

# Advanced Issues in Child Representation

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For CAFL Appellate Practitioners

Abby Salois – April 4, 2023



# Child's Position on Appeal: A Review

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- “Decision tree”
- CAFL Trial Performance Standard 1.6
- Appellate counsel has all options in Standard 1.6(c), (d)

# Child's Position on Appeal: A Review

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- Expressed preference
  - Adequately considered
  - Not adequately considered/NO harm
  - Not adequately considered/YES harm

# Substituted Judgment: A Review

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- Substituted judgment is not the same as a best interest determination.
- It is the deliberate act of “stepping into the shoes” of the client.



# Substituted Judgment: A Review

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- Factors to consider
- A child may be able to make some decisions and not others.



# Hybrid Briefs

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- Child is appellee regarding the underlying decree or judgment but is an appellant regarding another aspect of the judgment (such as choice of plan, post-adoption contact, or sibling contact).
- “Hybrid Brief Protocol”
- Website → “Appellate Practice Tools and Resources”

# Hybrid Briefs

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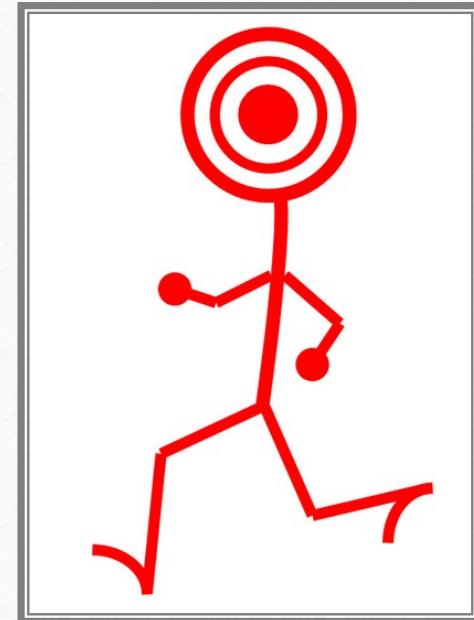
- If a child is an appellant, in whole or in part, the child *must* file a Notice of Appeal.
- The Rules apply to children the same way as adults in our appeals (other than signing notices of appeal and indigency determinations).



# Sibling Groups: Conflicts

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- Children are moving targets and their positions can change over the life of your case.







## Sibling Groups: Is it a Conflict?

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- One sib wants to go to Aunt Susie and the other want to go to paternal grandmother; sibs and placement resources are happy with those plans.



## Sibling Groups: Is it a Conflict?

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- Siblings want to be adopted by different resources who are fighting for the other child to be placed with them



## Sibling Groups: Is it a Conflict?

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- One sib expresses a strong preference to go home, and counsel is substituting judgment for a younger sib to also go home



## Sibling Groups: Is it a Conflict?

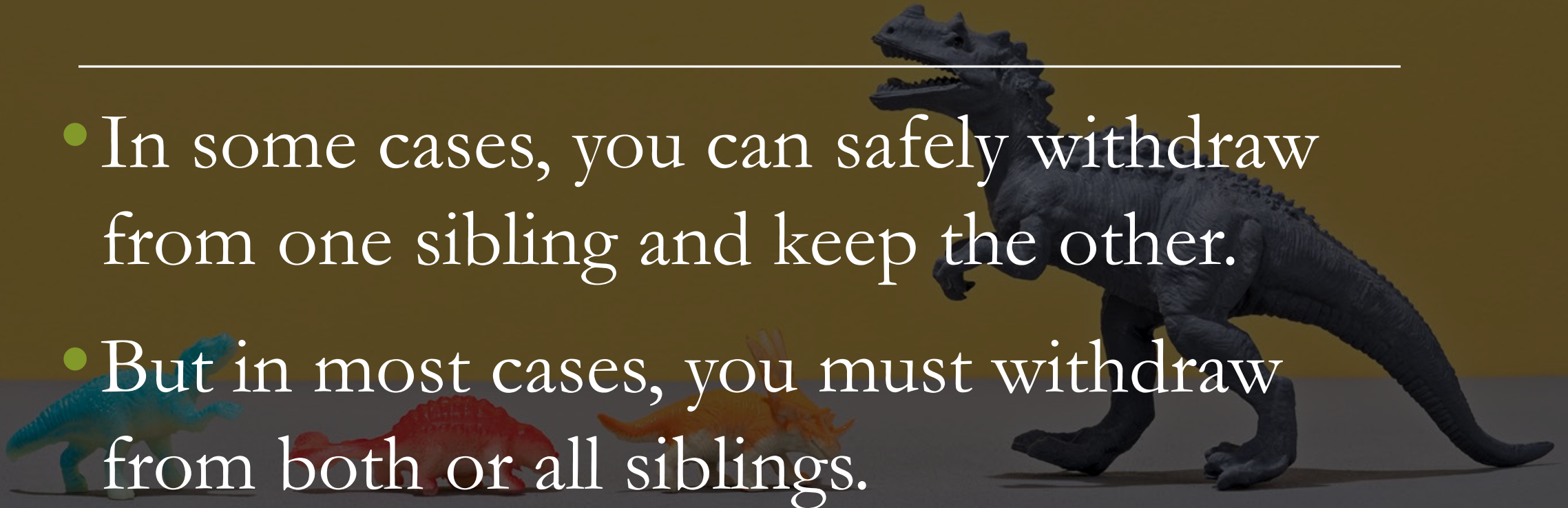
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- One sibling wants lots of post-adoption contact with a parent but the other one does not want it

# There's a Conflict. Now What?

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- In some cases, you can safely withdraw from one sibling and keep the other.
- But in most cases, you must withdraw from both or all siblings.



# There's a Conflict. Now What?

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- Tricky timing
- What if one sibling changes their position just before the brief is due?



# Sibling Visitation

Adoption of Pierce,  
58 Mass. App. Ct. 342 (2003).

C&P of Jamison,  
467 Mass. 269 (2014).



# Change in Child's Position

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- You were just assigned to represent a 10-year-old appellee-child. The decree entered 45 days earlier. When you meet with your client for the first time, she tells you she wants to go home to her mother.

What should you do?





# Change in Child's Position

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- You were just assigned to represent a 10-year-old appellee-child. The decree entered **90 days earlier**.  
When you meet with your client for the first time, she tells you she wants to go home.

What should you do?



# Change in Child's Position

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- You were just assigned to represent a 10-year-old appellee-child. 45 days ago, the court found her parents unfit and committed her to DCF's **permanent custody; no termination.** Child tells you she wants to go home. Now what?



# Change in Child's Position

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- After 8 months of telling you she wanted to be adopted, your 10-year-old appellee-child client *now* tells you she wants to go home. The parents' appellant briefs have already been filed, and your appellee brief is due soon.

Now what?



# Change in Child's Position

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- Your client changes from appellant to appellee (and vice versa) during the briefing process, and you've already filed a brief that is no longer consistent with the client's position. Now what?



# Change in Child's Position

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- You meet with your 14-year-old appellee-child client a few days before oral argument. She tells you that she no longer wants to be adopted and wants to live with her mother. If she can't, she wants more visits. Now what?



# Change in Child's Position

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- What if that same client changes her position *after* oral argument?

Now what?





## Conflicts with Child's Trial Attorney

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- Counsel must harmonize their position.
- The APSU & TPSU can help!
- What if harmony is not possible?

# Evidentiary Weight of Children's Positions

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*Adoption of Nancy*, 443 Mass. 512 (2005).

*Adoption of Flora*, 60 Mass. App. Ct. 334 (2004).

*Adoption of Ramona*, 61 Mass. App. Ct. 260 (2004).

*Adoption of Franklin*, 99 Mass. App. Ct. 797 (2021).

*Adoption of Arthur*, 34 Mass. App. Ct. 914 (1993).





# Discussion & Questions

