

# Legal Lines

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## **PRESIDENT'S MESSAGE**

**By Robert S. White**

Hello fellow members of the Worcester County Bar Association. As I follow up on my message of only a month ago, it actually feels more like a year since I wrote. Is time moving like that for you? Does it seem like forever since you shook someone's hand, sat in a restaurant or went on a trip? This is an unprecedented experience for me and, I suspect, for all of you.

It's a novel challenge for all of us to follow the advice of our local political leaders and just stay home. Like many of you, I am starting my fourth week of working remotely and social distancing. All the while, I've been trying to maintain a productive legal practice, service my clients' needs, and to keep up my morale. Frankly it's exhausting.

Does this sound familiar? I believe we are all in the same situation.

Thankfully, the Worcester County Bar Association has been working very hard to support and engage its members with information on its website and through its programs. We have been inundated by emergency orders and standing orders. We have been applying for PPP loans and grants. We have been trying to stay current. If you haven't gone there already, please check the WCBA website for the Covid-19 resources page that our staff has tirelessly been updating.

The WCBA has also started to conduct webinars for its members, mostly using the Zoom platform (the song from the childhood show on PBS plays in my mind every time I refer to the videoconferencing platform.) Last week, we held a webinar on "The Practice of Mindfulness," led by Brenda Fingold, Certified MBSR and assistant professor at the Brown University School of Public Health. It was outstanding. I highly encourage you to download the program materials from the member section of our website. There are also links to additional mindfulness programs, live and recorded.

We have many more webinars planned. This week, we scheduled two seminars, "The Economic Fallout of Covid-19", on April 22, 2020, (moderated by Leonardo "Billy Crystal" Angiulo) and "The Worcester County District Court Conference on Court Updates during the Covid-19 Crisis", on April 23, 2020 at 1:00pm, presented by the Honorable Jennifer L. Ginsburg, Honorable David Despotopoulos, Regional Administrative Judge and presiding judge in Worcester District Court, and Brian D'Andrea, Worcester District Court Clerk Magistrate."

Next week, Monica Passeno and John Goggins, chairs of the Bench/Bar Committee: Housing Court Division have arranged for the "Frequently Asked Questions in the Central Housing Court During Covid-19, on April 28, 2020 at 10:00 a.m., presented by Diana H. Horan, First Justice, Central Housing Court and Nickolas Moudios, Clerk Magistrate, Central Housing Court. Maria Joseph and Fran Russell, chairs of the Alternative Dispute Resolution Section will present a seminar entitled "Managing Expectations in Domestic Relations Mediation" on April 29, 2020 from 1:00pm to 2:30pm. Also, as part of the WCBA's Practical Skills series, President-Elect Terry McLaughlin and Executive Committee member Cassandra Arriaza have arranged a seminar on taking depositions remotely, scheduled on April 30, 2020 at 1:00pm.

The current crisis is allowing us to learn new skills and presentation methods that we otherwise would not have focused on, which will help the WCBA serve more of its members, especially those who are not geographically convenient to the Worcester County Courthouse. Though we have primarily used the Zoom platform, we have done our best to use its increasingly improved security features to avoid unwelcome attendees at our seminars. This is the reason the link for the seminars is on the member section of the WCBA website. Please use care in sharing those links and please never post them on social media.

We are all doing our best to get through this pandemic, and we will succeed. For now, we will live in our socially distant world and have our "Virtual" social gatherings like the one sponsored last week by the Young Lawyers Section. Someday, hopefully sooner rather than later, we will be able to resume some semblance of normalcy, and I believe that we will appreciate what is around us all the more. Finally, I wish to express my sincere condolences to those members of our organization that have lost loved ones the Covid-19 virus.

**Worcester County Bar Association – Juvenile Court Bench-Bar Committee**  
**Case Summary: Adoption of Luc, 484 Mass. 139 (2020)**

By Kevin J. Powers<sup>1</sup>

Submitted on behalf of the WCBA Bench Bar Committee: Juvenile Court Division

I. Issues

Under G.L. c. 119, what rules govern the admissibility of hearsay contained within court investigator reports under G.L. c. 119, § 24?  
Under G.L. c. 119, what rules govern the admissibility of hearsay contained within DCF-authored reports under G.L. c. 119, § 21A and official DCF records?

II. Procedural History

In a care and protection hearing on the merits, a DCF social worker testified on direct examination but died before the Mother had the opportunity to cross-examine him. The Juvenile Court struck the DCF social worker's testimony but, over the Mother's objection, admitted the deceased DCF social worker's reports and dictation notes. The Juvenile Court terminated the Mother's parental rights. The Appeals Court affirmed. On further appellate review, the Supreme Judicial Court affirmed.

III. Reasoning/Holding/Disposition

The Supreme Judicial Court affirmed the termination of the Mother's parental rights because the evidence was sufficient to support termination even without the challenged evidence.

IV. Rules of Law and Policies (Hearsay)

Notwithstanding the disposition of Luc, the Supreme Judicial Court set forth rules governing admission of specific hearsay in care and protection cases:

A. Hearsay contained within court investigator reports under G.L. c. 119, § 24.

Rule. Second-level hearsay contained within court investigator reports should be limited to factual information collected from identified sources. Such hearsay is admissible where the opposing party has an opportunity to refute the investigator and the investigator's sources, through cross-examination and through other means.

For opposing parties to have that opportunity, the court investigator report must identify, by name, the sources of such second-level hearsay statements. If the source of a challenged statement is not already present in court, then the burden to subpoena that source rests with the party challenging the statement's admission.

Policy. By providing a parent with the opportunity to effectively cross-examine the court investigator and the investigator's sources, the admissibility criteria for second-level hearsay contained within court investigator reports balance the importance of providing needed information to the court with fairness and due process concerns.

B. Hearsay contained within DCF-authored reports under G.L. c. 119, § 21A and official DCF records.

The "Luc" criteria. Under the "Luc criteria," first- and second-level hearsay in DCF reports and official DCF records that does not fall within an already existing common-law or statutory hearsay exception is admissible for statements of primary fact, so long as the hearsay source is specifically identified in the report and is available for cross-examination, should the party challenging the evidence request to do so. If the source is not already present in court, the party challenging the evidence may subpoena him or her. Hearsay need not meet the Luc criteria if it satisfies another, preexisting hearsay exception.

Statements of primary fact. Statements of primary fact are observations, rather than opinions, made by an individual with personal knowledge, and may include "words of summary description." However, summary description may not include judgment or opinion evidence that is not "rationally based on the witness's perception" or that fails to otherwise satisfy the criteria for admissible lay opinion.

Identification requires source's full name. Identification requires that the report contain the source's full name.

No exception for mandated reporters. To the extent that the Appeals Court, in Adoption of George, 27 Mass. App. Ct. 265 (1989), appeared to create a second-level hearsay exception for statements by mandated reporters within official DCF records, that was dicta. There is no such second-level hearsay exception unless the Luc criteria are satisfied.

Traditional official records exception distinguished. The Luc criteria only apply to the admission of DCF reports and official DCF records in care and protection cases. The traditional official records exception to the hearsay rule is still available for other qualifying records. Unlike traditional official records, official DCF records are created by a party to the case. Under the traditional official records exception, the availability of the out-of-court source is immaterial.

Policy. Interpreting evidentiary rules to permit a more lenient admissibility standard for DCF-created documents, especially because DCF is a party to the case, would contradict the fundamental protections that our law bestows upon a parent's relationship to his or her child. G.L. c. 119, § 21A also supports the "Luc criteria."

V. Rules of Law (Other)

The Supreme Judicial Court also articulated other useful rules of law regarding admissibility of evidence in care and protection cases.

Admissibility of evidence regarding parental conduct toward other children. A judge may rely upon a parent's past conduct with regard to old children to support a finding of current unfitness as to a different child, so long as that evidence is not the sole basis for the unfitness determination.

Admissibility of evidence regarding substance use treatment. The parent's willingness to engage in treatment is an important consideration in an unfitness determination where substance dependence inhibits the parent's ability to provide minimally acceptable care of the child.

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<sup>1</sup> The author handles appeals and complex trial motions for busy trial lawyers who love going into court but who lack the time to decamp to a law library. He can be reached at [kpowers@kevinpowerslaw.com](mailto:kpowers@kevinpowerslaw.com).