals who might help him implement Dr. Landry's recommendations. At trial, he said that he doesn't see any reason to request a referral for psychotherapy, as he doesn't believe that he needs it.

[23] W.N. has been non-compliant with mental health treatment and recommendations in the past. He sought treatment for his drug addictions at one time, but left the detox program after three days. After his psychiatrist left the area after only one visit, he didn't follow up for another psychiatric referral. And Dr. Landry's psychological assessment on custody and access was delayed because W.N. initially refused to engage with him, believing Dr. Landry to be biased in favour of the Minister of Community Services.

[24] He also breached the terms of a court order requiring him to have only supervised access with his children. On one occasion, he decided to take the children to a hotel pool without his mother (who stayed behind with another child) because he felt the security cameras sufficed as supervision.

[25] W.N. was initially resistant to the Minister's involvement and was combative with social workers. However, in the year and a half before the Minister closed its file, W.N. cooperated in completing sessions with a family support worker, he'd complied with the assessment by Dr. Landry and he was less combative with social workers. Clearly, he's capable of changing his behaviours.

[26] W.N. believes that C.N. is trying to cut him out of his children's lives, like she was cut out of her own father's life. He points to her error in judgement with a past boyfriend, but he takes little responsibility for his own actions in creating risk to the children and failing to follow up with mental health services. He projects blame in almost every situation, from his father (who "left" him with his children unsupervised) to his old friend in Dartmouth (who "got" him back into drugs when C.N. was pregnant, to social workers (who were "abrasive" and coercive), to physicians (who "threw medication" at him). Only on one occasion did he expressly accept responsibility - for the unsupervised pool incident.

[27] This pattern is consistent with Dr. Landry's testing, which shows a profile of an individual who is "not generally receptive to suggestions from others. They are quite rigid, opinionated and not generally insightful. Individuals with these profiles tend to resist psychological [intervention]."

[28] Also consistent with Dr. Landry's profile is W.N.'s accusation that C.N. fabricates illnesses on the part of the children for attention. C.N. points out that they have one child who suffers seizures and takes medication for her condition, while another child had heart surgery as an infant and is developmentally delayed. These conditions have been diagnosed and followed by medical professionals, yet W.N. didn't believe that their daughter suffered from seizures until he saw it happen himself.

[29] C.N. says that in refusing to recognize these medical concerns, W.N. puts the children at risk. One example she cites is when he forgot to return their daughter's medication after a visit, then refused to return home to obtain and deliver it to her, knowing that she couldn't get more

with the pharmacy closed for the night. Their daughter suffered a serious seizure as a result, requiring hospitalization. W.N. says that incident was just another example of C.N. trying to control him, and that his mother would have given C.N. the medication, had C.N. not confronted her. He also believes that C.N. deliberately manipulated the situation, so that the child would suffer a seizure.

[30] C.N. raises concerns about W.N.'s past ability to care for the children under the shared custody arrangement. She describes problems with the children's hygiene. She also says that W.N. caused their son to fear water after putting him in the shower fully clothed, with water spraying him in his face, while yelling at him about losing control of his bowels.

[31] W.N. denies all this. He concedes that he placed his son in the shower fully clothed on four or five occasions, because his son's diarrhea caused him and his clothing to become soiled, but says that he didn't yell at him and didn't cause him any fear.

[32] C.N. also claims that W.N. abused her during the relationship. He denies this, despite police involvement on at least one occasion when a neighbour called with concerns. When C.N. left the relationship, she took the children to a women's shelter.

[33] The test for access under the ***Divorce Act*** [R.S.C., 1985, c. 3 (2nd Supp.)] is laid out in section 16:

> (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.
>
> …
>
> (4) The court may make an order under this section granting custody of, or access to, any or all children of the marriage to any one or more persons.
>
> (5) Unless the court orders otherwise, a spouse who is granted access to a child of the marriage has the right to make inquiries, and to be given information, as to the health, education and welfare of the child.
>
> (6) The court may make an order under this section for a definite or indefinite period or until the happening of a specified event and may impose such other terms, conditions or restrictions in connection therewith as it thinks fit and just.
>
> …
>
> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as

> determined by reference to the condition, means, needs and other circumstances of the child.
>
> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
>
> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

[34] My primary concern in determining if W.N. should have access with his children is the best interests in the children. Everything else is subordinate. I must also consider the principle of maximum contact, to the extent it serves the best interests of the children. I have considered W.N.'s past conduct, because it's relevant to his ability to act as a parent to the children, particularly in unsupervised access.

[35] The children have not seen their father in over three years. Their contact with him for several months prior to that was supervised. The notes from the YMCA program show that the access was generally positive, with no incidents to report.

[36] By May, 2017, W.N. had seen Michael Bungay and had one appointment with a psychiatrist. He'd also completed the assessment with Dr. Landry. Mr. Bungay's involvement seems to have most benefitted W.N, but he stopped seeing him after three sessions.

[37] However, it's apparent from his testimony that W.N. still harbours a negative view of the social workers involved in his case and the physicians who've treated him. He appears to believe he knows better than everyone else what his diagnoses and treatment should be. In particular, he doesn't believe that he needs further psychological treatment. This is consistent with Dr. Landry's report.

[38] W.N.'s lack of insight into his mental health challenges is a concern. He was directed in 2016 to provide C.N. with details of his therapeutic mental health treatment plan, but failed to do so. In 2017 he was directed to provide the court with an updated mental health assessment, which he did in the form of Dr. Landry's report. But he failed to comply with Dr. Landry's recommendations and he failed to provide Dr. Landry's report to Mr. Bungay, despite being asked for it.

[39] The crux of the problem is that W.N. doesn't feel that he needs further psychological support to cope on a day-to-day basis. This is clearly contrary to Dr. Landry's conclusions. I accept Dr. Landry's opinion that W.N. presents with personality disorder, social anxiety, and periodic depression. I accept his opinion that W.N. requires psychological interventions, including regular psychotherapy, cognitive behavioral therapy, behavioral activation, coaching on regulation on his feelings, and the other supports outlined in the report.

[40] A related concern is that W.N. has significantly increased his use of medical marijuana, which he says helps him cope. He's gone from 1 gram daily in 2015, to 8 grams daily at the time of trial. Dr. Landry recommended that he seek psychological support to complement any pharmacotherapy. The physician who prescribed W.N.'s marijuana wasn't called to testify, nor was his family physician. I have no evidence on whether either physician is aware of Dr. Landry's diagnosis and recommendation. It's not even clear why medical marijuana was prescribed (for physical complaints or to cope with anxiety, for example).

[41] The children have been in their mother's primary care since the parties separated. They have not had contact with their father in the past three years. C.N. says that W.N. shouldn't be granted access at this time. She fears that he continues to abuse substances, that the children will be neglected in his care, and that he will not work cooperatively with her. She says that he needs to demonstrate a period of stability and consistent treatment before access resumes.

[42] W.N. wants be a father to his children. He says it's been ten years since he used hard drugs, and that there's no evidence of unwarranted use or abuse now. He credits medical marijuana use with easing his anxiety, along with the techniques he learned from Mr. Bungay. He points out that he's taken services through Child Protection and Eastern Family Services, and that his YMCA supervised visits with the children were only positive.

[43] The problem lies with his concluding statement that "I do not feel that I need psychotherapy to function effectively in my day to day life but I am certainly willing to get it done if it helps me get my kids back." A person who doesn't perceive a need for therapeutic interventions rarely benefits from it. W.N.'s offer to undergo "any assessment if it will help me get my kids back" is likewise unhelpful. The point of seeking assessments in the past wasn't just to diagnose his mental health issues, but more importantly, to learn how to address them. W.N.'s submissions indicate a fundamental misunderstanding about the purpose of the assessments completed to date.

[44] I agree with Justice Forgeron's statement on supervised access in the case of **D.S. v. R.M.T**., 2017 NSSC 155:

> **29** In my decision, I also have considered the following legal principles which have emerged from case law, including the decisions of **Young v. Young**, [1993] 4 S.C.R. 3 (S.C.C.); **Abdo v. Abdo** (1993), 126 N.S.R. (2d) 1 (N.S. C.A.); **Bellefontaine v. Slawter**, 2012 NSCA 48 (N.S. C.A.); and **Doncaster v. Field**, 2014 NSCA 39 (N.S.C.A.):
>
> > *The burden of proof lies with the party who alleges that access should be denied or restricted, although proof of harm need not be shown.
> >
> > *Proof of harm is but one factor to consider in the best interests test.

> *The right of the child to know and to be exposed to the influence of each parent is subordinate in principle to the child's best interests.
>
> *The best interests test is a positive and flexible legal test which encompasses a wide variety of factors, including the desirability of maximizing contact between the child and each parent, provided such contact is in the child's best interests.
>
> *The court must be slow to extinguish or restrict access. Examples where courts have extinguished access include cases where access would place the child at risk of physical or emotional harm, or where access was found to be contrary to the child's best interests.
>
> *An order for supervised access is seldom seen as an indefinite or long term solution.
>
> *Access is the right of the child; it is not the right of a parent.
>
> *There are no cookie-cutter solutions. Courts must examine the unique needs of each child and craft an order that protects and enhances that child's best interests.

30 In Lewis v. Lewis, 2005 NSSC 256, as approved in Bellefontaine v. Slawter, supra, this court reviewed circumstances which may lead to the imposition of supervised access at para 24, which include the following:

> *Where the child requires protection from physical, sexual or emotional abuse.
>
> ***Where the child is being introduced or reintroduced into the life of a parent after a significant absence.**
>
> *Where there are substance abuse issues.
>
> *Where there are clinical issues involving the access parent.
>
> *Supervised access is not appropriate if its sole purpose is to provide comfort to the custodial parent.
>
> [emphasis added]

[45] Given the historic concerns and W.N.'s untreated mental health issues, I am not prepared to order unsupervised access at this time. I recognize that W.N. has regular, unsupervised access

with his own child and his girlfriend's child, but they are not the subject of this hearing. Further, W.N. has a supportive, respectful relationship with his girlfriend. He does not have that kind of relationship with C.N., which can pose problems for someone whose anxiety and anger can be ignited by conflict.

[46] I have considered whether supervised access would be in the best interests of the children at this time. The children need a period of reintroduction with their father if access is to resume. But supervised access is not a long-term solution. The point is to move towards unsupervised access, which in my view, cannot occur until W.N. has shown a commitment to engage with, and benefit from, the services laid out by Dr. Landry. It's not certain he'll do so, given his personality profile, which is consistent with his evidence and submissions.

[47] If unsupervised access is not a realistic long-term prospect, then a reintroduction via supervised access is of no benefit to the children. It would only serve to confuse them, which is not in their best interests.

[48] I've considered the maximum contact principle in making my decision. I've subordinated that to the best interests of the children. A reintroduction without the realistic prospect of long-term, regular, beneficial access would only serve to disrupt the children's routines, create confusion, and possibly expose the children to conflict and anger.

[49] W.N.'s access will remain suspended unless and until certain conditions are met. Those conditions are: No variation application may be filed before June, 2020, and only then if leave is granted first. Leave to apply will be premised on whether W.N. produces a written report from a treating mental health professional who's been seeing W.N. regularly to address Dr. Landry's recommendations. It must outline W.N.'s progress, compliance, future treatment plan, and prognosis. W.N. must provide the mental health professional with a complete, unredacted copy of Dr. Landry's report at his first appointment.

[50] In addition, W.N. must produce a copy of his medical marijuana prescription and written confirmation from his physician that his use is in compliance with the prescription, and that the physician is aware of Dr. Landry's recommendation regarding complementary therapy.

[51] Because W.N. won't be exercising access in the immediate future, C.N. must provide him with written updates on the children's health and other developmental milestones on June 1st and December 1st of each year, starting in December, 2019. She will do by email to W.N. She will also provide W.N. with copies of the children's report cards for the prior semester. W.N. must provide an email address to C.N. through her counsel. Should his email address change, he must notify C.N. via email.

[52] I will accept submissions on costs within fourteen days. Counsel for C.N. will prepare an order to reflect my decision.