

**Matter of Burns**

2013 NY Slip Op 33500(U)

December 31, 2013

Surrogate's Court, Oneida County

Docket Number: 2012-117

Judge: Louis P. Gigliotti

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STATE OF NEW YORK  
 SURROGATE'S COURT                      COUNTY OF ONEIDA

**In the Matter of the Guardianship of  
 Meghan Jeanne Burns**

DECISION

File No.'s: 2012-117 &  
 2012-117/A

Pursuant to SCPA Article 17-A

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***APPEARANCES:***

For the Petitioner Charles R. Burns:

Michael G. Putter, Esq.

For the Cross-Petitioner:

Rebecca L. Burns-Davies, pro se

Guardian ad Litem for Meghan Jeanne Burns:

William L. Koslosky, Esq.

***SURROGATE GIGLIOTTI:***

**BACKGROUND**

On February 16, 2012 Charles R. Burns (hereinafter "Charles"), biological father of Meghan Jeanne Burns (d/o/b 03/08/83) (hereinafter "Meghan"), filed a petition seeking to be appointed Guardian of her person pursuant to Article 17-A of the Surrogate's Court Procedure Act (herein "SCPA"). Meghan's mother Rebecca L. Burns-Davies (hereinafter "Rebecca"), with whom she has resided since birth, was cited in Charles' proceeding and appeared in opposition to his appointment.

Thereafter, on April 26, 2012 Rebecca filed a cross-petition seeking to be named Guardian of Meghan's person and property under Article 17-A. Her petition was supported by the requisite certifications from medical providers to wit: the affidavit of Celesta Hunsiker, M.D. sworn to on March 3, 2012 who found her to have a permanent developmental disability attributable to epilepsy and autism and the affidavit of Dr.

Surendra Johri sworn to on March 29, 2012 who found her developmentally disabled due to autism, seizure and mood disorder and moderate mental retardation. Both physicians concluded that Meghan is incapable of managing herself and of taking care of her affairs by reason of such developmental disabilities, that she is not capable of understanding and appreciating the nature and consequences of health care decisions, including the benefits and risks of alternatives to any proposed health care, and she is incapable of reaching an informed decision in order to promote her own well being. Both doctors opined this included her ability to make a decision to withhold or withdraw life sustaining treatment.

Rebecca's petition originally requested that Meghan's brother Benjamin C. Burns be named Standby Guardian, that her brother Nicholas J. Burns be named First Alternate Standby Guardian and that her husband Bernard J. Davies (hereinafter "Bernard"), Meghan's stepfather, be named Second Alternate Standby Guardian. However, after filing her petition Rebecca orally amended the same so as to request that her husband Bernard be named Meghan's Standby Guardian and sought no appointments for Meghan's brothers. She also elected not to seek Guardianship of Meghan's property.

The Court thereafter appointed William L. Koslosky, Esq. as guardian ad litem for Meghan by Order dated September 12, 2012. After meeting in person with Meghan, Rebecca and Bernard, and interviewing Charles by telephone, the guardian ad litem issued a written report dated February 9, 2013 wherein he recommended the appointment of Rebecca as Guardian of the person of Meghan. He also recommended that her stepfather, Bernard, be named Standby Guardian since he resides with Meghan and possesses a "high degree of familiarity with Meghan in understanding and dealing with her disabilities, daily life challenges and special needs". The guardian ad litem concluded that Charles could be appointed First Alternate Standby Guardian "with the provision that he become familiar with Meghan's medical and development needs through contact with her treating physician and that he receive training concern "[sic]" Meghan's autism, seizure disorder and mood

disorder(s)”.

The written report and recommendations of the guardian ad litem were shared with the parties. Thereafter, Charles consented to Rebecca being named Guardian of Meghan’s person. However, he would not agree to the appointment of Meghan’s stepfather as Standby Guardian and requested that he be so appointed. As a result, a hearing was held on August 13, 2013 with the sole issue to be resolved being the appointment of the Standby Guardian for Meghan. Prior to commencement of the hearing, Charles, on the record, consented to Rebecca being named Guardian of Meghan and a Decree appointing her Guardian of Meghan’s person was issued on September 6, 2013.

**TESTIMONY OF CHARLES R. BURNS**

Charles testified in support of his request to be named Standby Guardian of Meghan. Charles resides in South Hadley, Massachusetts, which he acknowledged is about four hours away by car from where Meghan resides with Rebecca. Although he was formally divorced from Rebecca by a Judgment issued in New York State on October 8, 1993, he acknowledges that they actively separated in the summer of 1990, when Meghan was seven years old. Moreover, he acknowledged that Meghan has lived exclusively with her mother since the separation. Apparently, the Divorce Judgment indicated that he would have visitation as agreed upon with Rebecca.

Charles currently lives with his girlfriend, Joyce Careirra, with whom he has been in a relationship for three years. She is employed as a caretaker for the elderly at a retirement community in Massachusetts. He stated that if called upon to serve as Meghan’s Guardian, it would be his intent to take her to live with him and his girlfriend in Massachusetts. He asserted that Joyce would tend to Meghan when privacy was required, but the Court notes that she was not called as a witness to verify her willingness to do this.

Charles testified that he has been employed by Federal Express for approximately seven years. His hours are 8:00 p.m. to 9:00 a.m. Monday thru Saturday. As a result of

this schedule, he said he used to visit with Meghan in New York on Sundays once a month, or at least every other month. He said that this continued until September of 2010 when he came to New York on a Saturday night to attend a fall foliage party to which he had been invited by his son Nicholas. He intended to visit with Meghan the next day. Charles testified that Rebecca became angry when she learned he was attending this party and began to insist that if he wanted to see Meghan he would have to pick her up on Friday at 5:00 p.m. and have her back the following Monday morning. He said it was not possible to meet such a demand because of his work schedule. He testified that he has had Meghan over night before without encountering difficulties and that he has taken her to the movies, restaurants and shopping. He further asserted that if called upon to be her Guardian, he would be attentive to her needs.

He testified that after he filed the within proceeding he asked to see Meghan again but Rebecca then demanded that he first obtain formal training for her special needs. He noted, however, that Meghan has been in the care of her brothers in the past and that, as far as he knew, they have never had any such training.

In response to allegations made by Rebecca, Charles denied inflicting physical abuse on Rebecca in the presence of the children and denied not having contact with his children for a period of about two years.

Under questioning from the guardian ad litem, Charles acknowledged that up until the time he and Rebecca separated in 1990, he was not involved in dealing with any of Meghan's special education needs. He stated he never met with any of her physicians or therapists, nor was he involved with her special education needs up until the time Meghan turned 21 and her formal education ceased.

While he knew that Meghan was diagnosed with autism in 1992 or 1993, Charles could not identify the type. Although he is now aware that Meghan is epileptic and suffers seizures, he did not know whether they were petit or grand mal, nor could he describe the

difference between the two. More importantly, he acknowledged that he does not know Meghan's current medication regimen, nor who her doctor is. He also acknowledged that he has not made any such inquiries. He admitted that in the last five years he has probably seen Meghan only 25 to 30 times. When asked whether Meghan's stepfather Bernard has "an edge" over him when it comes to Meghan's care, he hesitated but eventually responded "I suppose". After he asserted that he would be willing to get training on dealing with autism, seizures and diabetes, he inquired "But where would I get it"?

Under questioning from Rebecca, Charles acknowledged that he would have "no way" of getting Meghan to her doctor visits, managing her social services if Rebecca were temporarily incapacitated or obtaining emergency treatment for Meghan if required.

Charles acknowledged that his visitation was originally supervised in Massachusetts but not New York. He also acknowledged that rather than talk to Rebecca about Meghan's seizures he asked his son Nicholas. He admitted that he has never had Meghan alone in Massachusetts. He also admitted that Rebecca suggested that he take Meghan with him on a recent vacation but that he declined.

#### **TESTIMONY OF BERNARD J. DAVIES**

Meghan's stepfather, Bernard, was called to testify by Rebecca. He stated he has had CPR and first aid training. He related that he has accompanied Meghan on doctor visits when her mother could not attend and that he has spoken with Meghan's doctors about her medications and procedures. He also noted that he has researched Meghan's medical issues including, most recently, her retinal bleeding. He has also met on "IEP" issues and with respite and day treatment providers when Rebecca was not available. He is also aware of Meghan's kleptomania and her proclivity to leave restaurant tables unannounced and proceed to the restroom where she would then intentionally leave a mess.

Under questioning from the guardian ad litem Bernard was able to describe Meghan's daily routine and stated that he often deals with issues concerning her that come

up while she is in day treatment and her mother is not available. He also noted that Meghan has never been left alone in the house.

Bernard testified he has observed several of Meghan's seizures and has had training on how to deal with petit and grand mal seizures. He also said that he is the one who normally administers Meghan's medications. His testimony revealed that he is quite familiar with Meghan's dietary needs.

Bernard asserted that if Meghan were required to move to Massachusetts and have Charles take over her care if Rebecca were no longer able to serve, it would cause problems. He explained when Meghan is taken out of her routine she gets very upset as she is very regimented in her living habits and suffers from mood disorders. He did, however, acknowledge that Meghan is "very fond" of her father.

#### **TESTIMONY OF REBECCA BURNS-DAVIES**

Rebecca responded to questions posed by the guardian ad litem. When asked directly why she believed it would be more appropriate to name Bernard rather than Meghan's biological father as Standby Guardian, she said it was because Charles was never really involved in Meghan's life whereas Bernard has been with her "24/7." She said that she is not seeking to exclude Charles but that he needs to receive training about epilepsy, behavior modification, diabetes and autism. She asserted that Bernard has already received such training. She also asserted that Charles needs to have not only "general" insight into Meghan, but also "special" insight because she is so unique.

On questioning from the Charles' attorney, she acknowledged denying the father's recent request for visitation on Sundays from 11:00 a.m. to 5:00 p.m. once a month and said that she did so only because it would interfere with Meghan's respite care.

#### **DISCUSSION AND CONCLUSION**

After the close of proof, Charles' attorney requested and was given an opportunity to provide a letter brief regarding his assertion that SCPA §1751 infers that the law prefers

the appointment of a parent as an Article 17-A Guardian over any other interested person. Counsel did submit such a brief dated September 5, 2013, wherein he concedes that there are no direct cases on point, but cited *Matter of Baby Boy W.*, 3 Misc.3d 656 (Sur Ct, Broome County 2004) in support of such an inference. The Court has read the cited case and reviewed the language of SCPA §1751 and does not find that it supports such an inference.

Section 1750-a. of the SCPA reads as follows:

1. *“When it shall appear to the satisfaction of the court that a person is a developmentally disabled person, the court is authorized to appoint a guardian of the person or of the property or of both if such appointment of a guardian or guardians is in the **best interest** of the developmentally disabled person.” (bold added)*

Thus, the statute does not address whether a parent is to be preferred over a non-parent. Indeed, in a recent case emanating from the Surrogate of New York County, the Court did appoint a stepfather as Standby Guardian over the biological father. See *Matter of Stevens*, 17 Misc.3d 1121(A), decided October 18, 2007.

In *Stevens*, Surrogate Glen stated “in determining what constitutes the best interest of an individual under Article 17-A of the SCPA, the Court must consider the emotional needs of the incapacitated individual, her physical and intellectual needs, and the limitations imposed on her as a result of her disability”.

In *Stevens*, the Court found that the ward’s best interest would be served by appointing her stepfather as Standby Guardian. In that case, the disabled ward lived with her stepfather, he shared her care for a long time and was found to be “best situated” to take short term immediate responsibility should the ward’s mother become unable to fulfill her functions as Guardian.

The Court finds the same circumstances are present in the instant case. Moreover, the record further shows that Meghan’s stepfather has received training to deal with her special needs and has a proven interest in researching and dealing with the same. In



addition, Charles has indicated that it would be his intent to move Meghan to Massachusetts. The Court finds that doing so at present would greatly upset Meghan and be very disruptive to her requirement of a regimented routine.

As a result of the foregoing, the Court finds that Meghan's best interest would be served by appointing Bernard as Standby Guardian. However, just as the Court observed in Matter of Stevens, should the time come for Bernard to serve as Standby Guardian, he must eventually seek permanent appointment from the Court. In this regard the Court directs that any such application by Bernard must be made on notice to Charles. At that time the Court would have the opportunity to entertain an application for permanent Guardianship from Charles and then make a new best interest determination appropriate to the circumstances as they might then exist. The fact that Bernard has been appointed to serve as Standby Guardian would not be dispositive in the event Charles subsequently seeks Guardianship of his daughter. Hopefully, in the interim, Charles will familiarize himself with her medical, dietary and emotional needs and receive any training that would be required to meet her special needs.

For the reasons set forth above, Bernard J. Davies is appointed Standby Guardian, without prejudice to the right of Charles R. Burns to apply for Guardianship should Rebecca Burns-Davies become unable to serve. The Court hereby directs the guardian ad litem to submit an affidavit of his services in this proceeding, after which the Court will determine the reasonable value of said services and the responsibility of the respective parties for payment of same.

The Clerk of the Court is directed to prepare an Amended Decree in accordance with this Decision.

Dated: December 31, 2013  
Utica, New York

ENTER:

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HON. LOUIS P. GIGLIOTTI, SURROGATE