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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

Recent Rule 1:28 Decisions

Writing Tips

Practice Tips

Date: June 26, 2013

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**Administrative Matters**

Training Issues

We’re hoping to offer a few different appellate trainings this fall. Please let us know if you have any ideas for topics.

Issue Bank

We’re also hoping to create an “issue bank” for both appellate and trial attorneys. And now that we’ve put this idea out there, we actually have to do it. We’ll send out a list of subjects in the next few months. The goals are to (a) give you ideas for briefs and motions, (b) save you from having to reinvent the wheel on common issues, and (c) give you law review articles, best practice manuals, and cases from other states that might broaden your arguments.

Moot Courts

There are no more arguments at the Appeals Court until September. But if you get an argument date in September or October 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.

**Recent Rule 1:28 Decisions**

This memo catches us up through the end of May 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. Adoption of Darian, 83 Mass. App. Ct. 1113, 2012-P-672 (February 14, 2013). Darian is interesting only because it suggests how appellants should address a trial court’s long delay in issuing findings. In this case, the trial court waited two years after the termination decree to issue findings. The mother argued that this violated her due process rights. The panel disagreed, noting that while Juvenile Court Standing Order 1-04 III.C (2004) states that judges should issue findings within 90 days after the close of evidence, here the mother failed to show any prejudice by the delay. “The mother did not seek to ‘reopen evidence to allow all parties to submit relevant, updated information concerning parental fitness’ in the two years before findings were issued.” Darian (citing Adoption of Rhona, 57 Mass. App. Ct. 479, 486-87 (2003)). Accordingly, if you represent an appellant and the judge has waited a long time to issue findings, you should file a motion to reopen and present the trial court (and, thus, the Appeals Court) with all of the facts that merit relief. Of course, such a post-trial motion is only appropriate where the facts have changed for the better for your client (and, perhaps, for the worse for the child).

2. Care and Protection of Nita, 83 Mass. App. Ct. 1113, 2012-P-1347 (February 15, 2013). The trial court found that the father did *not* sexually abuse Nita. DCF agreed that he didn’t do it. Nevertheless, the court found the father unfit because the child *believed* that her father sexually abused her, feared him, and wanted nothing to do with him. The court found that, despite the father’s best efforts, he was unable to alter the child’s views (and resulting needs), and was therefore unfit.

The Appeals Court acknowledged that this was an unusual case and emphasized that, even after an adjudication of unfitness, DCF is obligated to continue to provide services to the father. See G.L. c. 119, § 1; G.L. c. 119, § 26; Care and Protection of Elaine, 54 Mass. App. Ct. 266, 273-274 (2002). The takeaway? Even if a parent didn’t do anything wrong, if the parent is unable to meet the child’s emotional needs (however those needs might have arisen), the parent may be unfit.

3. Guardianship of Caleb, 83 Mass. App. Ct. 1114, 2011-P-1190 (February 20, 2013). This case involved a guardianship action in Probate Court between the paternal and maternal grandparents of the child. The Court granted guardianship of the child to the maternal grandparents, and the paternal grandmother appealed. The paternal grandmother raised a number of issues on appeal, but only one is worth mentioning because it emphasizes the importance of making the *right* objections at trial in order to preserve the record for appeal.

The paternal grandmother argued on appeal that the judge erred in appointing a GAL who had served as the child’s attorney or GAL/next friend (the panel isn’t clear which) in earlier paternity and guardianship actions, and that therefore the GAL was biased. The panel deemed the issue waived because the paternal grandmother did not object to the appointment of the GAL on that ground. This illustrates the importance of noting specific grounds for objections and not simply making general objections. See Hoffman v. Houghton Chemical Corp., 434 Mass. 624, 639 (2001) (plaintiffs failed to identify alleged errors with specificity, and thus they did not preserve their appellate rights).

In a footnote, the panel also noted that the paternal grandmother failed to establish that the two roles of the GAL created a conflict of interest. What does this mean? It means that just because a particular GAL (or court investigator) appointment raises an actual or potential conflict of interest, counsel for an aggrieved party is not relieved of the obligation of explaining the conflict to the court and showing how it is unfair to the client.

4. Adoption of Ervin, 83 Mass. App. Ct. 1114, 2012-P-1217 (February 22, 2013). This case discusses the admissibility of SORB files in termination proceedings. Here, the father argued that the judge erred in admitting his SORB file under the “business records” exception because records in the file were not authored by SORB employees and because the documents contained inadmissible hearsay.

The Appeals Court disagreed. The panel held that the SORB file was properly admitted as a business record because it was made in the regular course of business and not to prove a fact at trial. G.L. c. 233, § 78, according to the panel, requires only that the record was made in good faith; who created it is “immaterial.” In footnote 3, the panel noted that the business records of any business would include documents made by others that are compiled and maintained by the business (thereby suggesting that such “held” or “collected” records would also be business records).

With all due respect to the Ervin panel, this is not the law on business records. The fact that a business collects, compiles, or files the records of another business (or of an individual who does not work for the business) does not make those “outside documents” business records, regardless of the good faith of the author. Someone in the business must “make” the record in the regular course of business. Section 78 of c. 233 provides:

. . . [A] writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall not be inadmissible in any civil or criminal proceeding as evidence of the facts therein stated because it is transcribed or because it is hearsay or self-serving, *if the court finds that the entry, writing or record was made in good faith in the regular course of business* and before the beginning of the civil or criminal proceeding aforesaid and that *it was the regular course of such business to make such memorandum or record* at the time of such act, transaction, occurrence or event or within a reasonable time thereafter.

G.L. c. 233, § 78 (emphasis added). A record cannot be “made in the regular course of business” by someone who does not work for that business.

As the SJC held in Wingate v. Emery Air Freight Corp,

If the original source of the information [in the purported business record] was not an employee with “eyewitness” knowledge or similar “personal knowledge,” reliability is lacking. Further, if the original source of information did not have a business interest to report accurately, reliability is lacking. Thus, the statute makes admissible a business record which results from reports, passing through any number of people, so long as each person had a duty to report, *and the information originally came from an employee with personal knowledge who also had a duty to report*. Then, and only then, are there the necessary indicia of reliability. Only then may a record be substituted for the direct testimony of the employee with personal knowledge.

385 Mass. 402, 406-07 (1982) (emphasis added). Wingate clearly states that the author of a “business record” must either have a business duty to report information accurately or must be relying on others in the business who have a like duty to report. Reports authored by “outsiders,” and even reports by employees that rely on information relayed by “outsiders,” cannot be business records because the outsiders do not have an obligation to report accurately to the business. See also NationsBanc Mtge. Corp. v. Eisenhauer, 49 Mass. App. Ct. 727, 733-35 (2000) (where records made by one business were transferred to another, latter business unable to admit the records under business records exception because records were made by former business). The SJC in Wingate reasoned that “there was no evidence that the plaintiff or anyone else with personal knowledge and a duty to report had relayed the information to the preparer of the record or to someone under a business duty to inform the preparer of the record, so that the intermediary’s statement would itself be a part of the business record-keeping process.” 385 Mass. at 407. The report at issue in Wingate was therefore not a business record.

The mental health evaluations and other reports in the SORB file were not written by SORB employees, nor were they based on data compiled by SORB employees in the regular course of their business. They were not written by someone with a business obligation to convey accurate information to SORB. Accordingly, they could not have been business records at the Ervin trial unless DCF laid a foundation for them as business records of the *authors’* business (as opposed to SORB). This was not the case.

Let’s take a more typical example. Brockton Home Health Aides (BHHA) records are not DCF business records just because BHHA sends them to DCF and DCF keeps them in its files, even if it regularly does so. That is, the mere fact that DCF keeps the BHHA documents in its files does not give them any indicia of reliability. Of course, the BHHA records might be the business records of BHHA if someone from that agency (or someone else who knows that agency’s business practices) lays a proper foundation.

All told, you should not rely on Ervin for its business records analysis.

The panel did agree with the father that the police report contained within the SORB file should not have been admitted, because the police report contained hearsay. See Julian v. Randazzo, 380 Mass. 391, 394 (1980) (statements in police reports made by bystanders may be inadmissible as “second level” or “totem-pole” hearsay). But such admission was harmless error because there was ample other evidence of father’s unfitness. (Note that even here the panel’s reasoning is inconsistent with well-established, black-letter law: the police report shouldn’t have been admitted at all because (a) it wasn’t a SORB business record, and (b) no police officer laid a foundation for the report.)

5. Adoption of Irving, 83 Mass. App. Ct. 1118, 2012-P-1001 (March 13, 2013). In this case, the father appealed the termination decree and the single justice’s denial of his motion for leave to move for relief from judgment. The panel affirmed both orders.

Two aspects of Irving are noteworthy. In the middle of trial, the father moved for Indigent Court Costs funds for a homestudy of the father’s parents and sister. The trial judge insisted that the motion be heard in open court rather than *ex parte*. The father argued on appeal that this forced him to reveal his trial strategy to DCF. The panel held that the judge handled the motion appropriately for three reasons. Two of these reasons make sense: by the middle of trial, all parties already knew the father’s strategy and that the father wanted homestudy funds, and the court didn’t need the homestudies because it already had enough evidence to evaluate the father’s placement resources. Fair enough. But the final reason sets a dangerous precedent (thankfully blunted by the fact that Rule 1:28 decisions are not binding in any other proceeding).

Commonwealth v. Dotson, 402 Mass. 185 (1988), requires that, in criminal cases, courts hear most motions for funds *ex parte*: “Prosecutors serve neither the judicial process nor the interests of justice by impeding the indigent defendant’s efforts to obtain funds pursuant to G. L. c. 261, § 27C. We take this opportunity to state that the prosecution has no proper role to play in a defendant’s motion for defense funds unless the judge requests the prosecution’s participation.” Id. at 187. Historically, we have assumed that Dotson applies to care and protection cases as well, and that DCF has no role in a motion for funds. But the panel in Irving disagreed. First, the panel noted that “the plain language of G.L. c. 261 only requires a hearing; it does not require an ex parte hearing.” It also observed in a footnote that “[Dotson] has not been extended to care and protection proceedings.” This reasoning could be troubling if adopted by the juvenile courts in our cases.

The father also claimed that the single justice erred in denying his motion for leave to seek relief from judgment in the trial court. In support of his motion, the father argued that Annie Dookhan tested and certified the drug sample underlying his most recent criminal conviction. The father asserted that if a lower court were to vacate his conviction, then much of the judge’s factual findings as to his unfitness would be unsubstantiated. The panel disagreed, noting that even without the tainted conviction there was overwhelming evidence of father’s criminal record, history of substance abuse, and lack of demonstrated interest in the child that rendered him unfit. The takeaway on this point? A “Dookhan” motion for relief from judgment may be viable in our cases, but relief from judgment will only be granted if, absent the tainted conviction, there was insufficient evidence of parental unfitness.

6. Adoption of Van, 83 Mass. App. Ct. 1128, 2012-P-1372 (May 7, 2013). The panel in Van affirmed the termination of the mother’s parental rights but remanded the case for further consideration of the question of post-termination contact. The panel cited Adoption of John, 53 Mass. App. Ct. 431, 439 (2001), for the proposition that the judge is not required to make extensive findings regarding post-termination visitation if the judge’s unfitness findings address factual issues bearing on visitation within the context of those findings. (John is often improperly cited by the Department for the proposition that the judge need not make findings on post-termination visitation if the judge has made extensive findings *on unfitness*. But John clearly states that specific post-termination visitation findings need not be made if the judge has already made findings about visitation in the unfitness context – after all, why should the judge have to make two sets of visitation-related findings?) In Van, however, the trial judge’s unfitness findings did not address visitation, the children’s attachment to the mother, or the children’s best interests regarding ongoing contact with mother. The panel also considered the children’s ages, their request for continued visits with the mother, and the “impermanent nature” of their current placements in reaching its decision to remand the post-termination visitation issue to the trial court.

**Writing Tips**

1. **The term “sic”**

Here’s a great writing tip from Bryan Garner’s Oxford University Press usage newsletter.

**Sic. (9/4/2012).**   
  
**Generally.** “Sic” (= thus, so), invariably bracketed and preferably set in italics, indicates that a preceding word or phrase in a quoted passage is reproduced as it appeared in the original document. “Sic” at its best is intended to aid readers, who might be confused about whether the quoter or the quoted writer is responsible for the spelling or grammatical anomaly. This interpolation has been much on the rise: in published writings, its use has skyrocketed since the mid-20th century.

. . .

So if you want to quote some poorly-worded or poorly-transcribed portion of a transcript or findings, use “sic” as set forth below:

Allowing DCF’s expert to vouch for the child was not the trial judge’s only evidentiary error. The judge also refused to let Mother’s counsel submit an offer of proof while questioning DCF’s expert:

Roberts: Your honor, mother would like to submit an offer of proof on why these questions and Dr. Feelgood’s answers are so important. My next few questions to DCF’s expert would be . . .

Judge: Stop counsel. I have no attention [sic] of letting you make any offers of proof on this.

Roberts: But your honor, I . . .

Judge: No, Mr. Rogers [sic], I’m not hearing it. Move along to another topic.

If the mistake is in the original – a misspelled word, a grammatical error, an incorrect name, etc. – use “sic” to show that the mistake is from your source.

**B. Appositives**

We see comma problems in almost every brief: too many commas on one page, not enough on the next. One of the comma problems we see most frequently is the lack of commas (and misplaced commas) when using appositives.

Here’s a good writing tip from Maeve Maddox’s website, DailyWritingTips.com, on this issue.

**Restrictive Appositives** (<http://www.dailywritingtips.com/restrictive-appositives/>)

Nouns are said to be “in apposition” when a noun or noun phrase is used to identify, define, or tell more about a preceding noun.

When the appositive noun (the second one) is essential to the meaning of the sentence, it is said to be “restrictive.” In that case, no comma is used:

Have you read the novel *A Separate Peace*?

“A Separate Peace” specifies which novel is meant. It is necessary to the meaning of the sentence.

When the appositive noun provides additional information that can be omitted without altering the sentence’s main thought, it is said to be “nonrestrictive.”

George Clooney, the actor, is a social activist.

“The actor” is additional information. Commas are used to separate it from the main thought.

So what does this mean for us? Here are some examples of restrictive appositives:

* DCF adoption worker Monty Hall looked behind Mother’s doors and found piles of unwashed clothing.
* Pre-adoptive mother Susan Robinowitz refused to allow a visit.

There is no need for commas because each restrictive appositive is essential to the meaning of the sentence.

Here are some non-restrictive appositives:

* Mark Twane, the last DCF ongoing social worker, made no referrals for Mother whatsoever.
* The children, both Spanish-speakers, were placed with pre-adoptive parents who only spoke English.

Commas are necessary because the appositives provide useful information but are not essential to the meaning of the sentence.

Sometimes it’s not clear whether the appositive is restrictive or non-restrictive. Take, for example, these sentences:

* Suzie’s nanny, Marilu Henner, brought her to the hospital.
* Mother’s older children, Sarah and Robert, lived with her until they turned eighteen.

Here, both appositive are non-restrictive, because the names add information but are not essential to the meaning of the sentence. What is important in the first sentence is that the nanny brought the children to the hospital. Her name is not essential. What is important in the second sentence is that Mother’s older children lived with her until they turned eighteen. Their names are not essential. We think it’s a good rule of thumb that, when in doubt, treat your appositive as non-restrictive and add commas.

If there is a parenthetical that pertains to the non-restrictive appositive, the comma *follows* the parenthetical. For example:

* Paul Stephens, Father’s therapist for seven years (Tr.II:343; RA. 239), died two months before trial.
* Suzie’s nanny, Marilu Henner (“Marilu”), brought her to the hospital.

We often see briefs where the second comma is omitted. It looks weird, and it’s confusing.

Last, don’t use a possessive before your appositive. The sentence below is wrong:

* Paul Stephens’s, a therapist, failure to give *Lamb* warnings contributed to the confusion.

Instead, reconfigure the sentence:

* The failure of Paul Stephens, a therapist, to give *Lamb* warnings contributed to the confusion. Or
* Paul Stephens, a therapist, failed to give *Lamb* warning. This contributed to the confusion.

**Practice Tips**

**Factual Findings Based on Documentary Evidence**

In March we discussed Commissioner of Revenue v. Comcast Corp., 453 Mass. 293 (2009), in the context of motions to reconsider. Comcast is helpful on another issue, too: when a judge’s findings are based solely on documentary evidence, the reviewing court “do[es] not accord them any special deference.” 453 Mass. at 302. Accordingly, if you are challenging a finding of fact based purely on a § 51B or court investigator’s report (and the declarant hasn’t testified), you are *not* restricted to a clear error standard of review.

Mixed questions of fact and law generally receive *de novo* review. See id. at 303. What are some mixed questions of fact and law?

* Whether there has been a waiver of a privilege or whether a privilege applies. See id. at 302-303 & 302 n. 18.
* Whether counsel has a conflict of interest. See Commonwealth v. Wooldridge, 19 Mass. App. Ct. 162, 167 (1985).

Given the choice, it’s always better to argue for a *de novo* review by the panel.