

Matter of Elijah J.
2016 NY Slip Op 31942(U)
October 13, 2016
Surrogate's Court, New York County
Docket Number: 2015-1240
Judge: Rita M. Mella
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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court

Date: October 13, 2016

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In the Matter of the Petition of Andrea B. for the
Guardianship of the Person of

ELIJAH J.,

DECISION

Pursuant to SCPA Article 17-A

File No.: 2015-1240
2015-1240/A

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In the Matter of the Cross-Petition of Kendall J. for
the Guardianship of the Person of

ELIJAH J.,

Pursuant to SCPA Article 17-A

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M E L L A, S.:

In this contested proceeding, pursuant to Article 17-A of the SCPA, to appoint a guardian for respondent Elijah J., who is alleged to be developmentally disabled, his biological mother ("Andrea B." or "petitioner") seeks her appointment as guardian, and the appointment of her sister, Jasmine R. ("Jasmine"), as stand-by guardian. Elijah's father, Kendell J. ("Kendell J" or "cross-petitioner"), has cross-petitioned for his own appointment as guardian, and the appointment of his wife, Elijah's step-mother, as stand-by guardian. Both petitioner and cross-petitioner seek authority to make end-of-life decisions on behalf of Elijah, pursuant to SCPA 1750-b.

A trial was held on May 2, 2016, at which petitioner and cross-petitioner appeared *pro se*. Benjamin J. Rosin, Esq., a guardian ad litem appointed by the court to represent Elijah's interests, also appeared.¹ During the trial, petitioner, petitioner's step-father (Kenneth R.), cross-petitioner, and Elijah testified. The certifications, pursuant to SCPA 1750-a, of Elijah's two

¹Mr. Rosin provided his services pro bono. The court is grateful for the GAL's outstanding and efficient work and for the assistance he provided to the court in this proceeding.

treating physicians, Dr. Ada Bar and Dr. Prabjot Channa, were received into evidence as petitioner's exhibits, without objection. The report of a psychologist who administered tests to Elijah to determine his level of functioning and need for services was also introduced into evidence. The court makes the following findings of fact based upon the proof adduced at the trial:

1. Elijah was born on July 31, 1997 (at the time of trial he was 18 years old) and has lived his entire life with petitioner, initially at the home of petitioner's mother and step-father, and later in an apartment that he shares with petitioner. By order of the Bronx County Family Court, dated July 8, 2008, petitioner was awarded custody of Elijah. It is undisputed that petitioner has acted as Elijah's primary caretaker for his entire life.
2. The July 8, 2008 Order of the Family Court awarded visitation to cross-petitioner. Elijah has never lived with cross-petitioner, but has visited with him in the home cross-petitioner shares with his wife and their two daughters.
3. Petitioner and cross-petitioner are gainfully employed. Petitioner estimates that the annual cost of Elijah's care is between \$25,000 and \$30,000. Cross-petitioner pays child support in the amount of \$187.00 per week pursuant to an order of the Bronx Family Court.
4. For approximately the first 15 years of his life, Elijah was covered by health insurance supplied by petitioner's step-father or by petitioner. In approximately 2013 or 2014, cross-petitioner was directed by the Bronx County Family Court to add Elijah to his health insurance plan. Currently, Elijah is covered under petitioner's and cross-petitioner's health insurance plans.

5. Elijah's treating physicians conclude that Elijah is a developmentally disabled person. That disability is described as linked to autism. Both doctors assert that Elijah's condition is permanent in nature or likely to continue indefinitely.
6. In addition to his intellectual disability, Elijah has been diagnosed with glaucoma. For the last 15 years, he has attended the Jewish Guild for the Blind, a school for the visually impaired. Elijah uses a cane for outdoor ambulation and requires the assistance of others to navigate an unfamiliar environment.
7. Communication between petitioner and cross-petitioner is difficult and each parent blames the other for the failure to comply with the visitation schedule directed by the Family Court. From 2010 to 2013, however, the parties made informal arrangements for visitation. At the request of Elijah, petitioner would facilitate visits between Elijah and cross-petitioner in his home. The last visit of Elijah with cross-petitioner occurred ten months before the trial.
8. Elijah has significant and frequent contact with his aunt, Jasmine, the stand-by guardian nominated by petitioner. Jasmine visits Elijah's home regularly and takes him out for excursions approximately two or three times per month.
9. Petitioner is a member of the National Association of Parents of Children with Visual Impairments, an organization that offers information on the care of visually impaired persons. Petitioner took an online course to learn how to read Braille through the Hadley Institute for the Blind.
10. Petitioner is actively involved in Elijah's school activities. For instance, she meets with the school social worker between five and ten times a year. Cross-petitioner visited

Elijah's school once in the last ten years.

11. On occasion, Elijah is left alone in his home for short periods of time, and petitioner has enlisted a neighbor on her floor to be available to assist Elijah, if needed.
12. No reports of child abuse have been made against petitioner, cross-petitioner, Jasmine, or cross-petitioner's wife, or concerning Elijah, according to the clearances received from the New York State Child Abuse and Maltreatment Register.

DISCUSSION

Pursuant to the provisions of SCPA 1750-a, when it appears to the satisfaction of the court that a respondent is a developmentally disabled person, meaning a person who is incapable of managing himself and/or his affairs by reason of his disability, the court is authorized to appoint a guardian of the respondent's person if such appointment is in the best interest of the developmentally disabled person (*Matter of Maselli*, NYLJ, Mar 29, 2000, at 28, col 4 [Sur Ct, Nassau County]). The petitioner in such a proceeding must demonstrate that the proposed guardian is suitable to serve in such an important fiduciary capacity (*Matter of Nicholas L.*, NYLJ, Feb 28, 2014, at 31, col 2 [Sur Ct, Suffolk County]; *Matter of Amber M.*, NYLJ, Oct 6, 2016, at 27, col 1 [Sur Ct, New York County]; *Matter of Darius Ignatius M.*, 202 AD2d 1 [1st Dept 1994]).

Based on uncontroverted testimony and documentary proof adduced at trial, the court is satisfied that Elijah is a developmentally disabled person within the provisions of SCPA 1750-a, that he lacks the capacity to make health care and other decisions, and that his best interests will be served by the appointment of a guardian of his person. The issue raised in this proceeding is whether it is in Elijah's best interests to appoint petitioner or cross-petitioner as his guardian.

Making such a determination requires a scrupulous exercise of judicial discretion (*Matter of Stevens*, NYLJ, Oct 25, 2007, at 37, col 3 [Sur Ct, New York County], citing *Matter of Stuart*, 280 NY 245, 250 [1939] and *Matter of Hayley M.*, NYLJ, June 1, 1999, at 32, col 3 [Sur Ct, Nassau County]). The person appointed as guardian must be able to promote the best interests of the ward (*Matter of Nicholas L.*, *supra*). In determining what is in the best interests of an individual subject to Article 17-A of the SCPA, the court may consider the emotional, physical and intellectual needs of the ward as well as the limitations faced by the proposed ward as a result of his disability (*Matter of Stevens*, *supra*).

The evidence adduced at the trial convinced this court that, up until now, petitioner has provided excellent care for Elijah, as evidenced by her having: created a stable home environment for him; enrolled Elijah in a school that offers him appropriate and high-quality education and services; arranged consistent interaction between Elijah and his aunt Jasmine; and facilitated, or at least not impeded, the contact between Elijah and cross-petitioner. Petitioner has also been an effective and informed advocate for Elijah and has shown her commitment to improving the care she gives to him by studying Braille and educating herself further on the needs and care of visually impaired persons. By all evidence presented to this court, Elijah is flourishing in his family and school environments.

The court is also convinced that there is strong affection between Elijah and his father, which was palpable in their interaction before the court. However, at the trial, cross-petitioner failed to present any evidence of any substantial involvement with or understanding of Elijah's medical care and needs or of his educational progress. In fact, the evidence showed that his involvement was very limited. Additionally, cross-petitioner failed to establish that he has

initiated consistent and regular in-person contact with Elijah, at least since 2013. Nor did cross-petitioner present to the court a plan of how he would care for Elijah's medical, educational, emotional, and physical needs were he to be appointed as guardian.

In his report, the guardian ad litem, after reviewing all pleadings and interviewing Elijah, his parents, Jasmine, and Judith Skolnick (Elijah's school social worker), noted cross-petitioner's lack of participation in Elijah's school life as well as the lack of a credible explanation for his inconsistent visits with Elijah. The guardian ad litem concluded that petitioner is the proper person to be appointed as Elijah's guardian.

The court notes that, despite the contentious nature of these proceedings and the emotionally charged testimony presented during the trial of this matter, one thing was clear from the proof presented: Elijah has two parents that love him and care for him. For the reasons set forth above, however, the court finds that petitioner Andrea B. is best suited to act as Elijah's guardian and, therefore, grants her petition. Andrea B. is appointed as the guardian of the person of Elijah J., and Jasmine R. is appointed standby guardian. The cross-petition of Kendell J. is denied, except that he is appointed as alternate standby guardian of Elijah J. All three individuals are given end-of-life decision-making authority, pursuant to SCPA 1750-b.

Decree signed. A copy of this decision and of the decree shall be mailed to all parties by the clerk of the court.

Dated: October 13, 2016


S U R R O G A T E