***Committee for Public Counsel Services***

***Children and Family Law Division***

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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 Recent Unpublished Decisions

 Writing Tip – Bold and Italics

Date: May 14, 2020

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**Administrative Matters**

Support/Moots. During this tricky time, please don’t hesitate to contact your mentor or reach out to any of us in the CAFL Appellate Panel Support Unit. We’re here to support you and help you any way we can. We’re also available to do video moots; we’ve done several already this month.

Appeals Court Clerk’s Office. If you have questions about a pending appeal, the Appeals Court Clerk’s Office has a skeleton crew operating during the court closure. If you have an emergency matter with the Appeals Court, you can call (617) 723-1527 or email MACClerkEmergency@jud.state.ma.us. If you have a non-emergency matter, call (617) 723-1511 or email MACClerkNonEmergency@jud.state.ma.us. Someone from the Clerk’s Office will likely get back to you promptly.

Recruiting. If you know someone who might be a good fit for CAFL appellate work, please invite them to apply for our fall certification training. The training is *currently* scheduled to take place at Worcester Community Legal Aid on October 5, 6, and 7, 2020. The application deadline is August 31, 2020. (Of course, these dates and/or the nature of the training – live or online – may change.) Applications and more information can be found on the [CPCS website](https://www.publiccounsel.net/blog/cafl-training/).

**Recent Unpublished Decisions**

This Bulletin catches us up through August 2019. We have not summarized all unpublished child welfare decisions; rather, we’ve include only those with interesting facts and/or legal issues.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 from the first half of 2019, 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 – and you *should*; that’s why we’re including them here! – 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.

**1.** In **Adoption of Maisie, 94 Mass. App. Ct. 1117 (2019) (Mass. App. Ct. Rule 1:28) (Rubin, Maldonado, Lemire)**, the trial judge found the parents unfit and terminated their rights, “thereby freeing the children to be adopted by their maternal grandmother.”

The problem? Adoption wasn’t the plan; guardianship was. Although there was no permanency or adoption plan in the record that would have documented the parties’ intentions, both the maternal grandmother and the DCF social worker testified that their plan was for guardianship. The judge did not mention guardianship in her findings. The panel vacated the termination, noting that “the judge failed to meaningfully consider and evaluate that guardianship was the goal for the children.”

Most importantly, the panel noted that guardianship and adoption are very different outcomes, and that guardianship doesn’t require termination: “The ramifications of a guardianship versus an adoption are different and we cannot conclude, based on the judge’s findings, whether she would have terminated the parents’ rights in the event of guardianship rather than adoption.”

If guardianship was proposed in your case at the trial level, but the judge terminated without making findings about it, Maisie is worth citing.

**2. Adoption of Osma, 94 Mass. App. Ct. 1119 (2019) (Mass. App. Ct. Rule 1:28) (Agnes, Henry, Shin)**. In Osma, the mother argued that the judge erred by not ordering sibling visitation. The child’s paternal aunt in Virginia planned to adopt her. The judge terminated parental rights and ordered post-adoption visitation at the discretion of the adoptive parents. The judge found that it was the “customary routine” of the pre-adoptive parents to visit Massachusetts approximately twice a year for the child to visit the parents and that such visits “would continue,” thereby rendering an order unnecessary.

The entirety of the panel’s discussion of sibling visitation is as follows:

“If siblings are separated through adoption, a judge ‘shall, whenever reasonable and practical based upon the best interests of the child, ensure that the children ... shall have access to and visitation with siblings.” Adoption of Zander, 83 Mass. 363, 367 (2013), quoting G. L. c. 119, § 26B(b). The judge’s order provides that “the parents are encouraged to include [the child’s] sisters . . . in [parent-child post-adoption] contact to ensure that the child maintains contact with these siblings.” We interpret this to require that when the preadoptive parents visit Massachusetts, all reasonable and practical steps must be taken to ensure that the child has visitation with her siblings.

The panel’s interpretation of the trial court’s non-order is generous. (In fact, I can’t imagine that the pre-adoptive parents ever interpreted the trial court’s “encourage[ment]” as an order at all. A better response by the panel would have been a remand for clarification and amendment of the order.) Further, the panel’s reasoning in Osma contrasts with that of the panel in Adoption of Gerald, 73 Mass. App. Ct. 1116 (2009) (Mass. App. Ct. Rule 1:28). In Gerald, the panel remanded for a more specific sibling visitation determination and scheduling order by the trial court.

**The takeaway for trial and appellate counsel?** If a post-termination, post-adoption, or sibling contact order is vague or ambiguous – as part of the findings/conclusions or a separate order – take it back to the trial judge immediately on a motion for clarification or motion to amend. Don’t wait for the Appeals Court to attempt to divine the trial judge’s intentions. Parents and children are entitled to clear, unambiguous orders, especially those that are intended to survive (and be enforceable) after adoption.

**3.** **Adoption of Ido, 95 Mass. App. Ct. 1106 (2019) (Mass App. Ct. Rule 1:28) (Vuono, Desmond, Singh).** Ido concerned the youngest six of the mother’s twelve children. One of the six, Jane, challenged the termination of her mother’s rights because her pre-adoptive placement disrupted. DCF knew that the placement had disrupted at the time the decree was entered but never informed the judge. However, neither Jane nor the mother moved to reopen the evidence or for reconsideration. As a result, the panel affirmed the termination decree.

Jane also challenged the denial of post-termination and post-adoption visitation. Here, the panel did consider the disruption of Jane’s pre-adoptive placement, noting that the lack of an identified pre-adoptive family, together with the termination of the mother’s parental rights, were “precisely the circumstances in which an order for posttermination as well as postadoption contact may be appropriate and warranted.” Ido (citing Adoption of Rico, 453 Mass. 749, 755 (2009)). The panel vacated the decree for further consideration of post-termination and post-adoption visitation.

Finally, Jane challenged the lack of sibling visitation. The judge declined to order any because it was not reasonable or practical; there were 12 children, three over the age of 18, and they lived in “various homes, placements, and [states].” Instead of an order, the judge indicated that he “expected” DCF, as well as future adoptive parents and custodians of the children, “to collaborate with each other in order to maintain sibling contact and visitation consistent with each child’s best interests.” In a footnote, the panel diplomatically explained why this “expectation” was insufficient:

We sympathize with the judge’s position, being presented with the formidable task of ensuring sibling visitation in this complex circumstance. But it is precisely in these complicated scenarios where children are most at jeopardy of losing sibling contact; and, although the department may have its independent obligation to ensure sibling visitation under the statute, see Adoption of Garret, 92 Mass. App. Ct. 664, 679-681 (2018), any future adoptive parent is not so obligated. See Adoption of Zander, 83 Mass. App. Ct. at 367. An “expectation” that a future custodian of the children will cooperate with sibling visitation falls short of an order requiring such visitation.

According to the panel, “[t]here is nothing in this record to suggest that an order for posttermination and postadoption sibling visitation would not be in the best interests of these children. To the contrary, there is strong record support for the closeness of the entire sibling group. Notably, all six children are in favor of a sibling visitation order.” Ido (citations omitted).

Well said! The panel remanded for consideration of sibling visitation orders. Ido is a great case to cite when a judge uses logistical complications as an excuse not to order sibling visits.

**4.** **Adoption of Xuan, 94 Mass. App. Ct. 1116 (2019) (Mass. App. Ct. Rule 1:28) (Meade, Agnes, Englander)**. What do you do if the evidence shows a parent-child bond and a history of good visits and phone calls, but the judge makes no findings – or only clearly erroneous findings – about the bond and denies a request for post-adoption contact? Cite Xuan!

In Xuan, the father sought post-termination/post-guardianship contact at trial but was denied, even though he had kept in touch with his son during the case, including during his incarceration. The father and the child appealed the denial of contact. While the panel affirmed the judge’s decision to terminate father’s parental rights, it vacated the order declining to provide for post-termination contact and remanded for further proceedings on the topic.

The trial judge held that post-termination contact did not serve the child’s best interests. But there was no evidence to support this determination. Rather, the judge’s decision was solely “based on the Department's recommendation” that there be no contact. However, the Department presented no evidence to support that recommendation, other than its (non-evidentiary) closing argument, in which Department counsel stated, “[t]he Department is looking for termination of parental rights of [the father]. . . . No post-termination/post-guardianship contact, judge. No phone calls.” But closing argument isn’t evidence.

The judge found “no discernable bond” between the father and the child. But the findings didn’t actually show no bond; rather, they were silent on the issue, and there was, in fact, evidence of a parental bond. Father spoke to his son every Sunday while he was incarcerated.

Best of all, the panel recognized that visits aren’t the only form of post-termination contact. The panel was critical of the trial court for failing to “address any other form of contact between the father and the child, such as cards or letters to the child,” which the mother had obtained in an open/structured guardianship agreement. The panel remanded for further proceedings on post-termination contact.

Note: On remand, the judge issued additional findings that considered the visitation and contact that had occurred, again found that there was no evidence of any bond, and declined to order visitation or contact. The panel affirmed that ruling in **Adoption of Xuan [II], 95 Mass. App. Ct. 1103 (2019) (Mass. App. Ct. Rule 1:28) (Meade, Agnes, Englander)**. Still, Xuan is a great case to cite for your post-adoption contact argument.

**5.** In **Adoption of Ariadne, 95 Mass. App. Ct. 1117 (2019) (Mass. App. Ct. Rule 1:28) (Meade, Massing, Lemire)**, the mother did not appear at trial but contacted her attorney ten days later to explain that she had relapsed and had been in a drug treatment facility. The court drew a negative inference from her absence. She asked her attorney to file a motion to reopen the evidence so that she could testify and explain her absence to the judge. The attorney “resisted,” explaining that, in his judgment, it would not be in her best interest to reopen the evidence to admit she had relapsed. He ultimately agreed to try to reopen the evidence for the limited purpose of offering a letter from the mother’s treatment program. The attorney prepared a draft motion but would not proceed unless the mother signed a version specifying that the motion was filed “against the advice of undersigned counsel.”

Later, appellate counsel moved to stay the appeal to allow mother to move for a new trial based on ineffective assistance of counsel (IAC). The single justice denied the motion, ruling that the mother was unlikely to succeed on the IAC claim. Mother appealed, and that appeal was consolidated with the mother’s direct appeal.

The panel held that the single justice did not abuse her discretion when she determined that mother was unlikely to succeed in her IAC claim. That may well be true – perhaps the mother could not satisfy the second prong of the IAC test by showing that the result would have been any different had counsel done what she’d asked. But the panel chose to address the first prong, as well, and here is where it gets strange. The panel held that it was “not manifestly unreasonable for counsel to resist reopening the evidence to allow the mother to present further proof that her substance abuse was ongoing and interfered with her ability to attend to Ariadne’s needs.” Now *that* is bizarrely unfair, because the mother clearly didn’t intend to offer additional proof of her problems; she intended to offer evidence as to why she wasn’t at trial, so that the court could reconsider its adverse inference. What conceivable strategy by counsel was served by not letting the mother explain her absence? Further, what evidence could the mother have introduced at a reopened hearing that could have *hurt* her case? After all, she had lost her parental rights; letting her tell her story couldn’t have prejudiced her case, and it might have helped in some way, if only by letting her know that she had had a chance to be heard. (It does not appear that the judge had ordered post-adoption contact which the mother might have lost had the evidence been reopened. *That* might have represented a viable strategic decision.)

**For trial counsel:** If a parent fails to show for trial and the judge terminates parental rights, don’t push the parent away if she later shows up and asks to reopen the evidence. Call CAFL administration, and we can discuss your options.

**6.** **Adoption of Beatrice, 95 Mass. App. Ct. 1118 (2019) (Mass. App. Ct. Rule 1:28) (Rubin, Desmond, Ditkoff)**, is notable for the following footnote:

At the outset of trial, the judge commented that “this is scheduled for a five-day trial. I do want to tell you that, if we’re not finished on Friday, that I will call a mistrial. I don’t have any more time to give to the case than what I’ve got right now and you’ll have to start over again. So just keep that in mind.” Although we understand the importance of case management in the trial court, these comments by the judge were insensitive at best. In the future, it would be better to instruct counsel more tactfully as to the anticipated trial schedule, especially in light of the important rights of the parties at stake in these types of cases.

Beatrice, at n. 11. The judge’s comments here didn’t ultimately matter to the Appeals Court; it still affirmed. Still, what can you do when a judge says something like this and you really think that you need more time than the judge is allotting? A recent case – **Adoption of Yolane, 92 Mass. App. Ct. 1116 (2017) (Mass. App. Ct. Rule 1:28)** – gives some guidance. Ask the trial judge to ask the Chief Justice of that court to (a) give your judge a “block of time” and (b) assign “day-to-day activities of the court” to another judge. Or ask the judge to ask the Chief to assign another judge specifically for your trial. It’s worth a try.

**7.** **M.S-H. v. A.L., 95 Mass. App. Ct. 1123 (2019) (Mass. App. Ct. Rule 1:28) (Henry, Sacks, Ditkoff)**. In this case, the mother sought to vacate an open adoption agreement in the Probate and Family Court. During a colloquy, the judge

determined that the mother’s consent to the agreement was knowing and voluntary. See Adoption of John, [53 Mass. App. Ct. 431, 435 (2001)] (“What is required is that the judge make an appropriate inquiry to establish that the parent’s consent was knowing and voluntary”). During the colloquy, the mother informed the judge that she understood the terms of the agreement, that she found the terms reasonable and fair, that she had an opportunity to consult with her attorney, and that she had signed the agreement freely and voluntarily. There was no evidence of mental insufficiency or intoxication at the time of consent. See id. at 435-436.

Later, the mother testified at an evidentiary hearing on her motion for reconsideration that she did not sign the agreement voluntarily. According to the mother, her attorney coerced her into doing so by telling her that, if she didn’t, she would never see her child again.

The judge credited the mother’s representations made during the colloquy and discredited her testimony given at the evidentiary hearing. In support of her claim, the mother submitted text messages between herself and her attorney. Although the panel did not recite the contents of the text messages, it noted that the messages “do not paint trial counsel in a flattering light.” Nonetheless, it found that they did not compel a finding of coercion. The attorney had advised the mother that she would not win if she went to trial and that she had a better chance of establishing visits if she entered into an open adoption agreement. According to the panel, since the record did not include the transcripts from relevant pretrial hearings, there was no evidence before it that the attorney’s advice was faulty.

There are two takeaways here. First, an open adoption agreement is not involuntary (or the product of coercion) just because the parent’s attorney described the agreement as the only way for the parent to obtain visitation. Second, if appellate counsel is attempting to show that trial counsel coerced or misled the parent into signing by incorrectly describing the client’s chances of success, appellate counsel must include evidence showing that the parent did, in fact, have a chance of success.

**8.** **K.C.C. vs. C.D., 95 Mass. App. Ct. 1109 (2019) (Mass. App. Ct. Rule 1:28) (Desmond, Sacks, Lemire)**, is a stark illustration of the obligations of trial and appellate counsel to communicate with each other about assembly of the record.

A plaintiff filed a complaint in equity to establish paternity in the Probate and Family Court. The judge granted summary judgment for the defendants, and the plaintiff appealed. The plaintiff's trial counsel *and* appellate counsel had both filed appearances and were listed on the docket. The register's office sent the notice of assembly of the record *only* to trial counsel. When trial counsel received the notice, she assumed appellate counsel had it as well and did not notify her. Appellate counsel did not learn that the record had been assembled until one day after the deadline to enter the appeal.

Appellate counsel moved to enter the appeal late, but a single justice denied the motion. On appeal from that decision, the plaintiff argued that the failure of the register's office to send the notice of assembly to his appellate counsel constituted “good cause” for his late filing. The panel disagreed, noting that while it would have been “preferable” if the register's office had notified all counsel of record, the single justice did not err in concluding that “trial counsel's failure to communicate receipt of the notice of assembly to appellate counsel is not sufficient reason to warrant a finding of excusable neglect.”

The panel did not reach the merits of the case.

**The takeaway for trial counsel?** Trial counsel *must* let appellate counsel know that he or she received a notice of record assembly. Don’t assume that appellate counsel received the notice, even if appellate counsel has filed an appearance. In fact, trial counsel should *immediately* send appellate counsel *everything* issued by the trial court or clerk’s office after the appeal is filed. The consequences for failure to do so can be dire.

**The takeaway for appellate counsel?**  Appellate counsel should tell trial counsel to let them know ASAP if they receive *any* mail from a clerk’s office. Appellate counsel should also consider sending a letter to the trial court clerk’s office asking the clerk to send them notice of assembly directly. Is this really necessary if appellate counsel has filed a notice of appearance? In most cases, no. But K.C.C. shows us that the belt and suspenders approach can’t hurt.

**Writing Tip**

Minimal use of bold and italics. Every once in a while, we see a brief that has a **lot** of *really* unnecessary and *completely* ***distracting*** italics or bold. Bold and italics are fine, but use them sparingly (not on every page) and correctly.

Here are some tips from Matthew Butterick’s *Practical Typography* (2nd ed.), available at <https://practicaltypography.com/bold-or-italic.html> (5/13/2020):

* Pick one: italics or bold. Don’t use both.
* Use bold or italics for emphasis as little as possible. “[I]f everything is emphasized, then nothing is emphasized.”
* If your font is a serif font (which has little lines or “feet” coming off the ends of the letters, as in Times New Roman, Courier, Garamond, or Georgia), use bold for heavier emphasis and italics for gentle emphasis.
* If your font is a sans serif font (which has no little feet on the ends of the letters, as in Helvetica, Verdana, and Arial), use bold only. The slant of italics is too slight to see clearly.
* Do not use bold or italics for punctuation, parenthesis, or brackets at the outside edges of your emphasized words.

Sometimes we see briefs that use bold for all record references. Please don’t do that. That’s too much bold, it looks weird, and you can make record references stand out from the text by using parentheses instead. For example:

Father underwent a sexual abuse assessment in May 2017. (RA. 476, 482). The DCF worker was well aware of this (RA. 421-25, 472-83), but she claimed a lack of awareness during testimony. (Tr. II:160-68).

If you emphasize part of a quote with bold or italics, remember to tell the reader that the emphasis was your own. Add the parenthetical phrase “(emphasis added)” after the citation. If the emphasis appears in the original text, you do not need not to include the parenthetical phrase “(emphasis in original).” *See* The Bluebook, Rule 5.2.