

CAFL NEWS

Volume I, Issue V

October 2017

Your place for CAFL news, updates, training notices and more.

As many of you know, we are awaiting a decision from the SJC on what could be a very important case regarding the Department's obligations to make reasonable efforts to keep families together and to reunify families when children are removed. While that case is pending, I want to convey my appreciation for your continued advocacy to hold DCF to these obligations. Your advocacy is paying off for our clients more and more often. Sometimes it means getting unsupervised visits for a client early in a case; other times it's getting a family-friendly treatment program for a parent with substance use disorder; and other times it's an outright dismissal at a 72-hour hearing. Every day lawyers all over the Commonwealth advocate for clients in circumstances similar to those in the case waiting at the SJC. Even when you don't get the results your client wants, reasonable efforts advocacy helps to ensure that DCF and the Court hear your client's voice – which is a win in and of itself.

Reasonable efforts arguments often fit nicely with another type of 72-hour hearing advocacy, regarding section 29C's prohibition on removing children from their homes when it's not in their best interest. The need for this type of advocacy has become more pronounced over the last few years. With DCF taking custody of thousands of additional children, more and more children are housed in inappropriate placements or are bounced from one home to another. In many such cases, DCF's arguments that removal, as opposed to preserving a family, is in a child's best interest are more open to dispute. We hope that your advocacy efforts on that front can take root as well.

-Michael Dsida,

Deputy Chief Counsel, Children and Family Law Division, Committee for Public Counsel Services

Over September and October, the Committee for Public Counsel Services Children & Family Law Division certified close to 40 lawyers to accept Care and Protection cases and Children Requiring Assistance cases. Additionally, we welcomed eight new staff lawyers to the CAFL division. The CAFL Training Unit wants to thank the dozens of attorneys and staff who helped with the trainings and mock hearings. Welcome to our new CAFL lawyers and thank you for doing this difficult and important work.

- CAFL Training Unit

Proposed Changes to the Juvenile Court Rules

The Massachusetts Juvenile Court is currently soliciting comments on the proposed Juvenile Court Rules for the Care and Protection of Children. These rules apply to various actions in the Juvenile Court including adoption, paternity, and guardianship cases. The proposed new rules can be found here: <http://www.mass.gov/courts/case-legal-res/rules-of-court/rule-changes-invitations-comment/proposed-juvenile-court-rules-for-the-care-and-protection.html>. Public comments may be sent via email to: james.morton@jud.state.ma.us. Comments may also be mailed to James Morton, Deputy Court Administrator, Administrative Office of the Juvenile Court, 3 Center Plaza, 7th Floor, Boston, MA 02108. All comments must be received on or before **November 3, 2017**.

Judicial Announcement: Bristol County Juvenile Court

On Wednesday September 27, 2017, Fall River attorney James Harrington received a unanimous vote of approval from the Governor's Council to become a judge in the Bristol County Juvenile Court. Attorney Harrington served as the CAFL Resource Attorney for Bristol County until his nomination. Attorney Harrington has been a solo practitioner since 2002, focusing on the areas of child welfare, delinquency, and family law.

TRAINING NOTICES

Save the Date:
**18th ANNUAL JUVENILE DELINQUENCY & CHILD WELFARE
 LAW CONFERENCE 2017**

December 15, 2017 MCLE 10 Winter Street, Boston MA

October 19, 2017

Brown Bag: Efficient and Effective Legal Research
 1:00-2:00
 Holyoke Community College,
 Kittredge Center, Room 205
 1 CAFL CLE credit, Free
 Register:
Sarahschooley@verizon.net

October 19, 2017

When Due Process is Long Overdue
 2:00-4:00
 Holyoke Community College,
 Kittredge Center, Room 205
 2 CAFL CLE credits, Free
 Register:
Sarahschooley@verizon.net

October 23 and 24, 2017

Protecting the Education Rights of Court-Involved Youth & Children
 Morgan, Lewis & Brockius
 LLP
 1 Federal Street, Boston
 6.5 CLE Credits per day
 Register:
<https://www.eventbrite.com/e/protecting-the-education-rights-of-court-involved-youth-and-children-boston-registration-36775962895>

October 24, 2017

Child Custody Jurisdiction: Whose Case is it?
 12:00-2:00 PM
 Fall River Juvenile Court
 2 CLE Credits: Free
 Register:
anarris@publiccounsel.net

October 25, 2017

Brief Writing Workshop Introductions & Conclusions: Creating new advocacy opportunities
 2:00-4:00
 CPCS Boston
 44 Bromfield Street, Boston
 2 CAFL CLE credits, free
 Register (only open to CAFL appellate attorneys):
krusteika@publiccounsel.net

November 16, 2017

Responding Proactively or Punitively: Rethinking Prosecution by Service Providers of Those They Serve
 8:45 AM -5:00 PM
 MCLE Boston, 10 Winter Street
 4 CAFL CLE Credits
 Register:
http://www.mhlac.org/Upcoming_Training.htm

November 17, 2017

Brown Bag: Efficient and Effective Legal Research
 1:00-2:00
 Thomas Crane Public Library
 40 Washington Street,
 Quincy
 1 CAFL CLE credit, Free
 Register:
attydon@gmail.com

November 17, 2017

When Due Process is Long Overdue
 2:00-4:00
 Thomas Crane Public Library
 40 Washington Street,
 Quincy
 2 CAFL CLE credits, Free
 Register:
attydon@gmail.com

Additional training opportunities can be found on the CPCS training calendar. Check them out by clicking here:
<https://www.publiccounsel.net/train/calendar/>

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SPOTLIGHT: SERVICE OF THE MONTH

New Website to Aid Parents with Disabilities & their Providers

The National Resource Center for Parents with Disabilities has partnered with Brandeis University's Heller School and the Lurie Institute for Disability Policy to launch a new website for parents with disabilities and their providers. The Research Center's advisory board includes families with disabilities to provide perspective of those parenting with disabilities every day. To explore this website, click here: <http://heller.brandeis.edu/parents-with-disabilities/>

Launched in September, the website has several features helpful to parents and professionals. The parents' section provides advice from other parents with disabilities, including a "Parenting Know-How" section that features short videos and parenting tips. This section also includes articles with tips from other parents with disabilities, such as "Advice for Prospective Mothers with Disabilities from Mothers with Disabilities" and "Unmet Needs of Mothers with Disabilities."

The parents' section also contains research and important information. Specifically, the "Knowing Your Rights" section contains information regarding parents' legal rights in each state and the legal obligations of child welfare agencies when working with parents with disabilities. The "Research and Information" section shares the results of recent research studies and clinical data.

The new website also features information specifically for professionals working with parents with disabilities (including social workers and clinicians). These clinical recommendations may help attorneys advocate for services appropriate to meet their clients' needs. A section specifically tailored for attorneys includes practice tips, law, and resources. To visit the lawyer's page, click here: <http://heller.brandeis.edu/parents-with-disabilities/professionals/legal/index.html>.

"We offer resources to support [parents](#) with disabilities, and information about working with parents with disabilities for [social workers](#), [researchers](#) and [legal professionals](#)."



Attorneys representing a parent or child with a disability may explore this website to find valuable and easily accessible information. For more practice related support, the CAFL Appeals Unit has created a model motion for challenging DCF decision-making in cases where DCF is not accommodating your client's disabilities or treating a parent or child unfairly due to their disability. Contact your local Resource Attorney or staff office Attorney in Charge for more information.

ADMITTING TEXT MESSAGES AS EVIDENCE

Text Messages: Can they be used in court?

Text messages, like any written statements, can be entered as evidence in court so long as the messages satisfy a hearsay exception and the statements are relevant. However, the text messages must also be authenticated. A person's name or cell phone number on a text message is insufficient to prove the identity of the person who sent the message without some "confirming circumstances." The seminal Massachusetts case on the admission of digital evidence, like text messages, is *Commonwealth v. Purdy*, 459 Mass. 442 (2011). Although *Purdy* addressed the admissibility of emails, the court's analysis is applicable to other social media and digital communication. The SJC in *Purdy* wrote, "[e]vidence that the defendant's name is written as the author of an e-mail or that the electronic communication originates from an e-mail or a social networking Web site such as Facebook or MySpace that bears the defendant's name is not sufficient alone to authenticate the electronic communication as having been authored or sent by the defendant. There must be some 'confirming circumstances' sufficient for a reasonable jury to find by a preponderance of the evidence that the defendant authored the e-mails." (citations omitted). The Massachusetts Guide to Evidence echoes this standard and highlights that "neither expert testimony nor exclusive access is necessary to authenticate the source." Section 901 (b)(11).

Confirming evidence could be the author's reference to personal details or the corroborating actions of a person who is purported to have sent the text messages. Of course, a person could have also admitted to sending the texts. There may be pictures in the text message that link the communication to the sender.

The simplest way to introduce a text message is to make a copy (screenshot, photo, or print out) of the message that includes identifying information that connects the message to the person texting. The best evidence rule does not prohibit the admission of copies of digital evidence because "there is no 'original' in the traditional sense." *Commonwealth v. Salyer*, 84 Mass. App. Ct. 346, fn. 10 (2013). Then, have a witness with personal knowledge that the copy is a true and accurate representation of the text message authenticate the text on the stand. Be ready to identify for the judge what "confirming circumstances" show that the person who sent the message is who you say it is. When possible, also provide the electronic timestamp showing the date and time of the message and the phone number or contact information of the sender.



For more information on the admission of text messages as evidence, click here:

<https://www.masslegalservices.org/content/text-messages-evidence-how-overview>

IN THE NEWS

Jessica Lander of the Boston Globe comments on the school to prison pipeline. This September 4, 2017 opinion piece, "The Criminalization of School Kids," examines changes required in order to make a difference for our most vulnerable youth. The article suggests that police need to be trained better about how to work with children, and officers need to connect with community service providers. Programs like Cambridge's Safety Net Collaborative and Strategies for Youth have proven to be successful in significantly reducing the rate of student arrests.

<http://www.bostonglobe.com/opinion/2017/09/03/the-criminalization-school-kids/kzSCetKzcBI7jiS2P84SaO/story.html#comments>

Governor Baker signed a new bill into effect to protect expectant and new mothers in the work place. Employers will now be required to provide pregnant women and new mothers with reasonable accommodations. For more information on what sort of accommodations new mothers should receive in the workplace, click here:

<http://www.mass.gov/governor/press-office/press-releases/fy2018/bipartisan-pregnant-worker-protection-bill-signed.html>

Various states are experimenting with new Family Treatment Court Models to address the on-going opioid issue. The new models encourage the use of trauma-informed care, collaboration between service providers, and education. Massachusetts will join the ranks of these states as Franklin County is in the process of starting a new family treatment court model.

<https://www.nytimes.com/2017/09/26/opinion/courts-that-save-opioid-victims-family-life.html>
<http://www.recorder.com/family-drug-court-12702422>

The Massachusetts Attorney General filed a lawsuit against Fed Loan Servicing alleging deceptive practices and that the group prevented borrowers from making qualifying student loan payments towards public service loan forgiveness. To learn more about this suit affecting thousands of public service workers, click here:

<https://www.nytimes.com/2017/08/23/business/dealbook/student-loan-forgiveness-lawsuit.html>

Wonderfund, a newly launched non-profit organization, was founded by Lauren Baker and Robert Craft. The organization's goal is to provide children in DCF care with emergency essential items and with enrichment opportunities. Linda Spears, Commissioner of DCF, sits on the organization's board of directors. For more information on this new non-profit, you can contact the organizations at:

<http://www.wonderfundma.org/who-we-are/contact>
<http://www.businesswire.com/news/home/20170629006105/en/Newly-Launched-%E2%80%99Wonderfund%E2%80%99-Names-Erin-Murphy-Rafferty-CEO>

The Massachusetts State police will have a new cyber unit, created to commit resources towards fighting human trafficking. Foster children are historically at greater risk of human trafficking. For more information about this new police initiative, click here:

http://www.masslive.com/news/index.ssf/2017/08/state_police_to_bulk_up_securi.html

LEGAL UPDATES

New Massachusetts Child Support Guidelines in Effect

On September 15, 2017, the new Massachusetts Child Support Guidelines went into effect. A copy of the new guidelines can be found online here: <http://www.mass.gov/courts/docs/child-support/2017-child-support-guidelines.pdf>.

Changes to the guidelines were recommended by a task force created to address both substantive policies around child support and also to address practical concerns with the way child support is calculated across the state. Some major changes include an increase in the minimum weekly order, the college contribution presumptive cap, and the removal of the “hybrid” calculation for shared parenting custody orders.

**“On Tuesday,
September 5,
2017, the Trump
administration
rescinded the
executive
memorandum
that created
DACA.”**



Update on Deferred Action for Childhood Arrivals (DACA)

By Emma Winger, CPCS Immigration Impact Unit

In 2010, the U.S. Congress failed to pass the “DREAM Act.” That proposed law would have created a pathway to citizenship for approximately one million undocumented individuals, known as “DREAMers.” DREAMers were brought to the United States as children but are currently undocumented. Instead, in 2012, the Obama Administration created an executive policy called the Deferred Action for Childhood Arrivals (“DACA”), which suspended deportation (“deferred action”) and granted work authorization to some DREAM Act-eligible youth. On Tuesday, September 5, 2017, the Trump Administration rescinded the executive memorandum that created DACA.

Nevertheless, those who currently have DACA status do not immediately lose that status. DACA status--and the accompanying work authorization--remain valid so long as the individual remains eligible until the expiration date. DACA is valid for two years from the date the status was granted. The federal Department of Homeland Security (DHS) will continue to accept applications to renew DACA status until October 5, 2017, for those whose status will expire by March 5, 2017. DHS will not accept any initial applications for DACA after September 5, 2017. DHS will continue to process initial applications for DACA that were filed before September 5, 2017. The criminal bars to DACA status remain the same.

(Please see the practice advisory [HERE](#) for more details). For free legal services for our clients, look here:

<https://www.masslegalservices.org/daca-community-workshops/calendar/>

LEGAL UPDATES

Brangan v. Commonwealth, 477 Mass 691 (2017)

In the recent *Brangan* decision, the SJC reviewed whether a Superior Court judge must consider a defendant's ability to pay when setting bail. It ruled that, yes, the judge must consider the defendant's financial resources. However, the Superior Court judge is not required to set bail in an amount the defendant can afford "if other relevant considerations weigh more heavily." The judge can make necessary bail orders to secure the defendant's presence in court. For example, the judge can look at things like the record of defaults. While the judge may set bail at a higher amount than the defendant can afford, the bail amount can be "no higher than necessary to ensure the defendant's appearance for trial." At times where the defendant lacks the finances to pay the set bail, likely resulting in a long-term pretrial detention, "the judge must provide written or orally recorded findings of fact and a statement of reasons for the bail decision."

In its decision, the SJC reversed the single justice's order and remanded the case for a new bail hearing because the judge did not consider the defendant's financial resources. The SJC opined that "[a] bail that is set without any regard to whether a defendant is a pauper or a plutocrat runs the risk of being excessive and unfair." The SJC further noted that G.L. c.276, §57, relating to the setting of bail in the Superior Court, does not require a judge to consider a defendant's financial resources, although §58 (relating to bail in the District Court, the BMC, and the Juvenile Court) does explicitly require consideration of that factor. In any event, "[a] Superior Court judge ... must ... consider a defendant's financial resources when setting bail" under common law and constitutional principles. "Both the Eighth Amendment ... and art. 26 of the Massachusetts Declaration of Rights prohibit excessive bail." Moreover, a "defendant's right to an individualized bail determination that takes his or her financial resources into account is ... supported by the constitutional principles of due process and equal protection."



LAWYERS HAVE A PROFESSIONAL AND MORAL DUTY TO REPRESENT THE UNDERREPRESENTED IN OUR SOCIETY, TO ENSURE THAT JUSTICE EXISTS FOR ALL, BOTH LEGAL AND ECONOMIC JUSTICE.

- Sonia Sotomayor



CAFL Newsletter Submissions

Do you have an idea for a practice tip or spotlight service of the month? Interested in publishing an announcement? Do you have feedback on how we can make the newsletter better? We invite you to contact the CAFL News editors:

Ann Narris Anarris@publiccounsel.net (617) 910-5746 or
Patrick Sadlon Psadlon@publiccounsel.net (617) 910-5745

LEGAL PRACTICE TIP: REPRESENTING INCARCERATED PARENTS

By Abigail Salois, CAFL Appeals Unit

DCF social workers frequently fail to schedule visits between incarcerated parents and their children in foster care. How many of us have heard a DCF social worker say that they did not schedule visits because the parent did not request it, or they were concerned it would be hard on the child?

But, the law is clear that DCF must provide this type of parent-child contact. Specifically, DCF regulation 110 CMR § 1.10 requires DCF to provide incarcerated parents with “regular visitation” with their children. The regulation further states that “special efforts are required to prevent permanent or irremediable separation of children from their incarcerated parents.” There is some helpful language that we can pull from that regulation and use to advocate for our clients both with DCF and the courts.

DCF should never unilaterally refuse contact between an incarcerated parent and their child. The standard for terminating parent-child visits for incarcerated parents is the same as for non-incarcerated parents: DCF cannot terminate parent-child visits unless a court has determined by clear and convincing evidence that visits are harmful to the child or the public interest. Custody of a Minor (No. 2), 392 Mass. 719, 725-726 (1984). And visiting a parent in a prison is not *per se* harmful to the child. Indeed, in some corrections facilities the family meeting place may be more conducive to quality visits than a cramped DCF office. In Adoption of Nicole, 40 Mass. App. Ct. 259, 261-3 (1996) and in Adoption of Sarah, 31 Mass. App. Ct. 906, 907 (1991), the Massachusetts Appeals Court wrote that lack of quality visitation is highly relevant to the incarcerated parent’s current parental unfitness and the child’s best interests. For that reason, as advocates for both a child and parent, fighting for regular, frequent, and high quality parent-child contact for incarcerated parents is an important part of the work that we do.

Our advocacy for incarcerated clients or their children can go beyond ensuring family contact and can include making sure that incarcerated parents have access to services. In Adoption of Whitney, 53 Mass. App. Ct. 832, 837 n.5 (2002), the Massachusetts Appeals Court criticized DCF social workers for failing to include an incarcerated father in its planning or to offer him services. 110 CMR § 1.10 requires that DCF social workers hold case conferences and other consultations at the correctional facility. Clinical conferences include things like the foster care reviews and DCF social worker meetings. The social worker’s duty to meet with the parent is not changed by the fact that the parent is incarcerated.

We can take action if DCF is ignoring our incarcerated clients. How? Advocate directly with the DCF social worker and through the DCF legal office for frequent visits, cards and letters, and clinical meetings. Make requests in writing and copy the social worker supervisor and clinical management. And if that does not work, file a motion to compel regular contact. In our motions, we can attach clinical data showing that children do better if they remain in contact with their incarcerated parents. We can visit them regularly in prison and involve our clients completely in the case. We should make sure our clients are given the opportunity to participate in each court date (including being *habed* in should they want to attend) and object on the record to any court action occurring without their participation. Sometimes having an incarcerated parent brought to court can be difficult if they are held in another state or federal custody but their due process rights can be protected.

LEGAL PRACTICE TIP (CONTINUED): Representing Incarcerated Parents

While an incarcerated parent does not have an absolute right to be *habed* in for a care and protection trial, the trial judge “should determine among currently available options how best to assure that a parent has a meaningful opportunity to rebut the evidence presented at trial. In some cases, that may include the parent's presence at trial. In others, it may best occur through video or telephone conferencing during trial; in yet others, through appropriate documentary submissions, deposition testimony, or other reasonable means. The responsibility for devising a mechanism for meaningful participation, once requested, rests with the judge.” *In re Adoption of Whitney*, 53 Mass. App. Ct. 832, 836 (2002), citing *Adoption of Edmund*, 50 Mass. App. Ct. 526, 529-30 (2000). To exercise his right to participate in the trial, the parent’s attorney must let the court know that the parent wishes to be involved in the proceedings. *In re Adoption of Whitney*, 53 Mass. App. Ct. 832 (2002), compare *In re Adoption of Jacqui*, 80 Mass. App. Ct. 713, 719 (2011)(reversal “[b]ecause it is clear that the father did not receive proper notice of the trial to terminate his parental rights, and was not able to participate in the trial due to his incarceration, he was denied a meaningful opportunity to rebut the adverse evidence against him, despite having an attorney who participated at his trial. The father was denied his due process rights.”).

Resources for Representing Incarcerated Parents

Research study:

La Vigne, Nancy, Elizabeth Davies, and Diana Brazzell. Urban Institute Justice Policy Center. *Broken Bonds Understanding and Addressing the Needs of Children with Incarcerated Parents*, 2008. (“Children who continue to stay in touch with their parent in prison exhibit fewer disruptive and anxious behaviors.”) <https://www.urban.org/sites/default/files/publication/31486/411616-Broken-Bonds-Understanding-and-Addressing-the-Needs-of-Children-with-Incarcerated-Parents.PDF>

Incarcerated parents fact sheet:

http://www.kccba.org/wp-content/uploads/2015/10/Initiative-CIP-Stats_Fact-Sheet2_Final_4-27-12.pdf

FAQ’s about children of prisoners:

https://www.prisonfellowship.org/resources/training-resources/family/ministry-basics/faqs-about-children-of-prisoners/#children_know_parent

Legal services for prisoners with children:

<http://www.prisonerswithchildren.org/>

Prisoner’s Legal Services of Massachusetts: <http://www.plsma.org>

Aid to Incarcerated Mothers (AIM):

<http://www.aim-ma.org/index.html>

Inmate locator: Vinelink <https://www.vinelink.com/#!/home/site/20000>



SOCIAL WORKER FAQ: CLINICAL EVALUATIONS

—By Meg Grant, CAFL Social Work Coordinator

Q: DCF has asked my parent client to do an evaluation. I think I should hire my own expert instead. What should I consider in hiring an expert in this situation?

A: It is important to identify what questions/concerns the Department is seeking to have answered. DCF should not be asking for an evaluation to go on a fishing expedition. While the DCF social worker sees assessment value in receiving a concrete clinical diagnosis or treatment recommendations, these evaluations are also forensic tools that DCF may use against your client in court. Similarly, you may hire an independent expert to advise you and your client about treatment recommendations and/or provide affirmative evidence to support your case. Remember, you can choose whether to share that independently obtained evaluation with DCF after it is completed. CPCS advises attorneys to talk to the expert before a report is written to prevent the possibility that a damaging report would have to be disclosed.

Once you understand what information is being requested, you will have an idea of the type of evaluation that would answer the questions. For example, neuro-psychological evaluations are generally recommended if there has been a traumatic brain injury or a history of cognitive delays. These evaluations answer the question of how the brain functions. If these issues are not present for your client this would not be the appropriate evaluation. If your client has a mental health history, perhaps a psychological evaluation would be helpful. In other words, make sure that your client obtains the *right* evaluation depending on the facts of your case. Additionally, you should forward to the evaluator the questions that you want answered about your client's strengths and weaknesses and possible service needs.

Another thing to consider is timing. If the Department is requesting an evaluation to determine what services are needed, it is better to start sooner rather than later. This will provide your client the opportunity to obtain services sooner, and provide your client time to address any issues that might be identified by the evaluator.

Finally, make sure your client is able to understand the evaluation and participate fully. If your client has a disability, the parenting evaluator should have knowledge and experience with evaluating a parent with those needs. If your client has a language access issue, make sure the proper interpreters are involved. If you have a question about how to navigate a request for clinical evaluations, feel free to contact: me: Meg Grant, LICSW at mgrant@publiccounsel.net or 617-910-5839.

