
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 99-FM-1138

W.D., APPELLANT,

v.

C.S.M., *et al.*, APPELLEES.

No. 99-FM-1299

B.T., APPELLANT,

v.

C.S.M., *et al.*, APPELLEES.

Appeal from the Superior Court of the District of Columbia
Family Court, Domestic Relations Branch
(No. DR 3169-98)

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* IN SUPPORT OF
APPELLEES' PETITION FOR A REHEARING OR FOR A REHEARING *EN BANC***

Amicus curiae B.L. respectfully moves for leave to file an amicus brief in support of appellee's motion for rehearing and rehearing en banc, pursuant to D.C. Court of Appeals Rule 29(b). Counsel for Appellee consents to this motion. Counsel for the other parties in interest have not responded as of the filing of this motion. In support thereof, B.L. states:

Interest of Amicus

Amicus B.L. has a vital interest in the matter before this Court. B.L. and her family have been tragically affected by this Court's decision in W.D. v. C.M.S. At the center of this tragedy is D.G. (Tay-Tay), an 11 year old boy who has been raised in the District of Columbia since birth by his great-grandmother, amicus B.L. Ms. L. is the only mother Tay-Tay has ever known. Tay-Tay has thrived in his great-grandmother's care, growing into a healthy, happy, and well-adjusted young man who has done well in school and in the community. Perhaps most importantly, Tay-Tay has always known that he could turn to his great-grandmother for any need or with any problem.

Tay-Tay's birth mother, L.L., was only a teenager when Tay-Tay was born. Tay-Tay's birth father has never been involved in the child's life. B.L. brought L.L. and her infant, Tay-Tay, home from the hospital to live with her. L.L. stayed with B.L. on and off for a time after Tay-Tay's birth, but left the household permanently when Tay-Tay was four. According to family reports, L.L. is known to have physically abused Tay-Tay. L.L. currently lives in North Carolina with a boyfriend, E.P. Family members have observed L.L. with bruises, marks, cuts and stitches on various occasions. L.L. has reported that her boyfriend, E.P., physically abuses her. After a visit with L.L. and E.P. in 2005, Tay-Tay returned home with bruising on his buttocks – a result, he reported, of having been beaten by E.P. with a belt buckle. Tay-Tay was relieved to be home and has stated that he did not want to have to leave again. Tay-Tay said E.P. and L.L. constantly fought.

Like thousands of other relatives in the District of Columbia, B.L. has raised Tay-Tay for 11 years without ever seeking a formal order of custody from the court. Recently Ms. L. learned

about the benefits of having court-ordered custody, including eligibility for the District's "grandparent subsidy program". Acting on the information provided by these outreach programs, Ms. L. filed a pro se complaint for custody in Superior Court.¹ Although properly served, L.L. did not file an opposition or any other response to the custody complaint and B.L. filed the standard forms for entry of a default judgment.

Although L.L. chose to ignore the court proceedings, she was angry with B.L. for filing the action. Family members believe that L.L. had been illegally receiving public benefits for Tay-Tay even though he did not live with her. L.L. was irate that her great-grandmother was taking steps that could jeopardize receipt of these illegal benefits, and she began making menacing calls to the Lewis home. She threatened in a telephone call to Tay-Tay that she would set fire to the home shared by B.L. and Tay-Tay. L.L. also threatened to beat up Tay-Tay because he had revealed to family members that E.P. had beaten Tay-Tay in North Carolina.

L.L. then came to the District on October 29, 2006, and removed Tay-Tay from Ms. L.'s home. Efforts of B.L. and other relatives to stop L.L. from forcibly taking Tay-Tay were of no avail. The Metropolitan Police Department (MPD) was called, but the responding officers stated that without a legal custody order, there was nothing they could do to prevent L.L. from taking Tay-Tay. The family also called the Child and Family Services Agency (CFSA) child protection hotline. CFSA – the government agency charged with receiving both emergency and non-emergency reports of suspected neglect or abuse – did not take any action, stating that child welfare staff would only do a missing persons report once they received a police report number. Since the police declared themselves helpless to do anything in the absence of a court order showing that B.L. had custody, no such report number was ever issued.

¹ Eligibility for the subsidy requires a court order of legal custody. D.C. CODE § 4-251.03(a)(1).

On October 31, Ms. L. filed an emergency motion for temporary custody of Tay-Tay based on her fears that Tay-Tay was at serious risk of physical harm at the hands of L.L. and her abusive boyfriend, and that he would suffer terribly by a forced separation from the only home and primary caregiver he has ever known. The Family Court Judge, the Honorable Jerry Byrd, refused to consider the emergency motion and dismissed the entire custody case outright, ruling that under this Court's decision in W.D. v. C.S.M. he lacked authority to hear a custody case brought by a non-parent. According to Judge Byrd, the great-grandmother's only recourse for obtaining custody was to somehow have neglect proceedings instituted.

Amicus Participation is Highly Desirable and Relevant to Disposition of this Matter

Ms. L. is representative of the thousands of grandparents and other kinship caregivers who have primary physical custody of over 16,000 District of Columbia children. See, D.C. Kids Count Collaborative for Children and Families, Every Kid Counts in the District of Columbia: 12th Annual Fact Book, at 24 (citing the U.S. Census Bureau's Current Population Survey). Many -- if not most -- of these caregivers have no formal legal order of custody for the children in their care. Ms. L. desires to participate as amicus to inform this Court of the devastating effects the panel decision in W.D. has had on Tay-Tay, and to alert the Court that many other families and children will no doubt suffer similar tragedies if the panel decision is allowed to stand without rehearing. Ms. L. implores that this case be reheard for the protection and well-being of the thousands of other children living in the District of Columbia in stable, loving homes headed by extended family members.

Wherefore, for the reasons set forth above, Ms. L. respectfully moves for leave to file the lodged amicus brief in support of appellee's petition for rehearing or rehearing en banc.

Respectfully submitted,

Stephen B. Mercer, Esq.
D.C. Bar No. 452170
Sandler & Mercer, P.C.
27 West Jefferson Street, Ste. 201
Rockville, MD 20850
301-610-9797

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of *Amicus Curiae* in Support of Appellees' Petition for Rehearing or Rehearing *En Banc* has been served, by first-class mail, upon the following parties, on this November 29, 2006:

Carol A. Blume
1003 K Street, NW #830
Washington, DC 20001

Francis T. Lacey
751 Rockville Pike #7
Rockville, MD 20852

R. Laird Hart
Covington & Burling, L.L.P.
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

Matthew I. Fraidin
University of the District of Columbia
David A. Clarke School of Law
4200 Connecticut Avenue, NW
Building 38, Suite 200
Washington, DC 20008

Jennifer DiToro
The Children's Law Center
901 15th St. NW, Suite 500
Washington, DC 20005

Jan Allen May
AARP Legal Counsel for the Elderly
601 E Street, NW
Washington, DC 20049

Barbara McDowell
Legal Aid Society of the District of Columbia
666 Eleventh Street NW, Suite 800
Washington, DC 20001

Stephen B. Mercer, Esq

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**BRIEF OF AMICUS CURIAE B.L. IN SUPPORT OF APPELLEES' PETITION FOR A
REHEARING OR FOR A REHEARING *EN BANC***

Amicus curiae B.L. respectfully urges the Court to grant appellees' petition for a rehearing or a rehearing *en banc*. The panel opinion has led to a tragic result in B.L.'s family. Rehearing or rehearing *en banc* is urgently needed to correct the panel opinion so that the thousands of other children in the District of Columbia being raised by kin will not suffer similar fates and other unnecessary and irreparable harm.

Interest of Amicus

Factual History

D.M. (Tay-Tay) is an 11 year old boy who has been raised in the District of Columbia since birth by his great-grandmother, B.L. Tay-Tay's mother was a teenager when she became pregnant with Tay-Tay and she was dependent in all respects on her grandmother, B.L. B.L. was present at Tay-Tay's birth in November, 1995 at the Columbia Hospital for Women in D.C., and Ms. L. brought Tay-Tay and his mother home with her from the hospital. Tay-Tay's birth father was never involved in the child's life.

Despite the birth mother's initial presence in the home, Tay-Tay's great-grandmother immediately assumed full care and responsibility for little Tay-Tay. By the time Tay-Tay was four, L.L. had moved out of her grandmother's home to join a boyfriend in Southeast Washington, leaving Tay-Tay to be raised solely by his great-grandmother.

B.L. retired from her job at USA Today in 1997 and raised Tay-Tay full-time as her own child.² Tay-Tay's great-grandmother has provided Tay-Tay with a stable home embraced by the rest of his large family,³ and with all of the care, support, and nurturing the little boy required and deserved. Tay-Tay himself views B.L. as his mother and knows that she has raised him since his birth. Tay-Tay has a younger brother who was born to L.L. in 1998. This child was also raised by Ms. L from birth until age 4, when by agreement he went to live with his father.

From time to time over Tay-Tay's young life, his mother L.L. would return to her grandmother's home in Washington, D.C., for short periods because she needed a place to stay.

² In 1997, the birth mother sued D.G.'s putative father, who was determined not to be D.G.'s biological father, and obtained a court order giving her custody of D.G. Notwithstanding this order, however, D.G. continued to reside with Ms. L. and Ms. L. continued to serve as his sole caretaker.

³B.L. has eight children. She is close with her children and with her many grandchildren and great-grandchildren.

During these times, L.L. continued her usual lifestyle – napping on the couch, calling her friends, and going out on the town without fulfilling any of the responsibilities of a parent for either of her children. L.L. has not lived with Tay-Tay at all since 1999 and has never exercised parental responsibilities on his behalf. For some period of time after leaving the B.L. household for good, L.L. lived in an apartment in D.C. paid for via public assistance or housing benefits for her two children – although those children never lived there. B.L. knows through reports by various relatives that on at least one occasion L.L. physically abused Tay-Tay, punching him with a closed fist in the chest because Tay-Tay resisted her efforts to brush his hair.⁴ According to family members, L.L. has threatened and physically abused Tay-Tay more recently as well.

In contrast to L.L.’s intermittent and occasionally abusive interactions with Tay-Tay, the child has thrived in his great-grandmother’s care. Tay-Tay has his own bedroom in Ms. L.’s three-bedroom home in the River Terrace section of Northeast D.C., attending school a block away from his home and doing well. Tay-Tay is bonded to his younger brother and to his many cousins and other relatives in the D.C. area. Tay-Tay’s great-grandmother – the only real parent he has ever known – has provided Tay-Tay with food, clothing, shelter and all of the love, nurturing, and guidance he has needed to become a happy and healthy youth on the cusp of adolescence.

Recent Events

In the summer of 2005, L.L.’s whereabouts became unknown to her grandmother. L.L. claimed to be working somewhere in Baltimore, but in fact had moved to North Carolina with her boyfriend, E.P. During visits back to D.C., the mother told various relatives that E. P. was physically abusing her. One relative observed bruises on L.L.’s neck and chest on two occasions, once in the fall of 2005, and again in June 2006, and L.L. attributed these bruises to

⁴ This abuse occurred when Tay-Tay was only three or four years old.

abuse by E. P. When she was in D.C. in the fall of 2006, L.L. had stitches above her eye, and went to a doctor here to have them removed.

During L.L.'s fall 2005 visit to D.C. – when she had bruises on her neck and chest from E. P.'s abuse – L.L. decided to take Tay-Tay with her to North Carolina. Family members believe that L.L. took Tay-Tay so that she could obtain subsidized housing. L.L. returned him home to his great-grandmother within a few months. Tay-Tay told several relatives that he had been beaten, choked, and thrown by E. P. on several occasions while living in North Carolina. When he returned to D.C., Tay-Tay had bruised buttocks, which Tay-Tay said had been caused by E.P. beating him with a belt buckle. Tay-Tay was relieved to be home and has stated that he did not want to have to leave again. Tay-Tay said E.P. and L.L. constantly fought and that if Tay-Tay were required to return to North Carolina, he feared he would kill E.P.

Like many family members raising kin, Ms. L. raised Tay-Tay without ever seeking a formal custody order from the courts. However, in September 2006 Ms. L. learned through community outreach efforts that the City Council had passed a “grandparent’s subsidy program.” See D.C. Code § 4-251.01 *et seq.* This program encourages relatives who are raising kin to apply for a monthly subsidy on the child’s behalf (equivalent to monthly foster care payments for children in the neglect system). Ms. L. learned that under the subsidy law, she had to meet certain mandatory criteria to be eligible for the program. In particular, *she had to obtain a formal custody order from the court.* D.C. Code § 4-251.03(a)(1).

On September 25, 2006 Ms. L. filed a pro se complaint for custody of Tay-Tay in the domestic relations branch of the D.C. Family Court. The complaint was served on L.L. at her North Carolina address by certified mail, and proof of service was filed with the court. The mother did not file an opposition or any other response to the complaint. On October 24, 2006

B.L. filed a routine motion for default judgment pursuant to Superior Court Civil Procedure Rule 55(b)(2).

After the complaint for custody was served, L.L. became irate, perhaps fearing that an order granting custody to B.L. might jeopardize public benefits L.L. was receiving in North Carolina. L.L. began making menacing phone calls to her grandmother's home. She cursed at her grandmother, threatened in a telephone conversation with Tay-Tay to set fire to the house in which Tay-Tay resided with Ms. L., and threatened to beat up Tay-Tay for having revealed abuse suffered at the hands of E.P. While B. L. was obviously concerned by these threats, she believed L.L. was in North Carolina and so did not take any immediate action.

On October 29, 2006, L.L. showed up unannounced at B.L.'s home and removed Tay-Tay against his will. Both the Metropolitan Police Department and the Child and Family Services Agency hotline were promptly called. By the time police officers arrived, L.L. had vanished with Tay-Tay. The officers indicated there was nothing they could do because B.L. did not have a court order granting her custody. The Child and Family Services Agency – the government body charged with responsibility for investigating both emergency and non-emergency reports of possible neglect or abuse – declined to offer any assistance on Tay-Tay's behalf without a police report number -- which the police never issued because Ms. L. lacked a custody order.

On the following day, October 30, Tay-Tay's great-grandmother went to the Domestic Violence Division of Family Court in an attempt to protect Tay-Tay and obtain his return home to her care. Court staff advised Ms. L. to file an emergency motion in the pending custody case, which she did pro se using the standard court form.

On October 31, the matter was heard by Family Court Judge Jerry Byrd. Judge Byrd immediately dismissed both the emergency motion and the underlying custody complaint.⁵ Judge Byrd ruled that under the panel opinion in W.D. v. C.S.M., Ms. L. was somehow required to use the neglect system – rather than a custody action – to obtain relief. Citing W.D., Judge Byrd ruled that “absent a neglect finding, the court does not have the authority to take custody of a child away from a parent and give it to a non-parent.” Order at 1. Judge Byrd concluded his order by stating that “[i]f [Ms. L.] fears a minor child is being neglected, the appropriate course of action is to inform Child Protective Services . . . so that they may act to protect the child and, if appropriate, open a neglect case against the current *de facto* custodian.” Order at 2.

In sum, then, two days after Tay-Tay was snatched abruptly from his home, the trial judge found that W.D. v. C.S.M. required him to dismiss the custody complaint filed by his lifelong caretaker.

DISCUSSION

Despite the narrow factual circumstances presented in W.D., the panel’s decision has generated the belief on the trial court level that child abuse and neglect statutes have “preempted,” Slip Op. at 14, any third party custody claim. As reflected in the tragic facts of Ms. L.’s family, the trial court is applying this broad reading of W.D. v. C.S.M. even in situations such as B.L.’s, where a child has been raised since birth by a single caretaker. Because the child has thrived under the care of the non-parent caretaker, no neglect case exists through which the court or Child and Family Services Agency is monitoring the child’s welfare.

In dismissing B.L.’s custody complaint, Judge Byrd remarked that after W.D., the neglect system is the only means through which a judge is empowered to grant legal custody of a child to anyone other than a parent *because the neglect statutes have preempted the Superior Court’s*

⁵ Judge Byrd’s order, redacted to omit the names of the parties and the child, is attached to this brief.

authority to entertain custody actions brought by a non-parent against a parent. Family Court judges, such as Judge Byrd, appear to understand W.D. to require them to dismiss *any* custody petition filed by anyone other than a child's biological parent, and to suggest that caretakers such as B.L. must somehow seek redress through the neglect system.

CONCLUSION

The facts *amicus* B.L. has brought to this Court's attention demonstrate the dramatic results that flow from the panel decision as it now stands. An 11 year old boy has lived in D.C. and has been in the care of one person – a non-parent – for his entire life. He is thriving. The caretaker files for custody. Instead of answering the Complaint, the parent swoops in from North Carolina and snatches the child. The parent hustles the child off to North Carolina to the home of her abusive boyfriend. Two days later, the trial court dismisses the custody complaint. The child remains in North Carolina, away from his caretaker, home, family, school and friends.

Tay-Tay has been caught in the middle of a legal nightmare. He should be at home with Ms. L. who, if permitted to pursue her custody action, would present an extremely strong and straightforward case for Tay-Tay's custody. The panel decision in W.D., however, has closed the courthouse doors to Ms. L. and thousands of other relatives like her who seek only to provide the best life they can for the children in their care.

Respectfully submitted,

Stephen B. Mercer, Esq.
D.C. Bar No. 452170
Sandler & Mercer, P.C.
27 West Jefferson Street, Ste. 201
Rockville, MD 20850
301-610-9797

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Carol A. Blume
1003 K Street, NW #830
Washington, DC 20001

Francis T. Lacey
751 Rockville Pike #7
Rockville, MD 20852

R. Laird Hart
Covington & Burling, L.L.P.
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401

Matthew I. Fraidin
University of the District of Columbia
David A. Clarke School of Law
4200 Connecticut Avenue, NW
Building 38, Suite 200
Washington, DC 20008

Jennifer DiToro
The Children's Law Center
901 15th St. NW, Suite 500
Washington, DC 20005

Jan Allen May
AARP Legal Counsel for the Elderly
601 E Street, NW
Washington, DC 20049

Barbara McDowell
Legal Aid Society of the District of Columbia
666 Eleventh Street NW, Suite 800
Washington, DC 20001

Stephen B. Mercer, Esq.