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**APPELLATE BULLETIN**

To: CAFL Appellate Panel Members

cc: CAFL Trial Panel Members

CAFL Administrative Attorneys

Fr: Andrew Cohen, Director of Appellate Panel, CAFL Division

Jaime Prince, Staff Attorney, CAFL Division

Re: Administrative Matters

Recent Rule 1:28 Decisions

Writing Tips

Practice Tips

Date: October 4, 2016

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**Administrative Matters**

1. Copies of Briefs

The Appeals Court issued an Order on July 29, 2016 stating that parties shall file only 4 copies of each brief and record appendix volume, 2 copies of each exhibit volume, and 1 copy of each transcript volume.  (You will continue to serve on other counsel 2 copies of the brief/record appendix and 1 copy each of the exhibit and transcripts volumes.)  Per the Order, do not follow Mass. R. App. P. 18(e) and 19(b)(1) as to numbers of copies.

Note that your 4 copies of the brief can be either 1 original and 3 copies *or* 4 copies; Rule 19(b) contains no requirement of an original signed brief. Each of the 4 copies must be bound.

Please remember that the Rules are different for numbers of copies in the SJC.

1. Moot Courts

If you have an upcoming oral argument and want to be moot-courted, call us. Under some circumstances we can come out to your office or use CAFL staff space in Worcester. Remember, if you moot-court with someone from our administrative office, you will receive 2 CLE credits for the current fiscal year.

**Recent Decisions**

1. Published Decisions

This summer, the SJC and Appeals Court issued several published decisions relevant to our practice. Those cases are:

* Care and Protection of Vick, 89 Mass. App. Ct. 704 (2016);
* Commonwealth v. Grady, 474 Mass. 715 (2016);
* Commonwealth v. Gibson, 474 Mass. 726 (2016);
* Commonwealth v. Epps, 474 Mass. 743 (2016); and
* Adoption of Anisha, 89 Mass. App. Ct. 822 (2016).

The CAFL Training Unit has written summaries of these cases available on our website at: <https://www.publiccounsel.net/cafl/professional/relevant-statutes-and-case-law/summaries-of-recent-decisions/>.

1. Unpublished Decisions

*Citing to Rule 1:28 Decisions*

We still see briefs where Rule 1:28 decisions are cited incorrectly. If you cite to a Rule 1:28 decision in your brief or motion, you must:

(a) attach a copy of the decision as an addendum; and

(b) cite the page of the Appeals Court reporter that lists the decision and a notation that the decision was issued pursuant to Rule 1:28.  In your brief or motion, you do not need to cite the docket number, month or day. **For example: Care and Protection of Priscilla, 79 Mass. App. Ct. 1101 (2011) (Mass. App. Ct. Rule 1:28).** Please note that we’re using the docket numbers and dates of issuance below just to make it easier for you to find the decisions online.

Rule 1:28 decisions are now available at: <https://www.lexisnexis.com/clients/macourts/>. (Check off that you agree to the terms of usage, and click on “Begin Searching Opinions,” then select “Search by Party Name” (on the left border), then select “Appeals Court Unpublished Decisions.”) To find child welfare Rule 1:28 decisions, type in the first “party” box “adoption or care or custody or guardianship.” Unfortunately, the free LEXIS search engine limits you to the most recent 25 cases. To find a specific case, enter the case name.

*Recent Rule 1:28 Decisions*

This bulletin catches us up through February 29, 2016. We have not summarized all unpublished child welfare decisions; rather, we include only those with interesting facts and/or legal issues. If we left out one of your Rule 1:28 decisions, and it has a useful tidbit in it, please let us know.

1. **Adoption of Penrod, 88 Mass. App. Ct. 1106, No. 14-P-1939 (Sept. 30, 2015).**

The mother signed a stipulation and “affidavit of voluntariness,” agreeing to the termination of her parental rights, then she left the courthouse. Her attorney filed the stipulation and affidavit, and the court terminated the mother’s rights. Mother later filed a motion to withdraw the stipulation and vacate the decree. After the judge denied the motion, she appealed. She argued that the court erred in terminating her rights without a colloquy and that her trial counsel was ineffective for failing to object to the lack of a colloquy and for submitting the signed paperwork after she had left the building.

The panel disagreed. The affidavit showed that the mother’s stipulation was knowing and voluntary, the trial attorney had reviewed the stipulation with her line by line, and there is no requirement for a trial judge to conduct an oral colloquy to confirm that entry into a stipulation is knowing and voluntary. See also Adoption of John, 53 Mass. App. Ct. 431, 435 (2001). Because there is no requirement for a colloquy, the trial attorney was not ineffective for failing to insist on one. The panel refused to address whether the trial attorney was ineffective for submitting the signed paperwork in mother’s absence because the mother had not raised it in her motion to vacate the decree.

What should we take from Penrod? If your client is stipulating to judgment, review any stipulation with her line by line, and make sure you have enough time to answer all of her questions. While a colloquy isn’t essential, it is still good practice – and protective of counsel’s interests – to ask the judge to conduct one. Listen closely to the judge’s questions (and the client’s answers) during the colloquy. Make sure the judge inquires as to whether the client understands the consequences and finality of the stipulation, particularly whether there are any contingencies about placement or post-adoption contact. Most stipulations have no such contingencies, but many stipulating parents believe otherwise. Also make sure that the judge asks whether the client has reviewed the stipulation with counsel and whether the client is satisfied with counsel’s explanation of the document. Are these self-serving questions? Yes, but a healthy measure of self-protection is warranted; most challenges to stipulations involve allegations by parents that their trial counsel failed to review the stipulation with them or failed to explain it to them adequately.

1. **Adoption of Becky, 88 Mass. App. Ct. 1107, No. 14-P-1624 (October 2, 2015).**

This case offers a valuable lesson for trial lawyers regarding issue preservation. The mother and Becky lived with mother’s friend and boyfriend. The boyfriend sexually abused all of the friend’s children and Becky. The friend’s children were removed and, after mother refused to take Becky for a trauma evaluation, Becky was also removed. Mother’s rights were later terminated based in part on her refusal to believe that Becky had been sexually abused.

The mother argued on appeal that the trial court erred in denying her motion for access to her friend’s DCF file, which contained information about sexual abuse. She needed the file in order to prepare for cross-examination of Becky’s clinical trauma evaluator. According to the panel, the issue had not been preserved because the “mother failed to object to the [trauma evaluator’s] testimony or move to strike it.” At trial, mother cross-examined the trauma evaluator but “did not claim below and has not demonstrated on appeal that access to [key portions of the friend’s DCF file] was necessary to the mother’s case.”

Accordingly, it is not sufficient to move for access to, or turnover of, files of this nature. Once the judge denies the motion (or after DCF fails to provide the documents), counsel must object to proceeding without the files, object to any witness testimony relevant to the missing information, move to strike any testimony relevant to the missing information, and explain to the court how the missing information is relevant to the client’s case.

While the circumstances of this case were unusual, its lesson is relevant to more common file requests, including requests for updated DCF files and home-finder/home-study files about foster- and pre-adoptive parents. For example, if the trial judge denies counsel’s motion for the pre-adoptive family’s home-finder file, counsel should object to hearing any testimony from or about the pre-adoptive parents and move to strike any testimony from or about them. Counsel must also explain to the trial judge, as an offer of proof, how the files are relevant to the client’s case and how the failure to turn them over will prejudice the client. As Becky teaches us, a motion for the files, by itself, does not preserve the issue that the court erred in not ordering their turnover.

1. **Adoption of Sheldon, 88 Mass. App. Ct. 1109, No. 14-P-1604 (October 22, 2015).**

The mother of Sheldon appealed the termination of her parental rights and the denial of her motion for relief from judgment. The judge did not issue findings until a year after trial. At the time he issued the findings, he had retired. According to the mother, the judge was not a “judge” at the time he retired, and his findings were therefore void. The Chief Justice of the Trial Court appointed the judge to recall status for one day approximately a year and a half after the trial, and, on that date, the “judge-for-a-day” re-issued his findings. The panel held that this “cured” any structural infirmity.

Although the mother didn’t challenge any of the findings as clearly erroneous, she argued that the long delay called into question their accuracy. The panel disagreed, noting that although the judge officially entered his findings eighteen months after trial, he first issued them a year after trial and issued the termination decree only three months after trial. Additionally, the panel remarked that the judge’s findings were supported by citations to the record, indicating that he had carefully examined the evidence when he drafted them.

The mother also argued that the findings were stale by the time they were properly issued, eighteen months after trial. In that post-trial period, the mother had become sober and obtained stable housing, showing that the judge’s prognostications were incorrect. Again the panel disagreed. By the time of the judge’s denial of the motion for relief from judgment, the child had lived with the pre-adoptive family for 80% of his life. Denial of the motion was, therefore, not an abuse of discretion.

The takeaways? Findings issued when a judge has retired are void, but this can be cured by re-appointment, even for a day, by the Chief Justice of the Trial Court and reissuance of the findings on that day. Also, motions for relief from judgment are rarely successful unless the parent can show a tremendous change in circumstances *and* instability of the child’s placement. See also Adoption of Enoch, discussed below.

**4. Adoption of Valerio, 88 Mass. App. Ct. 1111, No. 15-P-72 (November 3, 2015).**

This case is worth noting because of comments the panel made regarding two evidentiary issues raised by the mother. First, the trial court admitted substantively the DCF affidavit filed with the initial petition. The mother argued that it was an inadmissible pleading under G.L. c. 231, § 87. DCF argued that the affidavit was akin to a DCF court report, admissible under Care and Protection of Bruce, 44 Mass. App. Ct. 758, 765-66 (1998), and the appellee-child argued that it was an official record under Adoption of George, 27 Mass. App. Ct. 265, 272 (1989). The panel “ha[d] doubts about the justifications offered by DCF and the child,” but found the admission of the affidavit to be harmless because of other overwhelming evidence of unfitness. Second, the trial court admitted testimony by a DCF supervisor as to her memory of dictation notes made by a social worker under her supervision. DCF claimed that the testimony was the “functional equivalent” of an official record, and the child argued that the burden was on the mother to produce the social worker who dictated the notes if she was concerned about the admission of hearsay. These arguments are baffling; there is no question that this is inadmissible hearsay. While the panel did not say this, it held that any error in admitting the statements was harmless.

**5. Adoption of Danielle, 88 Mass. App. Ct. 1116, No. 14-P-374 (December 8, 2015).**

This case has an extraordinarily complicated procedural history, most of which is of no interest to casual readers. Worth noting, however, is the panel’s willingness to bifurcate the appeal as to each child (without any party making such a request), and its recognition that the change in one of the children’s circumstances warranted a Rule 60(b) hearing as to that child only.

In Danielle, the mother of two girls (ages 16 and 11) appealed the trial court’s approval of the DCF adoption plans. After trial, the older girl’s placement disrupted and she no longer wanted to be adopted. The mother asked the Appeals Court single justice for leave to file a 60(b) motion based on the older child’s changed circumstances. The single justice denied her request because staying the appeal would prejudice the younger child who wanted to be adopted. The panel concluded that the single justice did not abuse her discretion because concern about the younger child was warranted. But given the panel’s affirmance of all aspects of the younger child’s case, delay for that child was no longer a problem. Accordingly, it stayed the appeal relating to the older child and granted the mother leave to file her 60(b) motion within 10 days of the decision. The panel ordered the juvenile court to act on the motion within 45 days, and the panel retained jurisdiction over the appeal.

Danielle suggests that siblings’ different positions and interests may call for child-specific orders from the panel – that is, a de facto bifurcation of the appeals. If one child wants speedy permanency but the other wants an evidentiary hearing on the disposition, the plan, or visits, counsel should consider asking the panel to grant independent relief for each child. In that way, neither child will be prejudiced, and the matters can be disposed of more quickly.

**6. Adoption of Zeb, 88 Mass. App. Ct. 1118, No. 15-P-531 (December 29, 2015).**

At least once each year the Appeals Court shows us why most Rule 1:28 decisions should never see the light of day. In this case, the trial judge denied the mother’s request for her experts to interview the children but then discredited the experts’ opinions about mother-child bonding in part because they failed to interview the children. According to the panel, while the judge may have, as a result of this error, underestimated the strength of the mother-child bond, “any error in this regard would not have affected her ultimate conclusion that court-ordered visitation would not be in the children’s best interests where they had already formed strong bond with their adoptive parents.”

Really? The trial judge unfairly hamstrings the parent’s defense and then bungles the parent-child bond aspect of the post-adoption contact inquiry – arguably the most important part of the test – and the panel decides that *it doesn’t matter*? Oh, and the panel got the law wrong, too, because a bond between the child and the pre-adoptive parent doesn’t predetermine the inquiry. Vito, Rico, and Ilona make that abundantly clear. The panel should have remanded on this issue.

**7. Adoption of Maura, 89 Mass. App. Ct. 1101, No. 15-P-356 (January 14, 2016).**

This case is noteworthy because of footnote 2, which suggests a preference of the Appeals Court for how counsel should move to dismiss an appeal. In Maura, the mother filed a motion to withdraw her appeal following the filing of briefs and panel assignment. The panel denied her motion without prejudice and directed her to re-file her request as a “stipulation of dismissal with prejudice signed by all parties.” Because the mother did not comply, the panel decided the appeal.

Maura suggests that, once a panel is assigned to the case, a party seeking to dismiss his or her appeal should get all parties to sign a stipulation of dismissal with prejudice. (Of course, this procedure might just be the preference of this panel – Cohen, Meade, and Agnes; with a different panel, counsel might want to take the speedier route and file a motion to dismiss with prejudice.)

**8. Adoption of Abraham, 89 Mass. App. Ct. 1101, No. 15-P-611 (January 15, 2016).**

After trial, the judge adjudicated the child in need of care and protection but did not terminate parental rights. Later, DCF filed a “motion to present additional evidence,” arguing that the parents had committed perjury at trial. The DCF motion did not reference a particular rule. The judge reopened the evidence and terminated parental rights. The father appealed.

The panel held that DCF’s motion could be analogized to a motion for relief from judgment under Rule 60(b)(3), which allows relief from judgment on the basis of “fraud . . . misrepresentation, or other misconduct,” or to a motion for new trial under Rule 59, which allows relief from judgment based on newly discovered evidence which by due diligence could not have been discovered before or during trial. DCF alleged, and the judge explicitly found, that the mother and father gave false testimony about their relationship throughout the trial, and the testimony had influenced the judge’s original decision. A trial judge’s decision to reopen evidence can only be set aside upon a “clear showing of an abuse of discretion.” See Pina v. McGill Dev. Corp., 388 Mass. 159, 166 (1983). There was no abuse of discretion here.

The panel also disagreed with the father’s argument that the judge erred in admitting evidence of the father’s relapse at the reopened trial. The father failed to object to the evidence at trial, and therefore it was properly admitted for all purposes. The panel affirmed the termination decree.

**9. Adoption of Blaine, 89 Mass. App. Ct. 1106, No. 15-P-277 (February 18, 2016).**

This case contains nothing of note, but it gives us a chance to discuss an issue that pops up in many appeals: the appellant-parent’s own abuse or trauma history. In a footnote in Blaine, the panel notes:

We acknowledge that the record indicates that the mother was subjected to severe trauma during her own childhood, including sexual abuse by her own father. We are not insensitive to the lasting impact that such trauma has had on the mother and on her ability to parent her own children. We also acknowledge, however, that this history cannot and should not be used to excuse or justify the mother's behavior, as an adult, that threatened the safety of her children.

Unfortunately, a parent’s own abuse history is common in our cases. But is it worthwhile to discuss it in your Facts section? Does it make the parent more sympathetic? Does it evoke feelings of pity in the panel? Feelings of disgust? Or does it bore the panel because it is irrelevant to the issue before them? This panel acknowledged mother’s history but took pains to note that it didn’t influence them favorably toward her. I suspect that this would be the message from all of the Appeals Court justices. If so, it makes little sense to discuss a parent’s own abuse history in a brief unless it is necessary to explain an important point in the Argument. That, I think, is rarely the case.

**10. Adoption of Chandler, 89 Mass. App. Ct. 1106, No. 15-P-938 (February 18, 2016).**

Chandler is the best case in this Bulletin. In this appeal, the two oldest of four children claimed that the trial judge abused his discretion in only ordering four post-termination sibling visits per year. Neither of the two was in a pre-adoptive home. The judge concluded that an order for more than four annual sibling visits “would place too high a burden on prospective adoptive parents” and would “deter them from adopting.” The judge based this conclusion on vague testimony from a DCF social worker that “rigorous” visitation terms “can be a bit of a barrier for [adoptive resources] to keep up with[.]”

The panel concluded that the trial judge abused his discretion. According to the panel, the older siblings lived together for much of their lives and shared a special bond; if they never found permanency, all they had was each other. Most significantly, the panel noted that “DCF has failed to articulate any reason why an order for more frequent *preadoptive* visitation between [the older children] would be a barrier to adoption or otherwise would not be in their best interests.” (emphasis added) The panel remanded the case to the trial court with instructions to fashion an order that “practically and reasonably, in the judge’s discretion, provides additional preadoption visitation” between the two oldest siblings.

**11. Adoption of Enoch, 89 Mass. App. Ct. 1109, No. 15-P-886 (February 29, 2016).**

The mother and children appealed from the trial court’s termination of mother’s rights and its denial of their Rule 60(b)(6) motion to vacate the termination decree. Only the latter appeal is of note. The Rule 60(b)(6) motion was based on DCF’s lack of definite placement plans for the children; as a result, the decrees provided “neither stability nor permanency[.]” The panel disagreed and concluded that the trial judge did not abuse his discretion in denying the motion. According to the panel, a Rule 60(b)motion is not the appropriate mechanism to address a lack of progress by DCF in implementing a permanency plan; the proper procedure is to address the issue at a permanency hearing under G. L. c. 119, § 29B. Although the children were of an age to have their wishes heard and considered, the panel noted that their wishes were not outcome determinative. (Three cheers for legal orphan-hood!)

Where does Enoch leave us with Rule 60(b) motions based on changed circumstances? As we have noted before, the movants most likely to succeed with such motions are those who can show *both* (a) a substantial improvement in circumstances of a parent previously found unfit, *and* (b) a placement disruption or some other deterioration in the child’s circumstances since termination. Absent (a) and (b), a change-in-circumstances Rule 60(b) motion is likely doomed.

**Writing Tips**

1. Hyphens for Ages and Duration

The most common punctuation errors we see in briefs involve hyphens. Here are some good rules of thumb:

If the age or duration serves as an adjective that modifies a noun and comes before that noun, hyphenate the entire phrase.

* DCF removed three-year-old Sarah on July 1, 2016.
* The judge refused to place the children with Aunt Lucy based on her ten-year-old drug offense.
* The wishes of a ten-year-old child must be considered.
* Mother never addressed her seven-year substance abuse problem.

In any other context, do not use hyphens:

* Sarah was three years old when DCF removed her.
* The judge refused to place the children with Aunt Lucy because she had a drug offense that was ten years old.
* Because Robert was ten years old at the time of trial, the judge was required to consider his wishes regarding custody.

Note that certain numbers are always hyphenated. For example

* Mother is twenty-four years old. (Don’t connect the word “years” with a hyphen.)
* Mother is 24 years old.

But:

* Mother is a 24-year-old Canadian citizen.
* Mother is a twenty-four-year-old Canadian citizen.

If “X-year-old” is a compound noun, use hyphens:

* Robert is a ten-year-old.
* Sally, like all fifteen-year-olds who have lived their entire lives in foster care, yearns for permanency.

See The Chicago Manual of Style, <http://www.chicagomanualofstyle.org/16/images/ch07_tab01.pdf>);

The Grammarist, <http://grammarist.com/style/ages-hyphenation/>.

1. Quotation Marks

Always put periods and commas inside the quotation marks:

* Mother told the DCF social worker that he was a “big, disgusting idiot.”
* Mother told the DCF social worker that he was a “big, disgusting idiot,” but she then smiled and hugged him.

Semi-colons and colons go outside the quotation marks:

* Mother called the DCF social worker a “big, disgusting idiot”; she also threatened to punch him.

See Purdue Online Writing Lab, <https://owl.english.purdue.edu/owl/resource/577/01/>;

Bryan Garner, LawProse Lesson #160, <http://www.lawprose.org/lawprose-lesson-160-correct-punctuation-with-quotation-marks/>.

**Practice Tips**

Rule 60(b)(6) Relief – Changes in the Law

DeMarco v. DeMarco, 89 Mass. App. Ct. 618 (2016), is not substantively relevant to our cases, but it contains a detailed discussion of the applicability of Rule 60(b)(6) when changes in the law occur following final judgment.

In DeMarco, the husband and wife reached a settlement agreement in 2014 regarding alimony payments. At that time, the retirement age provision of the act relating to alimony judgments entered prior to March 2012 was in dispute. The husband and wife’s original alimony judgment entered in 2010. The judge and the attorneys for the parties operated under the assumption that the relevant portion of the act applied *retroactively*, and, with that in mind, the parties entered into a settlement agreement. About a year later, the SJC issued a trilogy of cases holding that the retirement provision of the act applies *prospectively* and does not apply to cases where alimony judgments entered prior to March 2012.

The wife filed a motion for relief from judgment under Rule 60(b)(6) contending that the judge and both counsel had “relied on a mistake of law” in crafting and approving the 2014 agreement. The trial judge allowed the wife’s motion, and the husband appealed.

The Appeals Court held that the trial judge erred in allowing the wife’s motion. The Court explained that Rule 60(b)(6) has an “extremely meager scope” and requires the showing of “compelling or extraordinary circumstances.” Id. at 621 (citations omitted). A subsequent clarification of the law or a change in decisional law alone is not the type of extraordinary circumstance justifying the reopening of a final judgment. Id. at 622 (*citing* Smith v. Arbella Mut. Ins. Co., 49 Mass. App. Ct. 53, 56 (2000) (holding that, for reasons of finality, a Rule 60(b)(6) motion is not a substitute for an appeal)); Freitas v. Freitas, 26 Mass. App. Ct. 196, 198 (1988) (because of the importance of finality, “the rule should not be used as an instrument for relief from deliberate choices which did not work out”).

DeMarco suggests that a Rule 60(b) motion is not a viable vehicle for modifying or vacating a termination decree if the basis for the motion is a clarification or change in the case law. DeMarco does not speak to changes in the law based on newly-articulated constitutional rights (e.g., a new right to counsel).