***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, CAFL Division

 Katrina McCusker Rusteika, Staff Attorney, CAFL Division

 Lisa Augusto, Staff Attorney, CAFL Division

Re: Administrative Matters

 Recent Decisions

 Practice Tips

Writing Tips

Date: September 5, 2017

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**Administrative Matters**

1. Upcoming CAFL CLEs

The administrative office will be traveling around the state giving a two-part, three-hour seminar on legal research (brown-bag lunch, one CLE) and procedural due process (two CLEs). Both portions are open to the CAFL trial and appellate panels. The sessions are:

* September 19 at Mass. School of Law in Andover from 1-4 p.m. (legal research brown-bag from 1-2 p.m., with Claudia Bolgen, Esq., of Worcester; due process training from 2-4 p.m., with Andy and Lisa); contact Francis Weiner to RSVP (fweiner@BradleyMooreLaw.com);
* October 19 at Holyoke Community College from 1-4 p.m. (legal research brown-bag from 1-2 p.m. with Katrina; due process training from 2-4 p.m. with Andy and Lisa); contact Sarah Schooley to RSVP (sarahschooley@verizon.net); and
* November 14 at Thomas Crane Public Library in Quincy from 1-4 p.m. (legal research brown-bag from 1-2 p.m. with Steven Rosenthal, Esq., of Sharon; due process training from 2-4 p.m. with Andy and Lisa); contact Drew Don to RSVP (attyadon@hotmail.com).

In addition, Andy and Katrina will be leading a two-CLE brief-writing workshop on “Introductions and Conclusions” in three locations during October. These trainings are limited to ten people each and are only open to CAFL appellate panel members.

* October 3 at the Worcester Law Library from 2-4 p.m.
* October 25 at CPCS, 44 Bromfield Street, 1st floor, from 2-4 p.m.
* Third location and date TBA.

If you’d like to attend the brief-writing training, please email Katrina (krusteika@publiccounsel.net) to register.

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’s old email address.  It no longer works; emails to that address will disappear into the ether.  Thank you for your patience.

1. Appellate Counsel Billing Reminder

Ah, billing. Expensive cases get nabbed in our computer system for a case audit. That’s just the way it is; it’s nothing personal. Please help us process these audits as quickly as possible by sending us contemporaneous billing records that conform to Chapter V, § 24(B) of the Assigned Counsel Manual. Please don’t forget to include your “clock time.” Your time should look something like this:

*Client: Johnson, Michael (father) NAC# D9999999*

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| --- | --- | --- | --- | --- | --- |
| Date | Time | Activity | E-bill Categ. | Actual Time | Time Billed |
| 7/12/2016 | 4:05 – 4:46 p.m. | Mtg with client re appellate issues and aff of indig. | X | 41 mins | 0.70 |
| 7/13/2016 | 8:45 – 9:23 a.m. | Draft motion to docket late | X | 38 mins | 0.60 |
| 7/15/2016 | 11:00 – 11:08 a.m. | P/c with mentor re locating client  | X | 8 mins | 0.10 |
| 8/11/2016 | 12:00 – 4:28 p.m. | Draft argument re UCCJA non-emergency jurisd. | X | 268 mins | 4.50 |

If your contemporaneous billing is handwritten, please make sure it’s legible.

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.

**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:

* Adoption of Yadira, 476 Mass. 491 (2017) (on DCF’s authority to petition to terminate parental rights on behalf of unaccompanied refugee minors whose parents are also present in the U.S.);
* Adoption of Uday, 91 Mass. App. Ct. 51 (2017) (on ICWA compliance and timely reasonable efforts challenges);
* Fazio v. Fazio, 91 Mass. App. Ct. 82 (2017) (on notice and pleading requirements under Servicemembers Civil Relief Act (SCRA));
* Guardianship of Penate/DOR v. Lopez, 477 Mass. 268 (2017) (on special findings required to apply for Special Immigrant Juvenile Status);
* Adoption of Ilian, 91 Mass. App. Ct. 727 (2017) (on evaluation of competing plans); and
* S.M. v. M.P., 91 Mass. App. Ct. 775 (2017) (on the court’s authority to modify post-adoption contact agreement).

The CAFL Training Unit has written summaries of some 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 November 25, 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 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 Beatrix, 89 Mass. App. Ct. 1132, No. 15-P-933 (July 20, 2016).**

Beatrix belongs in the pantheon of great Rule 1:28 decisions. The panel vacated the termination decree of a mother with cognitive limitations based largely on the failure of the trial judge to make “the necessary even-handed assessment” of the evidence. Specifically, the judge’s findings (1) improperly focused on mother’s past unfitness; (2) failed to address uncontroverted evidence of mother’s progress and current fitness; (3) did not include “a well-founded reason for rejecting the parenting assessment performed at the department’s request”; and (4) were internally inconsistent.

The DCF-required parenting assessment was largely positive about mother. The judge rejected it because the evaluator’s background “focused on trauma, not parental functioning,” and he had failed to speak to the maternal grandmother. The panel found that this rationale was not supported by the record. The evaluator had conducted more than fifty parenting assessments, many of those for DCF, and the maternal grandmother was living in Florida, was estranged from mother, and had no knowledge of the mother’s current circumstances. According to the panel, “here the bases for discounting [the evaluator’s] opinion reflect an uneven assessment of the evidence.”

In addition, the panel noted that the absence of findings on the mother’s weekly visits with the child was significant, considering the “voluminous records” and favorable testimony of witnesses who observed the visits. While the judge was free to discredit the records and testimony, “she failed to address this evidence.” The failure to explain her scant visitation findings, and the “incomplete characterization of the uncontroverted evidence before her,” rendered the judge’s conclusion unsupportable.

The panel noted that the judge placed an inordinate amount of weight on an incident that was eight years old and mother’s noncompliance with services at that time, but failed to make findings as to the many years of mother’s more recent compliance with services and perfect visitation attendance. According to the panel, “given the dated nature of the evidence of the mother’s past parenting issues, and in light of the mother’s improved cooperation with the department, it was unduly speculative, without more, to conclude that the mother’s past conduct is predictive of the mother’s conduct in her current, significantly changed, circumstances.”

Beatrix also has great language regarding the department’s obligation to provide services to accommodate parents with disabilities. DCF and the judge placed great weight on the mother’s failure to complete a services journal; further, according to the trial judge, what the mother wrote in that journal “failed to provide any insights as to whether she understood Beatrix’s needs.” The panel was unimpressed. “A journaling requirement for a cognitively impaired parent seems particularly inappropriate, especially where the parent’s inability to complete it with a requisite level of insight is viewed as a failure to comply with that aspect of the service plan.” The panel specifically took the opportunity “to note the department’s ongoing obligation to make ‘reasonable efforts to strengthen and encourage the integrity of the family.’” DCF had concerns about the mother’s cognitive abilities, “yet her service plan failed to include services which could assist the mother in light of her impairment.” On remand, the panel instructed that “the department is required to follow its regulations, which include the creation of an appropriate service plan for the mother.”

The panel vacated the termination decree and remanded for further proceedings. It also specifically retained jurisdiction of any appeal from any future decree – that is, it wanted to make sure that the trial judge didn’t steamroll the mother again.

**2. Adoption of Yancey, 89 Mass. App. Ct. 1133, No. 14-P-1657 (July 21, 2106).**

The mother appealed the termination of her parental rights and the denial of her 60(b) motion for relief from judgment. The panel affirmed both. This case is useful only for the panel’s discussion of the trial judge’s denial of mother’s request for an evidentiary hearing on her 60(b) motion claiming ineffective assistance.

Mother alleged that her trial counsel advised her not to attend the trial. This, she argued, constituted ineffective assistance of counsel and deprived her of an opportunity to be heard. Both mother and trial counsel submitted affidavits that contained significant factual differences. Despite the discrepancies, and the fact that both mother and her trial counsel were present to testify, the judge denied mother’s request for an evidentiary hearing on her 60(b) motion.

The panel noted that the trial judge was “clearly troubled by the attorney-client privilege ramifications of having trial counsel testify” and erred in stating that the privilege would limit the evidentiary hearing to little more than a “one-sided consideration of mother’s live testimony.” The panel explained that the hearing would not have been restricted in this way; when a party claims ineffective assistance, the attorney-client privilege is waived as to any communications relevant to the claim. The panel remanded for clarification from the judge about the bases for his denial of the 60(b) motion. A week later the trial judge issued findings explaining his rationale, which was that the mother’s affidavit was “self-serving and not credible.” The panel held that this was not an abuse of discretion and affirmed the denial of the 60(b) motion.

The lesson from Yancey? It is very hard to win a 60(b) motion when the relevant facts come down to a he-said/she-said spat with trial counsel, because the judge will likely determine that the parent is less credible than her trial counsel. In a he-said/she-said scenario, appellate counsel will have to come up with other evidence to corroborate the parent’s claims. (Such evidence was probably not available in Yancey.)

**3. Adoption of Desdemona, 90 Mass. App. Ct. 1106, No. 15-P-1709 (Sept. 21, 2016).**

This competing plan case offers a valuable lesson for trial lawyers regarding issue preservation. At trial, father presented paternal aunt and uncle (who were living in Puerto Rico at the time of trial) as his proposed adoptive resource for the children. Father argued on appeal that the trial judge erred in not allowing paternal aunt and uncle to testify by telephone from Puerto Rico. The panel ultimately held that this was not an abuse of the judge’s discretion because (1) the father only put the paternal aunt and uncle on his proposed witness list the day before trial, and permitting them to be called as witnesses would prejudice the other parties; and (2) father’s counsel informed the judge that the aunt and uncle had little to say by telephone, stating, “I don’t really have anything to add that would be much different from what’s in the adoption plans, but I have them available to be cross-examined if anyone would like to do so.” (There was a third reason, too, but that one is contrary to the published case law. According to the panel, the judge did not have to examine the paternal aunt and uncle because he based his decision not on a true comparison of the two plans but on the “demonstrated benefits of keeping the children with a current placement that was working so well.” In other words, the kids were doing well with the current foster parents so they shouldn’t be moved. That reasoning is clearly wrong under Hugo and Dora. The trial court must balance the merits of all proposed plans and pick one. Courts cannot decide that the current placement wins because the kids are already there and doing well. That issue was addressed squarely in Hugo, which the panel did not cite and apparently did not read.)

Desdemona has two important take-aways for trial counsel. First, you must put your witnesses on the witness list in a timely fashion, especially if those witnesses are your competing plan resources. Second, it is not enough to ask the court to permit your witness to testify at trial via telephone and object if that request is denied; you must also make an offer of proof as to what the witness would testify about and how the failure to allow the witness to testify will prejudice the client. Absent that offer of proof, neither the trial court nor an appellate court can evaluate the necessity of the request or the harm from denying the request.

**4. Guardianship of Quillay, 90 Mass. App. Ct. 1110, No. 15-P-1694 (October 14, 2016).**

Quillay is helpful for trial attorneys representing children seeking special immigration juvenile (SIJ) status under the Immigration and Nationality Act, 8 U.S.C. §1101(a)(27)(J). Trial judges are sometimes hesitant to make the required finding that reunification with one or both of the juvenile’s parents is “not viable due to abuse, neglect, or abandonment” when the child has been safely reunified with a non-offending parent and is not currently suffering from abuse or neglect.

Here, the trial court appointed an adult sibling as the child’s guardian, but denied an accompanying motion for special findings because the child failed to demonstrate the “exigent circumstances to warrant entry of findings of abuse and abandonment.” The panel held that the trial court applied an incorrect legal standard. According to the panel, motions for SIJ special findings should be “evaluated under the best interests of the child standard” and do not include a requirement that the petitioner show exigent circumstances. Because the record on appeal consisted entirely of documentary evidence, the panel was “in as good a position as the probate judge was to decide questions of fact.” Bluhm v. Peresada, 5 Mass. App. Ct. 766, 766 (1977). Because the evidence was uncontested, the panel made its own special findings on the child’s SIJ status.

**5. Adoption of Ferris, 90 Mass. App. Ct. 1111, No. 16-P-537 (October 21, 2016).**

The mother appealed the dismissal of her appeal for failure to timely docket. The case is interesting only because the panel addressed the merits of the appeal and suggested that it would always do so in our cases absent specific findings showing the parent’s inexcusable neglect:

Although the propriety of dismissal is what brings this case before us, the mother, the Department of Children and Families (department), and the child have fully briefed the merits of the appeal from the decree. In view of the mother's right to the effective assistance of counsel, see [Care & Protection of Stephen, 401 Mass. 144, 148-149 (1987)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987140663&pubNum=0000521&originatingDoc=I53d1713899ba11e69822eed485bc7ca1&refType=RP&fi=co_pp_sp_521_148&originationContext=document&transitionType=DocumentItem&contextData=%28sc.UserEnteredCitation%29#co_pp_sp_521_148)*,* and the absence of specific and detailed findings indicating that the mother's failure to timely docket her appeal was due solely to her own inexcusable neglect and not that of her attorney, we vacate the order dismissing the appeal “in order that so vital a matter for parent[ ] and child shall not fail of a review here on the merits.” [Custody of a Minor (No. 3), 16 Mass. App. Ct. 998, 999-1000 (](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983146861&pubNum=0000523&originatingDoc=I53d1713899ba11e69822eed485bc7ca1&refType=RP&fi=co_pp_sp_523_999&originationContext=document&transitionType=DocumentItem&contextData=%28sc.UserEnteredCitation%29#co_pp_sp_523_999)1983).

The panel affirmed the termination decree.

If your appeal is from the dismissal of an appeal based on a procedural error, (a) cite Ferris in support of an argument that the panel should address the underlying merits, and (b) fully brief the merits, not just the propriety of the dismissal of the appeal.

**6. Adoption of Kaleah, 90 Mass. App. Ct. 1113, No. 16-P-252 (November 1, 2016).**

In Kaleah, the trial judge entered “supplemental” findings regarding post-termination and post-adoption visitation – a topic she had addressed in the original decision – after the mother had filed her brief. The panel stated that, ordinarily, the entry of an appeal strips the trial court of jurisdiction over the matters addressed in the judgment on appeal. In Kaleah, however, “neither party has raised a question about the judge’s authority to enter her supplemental findings, or challenged her orders on visitation.” Accordingly, the panel granted leave to the trial judge, nunc pro tunc, to enter her supplemental findings.

Once an appeal has been docketed in the Appeals Court, the trial court should not be entering new findings or orders on the matters addressed in the underlying judgment. Permanency hearings and review and redetermination hearings are an exception to this rule. Those hearings are authorized by statute, so the court can hold them and enter any appropriate orders thereafter, regardless of the appeal. See Custody of Deborah, 33 Mass. App. Ct. 913, 913-14 (1992).

**7. Adoption of Jacqueline, 90 Mass. App. Ct. 1114, No. 16-P-260 (November 3, 2016).**

In Jacqueline, the father proffered his parents as an adoptive resource for the child. He argued that the trial court erred in failing to suspend the trial *sua sponte* in order to address concerns about his parents’ home study. The trial judge, he argued, learned during cross-examination of the MSPCC evaluator that the home was faulty. Although the judge “quietly questioned the methodology and validity” of the home study, he did not continue the trial or take any steps to remediate the deficiencies of the home study.

The panel was not convinced. Despite the trial judge’s concerns about the home study, he reasonably determined that he had sufficient evidence to find that DCF’s adoption plan was best for the child. Here, as in Desdemona, the problem was issue preservation. The father did not ask for a continuance in order to conduct a more thorough home study. He also did not object to the trial concluding before the home study concerns were alleviated.

What does Jacqueline teach us? If you are proffering a competing plan, make sure before trial that you have solid evidence about your proposed resource. If more information is needed, ask for a continuance and object to trial beginning (or concluding) until you can get that information. Then, assuming the judge denies your motion to continue, make an offer of proof about what the missing evidence would be. The objection, the motion to continue, and the offer of proof are all needed in order to preserve the issue for appeal.

**Practice Tip – Concede what you must at oral argument**

Professor Andrew Pollis at Case Western Reserve Law School has an excellent tip about oral argument. Concede what you must:

Lawyers tend to be reluctant to concede anything—even points that we don’t really need to win. It’s ingrained in us not to give any ground unless we absolutely must. Instead of conceding outright, some lawyers use that awful word, “arguendo”—as in, “even assuming arguendo I’m wrong on Point X, I’m still right on Point Y.”

But, to borrow from *Ecclesiastes*, to everything there is a season. A time to refute, a time to concede. And oral argument is the time to concede weak points, so long as the concession causes no disruption to the integrity of your argument. Refusing to concede points that you cannot win comes across as defensive and suggests that you are unwilling to evaluate your case objectively. This defensiveness, in turn, undercuts your persuasiveness.

By contrast, conceding points you don’t ultimately need to win accomplishes two important goals: establishing your personal integrity with the court and emphasizing your confidence in the strength of your overall argument.

What about concessions in CAFL appeals? How about this?

[For an appellant-mother contesting an unfitness finding] “Yes, Justice Gorsuch, there *is* evidence that my client struck her boyfriend in 2012. But that was two years before this case was filed and five years before trial. That incident does not show her *current* unfitness, especially where she later participated in . . .”

Why engage in a quarrel you’re going to lose about whether the incident occurred – assuming that there’s some evidence to support it – if your real argument is that the mother is fit notwithstanding that incident?

[For an appellee-child opposing post-adoption contact] “You are correct, Justice Bork – the Mother attended all of the visits and the visits went well. But post-adoption contact doesn’t hinge on attendance at visits or the quality of those visits; it’s a matter of the child’s best interests. Here, the judge properly found that post-adoption visits don’t serve the child’s best interests because . . .”

Again, why quarrel about a “bad” fact – assuming there’s evidence to support it – if your argument is that the fact is irrelevant?

Of course, you might not be able to concede the bad fact if concession will sink your argument. Decide that well before argument. Ideally, you should decide that when writing your brief.

The full text of Pollis’ article, Ten Tips for Persuasive Oral Argument, is available at:

<https://www.americanbar.org/publications/gp_solo/2015/september-october/ten_tips_persuasive_oral_argument.html>

**Writing Tip – Introducing quotations**

## Don’t quote a case or statute – especially a long quote – without first giving the quote some explanation or context. Here is yet another great tip from Bryan Garner.

**LawProse Lesson #274: Introducing quotations with an effective lead-in (February 16, 2017). By Bryan Garner.**

After you’ve chosen the perfect quotation from a case, statute, treatise, etc.—and deftly cut it to 49 or fewer words (as we discussed in [Lesson # 273](http://www.lawprose.org/lawprose-lesson-273-reduce-block-quotations-redux/))—it’s time to tailor a lead-in that will effectively weave the quotation into the text. Some lawyers drop quotations into the text with no introduction at all. Others improve that slightly by leading in with phrases such as: the court stated as follows:, or according to a noted expert:, or the statute reads in pertinent part:. But these intros are stale and can make the quotation fall flat (if it’s even read). You need an informative opening to keep your reader interested.

So what’s the best technique? Be specific and assert something. Then let the quotation support your argument. Here are two good examples:

(1) The statute specifies three conditions that a trustee must satisfy to be fully indemnified:
(2) The Fullerton court found that Ohio’s export laws are stricter than its in-state regulations:

Crafting your lead-in to say what your quotation does for you gives you four benefits. First, it becomes more likely that the quotation will actually get read because the reader will know why you’ve quoted it. Second, you’ll enhance your credibility once the reader sees that the quotation does what you say it does. Third, because you’ll be asserting something specific, your quotations will almost certainly become shorter and more pointed. And fourth, even if the reader skips the quotation altogether, the introduction ensures that the thread of your argument will continue to flow through the text.

It takes practice to write an effective lead-in, but it’s worth it. This technique will surely improve your writing and, most important, bolster your persuasiveness.

Available at:

<http://www.lawprose.org/lawprose-lesson-274-introducing-quotations-effective-lead/>