***Committee for Public Counsel Services***

***Children and Family Law Division***

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**APPELLATE BULLETIN**

To: CAFL Appellate Panel Members

cc: CAFL Trial Panel Members

CAFL Administrative Attorneys

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

Jaime Prince, Staff Attorney, CAFL

Mimi Wong, Staff Attorney, CAFL

Re: Administrative Matters

Recent Rule 1:28 Decisions

Writing Tips

Practice Tips

Date: August 19, 2014

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**Administrative Matters**

Welcome to New Appellate Panel Members

Welcome to 18 new CAFL appellate panel members who survived the three-day CAFL appellate training program held on May 5-7, 2014 in Worcester. Thanks to our current panel members and CPCS staff who helped to make this training a huge success.

Welcome to Mimi Wong

In April, Mimi Wong, a trial attorney in our Boston CAFL Office since 2006, joined CAFL Administration in Boston. Mimi has some appellate experience as well, and she will be assigning appeals and doing other work with the panel. She will also be doing work with the trial panel. Welcome, Mimi!

New CPCS Website Coming Soon

We are very excited to announce that CPCS is in the process of updating its website. It is our hope that the new website will launch in late 2014. Although it will continue be a work in progress for some time, it is sure to be much more user-friendly than the current site and will contain many helpful trial and appellate resources. Stay tuned. (Note: Jaime is working very hard on this project, so I know it will be great.)

Issue/Resource Bank

We are making (slow) progress with the Resource Bank. Our plan is to roll out a portion of it at the end of the summer in order to get your feedback. Our “Due Process” files – which we will make available to you, on request, as Word and PDF attachments – will include not just the usual due process suspects (“right to notice,” “right to participate,” “fair procedures”) but also “right to counsel,” “ineffective assistance of counsel,” “structural error,” “judicial bias,” and many other topics under the umbrella of “Due Process.”

Moot Courts

If you get oral argument 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. 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 memo catches us up through June 2014. If we have left out one of your Rule 1:28 decisions and it has a useful tidbit in it, please let us know.

We’re still seeing attorneys cite Rule 1:28 decisions ***incorrectly***. If you cite to a Rule 1:28 decision in your brief or motion, you must:

(a) attach a copy of the decision as an addendum; and

(b) cite the page of the Appeals Court reporter that lists the decision and a notation that the decision was issued pursuant to Rule 1:28.  In your brief or motion, you do not need to cite the docket number, month or day. For example: Care and Protection of Priscilla, 79 Mass. App. Ct. 1101 (2011) (Mass. App. Ct. Rule 1:28). Please note that we’re using the docket numbers and dates of issuance below just to make it easier for you to find the decisions online.

**Please note that the Massachusetts Courts website has changed.** Rule 1:28 decisions are now available on the web at: <http://www.mass.gov/courts/case-legal-res/appellate-opinions/>. Click on the link for “Archives of Published Opinions and Unpublished Decisions.” To find all child welfare Rule 1:28 decisions, search by “party name” and type “adoption or care or guardianship” into the first box for party name. To find a specific case, enter the case name.

1. Adoption of Beatrice, 84 Mass. App. Ct. 1128, No. 13-P-482 (January 13, 2014). In Beatrice, the trial judge found the mother unfit and terminated her parental rights. The judge further determined that post-termination visitation was in the best interests of the child, but she refused to enter a specific visitation order. Instead, she made it clear that she would impose a visitation order if the parties could not agree on its specific terms. Rather than negotiate with the parties and bring any dispute back to the trial court, the mother appealed, arguing that the judge was obligated under these circumstances to issue a specific order. The mother further claimed that termination of her parental rights was premature because the issue of visitation had not been resolved. The Appeals Court affirmed the termination decree and further held that the issue of visitation was not properly before it because the mother had already effectively prevailed on the visitation question.

In a footnote, the panel commented that the mother retained standing to pursue a post-termination visitation order in the trial court, in contrast to the mother in Adoption of Malik, 84 Mass. App. Ct. 436 (2013), because the judge here clearly expressed her intention to order visits and allow the mother access to the court for that purpose. However, the panel went on to state that the mother would not retain such rights indefinitely. The panel did not comment on mother’s right to appeal any adverse order regarding visitation, although presumably, the mother would not have standing to appeal post-Malik.

1. Adoption of Anya, 84 Mass. App. Ct. 1128, No. 13-P-1011 (January 15, 2014). DCF obtained custody of Anya a week after her birth. The mother then disappeared for four months. Two months later – a total of six months after DCF filed the care and protection case – the Juvenile Court terminated the mother’s parental rights. On appeal, the mother argued that six months between removal and termination was too short a time and violated the Adoption and Safe Families Act (“ASFA”). She also argued that she had insufficient time to perform the tasks on her service plan. (The panel noted that the mother hadn’t visited the child or engaged in services during most of that time.) The mother further argued that her less-than-ninety-minute termination trial was too brief and violated her due process rights. The Appeals Court disagreed. It affirmed the termination decree, reasoning that ASFA did not impose restrictions on the speed with which DCF could initiate termination proceedings. Additionally, the panel noted that, while the trial was short, it did not violate mother’s right to due process; mother had counsel, the opportunity to testify and cross-examine DCF’s witnesses, and the opportunity to present her own witnesses and evidence (which she did not take advantage of).

The take-away? A termination trial six months after filing – at least in the context of a parent who fails to visit or engage in services – does not violate ASFA, chapter 119, or due process.

1. Care and Protection of Zerlinda, 84 Mass. App. Ct. 1129, No. 13-P-0527 (January 21, 2014). After both parents stipulated to unfitness in November 2007, the court granted DCF custody of the child, and DCF placed the child in the grandmother’s home in New Hampshire pursuant to the ICPC. In March 2011, New Hampshire DCYF determined that the grandmother’s home was no longer a suitable placement, and DCF removed the child. The grandmother did not appeal the DCYF’s decision. Instead, one year later, the grandmother moved to intervene in the Juvenile Court proceeding in Massachusetts, claiming that DCF interfered with her right to visit the child. Her motion was denied, and she appealed. The Appeals Court affirmed, noting that the grandmother failed to identify a constitutional, statutory, or common law principle indicating a right to intervene. The panel further held that intervention is not the appropriate alternative to an action seeking review of an administrative decision. The panel noted that the grandmother could petition for visitation with the child pursuant to G. L. c. 119, § 26B, but she had not done so.

There are a couple of take-aways from Zerlinda. First, relatives aggrieved by out-of-state agency decisions must appeal those decisions under that state’s rules; our Appeals Court is not the proper venue to appeal out-of-state agency decisions. Second, potential intervenors should first exhaust other remedies before claiming that intervention is all that remains. Had the grandmother in Zerlinda moved for visitation under G.L. c. 119, § 26B or petitioned for guardianship and been denied, she would have had a stronger argument for intervention.

1. Adoption of Calvin, 85 Mass. App. Ct. 1105, No. 13-P-147 (March 12, 2014). The mother appealed the termination of her parental rights as to two of her children, Calvin and Gail, alleging ineffective assistance of counsel. The mother argued that her trial counsel knowingly called a medical expert witness who testified using outdated medical and forensic theory and testified, contrary to mother’s own testimony, that Calvin sustained injuries consistent with child abuse. The mother argued that the court would not have terminated her rights if not for this expert testimony. In support of her claim, the mother pointed to a subsequent termination trial concerning another of her children in which the trial judge did not hear from this expert and concluded that neither the mother nor her boyfriend abused Calvin. The Appeals Court affirmed the termination. The panel held that trial counsel’s decision to call the expert wasn’t manifestly unreasonable, because the expert’s opinion “might form a basis for an argument that the injuries were inflicted at times when Calvin was not in his mother’s care, or that she was not the perpetrator.” Even if permitting that expert to testify was poor lawyering, it was harmless under the second prong of Saferian because the expert’s testimony was cumulative of the evidence submitted by DCF.

One aspect of Calvin is, quite frankly, baffling. While the expert’s opinion might have furthered trial counsel’s strategy, that “might” strains credulity. In fact, it was not consistent with trial counsel’s strategy. Trial counsel never argued that the child was abused but mother didn’t do it; trial counsel argued that the child’s injuries were accidental. As such, proffering the expert’s opinion – that the child was abused but mother didn’t do it – was not really a strategic decision at all; it was a mistake and manifestly unreasonable. The panel should have identified it as such.

1. Adoption of Mindy, 85 Mass. App. Ct. 1115, No. 13-P-722 (April 23, 2014). Mindy is an interesting case about pre-trial suspension/termination of visitation. The child entered DCF custody in September 2010. The mother had supervised visits with the child until DCF suspended visitation in November 2011, citing the child’s negative reactions to visits. DCF waited until January 2012 to file a motion to terminate visitation, and the judge did not hear the motion until trial in March 2012. Following trial, the judge terminated mother’s parental rights and terminated visitation. On appeal, the mother argued that DCF violated its own regulations by suspending visitation prior to court approval, and that the five-month delay between suspension and trial was prejudicial. The mother also argued that the judge erroneously admitted evidence from witnesses about the child’s negative reactions to visits.

The Appeals Court affirmed. The panel held that, while DCF may have violated its own regulations concerning the suspension of visitation, this violation was insufficient to merit vacating the termination decree absent a showing of prejudice (which mother could not show in this case). On the issue of “improper” witness testimony, the court held that the testimony was properly admitted because it involved “firsthand observations and discussions with the child[.]” The latter were properly admitted only to show the child’s state of mind.

Mindy teaches us two things. First, for trial counsel, *never* wait several months before bringing DCF’s suspension of visitation to the trial court’s attention; and if the trial court refuses to rule on your motion to resume visits – or delays ruling – file a single justice petition under G.L. c. 231, § 118. Second, for appellate counsel, if you are arguing that DCF’s suspension/termination of visitation harmed your client’s chances at the termination trial, you must show actual harm. This is not easy to do. Contact CAFL administration, and we can brainstorm.

1. Adoption of Lucia, 85 Mass. App. Ct. 1127, No. 13-P-1849 (June 25, 2014). In Lucia, there was no question of parental unfitness; rights were terminated soon after the child’s birth in March 2011. The only issue on appeal was whether the Juvenile Court properly selected DCF’s adoption plan (adoption by foster parents) over the parents’ and child’s plan (adoption by paternal grandfather and his wife). The Appeals Court held that the Juvenile Court abused its discretion in choosing the DCF plan because the trial judge made several clearly erroneous findings and failed to make other important findings. Specifically, the trial court failed to make findings about the foster parents’ ability to care for the child long-term, the viability of the foster parents’ “succession plan” should they be unable to do so, and whether the number of biological and foster children in the foster parents’ home impacted their ability to care for the subject child. The panel remanded for further findings on those issues. The panel rejected the father’s argument that there should be a presumption that kinship adoption serves a child’s best interests. The panel also declined to express any opinion about which plan actually served the child’s best interests.

**Writing Tips**

**Making a Better “Summary of the Argument”**

Many of the Summaries we see in CAFL briefs don’t conform to the Rules. You must include a Summary of the Argument if your Argument is more than 24 pages. See Mass. R. App. P. 16(a)(4). Rule 16(a)(4) provides that the Summary must (a) include references to the corresponding pages in the Argument, (b) be in paragraph form, and (c) not merely repeat the Argument headers.

How is a Summary of the Argument different from your Argument headers? An Argument header tells the panel – in one sentence – what you *will* prove. A Summary of the Argument paragraph actually proves it, usually in several sentences (but in less detail than in the Argument). Here is an example of a good Argument header, followed by a good paragraph from a Summary of the Argument:

Argument header:

1. The trial court erred in allowing DCF’s experts and the Child’s treating professionals to vouch for the Child’s credibility, compare her to sexually abused children, and testify that the Child was, in fact, sexually abused.

Corresponding paragraph in the Summary of the Argument:

The trial court allowed DCF’s experts and the Child’s treating clinicians to vouch for the credibility of the Child, testify that she was sexually abused by Father, and compare her to sexually abused children. This Court has long held that such vouching and comparisons are improper and warrant reversal. While the trial judge in this case claimed that he did not credit the expert vouching, the findings show that he did, in fact, rely on it extensively. Several key findings reflect that the experts believed that the child was telling the truth. This prejudicial error requires a new trial. (See pages 33-38).

Even if your Argument is too short to require a Summary, it is a good idea to include one. It is an opportunity to give the Appeals Court a preview of your arguments. Why pass up an advocacy opportunity? If your Summary is compelling, you may be able to convince the judges that you should win even before they read your Argument.

**Practice Tips**

# Captions

# We are still seeing incorrect captions on briefs. The Appeals Court captions all orders and notices as “Department of Children and Families v. Sarah L.” You can use that caption, too, on any motions filed in the Appeals Court prior to briefing. But regardless of the caption used by the Appeals Court, Joseph Stanton, the Appeals Court Clerk, has instructed us to caption our briefs as follows:

* For termination appeals, use “Adoption of Lisa S.” (where Lisa S. is the only subject child) or “Adoption of S. Children” (where there is more than one S. child). If the children have different last names, you may use “Adoption of Lisa S. and Peter H.”
* For care and protection/permanent custody appeals, use “Care and Protection of Lisa S.” or “Care and Protection of S. Children”
* For guardianship appeals, use “Guardianship of Lisa S.” or “Guardianship of S. Children”
* For CHINS appeals, use “Matter of Lisa S.”

And remember, please, please, please *never* use last names of parents and children on the cover or in the text of your brief.

# Unnecessary Motions

# You do not need to file a separate “motion to docket appeal.” Your motion to waive the docketing fee (with supporting affidavit) is sufficient. If you wish, you can include a request that the Appeals Court docket the appeal in your cover/filing letter for the motion and supporting affidavit.

# Also, you do not need to file a “motion to impound”; just write “Impounded” in bold letters at the top of your brief (and at the top of all other filings).

# Don’t Skip out on Your Oral Argument.

# Nervous before oral argument? We’ll moot-court you. *Really* nervous? We’ll talk you down. Just don’t do what Mr. Finn, below, did.

# Lawyer is suspended for faking illness to avoid oral argument

Posted Mar 19, 2014 10:36 AM CDT  
By [Debra Cassens Weiss](http://www.abajournal.com/authors/4/)

An Illinois lawyer will be suspended for 60 days for faking an illness to avoid oral arguments before the Chicago-based 7th U.S. Circuit Court of Appeals.

Michael Joseph Finn was suspended by consent in an [Illinois Supreme Court order](https://www.iardc.org/co_recentdiscdec_copy95.html) issued on Friday.

Finn initially told the court clerk he had vomited the morning of April 14, 2011, and he could not make oral arguments that day, according to a petition filed by the Illinois Attorney Registration and Disciplinary Commission. Finn also asserted he was ill in an initial response to ethics authorities.

Finn later admitted, however, that he had not been truthful. Finn felt unprepared for oral arguments, and that was the reason he missed the court appearance, the petition says. The matter was the first 7th Circuit criminal appeal that Finn had handled by himself.

The 7th Circuit held oral arguments without Finn, and Finn’s client lost the appeal. In an order to show cause, the appeals court said Finn should supply medical documentation of his illness, such as a certificate showing his admission to a hospital emergency room. Finn supplied no documentation and he admitted he was medically capable of attending oral argument, according to the 7th Circuit opinion. The appeals court fined Finn $1,000.

“To leave a client unrepresented on the morning of oral argument is nothing short of appalling,” the 7th Circuit said. Ethics regulators opened an investigation after receiving a copy of the [opinion](http://caselaw.findlaw.com/us-7th-circuit/1580353.html).

Finn is also required to pay $5,000 restitution to reimburse legal fees paid by his client’s mother and to repay the state’s client protection fund for any payments made as a result of his conduct.

Finn did not immediately respond to a phone message seeking comment.

Oral argument can be nerve-wracking. We’ll do everything we can to make it easier for you.