*Adoption of Luc*, 18-P-473, December 13, 2018 (Sullivan, J.) [[Slip Opinion](http://www.sociallaw.com/services/slip-opinions/slip-opinion-details/adoption-of-luc-1)]

Summary by Katy Krywonis, CAFL Training Unit

In this appeal from a decree terminating her parental rights, the mother argued, inter alia, that the trial judge improperly admitted dictation and reports of a deceased social worker that contained inadmissible hearsay. The Appeals Court rejected her argument and concluded that hearsay is admissible in DCF records, subject to the parent’s and child’s ability to subpoena the declarants.

*Facts:* The DCF worker testified on direct examination. Before the mother had an opportunity to cross-examine him, the worker died. The trial judge struck the worker’s testimony, but admitted his dictation, reports, and assessments in evidence. The documents were limited to statements of fact; they were redacted to exclude opinion and judgment. The worker’s supervisor then testified in his stead. The trial judge terminated the mother’s parental rights, and she appealed.

*Discussion:* The official records hearsay exception permits the admission of records of primary fact made by a public officer in the course of their official duties. DCF workers are required to keep regular notes of their contacts with families pursuant to the Department of Early Education and Care regulations (606 C.M.R. 5.12(2)) and DCF policy (policy no. 2017-01: Family Assessment and Action Planning Policy), so dictation is an official record.

The official records exception applies to statements of primary fact. The documents must therefore be redacted to exclude opinion, diagnosis, and evaluation. Here, the trial judge properly redacted the dictation.

In addition, opposing parties must be given the opportunity to cross-examine the author. The worker’s death in this case deprived the mother of the opportunity to cross-examine him. The worker’s testimony was properly stricken. But the Appeals Court concluded that the records authored by the worker were nevertheless admissible as a declaration of a decedent. Section 65 of G.L. c. 233 provides that “a declaration of a deceased person shall not be inadmissible in evidence as hearsay…if the court finds that it was made in good faith and upon the personal knowledge of the declarant.” The Appeals Court reasoned that the documents were reliable because they were made based on the worker’s duty to report the information, and no one argued that they were made without a good faith basis.

Further, the Appeals Court rejected the mother’s arguments that the court improperly admitted second-level hearsay in the DCF records. The Court, relying on dicta in Adoption of George, 27 Mass. App. Ct. 265 (1989), held that second-level hearsay was admissible in DCF reports, “with opinion, evaluation, and judgment material edited out[.]” The hearsay was presumably reliable because it came from service providers with an obligation to make accurate reports to DCF. The burden was on the mother to subpoena and cross-examine the declarants.

*Practice Tip:* If it sounds like the Appeals Court in Luc confused the rules governing hearsay in *official records* with the rules governing hearsay in *court investigator reports*, it did. This decision is inconsistent with the general rule in Massachusetts that hearsay is *not* admissible in official records, unless the statements themselves satisfy some other exception to the hearsay rule. See Sklar v. Beth Israel Deaconess Med. Ctr., 59 Mass. App. Ct. 550, 556 n.8 (2003); Kelly v. O’Neill, 1 Mass. App. Ct. 313, 318-19 (1973). Thankfully, the mother is seeking further appellate review. If the SJC takes this case, the Appeals Court’s decision does not take effect. But if the SJC denies the mother’s request for FAR, this will be the law. We will keep you posted on any developments in this important case.

If Luc stands, counsel may face serious strategic decisions. The admissibility or inadmissibility of hearsay in DCF records can be outcome-determinative at a 72-hour hearing and at trial. Counsel should argue that multi-level hearsay should not be admitted at a 72-hour hearing because there is no time to subpoena all of the sources of hearsay. Alternatively, counsel may request a continuance to subpoena the sources. But this is a Hobson’s choice; lose the right to a hearing in 72 hours or lose the right to challenge the hearsay by cross-examining the sources.

The touchstone for any hearsay exception is reliability. The second-level hearsay that the Appeals Court concluded was reliable in Luc (based on George) was attributed to service providers, i.e., mandated reporters charged with reporting the information to DCF as a matter of duty and routine. Counsel should argue that hearsay of non-mandated reporters – friends, neighbors, relatives, children, etc. – and unattributed hearsay lack the requisite indicia of reliability and should be excluded.