***Committee for Public Counsel Services***

***Children and Family Law Division***

*44 Bromfield Street, Boston, MA 02108*

*Phone: (617) 482-6212, Fax: (617) 988-8455*

**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: April 21, 2016

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**Administrative Matters**

Website Additions

CAFL recently added two new menu items to the CAFL page on the website. The first is an FAQ page for attorneys that answers frequently asked administrative questions. We will expand it periodically to include additional information that you may find helpful to your practice. The second item is a CAFL practice tip of the month. The tip may be administrative or more substantive. Some tips won’t apply to appellate practitioners, but most will be relevant to all panel attorneys. If you have any practice tips that you would like to see included on the FAQ page, please contact Jaime Prince at jprince@publiccounsel.net. Links to these pages can be found on the top-right menu of the CAFL homepage. (<https://www.publiccounsel.net/cafl/>.)

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 Rule 1:28 Decisions**

This bulletin catches us up through August 31, 2015. We have not summarized all unpublished child welfare decisions; rather, we include only those with interesting facts and/or legal issues.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.

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.

By now, you have probably noticed that the Massachusetts Courts website has changed. 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.

**1.** **Adoption of Omari, 87 Mass. App. Ct. 1102, No. 14-P-965 (January 14, 2015).**

This case is worth noting because it explains what proper findings of fact should look like:

We note that a finding of fact ‘is the judge’s declaration that it is a fact….Findings of fact are drawn from, and consistent with, the evidence and are not merely a recitation of the evidence….Findings of fact are factual deductions from the evidence, essential to the judgment in the case. Such findings should be stated clearly, concisely and unequivocally, and be worded so that they are not susceptible of more than one interpretation.’

Omari at \*4 (citing Care and Protection of Yetta, 84 Mass. App. Ct. 691, 694 n.7 (2014), *quoting* Commonwealth v. Isaiah I., 448 Mass. 334, 339 (2007)). The panel noted that, although the trial judge enumerated 341 paragraphs in his “findings of fact,” many of those paragraphs were “merely recitations of the testimony” and did not resolve inconsistencies in the evidence, weigh the evidence, or resolve credibility issues. Nevertheless, the panel found that the judge’s proper findings and conclusions of law were sufficient to establish the parents’ unfitness clearly and convincingly.

**2.** **Adoption of Ilene, 87 Mass. App. Ct. 1106, No. 14-P-1134 (February 20, 2015).**

In this case, the trial court found both parents unfit and terminated their parental rights. However, the trial judge made findings based on information that she had previously struck from the record. The Appeals Court remanded that case. On remand, the judge entered a new order simply stating that the “evidence which was stricken at trial shall be removed from the Court’s Findings of Fact and Conclusions of Law and Orders.” On appeal, all parties agreed that this order did not remedy the errors; portions of the amended findings still relied on the stricken evidence, and the supported findings did not prove unfitness by clear and convincing evidence. The Appeals Court vacated the decision and remanded for a new trial on the merits.

The takeaway? You may never see a case of lazy trial judging quite like this, but Ilene shows clearly that a remand for flawed findings requires that the trial judge do more than simply reissue the findings with the “offending” material struck out.

**3.** **Adoption of Ted**, **87 Mass. App. Ct. 1108, No. 14-P-746 (March 9, 2015).**

In Ted, the mother claimed that her trial attorney was ineffective and that his substandard performance was rooted in an employment-related conflict of interest. Unbeknownst to the mother, her trial attorney had applied to DCF and was interviewed for a position during the pendency of the case. The panel held that this was only a potential, not actual, conflict of interest, and that the mother therefore had to show prejudice. The panel determined that the mother suffered no prejudice, but it explained that any doubts by counsel whether to disclose “should have been resolved in favor of disclosure.”

Additionally, Ted argued that the trial judge erred by failing to address the issue of whether Ted’s stepfather was his “de facto father” for the purposes of ordering post-termination visitation. The panel agreed, noting that there was evidence that Ted’s stepfather played a significant role in Ted’s life; indeed, the stepfather was Ted’s primary caretaker before Ted was removed from the home. The panel remanded the matter because, given the evidence, the judge should have determined whether the stepfather served as Ted’s de facto father, and, if so, whether post-termination visitation was appropriate.

Ted is therefore a great case for to cite when arguing for post-termination or post-adoption visitation with someone who is, or might be, a de facto parent.

**4.** **Adoption of Gerard, 87 Mass. App. Ct. 1122, No. 14-P-858 (May 21, 2015).**

In this case, Gerard’s mother and stepfather filed an adoption petition in the Probate and Family Court. The trial judge terminated the biological father’s parental rights and approved the adoption. The biological father appealed. One of the father’s arguments on appeal was that the judge erred in failing to order or explicitly waive the requirement of a home study under G.L. c. 210, § 5A. The statute permits the court to waive the required home study when the petition for adoption is filed by a parent. Here, the petitioners filed a motion requesting that the judge waive the home study, but the judge never ruled on the motion. The panel determined that, although the judge failed to rule on the motion, it was clear from his favorable comments about the petitioner’s home that he “constructively waived” the home study requirement. Thus, the failure to either order or explicitly waive the home study did not constitute reversible error.

Note that this might still be a good issue in cases where the petitioner is not a parent and the judge does not have information about, or comment on, the home.

**5.** **Adoption of Nell, 87 Mass. App. Ct. 1125, No. 14-P-1651 (June 1, 2015).**

In this case, the mother, who had intellectual disabilities, anxiety, PTSD, and other conditions, conceded her unfitness but appealed the termination of her parental rights. At trial, the mother proposed an arrangement where a family friend would be the guardian for both the mother and the child, who also had significant developmental delays. The judge found that the proposed caretaker was not capable of addressing the child’s needs and instead approved DCF’s recruitment plan for the child. The mother argued that the judge abused his discretion in failing to consider a plan to recruit a caretaker for both the mother and child, especially in light of the recognized bond that they shared.

This is a very clever argument! Unfortunately, it wasn’t preserved. The panel held that the judge did not abuse his discretion because the mother never requested that the judge consider a plan other than the specific one she proposed. Although a judge *can* fashion a plan different from one proposed by any party, a judge is not *required* to address every possible arrangement for the child. If a parent wants a judge to consider alternative plans, the parent must propose such plans at trial.

**6. Adoption of Harry, 87 Mass. App. Ct. 1128, No. 14-P-1296 (June 10, 2015).**

The appellant-parents’ main argument on appeal centered on the manner in which the trial judge took testimony from the father’s daughter from a previous relationship, Kathryn. The judge excluded both parents from the courtroom during Kathryn’s testimony. The mother’s and father’s attorneys were allowed to be present, but they were only allowed to submit questions through the judge. The parents argued that this violated their due process rights. The Appeals Court disagreed. The panel held that the process allowed the parents sufficient opportunity to rebut Kathryn’s allegations of abuse. The panel further reasoned that the parents had ample opportunity to call additional witnesses and present other evidence to rebut the allegations.

The parents also argued that the judge erred by not making an explicit finding that the method for taking Kathryn’s testimony was tailored to prevent trauma to Kathryn. The panel again disagreed, noting that the judge’s determination that Kathryn would suffer trauma was “implicit,” given Kathryn’s history and the concerns of her psychiatrist. Explicit findings were not necessary.

Although Harry appears to be contrary to the holding in Adoption of Roni, 56 Mass. App. Ct. 52, 55 (2002), it is consistent. Roni stands for the proposition that modifications for children’s testimony should “ordinarily” be supported by written findings regarding trauma to the child. Id. But “ordinarily” is not “always”; indeed, in Roni, the Court held that the judge implicitly made findings of trauma based on testimony from the children’s therapists.

**7. Adoption of Zena, 87 Mass. App. Ct. 1136, No. 14-P-1691 (July 20, 2015).**

In Zena, the mother surrendered her parental rights, but DCF did not notify the father of the proceedings until 2 ½ years later. The father appealed the decree terminating his rights, arguing that DCF’s delay in notifying him violated his due process rights.

The father was in jail for most of Zena’s life. He learned of Zena’s birth while incarcerated. When he was out of jail on parole, he made no attempt to establish his paternity or develop a relationship with Zena. His only contact with Zena was when he appeared at the residential program where mother was residing with Zena and threatened the mother. Shortly thereafter, DCF removed Zena from the mother’s custody. Although DCF was aware of the father’s existence, it did not notify him of the case until more than two years later. The father appeared in the Juvenile Court at that time and was adjudicated Zena’s father. DCF offered him a service plan, but he refused to cooperate. He later represented himself at a seven-day trial.

According to the panel, DCF’s delay in notifying the father did not prejudice him and did not, therefore, violate his due process rights. Although DCF could have located the father sooner and failed to follow its own standards, the father could show no prejudice. He had many months to prepare for trial, had access to all of DCF’s exhibits, and fully participated at trial. The father was afforded all the process he was due once he became involved in the proceedings.

**8. Adoption of Amanda, 87 Mass. App. Ct. 1138, No. 14-P-1281 (July 30, 2015).**

This is a great competing plan case. The Appeals Court emphasized the importance of the ages, preferences, and circumstances of older children when considering which plan is in their best interests. In Amanda, the older children, Amanda and Beth, argued that the judge erred in approving DCF’s plan for adoption by their foster parents over their plan of placement with their maternal grandmother. The Appeals Court agreed:

With respect to the best interests of children, at issue in determining the proper placement . . ., the judge was required to assess the significance of the fact that Amanda and Beth are unlikely to be, and oppose being, adopted. [Citations omitted.] This is especially so when at trial . . . Amanda was eleven years old and Beth was ten years old, and on remand at least one of them will be old enough to block an unwanted adoption. [Citations omitted.]

The panel also noted the judge’s failure to make findings on the girls’ instability, lack of treatment, and academic deterioration while in DCF’s custody. The panel further criticized DCF’s position that the grandmother was an inappropriate placement because she had a fourteen- year-old outstanding warrant for resisting arrest; this, the panel suggested, should not be an absolute bar to consideration of her as a placement resource. As a result, the panel vacated the portions of the decrees approving DCF’s proposed adoption plans and remanded for further proceedings on the choice of plan.

**Writing Tips**

1. **Commas**

Put commas before *and* after appositives (words or phrases that rename, explain, or describe a prior noun):

* MaryAnn LeStrange, Ricardo’s DCF adoption worker, never visited him at the foster home.
* Robert S., Mother’s first husband, was convicted of sexually abusing his daughter in 2008.
* Lisa Smith, Mother’s neighbor who filed a § 51A report on Mother on April 4, 2013, petitioned for guardianship on April 6, 2013.

If your appositive has a defined term or date of birth in parentheses, put the comma after the closing parenthesis:

* + The father, Robert S. (“Father”), has lived in Lowell his entire life.
	+ Mother took the younger children, Carol R. (d/o/b 11/4/2011) and Michael D. (d/o/b 9/1/2013), with her to Pittsfield in May 2014.

Put commas between two independent clauses (that is, when the second clause has a new subject or the old subject is re-stated). The only exception is when the two independent clauses are very short and related. Do not put commas between an independent clause and a dependent clause that share the same subject:

* Mother relapsed in April 2014, and Father relapsed the next month.
* Mother screamed obscenities at the social worker, and she then threatened her with a knife.
* Mother relapsed in April 2014 but was sober for a year after that.
* The DCF ongoing social worker repeatedly brought the children to visits late but never informed Mother.
* The DCF ongoing social worker repeatedly brought the children to visits late, but she never informed Mother.
* [This is the exception for very short, related independent clauses] Father regularly abused heroin but Mother did not.

If a dependent clause comes before an independent clause, use a comma between them:

* Although Mother regularly used cocaine, she always got the children to school on time.

Introductory clauses usually take a comma:

* In January 2014, Mother wrote to her social worker and asked for more visits.
* By that summer, Sally no longer wanted to see Father.

It’s fine to start a sentence with “And,” “But,” or “Yet.” But don’t use a comma after any of them.

* Mother relapsed in January 2014. But she did not use drugs after that.
* Father wrote to his social worker on March 9, 2014, asking for visits. And he followed that letter up with another one on March 20, 2014.

And don’t start a sentence with “however.” Move it to the middle of a sentence and put commas on either side.

1. **Argument Headers**

Bryan Garner, in an excerpt of his ABA Journal article below, explains how to draft good Argument headers. He calls them “point headers,” but they are the same thing. He writes that each header should be a complete, declarative sentence of 15 to 35 words (never two or three sentences – that’s only for the Issues Presented). Headers should use normal capitalization, not all caps or initial caps. They should be bold-faced in the text of the Argument, but not bold-faced in the Table of Contents.

**Good headings show you've thought out your arguments well in advance**

**September 1, 2015**

By Bryan A. Garner

The most important part of a brief? That depends on whom you ask. Some say the issue statements. Others say page 1 (which ought to amount to the same thing). Still others say the statement of facts. A few say the conclusion. But one of my favorite answers is the table of contents: Done right, it shows all the substantive point headings arrayed on one or two pages. Certainly those headings are the most important part of the argument section in a brief.

. . . [L]et’s define our terms. What’s a “point heading”? It’s a full-sentence proposition that advances a major premise (law) or a minor premise (fact), or sometimes both. Added together, the point headings should be a cohesive outline of your case. In any clear-headed view of written advocacy, point headings should be high on the list of priorities.

. . .

Here are the basic guidelines you’ll generally see reflected in [excellent Solicitor General (SG)] briefs:

• All headings for points and subpoints are in complete declarative sentences varying in length from 15 to 35 words.

• Headings are typed as normal sentences (never in all-caps and especially never in all-initial-caps), boldfaced and single-spaced, in the body of the brief. (You’ll find some exceptions at the SG website. Ignore them.)

• Acronyms and initializations are disfavored—unless they’re well-known.

• If a case is mentioned in a point heading, its name is used without citation. (Footnotes are never appended to point headings.)

• In the brief’s table of contents, the point headings set forth a clear outline of the argument. They appear there with a cascading left-side indent to show the hierarchy of points. Nothing is in boldface in the table of contents.

• The headings move from major to minor premises (progressing from the law to the facts), and then to points in refutation.

• Up to three major points may take Roman numerals (I, II, III); if there is only one overarching point, it remains unnumbered.

• Subpoints are marked by capital letters (A, B, C).

It’s possible to depict the SG’s practice—which in this instance is the best existing practice—through a rhetorical template. Good point headings predictably go something like this:

I. [Full-sentence conclusion.]

A. [Full-sentence rationale.]

B. [Full-sentence rationale.]

C. [Opponent’s position on this point is wrong because … .]

II. [Full-sentence conclusion.]

A. [Full-sentence rationale.]

B. [Full-sentence rationale.]

C. [Opponent’s other position on this point is wrong because … .]

III. [Full-sentence policy conclusion.]

. . .

The full text of this article is available at:

<http://www.abajournal.com/magazine/article/good_headings_show_youve_thought_out_your_arguments_well_in_advance>

Garner’s advice here is excellent. Please use short, single-sentence headers that draw a roadmap of your argument.

**Practice Tips**

# Rule 16(l) and 22(c) Letters

# A new case on point is issued right after argument. What do you do? You file a Rule 16(l) letter with the Court (electronically) informing the Court, without argument, of the new case.

# The panel goes in a completely new direction with the appellee on a subject that no one briefed. What do you do? You file a Rule 22(c) letter with the Court (electronically) that addresses the new issue.

# What happens when both circumstances arise in the same case? We recently asked Joe Stanton, Clerk of the Appeals Court, whether Rule 16(l) and 22(c) letters could (or should) be combined into one “hybrid” letter when circumstances warrant both. We also asked if a Rule 22 (c) letter requires a separate motion requesting leave to file the letter or if the opening paragraph could contain the request. Here is what he said:

The two letters should not be combined. They serve different purposes and should be submitted separately when circumstances in a case warrant the submission of both types of letters. A letter submitted pursuant to Mass. R. App. P. 16(l) should be limited to the citation for the newly discovered authority and a citation to the relevant pages of argument in the party's brief.  There should be no argument.  If the newly discovered authority is from outside of Massachusetts, attaching a copy is permissible, and often appreciated by the judges.

On the other hand, a letter submitted pursuant to Mass. R. App. P. 22(c) requires leave of court and may contain new argument.  In support of that argument, the party is likely to cite authority, but that does not make the letter a 16(l) letter.  Sometimes, the court requests a 22(c) letter or states that a letter may be submitted when counsel is unable to recall a particular authority or fact at argument.  In those cases, no further leave is required, but the introduction to the letter should reference the panel's request or their grant of permission.  In all other cases, a letter submitted pursuant to 22(c) should be accompanied by a *separate* motion setting forth the request for leave to submit the letter so that the docket can clearly reflect whether leave is granted and the letter considered.  It also gives the panel the option of permitting the other side to respond, if appropriate or necessary.

# So now we know. Thanks, Joe!