***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

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 Jaime Prince, Staff Attorney, CAFL

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Re: Administrative Matters

 Practice Tips

 Ineffective Assistance and the CAFL Performance Standards

 Motions for Reconsideration

 Recent Rule 1:28 Decisions

Date: March 27, 2013

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**Administrative Matters**

Welcome. We are very pleased to welcome Anna Holden to our CAFL administrative office. Anna will be focusing on appeals, and I’m sure you will all get to know her sooner or later. Anna will be making appellate assignments (effective April 1), reviewing briefs, conducting moot courts, and handling advice calls. You can reach Anna at aholden@publiccounsel.net and (617) 988-8491. (Please note: Jaime hasn’t gone anywhere! She’s still here, doing all sorts of good stuff for the appellate and trial panels.)

Moot Courts. There are about a dozen oral arguments in our cases scheduled for April at the Appeals Court, and we are moot-courting attorneys on many of them. If you have an argument coming up and want to be moot-courted, call us. Under some circumstances we can come out to your office.

**Practice Tips**

1. **Ineffective Assistance and the CAFL Performance Standards**

CAFL appellate attorneys have been filing more and more motions for new trial/relief from judgment based on ineffective assistance of counsel. No one likes to file motions like these, but they are often necessary. The SJC recently came out with a new case in which it relied heavily on CPCS performance standards in evaluating the first prong of the Saferian standard, whether the trial attorney’s performance fell measurably below that of an ordinarily fallible attorney.

In Commonwealth v. Marinho, 464 Mass. 115 (2013), the defendant claimed that trial counsel was ineffective for failing to advise him of the immigration consequences of conviction at trial, discuss plea resolutions with him, and advocate for a lesser sentence. For each claim, the SJC looked to the CPCS (criminal) performance standards for instruction regarding what is expected from an ordinary fallible lawyer. The SJC also considered the American Bar Association's standards, and the Massachusetts Rules of Professional Conduct. Based in part on its review of the CPCS performance standards, the SJC held that trial counsel's performance fell measurably below that of an ordinary fallible lawyer. It nevertheless affirmed the defendant’s conviction because he was not prejudiced by counsel’s poor performance.

Marinho opens an important door for appellate counsel. It’s now fair game for appellate counsel to cite to the CAFL performance standards when arguing ineffective assistance. What CAFL performance standards are often ignored? Examples include failing to:

* file proposed findings and conclusions (CAFL Trial Perf. St. 6.2(d))
* file necessary pretrial motions, particularly comprehensive motions *in limine* (CAFL Trial Perf. St. 6.1(a))
* prepare witnesses to testify, particularly client witnesses (CAFL Trial Perf. St. 6.1(f))

If you do file a post-trial motion alleging ineffective assistance of counsel, please send a copy of the motion to CAFL administration.

1. **Motions for Reconsideration – Good, but not a Substitute for Raising All Issues the First Time**

The SJC in Commissioner of Revenue v. Comcast Corp., 453 Mass. 293 (2009), addressed whether attorney-client privilege extends to third-party assistants to the lawyer. (It does, but only in narrow circumstances.) Comcast is interesting for our purposes because it addresses whether novel issues raised in a motion to reconsider must be addressed by the trial court and whether the motion to reconsider preserves those issues for appellate review. The answer is disappointing:

[T]he commissioner did not make this [novel discovery] argument in her motion to compel [turnover of documents] or at the hearing before the [trial] judge on the motion. She made the argument for the first time in a motion to reconsider the judge’s order filed some fourteen months later. The motion judge ruled that the issue could have been raised in the motion to compel, and was waived. See *Commonwealth v. Gilday*, 409 Mass. 45, 46-47 n.3, 564 N.E.2d 577 (1991) (motion for reconsideration is not "the appropriate place to raise new arguments inspired by a loss before the motion judge"); *Publishers Resource, Inc. v. Walker-Davis Publ., Inc*., 762 F.2d 557, 561 (7th Cir. 1985) (motion for reconsideration should not serve as occasion to tender new legal theories for first time). It was well within the judge’s discretion not to consider the commissioner’s new argument on the motion for reconsideration. See *Liberty Sq. Dev. Trust v. Worcester*, 441 Mass. 605, 611, 808 N.E.2d 245 (2004) (where party filed “amended” motion and motion for “reconsideration” seven weeks after action on original motion, judge not required to entertain party’s “belated efforts to improve on its original motion;” no error in the denial of motion that “merely seeks, as this one did, a ‘second bite at the apple’”)[.]

Id. at 312-13. This waiver rule applies whether the judgment is final or interlocutory:

The commissioner argues that here, unlike *Commonwealth v. Gilday, supra* she sought reconsideration of an interlocutory order rather than a final judgment, and waiver therefore does not apply. We do not agree. The commissioner cites no authority supporting her claim. In any event, motions to reconsider an interlocutory order are themselves not “appropriate vehicles to advance . . . new legal theories not argued before the ruling.” *Zurich Capital Mkts. Inc. v. Coglianese*, 383 F. Supp. 2d 1041, 1045 (N.D. Ill. 2005).

Id. at 313. The SJC declined to address the discovery argument that the plaintiff made only in the motion for reconsideration, and instead only addressed the argument raised in the initial motion. *See id*. at 313-14.

So what does this mean? If you haven’t raised key issues in an initial motion, raising them in a motion to reconsider is better than nothing. If the trial judge *chooses* to address those issues but denies the motion to reconsider, you can appeal that decision and, if the original judgment is on appeal, seek to consolidate the appeals. But the trial judge does not have to address issues or grounds raised for the first time in your motion to reconsider. If the trial court does not address your “novel” issues, the appellate court may not address them either.

**Recent Rule 1:28 Decisions**

This memo catches us up through the end of January 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.

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. Care and Protection of Leif, 82 Mass. App. Ct. 1118 , 2012-P-465 (October 24, 2012). In this case, fourteen-year-old Leif and his mother appealed the Juvenile Court’s determination that mother was unfit. Leif had special needs. His foster placement disrupted shortly before trial, and he was placed in residential care where his condition deteriorated. Although the panel affirmed the lower court’s decision to commit Leif to DCF’s permanent custody, it noted that G.L. c. 119, § 26(b) allows the judge to enter “an appropriate order” to meet the child’s needs, especially when the treatment the child is receiving in DCF custody is not in his or her best interests. The panel went on to say:

A judge in such circumstances may seek additional evidence, including expert testimony, to determine whether the foster placement itself is causing the further harm to the child or whether his or her behavior is simply an expression of a preexisting emotional or psychological condition, and to determine whether some order might be crafted to allow for a disposition…that might mediate these effects.

The panel invited the trial court to “explore” how DCF was caring for Leif in a review and redetermination. The panel also stressed the role of Leif’s trial counsel: “We assume that counsel representing Leif in the court below will remain in the case to ensure that Leif’s interests are fully protected.” The panel got this right. It is critical for children’s attorneys to take an active role in dispositional proceedings, as well as in all permanency and post-adjudication hearings. Someone must keep an eye on the department.

2. C.D. v. S.M., 82 Mass. App. Ct. 1122, 2011-P-1337 (November 21, 2012). This case restates the test for challenging the paternity of a child born to a married woman, originally set forth in C.C. v. A.B., 406 Mass. 679, 689-90 (1990): “[A] person alleging himself to be the father of a child born to a married woman is not entitled to produce evidence of paternity unless he can first show by clear and convincing evidence that he has a substantial parent-child relationship with the child.” In this unpublished case, the plaintiff requested that the Appeals Court modify the C.C. v. A.B. standard based on modern trends in society and law. The panel declined to do so. The trial court found that the plaintiff had eight months prior to the mother’s death to develop a substantial parent-child relationship with the child, and he failed to do so. The judge properly dismissed the equity complaint.

1. Adoption of Alexandra, 83 Mass. App. Ct. 1101, 2012-P-0601 (December 7, 2012). In this case, the father stipulated to the termination of his parental rights. On appeal, he argued that the stipulation wasn’t knowing and voluntary because he didn’t understand it. Earlier in the proceedings, the trial court found the father to be incompetent to assist his attorney and appointed him a guardian ad litem. During the father’s colloquy, the judge asked him if he had had the chance to discuss the stipulation with his lawyers. The father answered “no.” The panel noted that the father “possibly misunderst[oo]d the thrust” of the [question.]” The trial judge, according to the panel, should have clarified the father’s response; if the answer remained “no,” he should have given the father a chance to review it with counsel. (Trial counsel should also have insisted on clarification – you cannot let a “no” answer like that pass unexamined when your client is being questioned in a colloquy.) Nevertheless, the panel found no error in accepting the father’s stipulation. The record showed that the stipulation had been drafted a month earlier. The father had that time to consult his attorney, and the content of the stipulation suggested that father had, in fact, consulted his attorney.

Needless to say, this case presents an ocean of waving red flags. Can an incompetent parent stipulate to unfitness? If the parent has a GAL/next friend, shouldn’t the GAL/next friend be signing the stipulation and answering the colloquy (or be questioned under oath)? How can a court infer a “knowing and voluntary” waiver from a parent who is incompetent and has a GAL/next friend, especially where it isn’t clear that the parent even understands whether he spoke to his attorney about the stipulation? Here, the GAL/next friend didn’t testify; rather, she “represent[ed] in open court that the surrender stipulation was something the father was ‘doing freely and voluntarily today.’” The panel held that this provided “sufficient assurance, notwithstanding the judge’s lapse, that the father’s rights were fully protected.” Accordingly, Alexandra is the best case to cite for the proposition that an incompetent parent with a GAL can stipulate to termination; that the incompetent parent can be given a colloquy; and that the GAL can sign and orally approve a stipulation terminating an incompetent parent’s rights.

Father also argued on appeal that his stipulation should have been revoked because it was conditioned on the plan of adoption by the paternal grandmother, but that plan fell through. The stipulation provided that the father “surrenders his rights as [the child’s] father . . . to free [the child] to be adopted by her paternal grandmother.” It also provided that the father “stipulates to a surrender of his paternal rights as to [the child]” and “supports the adoption of [the child] by her paternal grandmother.” While it did not expressly “condition” the surrender on adoption by his mother, it is difficult to read it any other way; this incompetent man clearly expected his mother to adopt the child in return for giving up his rights. The fact that DCF agreed with this plan at the time of the stipulation and colloquy supports this; the agency only changed its mind after rights were terminated. Nevertheless, the panel had a different interpretation:

We take the father’s statements in the surrender stipulation at face value, and acknowledge that they indicate a concern for the child and a recognition of his own current inability to provide for her needs. The surrender stipulation is not, however, conditioned on an order appointing the paternal grandmother as guardian or adoptive parent, no matter how desirable the father may view that outcome. We therefore do not need to address whether our law, under which the paramount concern is the child’s best interests, would enforce such a condition.

Frankly, I find the panel’s acceptance of the father’s stipulation “at face value” baffling. This father was incompetent and didn’t even remember if he spoke to his lawyer about the stipulation. Even father’s attorney and GAL didn’t seem to grasp the nuances between “conditioning” his surrender, surrendering his rights “in order to free a child for adoption” by his mother, and surrendering his rights and “supporting” adoption by his mother. How could *this* father grasp those nuances? His intent was obvious: he was surrendering the child so his mother could adopt, not with a hope she would adopt.

Regardless, the panel’s last sentence – expressing some doubt about the enforceability of a conditioned surrender – is important. The panel’s final footnote suggests where it would come on out this question: “We note however that the stipulation of parental unfitness is not rationally or causally related to the identity of the adoptive parent or guardian.”

The takeaway? If your client wants to expressly condition a surrender on adoption or guardianship by his chosen resource, use clear language: “Father agrees to the termination of his parental rights on the express condition that his mother adopt the child. If, for any reason, Father’s mother does not adopt the child, or if the court is considering approving a plan where Father’s mother is not the designated adoption resource for the child, his surrender shall be vacated and his parental rights reinstated.” Is such a condition enforceable? Does it contravene any public policy? Hard to say, but it’s worth a try. As we’ve seen in Alexandra, language that is even remotely ambiguous regarding a parent’s intent won’t work.

4. Care and Protection of Patience, 83 Mass. App. Ct. 1104, 2012-P-0481 (December 31, 2012), has lots of good language about evidence. The hearsay exception “declaration against interest” rarely arises in our cases, and we have found no child welfare opinions that address it. But Patience does:

The mother challenges the judge’s decision to admit her boyfriend’s electronic mail (e-mail) on grounds that it was a declaration against interest. The mother does not dispute that her boyfriend was not a party and was unavailable to testify as a witness. The contention that her boyfriend was unaware that his statements were contrary to his interest when made is belied by the evidence. Any reasonable person would have understood that some of the statements would have exposed the maker to criminal liability. See Mass.G.Evid. § 804(3) (2012 ed.).

Nice stuff. That’s the rule about declarations against interest in a nutshell. The statement of a non-party (here, the boyfriend, who wasn’t the father) is admissible if:

* + - * The declarant is unavailable (here, the boyfriend might have been out of state or he might have asserted his Fifth Amendment privilege not to testify about the abuse);
			* The statement is against the declarant’s penal, pecuniary or proprietary interests (here, the boyfriend’s email admitted that he may have harmed the child); and
			* The statement is based on first-hand knowledge (the boyfriend was there).

Note that the statement need not be an admission of guilt; it need only be a “disserving statement” that could be used at trial against the declarant.

Patience also has nice language about how second-level hearsay in an admissible document is inadmissible unless that level also has a hearsay exception:

The mother also argues that a hearsay statement by her boyfriend’s psychologist which was part of that e-mail was improperly admitted. The statement read: “The psychologist believes, in his professional opinion, that I have a moderate to high risk of endangering a child due to my disorder [OCD]. He said he does not find any malice in my actions . . . .” The judge admitted it as a statement against interest over the mother’s objection. The fact that the e-mail contained second-level hearsay – the psychologist’s statement – was overlooked. A judge in a care and protection proceeding may not rely on facts that are not properly admitted in evidence. *Care & Protection of Zita,* 455 Mass. 272, 280 (2009).

In other words, the judge erred in admitting the second-level hearsay in the email. But, in this case, the error was harmless because the evidence came in through other sources.

Last, the panel noted that court investigator reports should be limited to facts (a statutory limitation that is traditionally honored largely in the breach):

The mother also contends that the judge erred in disregarding the investigator’s report. However, the mother overlooks the scope of the statutory authority for the admission of such reports, which is confined to “the facts relating to the welfare of the child.” G. L. c. 119, § 21A, inserted by St. 2008, c. 76, § 83. Here, the judge properly disregarded most of the report because it was predominantly the product of opinions based on assessments of credibility and not a statement of facts. See *Care & Protection of Rebecca,* 419 Mass. 67, 83 (1994).

You might want to cite to Patience if you are objecting to any opinions in a court investigator report, and not just “opinions based on assessments of credibility.” Note that no witness can opine as to the credibility of another witness, whether live or in a document. See Commonwealth v. Ianello, 401 Mass. 197, 202 (1987) (“expert may not render an opinion on the credibility of a witness”); Commonwealth v. Harbin, 435 Mass. 654, 663 (2002) (“witnesses may not offer their opinions on the credibility of other witnesses”).

5. Care and Protection of Ilsa, 83 Mass. App. Ct. 1105, 2012-P-775 (January 8, 2013). Just because a parent assents to a guardianship doesn’t mean the court can’t find that parent unfit. In Ilsa, the father argued on appeal that the trial court need not have found him unfit because he assented to the paternal aunt’s petition for guardianship on the second day of trial. The panel disagreed. Although the father visited with the child regularly, he conceded that he lacked suitable housing for her. The panel held that the trial judge “properly could conclude that, as the father, himself, has admitted, he is not presently able to assume parental responsibility for Ilsa.”

If you are trial counsel for a child who wants a guardianship, you might wish to press for a parental unfitness finding even if the parent(s) consent. It is more difficult to challenge a guardianship based on parental unfitness than one based purely on consent. A parent can withdraw consent, but cannot withdraw an unfitness finding.