*Adoption of Posy*, 17-P-1473, February 4, 2019 (Singh, J.)

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This case highlights the special challenges faced by non-citizen clients and their families. The father and mother were Guatemalan citizens and the father had been deported. At trial, the father sought custody of his two daughters who were placed in DCF custody after their mother died. The father appealed from decrees terminating his parental rights. The father argued that the trial judge’s findings did not have adequate support in the record, including a finding that he had abandoned the children. The Appeals Court agreed and vacated the termination decrees.

*Facts*: The mother and father met in New Bedford and later had two children, Posy and Beth. Shortly before Beth’s birth, the father was deported. Over a year after his deportation, DCF became involved with the mother and children due to allegations of neglect relating to the mother’s alcohol use. The mother later died. The father could not take immediate custody of the children because of a ten-year restriction on his reentry to the United States (making him eligible for return by April 2019). A maternal uncle and his girlfriend took temporary guardianship of the children for a few months. Other family members and friends were disqualified from taking guardianship because of their immigration status, so DCF took custody of the children and placed them in foster care. The assigned social worker contacted the father in Guatemala and provided him a service plan. The father identified a paternal great uncle to take care of the children until he could take custody of them. The placement was “ruled out” by DCF, but the uncle and other family members visited the children regularly. During his absence, the father maintained telephone contact with the children and with the DCF worker. Less than one month after issuing the service plan, DCF changed its goal from reunification with the father to adoption. Following a one-day trial at which the father was represented by counsel but not present, or participating by telephone, the judge terminated his parental rights to Posy and Beth. She approved DCF’s plan of adoption and declined to order posttermination and postadoption contact. The father appealed.

*Discussion*: The Appeals Court concluded that the trial judge erred when she determined, most significantly, that the father “abandoned” the children by getting deported, had “a serious issue with criminal activity,” and had “longstanding issues of domestic violence.” The Appeals Court found that the father did not “abandon” the children as that term is defined in G.L. c. 210, § 3(c) because his location was well known to DCF, he kept in “pretty extensive contact” with DCF, and although unsuccessfully, he suggested various family members as potential caretakers. Citing *Adoption of Jacqui*, 80 Mass. App. Ct. 713, 718 (2011), the Appeals Court explained that unavailability due to deportation, similar to unavailability due to incarceration, alone does not conclusively render a parent unfit or serve as a basis for termination of their parental rights. In addition, the trial judge’s general allegations that the father was deported because of criminal activity and domestic violence were unsupported by any specific incidents. Contrary to the judge’s conclusion that the father refused to accept services offered or provided to him, the record showed that DCF did not make any referrals to specific service providers in Guatemala.

Some of the trial judge’s other findings were unrelated to the case, e.g. the father’s “documented failure to understand the basic concepts of parenting such as appropriate types, amounts and when to feed this child,” and many of her conclusions of law were irrelevant. They were “untethered to any specific findings of fact and generally assail the father with references to poor parenting, poor decision making, and parental neglect.” The Appeals Court said that while the judge’s statement that the father “never took any actions to seek to remove the girls from their alcoholic mother or the neglect that was going on for years” was true, it was unfair. There was no evidence the father knew about the issues with the mother or that the father was in a position to try to remove the children from her. The Court noted that DCF was “fully aware of the issues with the mother and legally obligated to seek removal if circumstances warranted, but did not do so.”

The Appeals Court also expressed concern about DCF’s goal change. “[W]e are troubled by the swiftness with which the department changed its goal from reunification to adoption.” The trial judge found that DCF changed its goal due to “lack of progress” by the father. Even if that were true, the father was given less than one month to demonstrate progress – an unreasonably short amount of time. Nevertheless, DCF’s explanation for its goal change indicated a greater concern with the father’s immigration status – “it’s impossible for him to come here” and “the children are United States citizens.”

*Practice Note*: If you represent a child who wants to live with their parent in another county, such as Guatemala, you should advocate for that to happen. Where the client wants to stay in the United States, you should explore temporary options. As happened in *Posy*, DCF, and some judges, may assert that a child should not be placed in the custody of an undocumented person because the arrangement is unstable and thus unsuitable. There are ways to make such a placement or custody arrangement more stable. For example, counsel could file a temporary guardianship, with provision for a back-up guardian in the event that the first guardian is detained and/or deported. Counsel should think creatively, and consult with kin to figure out an arrangement that might work, in accordance with the client’s direction. Counsel may then argue to the Court why this arrangement is stable, and perhaps may be more stable than a traumatic removal, separation from kin, and placement in stranger foster care. Counsel may cite to statistics that show that Massachusetts has a particularly high rate of placement instability for children in state custody. *See* Lowenstein, Kate. *Shutting Down the Trauma to Prison Pipeline: Early, Appropriate Care for Child-Welfare Involved Youth*, p. 8, 2018. Citizens for Juvenile Justice. Federal standards define placement instability as more than two placements while in state custody. Massachusetts averages three placements per child in its custody. *Id*. at 8-9.