

1:28 DECISION OF THE WEEK

January 8, 2019

CAFL APPELLATE PANEL SUPPORT UNIT

Adoption of Xuan, _ Mass. App. Ct. _ (2019) (Mass. App. Ct. Rule 1:28)

Let's ring in 2019 with a partial reversal! Adoption of Xuan, decided on January 7 (too new for a Mass. App. Ct. cite), is a great case to cite where there is a history of parent-child visits or phone calls, the parent asked for post-termination contact, and the judge's relevant findings have no record support.

In Xuan, the father sought post-termination/post-guardianship contact at trial but was denied, even though he had kept in touch with his son during the case, including during his incarceration. The father and the child appealed the denial of contact. While the panel affirmed the judge's decision to terminate father's parental rights, it vacated the order declining to provide for post-termination contact and remanded for further proceedings on the topic.

The trial judge held that post-termination contact did not serve the child's

best interests. But there was no evidence to support this determination. Rather, the judge's decision was solely "based on the Department's recommendation" that there be no contact. However, the Department presented no evidence to support that recommendation, other than its (non-evidentiary) closing argument, in which Department counsel stated, "[t]he Department is looking for termination of parental rights of [the father]. . . . No post-termination/post-guardianship contact, judge. No phone calls." But closing argument isn't evidence.

The judge found "no discernable bond" between the father and the child. But the findings didn't actually show no bond; rather, they were silent on the issue, and there was, in fact, evidence of a parental bond. Father spoke to his son every Sunday while he was incarcerated.



Best of all, the panel recognized that visits aren't the only form of post-termination contact. The panel was critical of the trial court for failing to "address any other form of contact between the father and the child, such as cards or letters to the child," which the mother had obtained in an open/structured guardianship agreement. The panel remanded for further proceedings on post-termination contact.

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The takeaway?

Here's a takeaway for trial attorneys. If your incarcerated parent client wants phone contact with the child, ask DCF. If the child is placed with a relative, DCF may have no objection. If the child is placed in a non-kinship foster home, and the foster parents are not comfortable with the parent calling from prison, DCF may be willing to have the parent call the child when the child is at the DCF office after an in-person visit with the other parent. You may need to make certain arrangements with the prison facility to make this happen and someone will need to set up an account to receive jailhouse calls. Indeed, you may be able to get DCF to help with these arrangements. After all, reasonable efforts at reunification don't necessarily stop at the prison gates. Remember that phone calls, like in-person visits, are evidence of a meaningful bond. As such, they may make or break your case for post-termination or post-adoption contact.

Further, the child's trial attorney in Xuan told the judge that the proposed guardian didn't want the father to have any future contact with the child. This was done by verbal proffer; there was no actual evidence on the issue. The panel in Xuan found this to be insufficient. There's a takeaway here, too. If you are opposing post-termination or post-adoption contact based on the wishes of a proposed placement resource, call that resource as a witness and get some testimony on the issue. Or stipulate, on the record, with other counsel as to the resource's wishes. In other words, offer evidence for the court to properly rely on; verbal proffers aren't enough.

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).