

1:28 DECISION OF THE WEEK

February 25, 2019

CAFL APPELLATE PANEL SUPPORT UNIT

Care and Protection of Ruth, 94 Mass. App. Ct. 1119 (2019) (Mass. App. Ct. Rule 1:28) (Sullivan, Kinder, and Shin, JJ)

Ever had a care and protection case where the children have gone home, the parents are doing well, and the petition should just be dismissed? Even then, it's not uncommon for DCF to object to dismissal, arguing that the court lacks authority to dismiss a case over DCF's objection before trial. (Why does DCF object to dismissal when things are going well? The agency usually tells the judge that it wants to monitor the situation. But it's often waiting for the parent to mess up; if the parent does, the case is ripe for trial.) This week's 1:28, Care and Protection of Ruth, provides some support when seeking a dismissal over DCF's objection. While this case isn't relevant to final appeals, it's a great case for single justice petitions and trial practice.

In Ruth, the father appealed a C&P dismissal where the children were in the custody of their mother. He wanted the

court to monitor the case, arguing that as soon as the case closed things would revert to the way they were before the case started. The allegations against mother included medical neglect, lack of supervision, and a dirty home. DCF, on the other hand, reported that the children—who had returned home just a month into the case—were doing well with their mother and that she was engaged in services. DCF sought dismissal of the C&P and planned to keep the clinical case open for a year.

The father objected and wanted a trial on the merits. The motion judge appointed a GAL to investigate father's concerns. The GAL, after interviewing 16 collaterals, agreed with DCF that the protective concerns had abated and recommended that the case be dismissed. DCF again moved to dismiss and the father again objected. The trial judge allowed DCF's motion.

The Appeals Court panel affirmed the pretrial dismissal of the petition over the father's objection. While, as a general rule, a parent can continue the proceedings and "press his concerns before the judge" independent of DCF, Ruth at *4 (citing Care and Protection of Benjamin, 403 Mass. 24, 26 (1988)), here the father could not. He was required to articulate a concern regarding the mother's present unfitness; allegations of the mother's past inadequacies were not enough to survive a motion to dismiss. "In the absence of any argument on appeal concerning present deficiencies in parenting by the mother," there was no error in dismissing the petition. Ruth at *5. Here, even if the father had proven his case, he still would not prevail.

So the juvenile court can dismiss a case pre-trial over the petitioner's (or a putative petitioner's) objection!

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PRACTICE TIPS: BRINGING (OR APPEALING) A PRE-TRIAL MOTION TO DISMISS

Narrow or Broad Reading of Ruth?

Your client might be on either side of a motion to dismiss. Because Ruth had unusual facts, counsel can argue that it should be read narrowly and applied only in similar circumstances. For example, in Ruth, DCF supported the dismissal and reported having no concerns. The judge also appointed a GAL and considered the GAL report when making her decision to dismiss. The father (who was *pro se* with stand-by counsel) did not subpoena the GAL to cross-examine her, which the panel noted. Further, no party alleged the mother's current parental unfitness. Moreover, there was an outstanding Probate and Family Court case—a petition for the modification of custody—in which the father could have presented his concerns.

On the other hand, Ruth can be read more broadly to bless the juvenile court's authority to dismiss a case pre-trial when the petitioner, or a putative petitioner (like the father here, who could have substituted in as petitioner under Benjamin), fails to allege current protective concerns. That is, if the petitioner cannot satisfy its burden regarding current unfit-

ness (assuming its allegations are true), the judge can dismiss the case pre-trial, even over a party's objection.

There is other support for the juvenile court's authority to dismiss a C&P case before trial over DCF's objection:

- The new Juvenile Court Rules contemplate the filing of a motion to dismiss in C&P cases. Juvenile Court Rule 7(c)(all motions to dismiss must be submitted in writing);
- The judge, not DCF, is responsible for deciding whether a petition should proceed or be dismissed. Care and Protection of Benjamin, 403 Mass. 24, 25 (1988); and
- At a permanency hearing, the court may make "any appropriate order as may be in the child or young adult's best interests including, but not limited to, orders with respect to care or custody." G.L. c. 119, § 29B(d). So a judge may have

the authority to dismiss a case at the permanency hearing stage.

None of these is as good as Ruth!

