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Appellate Bulletin

To: CAFL Appellate Panel Members
cc: CAFL Trial Panel Members
CAFL Administrative Attorneys
Fr: Andrew Cohen, Director of Appellate Panel, CPCS/CAFL Division
Ann Narris, Staff Attorney, CAFL Appellate Panel Support Unit
Sarah LoPresti, Staff Attorney, CAFL Appellate Panel Support Unit
Re: Administrative Matters
Updates to Compendium of Unpublished Child Welfare Decisions
Writing Tip – Parenthetical Information
Date: October 31, 2109

Administrative Matters

Welcome. Our Boston CAFL Administrative Office has moved! CAFL Appellate Panel Director Andy Cohen and CAFL Staff Attorney Sarah LoPresti have new office space at 100 Cambridge Street, 14th Floor, in Boston. (Note: We still receive all mail at 44 Bromfield Street, Boston, MA 02108). CAFL Staff Attorney Ann Narris will be at 100 Cambridge Street once a week. On all other days, Ann will be at the Worcester CAFL office at 340 Main Street, Suite 7137, Worcester, MA 01608. Our phone numbers and email addresses remain the same:

- Andy Cohen - (617) 910-6736, acohen@publiccounsel.net
- Ann Narris - (617) 910-5746, anarris@publiccounsel.net
- Sarah LoPresti - (978) 219-5548, slopresti@publiccounsel.net

The new 100 Cambridge Street location has wonderful space for moot courts!

Moot Courts. There are several oral arguments currently scheduled for November, and we're sure that there will be a bunch set for December and January. We are moot-courting attorneys on many of the November arguments. If you have an argument coming up and want to be moot-courted, call or email us. Under some circumstances we can come to your office. We can also do moots in our offices in Boston and Worcester.

Trainings. We are seeing a significant uptick in the number of appeals in child welfare matters – hence, all of the please-take-a-case emails from Ann. We are hoping that you can help us recruit new lawyers to join our panel. If you know someone who might be a good fit for CAFL appellate work, please invite them to apply for our spring certification training. The training will take place at Worcester Community Legal Aid on May 5, 6, and 7, 2020. The application

deadline is March 31, 2020. Applications and more information can be found on the CPCS website at: https://www.publiccounsel.net/blog/cafl-training/

In addition, this winter we plan on putting on a new multi-topic appellate training. Feel free to send us your ideas. We're also expecting to launch an advanced appellate writing training that we plan to bring to various locations throughout the state. We hope to see you all at one of those trainings!

Single Justice Petitions. Juvenile Court and Probate & Family Court interlocutory orders (temporary custody orders, denials of motions, etc.) can be reviewed by an Appeals Court single justice under G.L. c. 231, § 118. All single justice petitions used to be filed by trial attorneys, but in the past year we've been assigning many of them to appellate panel members. Interested? Contact Ann Narris at anarris@publiccounsel.net or (617) 910-5746. We have plenty of practice tools on the CPCS website to help get you started with single justice practice: https://www.publiccounsel.net/cafl/professional/single-justice-practice/

Updated Compendium of Unpublished Child Welfare Decisions. Sarah LoPresti has recently updated the Compendium of Unpublished Child Welfare Decisions with summaries of interesting cases from January-July 2018. (More updates will follow.) The updated version can be found on the CPCS website: https://www.publiccounsel.net/cafl/wp-content/uploads/sites/7/Compendium-of-unpublished-decisions-10-2019.pdf

Recent Unpublished Decisions

This bulletin contains select Rule 1:28 decisions through July 2018. (We'll be issuing another bulletin shortly that will catch us up through the end of 2018 – yes, we're a bit behind.). We have not summarized all unpublished child welfare decisions; rather, we've 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. In **Adoption of Ulyssia, 92 Mass. App. Ct. 1109 (2017) (Mass. App. Ct. Rule 1:28) (Milkey, Massing, and Ditkoff),** an incarcerated father was involuntarily absent on the first day of trial. The judge declared a mistrial on that basis, but not before DCF admitted exhibits 1-16. At retrial, DCF assumed that exhibits 1-16 were in evidence already and began to enter new exhibits starting at 17. The docket for the second trial indicated that exhibits 1-16 had been entered. The transcript did not specifically mention exhibits 1-16 being offered, but it showed plenty of discussion about exhibit numbers among the judge, clerk, and counsel. At no point did the father's attorney question why the numbering of the new exhibits began at 17 or make any objection. At this second trial, the judge terminated the father's rights.

On appeal, the father argued that exhibits 1-16 were not properly admitted at retrial because they had only been admitted at the trial that ended in a mistrial, and that the judge's reliance on them was erroneous. The panel disagreed. It noted that, at retrial, the docket reflected the admission of exhibits 1-16, and called the docket entry "prima facie evidence of what happened."

> [D]ocket sheets are part of the court records and may be presented as prima facie evidence of the facts recorded therein." Northeast Line Constr. Corp. v. J.E. Guertin Co., 80 Mass. App. Ct. 646, 651 (2011), quoting from Commonwealth v. Podoprigora, 46 Mass. App. Ct. 928, 929 (1999). See Commonwealth v. Denehy, 466 Mass. 723, 727 (2014), quoting from Savage v. Welch, 246 Mass. 170, 176 (1923) ("Docket entries 'import incontrovertible verity' and 'stand as final' unless corrected by the court"). Here, a contemporaneous docket entry indicates that Exhibits 1–16 were admitted at the new trial. Far from contradicting such prima facie evidence of what happened, the transcript reinforces that the parties understood that Exhibits 1–16 were in evidence.

The lesson? When in doubt about exhibits at a re-trial or a continued trial, ask the clerk or the judge to clarify. Perhaps the father in Ulyssia would have had a viable due process argument had his trial counsel objected to admission of the old exhibits at the second trial.

2. **Adoption of Ariston, 92 Mass. App. Ct. 1112 (2017) (Mass. App. Ct. Rule 1:28) (Green, Hanlon, and Neyman)**, is painful for parents who have achieved sobriety before trial after a long struggle with substance use disorder. In Ariston, the father had a two-decade substance use problem and an extensive criminal history related to his addiction. But, as of trial, he had been sober for more than a year. The panel detailed the father's extensive treatment:

> [While incarcerated,] the father detoxed "cold turkey." The father began to engage in services and successfully completed an intensive, one-month addiction program. On his own initiative, the father attended two Alcoholics Anonymous (AA) meetings per week and GED prep classes. When he entered a lower security facility, the father attended similar classes for two months. While incarcerated, the father attended up to four AA meeting per week, though only required to attend one. Following his release from incarceration in October, 2015, the father continued to engage in substance abuse counseling and was screened for

> substances multiple times per week, the results of which were all negative. When the father was released from the treatment program, his counselor noted that the father engaged in treatment with a "positive attitude" and his participation was "excellent," concluding that the father should have a "successful re-entry into society." At the time of trial, the father had been sober for thirteen months and was able to maintain full-time employment. He was attending three AA meetings per week, a weekly relapse prevention meeting, and GED prep classes. The father was able to articulate a detailed relapse prevention plan that would maintain his sobriety.

This dad was pretty impressive! Still, the panel thought otherwise, noting that he had previously had "brief periods of sobriety, when he was using suboxone, from a few months up to one year." (Although one could argue that previous periods of sobriety demonstrate commitment to recovery, the panel clearly took this fact to show that a year of sobriety was simply part of father's pattern, and relapse was inevitable.) Further, his sobriety at the time of trial was only because he was incarcerated and on probation:

> Although the father has made laudable strides toward sobriety and self-improvement, the judge did not abuse her discretion in concluding that his long-standing past behaviors were reliable prognosticators of his current and future fitness. The father has no record of sobriety outside his incarceration and the regulated context of his postrelease probation. The children should not have to face further risk while waiting to see if the sobriety the father achieved and sustained during the period immediately preceding trial are sustained once he is freed of the sanctions and close oversight provided by the conditions of his probation.

The take-away? Trial judges are free to give limited weight to a parent's recent sobriety if it comes while the parent is incarcerated and on probation, particularly if it is weighed against a long period of earlier drug use.

3. In **Adoption of Emmett, 92 Mass. App. Ct. 1118 (2017) (Mass. App. Ct. Rule 1:28) (Agnes, Maldonado, and McDonough)**, the trial court terminated father's rights largely based on his extensive substance use history. Although DCF presented plenty of evidence of the father's problem, he continued to deny it through trial. The trial court found the father unfit, in part, because he refused to participate in a substance abuse treatment program, a substance abuse evaluation, or drug testing. The trial judge drew a negative inference from the father's "largely unexplained refusal to cooperate with DCF." The panel affirmed, citing Care & Protection of Vieri, 92 Mass. App. Ct. 402, 406 (2017).

But wait just a minute! Does Vieri actually stand for the proposition that a judge can draw a "negative inference" from a parent's refusal to cooperate with DCF (by, for example, not participating in a substance abuse evaluation)? Not really. In that case, DCF proved that the mother had a chaotically messy home. The mother claimed that the conditions had since been ameliorated, but she refused to allow DCF to enter the home to verify that assertion. According

to the Appeals Court, the trial judge could therefore infer – negatively – that the conditions had not, in fact, been ameliorated.

The problem is that Vieri (and now Emmet) use the term "negative inference" loosely (and, I would say, unnecessarily). The term "negative inference" or "adverse inference" is used for a party in a civil action (including a parent in a care and protection case) who fails or refuses to testify, either by claiming Fifth Amendment privilege or merely failing to appear. See Adoption of Quinn, 54 Mass. App. Ct. 117, 123-24 (2002). In Vieri and Emmet, the parents appeared and testified. The parents in both cases didn't cooperate with DCF and failed to explain to the court *why* they didn't cooperate. But that's not really a failure to testify – it's just a failure to cooperate. And we know that failure to cooperate with DCF is, by itself, not a basis of unfitness if the cooperation isn't required to ameliorate a parenting deficiency. See Adoption of Yale, 65 Mass. App. Ct. 236, 242 (2005).

What both Vieri and Emmet probably mean is this: after DCF presents evidence of a long-standing problem, the burden then shifts to the parent to show that the problem no longer exists; if the parent fails to make that showing – either by refusing to cooperate with DCF or failing to offer some other explanation to the court – the court can infer that the problem persists. That inference may be unfavorable to the parent, but it is not an "adverse inference" or "negative inference" in the Fifth Amendment failure-to-testify context. It's just a plain old inference. For trial counsel, don't let the Appeals Court's conflation of unfavorable inference and "adverse inference" confuse you or your trial judge. Emmett and Vieri do not hold that a judge can draw a "negative inference" from a parent's lack of cooperation with a service plan. DCF must first prove that the parent has a problem that requires the service; then, if the parent doesn't cooperate with the service (or explain why cooperation wasn't necessary), the court can hold the lack of cooperation against the parent. (But, of course, the court could do that long before Vieri and Emmet.)

4. In **Adoption of Dalila, 92 Mass. App. Ct. 1126 (2018) (Mass. App. Ct. Rule 1:28) (Vuono, Sullivan, and Massing)**, the panel upheld the judge's finding that DCF had made reasonable efforts. It noted, though, that "DCF surely paid insufficient attention to the mother's cognitive limitations." Although the social worker helped the mother apply for DDS services, she "did not know what services DDS might have offered and failed to follow up on the issue." Sounds good so far. The problem, however, was that the court never heard what other actions the DCF social worker *could* have taken:

> However, other than criticize DCF's parenting plan for providing inadequate services and suggesting "specific programs to deal with people with developmental delays," the mother did not show what additional services she could have obtained from DDS or how they might have improved her parenting abilities more than the tailored services that DCF did offer.

The panel's reasoning here is a little muddy. It's unclear if DCF's failure to follow up on DDS services was cured by the other "tailored" services it offered. But, in any event, if you are arguing about DCF's lack of reasonable efforts at the trial level, don't just complain about how little DCF has done. Instead, (a) complain about how little DCF has done, *and also* (b) present

evidence about what relevant services are available to the parent, *and also* (c) present testimony from a therapist, substance use counselor, or other expert about how the parent might benefit from those services. Most important of all, don't wait for trial to make these arguments. File motions for services as early (and as often) as possible, preferably long before trial.

5. Adoption of Bonnie, 92 Mass. App. Ct. 1128 (2018) (Mass. App. Ct. Rule 1:28) (Hanlon, Maldonado, and Lemire). This case, along with C.D. v. S.M., 82 Mass. App. Ct. 1122 (2012) (Mass. App. Ct. Rule 1:28), concerned the paternity of a child born to a married woman. As in C.D. v. S.M., the panel found that the putative father's failure to establish a substantial parent-child relationship was fatal to his standing to assert parental rights:

> "[A] man is presumed to be the father of a child and must be joined as a party [in any care and protection action] if: (1) he is or has been married to the mother and the child was born during the marriage, or within three hundred days after the marriage was terminated by death, annulment or divorce." G.L. c. 209C, § 6(a)(1)., inserted by St. 1986, c. 310, § 16. Where, as here, the mother was married to another person at the time of the child's birth, in order for the putative father to have standing to assert parental rights, he is required to show by clear and convincing evidence that there was a "substantial parent-child relationship," or that he had not yet formed one due to action (or inaction) by the mother. *C.C. v. A.B.*, 406 Mass. 679, 689–690 (1990). The putative father has done neither here.

The putative father therefore had no standing to assert parental rights to the child. In addition, there was a legal father – the mother's husband – who stipulated to a termination of his parental rights. Although DCF had moved to strike the putative father from the petition, the trial court denied the motion and tried the case solely as to the putative father. And, even though the putative father had no legal rights to the child, the court terminated his rights *anyway*. The panel vacated the decree, holding that the trial court lacked jurisdiction to terminate the parental rights that the putative father did not possess.

Why would a putative father care about a termination of his non-existent rights? It is a stain on his reputation, to be sure. But, more importantly, it might cost him reasonable efforts for later (or other) children. Section 29C of c. 119 provides that DCF shall provide reasonable efforts to prevent removal and to return a child home except where, among other things, "the parent's consent to adoption of a sibling of the child was dispensed with under [G.L. c. 119, § 26, or G.L. c. 210, § 3], or the parent's rights were involuntary terminated in a case involving a sibling of the child[.]" DCF usually provides services in such circumstances anyway, but why risk it?

6. Adoption of Sabrina, 93 Mass. App. Ct. 1116 (2018) (Mass. App. Ct. Rule 1:28) (Rubin, Henry, and Desmond). The panel affirmed the termination of the mother's rights. Still, the case is noteworthy for the panel's willingness to find clear error in a number of the judge's findings and to call out several "mischaracterizations" in the findings that weren't clearly erroneous but were "misleading." According to the panel,

> [a] few of the judge's findings on trivial matters were clearly erroneous, but we will also assume there was clear error in the finding that the mother failed to monitor the child's weight. As discussed above, it might well be reasonable to read the judge to have mischaracterized some of the evidence concerning both the mother's ability to care for the child and her mental health status. For present purposes, we will also assume that the judge's decision contains the negative mischaracterizations we have identified.

For example, the trial court found that the mother failed to monitor the child's weight, which was important in a failure-to-thrive case. This was clearly erroneous, because the child's doctor called the mother "very appropriate and knowledgeable," the mother fed the child in the correct manner, and the child's loss of weight was due to her medical condition, not the mother's actions. Still, all of the erroneous or misleading findings were harmless.

What, exactly, is a "mischaracterization" or a "misleading finding"? I think it's a finding that isn't clearly erroneous but also isn't quite fair. Perhaps an example is, "Mother missed many visits leading up to trial." If mother missed 2 visits out of 50, that finding would be clearly erroneous. If mother missed 20 out of 50, it would *not* be clearly erroneous. If she missed 8 out of 50, it also wouldn't be clearly erroneous – 8 is "many," after all – but it might be a "misleading finding" if the court later uses the "many" missed visits to find that the mother had essentially abandoned the child before trial, or if the mother had a good excuse for some of the missed visits. Sabrina, I think, allows appellate counsel to argue that findings might not be clearly erroneous but might nevertheless be unfair or misleadingly slanted against a parent. And while a handful of misleading findings in Sabrina didn't affect the outcome, a slew of them in a different appeal might cast the ultimate unfitness determination in doubt. Other good Rule 1:28 cases on misleading findings, or a judge's aggressively negative take on the evidence, include: Adoption of Zaria, 79 Mass. App. Ct. 1114 (2011) (Mass. App. Ct. Rule 1:28), Adoption of Chase (No. 1), 74 Mass. App. Ct. 1112 (2009) (Mass. App. Ct. Rule 1:28), and Adoption of Jerrold, 74 Mass. App. Ct. 1121 (2009) (Mass. App. Ct. Rule 1:28). Check them out!

Mother also challenged the judge's failure to order post-termination and post-adoption visitation. She argued that (a) the absence of an explicit finding that visitation would not be in the child's best interests, coupled with (b) DCF's statement that it would "consider recruiting a pre-adoptive family that is receptive to an open adoption agreement," constituted an implicit finding that visitation would be in the child's best interests. Clever! But the panel was not impressed. The mother did not request post-termination or post-adoption visitation at the trial level, and the judge's finding that the mother and the child lacked a bond was not clearly erroneous.

Writing Tip

Parenthetical information.

Rule 1.5 of *The Bluebook: A Uniform System of Citation* says that parenthetical explanations can take three forms:

1. Present participial phrase (that is, an "-ing" verb ending):

- Care and Protection of Isaac, 419 Mass. 602, 615 (1995) (establishing abuse of discretion standard of review for DCF placement decisions after child adjudicated in need of care and protection).

Don't capitalize the initial letter of the present participle or add a period at the end, because it's not a full sentence.

2. A short statement explaining the purpose of the citation (if an entire participial phrase isn't necessary based on context):

- Even those courts that permit a post-deprivation hearing beyond 72 hours after removal require a hearing much closer to the time of removal than occurred in this case. See, e.g., Anderson v. H.M. and D.M., 317 N.W.2d 394, 401-02 (N.D. 1982) (96 hours);

3. A quote:

- Care and Protection of Zita, 455 Mass. 272, 284 (2009) ("The availability of emergency hearings is not an invitation to the department or a judge to ignore the rules of evidence or overlook the burdens of proof to meet the statutory grounds for temporary removal of a child from her parent.").

If the quote ends in a period, include the period within the quote *and* another period after the parenthetical (if there is no other citation following it). If there is a citation after it, replace the second period with a semicolon, then add the next citation.

Want to shorten the quote? Use an ellipsis if the omission is in the middle:

- Care and Protection of Zita, 455 Mass. 272, 284 (2009) ("The availability of emergency hearings is not an invitation to the department or a judge to . . . overlook the burdens of proof to meet the statutory grounds for temporary removal of a child from her parent.").

See *Bluebook* Rule 5.3. Never use an ellipsis to begin a quotation. If the omitted words are at the end of a sentence, end the quotation with an ellipsis *and* a period (that is, four dots):

- Zita, 455 Mass. at 284 ("The availability of emergency hearings is not an invitation to the department or a judge to ignore the rules of evidence . . . .").

Need to change a letter (upper to lower case, lower to upper case)? Put it in brackets:

- Care and Protection of Zita, 455 Mass. 272, 284 (2009) (holding that "[t]he availability of emergency hearings is not an invitation to the department or a judge to . . . overlook the burdens of proof to meet the statutory grounds for temporary removal of a child from her parent.").

See *Bluebook* Rule 5.2.

Need to add an explanatory or substitute word or phrase that changes the quote? Again, put it in brackets:

- Care and Protection of Zita, 455 Mass. 272, 284 (2009) ("The availability of emergency hearings is not an invitation to [DCF] or a judge to ignore the rules of evidence or overlook the burdens of proof to meet the [G.L. c. 119, § 24] grounds for temporary removal of a child from her parent.").

See *Bluebook* Rule 5.2.

We hope this is helpful!