The "Facts" Section of the
Child Welfare Appellate Brief

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Facts

Everybody likes stories. We want to be entertained; we want to identify with the main characters; we pull for the underdog; we want justice done. Appellate judges are like that, too. And while they have to follow the law, they also want to read briefs with stories that interest them, with characters they can identify with, and with injustices they can rectify. Child welfare appellate attorneys are fortunate in this regard, because our cases are narratively rich, populated with underdogs, and rife with injustice.

Parents have their stories, the children have their stories, the DCF social worker has his or her story, and the trial proceedings themselves are a story. Some of these stories are independent, but many are shared. But the sharing does not mean they are the same. In Akira Kurosawa's film *Rashomon*, the same terrible incident is told from the perspective of each of the major characters. Each sees what happened – and the importance of what happened – differently. Our cases are like that, too.

Many Facts sections fail to tell a story. Instead, they work through the case chronologically, pull out select details, reiterate witness testimony, or re-state the judge's findings. There are three problems with these methods. First, a chronology or finding-by-finding report does not tell a compelling story. Second, to the extent it does tell a story, it is the story of how your client *lost*, which is not the story you want to tell on appeal. Third, it is not consistent with, and does not further, your theory of the case. The story you tell in the Facts

section must be the story of why your client should have won, or was treated unfairly, consistent with your theory of the case.

Basic Rules. There are some important rules for telling your story. Following these rules is crucial to maintaining your credibility and keeping you out of trouble. For example, you must cite to the record for each factual reference in your brief. *See, e.g.*, Mass. R. App. P. 16(e). Even where it isn't required, it's good practice. Liberally citing to the record proves to the court that you aren't making anything up; it also permits the judges to easily verify the information.

You must be scrupulously faithful to the record. You must not lie about, misstate, or "fudge" any of the evidence. While you can give the evidence a "spin" consistent with your story, any spin must be supportable. You cannot hide important bad facts (although, as set forth below, you don't need to include every detail about every bad fact). When in doubt, err on the side of disclosure. Your credibility and integrity are essential. The appellate judges may not buy into your theory of the case, but they must never believe that you are misleading the court. Section _ below suggests some appropriate ways to address bad facts in ways that further your client's story.

Your Facts section should never be longer than your Argument, however many years the case lasted at the trial level. A fact belongs in your brief only if there is a reason: it helps you tell your client's positive story; it is important background necessary to your story; it is a difficult or damaging fact you must deal with; or it is needed for your Argument.

Never argue in the Facts section; save that for the Argument. There is often a gray area between narrative spin and argument. Stay out of that gray area. If the Appeals Court believes you are arguing in the Facts section, your story will lose credibility.

The Big Picture – the Story. As noted above, the story you tell in the Facts section must be consistent with, and further, your theory of the case. Your story may be about a parent who has conquered a substance abuse problem (with a very minor slip up close to trial); a parent who has escaped from the cycle of domestic violence; or a parent who didn't do the awful thing alleged and whose accuser isn't credible. Your story might also be about the unfair trial procedures themselves: a parent who came to court for every hearing but who was punished for missing a trial date because she was ill; a parent who lived and worked in Akron for years and who never knew about the proceeding because notice was published in a Cleveland newspaper with the child's name misspelled; or a fit parent who was badgered by the biased questioning of a judge determined to terminate rights.

Your story need not be, and in most cases should not be, chronological. Like a novel, your story can start in the middle or even at the climax. So long as you are faithful to the record and follow the rules for factual citation, you can create drama however you wish. Don't kill the drama by starting your story the same way the trial judge likely started his or her findings of fact – with the birth of the child, or even the birth of the parents – unless that "birth" is itself a dramatic moment. And never tell your story witness-by-witness. That is dry and repetitive, and it forces the appellate judges to create its own story from the evidentiary puzzle pieces.

In putting together *your* story, remember the principles of primacy and recency: readers tend to remember the first and last things they read and forget what's buried in the middle. So start and end your story with something memorable. Put the bad parts – and there are always bad parts; after all, your client has lost at trial – in the middle. For example, your story might begin with your client's successful completion of substance abuse counseling, a crowning achievement after years of drug abuse. Your client goes through a graduation ceremony and gets a certificate.

The head of the program writes her a glowing evaluation about her progress and prospects for the future. Your story might end with a discussion of all the other services your client completed before trial. In the middle of the story, you might address the many relapses and petty crimes your client perpetrated while battling her demons. That placement de-emphasizes the negative information. Why start your story with all of your client's problems?

Divide the story into sections. It's easier to read a story in smaller bites, and it's easier for judges to find key facts in sections about those facts. For example, your story can be broken down into your client's successful history of visits; your client's partial compliance with a case plan; your client's not-so-successful history of avoiding her abuser; and the trial itself, in which the court made several outcome-determinative procedural errors. If the procedural errors are the "best" part of the story, you might choose to start the Facts section with it.

Use headers for each section of the Facts. You are not allowed to argue in a Facts section, so your headers – unlike Argument headers – cannot be argumentative. There are two ways of approaching Facts headers. The "topic" method avoids any taint of argument but does little for your story other than divide it. Topic Facts headers may look like this:

- Mother's Substance Abuse Treatment
- Father's Visitation
- The Trial
- Trial Counsel's Actions

Alternatively, you can use more descriptive titles:

- Mother Graduates from Residential Substance Abuse Counseling
- Father's Perfect Attendance at Visits
- The Trial Court Strikes Mother's Counsel on Morning of Trial
- Trial Counsel's Failure to Interview Witnesses

The descriptive method is not argumentative provided everything that you write is uncontested, has support in the record, and includes no opinion. Whether you use topic headers or more

descriptive headers is a matter of style. But one thing you cannot do is argue in your headers.

These headers are *not* acceptable in a Facts section:

- Mother Proves Her Fitness by Completing Substance Abuse Treatment
- Father's Attendance at Visits Shows that He is More Committed to the Child than Mother Is
- The Trial Court Improperly Strikes Mother's Counsel
- Trial Counsel is Ineffective based on her Failure to Interview Witnesses

Use Facts headers, but keep the argument out of them.

<u>The Little Picture – Part 1: Addressing the Facts within Each Paragraph</u>. Unless your parent client is an appellee, your record will be replete with "bad facts." You must address them, but you can minimize their impact. Here are some techniques:

Pair a bad fact with a good fact

> Although Mother stopped seeing her psychiatrist four months before trial, she regularly took all of her medication and regularly attended her therapy appointments.
>
> Father attended almost all of his scheduled visits, missing only two just before trial.
>
> Although mother was late to ten of her visits, every one of her visits went well and the children were always happy to see her.

"Hide" the bad fact in the middle of a paragraph

The principles of primacy and recency suggest that we remember the first and last things we read in a paragraph. We tend to forget what's in the middle. "Bury" the bad stuff in the middle of a paragraph where it's easier to forget.

Summarize related bad events

While you must address bad facts, no rule requires that you separately discuss every related bad fact. Instead of this:

> On March 3, 2014, a mandated reporter filed a report to DCF alleging that mother brought Kim to daycare looking unwashed. (RA. 23). On March 23, 2014,

> another mandated reporter filed a report with DCF alleging that mother brought Kim to the doctor's office hungry and smelling like she hadn't been bathed in a month. (RA. 34). On April 1, 2014, a non-mandated reporter filed a report with DCF alleging that Kim appeared cold and unclean in the halls of their apartment building. (RA. 56).

Try this:

> Between March 3 and April 1, 2014, three reports were filed against mother alleging neglect of Kim. (RA. 23, 34, 56).

This is accurate. You are not "playing hide-the-ball."

Were there four restraining orders taken out on your client in the year before the case was filed? That's an important bad fact that you must mention. So mention it. But do not go into detail about any of them, unless the details are really important.

Generalize when describing a bad event

There is no need to describe a bad fact in detail unless the details themselves are important facts. Instead of this:

> On March 5, 2014, witnesses reported that mother and her boyfriend were screaming at each other on the sidewalk in front of the apartment. (Tr. 23; RA. 77). The screaming then continued up the stairs and into the apartment. (Tr. 24; RA. 77). Other neighbors overheard mother yelling at her boyfriend through the open widows, and they reported that they feared for mother's safety. (Tr. 24; RA. 77). One of them called the police. The police came, and the boyfriend was removed from the apartment in handcuffs. (Tr. 25; RA. 77).

Try this:

> In March 2014, mother and her boyfriend were overheard yelling at each other. (Tr. 23; RA. 77). Although no one was harmed, the boyfriend was arrested. (Tr. 25; RA. 77).

In the second example, you have fairly disclosed the bad fact. But you have given it the space that it deserves (in accordance with your theory of the case). Of course, if the details are themselves important, you must disclose them. If, for example, the boyfriend in the example above had waived a machete around during the argument, you should probably disclose that fact.

Use detail when describing a good event

Save the details for the good stuff. Here is where you want to paint a picture for the appellate judges. The description below fails to paint a picture:

> On July 8, 2017, Father visited with the child. The visit went well. He visited the child three more times in 2017 before trial. Those visits also went well.

Visits "going well" evokes no images for appellate judges who aren't familiar with child welfare cases. Instead, if the evidence supports it, give more details:

> On July 8, 2017, Father traveled for two hours each way, taking three buses, to a visit with the Child at the Albany DCF office. The Child ran to Father and hugged him, then sat on his lap while they ate a snack Father had brought for him. Father also brought the Child a toy truck which the Child played with all around, and often on, Father. They laughed and played together for the entire hour. At the end of the visit, the Child kissed and hugged Father and cried when the social worker told him the visit was over. A similar scene took place at three other visits before trial.

Details help paint a picture of mutual affection. They *show* the appellate judges that the visits went well. This is much more effective than telling them so.

Eliminate date clutter

You must include the dates of important events (the dates your client entered and completed substance abuse treatment, the date of the last incident of domestic violence, the date of a sexual abuse interview, the date of the visit where your client slapped the child), but you should not clutter your story with unimportant dates. For example, in the visitation example above, there is no need to include the dates of the father's other three successful visits because the dates aren't important. Indeed, including them would interrupt the narrative flow. Instead, include (as you must) the record citations for the three visits. If an appellate judge does think those dates are important, he or she can easily look them up.

The Little Picture – Part 2: Readability. You want the judges' eyes glued to your brief. You want them to *want* to read more. They won't if the language is dense, complicated, or confusing; they will if the language is crisp and easy to read. Here are a few techniques for making each paragraph more readable:

Active v. passive voice

Too much passive voice slows the narrative flow. It also creates confusion, because it is often unclear who the actor is. Active voice also permits you to use more powerful and descriptive verbs. Instead of this:

Parenting classes were not provided by DCF to Mother until six weeks before trial.

Try this:

DCF failed to provide Mother with parenting classes until six weeks before trial.

Instead of this:

Family therapy was not offered to Father by DCF, although it was requested.

Try this:

DCF did not offer family therapy to Father, although he requested it.

Or better yet,

DCF *refused* to offer family therapy to Father, although he requested it.

Use passive only when you are trying to distance your client from an act ("The Child was struck by Mother three times on the cheek.") or the actor doesn't matter or is unknown ("The needle was found in the crib near the baby's head.").

Verbs v. nouns

Some perfectly good active verbs are buried in vague nouns. Replacing those nouns with their verb forms enlivens the writing and reduces the number of words.

Instead of this:

> The social worker had knowledge that Mother was seeing the children at her cousin's house, but made no complaint about it.

Try this:

> The social worker knew that Mother was seeing the children at her cousin's house but never complained about it.

Instead of this:

> DCF made allegations that Mother used heroin and was therefore in violation of her probation.

Try this:

> DCF alleged that Mother used heroin and therefore violated her probation.

Instead of this:

> Father had visitation with the children twice per month. His attendance at parenting classes was regular.

Try this:

> Father visited with the children twice per month and regularly attended parenting classes.

Short paragraphs, short sentences

A few rules of thumb:

- No paragraph in your Facts (or Argument) section should be longer than a page. Page-long paragraphs should be broken into two or three smaller ones.

- A single-sentence paragraph is fine for dramatic effect, so long as you don't use too many of them.

- Long sentences try the reader's patience. If a sentence is so long it's hard to find the verb, break it into two or three shorter sentences.

- It's important to vary sentence length, but when in doubt, shorter is better.

Use bullet points for lists

We list many things in child welfare briefs. We list services offered and required by DCF; service plan tasks ordered by the court and fulfilled by our clients; conditions of custody; and much more. When we put those lists in paragraph form, we create eye-glaze for the appellate judges. It's difficult to find individual items, and the eyes naturally skip over the dense paragraph to the bottom.

Bullet points are a great way to make lists easier to read and keep judges' eyes on your brief. Instead of this:

> The April 2017 DCF service plan required that Mother attend parenting classes, participate in a psychological evaluation and follow through with recommendations, attend domestic violence counseling and follow through with recommendations, draft a budget of all monthly expenses, visit with Juan and Maria once each week at the DCF office, participate in therapy, and sign releases for all therapy providers. (RA. 234). Mother fulfilled all of her service plan obligations before trial. (Tr. 23; RA. 445).

Try this, which is much easier to read:

> The April 2017 DCF service plan required that Mother:
>
> - attend parenting classes;
> - participate in a psychological evaluation and follow through with recommendations;
> - attend domestic violence counseling and follow through with recommendations;
> - draft a budget of all monthly expenses;
> - visit with Juan and Maria once each week at the DCF office;
> - participate in therapy; and
> - sign releases for all therapy providers (RA. 234).
>
> Mother fulfilled all of these requirements before trial. (Tr. 23; RA. 445).

Summary of the Argument

You must include a Summary of the Argument if the Argument is more than 24 pages. See Mass. R. App. P. 16(a)(4). The Summary must include references to the pages in the

Argument and be in paragraph form. Id. It should be a "summary" of your actual Argument, not merely a re-statement of your Argument headers. Id. An Argument header tells the judges what you will prove. A Summary of the Argument paragraph actually proves it, albeit in less detail than the judges will find in the Argument itself.

Here is an example of a good Argument header, followed by a good paragraph from a Summary of the Argument:

Argument header:

> I. The trial court erred in allowing experts and the Child's treating professionals to vouch for the Child's credibility, compare her to sexually abused children, and testify that the Child was, in fact, sexually abused.

Corresponding paragraph in the Summary of the Argument:

> The trial court allowed DCF's experts and the Child's treating clinicians to vouch for the credibility of the Child, testify that she was sexually abused by Father, and compare her to sexually abused children. This Court has long held that such vouching and comparisons are improper. While the trial court noted that it did not credit the expert vouching, the findings show that the court relied on it extensively. Several key findings note that the experts believed the child was telling the truth. This prejudicial error requires a new trial. (See pages 33-38).

Even if your Argument is too short to require a Summary, it is a good idea to include one. It is an opportunity to give the Appeals Court a concise preview of your arguments. Why pass up an advocacy opportunity? If your Summary is compelling, you may be able to convince the judges that you should win even before they read your Argument.