

3. Another Planned Permanent Living Arrangement ("APPLA")

- a. In the Matter of Melinda J., 2008 D.C. Super. LEXIS 1



LEXSEE 2008 D.C. SUPER. LEXIS 1

In the Matter of Melinda J.

2004 NEG 286

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, FAMILY COURT

2008 D.C. Super. LEXIS 1

June 13, 2008, Decided

COUNSEL: [*1] Pierre Bergeron, Esq. [GAL], Washington, D.C.

Charles Feezor, Esq. [Medical GAL], Washington, D.C.

Sarah J. Bannister, Esq. [counsel for foster parents], The Children's Law Center, Washington, D.C.

Ashok Batra, Esq. [counsel for mother], Silver Spring, Maryland.

Relinda Louisy, Esq. [counsel for father], Washington, D.C.

Marinel deJesus, Esq., Assistant Attorney General, CFSA, Washington, D.C.

Dr. Ava Booker [Special Education Advocate], Silver Spring, Maryland.

Joanna Rainey, Social Worker, NCCF, Washington, D.C.

JUDGES: Cheryl M. Long, Judge.

OPINION BY: Cheryl M. Long

OPINION

MEMORANDUM OPINION AND ORDER CHANGING CASE GOAL FROM ADOPTION TO ANOTHER PLANNED PERMANENT LIVING ARRANGEMENT ("APPLA")

The purpose of this Memorandum Opinion is to elucidate the details of this Court's decision to change the goal of this case from adoption to placement in "another

planned permanent living arrangement" (hereinafter "APPLA"). The instant case is very unique. In open court at the permanency review hearing on April 3, 2008, the Court granted a joint motion filed on March 18, 2008 by the Guardian *Ad Litem*, the foster parents, and the Medical Guardian *Ad Litem*, seeking this change in the case goal. The District of Columbia did not file [*2] an opposition to the motion. Rather, at the same hearing the District determined that it would take "no position" on the request. The birth parents do not oppose this motion.

Although the motion already has been granted, the purpose of this order is to memorialize the Court's rationale for granting it. In this way, the record will be more precise.

In a nutshell, compelling circumstances justify the change in case goal, because the child herein is extremely compromised by physical abnormalities, life-threatening medical problems, and the need for constant medico-legal assistance that is beyond the ability of foster parents acting alone.

The Court's decision to change the case goal is best understood in light of the history of the case, the legal context of the case goal, the medical and educational issues confronting the child, the need for ongoing, sophisticated advocacy, the talents and commitment of the foster parents, and the likelihood of adoption of the child by other persons. Balancing all of these considerations, granting the joint motion was not a close question.

HISTORY OF THE CASE

The minor child herein was born on April 17, 2004. She was adjudicated to be a neglected child and [*3] was committed to the care of the Child and Family Services Agency on April 23, 2004. In the statutory sense,

the respondent was "removed from the home" as soon as she was born at Greater Southeast Community Hospital. The circumstances of her birth were terrible. When the child was a day old, a social worker at the hospital informed CFSA that the child weighed only three pounds and that the birth mother had tested positive for cocaine. The birth mother admitted that she had not had any prenatal care and also admitted that she had consumed 46 ounces of alcohol just prior to giving birth. The baby was born in distress, and she was transferred to Children's Hospital in the District of Columbia.

Right away, the child needed risky heart surgery. This surgery was performed at Children's Hospital in Philadelphia, and it was successful. The respondent was returned to the District of Columbia and again hospitalized at our local Children's Hospital. Upon medical discharge on July 22, 2004, Melinda was placed in the home of her present foster parents. She has never been apart from them. The foster parents are a married couple, Mr. W. and Ms. C.¹

1 In various pleadings, the foster parents have been [*4] identified erroneously as "Mr. and Mrs. C," even though they happen to have different surnames.

THE LEGAL CONTEXT OF THE CASE GOAL

The foundation for establishing the case goal is the District of Columbia Code. After a neglect adjudication and the filing of a dispositional order, the Superior Court must conduct periodic permanency review hearings for as long as the child remains in an out of home placement. *D.C. Code § 16-2323(a)(4)* (2001). The key component of each such hearing is determining the progress of whatever the child's permanency plan happens to be. The Court must probe whether and when the child can be returned to the parent, placed for adoption, placed pursuant to an award of legal custody or guardianship, or placed "because of compelling circumstances, in another planned permanent living arrangement . . ." *D.C. Code § 16-2323(c)(4)* (2001) (emphasis added). The latter option is the focus of the present motion. The other possible routes to permanency have never been viable possibilities.²

2 Both parents have shunned the child. The birth mother has specifically stated that she does not want to take responsibility for the child. The birth father was not identified until 2004, [*5] but did not subsequently exhibit any interest in caring for M.J. Without a doubt, reunification has never been a goal in this case, and it is not worth discussing any further.

The concept of "compelling circumstances" is not defined in any way by the Code. The term "permanent planned living arrangement" is also not defined by statute. It might include, for example, placement in an independent living program under contract with the government. This is common with teenagers who are old enough to object to adoption and who actually do so. However, the possibilities are as varied as the personal circumstances of the child in question. There is no established formula or footprint for what to do with all AP-PLA children.

Whatever this Court selects as a permanency goal must have a coherent, common sense basis that is tailored to the best interests of Melinda. Careful use of discretion is important, because, as the District of Columbia Court of Appeals has held, an order to change the permanency goal in a neglect case is not appealable. *In re K.M.T.*, 795 A.2d 688, 690 (D.C. 2002).

MEDICAL AND EDUCATIONAL ISSUES CONFRONTING THE CHILD

The respondent has a lengthy and disconcerting list of medical [*6] diagnoses. They are set forth in great detail in the instant motion (and in numerous other filings). The Court will not repeat all of these items, but the following descriptions are pertinent to the present issue. The movants accurately state the following:

Melinda has been diagnosed with a number of congenital medical conditions which severely limit her global functioning. . . . Melinda has congenital heart defects that have required surgical intervention and will continue to affect her overall health as she ages. Melinda has had three major surgeries to correct her congenital heart defects. In 2004, doctors performed a Yasui procedure on Melinda and inserted a VSD closure patch; in 2005, Melinda underwent an augmentation to her right ventricle to pulmonary artery conduit. Melinda will need future surgeries to replace the VSD closure patch and additional hospitalizations to deal with any complications arising from her heart and lung issues. In January 2006, Melinda was hospitalized for Kawasaki Syndrome, an inflammation of the blood vessels that can lead to serious heart complications if untreated.

In addition to her heart and lung issues, Melinda suffers from oropharyngeal dysphagia, [*7] a condition that prevents Melinda from swallowing food or saliva.

As a result, Melinda is unable to take food orally. Instead, she must be fed every four hours and overnight via a "G-tube" (a device that has been inserted surgically through the stomach wall directly into the stomach for feeding formula to be dripped into the tube by a pump). This condition also leaves Melinda susceptible to pooling oral secretions, i.e. (saliva that she is unable to swallow). Because she cannot clear her own oral secretions by swallowing, Melinda faces the constant risk of 'silent choking' and must be monitored carefully to make sure that her oral secretions do not build up and aspirate into her lungs.

Motion at 1-3.

The child's medical problems and disabilities also present massive developmental challenges. "Melinda is non-ambulatory; she cannot even crawl. She has only peripheral vision, and cannot speak." Motion at 3.

Furthermore, whenever the child is transported anywhere, she must be accompanied by much equipment and supplies, including a feeding pump, a long metal pole for hanging her feeding tube, PediaSure nutritional supplement, diapers, medications, bottles of distilled water, syringes, a car [*8] seat, a stroller, and a special chair.

As recently as March of 2007, a developmental psychologist reported on her developmental evaluation of this child. The psychologist (Dr. Penny Glass) concluded that this child's particular presentation of severe mental retardation means that " 'in all probability she will be unable to care for herself and will need custodial care in the future.' " Motion at 3, quoting Mar. 21, 2007 Follow-Up Developmental Evaluation of Dr. Glass.

THE NEED FOR ONGOING, SOPHISTICATED ADVOCACY

The role of the Superior Court in overseeing the implementation of a permanency plan is part of the reason why adoption is premature and not in the best interests of Melinda. Adoption may have seemed like the logical step at an earlier stage in the case. However, as more is known about the complexity of the child's condition and the uncertainty of her future needs, the involvement of the Court and the need for legal counsel and specialized advocates has become an integral part of the child's care.

It has become more and more important for the foster parents' attorney and the GAL to seek court orders in order to obtain what the child needs and in order to have a forum for scrutinizing [*9] whether the needs are be-

ing met. The Court will illustrate two of the many vivid examples.

One, it was necessary for the foster parents - through their legal counsel -- to seek relief from the Superior Court in order to insure that the child could receive very critical medical treatment. On October 31, 2007, counsel from the Children's Law Center filed a pleading styled as, "Foster Parents' Emergency Motion for Payment of Expenses Associated with Upcoming Trip for Respondent's Specialized Medical Care" (hereinafter Mot. For Payment").

This child's horrific disability of not being able to eat food by mouth is a condition for which the foster parents have sought help. They learned that there was hope for Melinda, when medical care providers at Children's National Medical Center recommended that Melinda participate in an intensive day treatment program that is designed to teach her how to eat and drink by mouth. The challenge is that this program is operated by St. Joseph's Children's Hospital in Patterson, New Jersey. It would be necessary for one foster parent (in this case, Ms. C) to travel with the child to New Jersey and to stay there with Melinda for a month. Ms. C took responsibility [*10] for researching the costs involved. Ms. C was able to arrange for the treatment itself through Melinda's medical insurance plan. What remained was the cost for transportation and lodging. This amount was calculated to be \$ 4,990.00. Ms. C made arrangements for the child to participate in this program from November 4, 2007 through December 1, 2007.

To be sure, such travel for Ms. C would not have been a frolic. For example, accompanying Melinda would require Ms. C to be away from her family (leaving the other foster children with no mother for nearly a month, including Thanksgiving), and she would have had none of the respite caretaker services that she has for eight hours per week at home. Melinda would benefit directly from Ms. C being with her, because the child needed round-the-clock care by someone who knows her well and because it made sense for Ms. C to learn the techniques that would be used in the therapy.

Without a doubt, CFSA has a statutory duty to obtain appropriate health care for a neglect child, including correction of remedial medical problems. Nonetheless, the agency did not notify Ms. C until October 24, 2007 that it would not fund any more than \$ 3,000.00 for this [*11] trip. Hence, the foster parents were forced to file an emergency motion, seeking an order that would require the agency to fully fund the transportation and lodging expenses.

On November 2, 2007, the District of Columbia filed a praecipe to confirm that it would pay all of the transportation and hotel expenses, so that the child could

receive the treatment and be accompanied by the foster mother.

Since this child is in such a unique medical condition, it is disturbing that such a motion was necessary. Apparently, the filing of the motion prodded a reassessment of the request for funds. Being able to eat and drink normally is a basic life function. No one should be denied the opportunity to achieve this function for want of \$ 1,990.00. Obviously, the ability to insure the best interests of this child depended upon the foster parents having a vigilant attorney available right away. Without such help, this child would not have had this critical treatment. Today, the child is able to eat "an ounce" of fruit yogurt.³ This is a major milestone.

3 This progress was noted in the CFSA Permanency/Review Hearing Report of April 3, 2008.

Two, the GAL was forced to retain a highly qualified Special [*12] Education Advocate, Dr. Ava L. Hughes-Booker in order to prepare to litigate Melinda's right to an appropriate education in a school that itself would not be a threat to her fragile health. Indeed, this Court heard live testimony from Dr. Booker at a hearing on the subject of why no District of Columbia Public School was a safe environment for Melinda. That testimony described, among other things, the child's need for a constant caregiver throughout the school day. This was necessary to prevent Melinda from choking to death, in the silent way in which her inability to swallow could go undetected by teachers. Furthermore, Melinda is at risk for infections if her G-tube is broken or compromised in any way. Melinda had been a student at Minor Elementary School. However, that placement was so inadequate - and dangerous to her health - that Ms. C removed her from the school with the agreement of the GAL.⁴

4 Ms. C documented various negative incidents that had occurred at this school, and her complaints included defaults as serious as the lack of oral suctioning equipment.

Convening a hearing on the school placement needs was the catalyst to ending the crisis. Miraculously, the staff of the [*13] Chancellor of the District of Columbia Public Schools ("DCPS") engineered an agreement to fund Melinda's placement at St. Coleta's School. This particular private school is precisely where Melinda belongs, and it was recommended by Dr. Booker. This Court is convinced that without an equivalent placement (not available in DCPS), Melinda could not safely attend school at all. The whole problem of insuring a safe and appropriate school for Melinda was solved only by the intervention of the GAL and his speedy retention of the expert.

All along, the child has needed an aggressive GAL and an effective Medical GAL. Both attorneys in this role have provided excellent services. Through them, there has been a way to compel government entities and service providers to explain their actions and to account on the record for what they commit. This has been a crucial benefit to the child. This benefit literally would be unavailable to the foster parents if they were to adopt this particular child.

The Medical GAL in particular constantly works with physicians to analyze precisely the technical aspects of surgeries, medications, and therapies. In many respects, the GAL relies on the professional input [*14] of the Medical GAL. They work closely together, and their combined recommendations to the Court are the linchpin to the Court's own understanding of what to order and what to expect. The Court has the obligation to weigh what they recommend and not to order merely anything that they might suggest at face value. Yet, they have proven consistently knowledgeable and reliable.

The Special Education Advocate has recently intervened to make a monumental difference in the child's educational opportunities and, indeed, to protect the child's life in a school setting. With Melinda, it is impossible to divorce education matters from safety and health issues.

To be clear, the social worker of the National Center for Children and Family plays a key role in coordinating services for the child. The current social worker is attentive to the case and communicates well with the foster parents. She is certainly part of the team of professionals who are necessary to the child's best interests. This is true in the practical sense, even if the other advocates occasionally must assert themselves separately in litigation. The value of an active social worker to Melinda cannot be minimized.

The foster parents [*15] have told the Court - and the two GALs agree - that they simply cannot achieve what is needed for this child if they are left alone without attorneys and specialized advocates. No other party in the case has effectively rebutted this basic fact of life. If Melinda is adopted by anyone whatsoever (not merely the present foster parents), this entire team will disappear. They should remain available to the child through the foster parents.

TALENTS AND COMMITMENT OF THE FOSTER PARENTS

It is not an exaggeration to state, as this Court has already observed, that the foster parents have provided magnificent love and care to the respondent. They are utterly devoted to her and the three of them are well bonded. The agency does not dispute this at all. They

have been zealous advocates for the child for the entire time that she has resided in their home.

All along, the foster parents have been quick to put the child first, even when doing so creates a hardship for themselves. For example, despite having two other foster children in the home, Ms. C has incurred financial risk by sometimes stopping her own employment in order to care for Melinda during the daytime.

Obviously, Ms. C and Mr. W are licensed [*16] therapeutic foster parents. Apart from this, Ms. C has individual skills that are most relevant to the care of this respondent. Ms. C is a registered nurse and has the training to deal with Melinda's medical requirements. Both foster parents insure that Melinda attends weekly visits with her primary care physician. Significantly, Mr. W. and Ms. C are so personally close to and observant of Melinda that they can discern from only a change in her breathing that immediate steps are necessary to prevent aspiration into her lungs. This closeness to the child and knowledge of the child is potentially life-saving because Melinda is a so-called "silent choker" and cannot verbally signal any physical distress.

In addition, the foster parents are meticulous in attending court hearings. They always provide useful input during the proceedings. The Court values their observations about the child and their views about the services being provided.

The commitment of the foster parents necessarily includes the commitment of the total family unit as a package. Their two twelve year-old foster sons are devoted to Melinda, and she receives the advantage of social interaction with siblings.

THE LIKELIHOOD [*17] OF ADOPTION BY OTHERS

It is highly unlikely that this child will be adopted by people other than the present foster parents. Moreover, there is no frivolous suggestion that the reunification with either birth parent might be possible in the future. Melinda's chances for adoption by anyone other than Mr. W and Ms. C are nil. This is the Court's assessment, for several reasons.

One, the birth family yields no links to potential adoptive parents who have a personal connection to Melinda. There are no other fit and willing relatives, family friends, etc. who have expressed any interest in the respondent. There are not even any unfit relatives or family friends who are interested in raising this child.

Two, any potential adoptive parent -- doing his or her due diligence -- would have the same concerns, questions and support needs as the current foster parents. Many facts must evolve before the Court and the parties

can have a reliable picture of the child's long term prognosis and the true character of what any adoptive parents must be able to provide on their own. Since the excellent foster parents who are raising the child cannot care for her without lawyers and other professionals to help [*18] them, it is not rational to expect totally new adoptive parents to do any better. Moreover, it would be very naive for new recruits to presume that they could fully protect the child without the team of experienced professionals who are now necessary adjuncts to the foster parents.

Invoking a particular case goal has the effect of requiring certain parties to take certain actions. A goal of adoption carries with it a firm and immediate mandate to the Child and Family Services Agency to begin a professional, nation-wide recruitment process. This requires professional time and expertise. It also would require the commitment of agency resources that are better spent on children whose adoptability is not already compromised. Accordingly, it is wasteful to have a case goal that requires the District to perform adoption recruitment.⁵

5 The movants have outlined a host of other barriers to a successful adoption, barriers not tied to the medical and developmental problems of this child. Not the least of these problems is the refusal of the agency to discuss the level of a potential adoption subsidy unless and until the potential adoptive parent files a petition for adoption. This is an arbitrary [*19] limitation on anyone's ability to perform a due diligence investigation of whether to file such a petition at all. No intelligent person would seriously file a petition without having some estimate of what financial support could be expected. This would not even be an official negotiation or contract. While this policy may generally be economical for the agency, this limitation is especially graphic because of the extreme needs of this particular child.

CONCLUSIONS

This Court concludes as a matter of law that the movants have established the requisite "compelling circumstances" justifying a change of the case goal to AP-PLA. All of the factors set forth herein are component parts of this conclusion. They form the factual basis for the Court's decision. The Court's decision is informed not only by the pleadings but by the entire record. This includes reports from the GALs, social worker reports, as well as representations and evidence adduced at multiple hearings.

The Court is fully aware that the District of Columbia must adhere to a well-reasoned federal policy that

requires states to create stable living arrangements for children who would otherwise languish in foster care. This policy [*20] was set forth in landmark legislation known as the Adoption and Safe Families Act of 1997 ("ASFA") and the various federal regulations implementing the Act. There is a link between this federal law and state courts because ASFA provisions "set the standards a state is required to meet in order to qualify for federal funding to support ongoing foster care, transitional living for older foster children and other programs necessary for the dependency system to operate." *In re Stuart S.*, 104 Cal. App. 4th 203, 207, 127 Cal. Rptr. 2d 856, 858 (Ct. App. 2002).

Nonetheless, the District of Columbia Code does provide leeway for exceptions to a general policy of avoiding long term foster care. The "compelling circumstances" exception exists for good reason, because no neglect case has a twin. Indeed, the ASFA does not purport to dictate to local courts what scenarios should constitute a legally justifiable planned permanent living arrangement.

Neither the District of Columbia Code nor the United States Code requires the Superior Court to settle for literally any adoption petitioner who surfaces. The rote purpose of ending or avoiding a foster care placement is not necessarily in the best interests [*21] of all respondents. Critically needed foster parents can be lost, unnecessarily, by such an arbitrary approach.

In the present case, the Court now approves a permanency goal that is anchored by a therapeutic foster home placement that is the only home the child has ever known. As one appellate court has observed,

the current federal scheme recognizes that some foster children may not be appropriate subjects for adoption or legal guardianship and may not have fit relatives who can provide a permanent home, but may be in a committed foster home, tribal clan placement or other committed placement which, while technically being a foster care placement, nonetheless has the characteristics of the more stable and permanent placement alternatives of adoption or legal guardianship. . . . A planned permanent living arrangement

may be a foster care placement which is particularly stable but it need not be. If such an arrangement exists, it arises from a particular case and set of circumstances and does not apply in every case.

Id. at 859-860 (emphasis added).

The above quoted passage from *In re Stuart S.* is an elegant description of the circumstances of Melinda J. Continued placement with Mr. W and [*22] Ms. C is technically a foster care arrangement that nonetheless mimics the stable and permanent placement of an adoption. It makes no sense to pretend that an ordinary, legal adoption with no publicly funded support team is a logical and attainable goal. The best interests of the child require that she remain with the present foster parents. Based upon the totality of the facts herein, this is a colossal understatement.

WHEREFORE, it is by the Court this 13th day of June 2008

ORDERED that the joint motion of the Guardian *Ad Litem*, and Medical Guardian *Ad Litem*, and the Foster Parents for Change of Respondent's Permanency Goal from Adoption to Another Planned Permanent Living Arrangement ("APPLA") is granted, *nunc pro tunc* to April 3, 2008 for the reasons set forth herein; and it is

FURTHER ORDERED that Child and Family Services Agency, until further order of the Court, is not required to take any further steps to search for an adoptive home for the respondent; and it is

FURTHER ORDERED that the best interests of the child require that she remain in the present therapeutic foster home, supported by all services necessary for her health and safety; and it is

FURTHER ORDERED that the petition [*23] to terminate parental rights shall remain held in abeyance until further order of the Court.

/s/ Cheryl M. Long

Cheryl M. Long

Judge