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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, CAFL Division

Re: Administrative Matters

 Recent Rule 1:28 Decisions

 Practice Tips

Writing Tips

Date: February 28, 2017

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**Administrative Matters**

Farewell to Jaime Prince, CAFL Staff Attorney

As most of you know, after five years with CAFL, Jaime Prince left CPCS on December 15 to pursue other endeavors. I can’t say enough about how much Jaime has meant to CAFL administration and the appellate panel, so I won’t try to do it here. Fortunately, some of Jaime’s new endeavors this coming spring will be CAFL appellate mentoring and training. Jaime has authorized me to let you know that she can be reached to discuss appellate issues at (617) 504-0866 or jaimeprince@gmail.com.

Appellate Assignments

It may be a while until I have a new staff attorney to handle appellate assignments. In the meantime, I will be making all assignments and handling mentor/mentee matters. Please feel free to call me or email me with any requests for new appeals (or any other questions) at (617) 910-5736 or acohen@publiccounsel.net. Please do not send any requests to Jaime’s old email address. It no longer works; requests to that email address will disappear into the ether. Thank you all for your patience.

**Recent Rule 1:28 Decisions**

This bulletin catches us up through July 15, 2016. We have not summarized all unpublished child welfare decisions; rather, we include only those with interesting facts and/or legal issues.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 often 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 Gareth, 89 Mass. App. Ct. 1114, No. 15-P-1317 (March 28, 2016).**

Judges have broad discretion to revisit judgments based on pre-trial incidents that weren’t raised at trial. In Gareth, after a sixteen-day trial, the judge found the mother currently unfit but declined to terminate her rights because DCF’s plan was not in the best interests of the child. However, one month before the close of trial, the mother attacked her disabled sister and got into a fight with police. (DCF didn’t know about this incident at the time of trial.) When DCF brought the incident to the judge’s attention, the judge reopened the evidence and terminated mother’s rights. The panel held that this was permissible:

We have previously recognized that the trial record in these types of actions can be reopened when circumstances warrant it. Given the seriousness of the new incident and the overriding importance of determining the best interests of children based on current circumstances, the judge committed no abuse of discretion or other error of law in reopening the proceedings here. (Citations omitted)

The takeaway? If DCF misses something bad about a parent at trial but discovers it later, that bad information is fair game for a motion to reopen the evidence. The traditional rule for motions to reopen based on newly-discovered evidence – if the “new” evidence was discoverable before trial with reasonable diligence, the movant is out of luck – doesn’t seem to apply. Clearly, the juvenile court doesn’t have to wait for a review and redetermination to revisit an earlier adjudication.

Does Gareth apply if the information is *favorable* to the parent? I don’t see why not. If you learn after trial about a favorable, significant, pre-trial event, consider filing a motion to reopen the evidence along with an affidavit explaining how the event (a) escaped your attention prior to trial, and (b) bears on the best interests of the child. Cite to Gareth; it’s worth a try.

**2.** **Adoption of Lucia, 89 Mass. App. Ct. 1115, No. 15-P-1232 (March 29, 2016).**

This case reaffirms that parents have standing to participate in appellate proceedings involving the adoption plan for the child even when termination is not being appealed. Here is the relevant language:

The [standing] question is controlled in material respects by [*Adoption* of Rico, 453 Mass. 749, 757 n. 16 (2009)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018760105&pubNum=0000521&originatingDoc=I4965f185f5d311e5a807ad48145ed9f1&refType=RP&fi=co_pp_sp_521_757&originationContext=document&transitionType=DocumentItem&contextData=%28sc.Search%29#co_pp_sp_521_757), and [*Adoption* of Douglas, 473 Mass. 1024, 1026 n. 7 (2016)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2038293160&pubNum=0000521&originatingDoc=I4965f185f5d311e5a807ad48145ed9f1&refType=RP&fi=co_pp_sp_521_1026&originationContext=document&transitionType=DocumentItem&contextData=%28sc.Search%29#co_pp_sp_521_1026). Read together, those cases illustrate that parents whose rights are terminated may challenge on appeal visitation and placement orders entered incident to the termination decree through continuation of the same litigation, even if the termination decree is no longer at issue.

Last month, in Adoption of Zak, 90 Mass. App. Ct. 840 (2017), the Appeals Court clarified that parents also retain standing at the trial level if the Appeals Court has affirmed the termination decree but remanded for plan or visitation issues. According to the Zak Court, “We see no principled distinction which would permit a parent to appeal a visitation order, but bar that parent from participating in a remand hearing ordered by the very appellate court that heard the appeal. In short, the parents retained standing here because the remand proceeding was part of the same proceeding to which the parents were already a party.” So let’s hope that standing arguments disappear. That issue is dead (and, I think, should never have been raised to begin with).

**3.** **Adoption of Hannon, 89 Mass. App. Ct. 1118, No. 15-P-891 (April 15, 2016).**

In Hannon, the panel affirmed the finding of unfitness but remanded because the trial judge failed to make findings as to the existence or extent of a bond between the mother and child when addressing post-adoption visitation. The court stated that a judge should consider whether there is a significant, existing bond with the biological parent whose rights have been terminated. “While the judge is not required to make extensive findings on the parent-child bond, she is required to make some findings . . . . The judge in this case did not make any findings as to the existence or extent of the bond between the mother and Hannon.” Accordingly, remand was appropriate “for reconsideration of that portion of the decree addressing postadoption visitation[.]”

**4.** **Adoption of Ursala, 89 Mass. App. Ct. 1120, No. 15-P-1293 (April 27, 2016).­­­**

Ursala teaches an important lesson about harmless error (not to mention the Appeals Court’s continued use of unusual name spellings). The panel noted that the judge’s findings about mother’s mental health were clearly erroneous. (Good work by mother’s counsel!) Under pressure, DCF acknowledged at oral argument that, if the judge’s unfitness finding depended on those findings, reversal would be appropriate. But, in the end, the panel held that the judge’s findings showed mother to be unfit based not just on her mental health but on her history of substance abuse, her deficient care of Ursala, and her inability to meet Ursala’s special needs.

The lesson? You may be able to successfully attack one factual basis for an unfitness finding, but unless you can attack all bases – such that the ultimate conclusion of unfitness is not based on clear and convincing evidence – the error you’ve fought so gallantly to prove will ultimately be harmless. Unfitness may be conceptualized as a stool that rests on a number of legs, each leg representing a parenting deficiency. You can knock out one or two legs, but if the stool is still standing when you’re done, the judgment will be affirmed. That doesn’t mean you have to knock out *all* of the legs – a very wobbly stool may show that the unfitness determination isn’t based on clear and convincing evidence. But you have to take your sledgehammer (saw?) to as many legs as possible. Okay – end of metaphor.

**5. Adoption of Nash, 89 Mass. App. Ct. 1123, No. 15-P-1302 (May 12, 2016).**

Nash has a nice discussion about the admissibility of electronic (Facebook) messages. The mother and her former friend (the pre-adoptive parent) had nasty interactions on Facebook, and the mother sought to introduce the electronic messages. The judge declined to admit them, noting that “it wasn’t clear [from the messages] who was saying what,” and cited concerns about their reliability. The panel held that this was not an abuse of the judge’s discretion:

To establish their admissibility, the proponent of electronic messages must demonstrate that there is sufficient evidence to permit the finder of fact (in this case the judge), to conclude that it is more likely than not that the messages were authored by the person the proponent (here the mother) claims was the author. See *Commonwealth v. Purdy*, 459 Mass. 442, 447 (2011); *Commonwealth v. Oppenheim*, 86 Mass. App. Ct. 359, 367 (2014). See also Mass. G. Evid. [901(b)(11)](https://web.lexisnexis.com/research/buttonTFLink?_m=806519b0cccdc97fdf495f3295ac795d&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b89%20Mass.%20App.%20Ct.%201123%5d%5d%3e%3c%2fcite%3e&_butType=4&_butStat=0&_butNum=12&_butInline=1&_butinfo=ALM%20G.%20EVID.%20901&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLzVzB-zSkAA&_md5=5169c4b78ba741fbb146ab30406006a6) (2016). The mother claims that the judge erred by concluding that she did not meet her burden to establish that the Facebook messages were authentic. The mother relies on *Commonwealth v. Foster F.*, 86 Mass. App. Ct. 734, 737 (2014), in support of her argument. That case is distinguishable, however, because the proponent of the evidence there not only presented an affidavit from a keeper of the records, but also “confirming circumstances” providing a basis for concluding that the records were authentic.  *Ibid.*  In this case, the expert witness testified that he accessed the mother’s Facebook account to pull metadata from the messages, but because the mother was no longer Facebook “friends” with [the pre-adoptive mother], the data showed an unknown account as the originator of the messages claimed to be from [the pre-adoptive mother]. The expert acknowledged in response to the judge’s questioning that the messages could have been altered prior to the expert accessing the account. (Citations shortened).

Fair enough. But how *might* the mother have authenticated the Facebook messages? The judge would probably not have ordered the pre-adoptive mother to turn over her computer or even her account information, had the mother so requested. What does that leave in terms of authentication? Electronic messages can also be authenticated using old-fashioned methods – that is, the “confirming circumstances” mentioned above. The easiest way would have been to have the pre-adoptive mother confirm on direct or cross that she had written the messages. Another way might have been for the mother to show that the pre-adoptive mother often used certain terms, phrases, or nicknames used in the messages. Still another way might have been to prove that only the pre-adoptive mother would have known of the content of her messages. In any case, the mother needed to prove that it was more likely than not that the messages were, in fact, from the pre-adoptive mother. She couldn’t here, despite the expert testimony. For more information on electronic evidence, see the “Evidence” chapter in the two-volume Child Welfare Practice in Massachusetts treatise by Amy Karp, at § 8.2.1(i).

**6. Guardianship of Verity**, **89 Mass. App. Ct. 1124, No. 15-P-778 (May 19, 2016)**

This case – a mother’s petition to remove a guardian – has some good language about what does *not* constitute parental unfitness.

The trial court found the mother unfit and dismissed her petition to remove the grandmother as guardian. In support of the unfitness finding, the judge found that the mother made some “infelicitous posts” on Facebook “reflective of parental frustration.” The panel was not convinced, and held that “[t]he kind of occasional venting of frustration through social media on display here does not amount to a ‘grievous shortcoming[.]” Indeed, “[a] few unseemly comments on social media over a period of months fall far short of a showing that terminating the grandmother’s guardianship would place Verity at serious risk of peril.” The trial judge also relied on mother’s “immaturity” because she didn’t want to give the grandmother much post-removal visitation if she successfully terminated the guardianship. The panel again disagreed: “While desirable, it is not necessarily realistic to expect parties battling for custody to maintain reasonable perspective in the heat of that battle.” What a great quote! Our parent clients say all sorts of uncharitable things about pre-adoptive parents and guardians in the heat of battle, and they are often found unfit because of it. Verity provides your response.

While the mother in Verity displayed some signs of immaturity and poor judgment, that evidence was insufficient to prove unfitness. The panel reversed the judge’s order dismissing the mother’s petition to terminate the grandmother’s guardianship.

**7**. **Adoption of Olav**, **89 Mass. App. Ct. 1125, No. 15-P-1646 (May 26, 2016)**

Olav suggests that the trial court must evaluate post-termination and post-adoption visitation separately, particularly as to children whose adoption prospects are unclear. In Olav, the children had not been placed in pre-adoptive homes. The judge left post-adoption visits to the discretion of the adoptive parents, and the panel held that this was proper. (This is an odd decision, considering there were no pre-adoptive parents identified.) But the panel held – without meaningful explanation or analysis – that the judge’s failure to consider the propriety of post-*termination* visits required remand. Olav therefore suggests – albeit weakly – that judges must consider making orders for post-termination visits whenever a parent or child so requests and the child is not in a pre-adoptive home.

The judge also failed to order post-termination or post-adoption sibling visits, instead leaving it to the discretion of the (as yet unidentified) adoptive parents. The panel, not surprisingly, held that this was an error and remanded on this issue as well.

Use Olav at the trial level to try to pry a post-termination visitation order from a judge, particularly if the child has no pre-adoptive home. At the appellate level, Olav might help you convince a panel that the trial judge erred in failing to order post-termination visits.

**8. Adoption of Yolanda, 89 Mass. App. Ct. 1126, No. 15-P-1327 (June 2, 2016).**

In Yolanda, the judge terminated rights, but never linked his findings to the c. 210, § 3 factors. The panel found this to be problematic but harmless. In footnote 10 it stated:

Despite our conclusion, we reiterate that ‘[o]rdinarily a judge should both reference the statutory requirements and explain their impact.’ Custody of Kali, 439 Mass. 834, 845 (2003). This approach further clarifies the careful and thorough analysis that should be performed by a judge when such important rights are at stake, which promotes confidence and trust in the judicial system.

Another great quote! Use it whenever a judge’s failure to make specific findings casts doubt on his or her “careful and thorough analysis,” leading to a lack of “confidence and trust in the judicial system.”

Yolanda was also a competing plan case. The mother asked for the DCF home finder files about the pre-adoptive parents, but the trial court refused to order the agency to turn them over. The panel found no abuse of discretion. The trial court had held a hearing on the motion and found that the mother’s request was a “fishing expedition” to attack DCF’s plan. In addition, there had been no “threshold showing by affidavit or sworn testimony” that there was something in the records warranting their release. The trial judge also found that the records weren’t relevant or necessary to the mother’s case.

Consider this a roadmap for requests for home finder files. Include an affidavit explaining what you think you’ll find in them and how those records are relevant to the court’s best-interests inquiry on the competing plans. That’s the best – and perhaps the only – way to show harm from the failure to turn the records over.

But what if you don’t know what’s in the home finder files? What if you really are fishing and grasping at straws? Try a couple of arguments that go something like this:

* The court will surely run CORIs on any plan resources your client proposes; DCF may have already done so if you proffered that resource to DCF pre-trial. Moreover, DCF will search its records for your plan resource’s history, if any, with DCF (even as a child). Why should *DCF* have more information on your competing plan resource than you have on DCF’s plan resource? That’s not fair. Why should *the court* have more information about your plan resource than about DCF’s resource? That’s even more unfair. I’m not sure this rises to the level of a due process violation, but if you utter the magic words “due process” and “fundamental fairness” a lot as you object to the judge’s rulings, this will preserve the argument on appeal.
* Even more compelling, how can the court make a balanced best-interests determination when it has unequal information about the competing resources? Courts do get tipped on appeal if they fail to consider all relevant best-interests factors.
* If your fairness and best-interests arguments for turnover of the unredacted home finder records fail, you can ask for the files redacted of all identifying names, addresses, and social security and other numbers. This greatly diminishes the pre-adoptive parents’ privacy concerns. Alternatively, ask for permission to review the records in chambers, without your client. You can promise that you will ask the judge to release to you only those (redacted) portions of the file that are truly relevant to the best-interests analysis. If even that fails, ask that *the judge* to review the home finder records in chambers. As a result, you may not know what’s in them, but at least the judge will know, and that’s almost as good. Most judges aren’t shy about questioning adoption workers about CORI waivers for, and the DCF history of, pre-adoptive parents. If the judge refuses to order DCF to turn over the home finder records and instead gives you one of these second- or third-best alternatives, don’t simply accept it. Object again, follow the court’s instructions, and then renew your objection, explaining why the court’s alternative wasn’t satisfactory (assuming, of course, that it wasn’t). This last part is your offer of proof about how you’ve been harmed by the order. Why must you jump through all of these hoops? Because if the record reflects that you agreed to the judge’s alternative, failed to object to it, or failed to explain to the judge why the alternative was insufficient, you will have waived any objection to the court’s orders.

**9. Adoption of Stan, 89 Mass. App. Ct. 1128, No. 15-P-1623 (June 17, 2016)**

Stan has an important takeaway for trial attorneys. Be careful about letting your client agree to certain service plan tasks.

The mother argued on appeal that, while she did not engage in substance abuse treatment, there was no evidence that she had a substance abuse problem that needed treatment. Therefore, she argued (citing Adoption of Yale, 65 Mass. App. Ct. 236 (2005)), her failure to engage in services was irrelevant. The panel held otherwise. The mother had agreed to DCF’s service plan requirement that she attend substance abuse treatment; accordingly, the trial judge drew a reasonable inference that there was a basis to make substance abuse treatment one of her tasks. Her failure to engage in substance abuse services was therefore an appropriate basis for an unfitness finding.

How this kind of due-process-violating burden-shifting found its way into an opinion, published or not, is a mystery. Can courts really find parents unfit by inference from the tasks DCF puts on its service plans? If DCF suggests that something is “broken,” is it broken unless a parent says it isn’t? Whatever its failings, Stan offers an important lesson: If a parent doesn’t have a particular problem, don’t let her sign a service plan in which she agrees to address that problem. If she wishes to sign the service plan with an objectionable task on it, she should indicate in the “comments” section of the plan that she objects to that task because she does not have a problem of that nature.

**Practice Tip – Judicial Notice of Post-Trial Orders/Docket Entries**

Remember that the Appeals Court can take judicial notice of post-trial decisions and docket entries by the trial judge. In an otherwise unremarkable Rule 1:28 decision, Adoption of Quinzel, 89 Mass. App. Ct. 1126, No. 15-P-1681 (June 6, 2016), the panel noted that it did not have a copy of the trial court’s denial of the mother’s motion for new trial until a later joint motion to supplement the record. That motion to supplement was (at least in Quinzel) unnecessary: “Even were the decision not included in the record, we may take judicial notice of it. See Jarosz v. Palmer, 436 Mass. 526, 530, 766 N.E.2d 482 (2002).” Jarosz itself is actually broader. It stands for the proposition that the trial court can take judicial notice of “the court’s records in a related action.” 436 Mass. at 530.

What does this mean for CAFL appeals? It means that the panel can take notice of post-trial docket entries and orders by the trial court. It does *not* mean that the panel can take notice of post-trial pleadings (although the *fact* that a particular pleading was filed is fair game because the filing is memorialized on the docket), attachments to those pleadings, or arguments made by counsel. As for post-trial orders and docket entries, I still suggest that you file a motion to supplement the record.

As an aside, just what the SJC meant by “related action” in Jarosz is unclear. An earlier care and protection case involving the same parents and children? Probably. An earlier proceeding involving a different child? Or a probate and family court custody action involving the same parties (minus DCF)? Unclear.

**Writing Tip – Block Quotes**

This Garner writing tip is great for those of us (including me) who abuse block quotations.

**LawProse Lesson #266: The plague of block quotations (November 2, 2016). By Bryan Garner.**

What are the primary hallmarks of lazy, mediocre (or worse) legal writers? Pages filled with citations and block quotations. Today we'll focus just on the latter. *The Bluebook* says that any quotation of more than 50 words must be set off in a block. *The Chicago Manual of Style* suggests that a quotation of 100 words or more (at least six to eight lines of text) should be set off. This standard serves the purpose of not having readers feel as if they're mired in a quotation from which they'll never emerge: it shows an end in sight. With double-spaced court papers, it also serves the purpose of condensing, since block quotations are ordinarily single-spaced within double-spaced documents. This point matters much less in an age of word counts as opposed to page counts.

But all this is beside the point: legal readers are notorious for the penchant for skipping block quotations. Hence desperate legal writers boldface and underline words and sentences within their block quotes—thereby underscoring their own ineptitude and highlighting their desperation.

So what's the recommendation? Vow to ban all block quotes. Simply quote 40 to 50 words. Then, if you must continue, add: "The court went on to observe that . . . ." And quote again. Just make sure you never exceed 50 words. You'll find that your paragraphs will become shapelier and your pages more attractive. They might even get read.

Available at: <http://www.lawprose.org/lawprose-lesson-266-plague-block-quotations/>.

(And yes, I’m aware that this is a very large block quote. I’m sorry, Mr. Garner.)