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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

 Recent Unpublished Decisions

 A Noteworthy Non-Child-Welfare Decision

 Practice Tip – Record References

Date: February 12, 2020

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**Administrative Matters**

*Hyperlinks*. This winter, the Boston Bar Journal will publish an article by Appeals Court Assistant Clerk Julie Goldman describing the results of a survey of Massachusetts appellate judges.  In the article, you’ll find information about what the judges like and don’t like in e-filed briefs.  In particular, judges really like hyperlinks within briefs.  They like hyperlinks from the Table of Contents to the corresponding sections in the brief.  They also like hyperlinks from references to the findings to the findings themselves in the Addendum.  In fact, the judges and clerks appreciate *any* opportunity to click and jump directly to what is cited.  Remember, though, that you can only link items within the same PDF document (that is, you can’t hyperlink record cites in the brief to pages in your separate record appendix or transcript volumes).  Check out the Appeals Court’s “[Guide to Creating Bookmarks](https://www.mass.gov/service-details/how-to-create-pdfs-with-bookmarks-and-internal-links)” to learn how to hyperlink content.  If you have general questions about electronic filing, call the Appeals Court Clerk’s Office e-filing hotline at (617) 725-8725. With this number, you’ll reach a live person much faster than calling the Clerk’s Office general number.

*Trainings*. Come join your CAFL appellate colleagues for a multi-topic training featuring:

* “Not So Usual Suspects:” Using legal authority beyond *Adoption of* \_\_\_ and *Care and Protection of* \_\_\_ to bolster your CAFL appellate arguments
* Standard of Review Jeopardy!
* An overview of how to best use the CAFL “Compendium of Unpublished Child Welfare Decisions”
* E-filing round table: Survival tips from CAFL Administration and your fellow panel members

Sign up to attend this training at the **Fall River** CPCS Office, 2nd Floor, Room # 38, **March 12, 2020**, 2:00-4:00 p.m. Register by emailing: caflcertificationtraining@publiccounsel.net.

We’re also doing a training for CAFL trial and appellate lawyers called, “Everything the CAFL Trial Attorney Needs to Know about Appeals (and Everything Appellate Counsel Needs to Know about Working with Trial Counsel).” Long title, but lots of good stuff. That will also be at the **Fall River** CPCS Office, 2nd Floor, Room # 38, **February 25, 2020**, 2:00-4:00 p.m.

*Recruiting*. 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](https://www.publiccounsel.net/blog/cafl-training/).

**Recent Unpublished Decisions**

**1. Adoption of Cassius, 93 Mass. App. Ct. 1120 (2018) (Mass. App. Ct. Rule 1:28) (Green, Vuono & Massing)**

Cassius is a father’s appeal of a step-parent adoption petition. The father had been convicted of two counts of indecent assault and battery and he later pled guilty to rape of a child.  The court terminated the father’s rights.

The father moved for a new trial based on ineffective assistance of counsel.  His counsel, he argued, should have presented expert testimony to prove that he was at low risk to offend and that he had taken responsibility for his past bad behavior. Appellate counsel retained a forensic psychologist post-trial who drafted a report and would have testified to father’s improvement and low risk.  The father moved for an evidentiary hearing on his IAC claim. The trial judge denied the motion, ruling that none of the evidence offered in support of the motion would have altered his decision.  The panel held, in light of the evidence at trial, that the judge did not abuse his discretion either by denying the motion for new trial or by denying the father’s request for an evidentiary hearing.

The take-away? While the facts of Cassius are bad, father’s appellate counsel did the right thing procedurally.  If you’re going to argue that trial counsel was ineffective for failing to offer important expert testimony, you must secure that testimony yourself from an expert and present it to the trial court in the form of a report or affidavit.  That report or affidavit becomes your offer of proof – and, hence, your factual record on appeal – if the trial court refuses your request for an evidentiary hearing.  Without it, the panel cannot assess whether trial counsel’s failure to introduce the expert testimony constituted IAC.

Of course, you need to file a motion for Indigent Court Costs Act (ICCA) funds for an expert in this context, and some judges are hesitant to order funds for a post-trial expert. Call CAFL administration and we’ll help you if your trial judge is dubious about the right to such funds.

**2. Adoption of Vicky, 93 Mass. App. Ct. 1120 (2018) (Mass. App. Ct. Rule 1:28) (Blake, Sacks & Ditkoff)**

The mother appealed the termination of her parental rights, arguing that DCF failed to make reasonable efforts to reunify the family. The mother didn’t raise the issue before trial, and the panel held that the issue was waived.  The panel also held that the trial court was under no obligation to address the reasonable efforts issue *sua sponte*.

A dumb, boring Rule 1:28 decision?  Not even close. Vicky is a great case about reasonable efforts. First, the panel explained what the mother could have done at the trial level to preserve the issue:

A parent may pursue a claim of inadequate services either through an administrative fair hearing or grievance process under department regulations or by commencing a separate action alleging discrimination under the ADA.

This isn’t very special; it comes right out of Adoption of Gregory, 434 Mass. 117, 124 (2001).  But then the panel explained what “pursue a claim” (or “raise a claim” per Gregory) means.  It doesn’t mean to see one through to conclusion.  Rather, it means merely to initiate one:

We do not agree with the mother’s argument that these remedies would have been too time-consuming to have afforded effective relief in this case (in which thirteen months elapsed between the department’s emergency petition and the trial), and accordingly that her failure to pursue them should be excused.  Merely initiating either type of claim would have put the department on formal notice that the mother believed the department’s services and efforts were inadequate, giving the department an opportunity to review those issues and make any adjustments it deemed advisable.

Interesting!  For this panel, an inadequate-services claim prior to trial is solely an issue of *notice* to DCF so that DCF has a chance to fix the problem; it is not intended to force the parties to litigate the matter administratively or in federal court.  But the case gets even more interesting in the next paragraph:

Moreover, the mother could have raised her claims of inadequate services or lack of reasonable efforts through a motion alleging that the department had abused its discretion filed in the Juvenile Court while the case was pending. See Adoption of Daisy, 77 Mass. App. Ct. at 781. If the judge had determined that the department was not making reasonable efforts, “he had the equitable authority to order the department to take reasonable remedial steps to diminish the adverse

consequences of its breach of duty.” Care & Protection of Walt, 478 Mass. 212, 228 (2017). Even if such a determination came “too late to order the department to fulfill its duty to make reasonable efforts to eliminate the need for removal, [it need not have been] too late to ensure that the department fulfilled its duty to make it possible for the child to return safely to [her mother] or to attempt to hasten the time when that reunification would become practicable.” Id. at 229. The mother did not pursue this course here.

Vicky at \*3 (brackets in original). Yes, that’s right – Vicky applies Walt to mid-case/pre-trial reasonable efforts to return a child home.  What does this mean?  It means that, sometime before trial (preferably long before), you can file a motion for more/different services or ask the court to determine that DCF isn’t making reasonable efforts toward reunification.  If the court agrees, it has the equitable authority to order DCF to make those efforts *at any point during the case*, not just immediately after removal or after the 72-hour hearing.  We know from Walt that the court’s equitable authority extends to specific orders for visits and services.  This is big!

**For trial lawyers**, the key to preserving the reasonable efforts issue for appeal lies in the case’s Conclusion: “The reasonableness of the department’s efforts not having been litigated below, we will not determine the issue on appeal.” So *litigate* reasonable efforts at the trial level. Ask for administrative review to put DCF on “formal notice.” Raise the issue at the pre-trial conference. Best of all, file a motion seeking more or different services. If you lose, you’ve preserved the issue for appeal. If you win, Vicky says clearly that the court has equitable authority to order the services or visits you’re seeking.

A final note. In a footnote, the panel states that the mother’s trial counsel told the judge that the mother was “AWOL,” had been “missing for months,” and had “made it very clear . . . she is not coming back until she is 18 and she is not going to contact anyone[.]” Please don’t do this. If your client has not contacted you for months and no-shows for trial, do not throw her under the bus. If a judge asks, “Where is your client?” you can answer, “She’s not here, Your Honor. I’m afraid that’s all I can tell you.” And then ask for a continuance. Don’t volunteer information that can be used against the client. (If you truly have no guidance from your client – for example, your last contact with her was months ago and her position was for custody of the child to be given to a relative who has since died – you can tell the court that you have no guidance from your client and ask to withdraw.) Of course, if you really expected your client to be present at trial because she has attended every hearing, you prepared her for trial, and her absence has thrown you for a loop, you are implicitly authorized to say more in order to help secure a continuance (or to avoid an adverse inference against your client).

**3. Adoption of Yelena, 94 Mass. App. Ct. 1103 (2018) (Mass. App. Ct. Rule 1:28) (Trainer, Mead & Kinder)**

On the seventh day of trial, the mother’s trial attorney (her fourth) moved to withdraw.  The mother, who had been found competent to stand trial by the court clinic, wished to represent herself. The trial court denied the motion, and the panel ruled that this was not an abuse of discretion:

We review the judge’s denial of a motion to discharge counsel for abuse of discretion. See Kiley, petitioner, 459 Mass. 645, 649 (2011); Adoption of Olivia, 53 Mass. App. Ct. 670, 675 (2002). This discretion is especially broad when the request is made on the eve of trial or later. See Commonwealth v. Tuitt, 393 Mass. 801, 804 (1985). Before allowing an attorney’s motion to withdraw, the trial judge “must be confident that [the moving party is] adequately aware of the seriousness of the [proceedings], the magnitude of [her] undertaking, the availability of advisory counsel, and the disadvantages of self-representation” (quotation omitted). Adoption of William, 38 Mass. App. Ct. 661, 665 (1995).

The judge was not confident that the mother satisfied this test, and the panel agreed: “The judge had presided over numerous pretrial conferences and six days of trial, in which he heard the mother testify. He was in the best position to assess the mother's ability to represent herself.” In addition, the panel noted the many delays caused by the mother’s panic attacks and failure to appear, as well as other delays caused by a lack of Russian-speaking interpreters.   Further, although the mother had been found competent to stand trial, the judge recognized that competency to represent oneself is different.

The panel also rejected the mother’s argument that the judge should have given her standby counsel, because the mother failed to request standby counsel at trial.

**Trial counsel:** If your parent client wants you to withdraw so she can appear *pro se* at trial, but she wants standby counsel to help her, ask for that relief specifically.

**4. Adoption of Bedelia, 94 Mass. App. Ct. 1103 (2018) (Mass. App. Ct. Rule 1:28) (Maldonado, Massing & Neyman)**

The father did not appear at trial.  Counsel for the father objected to going forward, but the judge started trial anyway.  The panel affirmed; the father “offered no reason or explanation for his absence at trial and made no claim that it was caused by circumstances out of his control.”

**The lesson for trial lawyers?**  If your client no-shows at trial, you must give a compelling reason for his absence (such as incarceration, verifiable hospitalization, localized tornados, etc.) and ask for a continuance.  If you don’t offer a good explanation for the client’s absence, the court can proceed without him.  In any event, please don’t do what the trial lawyer did in Vicky, above.

**5. Adoption of Dara, 94 Mass. App. Ct. 1106 (2018) (Mass. App. Ct. Rule 1:28) (Green, Hanlon & Maldanado)**

Are all post-trial changes in placement – including approvals and denials of adoption and guardianship applications – fair game at oral argument? Dara suggests that they are.

On appeal, the mother argued that the adoption plan was not sufficiently detailed.  The plan didn’t identify a specific adoptive family, but the panel noted that it didn’t need to.  See Adoption of Dora, 42 Mass. App. Ct. 472, 47 (2001).  DCF’s adoption plan for the children stated that DCF would seek a home that would keep the siblings together.  By trial, the foster parents had expressed an interest in adopting but had not yet completed the assessment process.  Because they had expressed this interest, the trial judge properly made findings about the children’s bond to the foster parents and comfort in the home.  All of that was in the record.

But then . . . in a footnote, the panel mentioned that, during oral argument, counsel for DCF stated that the foster family had since been approved as an adoptive resource.  The footnote suggests that the panel found this type of update permissible under current case law. See Dara at fn. 8 (citing Custody of Deborah, 33 Mass. App. Ct. 913, 913-914 (1992) (although developments after termination trial are not reviewed on appeal, it is vital for counsel to inform appellate court as to issues which may make appeal moot), and Adoption of Terrence, 57 Mass. App. Ct. 832, 840-41 (2003)).

What do we do with such a footnote?  I think we run with it.  If you can make an argument that post-trial factual developments either (a) moot the trial court’s decision on an issue, or (b) moot the adverse party’s argument on an issue, feel free to do so either at oral argument or in a Rule 16(l) letter.  Be prepared to cite to Dara’s footnote 8 (and Deborah and Terrence) to show the panel that you are not improperly arguing facts outside the record.

**6. Adoption of Esme, 94 Mass. App. Ct. 1106 (2018) (Mass. App. Ct. Rule 1:28) (Vuono, Agnes & Henry)**

Esme is a lesson in the danger (to counsel) of the court’s admission of evidence *de bene*.  The mother argued on appeal that the judge erred in admitting certain hearsay statements about the subject child’s sexualized behavior.  The trial judge had admitted some of the statements *de bene* during trial, but “Mother failed at the close of evidence to renew her objections[.]”  Therefore, the statements were properly in evidence.   **Let this be a reminder to trial counsel** – if the judge admits any evidence *de bene*, you must renew your objection before the close of evidence.  If you don’t, the evidence is in.

The father also argued that the trial judge relied on stale evidence of past abuse of other children to find him currently unfit.  The panel disagreed:

The father’s current unfitness was supported by clear and convincing evidence.  Contrary to the father’s argument, the judge did not rely on stale evidence, but rather, relied on the father’s current status as a level three sex offender, designating him as a high risk to reoffend, and the prognostic value of his criminal history earning him this classification. See Adoption of Jacques, 82 Mass. App. Ct. 601, 607 (2012).  Because the father targeted prepubescent victims, he “pose[s] an even higher risk of reoffense and degree of dangerousness.” 803 Code Mass. Regs. § 1.33(3) (2016).  In addition, as the judge noted, the father’s sex offender classification allows him to be with John “only at times when Mother or someone else in the household was available to supervise.”  (Emphasis in original)

Esme suggests that any level three sex offender – or at least any level three sex offender who has offended against young children – is currently unfit.  This is a reach; an administrative agency’s determination of current risk cannot substitute for the court’s own factual assessment.  Further, here, the father’s convictions were 13 years old when DCF filed the petition.  Although the panel cites to Jacques for its holding about sex offender status and current unfitness, Jacques is not a sex offender case and has no factual similarity whatsoever to Esme.

What should you do with Esme if your case concerns a level three sex offender parent with older offenses?  (If your case features recent offenses, it is the offenses – not the sex offender level – that will render the parent unfit.)  If you are supporting termination, cite Esme for the proposition that the parent’s sex offender status shows (or contributes to a showing of) current unfitness.  If you represent the parent or a child seeking reunification, try to distinguish your case factually from Esme.  For example, the child in Esme showed signs of sexual abuse, and the evidence suggested that the father may have been the perpetrator.  In addition, the father in Esme offended against his own six-year-old daughter and another relative.  Your case may lack such awful facts.

**7. Adoption of Fabiana, 94 Mass. App. Ct. 1108 (2018) (Mass. App. Ct. Rule 1:28) (Blake, Wendlandt & McDonough)**

When judges say things that suggest bias, you must move to recuse the judge right away. If you wait until the end of trial (or you never raise the issue at the trial court), you’ve probably waived the issue. See Demoulas v. Demoulas Super Markets, Inc., 428 Mass. 543, 549 (1998). This is what happened in Fabiana. After the first day of trial, in response to the parties’ announcement that they had reached a tentative settlement,

the judge indicated that, based on the evidence he had heard so far, “there’s certainly enough evidence to keep [the child] in the custody of the Department of Children and Families at this time. I didn’t feel as though there was enough evidence to terminate your parental rights.” He also stated that, although he had not heard all the evidence, he “had an idea as to how this thing was going to go. And I don’t think it would have been favorable for you to get on the witness stand and start answering questions to which you don’t really want to answer.” The judge also commented that it would not favor the mother that the child did not live with her, stating also that the court process was designed so that if the mother did “not put her daughter first, [her parental] rights ultimately [would] be terminated.”

Courts have held that comments like these show judicial bias or, at a minimum, give the appearance of bias. See Adoption of Tia, 73 Mass. App. Ct. 115 (2008). Presumably, the mother’s trial counsel didn’t move to recuse because a settlement was imminent. Alas, no settlement was reached, and the hearing continued. And before it continued, no one moved to recuse the judge.

The panel determined that the issue was not preserved because the mother never objected to the judge hearing the rest of the trial (that is, she never moved for recusal). While unpreserved bias claims may still be raised in “exceptional circumstances,” there was nothing exceptional here. Although the mother argued that the near-settlement at that point was indeed exceptional, the panel faulted her for not objecting once the settlement failed and the hearing continued. The panel affirmed the termination decree.

Note that an Appeals Court panel did address unpreserved claims of judicial bias in Adoption of Vince, 86 Mass. App. Ct. 1113 (2014) (Mass. App. Ct. Rule 1:28), discussed in our Compendium. In Vince, the panel applied a “substantial risk of miscarriage of justice” standard to unpreserved error. Is that standard different than “exceptional circumstances”? In practice, probably not. Still, appellate counsel should cite to Vince and Fabiana if the bias claim is unpreserved, and argue that both tests are satisfied.

**The take-away for trial lawyers?** Move to recuse as soon as the judge makes a statement showing bias. Are you – like the lawyers in Fabiana – waiting for a settlement, which would make an incendiary motion like this unnecessary? Fair enough. But as soon as the settlement fails and the hearing continues, file your motion. Otherwise you’ll have waived the objection (except in the most egregious circumstances).

**8. Guardianship of Jayce, 94 Mass. App. Ct. 1111 (2018) (Mass. App. Ct. Rule 1:28) (Rubin, Maldonado & Ditkoff)**

The paternal grandmother had been appointed permanent guardian of Jayce, who had significant medical needs. The mother was granted liberal visitation, and there was no finding of unfitness. When their relationship deteriorated, the mother moved to remove the paternal grandmother as guardian. The judge stated the proper standard for removal of a guardian – that the guardian bears the burden of proving by clear and convincing evidence that the mother remains unfit, under Guardianship of Kelvin, 94 Mass. App. Ct. 448, 453-54 (2018) – but denied the motion. The mother appealed, contending that, while the judge may have stated the correct standard, she in fact shifted the burden to the mother based on two aspects of her decision:

First, the judge stated that “[t]here was no expert testimony offered by [the m]other as to the potential impact on the child of a change in custody to [the m]other.” Second, the judge stated that the mother’s “ability to be consistent and to follow through has never been demonstrated by [the m]other in any meaningful way.”

As a preliminary matter, the appellee-child argued that the mother waived her burden-shifting argument, but the panel disagreed:

The mother had no reason to raise her burden-shifting argument in the Probate and Family Court because the judge articulated the correct burden of proof on a petition for removal of a guardian.  It was not until the judge released her decision that the issue arose, prompting the mother to challenge the purported error on appeal. The mother was not required to first file a motion for a new trial as counsel for Jayce seems to suggest.

This makes great sense. Sometimes an issue can’t be raised first at the trial level because the mistake is only evident from the judge’s findings. In such cases, appellate counsel need not return to the trial court on a Rule 60(b) motion (although counsel may choose to do so).

Then, the panel thoughtfully considered possible interpretations of the judge’s statements. On the one hand, they could be interpreted to impermissibly shift the burden to mother to prove her fitness; but on the other hand, they could permissibly reflect the mother’s failure to rebut evidence of unfitness presented by the guardian. The panel *could* have opted for the permissible interpretation and let the trial court off the hook, but it didn’t:

Given these different, but equally plausible, interpretations of the judge’s reasoning, we cannot say with confidence whether or not the judge erroneously shifted the burden of proof to the mother. It follows that we are unable to determine whether the judge properly concluded that the guardian had proved, by clear and convincing evidence, that the mother is currently unfit to parent Jayce.  Consequently, a remand for further proceedings is necessary.

This, too, makes great sense. If an appellate court lacks confidence that the judge correctly applied the law, it should send the case back.

Are your findings ambiguous about burden-shifting or another important issue? Cite Jayce and ask for a remand. Specify that the remand include evidence of current unfitness and best interests. A remand solely for clarification of the judge’s intentions will likely end in a predictable – and adverse – result.

**A Noteworthy Non-Child-Welfare Decision**

**Michelon v. Deschler, 96 Mass. App. Ct. 815 (2020) (Rubin, Wolohojian & Henry)**, decided just last month, is a great case about judges adopting one party’s proposed findings verbatim (not good) and judges failing to address “troublesome facts” in their findings (even worse).  In this divorce case, the mother appealed the judge’s award of equal parenting time to both parents and an order that the children enroll in a new school system.  The mother argued that the judge’s findings and rationale, which were adopted virtually verbatim from the father’s submission, did not demonstrate that the judge independently evaluated the evidence.  The Appeals Court agreed, holding that the findings lacked the required “badge of personal analysis” to survive appellate scrutiny.  The only indication that the judge did any independent evaluation of the evidence was his deletion of four paragraphs from the father’s proposed findings – those that rejected mother’s evidence about father’s DUI, his viewing of pornography in the children’s presence, and other disturbing allegations.  The judge made no findings at all on those important issues.

According to the Appeals Court, “[t]he judge was not required to accept the mother’s evidence, but the judge was required to deal with it; indeed much of it was uncontested.  ‘Troublesome facts . . . are to be faced rather than ignored. . . .  Only then is the judge’s conclusion entitled to the great respect traditionally given to discretionary decisions.’  Adoption of Abby, 62 Mass. App. Ct. 816, 817 (2005), quoting Adoption of Stuart, 39 Mass. App. Ct. 380, 382 (1995).”  In addition, “nothing in the findings or the rationale permit us to understand how the judge assessed the best interests of the children or the basis for the judge’s conclusion that the children were best served by attending a new school system.”  The panel vacated the parenting-time schedule and the placement of the children into the new school system, and remanded for further proceedings.

**Practice Tip**

Record References.Rule of Appellate Procedure 16(e) requires a record citation any time you write a factual statement. This includes a factual statement in the Procedural History, Facts, and Argument sections. Your record citation format is up to you, but it must be clear. Rule 16 gives an example of a good record citation: “RAII/55 (meaning Record Appendix volume II at page 55) or TRIII/231-232 (meaning Transcript volume III at pages 231-232).”

We suggest putting your record references in parentheses and using a period after the citation. This makes the citation easier to see and distinguish from the text. For example, which paragraph is easier to read?

Sally was “drawn to men” and exhibited “boundary” problems from her earliest days in foster care. Tr. II:85, 160; RA. 68-69 As a result, she underwent a sexual abuse assessment. RA. 476, 482 DCF was well aware of her issues. RA. 421-25, 472-83 DCF failed, however, to acknowledge the Child’s history when placing the Child with Mr. X. Tr. II:160-68

Sally was “drawn to men” and exhibited “boundary” problems from her earliest days in foster care. (Tr. II:85, 160; RA. 68-69). As a result, she underwent a sexual abuse assessment. (RA. 476, 482). DCF was well aware of her issues. (RA. 421-25, 472-83). DCF failed, however, to acknowledge the Child’s history when placing the Child with Mr. X. (Tr. II:160-68).

We think the second paragraph is easier to read, because the record references are readily distinguishable from the text.