

Legal Lines

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PRESIDENT'S MESSAGE

by Terry J. McLaughlin

As always in these difficult times, I'd like to begin by sending my best wishes that all of you and your families are safe and healthy, and remain that way, through the upcoming holidays.

I also want to take a moment to thank my editor, Ellyn Lazar, who makes sense of what I am trying say each month.

As the holidays approach, please remember to take care of yourselves mentally, physically and emotionally. We are part of a very stressful profession that is adversarial by design. We all spend our days taking care of and/or protecting others. Just remember, you can't take care of everybody else if you don't take care of yourself.

I again want to thank everyone that has suggested, planned, presented or participated in one of our virtual events over the last month.

The C.A.R.E. committee is busy planning several programming opportunities and events for the new year. Please stay tuned.

Our December First Monday education program, The Return of the Jury Trial, was remarkably informative and extremely well attended. We had approximately 240 attendees at one point. Thank you to Judge Hillman, Judge Wrenn, Judge Kenton-Walker and Judge Despotopoulos for planning and presenting. I also want to thank the Federal Bar Association for co-hosting the event.

The January edition of the First Monday educational series is going to be a presentation on Trials and Hearings by Zoom, something we can all use right now. The presentation will be on January 4th at 1 p.m. Once again, we have an awesome panel of presenters, including Judge Bailey of the Probate and Family Court, Judge D'Angelo of the District Court, Judge Hillman of the Federal Court and Judge Ritter of the Superior Court. Please participate if you have the chance. These are meaningful programs that pack a lot of useful information into a short period of time, and I have no doubt that this one will provide a lot of timely and useful suggestions as we continue these days of remote practice. If you cannot attend, the program will be recorded and uploaded on to the Association's website.

The Young Lawyers hosted their second event of the year on Wednesday, December 16th, which was Holiday Trivia. Thank you to Paige Barton and Liz Halloran for organizing and running the event. The event was a fun night and a great opportunity to see people outside of work. Congratulations to Judi Young for winning Holiday Movie Trivia and Janet Raheb for winning the general Trivia category. Notably, Geoff Spofford came in last in both.

This is another reminder that the Discovering Justice after-school Mock Trial and Mock Appellate Program has reached out to the WCBA and invited us to participate in their Mentor Program in Spring, 2021. Some of us participated in the fall Mock Trial the week of December 14th. The kids were outstanding. The middle school kids were extremely well prepared and did a wonderful job presenting their cases. There were opening statements, direct examinations, cross-examinations and closings. Judge Sorokin of the Federal Court oversaw the proceeding. We have had a number of people volunteer so far, but could use more. Discovering Justice is asking the WCBA to mentor three middle school teams from the Worcester County area. The program is intensive, so we are hoping to fill three mentor teams with multiple people on them. Please reach out to Geoff Spofford, or to me, if you are interested.

Our new website launched over the weekend of November 21st and 22nd. It is working well now, however the transfer has been a lot of work and has not been without a few glitches. Please continue to be patient, we are almost there. Equally important, please join me in thanking Sandra DiLuzio, Candice Staples and Rob White for all of their efforts to make this happen.

As you have heard from me before and will continue to hear, please reach out, be active and get involved. We continue to weather the current storm together as a community, and I continue to be confident that we will emerge stronger for it.

I hope that everyone has a happy, healthy and safe holiday break.

Submitted on Behalf of the WCBA Bench Bar Committee: Juvenile Division
Case Summary: Adoption of Bea, 97 Mass. App. Ct. 416 (2020)
By Kevin J. Powers¹

I. Issues

In a Care & Protection matter, where Child's Counsel arguably violated Mass. R. Prof. C. 4.2 by not providing prior notice of a Mother-Child visit observation by Child's expert, is admission of the expert's testimony regarding that observation reversible error?

II. Facts

Mother had an eighth-grade education, had cognitive limits, had slow processing, struggled to remember tasks, failed to comply with most of her service plan, refused to accept specialized services, and lacked community supports.

III. Procedural History

In a care and protection matter, Child's Counsel retained an expert to conduct a relationship assessment between Child and the pre-adoptive parents and between Child and Mother. Child's Counsel did not contact Mother's Counsel in advance of the observation upon which the assessment was based; instead, Child's Counsel gave the expert the contact information for Mother's Counsel and the pre-adoptive mother contacted Mother directly to arrange the observation. No one informed Mother's Counsel of the observation.

Mother's Counsel moved to exclude the expert's testimony and the Juvenile Court denied the motion. Following trial, the Juvenile Court found Mother unfit, found the unfitness likely to continue indefinitely, terminated Mother's parental rights, and ordered post-termination and post-adoption visitation between Child and Mother. Mother appealed.

IV. Rule of Law

The exclusionary rule does not extend to termination proceedings.

V. Policy

The argument that Child's Counsel's alleged ethical violation requires reversal of the termination decree gives no consideration to the best interests of the child.

VI. Reasoning

Justice Wendlandt, writing for the majority and reviewing the decision of the trial judge for clear error or abuse of discretion, observed that it is not clear that the expert's observation of the Mother-Child visit was the type of "communication about the subject of the representation" with a represented party expressly contemplated by Mass. R. Prof. C. 4.2. Instead, what transpired was a two-hour observation by a qualified expert.

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The only person who spoke to Mother about the assessment (in order to schedule the logistics of it) was the pre-adoptive mother, and there is nothing in the record to suggest that Child's Counsel directed the pre-adoptive mother to do so or that Child's Counsel was even aware of the contact. Nothing in the record suggests that Child Counsel's failure to notify Mother's Counsel of the observation was anything other than inadvertent.

Even in the criminal context, courts have declined to apply a prophylactic exclusionary rule to alleged ethical violations of Mass. R. Prof. C. 4.2. Any error in the admission of the Child's expert's testimony here was harmless. Even without the expert's opinion, the finding of unfitness was clearly and convincingly supported by the Juvenile Court's subsidiary findings.

Mother's additional claims of error do not require reversal.

VII. Dicta

Child's Counsel should have notified Mother's Counsel of the observation rather than assuming that the expert would do so.

VIII. Disposition

The Appeals Court affirmed the termination of Mother's parental rights.

IX. Dissent

Justice Singh, writing in dissent, observed that admission of the uncounselled assessment violated Mother's right to the effective assistance of counsel and deprived her of a fair trial. The right to counsel in termination of parental rights proceedings is grounded in constitutional procedural due process. Mother had a right to the advice of counsel as to whether, and under what terms, to participate in the assessment proposed by Child's Counsel. It was not within the Juvenile Court's discretion to admit this uncounselled assessment in evidence.

Although Mother appeared to believe that the expert was a visitation supervisor, the expert did nothing to disabuse Mother of that notion.

The absence of a per se exclusionary rule does not give a judge carte blanche with respect to the admission of evidence. The judge is still charged with ensuring due process and a fair trial. Given the purpose of Mass. R. Prof. C. 4.2, known as "the no-contact rule," it is reasonable to conclude that the Child's expert's assessment of Mother without Mother's Counsel's knowledge is encompassed within that rule. A determination that the assessment should have been excluded under the circumstances does not amount to an exclusionary rule.

A just determination of the best interests of the child cannot be reached through a flawed process, one where a party is deprived of the assistance of counsel at a critical juncture. The Juvenile Court's erroneous reliance on the uncounselled assessment contributed to the termination of Mother's parental rights and therefore cannot be viewed as harmless.