***Committee for Public Counsel Services***

***Children and Family Law Division***

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**MEMORANDUM**

To: CAFL Appellate Panel Members

cc: CAFL Trial Panel Members

CAFL Administrative Attorneys

 CAFL Staff Attorneys

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

 Jaime Prince, Staff Attorney, CAFL

Re: New Staff

 Trainings, Credits, and Moot-Courting

 Recent Rule 1:28 Decisions

 Writing Tips

Date: February 29, 2012

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**New Staff**

The CAFL Administrative Office in Boston welcomes three new staff attorneys: Maria Ventullo, Julie Meads and Jaime Prince. Here is the breakdown for advice calls, travel requests, etc.:

***Advice Calls***

Parents’ Counsel (Trial & Appeal) Children’s Counsel (Trial & Appeal)

Julie Meads: Jaime Prince:

(617) 988-8373; jmeads@publiccounsel.net (617) 988-8456; jprince@publiccounsel.net

Maria Ventullo: Andy Cohen:

(617) 988-8438; mventullo@publiccounsel.net (617) 988-8310; acohen@publiccounsel.net

Carol Rosensweig:

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***Out-of-State Travel Requests***

Parents (Trial) Children (Trial) Parents & Children (Appeal)

Julie Meads Jaime Prince Andy Cohen

***Collateral Representation and NAC Reopening Requests***

Parents (Trial and Appeal) Children (Trial and Appeal)

Julie Meads Jaime Prince

**Trainings, Credits and Moot-Courting**

Are there any appellate training subjects you’d like us to cover this spring/summer? Call or email to let us know.

Please don’t forget to submit your proof of CLEs for FY 2012 to Rita Caso.

If you have moot-courted a case with a CAFL staff member, we will waive 2 CLE hours (for a maximum of 4 CLE hours each fiscal year). There are a handful of oral arguments scheduled for March and (probably) a half-dozen or so for April. It’s not too late to moot court any of them.

**New Rule 1:28 Decisions**

Yes, we’re way behind. But this memo catches us up to . . . well, the end of last spring. Still, we’ll get there . . . . Remember, 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/>. Just type “adoption” or “protection” into the line for “Parties.”

1. Adoption of Andreas, 78 Mass. App. Ct. 1119, 2010-P-0817 (Jan. 11, 2011). I missed an interesting footnote in this case when I discussed it way back in June 2011. Footnote 4 states: “We agree with the father’s argument that the judge’s reliance on the father’s immigration detention to conclude that he had abandoned the children was misplaced. Deportation has not been deemed grounds for the termination of parental rights nor does deportation constitute abandonment.” While this statement is only a footnote in an unpublished decision, it’s something to grab onto if the trial court relied heavily on your parent-client’s immigration/detention status.

1. Adoption of Tyrik, 78 Mass. App. Ct. 1120, 2010-P-0511 (Jan. 12, 2011). The published decision Adoption of Tyrik, 456 Mass. 1009 (2010), was an esoteric procedural mess about appeals from single justice orders. The most useful thing in the published Tyrik decision was an explanation of how a party in a child welfare case should handle the denial by an Appeals Court single justice of a motion for stay pending appeal. The aggrieved party should *not* seek emergency relief from a single justice of the SJC under G.L. c. 211, § 3; rather, the aggrieved party should appeal the single justice’s order to a full panel of the Appeals Court, ask the full panel to stay the termination decree long enough for it to rule on the “interim” appeal, and ask the full panel for “expedited” review. Id. at 110-11.

The unpublished Tyrik addressed the appeal of the single justice’s denial of the stay, and it affirmed the order of the single justice. The panel held that G.L. c. 215, § 22 does not provide for an automatic stay of a termination decree issued by the Probate and Family Court because the “statute does not apply to a judgment and order concerning the custody of a child.” 78 Mass. App. Ct. 1120 (citing R.D. v. A.H., 454 Mass. 706, 720 (2009)). Relying on R.D., the panel held that Rule 62(g)(ii) of the Massachusetts Rules of Domestic Relations Procedure controls, and it provides that “the filing of an appeal shall not stay the operation . . . [of any order] relative to custody[.]” According to the panel, a termination decree under G.L. c. 210, § 3 is a proceeding relating to custody and is therefore governed by the Rules of Domestic Relations Procedure, specifically Rule 62(g)(ii). The trial court has discretion to grant a stay, but neither the trial judge nor the single justice abused his discretion in declining to issue a stay in this case. So if you have a termination appeal arising in the Probate and Family Court, you must argue that your appeal is meritorious in support of a motion for stay.

The panel’s reasoning in this case was probably incorrect. The Rules of Domestic Relations Procedure, by their very terms, do not apply to proceedings under G.L. c. 210. See Mass. R. Dom. Rel. P. 1 (“Scope of Rules”) (“These rules govern the procedure in the Probate and Family Court Department in all proceedings for . . . custody of minor children . . . as enumerated in General Laws, Chapters 207, 208, 209, 209A, 209C, 215 and 209D.”). Nevertheless, this decision is out there and may be cited. So while it is generally understood that the Rules of Domestic Relations Procedure do not apply to any Probate Court child welfare cases, you should cite to the unpublished Tyrik decision if a particular Rule is helpful to you.

Note that Adoption of Duval, 46 Mass. App. Ct. 916 (1999), governs stays pending appeal of termination decrees arising in the Juvenile Court. Duval requires a showing of meritorious issues.

1. Adoption of Neesa, 78 Mass. App. Ct. 1126, 2010-P-1410 (February 14, 2011). Neesa is interesting primarily for the panel’s comments about delay:

We are quite troubled that two and one-half years elapsed between the beginning of trial and the judge’s issuance of findings and conclusions. The long duration of this and other similar proceedings often borders on unconscionable treatment of the parties and inhibits effective appellate review. We also note that these delays are frequent, expected, and outside the practical ability of individual judges to control given the case volume and resource constraints of the Juvenile Court.

“Unconscionable treatment” – what a great phrase! The panel was also concerned about the time that elapsed between the end of trial and the issuance of findings. But the delay did not constitute a violation of due process because the mother did not show any resulting harm:

Although we are troubled by the judge’s failure to act within six months of the conclusion of the trial and the ten-month delay between the entry of termination decrees and the issuance of findings and conclusions, the mother has made no showing of prejudice resulting from these delays.

Accordingly, if you are raising delay (of trial, of issuance of findings, of assembly, etc.) in your appeal, you must explain in detail how your client was prejudiced by the delay.

3. Adoption of Francis, 78 Mass. App. Ct. 1128, 2010-P-1682 (February 22, 2011). This case is noteworthy only because it states, in no uncertain terms, that a parent waives any argument on appeal that she didn’t receive adequate services unless she used DCF’s internal grievance system or filed an “abuse of discretion” motion regarding services. If your client didn’t raise the services issue below, it’s not worth arguing it on appeal.

1. Adoption of Liz, 79 Mass. App. Ct. 1103, 2010-P-1706 (March 16, 2011). In Liz, the panel upheld the Juvenile Court’s choice of DCF’s proposed adoption plan (a local foster family) over the father’s proposed adoption plan (a relative in Puerto Rico). The case is important for trial practitioners because of some language in footnote 5 about the Interstate Compact on the Placement of Children. Social services in Puerto Rico rejected the relatives in Puerto Rico because their home was too small. The relatives did not challenge the rejected homestudy, and the trial court held their “tepid interest” against them. The panel suggested that the trial court could properly take this into account. (There is no discussion of what such a challenge by the relatives would entail. An appeal within Puerto Rico social services? An appeal to a court? Not all “receiving states” have an appellate mechanism for rejected homestudies.). Accordingly, if you represent a parent or child who is proffering an out-of-state resource that has been rejected under the ICPC, you should urge the resource to appeal, if only to show the resource’s serious and continued interest in the child.

In the same footnote, Liz suggests that the trial court could have chosen the father’s plan and placed the child in Puerto Rico *despite* the rejected homestudy:

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|   | [I]t is no cause for concern that the home study based its recommendation, in part, on its conclusion that the father’s relative’s home had inadequate space to accommodate both Liz and her brother. . . . Indeed, the judge was clear that he meant to rely on the information contained in the report, but not its conclusions, explaining: “the home study comes into evidence, for whatever it says, with the recognition that the denial of this home study does not bar placement of the child in Puerto Rico if I find that to be in the child’s best interest.’ In any event, the judge did not place particular significance on the adequacy of space in the father’s relative’s home in reaching his conclusion as to Liz’s best interests. He relied instead (as described above) on the many other advantages he identified as weighing in favor of placement with the preadoptive family, and the various disadvantages (other than adequacy of space) he viewed as associated with placing the child with the father's relative. |   |
|   |  |

Many trial courts are unclear about whether they can choose an adoption plan for a resource that has been rejected by the receiving state under the ICPC. Liz suggests – quite properly, in our view – that the court can make a placement or custody decision in the best interests of a child regardless of an out-of-state agency’s decision about that placement.

1. Adoption of Soledad, 79 Mass. App. Ct. 1107, 2010-P-1741 (April 1, 2011). In Soledad the panel vacated the decree terminating the mother’s parental rights because there was insufficient evidence of unfitness. The mother’s parental rights were previously terminated as to all three subject children in 2007, but by agreement that decree was vacated in 2009 because of insufficient evidence. However, DCF reinstated its petition in late 2009, and mother’s parental rights were again terminated. This decree was based primarily on mother’s continued association with the children’s father who had an extensive criminal record and substance abuse history.

The panel held that the trial judge’s reliance on mother’s continued contacts with father was defective for two reasons. First, there was no evidence linking father’s criminal history with abuse or neglect of the children. Second, during the period in question – between the first and second termination decrees – the children were never exposed to father by mother because she herself was denied contact with them by DCF and the court. The panel noted:

Even were we to accept an automatic imputation of adverse effect on the children from contact with the father, we reject the department’s argument that the parents’ association with each other allows the inference that the mother would expose the children to their father in the event she were given the opportunity.

But DCF wouldn’t give up, and argued that mother was unfit for violating the terms of her service plan, which forbade contact with father. The panel was unimpressed: “To the extent the assertion that the mother failed to comply with her service plan is based on her contact with the father, it merely restates the same complaint and adds nothing to the department’s case for termination.” The panel also rejected DCF’s argument as “circular” that mother “invited” termination of her rights by contacting father because she had been warned that DCF considered such contact detrimental to the children and grounds for termination.

This is all great stuff. But the best of all concerns the biggest problem in cases that last several years: attachment to foster parents. According to the panel,

[t]he most troubling aspect of the record before us are the findings, which we accept as supported, that the children have established close bonds with their preadoptive families. This factor speaks directly to the children's best interests, but we cannot allow it to dictate the result. The self-fulfilling nature of this circumstance, if allowed to prevail, permits the postponement of an insufficient case to act as an automatic cure to defects in the department's case as long as children are simply separated from their parents for a long enough period of time. We cannot endorse such a result. See *Adoption of Zoltan,* 71 Mass. App. Ct. 185, 195 (2008), quoting from *Adoption of Rhona,* 57 Mass. App. Ct. 479, 492 (2003) ('The bonding of children with their foster parents cannot be the dispositive factor in these cases because the very fact of placing a child in foster care during judicial proceedings would in every case determine the outcome of those proceedings').

This may be the best response to the “attachment to foster parents = unfitness” argument in any case, published or unpublished.

6. Adoption of Myles, 79 Mass. App. Ct. 1108, 2010-P-1649 (April 6, 2011). This case is only worth mentioning in reference to footnote 7, where Justice Brown, concurring in the decision to affirm the termination decree, wrote, “[t]he father’s arguments are not only devoid of merit; they cry out a command to his several counsels not to appeal. Moreover, DCF need not have even responded on appeal; it was a waste of time, talent, and resources.” Justice Brown may have forgotten that parents and children in these cases have a right to appeal under G.L. c. 119, § 27, and the right to a frivolous appeal under Commonwealth v. Moffett, 383 Mass. 201, 207-09 (1981), and Care and Protection of Valerie, 403 Mass. 317, 318 (1988). If you’re getting the sense that a panel member holds you responsible for allowing the appeal to proceed, consider reminding the panel of the statute and governing case law. To be fair to Justice Brown, the father’s brief in Myles was not filed as a Moffett brief; had it been filed as such, perhaps he would not have blamed counsel. We read the father’s brief in Myles, and it raised meritorious issues. Justice Brown’s dig at father’s counsel therefore seems unjust (which may be why his footnote was not joined by the other panel members).

1. Adoption of Zaria, 79 Mass. App. Ct. 1114, 2010-P-1148 (April 29, 2011). I have not yet seen a child welfare decision, published or unpublished, where a panel explicitly slams a trial judge for being biased. But Zaria comes mighty close, and it’s a wonderful case (perhaps even better in this regard than Adoption of Jerrold, 74 Mass. App. Ct. 1121, 2008-P-0867 (June 29, 2009)).

In Zaria, the child appealed the judge’s decision approving DCF’s adoption plan (adoption by pre-adoptive parents who had previously adopted the child’s half-sibling) rather than the child’s plan (guardianship by her long-term foster mother). The panel determined that the trial judge both abused his discretion and committed an error of law in determining that the DCF plan was in the child’s best interests, vacated the decision, and remanded to a different judge.

The panel was particularly disturbed by the trial judge’s findings regarding the testimony of the court investigator. The judge qualified her as an expert in bonding but then vituperatively discredited virtually all of her testimony. Judges are, of course, free to credit or discredit lay or expert testimony. But the judge in Zaria took it too far:

The fact that the judge did not believe [the investigator] was manifest throughout his findings, but his findings border on a dislike that went beyond merely an appropriate determination of credibility and resulted, inappropriately, in the judge making extensive findings concerning [the investigator] both personally and professionally. This time and energy would have been better spent in findings directed to determining the child’s best interests.

The judge was unfair to the investigator in other ways. DCF moved the child from her long-term foster home to its pre-adoptive family four days before trial. The judge faulted the investigator and discredited her report because she failed to interview the new family and observe the child in the new home. But the investigator was never given the opportunity to do so, because DCF refused to allow her access to the new home and pre-adoptive parents, and the judge (despite child’s counsel’s request) would not order DCF to give her such access.

The trial judge appeared to give dispositive weight to Zaria’s placement with her half-brother, a child she had never met until four days before trial. The panel held that, while a sibling relationship is an important factor in determining the best interests of a child, it cannot be given dispositive weight. See Adoption of Hugo, 428 Mass. 219, 230-231 (1998) (even where siblings spent time together and expressed a desire to live together, sibling relationship is not dispositive). Giving it dispositive weight was an error of law.

The panel also called out DCF for its heavy-handed attempts to influence the judge’s choice of placement, moving Zaria just four days before trial with an “unusually short transition period” consisting of just a few visits and no overnight visits. According to the panel,

[this] process…illustrated the potential abuse of DCF’s enormous inherent power to manipulate the evidence to achieve its own determinations and goals…. There was no clinical evaluation or an evaluation of any kind by DCF regarding the possibility of a bond between the child and [her former foster mother] or any harm the move could impose…. No visitation was allowed, an internal appeal was denied, and DCF prohibited the child’s representative from evaluating her while in the [new pre-adoptive parents’] custody. [Citations omitted]

The panel went on to criticize the judge for relying exclusively on the “uncorroborated and self-serving testimony” of the pre-adoptive mother to find that the child was thriving in her custody after only a couple of weeks. This was particularly egregious because the judge, at the same time, discredited the testimony of the court investigator regarding the strong bond between the child and her former foster mother. The judge’s weighing of testimony was therefore an abuse of discretion. What the panel had left of the judge’s decision – favoring placement with a half-sibling above all else – was an error of law. The panel vacated the trial judge’s decision and remanded the case to a different judge.

This case is very helpful for counsel opposing a placement that occurs on the eve of trial with minimal transition. It is also helpful to counsel if the trial judge has refused to credit testimony from an investigator, GAL or expert who has sought, but been denied, access to information bearing on the child’s best interests. Finally, it gives ammunition to a request for remand to a different judge in a case where the trial judge appears to have been systematically biased in a particular party’s favor.

**Writing Tips:**

1. **Judges notice spelling and grammar errors!**

Here is an excerpt from an amusing story about a Fifth Circuit case. The case itself is unimportant (in every way), but the warning about poor writing is very important.

# 5th Circuit Tosses Cheerleading Suit, Hits Law Firm for Grammar and Spelling Errors

Posted Jul 18, 2011 5:30 AM CDT

A federal appeals panel has tossed a Section 1983 suit by a former Texas cheerleader who didn’t make the varsity squad amid conflicts with another cheerleader who called her a “ho.”

The onetime cheerleader had claimed the school was indifferent to sexual harassment by her rival, but the New Orleans-based 5th U.S. Circuit Court of Appeals didn’t see it that way. The [opinion](http://www.ca5.uscourts.gov/opinions/pub/10/10-10325-CV0.wpd.pdf) (PDF) in *Sanches v. Carrollton-Farmers Branch Independent School District* begins this way:

“Reduced to its essentials, this is nothing more than a dispute, fueled by a disgruntled cheerleader mom, over whether her daughter should have made the squad. It is a petty squabble, masquerading as a civil rights matter, that has no place in federal court or any other court.”

The ire in the opinion by Judge Jerry Smith doesn’t end with the cheerleader’s cause of action, which claimed both a violation of TItle IX and Section 1983 for an alleged violation of the equal protection clause. He also criticizes the cheerleader’s lawyers for grammar and spelling errors. In footnote 13, Smith writes:

“Usually we do not comment on technical and grammatical errors, because anyone can make such an occasional mistake, but here the miscues are so egregious and obvious that an average fourth grader would have avoided most of them. For example, the word ‘principals’ should have been “principles.’ The word ‘vacatur’ is misspelled. The subject and verb are not in agreement in one of the sentences, which has a singular subject (‘incompetence’) and a plural verb (‘are’).”

In particular, Smith criticized this sentence in the plaintiff's opening brief: “Because a magistrate is not an Article III judge, his incompetence in applying general principals [sic] of law are [sic] extraordinary.”

Smith said the meaning of the sentence is unclear, though it appears to be making an “unjustified and most unprofessional” attack on the magistrate judge in the case.

. . .

We all have typos in our briefs. Words mysteriously drop out of sentences. Even the most hard-nosed proofreader makes a couple of gaffs in each brief. But we can’t have typos and missing words on the cover or in Argument headers or Issues Presented, the first things the judges see. And we can’t have typos and grammatical inconsistencies on every page. The judges notice. It hurts our clients and our own reputations.

1. **Bullet Points**

Here are two more great writing tips from Bryan Garner’s Oxford University Press usage newsletter.

**July 27, 2011: Punctuation (3). The Bullet.**

This mark draws the eye immediately to one of several enumerated items. When you don't mean to imply that one thing in a list is any more important than another -- that is, when you're not signaling a rank order -- and when there is little likelihood that the list will need to be cited, you might use bullet dots. They enhance readability by emphasizing salient points.

Bullets should generally be indented at least as far as a paragraph indent or perhaps a little more.

Here are seven more tips on using bullets well: (1) end your introduction with a colon, which serves as an anchor; (2) keep the items grammatically parallel; (3) if you begin each item with a lowercase letter, put a semicolon at the end of each item, use "and" or "or" after the next-to-last item, and put a period after the last item; (4) if you begin each item with a capital -- by convention, "fragments" are acceptable units here -- end each with a period; (5) use hanging indents, which are extremely important in giving each bullet its full weight; (6) ensure that the bullets are well proportioned both in their size and in their distance from the text they introduce, preferably with no more than one blank character-space between the bullet and the first word; and (7) resist the temptation to play with hollow characters, smiley faces, check marks, and the like -- unless you're trying for an offbeat appearance, use real bullet dots.

I’m a big believer in using bullet points. Why? It lets judges focus right away on the good stuff, instead of forcing them to dig deeply into a citation-thick paragraph.

Let’s say, for example, that you’re arguing that due process requires a certain type of notice or hearing. You could have a paragraph like this:

This Court and the Supreme Judicial Court have held that due process requires many procedural protections for parents in child welfare cases. See, e.g., Custody of Lori, 444 Mass. 316, 322 (2005) (a hearing within 72 hours after emergency removal); Adoption of Sherry, 435 Mass. 331, 338 (2001) (strict adherence to the rules of evidence); Dept. of Public Welfare v. J.K.B., 379 Mass. 1, 5 (1979) (appointment of counsel); Adoption of Edmund, 50 Mass. App. Ct. 526, 530 (2000) (an opportunity to participate in the case); Adoption of Hugh, 35 Mass. App. Ct. 346, 350 (1993) (appropriate notice of the proceedings).

It’s hard to find the good stuff in the paragraph above. Besides, what’s more important – the case name, or the type of protection it stands for? Instead, try using bullet points to highlight the protections:

This Court and the Appeals Court have held that due process requires many procedural protections for parents in child welfare cases:

* A hearing within 72 hours of emergency removal. Custody of Lori, 444 Mass. 316, 322 (2005).
* Strict adherence to the rules of evidence. Adoption of Sherry, 435 Mass. 331, 338 (2001).
* Appointment of counsel. Dept. of Public Welfare v. J.K.B., 379 Mass. 1, 5 (1979).
* An opportunity to participate in the case. Adoption of Edmund, 50 Mass. App. Ct. 526, 530 (2000).
* Appropriate notice of the proceedings. Adoption of Hugh, 35 Mass. App. Ct. 346, 350 (1993).

The eye goes right to the good stuff, and there is no risk that the judges will miss it as they skim over a citation-thick paragraph. Give it a try.

1. **Ellipses**

**August 9, 2011: Punctuation (10). Ellipses Dots [ . . . ].**

Ellipsis points -- also called "period-dots" -- come in threes. Each one is typographically identical to the period, but together they perform a special function: they signal that the writer has omitted something, usually from quoted matter.

Consider the following sentence: "Shakespeare's speech -- as exhibited in his works, at least -- seems to have represented rather well the cultivated usage of Elizabethan England, particularly in the area around London; and what is more, it was sensitive to social levels." Carroll E. Reed, Dialects of American English 10 (1967). If you quoted that sentence but omitted some words from the middle and at the end, it would look like this: "Shakespeare's speech . . . seems to have represented rather well the cultivated usage of Elizabethan England, particularly in the area around London . . . ."

The final period-dot in that quotation, which is spaced evenly with the other three, is simply the period for the sentence; it's not technically part of the ellipsis.

You can also use an ellipsis to indicate an omitted paragraph. Just put them between the quoted paragraphs on a separate line:

[Quoted paragraph]

. . .

[Quoted paragraph]