TO: Jaime Prince

FROM: Intern

DATE: October 20, 2015

RE: Multi-Party Issue Preservation \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Question Presented**

When two or more parties are aligned in child welfare proceedings, what actions of one party preserves an issue for another?

**Brief Answer**

In child welfare proceedings, one party’s actions will not always preserve an issue for the appeal of another party. An objection from an aligned party may be sufficient to preserve an issue because it alerts the trial judge to an issue and provides an opportunity for the judge to take action. An issue is also likely preserved when the judge’s ruling in response to one party is clearly intended for all parties, even if the appellant did not raise the issue at trial. However, a motion filed by one party may be insufficient to preserve an issue because the appellant was not a party to that specific motion.

**Discussion**

To raise an issue on appeal, a party must take action to preserve the issue during trial.Adoption of Mary, 414 Mass. 705, 712 (1993); *see also* Petition of the Dep’t of Social Servs. to Dispense with Consent to Adoption, 392 Mass. 696, 697 (1984). For example, issues are frequently preserved at trial when a party objects, giving a party the opportunity to challenge the “full probative force” of the testimony. *See* Adoption of Kimberly, 414 Mass. 526, 535 (1993) (quoting Freyermuth v. Lutfy, 376 Mass. 612, 617 (1978)). One exception to this rule exists when the case presents exceptional circumstances prompting judicial review, even if the issue was not properly preserved. *See* Adoption of Mary, 414 Mass. 705, 712 (1993); *see, e.g.*, Adoption of Willow, 433 Mass. 636, 642 n. 7 (2001) (addressing mother’s statutory claims in part because the “split termination order” was a new issue of law); *see, e.g.*, Adoption of Flora, 60 Mass. App. Ct. 334, 340 n. 10 (2004) (finding special circumstances to review when counsel failed to follow CPCS guidelines and represent the child’s wishes regarding visitation). Criminal cases have further defined the requirements to preserve an issue for appeal, requiring that the objections be noted on the record or filed as a written objection and that they must be timely. *See, e.g.*,Com. v. Fleenor, 39 Mass. App. Ct. 25, 28 n.4 (1995). Appellants must abide by the general rule that requires an issue to be preserved at trial to be raised on appeal. Adoption of Mary at 712.

**A. An objection from an aligned party may be sufficient to preserve an issue for appeal.**

In order to preserve an issue for appeal, an objection must be made “in a precise and timely fashion, as soon as the claimed error is apparent.” Com. v. Perryman, 55 Mass. App. Ct. 187, 192 (2002). In child welfare cases, objections are required to preserve an issue for appeal unless the case presents exceptional circumstances. Adoption of Mary, 414 Mass. 705, 711 (1993). Massachusetts courts have not yet extensively addressed this issue in the child welfare context, but previous cases suggest that one party may depend on another party’s objection to preserve an issue for appeal.

Objections are tools for parties to prevent irrelevant or prejudicial evidence from entering trial. Com. v. Seminara, 20 Mass. App. Ct. 789, 795 n.4 (1985). They are required “to afford the trial judge an opportunity to act promptly to remove from the jury’s consideration evidence which has no place in the trial.” Abraham v. Woburn, 383 Mass. 724, 726 n.1 (1981). Massachusetts criminal cases demonstrate that a co-defendant’s objection preserves an issue for the appeal of another defendant. *See* Com. v. Villanueva, 47 Mass. App. Ct. 905, 906 (1999); *see also* Com. v. Seminara, 20 Mass. App. Ct. 789, 798 (1985) (noting that the co-defendants were so “inextricably linked […] on the Commonwealth’s theory of the case” that evidence would have a spill-over effect and it was therefore sufficient that one defendant made a timely objection); *see also* Commonwealth v. Lieu, 50 Mass. App. Ct. 162, 165 n.3 (2000) (preserving the issue for review when co-defendant’s counsel “inquired” about the judge’s instructions, thus “fairly present[ing] the issue to the judge to take any necessary action”). Since the purpose of an objection is simply to raise the issue to the trial judge, the goal is generally accomplished regardless of the identity of the objecting party and so another party can later appeal the same issue.

The Supreme Judicial Court has endorsed this general rule in Massachusetts care and protection cases. *See* Care & Prot. of Sophie, 449 Mass. 100, 102-103 (2007). In Care and Protection of Sophie, children appealed extrajudicial statements permitted during trial. Care & Prot. of Sophie, 449 Mass. 100, 102-103 n.4 (2007)*.* While the children did in fact object during the trial, the court noted, citing the criminal case Commonwealth v. Seminara, that it would not affect the court’s analysis if the father instead objected during trial. *Id.* The children’s objection provided the trial judge with necessary notice of the issue, therefore satisfying the purpose of objecting. *Id*. Although the court did not extensively discuss this issue, it indicated support for the broad rule permitting a party to appeal because the purpose of objecting is satisfied, regardless of the objecting party’s identity. Therefore, in situations when an aligned party objected to a particular issue at trial but the appealing party did not, the issue may still be preserved for the appellant’s appeal.

**B. An issue may be preserved when the trial judge’s response clearly applied to all parties.**

Some jurisdictions recognize narrow circumstances when an issue is preserved for an appellant based on a trial judge’s response to another party. For example, Maryland courts recognize limited circumstances when a judge’s response to the actions of one party clearly applied to all parties, and so it would have been futile for a second party to continue to raise the issue and the issue was therefore preserved for an appeal. *See* In re Emileigh F., 724 A.2d 639, 642-43 (Md. 1999) (noting that the judge said that he would not let “you all argue”); *see also* Bundy v. State, 638 A.2d 84 (Md. 1994) (holding that a co-defendant’s objection preserved an issue for the defendant because the judge’s ruling indicated that it applied to “each” party). In re Emileigh F. held that a mother was permitted to appeal her inability to present a closing statement during a Child in Need of Assistance proceeding, despite not raising the issue at trial, since the trial court denied father’s request. In re Emileigh F. at 642. The Court of Appeals of Maryland noted that the judge’s ruling “clearly applied” to the mother as well and that “any objection would have been futile” regarding the same issue. *Id.* The Appeals Court of Maryland recognized that the issue was therefore preserved for mother on appeal. *Id.* at 643. Although Massachusetts does not have a comparable child welfare case on this same principle, the Supreme Judicial Court has held that “the adequacy of an objection to the admissibility of the evidence at issue must be assessed in the context of the proceeding as a whole” and that an issue was preserved for appeal when the trial judge told the defendant that his rights were preserved. Com. v. Aviles, 461 Mass. 60, 66 (2011) (holding that filing motions in limine preserved the defendant’s rights when the trial judge stated that the rights were maintained). This suggests that an issue will be preserved for appeal when the trial judge indicates that a ruling applies to all parties, given the context of the proceeding and the statement. Therefore, an issue may be preserved for appeal under these circumstances even if the appellant did not take affirmative actions at trial.

**C.** **An appellant may not rely on another party’s motion to preserve an issue because the appellant was not a party to that motion and motions must be particular to the party.**

Although there are situations when an appellant may rely on another party’s actions to preserve an issue for appeal, an appellant cannot generally rely on another party’s motion for the same purpose. *See* Adoption of Norbert, 83 Mass. App. Ct. 542 (2013) (reviewing mother’s appeal because of exceptional circumstances, not because father filed a motion requesting that the trial judge’s recusal); *see also* Adoption of Clive, No. 02-P-1025, 56 Mass. App. Ct. 1114 (Dec. 11, 2002) (rejecting father’s attempt to rely on mother’s motion to bifurcate the trial). The Appeals Court does not permit another party’s motion to preserve an appeal because the appellant was not a party to that particular action. Adoption of Clive at \*1; *see also* Adoption of Paula, 420 Mass. 716, 722-23 n. 8 (1995). The Appeals Court also recognizes this same limitation when parties seek to join appeals based on motions that were before a single justice. *See* Care & Prot. of Zita, 455 Mass. 272, 272 n.1 (2009) (noting that the single justice denied the parent’s motion to join the appeal and so neither parent was a party to the petition before the single justice or were parties on the child’s appeal); *see also* Adoption of Helen, 429 Mass. 856, 861 n.8 (noting that the child could not join the mother’s petition to appeal the mother’s denied request for a review and redetermination hearing, although the child herself could request the hearing). Instead, the Appeals Court recognizes situations when a party has “an affirmative obligation” to file a motion, such as awareness of reasons for a trial judge’s recusal, and a party cannot depend on another’s motion to preserve the issue for an appeal. Adoption of Norbert at 545; *see also* Demoulas v. Demoulas Super Mkts., Inc., 428 Mass. 543, 549 (1998). Therefore, Massachusetts limits issue preservation as a requirement directed to individual parties when filing motions.

Notably, other jurisdictions do recognize situations when a motion from one party may preserve an issue for another party, largely because the particular motion is seen more simply as a formality. *See* U.S. v. Love, 472. F.2d 490, 496-498 (5th Cir. 1973); *see also* U.S. v. Cassity, 631 F.2d 461, 464-466 (6th Cir. 1980) (noting that, if the motion to suppress was granted, the other co-defendants would have likely filed similar motions, and so the issue was not waived). For example, in U.S. v. Love, a defendant failed to move to suppress certain evidence during trial, although the co-defendant did file a motion to suppress the evidence. U.S. v. Love at 496. The Appeals Court excused the party’s failure to object or file a motion as a “useless formality” in the particular case. *Id.* While the reasoning that a motion is a simple formality may not apply to issues of appeals before single justices, there may be circumstances in care and protection proceedings when the particular motion served as a formality and the issue was perhaps arguably preserved for another party’s appeal. However, Massachusetts has not yet extended this principle to care and protection proceedings.

**Conclusion**

To successfully raise an issue on appeal in child welfare cases, the issue must generally be preserved at trial. Massachusetts may recognize an issue as preserved when a party objects or a judge indicates that the issue is preserved. However, Massachusetts does limit the exceptions to issue preservation, and motions filed by other parties are insufficient to preserve an issue for a different appellant.