***Committee for Public Counsel Services***

***Children and Family Law Division***

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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, CPCS/CAFL Division

 Jaime Prince, Staff Attorney, CAFL

Re: Administrative Matters

 Recent Rule 1:28 Decisions

Writing Tips

Practice Tips

Date: February 27, 2014

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**Administrative Matters**

Upcoming Appellate Panel Certification Training

We are now accepting applications for our Appellate Panel Certification Training.  All admitted applicants must attend the three-day CAFL appellate training program on Monday, May 5 through Wednesday, May 7, 2014 at the CPCS Worcester Office.  If you know of any attorneys who might be interested in doing child welfare appeals, please encourage them to apply. The application can be found on our website at:

<http://www.publiccounsel.net/Practice_Areas/cafl_pages/civil_cafl_index.html>.

The application deadline is March 31, 2014.

Resource Bank

We are working on a “resource bank” for both trial and appellate attorneys. The goals are to (a) give you ideas for briefs and motions, (b) save you from having to reinvent the wheel when writing about common issues, and (c) give you law review articles, clinical articles, best practice manuals, and cases from other states that might broaden your arguments. Subjects would be organized alphabetically by issue/topic and further divided into subtopics. For example:

Sex Offender Registry – Evidence

Sex Offender Registry – Level

Sexual Abuse – Non-offending Parent

Sexual Abuse – Perpetrator

Sexual Abuse – Sibling

Sexual Abuse – Unfitness

Sexual Abuse – Visitation

The subjects would also be cross-referenced. For example, we might have an entry entitled “Unfitness – Immigration Status” which would cross-reference “Immigration Status” or “Deportation of Parent.” That way, people should be able to find what they’re looking for no matter how they’re looking for it. Eventually, we hope to put all resources on our website. Until then, we plan to have material available in Word and PDF formats that we can email to you.

If you have suggestions for the Resource Bank, or subjects that you would like to see included, please contact Jaime at jprince@publiccounsel.net.

Moot Courts

If you get an upcoming 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.

2014 Edition of the Massachusetts Guide to Evidence Now Available

The Supreme Judicial Court and its Executive Committee on Massachusetts Evidence Law just released the 2014 edition of the Massachusetts Guide to Evidence. The Guide is one-stop shopping for all things evidentiary. The 2014 edition of the Guide is available for free on the websites of the Supreme Judicial Court, Appeals Court, and Trial Court at [www.mass.gov/courts/sjc/guide-to-evidence](http://www.mass.gov/courts/sjc/guide-to-evidence/) where it can be searched and downloaded. The official print edition is available for purchase from the Flaschner Judicial Institute at <http://www.flaschner.org/publications.htm>.

**Recent Rule 1:28 Decisions**

This memo catches us up through the end of 2013. If we have left out one of your Rule 1:28 decisions and it has a useful tidbit in it, please let us know.

We’re still seeing attorneys cite Rule 1:28 decisions ***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.

Each of the Rule 1:28 decisions discussed below is available on the web at:

<http://www.massreports.com/UnpublishedDecisions/>. To do a general search for all child welfare Rule 1:28 decisions, type “adoption” or “protection” into the line for “Parties.” To find a specific case below, enter the case name or the docket number.

1. Care and Protection of Averell, 83 Mass. App. Ct. 1137, No. 12-P-1710 (June 24, 2013). Following a trial in 2006, the Juvenile Court found the father unfit and appointed the children’s paternal uncle and his wife as the children’s permanent guardians. In 2012, the court found the father unfit again after a review and redetermination hearing, but did not terminate his parental rights. The Appeals Court affirmed, and noted that the father was free to seek review and redetermination every six months. The panel used some interesting language about reasonable efforts, suggesting that DCF had to continue offering father reunification services going forward:

[E]ven after an adjudication of unfitness, the department has the obligation under G.L. c. 119, § 1, to encourage the use by [the father] of all available resources to promote the strengthening and encouragement of family life[.] See G.L. c. 119, § 29C; Care and Protection of Elaine, 54 Mass. App. Ct. 266, 274 (2002).” [internal quotations omitted]. The fact that the children are currently placed with loving guardians does not mean that DCF may permissibly ignore efforts to strengthen the family further.

It is unclear in Averell whether the trial court had ever held a permanency hearing or whether the permanency goal, prior to entry of the guardianship, was guardianship or reunification. If the goal had been guardianship, presumably DCF’s reasonable efforts would have to be directed to maintaining the guardianship, not reunifying the children with the father. Nevertheless, Averell is a good case to cite if you represent a parent seeking services or visitation after entry of a guardianship decree.

1. Adoption of Yale, 83 Mass. App. Ct. 1137, No. 12-P-1759 (June 25, 2013). [Note: This case is unrelated to the published decision Adoption of Yale, 65 Mass. App. Ct. 236 (2005).] This case is only worth mentioning because of its brief domestic violence discussion. As we know from Custody of Vaughn, 422 Mass. 590 (1996), children do not have to be the victims of domestic violence to suffer harm. Children who witness domestic violence, even those who present as entirely unaffected, have suffered “a distinctly grievous kind of harm.” Id. at 595. There need be no specific showing of harm from witnessing it. But this case takes it a step further. Here, there was no evidence that the child (who was two months old at removal) was exposed to domestic violence. But given the past history of violent disputes between the parents (who were separated at the time of trial), the Appeals Court noted, “[t]he judge does not have to wait until the child actually observes the domestic violence” in order to protect the child from future harm.
2. Adoption of Bjorn, 84 Mass. App. Ct. 1101, No. 12-P-248 (July 3, 2013). In this case, the mother contends, among other things, that the judge violated her right to counsel by permitting her to proceed pro se without a valid waiver of counsel. Specifically, the mother argued that the judge should have conducted a colloquy to determine that her waiver was knowing and voluntary. The Appeals Court disagreed. Although the panel noted that a colloquy is the preferable course of action, other facts in Bjorn showed that the mother’s waiver was knowing and voluntary. Most significantly, “the mother had ceased her relationships with four attorneys, three of whom the court had appointed.” The fourth attorney, who remained as standby counsel, informed the judge by affidavit that the mother had instructed her to withdraw. The panel further noted that the mother had an opportunity to present her case, cross-examine witnesses, and give a closing argument. Overall, the panel held that the evidence of unfitness was overwhelming and “formal representation would not have achieved a different result.”
3. Adoption of Ezra, 84 Mass. App. Ct. 1102, No. 12-P-1887 (July 11, 2013). In Ezra, the trial court terminated the father’s rights because he couldn’t meet his son’s special needs. The father claimed that the trial judge was biased because he interrupted father’s cross-examination of expert witnesses. The Appeals Court acknowledged that “the number of interruptions became exceptional and risked the appearance of partiality.” [Note: This is the same trial judge who aggressively questioned witnesses in Adoption of Norbert.] However, because the interruptions sought clarification (not preferred answers) and there was no jury, there was no prejudice. The panel noted that, while the father claimed that he was denied the opportunity to challenge DCF’s expert testimony or solicit useful testimony, he failed to point to specific instances. The trial judge challenged DCF’s experts’ assessments on several points. As a result, the panel determined that the judge’s interruptions did not deny the father the opportunity to rebut adverse allegations of unfitness.

This is a bit tough to swallow. Is the panel saying that the father wasn’t denied the opportunity to challenge DCF’s experts because the judge did it for him? That can’t be right. What if the father wanted to challenge the DCF expert in other ways? If the judge is a true neutral fact-finder, how can his questioning adequately replace the adversarial questioning that is the hallmark of our trial system? Still, the case has an important take-away for trial counsel. If a judge interrupts trial counsel’s questioning and asks his/her own questions, trial counsel must resume where he/she left off. Don’t let the judge throw you; if you have an examination agenda (which you should), keep to it. If the judge won’t allow further questioning, trial counsel must object and preserve the issue by making an offer of proof (what counsel would have asked, what the witness’s expected answers would be, and why those answers matter). Trial counsel must also object if the judge asks either objectionable questions or questions that may elicit objectionable answers. That is, the judge’s questions must be treated like the questions of counsel. It is difficult to object to a judge’s questions, but you must do so in order to preserve the issues.

1. Adoption of Neil, 84 Mass. App. Ct. 1107, No. 12-P-1739 (August 14, 2013). When DCF asks your parent client to sign open releases, we urge you to push back and offer “limited” releases (attendance, perhaps subjects covered, etc.). But what happens if DCF’s case rests on a parent’s complicated mental health diagnosis, and it claims that its lack of open releases has hampered its ability to offer appropriate services or measure the parent’s progress? Sometimes your decision to offer DCF only limited releases comes back to bite you. Neil is such a case.

In Neil, the mother had a long history of complicated mental health issues. Her DCF social worker asked her several times to provide open releases, but she gave the agency only limited releases. Her service plans called only for “releases.” As a result, at two foster care reviews during the year before trial, the mother was found to be in full compliance. DCF nevertheless argued at trial that the mother wasn’t following the service plan because she knew the agency wanted and needed open releases. The trial court agreed, and found that the mother’s failure to provide the open releases, together with her mental health issues, rendered her unfit. The panel affirmed. According to the panel, the mother should have been aware that her mental health and its implications for her ability to parent were central issues in this case. She also should have known that her failure to sign open releases could have negative implications.

That said, what does Neil tell us about trial practice? Based on reports from the trial front, DCF has interpreted Neil to mean that it can ask for, and parents must provide, open releases in all cases. But I think Neil is more limited than that. In Neil, the mother had long-standing mental health issues, and her problems persisted for years. She insisted that DCF hadn’t provided her with appropriate services, but she didn’t help the agency determine what her needs were, choosing instead to keep them private. Under those circumstances, the mother’s failure to disclose to DCF the full extent of her mental health problems was a proper subject for comment and consideration by the court. If the mother (and her trial counsel) truly wished to keep her mental health issues away from DCF – a very reasonable desire in most cases – it was incumbent on her trial counsel to (a) retain an expert for mother to assess her mental health needs (using ICCA funds) and (b) ensure, to the extent possible, that the mother was attending appropriate services identified by that expert. Then, at trial, the mother’s refusal to give DCF access to her mental health providers would be irrelevant (or, at least, less relevant). Neil should not be read to give DCF carte blanche to go on a fishing trip through a parent’s mental health records by insisting on open releases for all providers, particularly where the parent’s mental health is not alleged to interfere with her parenting.

6. Adoption of Piers, 84 Mass. App. Ct. 1118, No. 13-P-430 (November 5, 2013). This case reminds us that *all* parties seeking review and redetermination – including DCF – have the initial burden to present “some credible evidence that circumstances have changed since the initial determination.” See Care and Protection of Erin, 443 Mass. 567, 572 (2005). In Piers, the father argued for the first time on appeal that DCF did not meet its initial burden when it petitioned for review and redetermination nine months after the father stipulated to his unavailability because he was incarcerated. The father argued that neither his nor the children’s circumstances had changed during those nine months, and DCF was well aware at the time of the initial adjudication that the father would not be available to care for the children for at least two years. However, the father did not make this argument at the time of the review and redetermination hearing, and thus he waived it. The panel noted that, even if father hadn’t waived the argument, DCF had, in fact, met its burden. The take-away? Counsel should always object when the petitioning party hasn’t met its initial burden in order to preserve the issue for appeal.

7. Adoption of Trina, 84 Mass. App. Ct. 1123, No. 13-P-470 (December 4, 2013). In Trina, one trial attorney represented four siblings.  When it became clear that Trina, the oldest child, had a different position than her siblings, the attorney withdrew as to Trina but continued representing the younger children. Successor counsel to Trina (who wanted to return home) did not object to former counsel remaining on the case on behalf of the younger children (who wanted parental rights terminated). On appeal, Trina, mother, and father argued that it was a conflict of interest for Trina’s former counsel to remain on the case and advocate against her position, and that Trina and her parents should therefore be given a new trial. Trina also argued that her trial counsel was ineffective for, among other things, failing to object to her former counsel’s actions and inactions.

The panel did not address the conflict-of-interest issue; rather, it determined that the issue had been waived because it was not raised by Trina’s successor trial counsel prior to trial.  (It was raised by the appellants’ appellate counsel in a motion for new trial, but the panel did not consider this sufficient to preserve the issue.) As to the ineffective-assistance-of-counsel claim, the panel declined to address the first prong of Saferian (whether counsel’s performance fell below that of a reasonably fallible attorney). The panel instead addressed the second prong, and held that Trina was not prejudiced by successor counsel’s performance because the evidence of parental unfitness was overwhelming. But the panel signaled its distress about the case in its Conclusion:

If the procedural background and facts were slightly different, the result of this case may too have been different. It appears that the judge here acted in conformity with a stated policy that allows continued representation of the remaining children following the withdrawal of representation of one of the children. Compare *Care & Protection of Georgette,* 439 Mass. 28, 35-37 (2003) (discussing problem of single attorney representing multiple children with differing interests). Such a policy may need to be reassessed in future cases if the issue is preserved and presented in a timely manner by the party directly affected.

The “stated policy” the panel refers to is unclear. But what trial counsel in Trina did, and what the trial judge blessed, is not uncommon in Juvenile Court trial practice.

CAFL Trial Performance Standard 1.4 provides that, in the event of a positional conflict between child clients, trial counsel “may” have to “withdraw as to one, some, or all of the children.” The Standard does not specify when counsel *must* withdraw as to one, some, or all; that is a fact-specific inquiry. But we generally recommend that attorneys who represent siblings with positional conflicts withdraw as to all of them as soon as the conflict becomes apparent.  (When in doubt, counsel should contact a mentor, CAFL administration, or the BBO for guidance.)

Rule 1.9(a) of the Mass. Rules of Professional Conduct – which was raised by appellate counsel for Trina and her parents but was not addressed by the panel – is instructive. Rule 1.9(a) provides that “[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client unless the former client consents after consultation.” Trina and her sibling were involved in the same matter; their interests were materially adverse (Trina wanted to go home, the others wanted parental rights terminated); and no effort was made to obtain (or obtain a ruling on) Trina’s consent. In any event, withdrawal as to all children probably would have been a better choice for trial counsel in Trina; no one wants his or her decisions in this regard turned into the subject to an appeal.

Trina also teaches us that, in most cases, successor counsel should discuss the conflict issue with prior counsel immediately. If you are successor counsel, and it’s in your client’s interests, encourage prior counsel to withdraw voluntarily from the other children. If prior counsel will not withdraw, you should (if it’s in your client’s interests) consider filing a motion to disqualify prior counsel. The motion must be filed in a timely fashion, preferably well before trial. The failure to raise the issue may, depending on the facts of the case, constitute ineffective assistance of counsel.

8. Adoption of Yves, 84 Mass. App. Ct. 1123, No. 12-P-1600 (December 10, 2013).  In this case, the trial court found that sibling visits were in the children’s best interests but refused to enter an order or schedule for sibling visits. The panel remanded for a specific schedule of post-termination and post-adoption sibling visitation.

Why do trial courts continue to make this mistake? The statute and case law are very clear on this issue. See Adoption of Zander, 83 Mass. App. Ct. 363, 367 (2013) (citing G.L. c. 119, § 26B(b) and reasserting the rule in Galvin and Rico that a judge must decide on the schedule and conditions of post-termination and post-adoption sibling visitation after deciding that visits serve the siblings’ best interests).  Appeals on this subject shouldn’t be necessary. If the trial court “forgets” to order sibling visits, or doesn’t think it “needs to,” trial counsel for the children should ask the judge, by motion, to fix the problem. If the judge isn't clear on her obligation, provide her with a copy of § 26B(b), this case, and Adoption of Zander so there will be no confusion.  Otherwise, the appeal will go forward, the Appeals Court will remand the matter for an order on sibling visits, and the siblings will have lost a year of their relationship.

**Writing Tips**

1. **Use of *etc*., *e.g.*, and *i.e.***

Here’s a great writing tip from Bryan Garner’s LawProse Lesson #134 (from 9/17/13):

**How should you punctuate around the common Latin abbreviations *e.g.*, *i.e.*, *etc.*, and *et al.*?**
     With *e.g.* (= for example) and *i.e.* (= that is), the usual convention in [American English] is to precede it with a comma or a dash, and invariably to follow it with a comma {He trades in farm commodities, e.g., corn and sorghum.} {He trades in farm commodities -- e.g., corn and sorghum.}. …

     With *etc.* (= and other things) and *et al.* (= and other people), the main question is whether to precede them with a comma. In [American English], the usual convention is to do so. In effect, because *etc.* is the abbreviation for *et cetera* (*et* meaning "and"), the comma before the abbreviation is simply the serial comma when more than one item is listed {*corn, wheat, sorghum, etc.*}. . . . *The Oxford Guide to Style* says (more explicitly) that *etc.* is "preceded by a comma if it follows more than one listed item: *robins*, *sparrows*, *etc.*, [vs.] *robins etc.*" *The Chicago Manual* also says that *et al.* doesn't require a preceding comma if it "follows a single item" {Taylor et al.}.
     . . .
     Two final notes. First, if an abbreviation ends a sentence, don't put a second period. The abbreviation's period doubles as the sentence's closing full stop. But if the end punctuation is an exclamation mark or question mark, then include the abbreviation's period and the end mark (see this lesson's heading above). Second, don't italicize any of these abbreviations unless you are referring to them as words, as we are here.
     …

1. **Punctuation in Connection with Quotations**

Does the comma go inside or outside the quotation mark? When do you use a comma before a quote? Does a question mark go inside or outside the quotation marks? Here are some good tips from The Writing Center at Georgetown University Law Center:

1) Use a comma before a quote when a phrase introduces the quote, but do not use a comma if the quote is integrated into a larger sentence.

He replied, “I think the car was blue.”

He replied that the car was “blue with white racing stripes.”

2) Commas and periods always go inside of the closing quotation mark.

3) All other marks go inside the closing quotation mark only if the mark is part of the quote.

He asked, “What time is lunch?”

4) All other marks go outside the closing quotation mark if the mark is part of the larger sentence.

Did he really call his classmate an “obsequious sycophant”?

She said “next Sunday”; however, I think she meant tomorrow.

Tips for Effective Punctuation in Legal Writing, The Writing Center at Georgetown University Law Center (2005) (<http://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/punctuationtips.pdf>)

**Practice Tips**

# Don’t Read Your Oral Argument

# Here’s an interesting article from the ABA Journal Law News Now web newsletter.

# Scalia calls out lawyer for a failure to extemporize

Posted Jan. 15, 2014, 10:12 AM CST

By [Debra Cassens Weiss](http://www.abajournal.com/authors/4/)

A lawyer arguing on behalf of a Wyoming family fighting the government’s effort to reclaim a strip of land got off to a rough start in the U.S. Supreme Court on Tuesday.

Lawyer Steven Lechner was arguing that the government did not retain any interest in an abandoned railway when Justice Antonin Scalia interrupted, report [Josh Blackman’s Blog](http://joshblackman.com/blog/2014/01/14/justice-scalia-chastises-lawyer-for-reading-from-notes/) and [SCOTUSblog](http://www.scotusblog.com/2014/01/argument-recap-oh-give-me-land-lots-of-land/).

“Counsel, you are not reading this, are you?” [Scalia asked](http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1173_7lh8.pdf).

According to SCOTUSblog, “Lechner didn’t answer, simply standing silent for a lengthy embarrassed moment. Lawyers at that lectern are, it seems, supposed to extemporize.”

Justice Stephen G. Breyer then jumped in, telling Lechner, “It’s all right.”

…

What does this tell us about good oral argument? (I will not ask what it tells us about Justice Scalia; various law blogs have called him out on this in far more purple prose than I care to use here.) Do your best to keep eye contact. Don’t read unless you absolutely have to (for example, if you are quoting a case, a statute, or the transcript). But if you are making an argument that does not rely on specific text, do your best to keep your head up and your tone conversational. That way you can at least create the illusion of extemporaneity.