

1:28 DECISION OF THE WEEK

September 20, 2018

CAFL APPELLATE PANEL SUPPORT UNIT

***Adoption of Liam*, 80 Mass. App. Ct. 1101 (2011) (Mass. App. Ct. Rule 1:28)** (Vuono, Wolohojian, Milkey, JJ)

Just because a parent is unfit doesn't mean that a child's best interests are served by termination. The problem with that principle has always been finding good cases to illustrate it. Adoption of Liam is such a case. It is also a helpful case if a parent and child both seek reunification and the parent has made late progress.

In Liam, the mother and child appealed the termination of mother's parental rights and the denial of their joint motion to vacate the decree. They argued that while mother could not be reunited with the child at the time of trial, termination was not in the child's best interests and was premature. They further argued that the judge erred in denying the motion to vacate without a hearing given the mother's changed post-trial circumstances.

The panel affirmed the trial judge's decision that the mother was unfit at the time of trial. But it reversed the denial of the motion to vacate, vacated the termination decree, and remanded the matter to the juvenile court for further proceedings to determine whether termination remained in the child's best interests. The panel

was persuaded that the change in circumstances post-trial warranted a new hearing.

The panel cited several "unusual circumstances" that led to this "rare" disposition: (1) this was not a case of "continuous unceasing unfitness" by mother, but rather one where the mother had shown herself unable to sustain long-term stability; (2) the mother and child shared a significant emotional relationship, and continued contact and visitation by the mother was found to be in the child's best interests; (3) the child was placed with his maternal aunt who, although willing to adopt, had given no indication that adoption or termination was a matter of urgency; (4) there was no evidence that returning the child to the mother would be disruptive to him or that the parties would not work together to effectuate a smooth transition; and (5) the evidence of post-termination changes in the mother's circumstances included affidavits from "neutral" persons (an employer and a social worker).

While these circumstances may be "unusual," they aren't rare. Liam is helpful if several of these factors are present in your case and there is evidence that the parent can currently care for the child.

Interestingly, the panel, on its own initiative, asked the parties for memoranda "on the procedural issues connected with obtaining factual information concerning Liam's current best interests and the mother's fitness." In other words, the panel wanted current information not in the appellate record. DCF failed to provide it, and the panel noted this failure. Liam, at n. 3.

Shout-outs to Kerry Bagnall and Rob Young, both appellant counsel, on preserving these issues and prevailing in this case!



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The takeaways?

Sometimes the panel requests information about the current circumstances of a case. If the panel wants it, provide it. But don't offer information outside the record at oral argument unless so requested.

And what about the post-trial motion in this case? Is that required of appellate counsel in every appeal? No, but if you have a case where circumstances have changed significantly since trial in a way that might impact the judge's decision or the best interests of the child—perhaps the parent has made great strides AND the child's placement has disrupted—consider filing a motion for relief from judgment. Be sure to attach affidavits and documentary record support. As Liam reminds us, it is important to request an evidentiary hearing to preserve and flesh out the issues (and to actually participate in the evidentiary hearing if the judge grants your motion).

Remember, you need leave of the Appeals Court single justice to file a post-judgment motion after the appeal has been docketed. Getting leave is a tricky business. So, if you can, file your post-judgment motion before the case is docketed.

Post-Judgment Motion Practice

Thinking of filing a post-judgment motion? To find some sample motions for new trial based on ineffective assistance of counsel, check out the CAFL website's "appellate practice tools" page at:

<https://www.publiccounsel.net/cafl/professional/appellate-practice-tools-and-resources/model-appellate-motions-and-briefs/>

Call Andy or Ann if you are on the fence about whether to file any post-trial motion.



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).