ADLER POLLOCK & SHEEHAN P.C.
FAST FIVE

RHODE ISLAND APPELLATE PRACTICE

(1) TRIAL COURTS MAY NOT CIRCUMVENT SUPREME COURT'S EXCLUSIVE JURISDICTION TO ENLARGE TIME FOR APPEAL.

In an order this term, the Rhode Island Supreme Court held that the Family Court exceeded its authority when it vacated and reissued for the sole purpose of permitting a party sufficient time to file an appeal. In re Kyla C., No. 2011-98-Appeal.

In *In re Kyla C*., over a year after the Family Court had issued a decree terminating the respondent's parental rights to his daughter, Kyla C., and after the respondent missed the deadline for filing an appeal, the Family Court vacated the termination of parental rights decree and issued a new termination decree to afford the respondent an opportunity to file a timely appeal. *Id*. at 1. When the case came before the Supreme Court, the Court issued an order declining to entertain the appeal on the grounds that it was not properly before it. In doing so, the Court recognized that "'courts of this state lack jurisdiction to vacate and then to re-enter a judgment as a means of extending the time allowed under the applicable statutory limitation for the claiming of an appeal.'" *Id*. at 2 (quoting *Ferranti v. M.A. Gammino Construction Co*., 289 A.2d 56, 57 (R.I. 1972)) In the Court's opinion, to hold otherwise and "permit a lower court justice to vacate and reenter an order to render an untimely appeal timely 'would have the effect of enabling a . . . judge to modify and enlarge the applicable statute by judicial fiat. That is clearly beyond his power.'" *Id*. at 3 (quoting *Ferranti*, 289 A.2d at 57).

(2) SUPERIOR COURT MAY DISMISS UNPERFECTED APPEAL.

In In re Kyla C., No. 2011-98-Appeal, although the Court held that the appeal was not properly before it, it proceeded to address the propriety of the Family Court's dismissal of the respondent's appeal. In that case, after the Family Court had vacated and re-entered its decree to allow the respondent to file a timely appeal, the respondent failed to timely transmit the record and had not requested an extension of time to do so. Accordingly, the guardian ad litem moved the Family Court to dismiss the respondent's appeal. An order entered dismissing the respondent's appeal.

On appeal, the Supreme Court recognized that the Family Court's dismissal of the respondent's appeal was proper. "'Article I, Rule 3(a) of the Supreme Court Rules of Appellate Procedure empowers [a] trial justice to dismiss an appeal for failure to comply with [Rules 10(b)(1) and 11].'" *Id*. at 3 (quoting *Pelosi v. Pelosi*, 50 A.3d 795, 798 (R.I. 2012)). To determine whether a trial justice has abused his or her discretion in dismissing an appeal, the Supreme Court applies the same standard used when considering extensions of time for transmission of the record as set forth in Supreme Court Rule of Appellate Procedure 11(c). *Id*. at 4 (citing *Daniel v. Cross*, 749 A.2d 6, 9 (R.I. 2000)).

Pursuant to Rule 11(c), an extension of time may be granted when "the inability of the appellate to cause timely transmission of the record is due to causes beyond his or her control or to circumstances which may be deemed excusable neglect." R.I. R. App. P. 11(c). The Supreme Court has consistently defined "excusable neglect" as:

> neglect occasioned by some extenuating circumstances of sufficient significance to render it excusable, . . . as a failure to take the proper steps at the proper time, not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident, or reliance on the care and

> vigilance of his counsel or on promises made by the adverse party, . . . and as that course of conduct that a reasonably prudent person would take under similar circumstances[.]

Id. (quoting *Business Loan Fund Corp v. Gallant*., 795 A.2d 531, 533 (R.I. 2002)). In *In re Kayla C.*, the respondent had not offered any reason for his neglect other than that he did not understand he was required to order the transcript. *Id*. Such neglect is not excusable, even for a pro se litigant. Consequently, the Family Court properly exercised its discretion in dismissing the respondent's appeal.

(3) SANCTIONS NOT ALLOWED FOR MERE FAILURE TO PERFECT AN APPEAL.

Although it is well settled that an appeal may be dismissed when it has not been perfected, the Rhode Island Supreme Court made clear this term that sanctions should not be imposed for mere failure to perfect an appeal. *See* Fiorenzano v. Lima, No. 2012-236-Appeal. In *Fiorenzano*, when the plaintiff failed to perfect his appeal, the trial justice granted the defendant's motion to dismiss plaintiff's appeal and, in addition, ordered that plaintiff pay defendant $1,500 as compensation for defendant's attorney obtaining dismissal of the appeal. *Id*. at 2. On appeal, the Supreme Court held that the imposition of a sanction for the plaintiff's failure to perfect his appeal was in error. *Id*. at 3. According to the Court, "[n]o statute or rule calls for any further sanctions for the failure to perfect an appeal." *Id*.

(4) PRELIMINARY RULING ON MOTION IN LIMINE GENERALLY INSUFFICIENT TO PRESERVE ISSUE FOR APPEAL.

The Rhode Island Supreme Court strictly adheres to the raise or waive rule, pursuant to which "an issue that has not been raised or articulated previously at trial is not properly preserved for appellate review." State v. Moten, 2008-51-C.A. at 9 (citing *State v. Gomez*, 848 A.2d 221, 237 (R.I. 2004)); *State v. Figuereo*, 31 A.3d 1283, 1289 (R.I. 2011)). Past editions of

the Fast Five on Rhode Island Appellate Practice have addressed the raise or waive rule at length. *See* http://www.riappeals.com/category/raise-or-waive-rule/ (cataloging prior posts on the raise or waive rule). Recently, the Supreme Court cautioned litigants that a preliminary ruling on a motion in limine generally is insufficient to preserve an issue for appellate review. Martin v. Lawrence, No. 2012-297-Appeal. In *Martin*, the defendant moved in limine to exclude a document from evidence. *Id*. at 7. After considering the defendant's motion, the trial justice stated that he was "rul[ing] preliminarily that the objection of the defendant is sustained on the grounds that the statement sought to be presented by the plaintiff . . . is hearsary [ ] that does not fall within any exception to the hearsay rule." *Id.*

In addressing whether the trial court's preliminary ruling was sufficient to preserve the issue for appellate review, the Supreme Court noted that "'a ruling on a motion *in limine*, unless unequivocally definitive, will not alone suffice to preserve an evidentiary issue for appellate review; a proper objection on the record at the trial itself is necessary.'" *Id*. at 7-8 (quoting *State v. Andujar*, 899 A.2d 1209, 1222 (R.I. 2006)). Nevertheless, the Supreme Court concluded that under the circumstances, where the trial justice's decision on the motion in limine was made on the same day that trial was to commence, plaintiff may have been reluctant to attempt to introduce the evidence. *Id*. at 8. Thus, the Supreme Court proceeded to address the appropriateness of the trial justice's ruling. *Id.*

(5) DID YOU KNOW?

The failure to foresee the need for a witness to authenticate a document until a motion in limine is filed by the adverse party on the day of trial does not excuse the proffering party from providing an adequate foundation for the evidence. *See* Martin v. Lawrence, No. 2012-297-Appeal at 9.

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Nicole J. Benjamin
Counsel

nbenjamin@apslaw.com
www.apslaw.com

AP&S | ADLER POLLOCK & SHEEHAN P.C.

One Citizens Plaza, 8th Floor
Providence RI 02903
401.274.7200
fax 401.751.0604

175 Federal Street
Boston MA 02110
617.482.0600
fax 617.482.0604

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