

# 1:28 DECISION OF THE WEEK

July 25, 2018

## CAFL APPELLATE PANEL SUPPORT UNIT

This week we're highlighting an important Rule 1:28 decision—*Adoption of Beatrix*. The Appeals Court reversed the termination decree, the child ultimately returned home, and the care and protection petition was dismissed.

### ***Adoption of Beatrix*, 89 Mass. App. Ct. 1132 (July 20, 2016) (Mass. App. Ct. Rule 1:28) (Kafker, Vuono & Henry)**

In *Beatrix*, the panel vacated the termination decree as to a mother with cognitive limitations, based largely on the trial judge's failure 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 inordinate 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 accom-

modate 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.

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### Past Appellate Bulletins

You can find all of our past appellate bulletins at:

<https://www.publiccounsel.net/cafl/professional/appellate-practice-tools-and-resources/appellate-bulletins128-unpublished-decisions/>

The bulletins include summaries of relevant Rule 1:28 decisions, practice tips, and writing tips.

## The takeaway?

*Beatrix* is a great case to cite when challenging whether DCF made reasonable efforts to reunify a family, especially where the parent has cognitive limitations. DCF is obligated to assist parents (and children) with disabilities. Cookie-cutter services designed for clients without disabilities won't suffice.

*Beatrix* is a great case to cite if the trial judge in your case has unreasonably chosen not to credit an expert's opinion.

Finally, it's a great case if you have a long track-record of favorable visits but the judge has failed to acknowledge that track-record in her findings.



### How to use a 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).