
SINGLE JUSTICE PRACTICE FOR THE CAFL APPELLATE ATTORNEY

ANDY COHEN, ABBY SALOIS, DAWN MESSER & JAIME PRINCE CAFL APPELLATE PANEL SUPPORT
UNIT (SPRING 2023)



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TWO TYPES OF SINGLE JUSTICE REVIEW

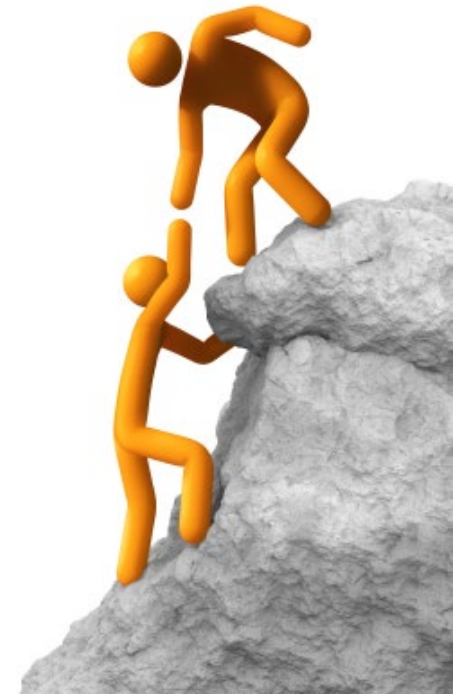
- First – single justice review of procedural matters in final child welfare appeals (generally from docketing to assignment to panel) (Justice Shin)
- Second – single justice review of interlocutory matters during Juvenile Court or Probate & Family Court proceedings (rotating justices)

INTERLOCUTORY REVIEW: G.L. C. 231, § 118 (PAR. 1)

- Juvenile Court interlocutory appeals *used to go to SJC SJ* under G.L. c. 211, § 3. But no more!
- Now Juvenile Court (and Probate & Family Court) interlocutory appeals go to App. Ct. SJ under G.L. c. 231, § 118.
- 211, § 3 petitions aren't dead, but they will be extremely rare for us (more later on that).

WE CAN ASSIGN YOU FOR SINGLE JUSTICE WORK!

- Take the case and file the petition
- Mentor a trial attorney who is filing a petition
- Advise a trial attorney who is trying to set one up (and then you assume one of the roles above)



WHY PURSUE AN INTERLOCUTORY APPEAL?



STRATEGIC LITIGATION: CHANGING THE STATUS QUO

- Walt (RE & trial court's equitable power to order visits at the initial stages of a case)
- Rashida (RE pre-trial)
- Robert (standard of review at 72-hr hrg)
- Manuel (right to 72-hr hrg whenever custody removed)
- Lori (right to 72-hr hrg in Prob Ct 23(c) – now 23(a)(3) – cases)
- Sophie (admissibility of children's hearsay in a 72-hr hrg)
- Zita (admissibility of petition letter/aff; inadmissibility of judge's reliance on her memory of prior c&p proceedings)
- Jeremy & Isaac (placement)

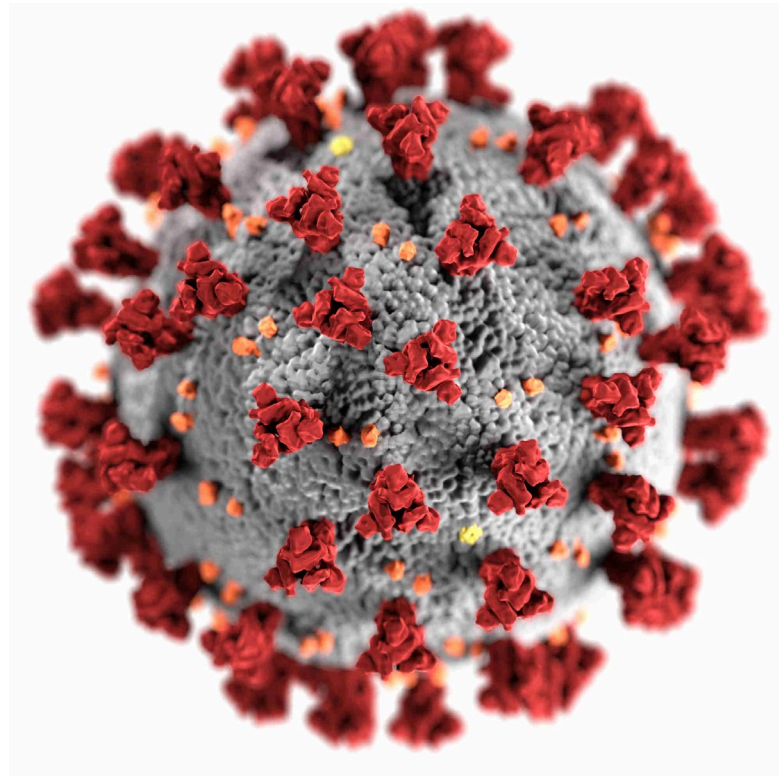
FINAL APPEALS (*NOT FOR SJ REVIEW*)

- C&P adjudication (even just permanent custody orders)
- Termination of parental rights
- Any final order on Review and Redetermination
- Approval of a permanency plan or other order at perm. hrg (§ 29B)
- Permanent guardianship decree
- Any order that finally determines a person's standing/status in the outcome of the case (dismissal of case, striking of party, denied motion to intervene, a few others)

WHAT IS “INTERLOCUTORY”?

- 72-hour/temporary/emergency custody hearing
- Motions for pre-trial visits (more, different, suspension, termination, etc.)
- AOD motions for specific services or specific placement
- Reasonable efforts (*Rashida*) decisions
- Temporary custody or temporary guardianship
- Judge’s refusal to stop DCF from moving a child across state lines
- Judge’s actions on an ICPC issue (pre-trial)
- *Rogers* orders

COVID-19 ISSUES



ALL CRA PROCEEDINGS APPEALED AS G.L. C. 231, § 118 SJ PETITIONS

- Final judgments (adjudication, disposition, disposition review, permanency hearings),
and
- Interlocutory orders (placement, visits, RE, etc.)



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Children and Family Law Division

Deputy Chief Counsel Michael Dsida

Single Justice Practice / Interlocutory review

c. 231, § 118 Guide to Appeals Court Single Justice Practice

[CAFL Guide to Appeals Court Single Justice Practice](#)

[Trial Counsel Single Justice Intake Form \(click here\)](#)

You can...

- Request appellate counsel to file a Single Justice Petition for your client; OR
- Request appellate counsel to assist you in filing a Single Justice Petition.
- **IMPORTANT:** Interlocutory appeals *must* be filed with the Appeals Court Single Justice within *30 days* of the date the decision was docketed. This is a strict, statutory filing deadline that cannot be extended.

NOTE: M.A.C. Rule 20.0 is the governing rule for single justice practice in the Appeals Court

c. 231, §118 (interlocutory review of all matters arising from the Juvenile or Prob. & Fam. Court)

You petition the single justice of the Appeals Court under this statute to appeal any issue regarding a 72-hour hearing (holding it at all, holding it late, a reasonable efforts decision, etc.), an adverse decision on visits, placement, or services, or any other interlocutory matter.

Trial counsel can handle single justice petitions, but CAFL can assign an appellate attorney to mentor trial counsel, assist trial counsel, or file the single justice petition. In any event CAFL can assign appellate counsel to handle a single justice petition. In any event, you must send CAFL administration a copy of the petition and memorandum of law that you file. [See](#) CAFL Perf. Standard 4.6(a).

Model c. 231, § 118 Petitions and Memoranda of Law

- [Model 1](#) (failure to hold a 72-hour hearing within 72 hours)
Petition and Memorandum of Law



The c. 231, § 118 Basics: When – How – What

THE RULES - TIMING

- Strict 30-day *statutory* deadline
- Cannot be extended (even by a super-kind judge's super-generous order)
- If you are one day late, the petition is denied. Period. That's it. You lose.

NO, REALLY ... A 30-DAY DEADLINE



THE BASICS

- No notice of appeal, but do file a motion for fees and costs (and supporting affidavit of indigency to waive transcript/copy fees)
- E-filed in the Appeals Court
- Served on all parties
- Governed by G.L. c. 231, § 118 & M.A.C. Rule 20.0

CONTENTS OF A SINGLE JUSTICE PACKET

- Petition
- Memorandum of law
- Record appendix with table of contents
- Proposed order
- Motion to waive fees (and affidavit of indigency)
- Certificate of service (and Certificate of Compliance if using proportional font)



WHAT TO DO AFTER APPOINTMENT AS SJ COUNSEL – I

- Communicate with trial counsel
- Communicate with the client
- Get the docket sheet to confirm the date of the decision (and your filing deadline)

WHAT TO DO AFTER APPOINTMENT AS SJ COUNSEL – 2

What is in the RA?

- Docket sheet
- Motions, responsive pleadings
- Exhibits
- Findings (if there are any; usually there aren't)
- 29C form if you are arguing lack of reasonable efforts
- Transcripts (or audio file or stip/aff of counsel until transcripts are ready)



WHAT TO DO AFTER APPOINTMENT AS SJ COUNSEL – 3

- Order the relevant hearing audio file and transcript
- File a motion for expedited transcript (Note: If you are appealing a 72-hour hearing decision, you may also want – and need to request – the emergency *ex parte* hearing audio & possibly the transcript)

DO NOT WAIT TO PUT RECORD TOGETHER



PETITION REQUIREMENTS – I

- Length: cannot exceed 5 pages of text in monospaced font or 1,000 words in proportional font.
- Must contain:
 - Request for review that states the nature of the underlying order
 - Entry date of the underlying order
 - The name of the judge/court that entered underlying order
 - Statement of the issues of law raised by the petition

PETITION REQUIREMENTS – 2

- Must also contain:
 - Statement as to whether a party has filed, or intends to file, a motion for reconsideration in the trial court
 - Statement of specific relief requested (may attach a draft order for the SJ)
 - Addendum containing a copy of the order or action of the trial court (including a typed version of any pertinent handwritten or oral endorsement, notation, findings, or order made by the lower court)
 - Word “Impounded” at the top (like a brief)
 - No full names (instead, use “mother,” “father,” “child,” “older son,” etc.)

MEMORANDUM OF LAW

- Must accompany each petition (can't combine them)
- Cannot exceed 15 pages of text in monospaced font or 3,500 words in proportional font
- Legal citations
- Record references

TRIAL CLERK WON'T GIVE YOU CASE FILE? OR INSISTS YOU FILE A NOTICE OF APPEARANCE OR MOTION?

- Most of the time, not a problem.
- If problem, see if trial counsel can help
- If all else fails, file the motion/appearance as requested by the Clerk

SJ PACKAGE MUST BE E-FILED

- Convert to a searchable PDF
- Consecutively numbered pages (cover is page 1, table of contents starts on page 2)
- Get confirmation email (or reach out if not received) that the petition was accepted by App Ct
- Serve all parties through e-file portal or (w/permission) by email
- Reminder: you need a motion to waive the filing fees allowed so you can file with a “waiver account” in the Tyler system



Developing a winning argument

MUST HAVE A “MERITORIOUS” ISSUE

- Unlike final appeal, there’s no right to file frivolous SJ petition (that is, no *Moffett* SJ petitions)
- Must present a “meritorious” claim = not frivolous/deserving evaluation
- Is “there is at least one appellate issue of sufficient heft that would give an appellate court pause.” *Commonwealth v. Nash*, 486 Mass. 394, 404 (2020).

NO MERITORIOUS ISSUE?????



MOTION TO RECONSIDER - I

Why file one?

- Issue not raised below
- Issue not adequately developed below
- Relevant objection not made
- Key evidence not introduced

Motion to reconsider *may* get issue before SJ, but not a guarantee.

Request evidentiary hearing.

MOTION TO RECONSIDER - 2

Warning: motion to reconsider does NOT restart your clock or buy you more time.

- 30 days runs from entry of initial order on docket.

Time running out and judge hasn't ruled on your motion to reconsider?

- Too bad! Must still file petition within 30 days of initial order. But disclose pending motion (or plan to file one) in your petition.

Motion to reconsider may get you relief in trial court (or win you some settlement leverage).

A GOOD ARGUMENT =

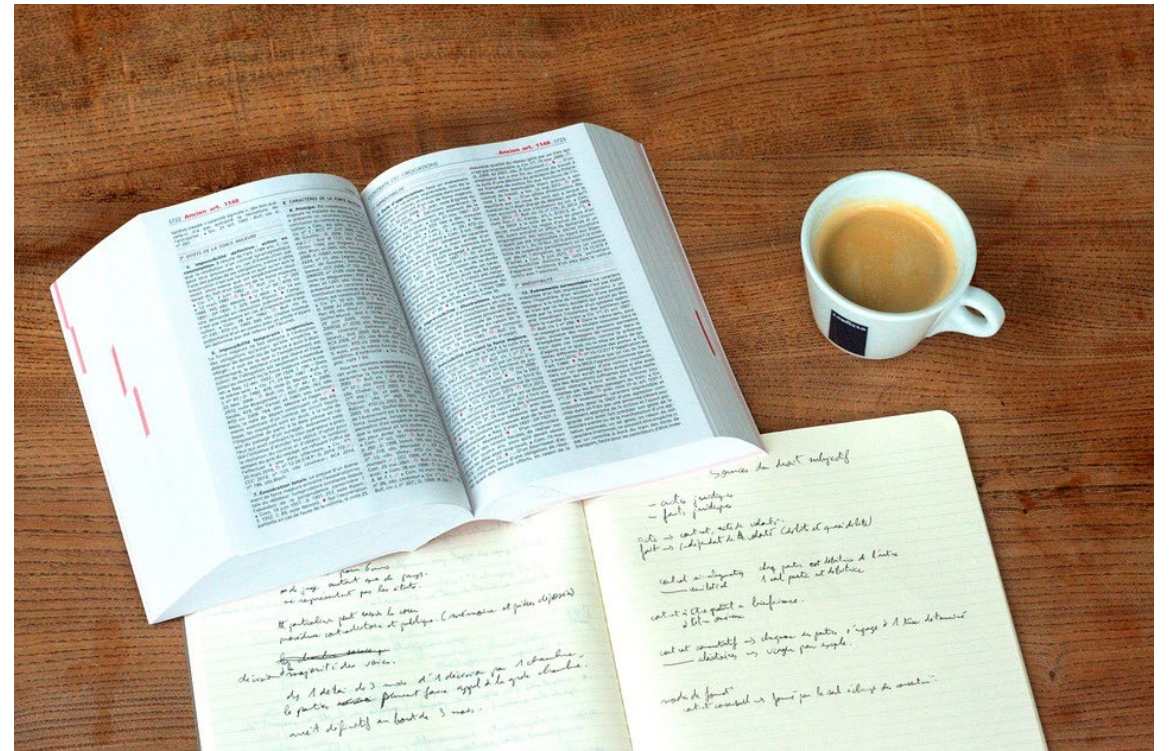
Clear Legal Error/Abuse of Discretion +
Preservation + Harm

CLEAR ERROR OF LAW



ABUSE OF DISCRETION

- Not just, “I disagree with the decision.”
- “[A] clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives.” *L.L. v. Commonwealth*, 470 Mass. 169, 185 n. 27 (2014).



HARM/PREJUDICE

Mistake(s) by trial judge made a difference to outcome.

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HARMLESS ERROR – I

Judge erred in admitting hearsay from a neighbor about your client's drug use based on a particular hearsay exception – but it was admissible under a different hearsay exception.

HARMLESS ERROR - 2

Judge erred in admitting hearsay from a neighbor about your client's drug use – but your client admitted the drug use.

HARMLESS ERROR -3

Judge erred in admitting hearsay about the father's physical abuse but specifically ruled that she removed the child based on his unaddressed substance use problem (that is, she specifically didn't rely on the improper hearsay).

HARMLESS ERROR - 4

Judge erred in not appointing counsel for father for three weeks, and not giving him a 72-hour hearing until four weeks, after DCF filed the petition. But she did appoint him counsel and hold a 72 (which he lost), and his counsel had plenty of time to prepare for it. The two due process errors were harmless because they were rectified.

NOT HARMLESS!!

- Judge removed child based on physical abuse, but the only evidence of physical abuse was improperly admitted.
- Judge removed child based on physical abuse, but the only properly admitted evidence showed that father calmly spanked the child using reasonable discipline.
- Judge refused to let PGM testify, and father made an offer of proof that PGM had witnessed the key incident leading to removal and it wasn't what DCF had represented it to be.



RELIEF?



- Be thoughtful and specific.. The App Ct. justices don't understand our cases, our unique procedures, or even the consequences of certain kinds of remands.
- SJ has pretty broad discretion and equitable power (see *Walt*)
- But ... SJ cannot dismiss the case. *DeLucia v. Kfoury*, 93 Mass. App. Ct. 166 (2018).
- In your petition, include catch-all prayer for relief: “Or make any such orders that this court deems equitable and just.”
- Attach a proposed order (make doing the right thing easy for SJ).



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EMERGENCY SJ PETITIONS

- Yes - absolutely permitted
- Call the App Ct Clerk's Office and let them know it is an emergency and when you'll file it
- Use word "Emergency" in the title of petition and memo
- Can be accompanied by a motion to stay the underlying decision pending review

MOTIONS TO STAY

- Motion to stay the trial judge's decision pending resolution of the SJ petition
- Generally must first be brought in the trial court (unless no time or it would be fruitless)
- Especially important if it's a true emergency (e.g., child about to moved across state lines)

PRACTICE TIP: JOINT PETITIONS



OPPOSING THE PETITION?

- Opposing the petition? Sure, you can do that.
- Do you have to file an opposition? No. But ... if SJ *wants* you to file an opposition (or to be heard), the Clerk will ask. Then do it.
- Can you file one even if the SJ doesn't ask for one? Sure! But if so, you must file it within 7 days after petition is filed
- Opposition – not to exceed 15 pages or 3,500 words (but we've also seen less formal “opposition letters”)
- Can include supplemental record appendix

WHAT IF YOU *LOSE* BEFORE THE SJ?

- No right to appeal to full panel (different from 211, 3)
- Two types of discretionary “appeal” from SJ order (that is, requiring permission from/agreement of SJ)
 - Report of question
 - Permission to appeal to full panel

HOW TO GET FULL PANEL REVIEW

- Show it's truly a novel issue/first impression.
- Explain why our practice *needs* a full panel (and published) decision.

ORAL ARGUMENT

- Bring trial counsel to the argument (or the Zoom)
- Prepare for it like a final appeal argument
- Be clear on the relief you want
- No rules, no time limits to these arguments (up to SJ)
- CAFL can moot the argument!

QUICK PRACTICE TIP – I

Take the time to be
brief.



QUICK PRACTICE TIP – 2

Be candid with the tribunal.



QUICK PRACTICE TIP – 3



Know your
record cold.

QUICK PRACTICE TIP – 4

Make it about not just legal error & harm, but also about *injustice*.



G.L. C. 211, § 3 (TO SJ OF SJC): IS IT STILL A THING?

Generally, for us, no: interlocutory matters from Juv. Ct. and Prob. & Fam. Ct go to SJ of Appeals Court under G.L. c. 231, § 118.

Unless ...

- Issue is *systemic* problem, not just problem in your case.
- If you lose before SJ and don't get permission for full appeal ... (then maybe, but only if SJC really, really wants to take it).

AND NOW A WORD FROM OUR PANEL OF EXPERTS

