1:28 DECISION OF THE WEEK

August 8, 2018

CAFL APPELLATE PANEL SUPPORT UNIT

In the wake of the family-separation crisis at our border and the increase in immigration enforcement proceedings throughout the country, we are highlighting a great Rule 1:28 decision out of Essex County. Andreas is a great case to cite if DCF alleges abandonment due to a parent's deportation. It's great for other issues, too.

Adoption of Andreas, 78 Mass. App. Ct. 1119 (2011) (Mass. App. Ct. Rule 1:28) (Graham, Vuono & Grainger, JJ.)

Let's start with Andreas' great footnote. Footnote 4 states: "We agree with the father's argument that the judge's reliance on the father's immigration detention to conclude that he had abandoned the children was misplaced. Deportation has not been deemed grounds for the termination of parental rights nor does deportation constitute abandonment." This is certainly something to cite if the trial court relied heavily on your parent-client's immigration/detention status. Only a footnote in a 1:28? So what!

The bulk of Andreas focuses on the mother. The trial court found mother unfit and terminated her rights as to Andreas, Edward, and Lionel. The panel affirmed as to the first two boys based largely on mother's inability to meet their behavioral and psychological needs. But with respect to Lionel, who was younger and had no special needs, the panel vacated the termination:

> [W]e conclude that, taken as a whole, the judge's subsidiary findings, even if supported by the evidence, do not support his ultimate conclusions that the mother is currently unfit to parent Lionel and that termination of her parental rights was in this child's best interests. Lionel was removed from the mother's care when he was only eighteen months old and has remained in department custody since that time. He has been living with his preadoptive parents since March, 2008, and he is bonded to his preadoptive parents and has little, if any, bond with the mother. However, Lionel does not suffer from any behavioral or emotional difficulties, and the evidence of the mother's unfitness to parent Lionel is much weaker than it is with respect to Andreas and Edward.

The fact of Lionel's stable placement in a pre-adoptive home was not enough to show that mother was unfit as to him. Courts, then, must look not just to a parent's ability to care for each child but to that parent's ability to care for each child *alone* without the burden of caring for the others (assuming they are not to be returned).

The panel remanded for further findings based on the mother's current circumstances. Because it recognized that mother appeared to no longer have the "grievous shortcomings" necessary to be found unfit, it signaled to the parties and the trial court that the evidence on remand should focus on bonding as set forth in G.L. c. 210, § 3(c)(vii), that is:

> the nature of the bond between Lionel and his substitute caretakers, if serious psychological harm would flow from the severance of those bonds, what means were considered to alleviate that harm, and which of those means would be adequate. . . . Finally, the mother's capacity, or lack thereof, to meet Lionel's needs upon removal from his caretakers should be addressed.

The panel also remanded regarding post-termination and post-adoption visitation between mother and Andreas, which the trial court declined to order. While there was no evidence of a bond or other compelling interest suggesting visits between mother and Edward,

> . . . Andreas appears to have a stronger bond to the mother than the other two children, having spent the first five years of his life in her care. Although the evidence indicates that the mother is unable to provide the structured environment that Andreas requires from a full-time care-giver, the evidence does not support the conclusion that the termination of visitation is in his best interests. In contrast to the evidence that visitation was traumatic for Edward, Andreas seemed to suffer most as a result of the termination of contact with the mother (he required hospitalization in the month following removal), and he has expressed his desire for visitation to continue. Considering, also, that the department has been unable to place Andreas with a preadoptive family, the judge's denial of visitation was an abuse of his discretion.

Good stuff!!

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The takeaway?

Andreas is a great case for trial and appellate attorneys to cite when arguing that a parent can adequately care for one child (perhaps an older child or one without special needs) even if she cannot care for other children or for all of the children together.

Andreas is also a great case to cite, at trial or on appeal, when DCF is alleging that a parent has abandoned the child based on that parent's deportation or immigration status.

Finally, Andreas is a great case to cite when challenging a judge's refusal to order post-termination visitation for a child who is not in a pre-adoptive home and who wishes to visit with the birth parent.

A Compendium of Rule 1:28 Decisions

The CAFL Appellate Panel Support Unit is putting together a compendium of summaries of good Rule 1:28 decisions, sorted by topic, going back to 2008 when the SJC officially permitted us to cite to unpublished decisions.

Be on the lookout this fall for this new appellate resource!

How to use a Rule 1:28 decision

An unpublished decision by the Appeals Court under Rule 1:28 is issued by a panel, whereas published decisions are reviewed and approved by all justices on the Appeals Court. Rule 1:28 decisions may be cited for their persuasive value, but not as binding precedent. If you cite to a Rule 1:28 decision in your brief or motion, 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).