

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

**Citation:** *Nova Scotia (Community Services) v. S.C.*, 2017 NSSC 336

**Date:** 2017-12-01

**Docket:** SFHCFSA-101078

**Registry:** Halifax

**Between:**

Minister of Community Services

Applicant

v.

S.C. and M.S.

Respondents

**Restriction on publication:**

**Publishers of this case please take note** that s. 94(1) of the *Children and Family Services Act* applies and may require editing of this judgment or its heading before publication.

Section 94(1) provides:

No person shall publish or make public information that has the effect of identifying a child who is a witness at or a participant in a hearing or the subject of a proceeding pursuant to this Act, or a parent or guardian, a foster parent or relative of the child.

**Revised decision:** The text of the original decision has been corrected according to the attached erratum dated **January 5, 2018**.

**Judge:** The Honourable Justice Elizabeth Jollimore

**Heard:** November 6-9, 2017 and December 1, 2017

**Written release:** December 1, 2017 (Decision rendered with reasons to follow: January 2, 2018)

**Counsel:** Peter C. McVey, Q.C. for M.C.S.  
Tanya R. Jones for S.C.  
Alisha Brown-Fagan for M.S.

## **By the Court:**

### **Introduction**

[1] After argument in this case, I dismissed the Minister of Community Services' application for an order for permanent care and custody of D. I said my reasons would follow. These are my reasons.

[2] There is a difference between parents who are poor, and poor parents. Ms. C and Mr. S are parents who are poor. The Minister argues that they are poor parents and that their twenty-month-old daughter, D, should be in the Minister's permanent care and custody. The Minister says there is substantial risk of D's physical or emotional harm or neglect. The parents dispute this.

[3] The deadline of November 25, 2017 was extended, in D's best interests, to permit the conclusion of the hearing and my decision.

### **History**

[4] Ms. C and Mr. S began their relationship in the summer of 2015. She was 18 and he was 22. A few weeks into the relationship, Ms. C learned she was pregnant. She and Mr. S began to live together in September 2015.

[5] It was unlikely Mr. S had fathered D and this was confirmed by a DNA test after D was born in late February 2016. D's biological father has had no part in D's life and taken no part in this application. Mr. S has always acted as D's father.

[6] Ms. C is now 21. She is the oldest of six children. She is bi-racial. She has had difficulties with her mental health since she was a teen-ager. As a teen, she was twice hospitalized at the IWK and took part in Adolescent Centre for Treatment programming. She was bullied because of her learning disability and her gender identity. She harmed herself through cutting and abusing her prescribed medication. It's unclear whether her prescription abuse was an attempt on her own life or a suicidal gesture. (Dr. Tulipan, a psychiatrist at the IWK's Reproductive Mental Health Clinic, said that when someone refers to a suicidal gesture it typically indicates feeling suicidal and engaging in self-harm but that isn't a "full attempt" at suicide.)

[7] Ms. C has completed grade 9. She said her education was compromised by her health and the need for her to care for her younger siblings. She tried to complete grade 10 three times but wasn't successful. She left school when her doctor prescribed bed rest because her pregnancy with D was high risk. In 2017, she was in the Options program, an education/employment program to finish school. The Options program ended when she found work.

[8] While she was pregnant with D, Ms. C worked with the IWK Reproductive Mental Health Clinic: Dr. Tulipan and clinical social worker, Kim MacLean. Her initial referral to the

clinic was approximately six months before the Agency became involved. She was later referred to Jennifer Parks, a community mental health worker at Bayers Road Mental Health. Currently Ms. C says her mental health is stable. There is no evidence of recent incidents of self-harm or suicidal thoughts. She says she can access mental health services by way of a referral from her doctor or the Mental Health Mobile Crisis Team, if needed. She has a family doctor.

[9] Mr. S is 25. He has no siblings. As a child, he was subjected to his father's verbal and emotional abuse. Mr. S left home at age 15 and became involved in the Phoenix Youth Program which provided him with support related to housing, education, employment and budgeting. Support from the Program ended when Mr. S turned 25. Mr. S is 4 credits shy of completing high school. Despite this, he has held several jobs. He has not been fired from any job.

[10] Mr. S's job had ended when his employer lost its contract in late 2015. Mr. S and Ms. C moved in with Ms. C's mother and step-father temporarily in January 2016. Their only income was what Ms. C earned babysitting. The parents didn't begin to receive Canada Child Tax Benefits promptly after D was born in late February. When D was born, this meant that the four-bedroom home was occupied by ten people: Ms. C, Mr. S and D, Ms. C's mother and her mother's partner, and their five children (aged 1 ½ years, 3 ½ years, almost 5, 12 and 13).

[11] Crowded into this home and without enough money, there was tension. D's parents fought. There was also conflict between Ms. C, Mr. S and Ms. C's mother and step-father.

[12] In March, Mr. S discovered the suicide of a long-time friend. His friend's death was violent and the discovery left Mr. S shaken.

[13] On March 29, 2016, the adults were arguing about the state of the house. The argument became physical. Mr. S called the police. Ms. C was taken into police custody for breaching the peace. She stayed in custody for a few hours.

[14] Mr. S reported the March 29 incident to the Department of Community Services on March 30. The Agency investigated, calling the police and Ms. C's doctor. Concluding that "the MPP [major presenting problem] of physical harm is unsubstantiated" and "risk has been mitigated" because Ms. C and Mr. S had moved out, the Agency closed its file without further involvement.

[15] A few days later, Ms. C returned to her mother's home to collect their things. There were no difficulties between Ms. C and her mother when this happened. Ms. C and her mother are currently active in a Bible study class and Ms. C attends a cooking class her mother facilitates.

[16] After leaving this home, D and her parents went to stay with D's godmother for a few weeks until they could find a place of their own.

[17] In April and May 2016, Mr. S called the police two more times: in April when he restrained Ms. C from committing suicide by throwing herself into traffic, and in May when Ms. C and Mr. S got into an argument.

[18] The Minister of Community Services took D into care on June 3, 2016.

[19] Ms. C became pregnant shortly after D was born. The couple's son, C, was born in mid-December 2016; the children's birthdays are less than ten months apart. C remained with his parents until mid-February 2017 when he, too, was taken into care. He has been placed with Mr. S's parents.

[20] D is twenty months old. She is bi-racial. She has been in only one foster placement since coming into care. She is not in a culturally appropriate foster placement and the Minister has never sought a culturally appropriate foster placement for her.

[21] D has no unusual needs. Throughout the case recordings, D is described as "healthy", "developing well" or "developing on par for her age". There were no issues with D meeting her developmental milestones. She's described as "very happy", having an "even temperament" and being "social". No concerns have been identified about D by her foster parent or her doctor.

[22] The parents have communicated with D's foster parent using a communication book.

### **Analysis**

[23] This is a review hearing under section 46 of the *Children and Family Services Act*, S.N.S. 1990, c. 5. Before I make my order, I must consider whether the circumstances have changed since the previous disposition order; whether the plan that I applied in the previous disposition order is being carried out; and the least intrusive alternative available to meet D's best interests. Because we are at the end of the statutory time limits, I cannot consider subsection 46(6).

[24] Circumstances have changed since the last disposition order was granted.

- Access attendance has regularized.
- Both parents have more regularly participated in couple's counselling with Marilee Burwash-Brennan, who reports that they were attending sessions "more consistently in the past two and a half months".
- Mr. S has begun individual counselling with Wayne Hollett.
- Mr. S has been prescribed medication to treat his anxiety.
- The parents have moved to a new apartment which does not have the health or safety hazards of their earlier apartment.

[25] The Agency's most recent plan was dated June 21, 2017. It noted that the parents' access with D was sporadic and Mr. S was inconsistent in attending and participating with individual counselling. The plan noted the parents hadn't demonstrated that they were able to maintain stable housing, and that there appeared to be ongoing conflict in their relationship.

[26] The plan was for the parents to work with a family support worker, do couple's counselling, and attend access with D. Mr. S was to do individual counselling and Ms. C was to work with a mental health practitioner.

[27] This plan is being carried out, with the exception of Ms. C's work with a mental health practitioner.

[28] From the date the plan was filed in June until the application was heard in November, the parents were working with Ms. Halpern, their family support worker. They met with her at scheduled appointments on July 19, August 17, August 30, September 12, September 14, October 20 and October 31. The Agency's case recordings do not reveal why a scheduled session on September 27 appears not to have happened.

[29] The parents attended their couple's counselling sessions with Ms. Burwash-Brennan on June 28, July 7, July 18, July 25, August 1, August 17, August 30, September 6, September 13, September 20, and October 11. In each of June and July, they missed one appointment: they called in advance of the appointment to cancel it, but their call came past Ms. Burwash-Brennan's cancellation cut off, so she treated the appointment as a missed appointment. Ms. Burwash-Brennan acknowledged there was a mix-up about the time of an appointment in September which resulted in another such late cancellation. Their attendance at couple's counselling after the Minister filed her last plan for the child's care is an improvement over their earlier attendance.

[30] Similarly, the parents attended access more regularly after the last plan was filed. The parents had tried to improve their situation by finding jobs. When the Minister complained that they were missing access or service appointments, the parents reduced their work hours or left their jobs and sought income assistance.

[31] In August, Mr. S was referred to Wayne Hollett for individual counselling which began on August 30. Mr. S attended no appointments in September though three were scheduled. Some of these may have been missed because notice of the appointments was sent to Mr. S's previous text number. During their limited involvement, Mr. Hollett learned that Mr. S was going to the gym, which was a positive method for coping with his agitation. Mr. Hollett suggested that walking or patting the couple's cat could be calming. Where Mr. S had been prescribed lorazepam in the past, Mr. Hollett testified that he told Mr. S it might not be a bad idea for Mr. S to use medication to calm himself. Mr. S now has a prescription for lorazepam which he takes as needed. His use is modest: in a month and one-half, he has taken between 5 and 8 pills.

[32] The only element of the plan which was not being carried out was Ms. C's work with a mental health practitioner. Ms. C had been referred by the emergency department at the Infirmary site of the Queen Elizabeth II Health Sciences Centre to Bayers Road Mental Health where she met with Jennifer Parks for an assessment and follow up counselling. They had four sessions between December 5, 2016 and April 20, 2017. These services ended when Ms. C failed to attend an appointment in May 2017 and there were no further appointments.

[33] Because we are past the deadline for final disposition the two options available are the least and most intrusive options: returning D to her parents or ordering her into the Minister's permanent care and custody.

### **The Minister's claim**

[34] According to the Minister, there is a real chance of harm to D. The parents say the Minister has not shown that there is a substantial risk of D's physical or emotional harm or neglect.

[35] "Substantial risk" is a real chance of danger that is apparent on the evidence: subsection 22(1) of the *Children and Family Services Act*. It is the real chance of physical or emotional harm or neglect that must be proved to the civil standard. That future physical or emotional harm or neglect will actually occur need not be established on a balance of probabilities: *MJB v. Family and Children Services of Kings County*, 2008 NSCA 64 at paragraph 77, adopting *B.S. v. British Columbia (Director of Child, Family and Community Services)*, 1998 CanLII 5958 (BC CA), at paragraphs 26 to 30.

[36] If the Minister establishes that there is a real chance of harm, the question is purely one of D's best interests, as between permanent care and a return to the parents. If the Minister does not establish this that there is a real chance of harm, then D must be returned to her parents.

[37] The Minister grounded its claim for permanent care in clauses 22(2)(b), (g) and (ja) of the *Act*. In argument, the Minister identified the factual bases for the claim as:

1. each parent's unresolved mental health problems;
2. the uncertainty of the parents' relationship; and
3. the parents' transiency and residence instability.

[38] The Minister argues that these circumstances mean D will need protective services if she is returned to her parents.

### **The parents' mental health**

[39] The Minister's argument on this point was framed as the rhetorical question, "What are the prospects that she [Ms. C] will get help in the future?" This is an appropriate way to frame the issue. Parents who have poor mental health are not deprived of their children: parents whose poor mental health puts their children at risk and who do not seek needed treatment are. As well, this framing acknowledges that mental health conditions may be chronic and not capable of once-and-for all-resolution.

[40] The parents' ability to live independently and to find and maintain work isn't compromised by the state of their mental health. I will address each parent's mental health individually.

### **Ms. C's mental health**

[41] Ms. C has received psychiatric treatment since she was in her mid-teens and she has accessed services from various service providers at different times.

[42] As an adolescent, Ms. C accessed services at the IWK (4 South – now the Garron Centre) and the Adolescent Centre for Treatment. She was treated by her family physician. During her pregnancy with D, Ms. C accessed treatment through the Reproductive Mental Health Centre at the IWK. All this was done prior to any involvement by the Minister.

[43] Prior to the start of this proceeding, when there were crises with Ms. C's mental health, Mr. S took the appropriate steps to ensure that both D and Ms. C were protected. When he did this in March 2016 by calling the Agency, the file was closed after the initial investigation on the basis that the major presenting problem of physical harm was "unsubstantiated" and the risk had been mitigated.

[44] Ms. C has experienced no mental health crises for the past 17 months. Her history demonstrates that when there is a crisis, services are accessed. She is aware of the available services, as are those who support her (her mother and Mr. S).

[45] Ms. C has extensive experience in caring for her 5 younger siblings. The access notes reveal her to be a confident, competent and capable care-giver.

[46] I conclude that Ms. C's mental health does not put D at risk.

### **Mr. S's mental health**

[47] The Minister pointed to Mr. S's post-traumatic stress disorder as an unresolved problem for Mr. S. Following the discovery of the suicide of a long-time friend in March 2016, Mr. S experiences flashbacks and "at times" disturbed sleep.

[48] The Minister said that Mr. S had very limited discussion with Marilee Burwash-Brennan about his PTSD. Mr. S's counselling with Ms. Burwash-Brennan began approximately 5 months after his friend's death. In her initial report, Ms. Burwash-Brennan said that Mr. S had "been able to share his feeling associated with the suicide and reported that he felt he has for the most part dealt with his friends' [sic] death." She noted his comment that he felt he was "coping well with the loss of his friend". Ms. Burwash-Brennan did not question Mr. S's self-assessment. She reported that he was "open and honest".

[49] The Minister also identified Mr. S's anxiety as an unresolved problem, saying that Mr. S presented – at times - as very anxious while in a child-caring role. The Minister says that Mr. S's anxiety has a direct relationship to Mr. S's ability to parent and his statement "I'm done" at certain access meetings reflected a need for treatment. I do not accept this characterization.

[50] Until March 2017, access facilitators took notes describing events during every single access visit. The notes about these parents were generally positive, but not always so.

[51] Documenting parents' interactions with their children, the notes were an important source of information. The notes could reveal whether parents were caring for their children appropriately, and have an impact on the decision to return a child. Parents are aware that they are being observed during supervised access visits and that these observations are being recorded. Unlike the access facilitators, parents cannot document access activities while they are occurring. For a parent, these visits are fraught.

[52] For example, in February 2017, an access facilitator criticized Mr. S for allowing C outside without a hat or sweater.

[53] Faye Halpern was the Family Support Worker assigned to work with the parents to ensure, among other things, that they had adequate parenting skills. Ms. Halpern is highly qualified: in closing argument, the Minister suggested Ms. Halpern was over-qualified for this work, describing her as "a race horse tied to a plow".

[54] Ms. Halpern was working with Mr. S at the access visit when C left without a hat or sweater. It was Ms. Halpern's view that both children were adequately dressed. C was in a hooded baby carrier. Ms. Halpern said it was 8 degrees outside, with no wind. The children were being moved 50 feet, from the library to the car. Ms. Halpern's judgment that the children were properly dressed was contradicted by that of the access facilitator. Mr. S was caught in the middle.

[55] As of March 2017, access facilitators stopped writing notes and were required to complete an incident reporting form if something happened that might be relevant for considering, or reviewing visit plans. The incident reporting form says: "Consistent with our Duty to Report, if the incident is one in which the child is harmed or is believed to be at risk of harm during a visit, a child welfare referral is required to be made by the individual who has witnessed this incident." The introduction of incident reporting forms means that the only notes about access visits are negative ones.

[56] After C was born, the Minister let C stay with the parents, but wouldn't return D on the basis that caring for both children would be too much for the parents. Regardless of this thinking, when C was taken into care and the parents were exercising access individually, access was scheduled so each parent, on his or her own, had access with both children together. At the time, D was crawling and learning to walk, while C was less than six months old.

[57] Twice, Mr. S was criticized for how he dealt with the competing demands of D and C. On one day, the access facilitator told Mr. S that he could put D on the floor at the library - "don't worry if she crawls away at the library" - while he dealt with C. Eight days later when he did exactly this, a different access facilitator completed the incident reporting form because this was the wrong thing to do. Again, Mr. S was caught in the middle, unable to satisfy the conflicting judgments of the access facilitators.

[58] Mr. S said, "I'm done" in response to the contradictory instruction he was being given by the access facilitators. He asked the access facilitator and the long term social worker for



parenting classes.

[59] In response to Mr. S's request for parenting classes, the social worker suggested he find parenting classes on his own, or direct Ms. Halpern to deal with this (though the Agency criticized her judgment), or have access moved from the community back into the Agency's offices. Since the Agency was critical of Ms. Halpern's judgment, it wouldn't help Mr. S to follow her guidance. Moving access back into the Agency offices would mean that Ms. C's access would be moved back, too. It appears no consideration was given to allowing him to spend time with one child at a time.

[60] I do not accept the Minister's argument that Mr. S's statement "I'm done" reflected a need for treatment. It reflects a parent's frustration in the absence of coordinated and consistent feedback. It reflects a need for Agency staff to take a consistent approach in making decisions. If Agency staff believe that two parents cannot handle two children, why demand one parent be able to do this?

[61] Mr. S's PTSD and anxiety have not hindered him in finding and maintaining employment. Mr. S was proud that he'd never been fired from any job. Before this proceeding he worked in a lobster plant and as a security guard for Securitas at the Autoport in Eastern Passage. During the proceeding, he worked as a security guard in Burnside. When the Minister complained that the parents were missing too many access visits, Mr. S left this job so he could attend access visits. He found a new job at Blue Ocean earning \$14.00 per hour just before the trial was scheduled but couldn't follow through with it because his employer would not let him miss 5 days of work to attend the trial. So, he found a part-time job earning \$11.00 per hour cleaning floors. Mr. S is hard-working and committed to supporting his family.

[62] I conclude that Mr. S's mental health does not put D at risk.

### **Uncertainty about the parents' relationship**

[63] The Minister said the parents' relationship is unstable. This court's docket is populated by broken family relationships. The end of a family does not necessitate the Minister's involvement. The Minister must point to something more.

[64] The parents' plan is to parent D together with Ms. C at home to provide primary care.

[65] The parents separated at the end of January 2017 when they were in conflict about Ms. C's sending text messages to another man. At the time, the parents were arguing. If arguments arose, they ensured that their son was elsewhere so he was not exposed to the conflict.

[66] As this proceeding has advanced, the parents became more adept at isolating the children from their disagreements. As well, through their counselling with Marilee Burwash-Brennan, they've improved their communication skills.

[67] Both with D and with their younger child, C, Mr. S has shown that he will protect the child from harm. When a conflict arose at Ms. C's mother's home, he called the police and the

Department. The family moved. On other occasions, the child wasn't present when the parents argued.

[68] The Minister said that as late as May 24, 2017, Mr. S was unsure about the relationship. He told Ms. Burwash-Brennan that he and Ms. C were in a relationship "for now".

[69] Ms. C's gender identity has been a longer-term focus of disagreement for the parents. Mr. S does not want to be in a relationship with Ms. C if she transitions her gender identity.

[70] As a teen-ager, Ms. C looked for help in transitioning her gender identity. She hasn't followed up on this at any point since she was pregnant. She explained that as she became happier in her relationship with Mr. S she was less interested in transitioning her gender identity.

[71] Both the parents and Ms. Burwash-Brennan testified that the parents improved their communication skills. Even in the challenging circumstances of a child welfare case and with strained finances, the parents argued less.

[72] The parents cannot guarantee whether their relationship will endure. I don't believe that is necessary. The parents have developed communication skills through their counselling which can assist them if they choose to separate. They are aware of the need to isolate D from arguments and have taken steps to do so when needed.

[73] I conclude that the parents' relationship does not put D at risk.

### **The parents' transiency and residence instability**

[74] It's in the context of the parents' accommodations that their poverty is conflated with being poor parents.

[75] When the parents' relationship began, they lived in an apartment in Herring Cove. Mr. S's employer lost its contract and, as a result, Mr. S lost his job. With little money, their options were limited. They moved in with Ms. C's parents on a temporary basis. Too many people in too small a house led to conflict. Mr. S called both the police and the Department of Community Services. This was appropriate. Ms. C, Mr. S and D moved immediately to D's godmother's home where they stayed until they could find a place of their own.

[76] The family's next home was in Herring Cove where they lived until April 2017 when they moved to North Street. In Herring Cove, they had problems with a neighbour who engaged in criminal behaviour. Subpoenaed by the police, the parents were witnesses in the neighbour's court proceedings. Their landlord at the North Street apartment was "unkind", to borrow Ms. Halpern's word. Rent was demanded when it wasn't due and the landlord was slow to perform needed repairs. When the landlord demanded the parents move - saying that a new tenant was taking possession - the parents were happy to leave. No new tenant moved in.

[77] Lack of income forced the parents from their first home. They relied on family support for their second home. When the tensions of crowding made this arrangement untenable, they quickly found another place to stay until they could secure a longer-term home.

[78] The parents left housing where there was criminal activity, health or safety concerns. This is appropriate: the Minister would raise concerns if the parents remained.

[79] The Minister suggests the parents are failing for living in these homes in the first place. With limited means, the parents have limited choices.

[80] The parents have recently found a home in Dartmouth. Ms. Whynot described their new neighbourhood as a “lower income area” where there is “reported criminal activity”. She says the methadone bus stops outside their building.

[81] The parents’ homes have been tidy and clean according to Ms. Halpern, who is a frequent visitor to them. They have modest furnishings and depend on the Parker Street Furniture Bank, Circle of Care or purchase vouchers from the Department of Community Services for necessary furniture. Ms. Whynot, their worker, has seldom visited their homes. Her concerns about the neighbourhoods are shared by the parents, who have left homes if a neighbourhood proves inappropriate.

[82] The parents cannot be faulted for their inability to afford homes in better neighbourhoods. This past summer, both parents left their jobs which were interfering with their ability to attend appointments and access in response to the Minister’s concerns that they were missing appointments and access. Without earnings, they have less income and fewer housing options. Mr. S has just found a job. His earnings will reduce the amount of income assistance he receives. They are aware of the need to provide D with appropriate housing.

[83] I conclude that the parents’ housing instability does not place D at risk.

## **Conclusion**

[84] I do not accept that the parents would fail to provide services or treatment to alleviate harm to D. The parents are aware of their daughter’s needs and seek services and assistance to meet her needs, and to protect her from the challenges posed by their mental health conditions and their poverty.

[85] I conclude that D is not in need of protective services and I dismiss the Minister’s application for permanent care and custody of D. An order dismissing the application is enclosed.

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Elizabeth Jollimore, J.S.C. (F.D.)

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

**Citation:** *Nova Scotia (Minister of Community Services) v. S.C.*, 2017 NSSC 336

**Date:** 2017-12-01

**Docket:** SFHCFSA-101078

**Registry:** Halifax

**Between:**

Minister of Community Services

Applicant

v.

S.C. and M.S.

Respondents

<b>Erratum</b>
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**Restriction on publication:**

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**Judge:** The Honourable Justice Elizabeth Jollimore

**Heard:** November 6-9, 2017 and December 1, 2017

**Written release:** December 1, 2017 (Decision rendered with reasons to follow: January 2, 2018)

**Counsel:** Peter C. McVey, Q.C. for M.C.S.  
Tanya R. Jones for S.C.  
Alisha Brown-Fagan for M.S.

**Erratum date:** January 5, 2018

**Erratum:**

Paragraph [85] of the original decision dismissed the Minister's application for permanent care and custody of **C**. The paragraph was intended to dismiss the Minister's application for permanent care and custody of **D**. Paragraph [85] should be deleted and replaced with the following paragraph:

[85] I conclude that D is not in need of protective services and I dismiss the Minister's application for permanent care and custody of D. An order dismissing the application is enclosed.