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Appellate Bulletin

To: CAFL Appellate Panel Members

Cc: CAFL Trial Panel Members
CAFL Administrative Attorneys

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Re: Administrative Matters
Recent Unpublished Decisions
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Administrative Matters

Certification Trainings. Welcome to our new panel colleagues! In October, we trained 15 new appellate panel members. For the first time, our certification training was conducted over Zoom.

CAFL is now accepting applications for the spring 2021 CAFL Appellate Panel Certification Training. The training will be held from 9:00 a.m. to 12:30 p.m. on **April 5, April 8, April 13, and April 16, 2021** live via Zoom. There will also be a short training orientation via Zoom on **April 1, 2021 from 4:00-5:00 p.m.** Due to the format of this training, space is limited. The agency actively seeks to diversify its private attorney panel membership. For more information about the training and to download the application, click here: CAFL appellate panel recruitment notice & application- 2021 training

Why are we adding more appellate panel members at a time when there are almost no trials (and, therefore, almost no new appeals)? Before COVID, our appellate numbers had exploded. In FY2020 we had almost 50% more appellate assignments than we had in FY2018! We expect similar numbers once things get back to normal.

Oral Arguments. Have an oral argument coming up? Email us to arrange a moot. Also, let us know how Zoom oral arguments are going, so we can bring any complaints, observations, or issues to Chief Justice Green's attention.

Recent Unpublished Decisions

This Bulletin catches us up through May 2020. We have not summarized all unpublished child welfare decisions; rather, we've included only those with interesting facts and/or legal issues. If we left out one of your unpublished decisions, and it has a useful tidbit in it, please let us know.

(Note: Under the Massachusetts Appeals Court Rules, unpublished decisions released before July 1, 2020 should be cited as "Rule 1:28," and decisions released after should be cited "Rule 23.0.")

1. Adoption of Hamilton, 96 Mass. App. Ct. 1109 (2019) (Mass App. Ct. Rule 1:28) (Green, Rubin, Agnes). If you file a post-trial motion and lose, you must file a notice of appeal and then move to consolidate that appeal with the appeal of the underlying judgment. If you don't, the panel won't consider the issues in the post-trial motion.

In Hamilton, the appeal was stayed so that the mother could file a Rule 60(b) motion on the basis of constructive denial of counsel and ineffective assistance of counsel. The trial judge denied the 60(b) motion following a hearing, but the mother did not file an appeal from that denial. The only appeal before the panel, therefore, was the appeal of the termination decree. The panel confined its analysis to the trial record; it did not look to any evidence elicited at the 60(b) hearing.

The panel did consider parts of the mother's argument because certain facts bearing on IAC were clear in the trial record. At trial, mother's counsel told the court that he could not locate the mother and hadn't spoken to her in months. (Please don't do that! See discussion in **Adoption of Zosha, 92 Mass. App. Ct. 1117 (2018) (Mass. App. Ct. Rule 1:28)**.) He nevertheless cross-examined the social worker, elicited some favorable testimony, and objected to certain questions posed by opposing counsel. According to the panel, there was no evidence that counsel had abandoned the mother prior to trial. Further, based on the facts of the case, even if counsel had been ineffective – which the panel declined to find – better lawyering would not have made a difference.

The panel noted that counsel may have failed to satisfy certain CPCS performance standards, but this was not dispositive. Rather, as published cases show, counsel's failure to follow CPCS performance standards is only one "among a variety of factors" considered in the IAC analysis. See Care and Protection of Georgette, 439 Mass. 28 (2003), and Adoption of Nancy, 443 Mass. 512 (2005).

The takeaway? If you lose a motion for new trial or relief from judgment, you must file a notice of appeal (and, if there is an underlying appeal, move to consolidate the two appeals). That way, the evidence elicited at your new trial hearing (or set forth in your motion, if you don't get an evidentiary new trial hearing), can be considered by the panel.

2. Adoption of Ophira, 96 Mass. App. Ct. 1111 (2019) (Mass. App. Ct. Rule 1:28) (Milkey, Singh, Hand). There are two minor points of interest in Ophira. First, "current" unfitness means the end of trial (or close of evidence). The mother's appellate attorney argued that the judge did not adequately focus on the mother's recent sobriety. But the panel pointed out in its

decision, "as the mother acknowledged at oral argument, the judge's ultimate finding that she was not fit to regain custody of Ophira *as of the end of the trial* is difficult to challenge." (emphasis added). So "current" means as of the end of trial, not earlier. See also Adoption of Linus, 73 Mass. App. Ct. 813, 821 (2009) (parents not currently unfit: "from February, 2006, *through the end of trial* in August, 2007, they had housing suitable for the two boys.") (emphasis added).

And second, appellate counsel for the child must always know – and be prepared to tell the panel – about the child's current placement: "At our request, Ophira's lawyer provided an update at oral argument that Ophira currently was placed with the maternal great-aunt." Don't *volunteer* this kind of outside-the-record information to the panel (unless it's clear on the docket; the panel can take notice of the contents of the trial court's docket. See Jarosz v. Palmer, 436 Mass. 526, 530 (2002)). But know it, just in case the panel asks.

3. Adoption of Clara, 97 Mass. App. Ct. 1105 (2020) (Mass. App. Ct. Rule 1:28) (Maldonado, Blake, Lemire). In this case, the father argued that DCF failed to accommodate his disability – deafness – and therefore prematurely terminated his parental rights. First, the good stuff in Clara: the panel acknowledged that the father qualified for protections under the ADA and that it was DCF's responsibility to provide the father with services that accommodated his needs.

Now the not-so-good stuff: the father claimed that DCF's failure to accommodate his deafness hindered his ability to reunify with the children. The panel disagreed. First of all, like the trial judge, it didn't believe that the father needed additional or better communication-related services:

> The judge did not credit the father's testimony that he experienced problems communicating with the department, which he claimed even occurred with the use of ASL interpreters . . . [T]he father said that he had "no problem" dealing with the hearing community, and it was easier to communicate with his friends because he was more interested in those conversations, and he was more reluctant to talk about his parental rights. While ASL interpreters were not always available, the father told the department that it was not necessary to have interpreters for each visit with the children.

Second, the panel noted that DCF did provide some services. DCF referred father to a therapist serving the deaf and hard-of-hearing community; it made some referrals for ASL interpreters; and it used a case manager from the Massachusetts Commission for the Deaf and Hard of Hearing who participated in DCF meetings. And while DCF failed to secure interpreters for many visits and meetings, the panel held that these omissions were not the cause of the father's failure to complete and benefit from service plan tasks. Rather, father's failures were due to his own "inconsistency" and "violent nature." "The department's obligation to make reasonable efforts to accommodate the father's disability was ultimately contingent upon the father's fulfillment of his responsibilities, including service plan compliance." The panel affirmed the termination decree.

The takeaway? Make sure that your disabled parent client is clear from the start about the nature

of his or her disability and the accommodations needed. Further, all parents, whether disabled or not, must participate – or try to participate – in the relevant services they are offered. Here, father's inconsistent participation in some services rendered incredible his claim that he would have participated in and benefited from others.

4. Sometimes, panels just get the law wrong. The panel in **Adoption of Elise, 97 Mass. App. Ct. 1111 (2020) (Mass. App. Ct. Rule 1:28) (Vuono, Rubin, Sacks)**, got one issue wrong, and while the SJC didn't take the case on FAR, that doesn't validate the panel's mistake.

In Elise, the mother argued that the trial court improperly failed to discuss favorable testimony from mother's expert in her findings. The panel disagreed. It reasoned that the judge was not bound to adopt the expert's opinion, the opinion was not binding on the trier of fact, and the expert's opinion was contradicted by other evidence that supported the unfitness finding. The panel "cannot conclude that the judge abused her discretion in failing to adopt or explicitly weigh the expert's opinions regarding the mother's parenting capabilities."

So much is wrong with the panel's analysis. First, that wasn't the mother's argument. Mother didn't argue that the judge erred in failing to *adopt* the expert's opinion; she argued that the judge failed to *consider or make any reference* to it. Second, the trial court's failure to even note the expert testimony cannot be a tacit rejection of it, because it could just as well be a failure to remember it or acknowledge its existence, which are *not* acceptable. That's why the judge – at the very least – needed to make a finding like this: "I have heard mother's expert and I reject her testimony regarding X and Y as not credible, because [one or more reasons]." That's not what the judge did here. While judges are never bound by expert's opinions, and they can accept or reject expert testimony in whole or in part, judges can't simply pretend that an expert didn't testify, and they can't forget that the expert testified. Further, the cases cited by the panel offer no support for its conclusion. Indeed, the failure to even note the testimony of an expert favorable to a parent is a failure to carefully consider evidence *and* a failure to make detailed findings, both of which are reversible errors.

Finally, the panel's conclusion in Elise directly contradicts **Adoption of Dimitri, 96 Mass. App. Ct. 1108 (2019) (Mass. App. Ct. Rule 1:28)**. In Dimitri, the panel found error in the trial judge's "wholesale adoption" of the testimony of DCF's bonding expert without identifying specific statements by the expert upon which it relied, because the panel could not ascertain whether the judge had paid careful and close attention to the evidence. See also **Adoption of Jerrold, 74 Mass. App. Ct. 1121 (2009) (Mass. App. Ct. Rule 1:28)** (holding that the judge selectively crediting the negative testimony and ignoring positive testimony of the parents' experts showed a lack of even-handed analysis and attention to the evidence).

How can a judge's findings show careful consideration and close attention to the evidence when they fail to mention the expert at all?

5. Adoption of Benedict, 97 Mass. App. Ct. 1112 (2020) (Mass. App. Ct. Rule 1:28) (Maldonado, Singh, Englander), is an excellent reversal. Domestic violence does not always call for termination!

In Benedict, the judge's decision to terminate both parents' rights rested on two instances of domestic violence perpetrated by the father on the mother years before trial as well as the mother's continued denials that domestic violence occurred. The panel reversed as to the termination of the mother's parental rights and affirmed as to the termination of the father's.

There were two police responses in 2015 and 2016. The mother kicked the father out of the home. Both parents stipulated to their current unfitness later in 2016, but the children were allowed to remain with the mother. The children were removed and placed in foster care in 2017, when the mother met with DCF, reported feeling depressed and suicidal, and asked if the father could come home. DCF thereafter sought termination of parental rights. At trial in June 2018, the father was still out of the family home, although the parents continued to consider themselves a couple. Evidence showed that the mother was in compliance with her service plan, and she testified that, if the children were returned to her, the father would not be allowed to be alone with them. The court terminated both parents' rights.

In reversing as to mother, the panel noted that the judge's findings lacked "the link between that past history [of violence] and the judge's prediction 'with near certainty' that, despite [the father moving out], neglect of the children would occur if the mother regained custody." Notably, the panel relied heavily on Adoption of Katharine, 42 Mass. App. Ct. 25 (1997), a case involving parents who were admitted cocaine users, though there was no evidence that the use negatively impacted the children. In Benedict, the last of the two incidents of domestic violence occurred over two years before trial. There was no evidence that past domestic violence or the mother's continued relationship with the father had any negative impact on the children.

Before Benedict, the Katharine/nexus argument had never been successful in the domestic violence context (at least in an appellate decision). Benedict is worth citing to support the argument that a history of domestic violence is not a basis for termination of parental rights – at least as to the victim-parent – unless that history shows a likelihood of future harm to the child.

Another interesting part of Benedict: the panel reversed the termination of the mother's rights even though it affirmed the termination of the father's rights, *and they were still a couple*. In most cases, the unfitness of one parent translates directly to the unfitness of the other if they are in a relationship. But here, the mother had successfully imposed limits on the father's exposure to the children, and the judge did not discredit the mother's testimony that she would not allow the father to be unsupervised in the presence of the children. On this record, there was simply not enough evidence for the judge to properly conclude that the mother could not protect the children.

6. In **Gilbert v. Department of Children and Families, 97 Mass. App. Ct. 1117 (2020) (Mass. App. Ct. Rule 1:28) (Desmond, Wendlandt, McDonough)**, DCF supported a 51A alleging neglect of a 16-year-old by the mother because the child was locked out of the mother's apartment. A fair hearing officer affirmed the decision. Mother appealed to Superior Court under G.L. c. 30A. The Superior Court judge allowed DCF's motion for judgment on the pleadings, and this appeal followed.

Mother's persistence earned her a rare reversal; the panel found that there was no substantial

evidence to support a reasonable cause to believe that the mother was neglectful. The panel noted that the fair hearing officer relied on hearsay statements in the 51A and 51B that did not relate to primary fact, namely, unidentified sources who stated that Mother locked the child out of the home on a regular basis. Although fair hearing officers can rely on hearsay, that hearsay must be reliable. In this case, there was no evidence that the hearsay was reliable. The admissible evidence showed only that the mother had locked the child out of the house *during the hours when the child was supposed to be in school*, as a way to prevent her from leaving school early. "There was no evidence that the child was placed in danger by the mother's actions; that she suffered any physical harm as a result of being excluded from the home during school and after-school hours; or that she became 'truly terrified' when she could not access the apartment." The panel made some common-sense observations about the lack of danger, like noting that the child could have simply used restroom facilities at a fast food restaurant or the school or waited at the public library.

Additionally, the panel noted that it could not give deference to DCF's assessment as to what degree of supervision was "minimally adequate" or "essential" because DCF offered no evidence to that effect about 16-year-old children or this child in particular.

The takeaways? A challenged 51B support decision must be based on reliable evidence; if it's based on hearsay, that hearsay should be from identified sources and shown by the proponent to be reliable. And if DCF is alleging a neglectful failure to supervise an older child, DCF must show what kind of supervision is necessary for a child of that age and for the particular child in question.

7. Care and Protection of Hamid, 97 Mass. App. Ct. 1118 (2020) (Mass. App. Ct. Rule 1:28) (Shin, Englander, Hand), provides a thorough examination of the rare circumstance where DCF obtains an order to forego life-sustaining medical treatment over the objection of a parent. Hamid and Beth, referenced below, are good resources for counsel in a DNR case.

In this case, a 17-month-old child was hospitalized after a near-drowning and found to have "no signs of higher-level consciousness." DCF took temporary custody. A judge appointed a medical GAL for the child. After several months, DCF moved for an order directing the child's medical providers to forego life-sustaining treatment, extubate him, and focus on the child's comfort. The father supported the motion, but the mother did not.

The panel noted that the judge correctly applied a substituted judgment standard: "In making a substituted judgment determination, the court dons the mental mantle of the incompetent and substitutes itself as nearly as possible for the individual in the decision-making process . . . [T]he court does not decide what is necessarily the best decision but rather what decision would be made by the incompetent person if he or she were competent." Hamid (citing Care and Protection of Beth, 412 Mass. 188, 194 (1992) (internal quotation omitted)). The panel found that the judge had carefully considered each applicable factor, including expert testimony and the GAL's report. According to the panel, the judge's findings gave appropriate weight to the mother's treatment recommendation and did not give more weight to the father's. Finally, although the DCF Commissioner failed to check a necessary box on the form providing DCF's recommendation as required by G. L. c. 119, § 38A, that failure amounted to a scrivener's error.

Practice Tips

1. *Moffett* Briefs

What if you review the findings, the transcripts, and the documentary evidence and you've got absolutely nothing of merit to argue? Can you brief a frivolous issue just because you can't find anything else? No! You aren't allowed to raise frivolous issues on appeal just to have something to write about. Cf. Avery v. Steele, 414 Mass. 450 (1992). An appeal is frivolous "[w]hen the law is well settled, [and] when there can be no reasonable expectation of a reversal[.]" Glorioso v. Retirement Bd. of Wellesley, 401 Mass. 648, 652 (1988). But "[u]npersuasive arguments do not necessarily render an appeal frivolous." Id. (citing Shahzade v. C.J. Mabarby, Inc., 411 Mass. 788, 797 n. 8 (1992)). So you can still brief a weak argument. Call your mentor or CAFL administration – we will help you find an issue, or an angle on an issue, that is worthy of appellate argument.

But what if your client insists that you brief an issue that is clearly meritless? Ah, that's different. You *can* brief that issue under Commonwealth v. Moffett, 383 Mass. 201 (1981), but you must follow the Moffett protocols. Moffett is not, shall we say, a model of clarity. Luckily, the Appeals Court has some very helpful guidance. Note that Moffett applies to child welfare appeals through Care and Protection of Valerie, 403 Mass. 317, 318 (1988).

The Appeals Court's Moffett guidelines, available at: https://www.mass.gov/service-details/procedures-governing-appeals-with-moffett-issues-filed-in-the-appeals-court, are as follows:

> The following procedural guidelines are to be followed by appointed counsel when a client's appeal includes issues that counsel believes to be frivolous ("Moffett issues"):
>
> 1. Counsel must prepare and submit a brief arguing any issues that may have some merit. Id. at 216.
>
> 2. If counsel determines that there is nothing to support a contention which the defendant insists on pursuing despite counsel's efforts to dissuade the defendant, counsel should present the contention succinctly in the brief in a manner that will do the least harm to his client. Id. at 208. Counsel should present the contentions sketchily by designating pertinent portions of the trial transcript and citing any relevant cases. Id. at 216-217.
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> 3. If counsel, due to professional or ethical concerns, deems it absolutely necessary to dissociate from the purportedly frivolous contentions, counsel may do so in a preface to the brief ("Moffett Preface"), which is to include a statement that it is filed pursuant to the guidelines outlined in Commonwealth v. Moffett, 383 Mass. 201 (1981). Moffett, 383 Mass. at 217. The preface may apply to the entire brief, or to certain contentions found within. Examples of a Moffett Preface are provided below.

4. Beyond including a Moffett Preface, counsel must refrain from injecting disclaimers of personal belief in the merits of the case or otherwise arguing against the defendant's interests. Id. at 217.

5. If a Moffett Preface is included in the brief, the following procedures apply:

    a. Upon the filing of the brief prepared by counsel in the Appeals Court, and service upon the Commonwealth, a copy of the brief must be sent to the defendant, and his/her attention must be directed to the Moffett Preface.
    b. Counsel must inform the defendant that he/she may present additional arguments to the court within 30 days.
    c. Counsel must include in the brief a certification stating that the defendant has been notified of the inclusion of a Moffett Preface in the brief with a copy of the certification sent as a separate document to the Commonwealth. In addition, counsel must file a copy of the certification as a separate document with the Clerk's Office. See id. at 208 and n. 3.
    d. Additional arguments to be submitted by the defendant must be made in the form of a brief ("Moffett brief"), and must comply with Mass.R.A.P. 16, 19 and 20, including containing accurate references to the transcript and record appendix. A Moffett brief may be accompanied by a supplemental record appendix containing documents that were not filed with counsel's brief and record appendix, provided that the supplemental record appendix conforms to the requirements of Mass.R.A.P. 18 and 20 (table of contents, chronological order, consecutive pagination).
    e. The Clerk's Office requests that counsel format the defendant's Moffett brief to comply with court rules, and on behalf of the defendant, forward the submission to this court, and serve the Commonwealth.
    f. Upon the filing of the defendant's Moffett brief with this court, and service thereof on the Commonwealth, or upon the expiration of the 30 day period allowed for the defendant to file a Moffett brief, whichever first occurs, the Commonwealth has 30 days to file its brief. Id. at 208 n. 3. The Commonwealth may file one brief in response to the brief filed by the defendant's attorney and the Moffett brief. If necessary, the Commonwealth may file a motion to exceed the page limit in responding to the arguments raised in both briefs. See Mass.R.A.P. 16(h).

6. If the court finds merit in any issue, whether raised by appointed counsel or by the defendant, the court on its own motion may appoint new counsel and order rebriefing and reargument. Id. at 208 n.3.

7. The brief prepared by counsel, and any other submissions by counsel or the defendant, must comport with the requirements of the Massachusetts Rules of Appellate Procedure.

(Emphasis and hyperlinks in original). The website also offers some sample Moffett prefaces.

Two important points. First, you *can* submit a meritless argument (when the client insists) without a Moffett preface; just do so sketchily. Include the Moffett preface – and follow the rest of the procedures – if you feel "ethically compelled" to distance yourself from an argument. Moffett, 383 Mass. at 216-17. For example, the client wants you to argue that the judge made an evidentiary error. You agree, but you think it's a harmless error, so you wouldn't brief the issue absent the client's insistence. You can argue the point "sketchily" without the need for a Moffett preface. Now let's assume the client wants you to argue judicial bias. You see no evidence to support the claim, and you feel "ethically compelled" to distance yourself from the argument. For something like that, you would include a Moffett preface.

Second, note that you can submit a Moffett argument within an otherwise meritorious brief. If you are not including a Moffett preface, put the client's meritless – and sketchily drafted – argument last. If you are using a Moffett preface, make sure that it states clearly that you are dissociating yourself from only Argument X pursuant to Moffett, not from the entire brief.

Last, can you submit a Moffett FAR application? The Rules don't forbid it, and our Performance Standards require that you file an FAR application unless the client instructs you not to. *See* CAFL App. Perf. St. 17. Still, it's better to try to find a colorable issue. If you can't come up with one, call us and we'll try to help.

2. Don't insult the judge

A final tip to be filed under the category, "Don't Try This at Home."

Let's assume the trial judge made a mistake. Call it a mistake or an error – that's fair. But don't call his or her reasoning or decision "nonsensical" (especially in a motion for reconsideration filed with the same judge). Judges don't like that, as you can see in this epic "benchslap."