

COMMITTEE FOR PUBLIC COUNSEL SERVICES
CHILDREN & FAMILY LAW DIVISION

CAFL NEWSLETTER

VOLUME 3, SEPTEMBER 2009

CPCS CELEBRATES 25TH ANNIVERSARY

On Wednesday, July 1, 2009, members and friends of CPCS gathered in the John Adams Courthouse to celebrate twenty-five years of “following the call of Gideon’s Trumpet,” and providing counsel to indigent men, women and children in Massachusetts.



Chief Counsel Leahy, Chief Justice Marshall, Governor Patrick, Magistrate Davis, and former Chief Counsel Rosenthal

The event, funded wholly by private donations, included speeches, music, food, drink, and slideshows of CPCS throughout the years, all honoring CPCS staff, public and private counsel. The Supreme Judicial Court graciously opened its doors to provide a venue for the party.

The second floor hallway of the John Adams Courthouse was filled with chairs and a podium over which a celebratory banner hung. The Honorable Willie J.

Davis, former chairman of the Committee, kicked off the evening festivities and acted as MC for the program.

Governor Duval Patrick led the speakers and delivered a speech recognizing the important work performed by everyone associated with CPCS. The Governor included CAFL lawyers in his remarks, stating “We are lucky to have the good men and women, public and private. . . Day after day you represent low income . . .struggling families in need of legal service and you do it

with honor and respect. . . Thank you for your service.”

Chief Justice Margaret Marshall followed the Governor with a speech in a similar vein, and quoted from the bestselling book, *Gideon’s Trumpet*, penned by her husband Anthony Lewis. Chief Justice Marshall also acknowledged all of the agency’s different divisions individually, including CAFL, and noted, as of July 1, the new right to counsel for wards and minors in Guardian-

SAVE THE DATE

- *CAFL Appellate Panel Certification Training, Marlborough, October 28 (See News Section for Details)*
- *Juvenile Court/CAFL/DCF Guardianship Trainings (See News Section for details) :*
September 21, Worcester
October 2, Springfield
October 14, Dedham
October 23, Pittsfield
October 28, Salem
October 29, Fall River

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The Constellation Jazz Orchestra and vocalist Rachel Bronstein

ship proceedings. The Chief Justice called CPCS staff attorneys and bar advocates “remarkable lawyers” who “really do bring to life the dream of Gideon versus Wainwright.” The Chief Justice remarked that “CPCS has been doing an extraordinary job . . . for children and family laws . . .”

Former CPCS Chief Counsel Arnold Rosenfeld spoke of the history of indigent representation in Massachusetts, and the beginnings of CPCS. Mr. Rosenfeld recalled how Patricia McGovern, Chairman of the Senate Ways and Means Committee, drafted legislation “in the dead of night,” and “had the foresight to add . . . people who needed assigned counsel, and that included . . . family law people . . . who deserve to have representation.”

Chief Counsel William Leahy rounded out the program with an inspirational speech (See pg. 3 for entire text). Chief Counsel Leahy closed in dramatic fashion, asking “So where do we go from here? . . . We stay true to our values and our profession . . . and we continue to follow the honorable call of Gideon’s Trumpet. In fact, if you listen very closely, you may just be able to hear the sound of Gideon’s trumpet right now...”

Chief Counsel Leahy’s words cued a trumpet

to sound from the balcony, and the Constellation Jazz Orchestra, with vocalist Rachel Bronstein, descended the staircase, and wended its way through the cheering crowd up to the podium, playing “When the Saints Go Marching In.”

Members of the band included CPCS attorneys Murray Kohn on String Bass and Banjo and Terry Nagel on Trombone. The band made its way back up the staircase to the hall above where the reception was held and the celebration continued.

Guests milled about and chatted among posters including those depicting Clarence Gideon and his case, the different CPCS divisions (See pg. 14 for a reproduction of the CAFL poster), and a timeline of CPCS’s history. The evening was a fitting tribute to all of those who have dedicated their careers and their time to follow the call of Gideon’s trumpet and to serve the men, women, and children in need of legal counsel in Massachusetts.



Members of CAFL, seated among the crowd, applaud the speakers celebrating CPCS.



CHIEF COUNSEL DELIVERS ROUSING SPEECH AT 25TH ANNIVERSARY CELEBRATION



Chief Counsel Leahy at the podium, with Chief Justice Marshall and Governor Patrick seated

Let me first say a word to each of the three previous speakers, while we have everybody in the room:

Thank you, Governor Patrick, for affirming the Legislature's principled decision to support the right to counsel, even during the throes of our economic crisis. We have noted with interest your pending criminal justice proposals. We pledge to work with you in pursuit of long overdue and badly needed reform in the areas of Criminal Offender Record Information, Mandatory Drug Sentences, Conversion of Misdemeanors to Civil Infractions and other essential initiatives which will save money, protect public safety, and reverse the recklessly punitive march of our criminal justice system over the past 20 years. Having just returned from meetings between the American Council of Chief Defenders and Attorney General Eric Holder and his staff in Washington, and having visited with members of our Congressional delegation, I will also be seeking your support for our effort to achieve meaningful federal support for the right to counsel, including the creation of a National Center for Defense Services which has been advocated by the American Bar Association and the National Legal Aid and Defender Association since 1975, and which was proposed by Senator Kennedy in 1979. We are on the march in Washington with that agenda, and we invite your support.

Thank you, Chief Justice Marshall, for being such a steadfast supporter of the right to counsel, notwithstanding the institutional tensions which exist between our single-minded duty to represent the cause of every client, and the court's broader duty to do justice for all. Your powerful decision for a unanimous Court less than 3 weeks ago in *Commonwealth v. Means* was a much-needed tonic, and an implicit rebuke to the shameful denigration of the right to counsel by a bare majority of the United States Supreme Court in *Montejo v. Louisiana* only weeks earlier. The *Means* decision also recognizes that many persons charged with criminal offenses, and many other CPCS clients in civil cases as well, confront significant mental health issues, often to a degree which would overwhelm any of us in this room. Your decision underlines the essential humanity and dignity of every person. We thank you for affirming our clients' humanity.

Thank you, Arnie Rosenfeld, for somehow, some way, getting this unwieldy new agency off the ground and actually functioning. I don't know how you did it. You did all the hard leadership work – establishing the rules and the performance standards, accomplishing the necessary conversion to hourly rates for private counsel, insisting that CPCS have a voice in the public debates about issues which impact our clients – in a word, establishing the visibility and the legitimacy of this new and often unappreciated agency with the impossible name. I often think that we who have followed in your footsteps have merely added layers of frosting to the cake you baked. Guess what? I'm told that Gerry Schaefer's in the house!

All one has to do is read two consecutive weekly issues of the *New Yorker* magazine, April 14 and 21, 1973. They're in the official SJC record as part of the *Lavallee* record appendix, and they capture the pre-Roxbury Defenders and pre-Gerry Schaefer Mass. Defenders Committee, which was a horribly ineffective mockery of the

Sixth Amendment right to counsel. And then you have in 1972 the Roxbury Defenders Committee breathing fresh life and fresh aggressiveness into the representation of the poor in Roxbury, and you have Gerry Schaefer coming in as head of the Mass. Defenders; and you have this whole new spirit and this concept of caseload control. And decades before this person attended national conferences and learned about “client centered representation”, Gerry Schaefer had brought it to Massachusetts.

Gerry, you’re a hero. Thank you for coming.

A quick look at the “Major Events” listed on page two of your program shows that this is a very different agency than began operations in 1984. We have acted to meet the challenges of the explosion in child welfare cases, where increasingly the Commonwealth has found it appropriate to remove children from the custody of their parents; and of the forensic revolution, especially in light of the recent National Academy of Sciences report which indicates that the law needs to become much more rigorous in assessing forensic evidence. We have acted to ensure that our child clients receive representation every bit as competent as our adult clients; to insist that the rights of the mentally ill be fully and vigorously enforced; to guard against unforeseen and pernicious immigration consequences of criminal convictions; to respond to litigation challenges for which the adjective “Special” is but a euphemism; and to attack the perennial problem of wrongful convictions, including the false assurance that the limits of DNA exoneration define the contours of the wrongful conviction disease which infects our criminal justice system. Last but not least, for well over a decade we have engaged in a protracted and difficult but frequently successful struggle to combat widespread hysteria and blatant disregard of proven recidivism data concerning the threat which former sex offender clients pose to public safety.

We have changed so much over the past 25 years, and yet in the truest, most fundamental

sense we have not changed at all. We take our mission – and we always will - from the *Gideon* case itself, and from *Powell v. Alabama*, the Scottsboro Boys case, on which it heavily relied. This is why we place a copy of Anthony Lewis’ brilliant book, *Gideon’s Trumpet*, in every CPCS office. We believe that every client, whether his or her case is civil or criminal or delinquency in nature, is entitled to our undivided attention and our utmost professional competence; and all the zeal we can muster.



Chief Counsel Leahy receives a standing ovation

We are the guardians of the right to counsel. Not the right to counsel of the Madoffs or the Skillings of the world, but the right to counsel of the poor, the displaced, the disoriented, the troubled, the newly arrived: all the vulnerable persons who by their actions or their alleged actions have been visited with the incredible force of state intervention and state authority. It is these people who depend entirely upon CPCS to present their side of the case, and to insist that they be treated with that degree of dignity to which every human being is entitled. We also know that by protecting their rights, we protect the rights of every individual against the ever-present threat of excessive government power. Eighty-one years ago, in his classic dissent in *Olmstead v. United States*, Justice Brandeis issued his timeless warning that “Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by

evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.” That statement is every bit as vital and true today as it was on the day it was written. We see its wisdom every day.

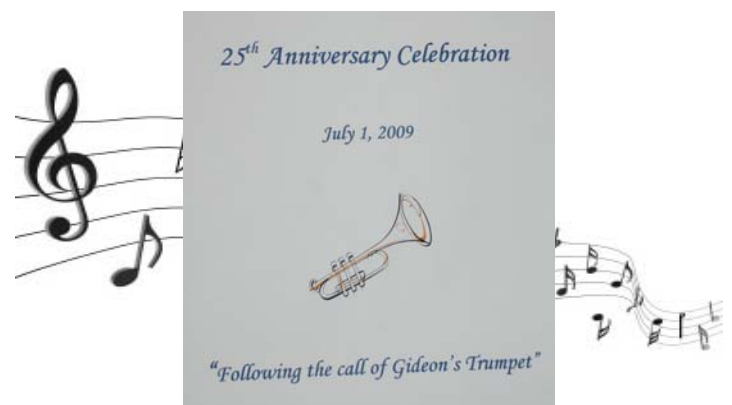
We are also guided by the independence and the concomitant responsibility granted to us by our governing statute, which is as wisely drafted as it may be awkwardly entitled. Consider this quote: “It is the genius of Chapter 211D that the potential for conflicting institutional goals which might distract those charged with securing indigent representation from single minded concern with the individual client has been prevented by the creation of an agency whose sole purpose is to serve the client’s interests.”

Those are bold words, aren’t they? “... [A]n agency whose sole purpose is to serve the client’s interests.” They were penned on July 11, 1986 by CPCS Chairman Doug Woodlock, in his resignation letter to then Chief Justice Hennessey on the occasion of his induction to the federal bench. We believe those words, and we do our best to fulfill their promise every day. I am very pleased to say that in the *Lavallee* litigation in 2004 – not only in the famous opinion by a unanimous Supreme Judicial Court, but also in a critical Single Justice decision issued by Justice Spina, which reversed a Superior Court Judge’s order that disregarded our public defender caseload limits – the Court acted decisively to enforce the independent agency operation promised by Chapter 211D. It is precisely these caseload limits, enshrined in our statute and enforced by our Court, which are the very bedrock of quality control. Therefore, Judge Woodlock’s words, like those of Justice Brandeis are as true and as alive today as they were when he wrote them.

We celebrate today because we are fortunate enough to live in a Commonwealth which pays sufficient heed to the fallibility of its ac-

tions, and has sufficient respect for the personal integrity of its residents, to establish and to finance an agency that is specifically designed to protect the impecunious individual against the sometimes excessive weight of the state’s authority. We hope we have been true to that important responsibility during the past quarter-century, and that we will continue to be true to it during the even more challenging years to come; for the work of enforcing the right to counsel is never easy, and it is never finished.

So where do we go from here? The answer is simple. We stay true to our values and our profession. We continue to accept the teaching of *Gideon*, and we continue to follow the honorable call of Gideon’s Trumpet. In fact, if you listen very closely, you may just be able to hear the sound of Gideon’s trumpet right now.... {sound of trumpet played by Anna Callahan from the balcony, following which The Constellation Jazz Orchestra and vocalist Rachel Bronstein descend the staircase to the tune of “When the Saints Go Marching In”}.



MESSAGE FROM CAFL DEPUTY CHIEF COUNSEL

Michael Dsida, Deputy Chief Counsel

Making (*Isaac and Jeremy*) History

This year we approach the 15th anniversary of *Care and Protection of Isaac*, and *Care and Protection of Jeremy*, and it's a good time to ask the Massachusetts Supreme Judicial Court to take another look at these decisions. CAFL is looking for a good case to take up on appeal to the SJC to challenge and clarify *Isaac* and *Jeremy*. We're looking for a case whose facts will show that trial judges should have the authority to reverse and overrule DCF decisions on placement and services. We also ask that you continue to challenge DCF decisions that adversely affect your client, push back against any broadening of *Isaac* and *Jeremy*, and continue to ask Juvenile Court judges to exercise the legal authority they continue to hold.

Before *Isaac* and *Jeremy*, judges had much greater oversight over DCF and routinely entered orders on placement and visitation. *Isaac* and *Jeremy* drastically reduced this level of oversight. These two cases limit judicial review by prohibiting the Juvenile Court from overturning "custodial" decisions by DCF (such as decisions regarding where and with whom a child in foster care will live) unless the agency has abused its discretion or erred as a matter of law. By contrast, most other states afford judges significant authority over the child welfare agency. In some other states, judges must even approve agency service plans. Here in Massachusetts, we've had almost fifteen years to evaluate the limits *Isaac* and *Jeremy* placed on our judges. Now seems like a good time to ask the SJC to take a critical look at whether these judicial restrictions are still appropriate.

In 2009, the landscape of child welfare law is significantly different from 1995 when *Isaac* and *Jeremy* were decided. In 1995, the statewide Juvenile Court system was in its in-

fancy. Today, we are lucky to have a Juvenile Court bench that presides exclusively over cases involving children and families. Indeed, there are now more than 40 specialized Juvenile Court judges with greater expertise and the ability to assess evidence and make decisions regarding placement of children, conditions of visits, and other services to be provided to children and parents in care and protection and CHINS cases.

The decisions that DCF workers make have always affected fundamental liberty interests in family integrity and the best interests of children. However, in 2009, a parent's rights can be terminated much more quickly than was generally the case in the mid-1990s. All cases are now potential termination cases, and many judges now take the position that after trial a case should either end in termination of parental rights or be dismissed. Time standards, pressure to move children toward "permanency," and efforts to clear up court dockets are all making these cases move much faster. In this climate, DCF decisions about placement, visits, and other services have an immediate and more long-lasting impact on the ultimate outcome of the case. Judges charged with making the most difficult and permanent determination about the future of a child and a family should be afforded authority to oversee decisions that lead up to this critical point.

We need increased judicial oversight even more today because parties no longer have a timely remedy through DCF's internal fair hearing process. Judicial deference to an executive agency is often premised on an aggrieved party's ability to challenge the agency's decision through a timely administrative hearing. Waiting time for a fair hearing is now reported to be up to eighteen months or even more. Aggrieved parties are thus left with no effective recourse when they disagree with a DCF decision.

Even as we plan to ask the SJC to clarify and limit the scope of *Isaac* and *Jeremy*, we can also remind ourselves, the courts, and DCF, that, even as it stands, courts have significant author-

ity over DCF. The abuse of discretion standard may make some attorneys reluctant to challenge DCF decisions in court. However, the abuse of discretion standard is by no means insurmountable. A court can hear evidence, determine that DCF has abused its discretion, and order appropriate relief. In some cases, counsel may successfully argue that there is only one way for DCF to fulfill its legal obligations, and that therefore, the court can enter a specific order against DCF. Further, the abuse of discretion standard does not apply to all DCF decisions. It only applies to those decisions for which the legislature has vested discretion with the agency. There are many decisions that the legislature has entrusted to the court, not DCF. These include whether a care and protection petition should issue, who gets custody at a seventy-two hour hearing, and whether or not to approve DCF's permanent plan for a child in foster care. The Juvenile Court is also empowered to make decisions regarding sibling and grandparent visits and whether to terminate parent-child visits. In CHINS matters, DCF must comply if the court recommends that the child be placed out of the home. Therefore, we urge you to continue to challenge DCF decisions that adversely affect your client, push back against any broadening of *Isaac* and *Jeremy*, and ask Juvenile Court judges to exercise the legal authority they continue to hold.

Your work on these cases will help make Isaac and Jeremy history. If you have a case that could be used to bring these important issues back before the appellate courts, and if an appeal of these issues will help reach your client's goal, please let us know. We would like to assist individual lawyers in setting up an appropriate appeal. If you represent a child, please contact Cathy Sinnott or Andy Cohen; if you represent a parent, please contact Peter Heffernan or Carol Rosenzweig. (See the back page for contact information). We will do everything we can to help you set up the case and bring all of our resources to bear on the appeal.



MESSAGE FROM CAFL APPEALS

Andrew Cohen, Director



Expedited Appeals

Two decisions, neither of much interest on its merits, address something we ask for far too rarely: an "expedited appeal." In *Prenaveau v. Prenaveau*, __ Mass. App. Ct. __, No. 09-P-950 (August 28, 2009), the Appeals Court noted that the appellant-wife asked the single justice for a stay of a custody order to her out-of-state husband. The single justice denied the stay but sua sponte "converted the petition into a full appeal and expedited that appeal for a decision to issue prior to the commencement of the children's school year." The full panel then reversed the order of custody to the husband. From notice of appeal (shortly after the Probate Court's final order on April 15, 2009) to Appeals Court decision (August 28, 2009), the entire appeal took only four months.

In *Care and Protection of Rae*, 454 Mass. 1019 (2009), former foster parents filed a c. 211, § 3 petition seeking review of the denial of their motion to intervene in consolidated guardianship and care and protection matters. The child was placed with the guardian. (Although the SJC does not explain the petitioners' reasoning, the petitioners probably sought relief under c. 211, § 3 because they believed that a final appeal to an Appeals Court panel would take too long, and they did not want much time passing after the child was removed from them and placed with the guardian.) The single justice denied the petition. On appeal to the full bench under SJC Rule 2:21, the SJC affirmed the dismissal of the petition on the grounds that the petitioners failed to show the lack of an adequate alternative remedy. According to the SJC, the petitioners could have appealed the denial of their motion to intervene to a panel of the Appeals Court. "Any concern the petitioners might have about the speed with which the Appeals

Court might handle their appeals . . . can be addressed by motions for expedited rulings on those appeals. Cf. Restucci v. Commonwealth, 442 Mass. 1045, 1046 (2004).”

If you need a fast decision on appeal, consider filing a motion for expedited ruling, citing Prenaveau, Rae and Restucci. You will likely have to deal with an expedited briefing schedule.



NEWS

COURT MOVES

LAWRENCE JUVENILE COURT MOVES TO FENTON JUDICIAL COURTHOUSE

Beginning on Monday, June 29, 2009 all cases scheduled for hearing at the Lawrence Juvenile Court, 10 Railroad Street, Lawrence, MA will be heard at a new location: Fenton Judicial Center, Essex County Juvenile Court, 2 Appleton Street, 2nd Floor, Lawrence, MA 01840. Courtrooms #7 and #8 are designated for the Juvenile Court and are located on the 3rd Floor. The Office of the Clerk-Magistrate and the Probation Department are located on the 2nd Floor.

CAMBRIDGE JUVENILE COURT JURY SESSION RELOCATED TO MIDDLESEX SUPERIOR COURT IN WOBURN

Effective February 23, 2009 and continuing, the "jury session" of the Cambridge Juvenile Court will be relocated to the Middlesex Superior Court located at 200 Trade Center, Woburn, Ma. 01801. The Cambridge Juvenile Court jury session will be held the last week of each month

in room 440 of the Superior Court. Any questions concerning juvenile court jury matters should be directed to the Clerk's office in Cambridge at 1-617-494-4100. This change was required due to the closing of the courthouse 40 Thorndike Street, Cambridge which had previously provided jurors for the juvenile court located next door at 121 Third Street.

ATTLEBORO JUVENILE COURT BUSINESS HEARD IN TAUNTON JUVENILE COURT

Attleboro Juvenile Court continues to be closed due to a fire in the North Main Street Court courthouse on May 18, 2009. A fire restoration company is cleaning and repairing the damaged areas of the courthouse. Beginning on Monday, June 1, Attleboro Juvenile Court business will continue to be conducted in Taunton Juvenile Court. Anyone with questions may still call the Attleboro District Court at 508-222-5900 for further instructions. The Taunton Juvenile Court is located in the same building as the Taunton Superior Court, 9 Court Street in Taunton. The telephone number is 508-824-0609.

DEBORAH A. S. CAPUANO APPOINTED TO THE JUVENILE COURT BENCH

Adding her name to a growing list of CAFL practitioners appointed to the Juvenile Court bench, Deborah A. S Capuano was confirmed to retired Chief Justice Martha P. Grace's vacant Worcester Juvenile Court seat. When he announced her nomination, Governor Patrick lauded her and said that "Deborah is highly regarded both for her first-rate legal skills and for her long-time commitment to serving youth and families. . . Her experience, compassion and appreciation for the communities she will serve make her uniquely qualified to adjudicate these sensitive and important matters."

Before becoming a judge, Capuano represented private and court appointed clients in the juvenile, probate and family and district courts. She focused her practice on delinquency, youthful offender and juvenile defense; care and protection and CHINS cases; and domestic relations and family law. For almost a decade, Capuano served as a Regional Coordinator for CPCS's Children and Family Law Program and also assisted children in DCF custody to obtain special education plans and services.

Prior to obtaining her law degree, Capuano worked for 17 years in the Worcester Public Schools as a middle and high school English teacher. She is a graduate of Worcester State College, Assumption College (M.A. English) and Massachusetts School of Law.

SALEM CAFL STAFF OFFICE HONORED ON LAW DAY

The Lynn Juvenile Court Law Day Award was presented to the Salem CAFL office. Juvenile Court Chief Justice Michael Edgerton and Associate Justice Amy Nectem presented this award to the Salem CAFL office in recognition of their diligent and tireless commitment to children and families. The Justices stated that "The competent and professional advocacy undertaken by CAFL epitomizes the spirit and tradition of Law Day."

The Justices presented the award at the Lynn Juvenile Courthouse celebration of Law Day on May 1, 2009. The Salem CAFL office is headed by Kathe McCaffrey, Attorney in Charge, and staffed by Judy Bernstein, Kaitlin Donahue, Mary McDonough, Erin Raine, Kate Santelli, Stacy Schleif and Jane Song.

CAFL STAFF POSITIONS FILLED

CAFL has hired two staff attorneys and one social worker to fill vacant positions in Pittsfield, Brockton, and Lowell. The CAFL Pittsfield office has already welcomed Attorney Eleanor Wilkinson.

The Brockton office will welcome Attorney Amy Reichbach, and the Salem office will welcome social worker Kelly Desjardins later in September.

NOW ACCEPTING APPLICATIONS FOR CAFL APPELLATE PANEL TRAINING

CAFL is now accepting applications for the annual Appellate Panel Certification Training on October 28, 2009, in Marlborough. An application and further information may be found on the CAFL website at:

http://www.publiccounsel.net/practice_areas/cafl_pages/civil_cafl_index.html

GUARDIANSHIP TRAININGS TO ROLL OUT ACROSS STATE

The Juvenile Court Department, CPCS/CAFL, and DCF are conducting a training program on the Uniform Probate Code, Article V (Guardianship of Minors). The training will take place from 1:50 - 4:15 p.m. at the locations listed.

The program is open to Juvenile Court judges, clerks, and probation officers, CPCS/CAFL attorneys, and DCF attorneys and social workers. Non-CPCS, DCF or Juvenile Court personnel may attend with prior approval. This training does **not** certify CAFL attorneys to represent children in private guardianship cases in the Probate and Family Court. CPCS/CAFL will hold a separate certification training for Probate Court cases.

A registration form and further information may be found on the Juvenile Court website, at the link listed below.

<http://www.mass.gov/courts/courtsandjudges/courts/juvenilecourt/upc-announcement-registration.pdf>



CASENOTES

Adoption of Rico, 453 Mass. 749 (2009) May 7, 2009 Botsford, J.

In an exciting decision on posttermination and postadoption visits, the SJC remanded and held that because the trial judge found that it was in Rico's best interests to have visits with his father and his siblings, she was obligated to enter specific orders for posttermination and postadoption visits or contact. The SJC did not address the issue of sibling visits; it upheld the Appeals Court's decision to remand on that issue.

The SJC held that, on the record of this case, the trial judge abused her discretion when she failed to order postadoption and post termination contact between Rico and his father, leaving such contact to the discretion of DCF and any adoptive family. The Court agreed with Rico and his father that a specific order was warranted where the evidence was undisputed that Rico and his father have a strong bond, there were no identified adoptive parents or a situation where adoption was within reasonable sight, and the trial judge found that Rico should have postadoption contact with his father. The Court said that an order offers protection to the child and relieves the child of the "burdensome and uncertain avenue of relief" of petitioning the court if DCF or the adoptive parents refuse to allow contact. The SJC also said that "If the current best interests of the child dictate posttermination and postadoption visitation with a biological parent because of the importance of the child's bond to his parent, it follows that the child's best interests will be advanced by assuring the child that the bond is going to be honored and protected by the power of the court." (citations omitted).

The SJC emphasized that a court order for posttermination and/or postadoption visits is "in a sense a provisional order." If the child is later adopted, the judge who presides over the adoption will need to determine whether the order still reflects the child's best interests.

The SJC also drew attention to the need to consider, in addition to bonding, "other circumstances of the actual personal relationship of the child and the biological parent." Adoption of Vito, 431 Mass. 550, 562 (2000). The Court cited articles that suggest that a child adopted after his parents' rights are terminated may benefit from contact with them "even if he did not earlier form a strong bond with them." (citations omitted).

In a footnote, the SJC stated that the father has standing to challenge the judge's visitation order even though his parental rights were terminated and he had not appealed from that decision. The Court stated that the visitation order was part of the adjudication of a termination proceeding to which the father was a party and thus has a right to press his appeal on the visitation issue.

Adoption of Linus, 73 Mass. App. Ct. 815 (2009) Dreben, J.

The Appeals Court reversed and remanded judgment finding the parents unfit and terminating their parental rights to their two older children, Linus and Malcolm. At retrial, the judge shall determine whether DCF has additional evidence that arose after the first trial to show parental "grievous shortcomings or handicaps" that put Malcolm and his brother Linus at risk. If the plan is not termination, DCF must devise and implement a reunification plan with increased visits and services with judicial oversight and approval.

Findings of Unfitness: The Appeals Court ruled that the trial court made erroneous findings that the parents were currently unfit due to ongoing drug use, homelessness, and failure to comply fully with the service plan. The Appeals Court held that the evidence of parental misconduct was stale, that there was no evidence of drug use after 2003, and that the DCF social worker testified at the time of trial that the parents were living in housing suitable for the boys. The social worker also testified that both parents were in compliance with the service plan.

The Appeals Court pointed out that drug use alone would not prove unfitness, and that DCF regulations preclude removal on the sole basis of homelessness. The Court noted that if the parents did fail to comply fully with the service plan, there was no evidence that the failures were related to any “clearly identified deficiencies” on their part, and hence, are not significant.” Adoption of Yale, 65 Mass. App. Ct. 236, 242 (2005).

The Appeals Court also noted that there were no issues concerning the parents’ care for their youngest child, Alice, who remains with the parents and has significant medical needs. The trial judge found that both parents had demonstrated adequate level of parenting skill to care for Alice. There was evidence that the parents met their service plan tasks of having Alice attend school, providing for her educations and medical needs, and meeting with collaterals. A VNA wrote that the mother was doing “great” with Alice, and there was evidence that the father has

“taken much responsibility for his daughter’s care.”

The Court stated that the judge’s conclusion that the parents are not fit to take care of three children was not based on any evidence elicited at trial. While there may be legitimate concern that these three children “may prove to be too much for these parents,” the court was clear that “such concern, not based on fact, is insufficient to take the ‘extreme step’ of terminating the parent and child’s legal relationship.” Adoption of Carlos, 413 Mass. 339, 350 (1992).

Bonding with Preadoptive Parents: The Appeals Court acknowledged that “there is bonding with the preadoptive parents” that “does pose problems.” However, the Court pointed to the lack of expert testimony or other evidence of future harm to Malcolm and Linus if they were removed from their preadoptive homes. The Court also stated that DCF “exacerbated the problem by terminating visitation without court approval.”

WELCOME NEW TRIAL ATTORNEYS WHO COMPLETED THE CAFL TRAINING IN AMHERST

Peter C. Alessio
Berkshire

Cynthia M. Furtado
Bristol

Roxi J. Rose
Norfolk, Plymouth, Bristol, Middlesex

Alice B. Braunstein
Middlesex, Suffolk

John E. Garber
Hampden, Hampshire

John R. Rothery
Hampden

Elizabeth V. Brennan
Worcester

Edward Patrick Gonzalez
Essex, Middlesex, Norfolk

Richard S. Showkier
Berkshire, Hampden

Jessica Byrne
Berkshire

Carol J. King
Bristol, Norfolk

D. Luray Wallace
Norfolk, Plymouth

David R. Cartmill
Bristol, Plymouth, Barnstable

Michael A. Lambert
Suffolk, Middlesex

Eleanor L. Wilkinson
CAFL Pittsfield

Christopher J. Curtin
Medford

Judith R. Liebowitz
Berkshire

Marianna Yang
Middlesex, Suffolk

Alexander A. Flig
Norfolk, Suffolk, Bristol

Kristin Michaud
Middlesex, Suffolk



CPCS/CAFL 2009-2010 REGIONAL COORDINATORS

Our CAFL regional coordinators have a myriad of skills and responsibilities. RC's are CAFL certified and have substantial experience practicing law and representing families in CHINS, care and protection, and termination of parental rights cases. RC's provide advice and technical assistance to other CAFL attorneys, conduct and/or coordinate training programs, and assist in oversight of the mentor program. They serve an important role supporting CAFL practitioners. RC's are familiar with the local court practices and personalities and are an excellent resource. If you have a questions and do not have a mentor, or your mentor is unavailable, you should contact your RC. You can also contact an RC in a different county. Here is a list of the RC's by region:

Barnstable / Nantucket / Dukes Counties

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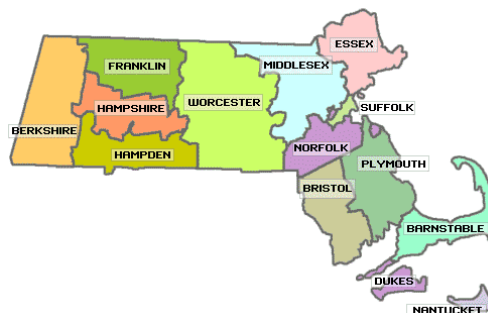
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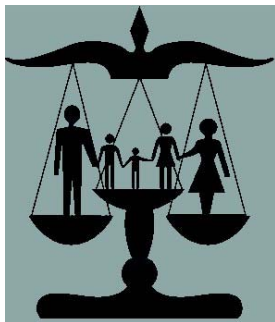
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Parents have a “fundamental liberty interest” in the “care, custody, and management of their children.”

Santosky v. Kramer, 455 U.S. 745 (1982)

DUE PROCESS

effective assistance of counsel

“Loss of a child may be as onerous a penalty as the deprivation of the parents’ freedom.” *Custody of a Minor (No. 1)*, 377 Mass. 876, 884 (1979).

“There is no question that the children are entitled to counsel, that their autonomy and rights to be heard on issues affecting their interest should be respected.” *Care & Prot. of Georgette*, 439 Mass. 28 (2003).

The child's liberty interest in the parent-child relationship is "substantial." *In re Hilary*, 450 Mass 491 (2008)

separation

safety

child welfare

state intervention

permanency

"The rights to conceive and to raise one's children" are "essential . . . basic civil rights of man . . . far more precious . . . than property rights." *Stanley v. Illinois*, 405 U.S. 645 (1972).



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CHILDREN & FAMILY LAW DIVISION

The Committee for Public Counsel Services' Children & Family Law (CAFL) Division provides legal representation to children and indigent parents in child welfare matters. The cases within the purview of CAFL include care and protection proceedings, children in need of services (CHINS) (status offenses) cases, actions to terminate parental rights, state agency-sponsored guardianships, and any other proceeding regarding child custody where the Department of Children and Families (DCF) is a party or where the court is considering granting custody to DCF.

In Massachusetts, children and indigent parents have a right to representation by counsel in child welfare cases. See G.L. c. 119 § 27 and Dep't of Public Welfare v. J.K.B., 379 Mass. 1 (1979). By statute, children are represented in child welfare cases by attorneys, not guardians ad litem. (Guardians ad litem are occasionally assigned by the courts for specific, limited roles; the courts, not CPCS, select, oversee, and pay guardians ad litem.) CAFL attorneys have a caseload that includes parent and child clients.

WHO'S WHO IN THE CAFL ADMINISTRATION

Mike Dsida - Deputy Chief Counsel

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Amy Karp- CAFL Training Director

Andrew Cohen- Director of CAFL Appeals

Katharine Klubock- Legal Training Attorney

Peter Heffernan - Staff Attorney (Parent Advice Calls)

Catherine Sinnott - Staff Attorney (Child Advice Calls)

Sarah Derby - Director of Social Work

Rita Caso - Certification, Appellate Assignment, & Insurance Coordinator

Michael Meagher- Training Unit Administrative Assistant

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