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APPELLATE BULLETIN

To: CAFL Appellate Panel Members
cc: CAFL Trial Panel Members
CAFL Staff
Fr: Andrew Cohen, Director of Appellate Panel, CAFL Division
Ann Narris, Staff Attorney, CAFL Division
Lisa Augusto, Staff Attorney, CAFL Division
Re: Administrative Matters
Recent Unpublished Decisions
Date: December 20, 2018

Administrative Matters

A. Amended Rules of Appellate Procedure

The SJC has issued amended Rules of Appellate Procedure that take effect March 1, 2019. Here is a link:

https://www.mass.gov/law-library/massachusetts-rules-of-appellate-procedure

Attorneys must follow the current Rules governing timing until March 1, but the appellate courts are permitting attorneys to follow the amended Rules concerning formatting right away. Soon we'll send out a notice regarding important changes to the Rules.

B. E-Filing

E-filing is here! For impounded cases (which include child welfare appeals), it's voluntary for briefs, transcripts, etc. But CPCS will be requiring CAFL Appellate Panel attorneys to E-file as of March 1, 2019. We urge you to file your next briefs electronically. The Appeals Court and Tyler Technologies, the entity that runs the E-filing portal, have help lines (and helpful people answering them) to get you through your first adventures in E-filing. For technical assistance with the eFileMA.com portal, contact Tyler Technologies at (800) 297-5377 (issues with registration, error messages, etc.). For questions about what E-filing code to select or why your submission was rejected, contact the Appeals Court E-filing hotline at (617) 725-8725. Below are links that show you how to do it:

https://www.mass.gov/guides/electronic-filing-at-the-appeals-court
https://www.mass.gov/files/documents/2016/12/vu/e-filing-quick-tips.pdf

C. New Appeals and Appellate Assignments

If your client is appealing a final judgment (termination, permanent custody, permanent guardianship, and a handful of other orders), please send a copy of the notice of appeal, the motion for appointment of appellate counsel, and an appellate assignment intake form to Ann Narris so that she can assign appellate counsel. She can be reached at (617) 910-5746 or anarris@publiccounsel.net.

Here is a link to the intake form and other key documents:
https://www.publiccounsel.net/cafl/professional/administrative-matters-and-forms/

For appellate attorneys, contact Ann if you want a new appellate assignment or if you need an appeal reassigned.

D. Single Justice Practice

Need help with a single justice petition? We have new model petitions and memoranda of law available in Word format, focusing on problems at 72-hour hearings. We also have model single justice motions and other resources (also in Word format). They are all available at: https://www.publiccounsel.net/cafl/professional/single-justice-practice/. Best of all, we have a step-by-step guide for filing petitions both electronically and by hard-copy, at:

https://www.publiccounsel.net/cafl/wp-content/uploads/sites/7/Guide-to-SJ-Practice-11.6.18.pdf

Please contact Lisa with any questions or to request a model petition to get you started. She can be reached at (617) 910-5738 or laugusto@publiccounsel.net.

E. Judicial Comments Project

We're inviting you to send in comments about common questions the Appeals Court justices ask at argument, as well as pet peeves or peccadillos they seem to have. We will organize feedback for each justice and provide it to you upon request. All feedback will be anonymous, and this will *not* be a publically available document. Please email Ann at anarris@publiccounsel.net with your comments or to request information about the judges on your panel.

F. 2019 Appellate Panel Certification Training

We are now accepting applications for the CAFL appellate panel certification training on April 29, April 30, and May 1, 2019 in Worcester. If you know someone who might be interested in child welfare appellate work, please send him/her this link to the application materials: https://www.publiccounsel.net/cafl/training/. Completed applications are due by March 22, 2019.

Recent Unpublished Decisions

This bulletin catches us up through January 2018. (We'll be issuing another bulletin shortly that will catch us up through fall 2018). We have not summarized all unpublished child welfare decisions; rather, we include only those with interesting facts and/or legal issues. If we left out one of your Rule 1:28 decisions, and it has a useful tidbit in it, please let us know.

We still see Rule 1:28 decisions cited incorrectly in briefs. Remember, if you cite to a Rule 1:28 decision, 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).** We're adding the judges in parentheses just for your information.

Rule 1:28 decisions are available at: https://www.lexisnexis.com/clients/macourts/. Check off that you agree to the terms of usage, and click on "Begin Searching Opinions," then under the heading "Sources" select "MA Appeals Court Unpublished." To find child welfare Rule 1:28 decisions, type in the "party name" box: "adoption or care or custody or guardianship." To find a specific case, enter the case name.

1. Adoption of Stacey, 92 Mass. App. Ct. 1105 (2017) (Mass. App. Ct. Rule 1:28) (Maldonado, Neyman, and Desmond)

Mother argued that the trial judge erred in not ordering post-termination and post-adoption visitation. Although the panel ultimately addressed the merits of Mother's visitation argument (and affirmed), it noted that the issue of post-judgment visitation was unpreserved because Mother failed to request it at trial. So this is just a reminder to trial counsel – if you don't ask for post-termination and -adoption visits at trial, and the judge doesn't order any, the issue is waived on appeal.

How do you ask for post-termination and -adoption visits while you're fighting for your client to maintain her parental rights? Try this: "Your Honor, I ask that you order post-termination and post-adoption visits between the child and my client in the event you decide to terminate her rights. Of course, I'm arguing today that you should *not* terminate her rights because DCF can't meet its burden, but, as you know, in order to preserve this issue, the case law requires that I raise this issue with you." Explain to your client ahead of time that you need to say this to the judge so that your client doesn't think you're conceding anything. Then make sure you back up your request for visits by presenting evidence that there is a bond between the client and the child, that visits do, in fact, serve the child's best interests, and that an order is necessary.

2. Adoption of Quest, 92 Mass. App. Ct. 1110 (2017) (Mass. App. Ct. Rule 1:28) (Green, Blake, and Singh)

Be careful what you agree to in the name of expediency!

In Quest, Mother no-showed for trial. The DCF ongoing and adoption workers testified and the adoption plan was offered in evidence. The judge terminated Mother's rights and continued the case for further hearing on post-adoption contact. Two months later, Mother appeared, moved to vacate the termination decree, and requested a new trial; according to Mother, she had been prevented from attending trial by an abusive partner. The judge allowed Mother's motion.

At the retrial, Mother's counsel agreed that the judge could consider the testimony of both DCF social workers from the original trial on the issue of post-adoption contact. DCF's recruitment adoption plan was not offered in evidence. At the conclusion of the retrial, the judge terminated Mother's rights and found that DCF's adoption plan was in Quest's best interests. In her findings, the judge acknowledged DCF's failure to enter its adoption plan in evidence at the retrial, but stated that "she was taking judicial notice from the original trial that the department's plan was adoption by recruitment."

On appeal, Mother argued (among other things) that DCF never offered an adoption plan at the retrial, and, therefore, the court erred in determining that termination served the child's best interests. The panel agreed – partially – noting that the "adoption plan entered in evidence in the original trial was not a matter of which judicial notice could be taken." But the panel held that Mother failed to preserve this issue by not objecting to the absence of a plan at the retrial. (This reasoning is dubious, at best. A plan is part of DCF's affirmative proof that adoption serves the child's best interests and is mandated by statute. A parent shouldn't be required to object to the lack of a plan any more than a parent should be required to object to DCF's failure to prove unfitness.) Further – and more importantly – the panel held that, in any event, Mother was not prejudiced by the judge's consideration of a plan that wasn't in evidence because counsel had agreed to the admission in evidence of the DCF social workers' testimony from the prior trial, and that prior testimony included discussion of DCF's plan of adoption by recruitment.

3. Adoption of Yolane, 92 Mass. App. Ct. 1116 (2017) (Mass. App. Ct. Rule 1:28) (Milkey, Blake, and Singh)

Dozens of trial dates spread out over a year or more – an hour here, two hours there, weeks or months in between trial dates. You know the story. Is the Appeals Court as concerned about this as we are? Apparently not.

The trial in Yolane took place on 70 (!) nonconsecutive days and spanned 14 months. In response to Mother's argument on appeal that her due process rights were violated because of the length of trial, the panel noted that these delays were "outside of the practical ability of the judge to control given the case volume and resource constraints of the Juvenile Court." That is, the panel gave the Juvenile Court a pass.

But there is something of value here. Although the panel ultimately found that the delay did not prejudice Mother, it suggested steps a trial judge could take – and therefore what trial counsel can ask for – when faced with this kind of anticipated scheduling nightmare. The panel suggested that it "may be appropriate for a trial judge to seek leave from the Chief Justice of the Juvenile Court to be assigned a block of time" to conduct a complicated or lengthy trial and to have the "day-to-day activities of the court" assigned to another judge during that time.

What can trial counsel do with these suggestions? Ask the trial judge to do exactly what the panel suggested in Yolane – in fact, attach Yolane to a "motion for special assignment." In your motion, ask the trial judge to ask the Chief Justice to (a) give your judge a "block of time" and (b) assign "day-to-day activities of the court" to another judge. Or ask the judge to ask the Chief to assign another judge specifically for your trial. Give it a try!

4 & 5. J.C. v. M.T., 92 Mass. App. Ct. 1111 (2017) (Mass. App. Ct. Rule 1:28) (Wolohojian, Maldonado, and Wendlandt), and **Tejada v. Lemus, 92 Mass. App. Ct. 1111 (2017) (Mass. App. Ct. Rule 1:28)** (Green, Blake, and Lemire)

This pair of decisions reversed the Probate and Family Court's denials of motions for special findings necessary to establish a child's eligibility to apply for special immigration juvenile (SIJ) status. Although these cases predate the SJC's decision in Hernandez-Lemus vs. Arias-Diaz, 480 Mass. 1002, 1003 (2018) (clarifying that "a judge simply may not decline to make findings; he or she must make the findings –whether favorable or not"), they are helpful because they suggest an alternative pathway for trial counsel to secure timely SIJ findings. In each case, the panel reversed the trial court's denial of the motion for findings but also, in light of the time-sensitive nature of the requests, considered the uncontested documentary evidence and issued the requested findings itself (and ordered the trial court to enter a decree incorporating those findings forthwith).

What does this mean? It means that, if the trial judge denies your motion for special findings, you could ask an Appeals Court single justice to enter them instead of remanding to the trial court. But only make such a request if it is truly time-sensitive.

If you represent a child who is seeking SIJ status and you need to file a motion for special findings, reach out to CAFL Training Director Amy Karp (akarp@publiccounsel.net) for materials to assist you.

6. C.L. v. Department of Children and Families, 92 Mass. App. Ct. 1120 (2017) (Mass. App. Ct. Rule 1:28) (Green, Maldanado, and Kinder)

DCF supported an allegation of neglect against Mother for putting her children "in the middle of a contentious divorce proceeding" and for filing unsubstantiated 51A reports against Father. Mother appealed through the fair hearing process and lost. She then sought relief in the Superior Court under G.L. c. 30A, § 14, lost again, and appealed to the Appeals Court.

On appeal, the panel reviewed whether DCF presented substantial evidence to support its conclusion that there was "reasonable cause to believe" Mother neglected the children. The panel

affirmed. Here, Mother instigated false claims against Father by mandated reporters. She also sought medical attention for the children to validate her allegations against Father, and a school counselor and DCF investigator believed that the children had been coached and rehearsed. "The destabilizing impact of involving one's children in false allegations of abuse and neglect is self-evident." Although the Mother argued that DCF's 51B investigation was incomplete or unfair, she had a chance to supplement it at the fair hearing but didn't; she even failed to testify. The fair hearing officer could therefore properly draw a negative inference. See id. at *2 (citing Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 826 (2006)).

What do we take from C.L.? First, false reports of neglect are a form of neglect! Second, if you ask for a fair hearing and have a chance to submit evidence, do it. And if you have a chance to testify at that fair hearing, do it, or the fair hearing officer can draw an adverse inference from your failure, just like a judge.

7. Adoption of Leroy, 92 Mass. App. Ct. 1122 (Mass. App. Ct. Rule 1:28) (Green, Sullivan, and Sacks)

This long 1:28 decision is interesting only for its commentary about judicial questioning. Father argued that the trial judge improperly asked "numerous and assertedly result-oriented questions of certain witnesses." The panel rejected Father's bias claim, but was still critical of the judge's questioning. While judges are permitted to question witnesses, they may only do so to clarify answers or eliminate confusion; they aren't allowed to weigh in on, or appear to weigh in on, one side or the other. See id. at *5 n. 20 (citing Adoption of Norbert, 83 Mass. App. Ct. 542, 547 (2013)). The judge warned counsel that he was going to ask questions:

> [He] informed all counsel at the start of the trial that he expected to engage in such questioning; that he did not intend to interfere with counsel's opportunity to present their own cases; that if they found any of his questioning objectionable, they should object; and that there would be no consequences for doing so.

Id. at *5. (This wasn't generosity, of course; it's the law. Attorneys are not only welcome to object to judges' questions, they *must* in order to preserve those objections for appeal, however difficult that might be.) The panel wasn't impressed with the judge's warning:

> Such a statement, while helpful, still leaves counsel in a difficult position. It is not a substitute for exercising restraint and sensitivity in asking witnesses questions only when necessary to clarify the judge's understanding of the evidence. Here, at times, the judge's interventions may have been more overbearing than necessary.

The example given of the judge's "overbearing" intervention is scary:

> It was unnecessary for the judge, in overruling the mother's objection to the department's question about the father's substance abuse, to suggest that the mother's counsel was "cross[ing] an ethical line and represent[ing] another party, [and] I might as well have [the father's counsel] leave." The judge's initial decision to overrule the objection on substantive grounds was sufficient.

> Continuing on to suggest that an evidentiary objection constituted an ethical violation needlessly risked chilling counsel's advocacy.

Id. at *5 n. 21. This is, to be frank, downright bizarre on the part of the trial judge. There are many reasons why one parent's counsel might legitimately object to questions designed to elicit hearsay about the other parent's problems. Maybe the parents live together, and one parent's problems are a contributing factor in the other parent's fitness calculus; maybe DCF is alleging that the objecting parent knew (or should have known) about the other parent's problem; or maybe the objecting parent wants the child to live with the other parent. Perhaps the trial judge here was just confused about counsel's strategy, but that is no reason to raise the ugly specter of an ethics violation.

Overall, though, according to the panel, the judge didn't prevent Father from asking any questions, and most of his questions were appropriate. See id. at *6 & n. 22.

8. Adoption of Major, 93 Mass. App. Ct. 1123 (2018) (Mass. App. Ct. Rule 1:28) (Green, Maldanado, and Kinder)

The parents filed Rule 60(b) motions for relief from judgment, including affidavits from the parents showing that the children's adoptive placements disrupted, the circumstances in the parents' home had improved, and they had successfully been raising another child. The trial judge denied the motions, and the parents appealed. The panel affirmed.

According to the panel, the motion judge was not required to credit these "self-serving affidavits," especially in the absence of evidence that the parents could meet the subject children's special needs. The lesson? Where possible, attach more than just parent affidavits in support of a 60(b) motions. Attach other documentary evidence, such as school records, medical records, pictures, brochures describing services, and/or affidavits from fact witnesses or experts. Parent affidavits, by themselves, are almost never enough.