1:28 DECISION OF THE WEEK

CAFL APPELLATE PANEL SUPPORT UNIT August 30, 2018

Adoption of Loughlin, 74 Mass. App. Ct. 1128 (2009) (Mass. App. Ct. Rule 1:28) (Vuono, Smith & Rubin, JJ)

In Loughlin, the panel vacated a termination because the trial court's findings were not supported by the evidence and failed to satisfy the requirements of c. 210, § 3. The trial court terminated mother's rights primarily based on her history of drug use and the strong bond between the child and the pre-adoptive parents. (The child had lived with them for 27 months of his 34-month life). However, the panel held that there was no evidence to support the judge's conclusion that the mother was likely to continue to abuse drugs "for a prolonged indeterminate period":

> [T]he judge stated that the mother's substance abuse issues had not been remedied despite her participation in a variety of services. Although the judge was entitled, as he did, not to credit the mother's testimony that she had not relapsed prior to [selling drugs, leading to her incarceration], there was no affirmative evidence of drug use subsequent to the birth of the child. . . . [Nevertheless, the judge] "seriously question[ed] Mother's sobriety when she was actively selling the drugs that she previously abused."

The judge may have "seriously questioned" the mother's sobriety, but judicial doubts are not the same as evidence, and here the evidence was lacking.

Absent supported findings of substance abuse, all that remained to support the unfitness conclusion was the child's bond to the pre-adoptive parents. The judge found that the child had a strong bond to the pre-adoptive parents and would be harmed by removing him from them. But the panel held that this was not enough:

> "[W]e have required specific findings where severance of the bonds with a substitute caretaker becomes a decisive factor in a determination of parental fitness. … See *Adoption of Katharine,* 42 Mass. App. Ct. at 27. . . . "To the extent that traumatic severance of bonds with a substitute caretaker became a decisive factor, a judge would be bound in findings [1] to describe the nature of the bonds formed, [2] why serious psychological harm would flow from the severance of those bonds, [3] what means to alleviate that harm had been considered, and [4] why those means were determined to be inadequate.' *Id.* at 30-31."

Here, the judge made findings [1] and [2] but not [3] and [4] regarding what means to alleviate the harm were considered and why those means were inadequate. "While we are not in a position to suggest in a comprehensive way what evidence will be required to make the findings required by *[Katharine],* we do not believe adequate findings can be made without an assessment of the bond between the mother and the child." The department's bonding evaluation had looked at the bond between the child and pre-adoptive parents but not at the child's attachment to his birth mother. Further, there was testimony from the department's expert that it is "always desirable" "to see both bio-parents and foster parents to help [him] make a better judgment of where a child ought to be."

The panel vacated the termination and remanded, specifying that a mother-child bonding assessment and more specific findings about bonding "are required."

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The takeaway?

Loughlin is helpful where the parent has a history of substance use but there is no evidence of current use.

It's also a great case to cite when a judge has found a parent unfit based on the child's bonding with substitute caregivers. Termination findings usually address the existence of a bond and the harm from removal but they are often silent on the final parts of the bonding inquiry—what means to alleviate the harm were considered and why they were inadequate.

Finally, Loughlin is a good case to attach to a motion for reconsideration if the trial judge denies your ICCA motion for your own evaluation to counter an adverse DCF evaluation. The trial judge in Loughlin had denied mother's motion for a bonding evaluation. The panel noted this and specifically instructed the judge on remand to order such an evaluation.

PARENTING TIME

Although the panel did not base its decision on visitation issues, it suggested that monthly visits with incarcerated parents are insufficient: "Despite departmental regulations designed to encourage the maintenance of bonds between children and their incarcerated parents, see 110 Code Mass. Regs. § 1.10 (2000), once the department changed its goal to adoption, it allowed the mother only one hour per month of visitation with the child." This is great language to use when urging a court to order more regular or frequent visits with incarcerated—or any—parents. *We* know that monthly visits is inadequate; clearly some members of the Appeals Court know this, too. (And Vuono and Rubin are still on the Court.)

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).