*Adoption of Ulrich*, 94 Mass. App. Ct. 668 (2019)

Summary by Katy Krywonis, CAFL Training Unit

This case is important for appellate attorneys because it establishes a new procedure for a single justice considering a motion to stay an appeal to pursue a new trial motion in the trial court. The Appeals Court held that a party who moves to stay an appeal to pursue a motion for new trial – based on ineffective assistance or other grounds – should provide enough evidence and argument to allow the single justice to assess whether the motion has a sufficient likelihood of success on the merits to justify delaying appellate review. Further, the single justice should balance the importance of a prompt resolution of the case with the merits of the motion, while recognizing that “too stingy a filter” could prolong final resolution even further if a postappeal new trial motion is allowed.

*Facts*: The trial judge concluded that the mother was unfit to parent five of her children and terminated her parental rights to each of them. The mother and four of the children appealed. The mother then moved to stay the appeal to pursue a motion for new trial in the Juvenile Court based on ineffective assistance of counsel (IAC). The basis of the mother’s IAC claim was her trial attorney’s decision not to call the maternal grandmother to testify about the domestic violence that prompted the removal and the sexual abuse of two of the children while they were in the paternal aunt’s care. The single justice determined that the mother’s IAC claim showed an inadequate prospect for success to justify a stay and denied her motion. The mother appealed that denial. She argued that a motion to stay the appeal so that she could pursue a new trial motion should presumptively be allowed; no authority required her to satisfy the single justice of the merits of her motion. The Appeals Court affirmed the denial of her motion for a stay and the termination decrees.

*Discussion*: Generally, appellate courts do not review IAC claims for the first time on appeal; a party wishing to raise IAC after an appeal has been docketed must move to stay the appeal – or seek leave of the single justice – to pursue a motion for new trial. Motions to stay or for leave are not automatically allowed. The single justice must decide whether the interests of fairness, balanced with the interests of judicial economy and prompt resolution of custody issues, will be best served by resolution in the trial court. Factors that weigh in favor of a stay of the appeal include the possibility that the motion for new trial will be allowed, the economy of consolidating an appeal from denial of a new trial motion with the direct appeal, and the general benefits of earlier retrials in cases in which a motion for new trial is allowed. Factors that weigh against a stay include the similarity of issues raised in the motion for new trial and in the direct appeal, and reluctance to delay appellate review when briefing is complete and the case is, or is ready to be, scheduled for oral argument.

The Appeals Court concluded that the single justice’s assessment was consistent with this balancing test, and that the record before her was adequate even though the mother did not fully present the parameters of her IAC claim. The Court reasoned that the maternal grandmother was not a critical witness concerning the children’s needs and the mother’s ability or inability to address them, and it was reasonable for trial counsel to decide not to call her as a witness to avoid the risk of damaging cross-examination. More importantly, the evidence of the mother’s unfitness was “overwhelming,” so it was unlikely that her trial counsel’s performance in this regard made any difference.