1:28 DECISION OF THE WEEK

September 26, 2018

CAFL APPELLATE PANEL SUPPORT UNIT

Care and Protection of Patience, 83 Mass. App. Ct. 1104 (2012) (Mass. App. Ct. Rule 1:28) (Grasso, Fecteau, Agnes, JJ.)

A Rule 1:28 decision with *good* language about evidence? Is it possible? In fact, it is. Care and Protection of Patience makes three good points about evidence. First, the hearsay exception "declaration against interest" rarely arises in our cases, and we have found no child welfare opinions that address it. But Patience does:

> The mother challenges the judge's decision to admit her boyfriend's electronic mail (e-mail) on grounds that it was a declaration against interest. The mother does not dispute that her boyfriend was not a party and was unavailable to testify as a witness. The contention that her boyfriend was unaware that his statements were contrary to his interest when made is belied by the evidence. Any reasonable person would have understood that some of the statements would have exposed the maker to criminal liability. See Mass.G.Evid. § 804(3) (2012 ed.).

Nice stuff. That's the rule about declarations against interest in a nutshell. The statement of a non-party (here, the boyfriend, who wasn't the father) is admissible if:

- The declarant is unavailable (here, the boyfriend might have been out of state or he might have asserted his Fifth Amendment privilege not to testify about the abuse);
- The statement is against the declarant's penal, pecuniary, or proprietary interests (here, the boyfriend's email admitted that he may have harmed the child); and
- The statement is based on first-hand knowledge (the boyfriend was there).

Note that the statement need not be an admission of guilt; it need only be a "disserving statement" that could be used at trial against the declarant.

Second, Patience has nice language about how second-level hearsay in an otherwise admissible document is inadmissible unless that second level also has a hearsay exception:

> The mother also argues that a hearsay statement by her boyfriend's psychologist which was part of that e-mail was improperly admitted. The statement read: "The psychologist believes, in his professional opinion, that I [the boyfriend] have a moderate to high risk of endangering a child due to my disorder [OCD]. He said he does not find any malice in my actions . . . ." The judge admitted [the email] as a statement against interest over the mother's objection. The fact that the e-mail contained second-level hearsay – the psychologist's statement – was overlooked. A judge in a care and protection proceeding may not rely on facts that are not properly admitted in evidence. Care & Protection of Zita, 455 Mass. 272, 280 (2009).

In other words, the trial judge erred in admitting the second-level hearsay in the e-mail. Good call by the panel! But, in this case, the error was harmless because the evidence came in through other sources.

Last, the panel noted that court investigator reports should be limited to facts (a statutory limitation that is traditionally honored largely in the breach):

> The mother also contends that the judge erred in disregarding the investigator's report. However, the mother overlooks the scope of the statutory authority for the admission of such reports, which is confined to "the facts relating to the welfare of the child." G. L. c. 119, § 21A, inserted by St. 2008, c. 76, § 83. Here, the judge properly disregarded most of the report because it was predominantly the product of opinions based on assessments of credibility and not a statement of facts. See Care & Protection of Rebecca, 419 Mass. 67, 83 (1994).

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Issue Preservation

You represent the mother on appeal. At trial, the *father's* counsel made a really good objection to a key piece of evidence, but mother's counsel was silent. Can mother raise the issue on appeal, or has she waived it? That is, can one party take advantage of another party's objection and argue the issue on appeal?

While best practice remains for all parties to object and state their grounds to the trial judge, the mother probably has not waived the issue for appeal. The purpose of an objection is to call the judge's attention to a problem, and any party's objection will suffice. See Care and Protection of Sophie, 449 Mass. 100, 103 n. 4 (2007) (although father didn't raise hearsay objection at trial, the children's hearsay objection raised issue for court and preserved it for father on appeal, as well). Several criminal cases stand for the same proposition in the context of co-defendants. See, e.g., Comm. v. DePina, 476 Mass. 614, 624 n. 9 (2017); Comm. v. Lieu, 50 Mass. App. Ct. 162, 165 n. 3 (2000); Comm. v. Seminara, 20 Mass. App. Ct. 789, 795 n. 4 (1985).

So don't despair if your client's trial lawyer failed to make an objection so long as another attorney did. The issue may still be preserved for appellate review.

The takeaway?

Remember, just because a document is admissible doesn't mean that everything in that document is admissible. Every layer of hearsay needs its own exception (except in a court investigator or GAL report, where hearsay and totem-pole hearsay are admissible).

But even court investigator and GAL reports have limits. Trial counsel should cite to Patience in a motion in limine whenever a report contains credibility assessments or includes opinions or recommendations based on the credibility assessments of the various declarants. No witness can opine as to the credibility of another witness, whether live or in a document. See Commonwealth v. Ianello, 401 Mass. 197, 202 (1987) ("expert may not render an opinion on the credibility of a witness"); Commonwealth v. Harbin, 435 Mass. 654, 663 (2002) ("witnesses may not offer their opinions on the credibility of other witnesses").

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).