***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 Staff

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

 Katrina McCusker Rusteika, Staff Attorney, CAFL Division

 Lisa Augusto, Staff Attorney, CAFL Division

Re: Administrative Matters

 Recent Decisions

 Practice Tips

Date: December 7, 2017

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**Administrative Matters**

1. New Appeals and Appellate Assignments

If your client is appealing a final judgment (termination, permanent custody, permanent guardianship, and a handful of other orders), please send a copy of the notice of appeal, the motion for appointment of appellate counsel, and an appellate assignment intake form to Katrina so that she can assign appellate counsel. She can be reached at (617) 910-5843 or krusteika@publiccounsel.net.

Here is a link to the intake form and other key documents: <https://www.publiccounsel.net/cafl/professional/administrative-matters-and-forms/>

For appellate attorneys, contact Katrina if you want a new appellate assignment or if you need an appeal reassigned.

Please do not send any documents, questions, or requests to Jaime Prince’s old email address.  It no longer works; emails to that address will disappear into the ether.  Thank you for your patience.

1. Moot Courts

If you get 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 two CLE credits for the current fiscal year.

1. Single Justice Practice

Need help with a single justice petition? We have new model petitions and memoranda of law available in Word format, focusing on problems at 72-hour hearings. We are happy to email them to you. We also have model single justice motions, checklists, and other resources on our website (and also in Word format), at <https://www.publiccounsel.net/cafl/professional/single-justice-practice/>. Please contact Lisa with any questions or to request a model petition to get you started. She can be reached at (617) 910-5738 or laugusto@publiccounsel.net.

D. Appellate Panel Certification Training

We are now accepting applications for the CAFL appellate panel certification training on May 1-3, 2018 in Worcester. If you know someone who might be interested in child welfare appellate work, please send him/her this link to the May 2018 application materials: <https://www.publiccounsel.net/cafl/training/>. Completed applications are due by March 23, 2018.

**Recent Decisions**

1. Published Decisions

Since our last bulletin, the SJC and Appeals Court have issued published decisions relevant to our practice. Those cases are:

* Care and Protection of Walt, 478 Mass. 212 (2017) (on reasonable efforts prior to removal and the court’s authority to make remedial orders where it finds DCF failed to make reasonable efforts);
* Care and Protection of Vieri, 92 Mass. App. Ct. 402 (2017) (on judge’s ability to draw a negative inference that a home remains in poor condition where a parent refused access to DCF and other collaterals);
* Adoption of Talik, 92 Mass. App. Ct. 775 (2017) (on whether a trial judge may draw an adverse inference from a parent’s failure to appear).

The CAFL Training Unit has written summaries of these cases on our website at: <https://www.publiccounsel.net/cafl/professional/relevant-statutes-and-case-law/summaries-of-recent-decisions/>.

1. Unpublished Decisions

This bulletin catches us up through August 9, 2017. 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.

We still see Rule 1:28 decisions cited incorrectly in briefs. Remember, if you cite to a Rule 1:28 decision, 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.

Rule 1:28 decisions are 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 Rhonda, 90 Mass. App. Ct. 1124, No. 16-P-403 (January 9, 2017).**

Rhonda suggests that the trial court can schedule a termination trial less than six months after a parent is adjudicated at a care and protection trial, and that the termination trial is not a “review and redetermination” under G.L. c. 119, § 26(c) but a separate proceeding. In Rhonda, DCF filed a motion requesting dates for a termination trial pursuant to G.L. c. 210, § 3 the day before the care and protection trial was conducted. The next day, the trial court adjudicated mother unfit and the child in need of care and protection, and then scheduled a termination trial for four months later. The court terminated Mother’s rights at the later trial. Mother argued on appeal that DCF’s motion for termination trial dates was, in fact, a petition for review and redetermination under G.L. c. 119, § 26(c), which could not be heard sooner than six months after the care and protection adjudication. The panel disagreed, reasoning that, while a termination proceeding and care and protection proceeding usually are consolidated, they are “separate and distinct inquiries.” As a result, the six-month waiting period under § 26(c) for reconsideration of a care and protection adjudication did not apply.

The reasoning here is befuddling. While a care and protection case and a termination case *can* be separate proceedings – *i.e*., if the care and protection petition is filed in juvenile court and the termination petition is filed in the probate and family court – they *aren’t* separate proceedings in the juvenile court under c. 119 and weren’t separate in Rhonda. Termination is just another dispositional option under c. 119, § 26, and the c. 210, § 3 factors are simply incorporated into the juvenile court judge’s c. 119, § 26 termination analysis. DCF shouldn’t be allowed to skirt the plain language of c. 119, § 26(c) just because it decides to call the next trial a “termination trial” instead of a “review and redetermination.”

That said, attorneys should be aware that DCF might cite to this badly-reasoned decision and seek a “termination trial” less than six months after adjudication. If your client is stipulating to the adjudication in order to buy more time, that extra time should be specifically set forth in the stipulation. After Rhonda, counsel can’t guarantee that the “termination trial” – that is, what *should be* the review and redetermination hearing – will be six months later.

1. **Adoption of Quan, 91 Mass. App. Ct. 1102, No. 16-P-899 (January 19, 2017).**

In Quan, the parents argued on appeal that the trial procedure – using oral proffers by DCF counsel in lieu of direct testimony from the DCF ongoing and adoption workers to establish the uncontested facts of the case – violated their due process rights. The panel agreed that this was error. Because trial counsel did not object to the procedure, the panel considered whether the case presented “exceptional circumstances” warranting relief but concluded that there was “no manifest injustice warranting a new trial” and affirmed. The circumstances did not warrant a new trial because all counsel had stipulated to the content of the proffers and had an opportunity to cross-examine the workers, but declined. Still, the panel’s warning language in Quan is worth repeating:

Although we discern no cause in the present case to disturb the decrees, we observe that the proffer procedure employed by the judge, though perhaps offering some benefit of efficiency, is of concern. The fundamental rights at stake in a proceeding to terminate parental rights are significant, and proffers by counsel simply cannot furnish the same depth of evidence that live testimony from the witnesses themselves would provide. While we recognize the need to manage busy court calendars, in circumstances such as those in the present case, where the witnesses were present and available to testify, the substitution of proffers for live testimony should be avoided, or at least limited to relatively minor portions of their testimony, barring exceptional circumstances.

The take-away for trial counsel? Cases shouldn’t be tried by oral proffer, even if the contents of the proffer are agreed upon, unless the information covered by the proffer is minor (*i.e*., “The parties will stipulate to the proffer that Mother’s upstairs neighbor, Ms. Jones, would testify that she never heard any yelling or loud noises from Mother’s apartment.”) If DCF attempts to try the case by oral proffer, object and explain how the live testimony will likely differ from the proffer and why it matters to the case. That is the best way to preserve this issue for appeal.

For appellate counsel, the quote above from Quan can be cited whenever the trial judge employed a “time-saving” or docket-management procedure that abridged the client’s due process rights.

1. **Adoption of Camille, 91 Mass. App. Ct. 1110, No. 16-P-1160 (March 9, 2017).**

Camille is an appeal from the dismissal of Mother’s appeal of a decree terminating her parental rights. Mother failed to file an affidavit of indigency (presumably in support of her motion for appointment of appellate counsel and her motion for fees and costs) for several months after filing her timely notice of appeal. The delay was caused by her out-of-state incarceration and problems with mail at the facility. (Mother’s trial counsel had filed a detailed and uncontroverted affidavit outlining the reasons for the delay.) Nevertheless, the children moved to dismiss the appeal, and the judge dismissed it for failure to prosecute. On appeal, DCF jumped on board and argued that the judge properly dismissed the appeal because the delay prejudiced the children’s right to “stability.” DCF also argued that the court properly dismissed the appeal because it lacked merit.

The Appeals Court disagreed. Section 27B of G.L. c. 261 (the Indigent Court Costs Act) provides that, “[u]pon *or* after commencing . . . any civil, criminal or juvenile proceeding or appeal in any court, . . . any party *may* file with the clerk an affidavit of indigency [in support of a motion for fees and costs.]” (Emphasis in opinion, added to statute). Accordingly, a contemporaneous filing of an affidavit of indigency is not required – the statute does not use the word “shall” – when filing a notice of appeal. In addition, parents have a due process right to the care and custody of their children that cannot be impinged upon without due process, and due process includes the right to be heard in a meaningful manner. The judge’s action here deprived Mother of an opportunity to be heard on appeal in a meaningful manner. Finally, the judge reasoned that Mother had not shown excusable neglect with respect to her affidavit of indigency. The panel held that this was an abuse of discretion. Mother’s counsel’s uncontroverted affidavit laid out many reasons why the delay was attributable to factors beyond Mother’s control.

The panel vacated the order dismissing the appeal. In a footnote, it refused to address DCF’s argument that the appeal lacked merit: “[I]t would be difficult to [express an opinion on the merits of the appeal] as the mother’s motion for appellate counsel and production of a transcript and other materials necessary to decide such an appeal was denied.” Well said! How could the panel assess the merits of the appeal without a transcript and without counsel’s arguments on Mother’s behalf?

This is a great decision for many reasons, and it offers several practice pointers for parents’ and children’s counsel. For trial attorneys, it’s always best practice (and the most efficient use of your time) to have your client sign both the notice of appeal and an affidavit of indigency (in support of the motion for appointment of appellate counsel and motion for fees and costs) at the same time. If you can’t file your client’s affidavit of indigency along with your various appellate motions, submit an affidavit of counsel explaining the delay. For children’s counsel (if supporting termination), don’t be so fast to jump on the dismissal bandwagon. Instead, work with parent’s counsel on an agreed-upon date for the filing of the affidavit (or whatever else is late), then get the court to order that agreed-upon date as a deadline. For appellate counsel, remember that appeals are delayed for many reasons that are not the client’s fault. Explain those problems to the trial court and/or the Appeals Court single justice. Invoke due process. Cite to Camille. Circumstances beyond a client’s control should not deprive the client of an opportunity to be meaningfully heard on appeal.

1. **Guardianship of Geneva, 91 Mass. App. Ct. 1119, No. 16-P-1189 (May 1, 2017).**

The probate and family court found Father unfit and awarded permanent guardianship of Geneva to her paternal grandparents. Father appealed. The case is of little interest other than as a reminder of the importance of issue preservation.

Father argued on appeal that the trial judge erred in keeping the evidence open for the purpose of admitting results of a drug test but failing to provide him with an opportunity to present rebuttal evidence. The panel concluded that father waived this argument by not raising it at trial:

The judge stated at the start of trial that he intended to “keep the evidence open for the sole purpose of getting the results of a drug test.” The father did not object. Although he did raise an objection later in the trial, it is clear that he was objecting not to the judge’s decision to keep the evidence open, but to the underlying order that he submit to a drug test. Moreover, when the test results were received, the father did not ask the judge for the opportunity to submit additional evidence. The father thus failed to preserve his objection to the admissibility of the results. *See* [*Adoption of Kimberly*, 414 Mass. 526, 534-535 (1993)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993066767&pubNum=0000521&originatingDoc=I408354a0303811e7bc7a881983352365&refType=RP&fi=co_pp_sp_521_534&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_521_534).

The takeway? When the judge enters an unfavorable procedural order, you must object. But objecting alone is often not enough to properly preserve the issue. If the judge reopens the evidence for DCF, you must object *and* insist that you (a) have an equal right to reopen to present evidence favorable to your client, and (b) have a meaningful opportunity to rebut DCF’s evidence as a matter of due process.

1. **Care and Protection of Halona, 91 Mass App. Ct. 1119, No. 17-P-148 (May 2, 2017).**

In Halona, Mother argued that the Juvenile Court erred in precluding her from presenting evidence at a permanency planning hearing. The panel agreed: “[T]he judge’s failure to allow Mother to present evidence was an error that affected the integrity of the hearing.” It vacated the findings and judgment from the permanency hearing, remanded the case to the Juvenile Court for a hearing where Mother would be given an opportunity to present evidence, and ordered that the case be assigned to another judge. The panel does not explain why the case should be heard by another judge, but remands to different judges don’t usually happen unless a panel is convinced that the same trial judge can’t rule on the case fairly on remand.

If a trial judge in your case is reluctant to take evidence at a permanency planning hearing – as it often is when the permanency hearing pre-dates the trial – you must object and make an offer of proof as to what evidence you would elicit at that hearing. Also, give the court a copy of Halona.

1. **Adoption of Ivy, 91 Mass. App. Ct. 1128, No. 16-P-1485 (June 15, 2017).**

Ivy addresses three issues concerning interpreters.

First, if a parent believes that he needs an interpreter, he must ask the court for one. In Ivy, the Father argued on appeal that the court erred in failing to *sua sponte* give him an interpreter for a care and protection stipulation. The panel disagreed. The father had lived in the United States for 14 years, attended an English-speaking vocational school and obtained HVAC licensure, answered questions during the colloquy with more than “yes or no” answers, and both Father and his attorney affirmed that Father understood the stipulation.

Second, the court has wide discretion in determining whether a parent needs an interpreter, and discretionary calls by trial judges are rarely overturned on appeal. The panel held that the trial judge did not abuse his discretion in failing to appoint an interpreter for Father *sua sponte* based on the facts noted above.

The third issue concerns prejudice. Under certain circumstances, the absence of an interpreter for a parent might be a structural error that requires a new trial without resort to a harmless error analysis. But not in this case. In Ivy, nine months after Father’s stipulation, the court held a termination trial. At the start of that trial, Father requested a Swahili interpreter. The judge granted the request, and Father had an interpreter for the entire termination trial. According to the panel, even if Father should have had an interpreter for the stipulation, the lack of one didn’t prejudice Father. The stipulation was not admitted as an exhibit at the termination trial, the judge’s termination findings did not rely on the stipulation, and Father was able to fully defend his rights at the termination trial with an interpreter, which cured any defect.

Here are some rules of thumb regarding clients whose first language isn’t English. If your client needs an interpreter, ask for one right away. If your client *might* need an interpreter, err on the side of asking for one. File a motion for funds for an interpreter to help you converse with your client outside of court. And, of course, make sure the client understands the finer details of what you (and the judge) are saying, not just the basic ideas.

1. **Care and Protection of Polly, 92 Mass. App. Ct. 1103, No. 16-P-80 (August 9, 2017).**

In Polly, Mother appealed the juvenile court’s unfitness finding and its failure to order visitation with her twin daughters after awarding permanent custody to Father. The panel affirmed the court’s unfitness finding, but remanded for further proceedings on the visitation issue.

The trial judge refused to order visits because permanent custody was awarded to Father; as a result, she believed that visits were purely left to his discretion. The panel disagreed. Parents retain the residual right of visitation if their rights aren’t terminated, see Care & Protection of Thomasina, 75 Mass. App. Ct. 563, 573 (2009), and they are “entitled to visitation with their child so long as the visits are not harmful to ‘the welfare of the child and the public interest.’” Adoption of Rhona, 57 Mass. App. Ct. 479, 488 (2003), quoting G.L. c. 119, § 35. Whether to order visits is squarely within the judge’s discretion, but the failure to exercise that discretion was error. See Lonergan-Gillen v. Gillen, 57 Mass. App. Ct. 746, 748-49 (2003). Because the judge refused to consider the issue, the panel remanded.

Trial judges often decline to enter visitation orders when permanent custody is awarded to a parent – usually the previously-non-custodial parent – and say that the parents should deal with the issue themselves in the probate and family court. Polly clearly states that this is improper; the juvenile court can and should enter a visitation order if it is in the best interest of a child. If your parent client’s rights have not been terminated – or if you represent a child who wants visits with a parent whose rights have not been terminated – ask for that order, citing Polly.

Polly also has good language regarding judicial bias. During a settlement discussion prior to completion of the trial and prior to mother’s testimony, the judge made negative comments about Mother’s credibility. Also, before hearing any evidence on these points, the judge commented that Mother’s divorce seemed to be a sham and that her injuries might have been caused by her ex. The panel criticized the judge, stating that, as in Adoption of Tia, 73 Mass. App. Ct. 115, 119-124 (2008), her comments were “troubling and should not have been made.” Although the panel determined that her decision was supported by the record, it noted that “commenting on issues of fact and the credibility of a witness well before that party has testified are precisely the type of statements that can sow seeds of doubt as to the fairness of the trial.” Good language, to be sure, but a remand to a different judge would have made a stronger statement.

**Practice Tip 1 – De novo review for findings of fact based on documentary evidence**

This practice tip comes from a recently published criminal case, Commonwealth. v. Tremblay, 92 Mass. App. Ct. 295, 301-02 (2017). Tremblay is important because it reminds us that findings of fact based on documentary evidence are not reviewed under the clearly erroneous standard.  Rather, they are reviewed de novo by the panel, because the panel is in as good a position as the trial judge to view and assess the evidence:

As the Supreme Judicial Court has stated, "[w]e have consistently held that lower court findings based on documentary evidence available to an appellate court are not entitled to deference."  Commonwealth v. Novo, 442 Mass. at 266.  This is because we are in as good a position as the judge to view and assess such evidence.  See Commonwealth v. DiGiambattista, 83 Mass. App. Ct. 180, 181 (2013).

The critical question in a case like this, in which the judge heard the testimony of three police officers in addition to the videotape evidence, is whether the controlling facts are attributable to the testimonial evidence or to the videotape, or a combination of the two.  If the controlling facts (here the facts about the degree of the defendant's intoxication) are based on testimonial evidence, we must defer to the judge's findings unless they are clearly erroneous.  Commonwealth v. Hoose, 467 Mass. 395, 399-400 (2014).  On the other hand, if the controlling facts were derived from documentary evidence, we are authorized to review those findings de novo.  Commonwealth v. Clarke, 461 Mass. 336, 341 (2012) ("Here, to the extent that the judge based his legal conclusions on facts found by virtue of a video recording, we are in the same position as the [motion] judge in viewing the videotape" [quotation omitted]).  In this case, the judge's several findings that the defendant was intoxicated during the first and second interviews were based on a combination of documentary and testimonial evidence.  However, the controlling facts that support the judge's ultimate finding that the degree of the defendant's intoxication rendered him incapable of waiving his Miranda rights are based exclusively on documentary evidence.

In the CAFL appellate context, findings based on 51Bs, medical records, or court investigator reports should be reviewed de novo, not under the clearly erroneous standard.

**Practice Tip 2 – Free or low-cost legal research**

Don’t forget to make legal research a routine part of your practice. Cite the best and most recent cases. Find good criminal case analogs or good out-of-state child welfare cases. These can make your brief more interesting to the panel and perhaps create some new law.

In case you missed the brown-bag lectures on legal research this fall, here is a chart\* of the resources that we discussed:

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| **LexisNexis Advance:** basic subscription; optimal for solo-practitioners and limited to MA materials only; approx. $125/month | <https://www.lexisnexis.com/en-us/products/lexis-advance.page> |
| **Westlaw Essentials:** basic subscription; optimal for solo-practitioners and limited to MA materials only; approx. $150/month | <http://legalsolutions.thomsonreuters.com/law-products/westlaw-legal-research/small-law-firms> |
| **MA Reporter of Decisions:** free; search engine for published and unpublished SJC and Appeals Court decisions from 2001 and on; helpful for finding most recent opinions. | <https://www.lexisnexis.com/clients/macourts/> |
| **Trial Court Law Libraries:** locations in every county; free access to Lexis and Westlaw at library; can provide online document delivery service from anywhere, including Shepard’s printouts | <http://www.mass.gov/courts/case-legal-res/law-lib/libraries/locations/> |
| **Social Law Library:** access several research databases, including Fastcase and HeinOnline; in-house research librarian; membership is $430 (if you practice within Rt. 128) or $305 (if you practice outside of Rt. 128) | <http://socialaw.com/> |
| **Fastcase:** research tool giving access to 50 state and all federal case law and statutes; $65/month with month-to-month subscription or $695/year | <https://www.fastcase.com/> |
| **MA Bar Association:** access to Fastcase included with membership; annual membership cost around $430 | <https://www.massbar.org/for-attorneys/fastcase> |
| **Google Scholar:** free research tool giving access to 50 state and all federal case law; has MA published and unpublished decisions | [www.scholar.google.com](http://www.scholar.google.com) |
| **Casemaker:** online research database with 50 state and federal access; performs negative treatment cite check; free for MA bar members and Hampden County bar members; annual subscription is $300 | <https://www.casemakerlegal.com/Products.aspx> |
| **CAFL website:** free; in the “Appellate Resources” link, you will find legal research memos, motion and brief templates, and a table of contents to the due process issue bank with topics that the CAFL admin office has materials on | <https://www.publiccounsel.net/cafl/> |
| **SJC arguments:** free; you can watch SJC arguments online to assist in preparation for oral argument; go to the “Archive” page | <http://www.suffolk.edu/sjc/> |

\*This chart includes only a few of the many online research tools available. CPCS does not endorse any particular research tool or product.

Remember, you can bill for time spent performing research. When filling in your own time records, indicate *what* you’ve researched, not just the time of the research (in case of a billing audit). If you get stuck, don’t know where to start, or just want to bounce ideas off someone, call the CAFL appellate panel administrative staff. We’re here to help.