

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

**Citation:** Nova Scotia (Community Services) v. E.C., 2007 NSSC 302

**Date:** 20071018

**Docket:** SFHCFSA-047885

**Registry:** Halifax

**Between:**

Minister of Community Services

Applicant

v.

E.C.

Respondent

**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."

**Judge:** The Honourable Justice Mona M. Lynch

**Heard:** September 17, 18, 19 & 20, 2007, in Halifax,  
Nova Scotia

**Counsel:** Peter McVey, for the Applicant  
Tanya Jones, for the Respondent

**By the Court:**

**Introduction:**

[1] This is an application by the Minister of Community Services (“MCS”) for an order of permanent care and custody pursuant to s. 42(1)(f) and s. 46 of the **Children and Family Services, S.N.S. 1990, c. 5 (“CFSA”)** in relation to the child, J.X.C., born May (*editorial note- date removed to protect identity*), 2006. The mother of J.X.C. is the respondent in this matter. This is the second application by the MCS for an order of permanent care and custody of J.X.C. The first application for permanent care and custody was made on December 29, 2006 and resulted in an order for temporary care and custody. The decision in the first application is dated February 6, 2007 and is **Minister of Community Services v. E.C.**, 2007 NSSC 37.

**Background:**

[2] The conclusion of the decision dated February 6, 2007 as set out in paragraph 63 was:

J.X.C. will be placed in the temporary care and custody of the Minister of Community Services. Access between the mother and J.X.C. will continue to be supervised but should be increased to allow more time for bonding between mother and son. Arrangements should be made to allow the mother to attend parenting programs with the child outside of her home. The services of a family support worker should continue. The mother should continue with the services of mental health counselling and the Healthy Beginnings Program including parental education with Shonda Johnson.

Since the decision dated February 6, 2007 J.X.C. has remained in the temporary care and custody of the MCS. After the decision the access between the mother and J.X.C was increased from three visits per week for an hour and one half each to three visits per week for two and one half hours each. The access continues to be supervised. Due to the move of the foster family, access was changed again in August of 2007 to two visits per week for three hours and forty-five minutes each. The mother has changed residence twice since the last decision.

[3] The mother continued to be involved in the Healthy Beginnings Program. The mother continued mental health counselling. The family support or skills worker continued to work on parenting skills with the mother. The mother attended at the Dartmouth Family Centre for the Well Baby Clinic and playgroup on most Wednesday afternoons with J.X.C. The mother took J.X.C. swimming during some access visits.

[4] Psychologist, Dr. Carolyn Humphreys, was consulted in May 2007 regarding the recommendation in the parental capacity assessment that J.X.C. and his foster mother participate in therapy to ensure the development of a secure attachment. Dr. Humphreys assessed J.X.C. with his foster mother present and determined that therapy was not necessary as the process of attaching was occurring without therapeutic intervention. Dr. Humphreys testified that once a secure attachment was formed it could be transferred to another care provider. Dr. Humphreys recommended a follow up appointment to observe J.X.C. and the foster mother but this has not occurred.

[5] In August of 2007, the mother gave birth to a baby girl, A.R.M.C., who was taken into the care of the MCS and is the subject of a separate proceeding. The mother's January 2007 plan to move to Massachusetts to live with the father of her baby girl has changed. The relationship between the mother and this man terminated around the time of the first permanent care and custody hearing.

[6] During the summer of 2007 there were some concerns noted regarding J.X.C. from both the foster mother and the mother. These concerns included rocking behaviour, fluttering of his eyes when eating, putting too much food in his

mouth and being bothered by airplanes flying overhead. Referrals have been made for J.X.C. to explore these concerns, including assessment for autism.

[7] In June 2007 psychologist Heather Cake conducted a developmental assessment of J.X.C. Heather Cake recommended that J.X.C. undergo a speech evaluation and identified delays in language skills and gross motor skills. Referrals for J.X.C. were made for hearing and speech services J.X.C. has continued to have sessions with a physiotherapist to work on his gross motor skills.

**History of Proceedings:**

[8] Since the hearing of the first application for permanent care and custody of J.X.C., he has remained in the temporary care and custody of the MCS. There was an order of temporary care and custody dated February 6, 2007 as a result of the decision from the first hearing. On April 23, 2007 the MCS applied for a review order and filed a plan of care seeking an order for permanent care and custody. The review hearing of April 30, 2007 resulted in an order for temporary care and custody and the permanent care and custody hearing was set for four days starting September 17, 2007. A further order of temporary care and custody was made on

July 30, 2007. The permanent care and custody hearing was held on September 17, 18, 19, and 20, 2007.

**Position of the Parties:**

[9] The MCS seeks an order of permanent care and custody for J.X.C. The plan is to seek an adoption placement.

[10] The mother opposes the plan of the MCS, seeks a termination of the child protection proceeding and a return of J.X.C. to her care. Her plan would be to continue to be involved in her current supportive services. The mother has indicated she would participate in programs offered by Family SOS and would have J.X.C. participate in programs such as swimming. If the court is not prepared to terminate the proceeding, the mother is seeking an order placing J.X.C. in her care subject to the supervision of the MCS.

**Legislation:**

[11] The preamble to the **CFSA** sets out that the basic rights and fundamental freedoms of children and their families include a right to the least invasion of privacy and interference with freedom that is compatible with their own interests and of society's interest in protecting children from abuse and neglect. The preamble says that children have a sense of time that is different from that of adults and services provided pursuant to this **Act** and proceedings taken pursuant to it must respect the child's sense of time. The preamble also provides that social services are essential to prevent or alleviate the social and related economic problems of individuals and families.

[12] The paramount consideration in all proceedings under the **CFSA** is the best interests of the child. In considering the best interests, I am to consider all of the factors in s. 3(2) of the **CFSA**. Along with the other factors, I must consider the importance for the child's development of a positive relationship with a parent or guardian and a secure place as a member of a family. I must consider the child's physical, mental and emotional needs and the appropriate care or treatment to meet those needs. I must consider the child's level of development. I must consider the effect on the child of delay in the disposition of the case. I must consider the risk that the child may suffer harm through being removed from, kept away from,

returned to or allowed to remain in the care of a parent or guardian. I must consider the degree of risk that justified the finding that the child is in need of protective services.

[13] Section 22(2) of the **CFSA** sets out enumerated grounds for finding a child in need of protective services.

[14] Under section 41 of the **CFSA** I am to consider the evidence from the protection hearing and the plan of care prepared by the Minister. I must also consider the evidence presented at the first permanent care and custody hearing in January 2007.

[15] Under section 42 of the **CFSA** I am to make a disposition order in the best interests of the child. The outside date is February 6, 2008. The options open are to terminate the proceeding and return J.X.C. to his mother, place J.X.C. in the care of his mother subject to the supervision of the MCS, make a further order for temporary care and custody or make an order placing J.X.C. in the permanent care and custody of the MCS.



[16] There are other subsections of section 42 of the **CFSA** that I must consider:

(2) The court shall not make an order removing the child from the care of a parent or guardian unless the court is satisfied that less intrusive alternatives, including services to promote the integrity of the family pursuant to Section 13,

(a) have been attempted and have failed;

(b) have been refused by the parent or guardian; or

(c) would be inadequate to protect the child.

(3) Where the court determines that it is necessary to remove the child from the care of a parent or guardian, the court shall, before making an order for temporary or permanent care and custody pursuant to clause (d), (e) or (f) of subsection (1), consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family pursuant to clause (c) of subsection (1), with the consent of the relative or other person.

(4) The court shall not make an order for permanent care and custody pursuant to clause (f) of subsection (1), unless the court is satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limits, based upon the age of the child, set out in subsection (1) of Section 45, so that the child can be returned to the parent or guardian.

[17] The maximum time period for an order of temporary care and custody under

s. 45 of the **CFSA** is twelve months and the outside date is February 6, 2008.

[18] This proceeding is a review of the original disposition order and under s. 46 of the **CFSA** I must consider:

- (4) Before making an order pursuant to subsection (5), the court shall consider
  - (a) whether the circumstances have changed since the previous disposition order was made;
  - (b) whether the plan for the child's care that the court applied in its decision is being carried out;
  - (c) what is the least intrusive alternative that is in the child's best interests; and
  - (d) whether the requirements of subsection (6) have been met.
- (5) On the hearing of an application for review, the court may, in the child's best interests,
  - (a) vary or terminate the disposition order made pursuant to subsection (1) of Section 42, including any term or condition that is part of that order;
  - (b) order that the disposition order terminate on a specified future date; or
  - (c) make a further or another order pursuant to subsection (1) of Section 42, subject to the time limits specified in Section 43 for supervision orders and in Section 45 for orders for temporary care and custody.

Before making an order for temporary care and custody I must consider:

(6) Where the court reviews an order for temporary care and custody, the court may make a further order for temporary care and custody unless the court is satisfied that the circumstances justifying the earlier order for temporary care and custody are unlikely to change within a reasonably foreseeable time not exceeding the remainder of the applicable maximum time period pursuant to subsection (1) of Section 45, so that the child can be returned to the parent or guardian.

**Analysis:**

[19] The onus is on the MCS to show that it is in the best interests of J.X.C. to be placed in permanent care and custody. The burden, while the civil standard, is a heavy one. On a review there is a two-stage test, the first whether the child is still in need of protective services and the second is a consideration of the best interests of the child.

[20] In the decision from the first permanent care and custody hearing it was found that J.X.C. was still at risk in his mother's care. While it was found that the mother did not cause the injuries suffered by J.X.C., the injuries to him were caused by the mother's failure to supervise him and protect him adequately. The mother placed J.X.C. in the care of a person who caused the injuries. The mother must clearly understand that she was responsible for the injuries to J.X.C. by her choice of caregiver.

[21] There were other concerns after the first hearing. There was concern that the mother was not consistently responding to J.X.C.'s cues. There was still too much risk at that time to place J.X.C. in the care of the mother subject to the supervision of the MCS.

[22] Since the time of the first hearing the mother has continued with services including mental health counselling, the family skills worker and the Healthy Beginnings Program which includes the community home visitor. The case aides from the MCS have continued to supervise visits and make notes regarding the visits. J.X.C. has had a developmental assessment and was assessed regarding attachment. J.X.C. continues with physiotherapy. J.X.C. has been referred for a hearing and speech assessment. He has also been referred to an early intervention program and been referred for an assessment regarding the behavioural concerns noted.

[23] As in the first hearing, there has been progress noted with the mother's parenting skills but there are still concerns regarding her parenting. J.X.C. has not been in the full time care of his mother since late July 2006. She has seen him for

a maximum of seven and one half hours a week. All of the concerns with regard to the mother's parenting have not been alleviated to the extent necessary to return J.X.C. to her care.

[24] I find that there is still a substantial risk that J.X.C. will suffer physical harm by the failure of the mother to supervise and protect him adequately under s. 22(2)(b) of the **CFSA**.

[25] The MCS held a risk conference on April 17, 2007. The decision at the end of that conference was to seek permanent care and custody of J.X.C. There was a review of that decision on August 10, 2007 and the conclusion was the same.

[26] The mother's access was increased immediately after the initial decision. Access was not increased again which is consistent with the decision of the MCS on April 17, 2007 to seek permanent care and custody. The move of the foster family has resulted in a reduction in the frequency of access although it is still the same number of hours per week.

[27] The concerns of the MCS include the mother's mental health. The mother is continuing to seek counselling for her mental health. She sees her counsellor approximately once per month. All appointments with the mental health counsellor have been kept or rescheduled. The mental health counsellor did not find the mother to be unfocussed. The mental health counsellor did not express concern about her attendance at appointments or the topics of discussion. The mental health counsellor said they have been discussing the stressors in the mother's life. That is understandable as the mother had only recently had her second child taken into the care of the MCS. I do not have evidence that, at the present time, the mother's mental health is a concern that would hamper her ability to care for J.X.C.

[28] The mother continues to take anti anxiety medication in order to clear her mind to get to sleep. The mother herself determines the amount of medication to take at bed time within certain limits. There was evidence at the first hearing which led me to believe that the medication affected her ability to respond to J.X.C. through the night. Questions about the medication must be answered. The mother says that the drug does not make her sleepy or affect her reflexes or motor skills. This must be verified.

[29] The MCS has also raised concern about the mother's financial and housing stability. The mother has moved many times over the last few years and is in receipt of income assistance from the Province of Nova Scotia. The mother has debts and has considered bankruptcy. While the mother has limited financial resources, the best interests of children has never been found to be tied to the person with the most money. If J.X.C. were placed in her care, the mother would receive the child tax benefit and an increase in assistance from the Province. The mother's prospective financial resources are adequate.

[30] Since the last permanent care and custody hearing, the mother has moved twice. After the injuries to J.X.C. she was unable to maintain the apartment she lived in with her roommate. She moved to a smaller, more affordable apartment. Service providers and representatives of the MCS expressed concern that the apartment was too small for her and two small children. The mother then obtained a bigger apartment and had her prospective roommate checked by the MCS. The evidence at the trial is that the roommate will be moving out in December 2007. The mother has a new candidate for a roommate subject to the proper checks by

the MCS. The mother has valid reasons for her moves and by all accounts the mother's current accommodations are adequate for her and J.X.C.

[31] There was some concern expressed about the mother using time outs as a form of discipline for J.X.C. I accept the mother's explanation that she was separating herself to give herself a time out from frustration with J.X.C. and not using time outs as a form of discipline for J.X.C. Service providers who saw the interaction between the mother and J.X.C. say they witnessed the mother using redirection with J.X.C.

[32] The MCS has expressed concern about the mother's lack of support if left on her own with J.X.C. However, the mother was seeing a family doctor, pediatrician, mental health counsellor, public health nurse, community home visitor and others before the involvement of the MCS. The mother says she will continue with the services in place and I accept that she will. The majority of services were not imposed by the MCS but voluntary services the mother had engaged.

[33] The MCS has expressed concern that the mother has not fully participated in the Healthy Beginnings Program which involves the community home visitor. It



was clear from the evidence that there was confusion on the mother's part between the Healthy Beginnings Program and the Well Baby Clinic and playgroup. The mother thought the Wednesday afternoon session was the Healthy Beginnings Program. The confusion is understandable to some extent as Wednesday is when she saw the community home visitor from the Healthy Beginnings Program.

[34] The mother and the community home visitor had problems scheduling home visits when the new community home visitor first started. The community home visitor attributed the problems to her caseload and the mother's access schedule. The Healthy Beginnings Program includes child development, nutrition, and children's cues. While home visits did not occur once per week, the program was delivered at the Wednesday afternoon Well Baby Clinic and playgroup. The community home visitor and the mother met for the most part on a weekly basis. The mother provided excuses for any missed visits. I am satisfied that the mother participated fully in the Healthy Beginnings Program.

[35] The MCS expressed concern that the mother was still not responding to J.X.C.'s cues and was inconsistent in following the directions given by the case aides and the social worker for the MCS. Examples given were that the mother

would be told that J.X.C. was due to eat his lunch but she would not prepare the food in a timely manner. This, at times, would mean that J.X.C. was fussy and crying during the fifteen minutes it would take to prepare the food once J.X.C. showed his hunger. Other examples included not putting sun screen on J.X.C. when directed. Concern persisted in the slow speed of changing diapers.

[36] The mother's response to these concerns was that on some occasions the case aide would tell her that J.X.C. was due to eat and she would prepare the food and try to feed J.X.C. but he would not be hungry. Therefore she decided to wait for cues for his hunger and learn from him rather than the case aides when he was hungry. The mother disputed that the food for J.X.C. would take fifteen minutes to prepare as it usually just needed to be heated. With regard to the sun screen, the mother asked the case aide whether the foster mother had applied sun screen and the case aide was not certain. The mother applied the sun screen within a few minutes of being directed to do so. Diaper changes, the mother said, were a problem when she was very pregnant during the summer as she had to sit on the floor to change J.X.C. The community home visitor timed and observed the mother changing diapers and did not express a concern.

[37] There was concern expressed by the MCS regarding a safety gate for the stairs in the home of the mother. The mother purchased the safety gate and there were options as to how to install or set up the gate. The service providers testified that the gate had to be anchored to the wall. The mother testified that this was not possible as the screws would not hold in the walls. The mother set up the gate in the alternative way and testified that she cannot push the gate down and that J.X.C would not be able to push the gate so that he would fall down the stairs. The gate should be checked to ensure it is as safe as the mother asserts.

[38] The mother's explanations for the concerns are all reasonable. While the MCS is still expressing concerns, there appears to be a big improvement since the initial permanent care and custody hearing.

[39] The MCS expresses concern about the special needs that J.X.C. may have and the mother's ability to respond to those needs. As noted, J.X.C. has been sent for a hearing and speech assessment and another assessment to explore the possibility of autism and to explore the recent behavioural concerns. Without the results of the assessments it would be pure speculation to suggest that the mother can or cannot respond to any special needs that J.X.C. may or may not have.

[40] The MCS expressed concern that the mother did not testify about her plan for the medical needs of J.X.C. The MCS says that her plan was parent and not child focussed. The MCS says that the mother did not mention appointments with the pediatrician, hearing and speech or physiotherapy for J.X.C. J.X.C. has been in the care of the MCS since late July 2006. Since that time the mother has not had the opportunity to attend any medical appointments with him. The only appointment the mother attended was the developmental assessment by Heather Cake. During access visits the mother has done the physiotherapy exercises with J.X.C. In the part of the mother's affidavit outlining J.X.C.'s health, she states that she will do the same thing as the foster parent is doing.

[41] The MCS says that J.X.C. needs a parent who will respond to his needs and is available, responsible and attuned. The report and evidence of Heather Cake was instructive in analysing the relationship between J.X.C. and his mother. Heather Cake was the psychologist who worked at the Dartmouth Family Centre. Heather Cake observed the mother and J.X.C. weekly until July when she changed employment. Heather Cake noticed that J.X.C. was quiet and did not move around a whole lot and suggested a developmental assessment. Heather Cake described

the mother interacting appropriately with J.X.C. and redirecting him from behaviour. Heather Cake observed the mother trying to teach J.X.C. to walk and encouraging him to move through his environment. During the assessment Heather Cake described J.X.C. sitting on his mother's lap. When J.X.C. was distressed Heather Cake described the mother as a source of security and J.X.C. would settle back in his mother's lap. If J.X.C. moved away from the mother he checked back to ensure his mother, his safe base, was still there.

[42] The author of the parental capacity assessment expressed concern that J.X.C. would not develop a secure attachment. The assessment by Dr. Humphreys would indicate that J.X.C. is developing a secure attachment. It is concerning that the follow up appointment with Dr. Humphreys was not rescheduled.

[43] The family skills worker still expressed concerns regarding the mother's parenting but also noted improvements in her parenting skills. The case aides noted that the mother did some things well and others not and noted inconsistency.

[44] The concerns raised by the MCS are not sufficient to satisfy me that the best interests of J.X.C. require that he be placed in the permanent care and custody of

the MCS. The MCS is asking for what they believe to be in the best interests of J.X.C. and they have followed their plan for J.X.C. The MCS bears the burden of showing that permanent care and custody is in the best interests of J.X.C.

[45] Section 42(4) of the **CFSA** prohibits me from making an order for permanent care and custody unless I am satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time not exceeding the maximum time limit - in this case February 6, 2008. All of the evidence leads me to believe that the mother's parenting is improving. The psychologist who observed the mother and child together described the mother as a source of safety and security for J.X.C. Improvements have been noted in her parenting since the previous hearing. I am not satisfied that the circumstances justifying the order are unlikely to change within a reasonably foreseeable time or between now and February 6, 2008.

[46] As I have already stated, I am not satisfied that the child protection concerns have been alleviated to the extent necessary to terminate the proceeding and return the child to the mother. Termination is not in J.X.C.'s best interest.

[47] Access has not been increased between the mother and J.X.C. since February 2007. In fact the frequency of access has decreased because of the foster family's move outside the metro area. Between now and February 6, 2008 access must be increased and supervision lessened with a view to returning J.X.C. to the care of his mother under the supervision of the MCS. Moving to a supervision order is the least intrusive order that is in the best interests of J.X.C.

[48] Prior to supervision being lessened, the safety gate in the mother's home must be checked to ensure it is adequate to keep J.X.C. from falling down the stairs. Prior to overnight access occurring, the mother must provide a medical opinion from the doctor who prescribes her anti anxiety medication. The medical opinion must state that the medication, in the doses taken by the mother, will not affect her ability to respond to J.X.C.'s needs through the day and night.

**Conclusion:**

[49] J.X.C. will remain in the temporary care and custody of the MCS. After ensuring that there are no safety concerns in the mother's apartment, the access

will be partially supervised for two visits a week of four hours duration.

Beginning the first of November there will be an increase to partially supervised and unsupervised visits of seven hours duration twice a week. In the middle of November access will be increased to partially supervised and then unsupervised overnight access if the medical opinion has been provided showing that the mother's medication will not affect her ability to respond to J.X.C.'s needs through the day and night. In the middle of December, J.X.C. will be returned to the care of his mother subject to the supervision of the MCS.

[50] The mother will continue with the services of the family skills worker from the MCS. The mother will continue to participate in programming at the Dartmouth Family Centre including the Healthy Beginnings Program. The mother will continue to participate with mental health counselling with Community Mental Health Services. Non-compliance with the order will entitle the MCS to take J.X.C. into their care.

J.