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MEMORANDUM

To: Andy Cohen

From: [Intern]

Date: November 23, 2015

Re: Hearsay Statements by DCF’s Internal “Specialists” and by Foster Parents - Are They “Admissions” against DCF?

**Question Present**

Are favorable hearsay statements made to a DCF social worker by (1) a DCF domestic violence counselor and (2) a foster parent admissible as vicarious admissions (or vicarious statements of a party-opponent) against DCF when offered by an adverse party?

**Short Answer**

(1) Yes. Statements made by a domestic violence counselor, or other DCF employee, may be admitted against DCF as an admission or statement of a party-opponent when offered by an adverse party.

(2) Probably. Foster parents are not DCF employees. But they are doing the work that DCF would itself have to do but for DCF’s decision to contract it out to a private agency. Accordingly, by analogy to *Adoption of Vidal* (assessment contracted out to private agency by DCF that would be an official record if written by DCF employee is, itself, an official record), foster parents’ out-of-court statements *may* be admitted against DCF as admissions or statements of a party-opponent when offered by an adverse party.

**Facts**

 DCF social worker Alice Allen (“Social Worker”) spoke with Mother’s domestic violence counselor, Mary Maynor (“Counselor”), to discuss Mother’s progress. Counselor stated that “Mother has benefited greatly from counseling and understands her options to secure a safe and healthy environment for herself and her daughter.” Social Worker also met with the foster mother, Carrie Crane (“Foster Parent”). Foster Parent told her that visits between Mother and her daughter have been successful, safe, and loving, and that Daughter is excited to return to a new home with Mother. During Social Worker’s trial testimony, Mother’s counsel sought to admit Counselor’s and Foster Parent’s favorable hearsay statements about Mother’s progress as admissions against DCF. DCF counsel objected. The judge asked for memoranda on the issue.

**Analysis**

Vicarious admissions permit a witness to “testify to the out-of-court statement of an agent of a party.” *See* *Chan v. Chen*, 70 Mass. App. Ct. 79, 83 (2003). Vicarious admissions are admissible when “offered against a party and . . . [they are] made by the party’s agent or employee on a matter within the scope of that relationship and while it existed.” Mass. Guide Evid. 801(d)(2)(D) (2015); *see* *Ruszcyk v. Sec. of Pub. Safety*, 401 Mass. 418, 420 (1988); [*Thorell v. ADAP, Inc.*, 58 Mass. App. Ct. 334, 339 (2003)](https://advance.lexis.com/document/documentlink/?pdmfid=1000516&crid=c0333b9d-47e6-49c3-8646-5deae274475e&pddocfullpath=%2Fshared%2Fdocument%2Fcases%2Furn%3AcontentItem%3A48V2-4SK0-0039-40V8-00000-00&pdpinpoint=PAGE_339_3213&pdcontentcomponentid=7682&pddoctitle=Thorell+v.+ADAP%2C+Inc.%2C+58+Mass.+App.+Ct.+334%2C+339%2C+789+N.E.2d+1086+%282003%29&ecomp=49vfk&prid=c4fe10cc-9ab8-4f92-b901-0301569bc20b). The trial judge, when determining the admissibility of a vicarious admission, must determine “whether the declarant was authorized to act on the matters about which he spoke.” *Chen*, 70 Mass. App. Ct. at 83. The judge must then decide “whether the probative value of the statement substantially outweighs its potential for unfair prejudice.” *Id.*; *Ruszcyk*, 401 Mass. at 422-23. The judge should also consider “the credibility of the witness; the proponent’s need for the evidence, e.g., whether the declarant is available to testify; and the reliability of the evidence offered, including consideration of whether the statement was made on firsthand knowledge and of any other circumstances bearing on the credibility of the declarant.” *Chan*, 70 Mass. App. Ct. at 83 (citations omitted).

DCF Domestic Violence Counselor

 A hearsay statement is admissible if it is made by a party’s “agent or *employee*” regarding “a matter within the scope of that relationship [ ] while it existed.” Mass. Guide Evid. § 801(d)(2)(D) (2015) (emphasis added). In *Ruszcyk*, the commandant of the police academy where Ruszcyk was injured told the chairman of the board of selectman and the police chief that the injuries were caused by a trooper kicking the door in on Ruszcyk. *See* 401 Mass. at 419-20. Ruszcyk sought to admit the commandant’s statement as an agent of the police academy, but the trial judge excluded the testimony as inadmissible hearsay. *Id.* at 420. The Massachusetts Supreme Judicial Court found that the commandant’s statement regarding the cause of the injury was within the scope of his employment because his duties involve receiving reports of investigations of incidents. *See id.* at 424. Thus, other police department employees could testify to the commandant’s statement to them, and such statements were admissible against the police department as vicarious admissions so long as the potential for unfair prejudice toward the defendant did not substantially outweigh the probative value of the evidence. *See id.*

 Here, Counselor is an employee of DCF. Counselor’s scope of employment includes meeting with mother, formally or informally evaluating Mother’s progress, and discussing Mother’s progress with Social Worker. Counselor’s statements would not have a substantial prejudicial effect on DCF that outweighs its probative value in the case. Accordingly, under Mass. Guide Evid. § 801(d)(2)(D) and *Ruszcyk*, Counselor’s statements are admissible against DCF as vicarious admissions when offered against DCF by Mother.

Foster Parents

As noted above, a hearsay statement is admissible if it is made by a party’s “*agent* or employee” regarding “a matter within the scope of that relationship [ ] while it existed.” Mass. Guide Evid. § 801(d)(2)(D) (2015) (emphasis added). In an unpublished Appeals Court decision, *Reardon v. Boylan*, 2014 Mass. App. Unpub. LEXIS 331 (March 17, 2014), the panel applied *Ruszcyk* to the out-of-court statements of successor counsel in a malpractice action against former counsel. Successor counsel sent an email to his co-counsel discussing information the client (Reardon) told him. That information contradicted certain allegations Reardon had raised against his former counsel. The trial court analyzed the issue of admissibility of the email under *Ruszyck*, and admitted it as a vicarious admission by Reardon’s agent. The panel agreed with the trial court:

*Ruszcyk* mandates a two-step inquiry. The first step is whether the declarant (here, [successor counsel]) was an agent or servant of Reardon's who was authorized to act on the matter about which he spoke. This step was plainly satisfied, because there can be little doubt that in making his statements in order to brief co-counsel, [successor counsel] was an agent or servant of a party (Reardon) and was acting within the scope of his employment.

*Reardon*, at \*11-12. The panel then addressed whether the probative value of the email outweighed its potential prejudicial value, concluded that it did, and affirmed the trial court’s decision. *See also Chan*, 70 Mass. App. Ct. at 85-86 (applying *Ruszcyk* to statements of real estate brokers, but finding that they were not agents of the defendant-principal because the real estate brokers were acting against the principal’s interests at the time of the statements). *Cf*. Fed R. Evid. 801(d)(2)(D) (stating that agent’s statements cannot be imputed to principal if agent and principal have conflicting litigation positions).

Foster parents are not employees of DCF, but they are agents of DCF. They are expressly authorized to act for DCF, as a child’s legal custodian, in the day-to-day care of the child. They are authorized to discuss with DCF all aspects of that care, including observations of the child before, during, and after visits, and observations of others at visits.[[1]](#footnote-1) Because foster parents are agents of DCF, their statements made “within the scope of that relationship [ ] while it existed,” Mass. Guide Evid. § 801(d)(2)(D), are admissible as admissions or statement of a party opponent against DCF.

In addition, for hearsay purposes – albeit, perhaps not for other purposes – foster parents should be treated like DCF employees under *Adoption of Vidal*, 56 Mass. App. Ct. 916, 917 (2002). In *Vidal*, a foster care agency, contracted by DCF, created written assessments of the needs of the child. *See id.* Such assessments become part of DCF’s records. *See id.* According to the Appeals Court in *Vidal*, “[a]n assessment completed by one employed by an organization under contract with [DCF] is the functional equivalent of an assessment undertaken by a person employed directly by [DCF].” *Id.* at 917; *see* 110 CMR 7.002(3) (stating “[a]ll written contracts between the Department and any provider shall obligate the provider to comply with all of 110 CMR, service delivery standards, and policies”). Because the private agency’s assessments were the functional equivalent of DCF’s own assessments, the trial court properly admitted them as “official reports.” *See* *Vidal*, 56 Mass. App. Ct. at 916.

By analogy, if a written task contracted out by DCF to a private agency satisfies a hearsay exception (official records) if the written product is the functional equivalent of DCF’s written product, a verbal or written statement by a foster parent should also satisfy a hearsay exception (admissions or statement of a party opponent) if the foster parent is performing a task that is contracted out by DCF but would otherwise be performed by DCF. DCF, as legal custodian of children, is responsible for their care. *See* G.L. c. 119, § 21. As legal custodian, DCF must take care of children’s daily needs, as well as determine their place of abode, visits, and medical care. *Id*. An agency can only do so through a caretaker/custodian – that is, a foster parent. DCF would have to provide its own foster parents were it not for its ability to contract that service out to private agencies. Foster parents’ work – like that of the agency in *Vidal* – is the “functional equivalent” of work that would have to be done by DCF employees.

Finally, foster parents are “public employees.” A “public employee” who is acting within the scope of her employment is entitled to “both individual immunity from negligence claims and legal representation by the Commonwealth.” *See* *Archer ex rel. Goodwin v. Dare Family Servs.*, 14 Mass. L. Rep. 375, \*6 (2002); G.L. c. 258, § 10(b). In *Perez v. Sugarman*, the private institutions that took custody of the children were “performing a function public or governmental in nature and which would have to be performed by the Government but for the activities of the private parties.” 499 F.2d 761, 765 (2nd Cir. 1974). The private foster caregivers were stepping into the shoes of the government, as “state actors,” and were entitled to state protection. *Id.* If foster parents are performing a “public or governmental” function, and are protected as if they were state employees, their statements should be treated the same as statements by state employees. On this basis, as well, statements by foster parents should be treated as vicarious admissions when made within the scope of their work for DCF.

**Conclusion**

 DCF “specialists” such as Counselor may make vicarious admissions (when offered by an adverse party against DCF) based on their employment relationship with DCF. Foster parents are agents of DCF; their statements, too, may be vicarious admissions (when offered by an adverse party against DCF), where the statements are made within the scope of the foster parents’ work for DCF. In addition, by analogy to *Vidal*, foster parents may make vicarious admissions against DCF because they are doing the work that DCF employees would have to do but for DCF’s decision to contract the work out to a private agency. Finally, foster parents are “state actors” who are treated as employees for liability purposes under many circumstances. As such, their statements as “state actors” should be treated as vicarious admissions against DCF.

In this case, all statements by Counselor to Social Worker and by Foster Parent to Social Worker are admissible against DCF when offered by Mother.

1. Moreover, to ensure that foster parents do their jobs well and safely, DCF intensely regulates them. *See, e.g.,* 110 CMR 7.100 (discussing eligibility of foster parents); 110 CMR 7.104 (providing standards for foster parent licensure); 110 CMR 7.106E (permitting limitations and regulations of contracted foster parents); 110 CMR 7.107 (explaining assessment and licensure of foster parents). [↑](#footnote-ref-1)