

1:28 DECISION OF THE WEEK

September 13, 2018

CAFL APPELLATE PANEL SUPPORT UNIT

***Adoption of Serafina*, 80 Mass. App. Ct. 1114 (2011)(Mass.App.Ct. Rule 1:28) (Cypher, Grainger, Fecteau, JJ).**

Serafina is a great case about unsupported findings. The panel reversed and remanded the case back to the Hampden County Juvenile Court.

At trial, the judge placed great weight on the fact that it took 16 months for the putative father to establish paternity. Although the DCF attorney, shortly before trial, told the judge that the delay wasn't the father's fault, the judge blamed him anyway and heavily cited father's "lack of interest in his paternity" in several conclusions of law.

The panel agreed with the father that many of the paternity-related findings were clearly erroneous. Much of the delay wasn't the father's fault: he was not appointed counsel for almost a full year after the child's birth; his court-appointed attorney failed to order genetic testing due to vacation, illness, or the mistaken belief that it had already been ordered; the DCF attorney failed to schedule the testing due to vacation; and DCF misplaced relevant documents for three months.

The panel noted that "[i]t is incumbent on the courts no less than the department to ensure that neither children nor parents are pe-

nalized for the defective operation of a system into which they have been drawn involuntarily." What a great quote!

The trial judge also based the termination on father's employment circumstances: "Father's main focus, instead of being on [the child] and working toward reunification, has been, and continues to be, on his job." The court blamed father for working long hours. The panel acknowledged the catch-22 parents face in these cases: a parent is unfit if he doesn't work hard enough to provide financial security for a child, and he's unfit if he works too hard seeking financial security. (And, of course, if he works hard enough to provide financial security, DCF may move to strike his counsel.). The panel held that the father's work circumstances did not qualify as clear and convincing evidence of unfitness.

Finally, the trial judge based the termination on the child's bonding with pre-adoptive parents. But after trial, a 51A report was filed on the pre-adoptive parents and the placement disrupted.

While that information wasn't before the trial court or part of

the appellate record prior to argument, the panel was receptive to father's request to enlarge the record to include information about the problems and disruption.

The panel was clearly displeased (at argument as well) with the position taken by DCF and the appellee-child about enlarging the record: "Both the department and the child's counsel objected to enlargement of the record. We fail to see how this posture advances the best interests of the child." Serafina, at n. 5. Of course, "this posture" was solid appellate practice – why agree to enlarge the record this late in the game and allow the panel to consider a potentially dispositive fact? – but it felt like a game of "hide the (best interests) ball" to the panel.



1:28 DECISION OF THE WEEK

September 13, 2018

CAFL APPELLATE PANEL SUPPORT UNIT

The takeaway?

Serafina is a great case to cite when challenging findings that a father is “disinterested” in his paternity, especially if the father’s delay in establishing paternity was caused by things like attorney vacations or the court’s heavy docket.

It’s also a great case if the child’s bonding with the pre-adoptive parents was a factor considered by the trial judge and that placement disrupted.

You can present this information to the panel in two ways. First, you can file a 60(b) motion, appeal the denial of that motion, and consolidate the two appeals. Second, you can do what appellate counsel did here—move to expand the appellate record.

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.



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).