

Francis P. Maneri, Esquire  
Thomas Vecchio, Esquire  
DILWORTH PAXSON LLP  
1500 Market Street, Suite 3500E  
Philadelphia, PA 19102-2101  
Telephone: (215) 575-7000  
Facsimile: (215) 575-7200  
fmaneri@dilworthlaw.com  
tvecchio@dilworthlaw.com

*Attorneys for Plaintiff*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

MASHA ALLEN, by her Parent and  
Guardian, FAITH ALLEN,

Plaintiff,

v.

FAMILIES THRU INTERNATIONAL  
ADOPTION, INC.; et als.,

Defendants,

and

FAMILIES THRU INTERNATIONAL  
ADOPTION, INC.,

Third Party Plaintiff,

v.

ADAGIO HEALTH, INC. (formerly  
known as Family Health Council, Inc., and  
trading as "Family Adoption Center")

Third Party Defendant.

Civil Action No.:  
08-4614 (JHR)(AMD)

PLAINTIFF'S MOTION TO  
AMEND/SUBSTITUTE/ADD  
PARTIES

Motion returnable: February 1,  
2010

TO: ALL COUNSEL OF RECORD

YOU ARE HEREBY notified that on the 1st day of February, 2010, at 9:00 a.m., or as soon thereafter as counsel may be heard, at the Mitchell H. Cohen Building and United States Courthouse, 4<sup>th</sup> and Cooper Streets, Camden, New Jersey, 08101, Plaintiff Masha Allen, by her parent and guardian, Faith Allen, by and through counsel, shall move to amend the Plaintiff in this matter to name Timothy J. Sloan as Ms. Allen's new representative party.

In support of this Motion, Plaintiff will rely upon the attached Brief. Oral argument is not requested on this Petition.

You are hereby notified that if you do not respond to this Motion within the time allowed by the Federal Rules of Civil Procedure, that relief may be granted in the form requested in the attached proposed Order.

Respectfully submitted,

/s/ Francis P. Maneri

Francis P. Maneri, Esquire  
Thomas Vecchio, Esquire  
DILWORTH PAXSON LLP  
1500 Market Street, Suite 3500E  
Philadelphia, PA 19102-2101

/s/ Darren Summerville

Darren Summerville  
BIRD LAW GROUP, PC  
2170 Defoor Hills Road  
Atlanta, GA 30318

Dated: December 29, 2009 *Attorneys for Plaintiff*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

MASHA ALLEN, by her Parent and Guardian, FAITH ALLEN,	:	
	:	
Plaintiff,	:	Civil Action No.
	:	08-4614 (JHR)(AMD)
v.	:	
FAMILIES THRU INTERNATIONAL ADOPTION, INC.; et als.,	:	Motion returnable:
	:	February 1, 2010
Defendants,	:	
and	:	
FAMILIES THRU INTERNATIONAL ADOPTION, INC.,	:	
	:	
Third Party Plaintiff,	:	
	:	
v.	:	
ADAGIO HEALTH, INC. (formerly known as Family Health Council, Inc., and trading as "Family Adoption Center")	:	
	:	
Third Party Defendant.	:	

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BRIEF IN SUPPORT OF PLAINTIFF'S  
MOTION TO AMEND/SUBSTITUTE/ADD PARTIES

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Of Counsel:  
Francis P. Maneri, Esquire  
Darren Summerville, Esquire

On the Brief:  
Darren Summerville, Esquire

DILWORTH PAXSON LLP  
1500 Market Street, Suite 3500E  
Philadelphia, PA 19102-2101

BIRD LAW GROUP, PC  
2170 Defoor Hills Road  
Atlanta, GA 30318

*Attorneys for Plaintiff*

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The causes of action in this litigation are held by Masha Allen, a minor. By law, Masha is legally incompetent to maintain a lawsuit. At the outset of this litigation, the proper representative party Plaintiff was Faith Allen, Masha's adoptive parent. Factually and legally, Faith Allen's ability to maintain this lawsuit has changed, necessitating this Motion. Plaintiff respectfully asks that this Court allow amendment of the pleadings to reflect a new representative party Plaintiff, Timothy J. Sloan. Mr. Sloan has been, and continues to be, Masha's *guardian ad litem* based upon a pending action in the Juvenile Court in the Cambria County, Pennsylvania Court of Common Pleas ("Juvenile Court").

Alternatively, under Rule 17(c), Plaintiff asks that this Court appoint Mr. Sloan as a *guardian ad litem* in this matter, to prosecute the litigation in Masha's Allen's best interests.

**I. Faith Allen is No Longer Masha Allen's Proper Representative.**

Faith Allen, as Masha Allen's Parent and Guardian, initiated this litigation on September 15, 2008. *See generally* Complaint, Docket Entry 1. On or about August 18, 2009, Faith Allen freely and voluntarily executed a consent to adoption with respect to Masha, pursuant to 23 Pa.C.S.A. § 2711. Because Faith Allen did not revoke this consent to adoption within the

statutorily allowed 30-day revocation period, it became irrevocable subject to narrow exceptions. The Orphan's Court with jurisdiction over the matter has now terminated Faith Allen's legal rights as a parent to Masha Allen. Dec. 3 Order of the Court, Court of Common Pleas for Cambria County, Pennsylvania (a true and correct copy is attached as Exhibit 1).

For several years, Masha Allen has been subject to the jurisdiction of the Juvenile Court division of the Common Pleas Court. As part of these proceedings, attorney Timothy J. Sloan was appointed and has continuously served as her *guardian ad litem*. These proceedings remain open and Mr. Sloan remains Masha's *guardian ad litem*.

Plaintiff's counsel has explained the status of the present litigation to Mr. Sloan, who has agreed, pending this Court's permission, to serve as Masha Allen's party representative going forward. Plaintiff respectfully requests such relief.

## **II. Amendment Under Rule 15 is Necessary and Proper.**

Leave to amend should be freely given when justice requires. Fed. R. Civ. P. 15(a)(2). Plaintiff Masha Allen asks that leave be granted to amend the pleadings to reflect Timothy Sloan become Plaintiff's party representative, as her *guardian ad litem*. Such an amendment has become

necessary given the legal impossibility of going forward in this matter with the current party representative, Faith Allen.

Faith Allen's parental rights, including the right to serve as Masha Allen's legal representative, have been terminated. Masha Allen, as a minor, cannot bring this lawsuit in her individual capacity. Rule 17, of course, allows an unrepresented minor to sue through her *guardian ad litem*. Fed. R. Civ. P. 17(c). Mr. Sloan has been Masha Allen's guardian in a different litigation for years, and is well situated to represent her interests in this matter.

Additionally, Rule 15 provides an appropriate proper vehicle to allow Mr. Sloan to assume the party representative status currently (and now, inappropriately) occupied by Faith Allen. *Erie R. Co. v. Fritsch*, 72 F.2d 766, 767 (3d Cir. 1934) (affirming amendment of pleadings to allow "next friend" to prosecute litigation on behalf of minor, when no other legal representative was available); *MCI Worldcom Network Servs., Inc. v. Graph-Net, Inc.*, Civ. Action No. 00-5255(WHW), 2005 U.S. Dist. LEXIS 40835, at \*21 (D.N.J. May 11, 2005) (amendment proper to allow real party in interest to litigate claims).

Other sister courts have made such a determination. In one such case, a trial court rejected a motion to substitute parties – brought under Rule 25 – and held that Rule 15 governed:

Under Rule 17(c) a guardian may bring an action of this type on behalf of an incompetent ward. . . . It does not appear, however, that substitution under Rule 25 is the proper procedure to accomplish this, for Rule 25 applies only if, after the action is instituted, a party dies, becomes incompetent, or transfers his interest, or if a public officer who is a party is succeeded in office by someone else. The substitution sought in the instant case does not fall within any of the foregoing categories, nor is it a question of Peggy Burns as duly appointed guardian, being the one who **must** represent Steve Burnes. However, the requested change clearly may be accomplished by amending the complaint under Rule 15, and as such it will be allowed.

*Burns v. Phillips*, 50 F.R.D. 187, 188 (N.D. Ga. 1970) (internal citations omitted).

The present situation is no different. Mr. Sloan already represents Masha Allen in a Pennsylvania proceeding, and is familiar with both her tragic history and her current circumstances. Plaintiff asks that she be given leave to amend the pleadings to reflect Mr. Sloan as the proper party representative.

**III. Alternatively, this Court Should Appoint Mr. Sloan as *Guardian ad Litem* for Masha Allen in this Matter.**

If this Court is not inclined to allow amendment of the pleading to substitute a new Plaintiff party representative, the proper course of action is

to use the powers granted under Rule 17(c) to appoint Mr. Sloan as *guardian ad litem* in this action. The plain language of the rule indicates that some representative must be appointed in the vacuum left by Faith Allen's actions, or other adequate protections put into place:

A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or a guardian ad litem. The court **must appoint a guardian ad litem - or issue another appropriate order** – to protect a minor or incompetent person who is unrepresented in an action.

Fed. R. Civ. P. 17(c) (emphasis added).

Mr. Sloan, as a veteran advocate for children's interests with a long history with this minor, is an appropriate choice should this Court opt to appoint a *guardian ad litem* for Masha Allen.

Though there are few on-point cases as to how Rule 17(c) plays out in practice, *Garner v. Parson*, 874 F.2d 131 (3d Cir. 1989) is highly instructive. The question there, arising in Delaware but under the Federal Rules, was what individual was the proper party representative for a minor plaintiff. In state court litigation, the minor's parent lost custody to the state protective services division. 874 F.2d at 136. A *guardian ad litem* had been previously appointed in the Delaware state court. *Id.* at 137.

The minor's parent, as a "next friend," then instituted litigation in federal court, in an apparent attempt to undermine the adverse state court

rulings as to custody. *Id.* at 136. The district court found that the parent's custodial rights had been lost in the earlier state court litigation, and dismissed the "next friend's" claims. *Id.* Most importantly, the trial court refused to provide a replacement party representative. The only remaining claims were those being brought by the minor child, who was legally incompetent to maintain any sort of action. *Id.* Accordingly, those acts functioned as a dismissal. *Id.*

Ultimately, the biological parent appealed, claiming that she was proper party representative. The Third Circuit affirmed, finding that the legal severance of any custodial rights was dispositive. *Id.* at 137 (citing trial court order). Perhaps most relevant to this proceeding, the appellate court also held that the refusal to select or allow another party representative for the minor was error:

The last sentence of Rule 17(c) again provides the reference point for reviewing the district court's failure to appoint a next friend [or guardian for the minor]. "The court shall appoint a guardian ad litem for an infant of incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant of incompetent person." Thus, under Rule 17(c), a court may appoint a guardian, or it may decline to do so if the child's interests may be protected in an alternative manner. For example, the court may determine that a child without a guardian or next friend is adequately represented by some other person, such as a parent.

The decision as to whether to appoint a next friend or guardian ad litem rests with the sound discretion of the district court and will not be disturbed unless there has been an abuse of authority. We have found no case, however, holding that a court may decline to appoint a guardian with the result of allowing the child's interests to go unprotected.

*Id.* at 140 (emphasis added; internal citations omitted).

The situation before this Court is no different.<sup>1</sup> Faith Allen's actions have effectively stranded Masha Allen in this litigation, as Faith is no longer a proper party representative. But Mr. Sloan is, either in his current capacity or as appointed by the Court.

Accordingly, going forward, under Rule 17, this Court can and should either allow amendment of the pleadings, or actually appoint Mr. Sloan as *guardian ad litem* for purposes of this litigation. Either course of action would allow this case to proceed in an expeditious and orderly manner.<sup>2</sup>

*Signatures on next page*

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<sup>1</sup> Though historically a minor plaintiff would bring suit by a "next friend," and a minor defendant would be defended by a "guardian ad litem," the "duties and powers of a representative are identical, regardless of which title applies. Moreover, any difference between a "next friend" and a "guardian ad litem" is primarily historical. *Garner*, 874 F.2d at 137 n.10 (1989) (internal citations omitted).

<sup>2</sup> In the interests of judicial economy, Plaintiff's counsel contacted opposing counsel and Ms. Smith to determine if all parties would consent to the requested relief. At the time of filing of this Motion, counsel for Adagio Health, Inc. has consented to this motion but no other party had formally consented.

Respectfully submitted,

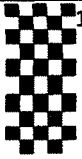
/s/ Francis P. Maneri

Francis P. Maneri, Esquire  
Thomas Vecchio, Esquire  
DILWORTH PAXSON LLP  
1500 Market Street, Suite 3500E  
Philadelphia, PA 19102-2101

/s/ Darren Summerville

Darren Summerville  
BIRD LAW GROUP, PC  
2170 Defoor Hills Road  
Atlanta, GA 30318  
O: 404.873.4696  
F: 404.872.4635  
Email: [ds@birdlawgroup.com](mailto:ds@birdlawgroup.com)

Dated: December 29, 2009 *Attorneys for Plaintiff*



IN RE: ADOPTION OF  
MASHA ELIZABETH ALLEN

\* IN THE COURT OF COMMON PLEAS OF  
\* CAMBRIA COUNTY, PENNSYLVANIA  
\* ORPHAN'S COURT DIVISION

\*  
\*  
\*

NO. 2009-1078 VT

**DECREE**

AND NOW, this 3<sup>rd</sup> day of December, 2009, upon consideration of the Petition To Confirm Consent to Adoption and after a hearing thereupon, **IT IS HEREBY ORDERED, ADJUDGED and DECREED** that all parental rights and duties of FAITH ELIZABETH ALLEN with respect to MASHA ELIZABETH ALLEN are forever terminated.

**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that the custody of Masha Elizabeth Allen shall remain with the Petitioner Cambria County Children and Youth Service, who shall, from the date of this decree, have the right to proceed with the adoption of Masha Elizabeth Allen.

BY THE COURT:

  
\_\_\_\_\_ J.

FILED  
2009 DEC 29 14:50

2009 DEC -4 A 9:05

ORPHANS'

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

\_\_\_\_\_  
MASHA ALLEN, by her Parent and  
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Plaintiff, )

v. )

FAMILIES THRU INTERNATIONAL )  
ADOPTION, INC.; et als., )

Defendants, )

and )

FAMILIES THRU INTERNATIONAL )  
ADOPTION, INC., )

Third Party Plaintiff, )

v. )

ADAGIO HEALTH, INC. (formerly )  
known as Family Health Council, Inc., and )  
trading as "Family Adoption Center") )

Third Party Defendant. )

Civil Action No.:  
08-4614 (JHR)(AMD)

**ORDER**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2010, upon consideration of the Plaintiff's Motion to Amend/Substitute/Add Parties, and any response thereto, it is hereby **ORDERED** that the Motion is Granted. It is further ORDERED that the pleadings in the above-captioned matter shall be amended to reflect that Timothy J. Sloan is the Plaintiff's representative party.

BY THE COURT;

\_\_\_\_\_  
J.

Francis P. Maneri, Esquire  
Thomas Vecchio, Esquire  
DILWORTH PAXSON LLP  
1500 Market Street, Suite 3500E  
Philadelphia, PA 19102-2101  
Telephone: (215) 575-7000  
Facsimile: (215) 575-7200  
fmaneri@dilworthlaw.com  
tvecchio@dilworthlaw.com

*Attorneys for Plaintiff*

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08-4614 (JHR)(AMD)

**CERTIFICATE OF SERVICE**

I, Francis P. Maneri, attorney for plaintiff, hereby certify and state that a true and correct copy of the Plaintiff's Motion to Amend/Substitute/Add Parties was served ECF Electronic Filing and First Class Mail on the 29th day of December, 2009, upon the following:

Ms. Jeannene Smith  
312 South Lincoln Avenue  
Cherry Hill, New Jersey 08002

Alan J. Baratz, Esq.  
Brad Weintraub, Esq.  
629 Parsippany Road  
Parsippany, NJ 07054

Donald C. Cofsky, Esquire  
Cofsky & Zeidman, LLC  
209 Haddon Avenue  
Haddonfield, NJ 08033-2322

/s/ Francis P. Maneri  
\_\_\_\_\_  
Francis P. Maneri