1:28 DECISION OF THE WEEK

August 1, 2018

CAFL APPELLATE PANEL SUPPORT UNIT

This 1:28 is a great "competing plan" decision out of the Essex Juvenile Court. While the panel issued this decision in 2011, its language remains useful. Not only did the panel find errors by the score, it also hammered the trial judge for being biased. What a great case! Congratulations to Deborah Sirotkin Butler who represented the appellant-child on this winning 1:28.

Adoption of Zaria, 79 Mass. App. Ct. 1114 (2011) (Mass. App. Ct. Rule 1:28) (Trainor, Katzmann & Rubin, JJ)

In Zaria, the child appealed the judge's decision approving DCF's adoption plan (adoption by pre-adoptive parents who had previously adopted the child's half-sibling) rather than the child's plan (guardianship by her long-term foster mother). The panel determined that the trial judge both abused his discretion and committed an error of law in determining that the DCF plan was in the child's best interests, vacated the decision, and remanded to a different judge.

The panel was particularly disturbed by the trial judge's findings regarding the testimony of the court investigator. The judge qualified her as an expert in bonding but then vituperatively discredited virtually all of her testimony. Judges are, of course, free to credit or discredit lay or expert testimony. But the judge in Zaria took it too far:

> The fact that the judge did not believe [the investigator] was manifest throughout his findings, but his findings border on a dislike that went beyond merely an appropriate determination of credibility and resulted, inappropriately, in the judge making extensive findings concerning [the investigator] both personally and professionally. This time and energy would have been better spent in findings directed to determining the child's best interests.

The judge was unfair to the investigator—and thus to the child—in other ways. DCF had moved the child from her long-term foster home to its pre-adoptive family four days before trial. The judge faulted the investigator and discredited her report because she failed to interview the new family and observe the child in the new home. But the investigator was never given the opportunity to do so, because DCF refused to allow her access to the new home and pre-adoptive parents, and the judge (despite child's counsel's request) would not order DCF to give her such access.

The trial judge appeared to give dispositive weight to Zaria's placement with her half-brother, a child she had never met until four days before trial. The panel held that, while a sibling relationship is an important factor in determining the best interests of a child, it cannot be given dispositive weight. See Adoption of Hugo, 428 Mass. 219, 230-231 (1998) (even where siblings spent time together and expressed a desire to live together, sibling relationship is not dispositive). Giving it dispositive weight was an error of law.

The panel also called out DCF for its heavy-handed attempts to influence the judge's choice of placement, moving Zaria just four days before trial with an "unusually short transition period" consisting of just a few visits and no overnight visits. According to the panel:

> [this] process…illustrated the potential abuse of DCF's enormous inherent power to manipulate the evidence to achieve its own determinations and goals….

The panel went on to criticize the judge for relying exclusively on the "uncorroborated and self-serving testimony" of the pre-adoptive mother to find that the child was thriving in her custody after only a couple of weeks.

This was particularly egregious because the judge, at the same time, discredited the testimony of the court investigator regarding the strong bond between the child and her former foster mother. The judge's weighing of testimony was therefore an abuse of discretion. What the panel had left of the judge's decision – favoring placement with a half-sibling above all else – was an error of law. The panel vacated the trial judge's decision and remanded the case to a different judge.

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The takeaway?

For trial lawyers, Zaria is very helpful for counsel opposing a new placement on the eve of trial that takes place with minimal transition. Cite Zaria whenever DCF makes a "clinical decision" that is clearly intended to improve its litigation position.

For appellate lawyers, Zaria is helpful if the trial judge has refused to credit testimony from an investigator, GAL, or expert who has sought, but been denied, access to information bearing on the child's best interests. Indeed, this case is helpful whenever a judge is particularly hostile toward an investigator or expert.

Finally, Zaria gives ammunition to a request for remand to a different judge in a case where the trial judge appears to have been systematically biased against your client.

1:28s: A Compendium

The CAFL Appellate Panel Support Unit will be putting together a compendium of good Rule 1:28 decisions, sorted by topic, going back to 2008 when the SJC officially permitted us to cite to unpublished decisions.

Be on the lookout some time this fall or winter for this new resource!

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).