S.M. v. M.P., 91 Mass. App. Ct. 775 (2017)

Summary by Katy Krywonis, CAFL Training Unit

In this case, the biological parents filed an equity complaint in the juvenile court after the adoptive parents notified them they were terminating their visits. They successfully sought an order compelling the adoptive parents to provide the agreed upon four visits per year. The adoptive parents appealed. The Appeals Court vacated the order and remanded the matter to the juvenile court to (1) enter the appropriate findings and an order of modification if “a material and substantial change in circumstances” is found and the judge determines that “the modification is necessary in the best interests of the child,” and (2) determine whether the adoptive parents acted in honest good faith in terminating the visits. The Appeals Court agreed that the adoptive parents waived the requirement to provide a working telephone number because they acquiesced in this failure for almost a year while communicating with the biological parents solely by mail.

*Facts:* The biological parents and adoptive parents entered into an open adoption agreement that provided for four supervised visits per year. The agreement provided that if a visit causes the child “undue stress or anxiety,” the adoptive parents “have the sole ability to modify visitation to conform to what they believe is in that child’s best interest, including the ability to terminate the visit.” The agreement also required the biological parents to provide a working telephone number. If the biological parents fail to do so, the adoptive parents, in their discretion, may terminate the agreement.

In June 2014, the adoptive parents notified the biological parents that they were terminating all future visits because (1) the biological parents had not provided a working telephone number, (2) the biological parents continued to refer to themselves as “mom and dad” (this was not part of the written agreement) and (3) the visits caused the children “undue stress, anxiety and confusion.” The biological parents filed an equity complaint seeking specific performance of the visits. At the hearing on the complaint, the adoptive mother testified that she believed the visits were causing the child undue stress because several days after the visits, the child would resume her old habit of picking the skin off her fingers and toes. This behavior would resolve well before the next visit. The judge found that the biological parents’ failure to provide a telephone number was not a material breach of the agreement, and that there was no indication that their use of the term “mom and dad,” or any other behavior at visits, had caused undue stress or anxiety. The judge issued an order reinstating the visits. She further ordered the biological parents to provide a working telephone number, and to stop referring to themselves as “mom and dad.”

*Discussion:* (1) Equitable Powers: The Appeals Court said the court could not exercise its equitable powers here because G.L. c. 210, §§ 6C and 6D provide a prescribed and adequate legal remedy. The sole remedy for the breach of an open adoption agreement is an order for specific performance. G.L. c. 210, § 6D provides that the court may modify the terms of the agreement if it finds that there has been “a material and substantial change in circumstances and the modification is necessary in the best interests of the child.” Here, the judge modified the agreement by ordering the biological parents to stop referring to themselves as “mom and dad,” even though she found no material and substantial change in circumstances.

(2) Adoptive Parents Discretion to Terminate Visits: The Appeals Court held that the terms of the agreement gave the adoptive parents sole discretionary power to modify or terminate the visits if the visits caused the children undue anxiety or stress. The adoptive parents were simply obligated to exercise that discretion honestly and in good faith. Thus, the Appeals Court stated that the judge’s only review should be whether the adoptive parents exercised their discretion in good faith. The Appeals Court said that the judge should not review whether the biological parents’ use of the term “mom and dad” caused undue stress or anxiety.

(3) Requirement to provide a telephone number: The Appeals Court concluded that the judge correctly deemed this provision waived, and appropriately reinstated (or retained) the agreement’s requirement to provide a working telephone number, including the potential negative consequences of failing to do so.

*Dissent:* The adoptive parents bear the burden to show not just that they acted in good faith. They must provide sufficient proof that it was the biological parents’ behavior that caused the child undue stress. A good faith belief that a causal link exists does not by itself equate to proof of it. The dissent stated that the adoptive parents’ discretion is not unfettered, and that adopted children can benefit from supportive relationships with their biological family. “Too much love, by itself, is seldom a problem.”

*Practice Note:* Be careful what you agree to! Settlement is a minefield - there are no assurances. The risks, which are substantial, are really all on the parent’s (and sometimes the child’s) side. Clients need to understand those risks to make an informed choice. Watch out for language that is so vague it renders the agreement meaningless, or that gives adoptive parents too much discretion. For example, require a neutral, third party clinical opinion that visit suspension or termination is necessary to avoid serious emotional harm to the child, rather than leave it solely to the adoptive parents to decide.