

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** CM v. CS, 2013 NSSC 273

**Date:** 20130624

**Docket:** SFSNMCA-040745

**Registry:** Sydney

**Between:**

CM

Applicant

v.

CS

Respondent

**Judge:** The Honourable Justice Theresa Forgeron

**Heard:** October 5 and 10, 2012, and April 29, 2013  
in Sydney, Nova Scotia

**Oral Decision:** June 24, 2013

**Written Decision:** September 12, 2013

**Counsel:** Darren Morgan, for the Applicant  
Alan Stanwick, for the Respondent

**By the Court:**

[1] **Introduction**

[2] Fifteen year old, D and 12 year old, Ch are the sons of CM and CS. The children were in the primary care of their mother until August 2011. Since August 2011, the children have lived with their father, and CS has exercised supervised access. Because the parties were unable to reach agreement on parenting issues, a trial was held to determine the children's best interests.

[3] **Issues**

[4] In this decision, the court will determine the following issues:

- What impact does the 1998 order have on this proceeding?
- What principles apply to the parenting determination?
- What parenting arrangement is in the best interests of the children?
- What custodial designation is in the best interests of the children?
- What access provisions are in the children's best interests?
- What is the appropriate maintenance order?

[5] **Background**

[6] The parties began a relationship in 1997, while they were both living in Ontario. Their son, D, was born on February \*, 1998. A consent order issued on June 8, 1998, which order granted sole custody to CS, and reasonable access to CM.

[7] After the court order issued, the parties began to cohabit. They eventually married on November 30, 2000. Their second son, Ch, was born November \*, 2001.

[8] The parties' relationship was tumultuous. Their final separation occurred in September 2004. As neither party applied for a divorce, this matter proceeded pursuant to the provisions of the *Maintenance and Custody Act*.

[9] Since the separation, CS formed a new relationship with SH. CS and SH have one child, M, who is eight years old. M resides with her mother, and is currently subject to a supervision order pursuant to the provisions of the *Children and Family Services Act*. SH has a criminal record and was incarcerated during the April 2013 proceeding.

[10] Since the separation, CM also formed a new relationship. He lives with his fiancé, LG. They have one child, Ch, who is three years old. In addition, LG's nine year old daughter, T, also lives in the M household.

[11] Following the parties' separation, an informal parenting arrangement was followed. CS acted as the primary care parent, while CM exercised liberal and frequent access to the children.

[12] On August 20, 2010, CM filed an application for custody of the children. A date assignment conference was held on February 14, 2011. Trial dates were scheduled for April 29 and June 2, 2011. An adjournment of the April 29 trial date was sought by CS because her then solicitor applied to be removed as solicitor of record. The application was granted, and the trial was rescheduled to begin on June 2.

[13] CS sought a second adjournment of the June 2, 2011 trial date because she had only been able to retain new counsel late in the day. The adjournment was granted and the hearing was then rescheduled to begin on November 8, 2011.

[14] In August 2011, CM refused to return the children to CS following an access visit. CM was concerned for the health and safety of the children because of domestic violence and drug use in the household of CS.

[15] On October 28, 2011, CS requested another adjournment because she was not "in a position to contest custody on November 8." As a result of the adjournment request, and negotiations between the parties' solicitors, an interim order issued on November 7, 2011. The interim order granted CM sole custody of

the children. CS was granted two, two hour supervised access visits each week. The access supervisor was designated as CT. The supervised access was to take place at the residence of CT, and at no time were the children to be at the residence of CS. Further, the order stipulated that the children were not to be in the company of SH. The order also indicated that the “baby bonus” would be transferred to CM, and the parties would cooperate in ensuring the completion of that process.

[16] A pretrial conference was scheduled for March 26, 2012 at the request of counsel. Trial dates were assigned for October 5 and 10, 2012. The trial commenced late on October 5 because CS did not appear. She later advised that she had attended a medical appointment. The trial was not completed in October and a third day, April 29, 2013 was assigned to complete the matter.

[17] The court heard the evidence of the following witnesses during the course of the proceeding: CM, CT, PM, and CS. The oral decision was rendered on June 24, 2013.

[18] **What impact does the 1998 order have on this proceeding?**

[19] In **Clark v. Gale**, 2009 NSSC 170, at para. 13, this court held that a court order does not become a nullity because of the subsequent cohabitation of the parties. A court order can only be varied by a further court order. Parties cannot vary an order by agreement, or by virtue of a common understanding. Therefore, the 1998 order is a valid order unless the requirements of s. 37 of the *Maintenance and Custody Act* have been met.

[20] It is clear that a material change in circumstances has occurred since the issuance of the 1998 order. Since the order issued, the parties cohabited, were married, had a second child, separated, and CM was vested with interim custody of the children pursuant to the 2011 order. The requirements of s. 37 of the *Act* have been met.

[21] **What principles apply to the parenting determination?**

[22] All court decisions involving children must be based on their best interests. In assessing the evidence related to best interests, this court must have regard to

the standard of proof and make credibility determinations. In **C.(R.) v. McDougall**, 2008 SCC 53, Rothstein, J. confirmed that there is only one standard of proof in civil cases - that is proof on a balance of probabilities. In every civil case, the court must scrutinize the evidence when deciding whether it is more likely than not that an alleged event occurred. The evidence must not be considered in isolation, but must be based upon its totality. The evidence must always be clear, convincing, and cogent to satisfy the balance of probabilities test.

[23] Further, the court must assess the impact of inconsistencies on questions of credibility and reliability, which relate to the core issues. It is not necessary that every inconsistency be addressed, but rather a judge must address in a general way the arguments advanced by the parties: **C.(R.) v. McDougall**, *supra*, paras. 40, 45 and 49.

[24] In **Baker-Warren v. Denault**, 2009 NSSC 59, as approved in **Hurst v. Gill**, 2011 NSCA 100, this court reviewed factors to be considered when making credibility determinations at paras. 18 and 19, which state as follows:

18 For the benefit of the parties, I will review some of the factors which I have considered when making credibility determinations. It is important to note, however, that credibility assessment is not a science. It is not always possible to "articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events:" **R. c. Gagnon**, 2006 SCC 17 (S.C.C.), para. 20. I further note that "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization:" **R. v. M. (R.E.)**, 2008 SCC 51 (S.C.C.), para. 49.

19 With these caveats in mind, the following are some of the factors which were balanced when the court assessed credibility:

a) What were the inconsistencies and weaknesses in the witness' evidence, which include internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony, and the documentary evidence, and the testimony of other witnesses: **Novak Estate, Re**, 2008 NSSC 283 (N.S. S.C.);

b) Did the witness have an interest in the outcome or was he/she

personally connected to either party;

c) Did the witness have a motive to deceive;

d) Did the witness have the ability to observe the factual matters about which he/she testified;

e) Did the witness have a sufficient power of recollection to provide the court with an accurate account;

20 I have placed little weight on the demeanor of the witnesses because demeanor is often not a good indicator of credibility: **R. v. Norman** (1993), 16 O.R. (3d) 295 (Ont. C.A.) at para. 55. In addition, I have also adopted the following rule, succinctly paraphrased by Warner J. in **Novak Estate, Re**, supra, at para 37:

There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See **R. v. D.R.**, [1966] 2 S.C.R. 291 at 93 and **R. v. J.H.** supra).

[25] I have reviewed the totality of the evidence. I have only considered the evidence that was properly before the court by way of exhibits, or as elicited while a witness testified. I have assigned the civil burden of proof to CM as it relates to his application to vary the 1998 parenting order in relation to D. Each party bears the burden of proof in respect of their application for custody of Ch.

[26] I have also made credibility determinations. Where there is a conflict in the evidence, I accept the evidence of CM over the evidence of CS. CM provided truthful and accurate accounts. His evidence was clear, balanced, and logical. He was not evasive. CS, on the other hand, minimized serious parenting concerns, and was evasive at times.

[27] Parenting decisions pursuant to the *Maintenance and Custody Act* must be based on the best interests of children. The best interests principle has been described as one with an inherent indeterminacy and elasticity: **MacGyver v. Richards** (1995), 22 O.R. (3d) 481 (Ont. C.A.), paras. 27-29. The test is a fluid concept that encompasses all aspects of a child, including the child's physical,

emotional, intellectual, and social well being. I am concerned not only with the day to day needs of D and Ch, but also as to their ability to mature, develop, and grow into confident, happy, and well adjusted young men.

[28] The Supreme Court of Canada, in **King v. Low**, [1985] S.C.J. No. 7 (S.C.C.), directed the court to review the plans of rival claimants and chose the course which will best provide for the healthy development of the child. In **Foley v. Foley** (1993), 124 N.S.R. (2d) 198 (N.S. S.C.), Goodfellow, J. provides a series of factors for courts to consider and balance in determining the best interests of children. **Foley**-like factors have also been outlined in the provisions of the *Maintenance and Custody Act* for the court's review. I have considered all of these factors in the context of the evidence and the submissions of the parties.

[29] **What parenting arrangement is in the best interests of the children?**

[30] CS seeks a joint custody order with primary care, or in the alternative, a shared parenting order based upon a week about schedule. In contrast, CM seeks a sole custody order, with supervised access to CS. In support of each of their positions, each party supplied a parenting plan. I will now review the various factors addressed by each of the parties before commenting on the plan which I have determined is in the best interests of the children.

[31] *Physical Environment*

[32] CS currently resides in Sydney in a two bedroom apartment. The home is occupied by CS and M. Should the court provide CS with custody of D and Ch, she will seek alternate accommodations in the Sydney area. Previously, CS lived approximately eight years at the same residence in Glace Bay. It was a rented home and had sufficient bedrooms and space to accommodate all of her children.

[33] CM, his partner, and the four children, reside in a house situate in Glace Bay. The home has four bedrooms. Ch and C share a room, while T and D each have their own rooms. The fourth bedroom is occupied by CM and LG.

[34] Both parties rent their homes. CM's home meets the needs of D and Ch. CS can likely obtain a rental property which will likewise meet the physical needs of the children. Neither parties' plan is superior in respect of this factor.

[35] *Emotional and Safety Needs*

[36] I accept that CM is best equipped to meet the emotional needs of the children, including their need for stability and safety. Although CM had a past association with illicit drugs, he is no longer part of the drug culture. I accept that neither CM, nor LG, currently use or allow illegal drugs to be used in their home.

[37] CM's lifestyle is not that of a drug user. CM's life has been stable, safe, and secure. He works as a manager at a local department store, and has been employed in that capacity for four years. When Ch and D are residing with CM, they have routine, structure, and participate in family and organized activities. D and Ch can be children and are not required to assume a parenting role in the M household. CM has the capacity and ability to provide emotional and physical security to the children because his mind is not impaired. CM is focussed on the needs of his children. He is emotionally available to meet the parenting demands that are implicit in raising children.

[38] In contrast, D and Ch experienced a chaotic life while in the care of CS. CS was not emotionally available to the children because of the lifestyle that she adopted. CS was heavily engaged in the drug culture and was also involved with SH, who has a lengthy criminal record, and who was incarcerated during the April proceeding.

[39] There was no routine or stability for D and Ch while they were in CS's care. For example, the children were absent from school for an extraordinary amount of time while in CS's care. CS initially dismissed the seriousness of this problem until confronted with the school records.

[40] To her credit, CS is making progress tackling the drug issue. She is currently involved in the methadone maintenance program. Despite participating in this program, CS has not been drug free. She continues to test positive for marijuana, notwithstanding the prohibition against the use of this illegal drug in Canada, and notwithstanding the current prohibition as a result of the involvement of child protection officials. Addiction issues negatively impacted upon CS's ability to properly care for Ch and D in the past, and will likely do so in the future,

unless and until CS stops using drugs and gains better insights into these issues through therapy and counselling.

[41] CS's lack of insight into the emotional needs of the children is unfortunately an ongoing challenge. CS continues to place her own needs in priority to the needs of the children. For example, CS has not exercised access to Ch and D since approximately May 2012. The current order provides CS with supervised access. The access supervisor is CT. CS feels that CT is no longer appropriate. CS stopped seeking access in May 2012. CS has not seen D and Ch pursuant to the order in excess of one year. CS's inability to place the children's needs in priority to her own belief as to the unsuitability of the access supervisor confirms that CS is unable to provide the necessary emotional support to her sons that they require.

[42] CM's ability to meet the emotional and safety needs of the children is superior to CS's plan.

[43] *Social Needs*

[44] CM's plan for the social needs of the children is superior to CS's plan. The children, while in CM's care are involved in both organized and unstructured activities. Both D and Ch made the basketball team, and they also play floor hockey. The children are involved in unstructured play outside of the home, including attending the library, engaging in family activities and playing with friends. To his credit, CM enforces the rule that the children must be diligent with their academics in order to play on organized sporting teams.

[45] When the children were living with CS, they were not involved in organized activities, although she noted that her daughter, M, was currently involved with reading recovery at school and attended the YMCA.

[46] *Educational Needs*

[47] CM is better equipped to meet the educational needs of Ch and D, than is CS. School records were entered as exhibits. These records confirm that D and Ch regularly were absent from school while in CS's care. Their marks suffered as a result. Further, in addition to lost academics, by missing school, the children

also lost opportunities to strengthen social connections and engage in organized school events.

[48] Another troubling aspect of CS's plan was her attempt to minimize the serious nature of the truancy issue, and the impact that the school absences could have on the children's development. By repeatedly missing school, Ch and D lost opportunities to learn appropriate skills, educational and social, that are taught when children engage in independent activities.

[49] Education is a value that is experienced in the M household. Not only do the children attend school while in CM's care, their marks improved significantly. The children are achieving their potential. CM has established a routine to ensure that the children continue to be motivated and engaged in their academic work. The children's educational needs are best achieved by being placed in CM's care.

[50] *Willingness to Foster a Relationship with the Other Parent*

[51] This factor must always be viewed from the lens of the best interests of the children. Children should have as much contact with each parent as is consistent with their best interests. In this particular case, serious health and safety issues resulted in an interim consent order which permitted only supervised access.

[52] Although CS appears, on the face, to be the parent who will best promote a relationship with the other parent, based upon her joint and shared parenting proposal, this must be balanced against CM's justifiable and realistic concerns which impact on the open relationship principle.

[53] CM's request for restrictions were based upon serious and existing concerns, some of which continue to be problematic and are posing a risk of harm to this day. Indeed, child protection proceedings were recently initiated against CS in 2013. Although CS is subject to a supervision order, and not a temporary care and custody order, the situation was critical enough to require the intervention of the state in CS's life in order to ensure that her daughter was protected from harm. Child protection proceedings are not initiated and maintained unless there are outstanding protection concerns.

[54] Although CM is currently requesting restrictions on access, that request is based on realistic and relevant protection concerns. Thus, CS's plan cannot be said to be superior to CM's plan in respect of the promotion of a relationship with the other parent.

[55] *History of Child Care*

[56] Prior to August 2011, CS was the primary care parent of Ch and D, while CM was an active and involved parent. D and Ch usually spent every weekend with their father, as well as time during the weekdays. The status quo changed in August 2011 because of the protection concerns which arose. This resulted in an interim consent order transferring defacto and, indeed, legal custody to CM in November 2011. CM has met the physical, emotional, social, and educational needs of Ch and D while they have been in his care since August 2011.

[57] *Relationship with Extended Family*

[58] Ch and D are fortunate to have a number of siblings. Two of these siblings reside in the M household, and one resides in the S household. It is important that D and Ch have quality time with all of their siblings, as children generally benefit from supportive family relationships. Further, while in the care of CM, the children also benefit from involvement with the M and G extended family. All such relationships should continue to be maintained in so far as they are supportive, and safe, and protective of the children.

[59] *Ability of Each Parent to Communicate and Cooperate*

[60] The parties do not have an ability to cooperate and communicate well. It is necessary that a third party assist with the communication. In the past, CS's prior boyfriend, SH, threatened CM. Communication is poor between CM and CS. It is doubtful this will improve even with counselling.

[61] *Structure, Discipline and Routine*

[62] CM provides better structure, discipline, and routine to the children, than does CS. CM maintains an organized and structured household where rules and values are taught and enforced, and where appropriate expectations are known

and are meant to be achieved. Discipline includes consequences for failure to follow legitimate rules. Education, activities, and family values assume priority in the M household. These values will help D and Ch to develop a healthy sense of self and family and will help each of the boys achieve their potential in a loving, nurturing, and safe environment.

[63] In contrast, the S household did not operate with structure and routine. There were few expectations. The lack of structure, rules, and routine negatively impacted D and Ch.

[64] *Childrens' Views and Preferences*

[65] The court has no independent knowledge of the childrens' views and preferences in respect of the parenting arrangement.

[66] *Summary*

[67] A review of the factors which the parties brought forward as composing the children's best interests underscore that it is in the best interests of the children to be in the primary care of their father. The relationship which Ch and D enjoy with their father is strong, stable, consistent, loving, and nurturing. The children have been able to engage in family, educational, social, and recreational activities, which are assisting them achieve their potential. The children have been able to learn independence while maintaining a sense of family security in CM's home.

[68] In contrast, Ch and D's relationship with CS, unfortunately, is not stable or secure. It is not in the children's best interests to be returned to the care of CS.

[69] *What custodial designation is in the best interests of the children?*

[70] CM seeks sole custody. CS seeks joint custody or shared parenting. In **Baker-Warren v. Denault**, 2009 NSSC 59, the court reviewed principles of custodial designation in high conflict families at paras. 24 to 26, and para. 32, which state as follows:

24 Where parental relationships are rift with mistrust, disrespect, and poor communication, and where there is little hope that such a situation will change, joint custody is ordinarily not appropriate: **Roy v. Roy**, [2006] W.D.F.L. 2830

(Ont. C.A.) [2006 CarswellOnt 2898 (Ont. C.A.)]. This lack of effective communication, however, must be balanced against the realistic expectation, based upon the evidence, that communication between the parties will improve once the litigation has concluded. If there is a reasonable expectation that communication will improve despite the differences, then joint custody may be ordered: **Godfrey-Smith v. Godfrey-Smith** (1997), 165 N.S.R. (2d) 245 (N.S. S.C.).

25 Mr. Denault and Ms. Baker-Warren's interaction is marked by high levels of distrust and disrespect. Communication is poor. Therefore, joint custody, in its traditional sense, would not appear to be viable. Despite this grim finding, sole custody is not the only option. A parallel parenting order must also be considered.

26 Courts have increasingly embraced the concept of parallel parenting in circumstances similar to the case at bar. A parallel parenting regime is a mechanism which can be employed where there is high parental conflict, and where a sole custody order is not in the child's best interests. A parallel parenting regime permits each parent to be primarily responsible for the care of the child and routine decision-making during the period of time when the child is with him/her. Significant decision-making can either be allocated between parents, or entrusted to one parent. Parallel parenting ensures that both parents play an active and fruitful role in the life of their child while removing sources of conflict through a structured and comprehensive parenting plan.

...

32 The adoption of a parallel parenting regime is not a solution for the vast majority of the cases before the courts. It is reserved for those few cases where neither sole custody, nor cooperative parenting meets the best interests of the child. This is one such case. The adoption of a parallel parenting regime is in the best interests of Kyra in the circumstances.

[71] It is in the best interests of D and Ch to be in the sole custody of CM. Neither joint custody, nor parallel parenting, are in the best interests of the children. CS does not have the parenting ability to meet the needs of the children at this time. Although her circumstances are improving by virtue of her involvement with addictions counseling and the methadone maintenance program, she nonetheless continues to use illegal drugs and she continues to lack insight into the nature and extent of her past difficulties, together with the impact that her lifestyle had on D and Ch. The parties do not communicate. A sole custody order is the only order that is in the best interests of the children.

[72] **What access provisions are in the childrens' best interests?**

[73] The following legal principles are distilled from **Young v. Young**, [1993] 4 S.C.R. 3; **Abdo v. Abdo**, (1993) 126 N.S.R. (2d) 1; and **Bellefontaine v. Slawter**, 2012 NSCA 48

- The right of the child to know and be exposed to the influence of each parent is subordinate in principle to the child's best interests.
- 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.
- The court must be slow to extinguish or restrict access, unless the evidence dictates that it is in the best interests of the child to do so.
- An order for supervised access is seldom seen as an indefinite or long term solution.

[74] I have determined that it is in the best interests of D and Ch that access between them and their mother be restricted at this time and subject to the terms and conditions which I will elaborate upon, for the following reasons:

- CS continues to use illegal drugs, although she is no longer using cocaine. Despite being involved in the methadone maintenance program and receiving addiction counseling, CS continues to use marijuana. CS attempted to minimize the seriousness of this usage. As a result, the court concludes that CS does not fully appreciate the nature and extent of her addictions, and the nature and extent that such addictions have, and will continue to play, on her parenting of her teenage sons, who are impressionable and require stability, safety, routine, and structure.
- CS has chosen not to request access to the children in excess of a year. I accept the evidence of CM and CT that CS stopped seeking access after May 2012. CS did not exhibit any insights as to the difficulties that her decision would have on D and Ch. CS was focussed on her own needs, and felt justified in the decision because,

from her point of view, CT was no longer a suitable supervisor. CS also placed herself in the position of a victim by noting that she had be “wronged”. This attitude lead CS to refuse to return the health cards of the children to CM, despite the fact that CM was the sole custodial parent, and despite the requests of CM’s counsel for their return.

[75] I see little validity in the argument put forth by CS regarding the involvement of the Minister of Community Services. The fact that her daughter is in CS’s supervised care, as opposed to the temporary care and custody of the Minister, does not bolster CS’s position. The Minister of Community Services must make decisions based upon the evidence and factual material which is before the Minister. This court must make a determination based upon the evidence before it. This court does not delegate its decision making function to an outside agency. The fact that the Minister is involved in CS’s life confirms that there are serious protection issues which mandated the involvement of an agency in the private lives of CS, SH, and their daughter.

[76] At this time, supervised access is granted for a period of eight months, at which time a review hearing will be held. CS’s progress with drug abstinence, therapies, and programming will be reviewed. If CS remains drug free, from all illegal substances, or from abusing prescription medication, and if she has gained insight, and has regularly exercised access, then it will likely be appropriate to vary the supervised aspects of this parenting order.

[77] During the next eight months, CS will have the opportunity to engage in counseling and therapy to gain better insights as to the impact that her addictions have on her ability to parent, and the impact that addictions have on the development of children.

[78] Supervised access should be commenced as soon as possible. If the parties are unable to agree as to the name of an appropriate supervisor, or do not wish to avail themselves of any supervised counseling through such services as the YMCA, then submissions are to be provided to the court by way of affidavit. A brief chambers appearance will be scheduled so that the court can determine the appropriate supervisor and time frame for supervised access.

[79] **What is the appropriate maintenance order?**

[80] CM is not seeking maintenance. CS is currently in receipt of disability benefits. CS's income is below the *Guidelines*' threshold. No child support is payable as a result.

[81] **Conclusion**

[82] Sole custody of D and Ch is vested with CM in their best interests given the plans which have been presented and reviewed. Supervised access to CS is granted, subject to review and confirmation of abstinence from illegal drugs and the abuse of prescription medication, during the next eight months, and subject to CS continuing with therapy, programming and counselling to gain better insights. The court retains jurisdiction to determine the particulars of the supervised access in the event the parties are unable to agree as to the details. Mr. Morgan is to draft the order.

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Forgeron, J.