COMMITTEE FOR PUBLIC COUNSEL SERVICES
CHILDREN AND FAMILY LAW DIVISION

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CHINS REFORM ENACTED, "FACES" STATUTE GOES INTO EFFECT ON NOV. 5, 2012

On August 7, 2012, Governor Patrick signed into law Chapter 240 of the Acts of 2012, reforming the CHINS statute. The new law, referred to as FACES, for "Families and Children Engaged in Services," does away with the term "CHINS," or Child in Need of Services. The new term is "child and family requiring assistance."

While the services portion of the law has a three-year phase in period, the procedural changes to Chapter 119 go into effect on November 5, 2012, 90 days from the date of signing. All attorneys handling status offense cases must be familiar with the new law. What follows is a detailed memorandum discussing the changes in the new law.

The new law can be found at http://www.malegislature.gov/Bills/187/Senate/S02410.

A copy of the portions of Chapter 119 that pertain to status offenses, as it will read on November 5, 2012, can be found at http://www.publiccounsel.net/practice_areas/cafl_pages/cafl_news.html.

Legislative Intent of New Law

The reform of the CHINS law is intended by the drafters of the legislation to break down barriers between the juvenile court, parents, and the community, and create a second access point for children to receive necessary services. The law over three years creates a statewide network of community-based programs and services including direct access to mental health and substance abuse counseling as well as a number of other behavioral and preventive services including special education evaluations, mentoring, family and parent support and after-school and out-of-school opportunities outside the court system. The bill hopes to steer children away from the criminal court system and refocus on prevention rather than punishment.

The bill also:

- De-stigmatizes the process by deleting the "CHINS" label for children receiving services;
- Decriminalizes the process by prohibiting children requiring assistance from being arrested, confined in shackles or placed in a court lockup;
- Focuses on the child and family as a unit – not just the behavior of the child – and allows the parents to be full and active participants in their child's proceedings;
- Ensures that the child and family fully understand the procedures by requiring that information be given to parents in writing at the beginning of the court process;
- Creates a realistic timeframe for children and families to receive the necessary services;

- Requires school districts to establish truancy prevention programs that would be offered to students before referring them to juvenile court; and
- Creates a standardized data collection system to evaluate outcomes and ensure the Commonwealth and children appropriately benefit from the new system.

While the drafters of the new law intend that the new system be called "FACES", for "Families and Children Engaged in Services", that term is not contained in the actual statute, but only in the title of the act signed by the governor. It is unclear what the new applications will be called by the court. It is clear that the law intended to do away with the label "Child in Need of Services" or "CHINS."

The proponents of the FACES law intended to have community based services available to provide to children and families who were experiencing difficulties. Because of the financial implications, this part of the FACES law is to be implemented over the next three years.

An advisory board is to be in place within 60 days of the effective date of the act. This board will begin to implement a pilot program of community services in one location in the state within the first year. The second step by the second year will be to have a pilot program in each county. And by November 5, 2015, there is to be community based services available throughout the Commonwealth. All of these programs are "subject to appropriation."

In addition, all school districts are separately being encouraged to implement truancy prevention programs. The FACES law requires all such programs to be certified by the state.

The FACES law also establishes other pilot programs, including a pilot truancy prevention program using a restorative justice format in at least one urban high school, and a pilot program to address the unique needs of girls who run away from their parents and legal guardians.

The new law also encourages the use of private insurance to pay for services. "If the family or child are directed by the court to participate in treatment or services which are eligible for coverage by an insurance plan or other third-party payer, payment for such services shall not be denied if the treatment or services otherwise meet the criteria for coverage." C. 119 s. 39G

What follows is our best analysis of the new law, but we are still waiting for all the forms and memos to be promulgated by the Juvenile Court, and will update this memo when that information is received.

1. The new law allows applications for assistance to be filed up to the child's 18th birthday.

One of the major changes in the new law is that "applications for assistance" may be filed up until the child's 18th birthday. The prior statute only allowed CHINS petitions to be filed up until the child's 17th birthday. G.L. c. 119, s. 21 (Definitions).

The term "child in need of services" is no longer used. The new terms are "child requiring assistance" and "family requiring assistance." G.L. c. 119, s. 21 (Definitions).

Although a school-based application can apparently now be filed up to age 18, any dispositional order must still be dismissed when the child turns 16. G.L. c. 119, s. 39G. (See infra.)

2. The definitions of the four traditional status offense categories remain the same as they were amended in 2008.

The definitions of status offenses contained in s. 21 and s. 39E remain the same, as they were amended in 2008, except that the fifth category of sexually exploited child was inadvertently deleted.

An application for assistance may be filed on a child between the ages of 6 and 18, for the four traditional categories of stubborn, runaway, truant, and school offender.

The definitions of the four categories stay the same as in the 2008 definitions:

– "repeatedly" runs away from home

– "repeatedly" fails to obey the lawful and reasonable commands of a parent, legal guardian, or custodian, thereby interfering with their ability to care for and protect the child

– "repeatedly" fails to obey lawful and reasonable school regulations

– "willfully" fails to attend school for more than 8 school days in a quarter.

3. The new law inadvertently deleted the provision which added a fifth category of child in need of services for a sexually exploited child. There are reports that this will be returned to the statute.

The definition of "sexually exploited child" was inadvertently removed from c. 119, s. 21 by the new FACES law.

The sexual trafficking law contained in c. 178 of the acts of 2011 added a fifth category of CHINS petitions, for a "sexually exploited child." While the definition of "sexually exploited child" remains in s. 21, the category was deleted in the definition of "child requiring assistance."

The ability to file a CHINS for a sexually exploited child is integral to the diversion efforts contained in c. 119 s. 39L, which allows a child under the age of 18 charged with a sexual offense to be treated as a victim rather than as a defendant. The CHINS law was amended by c. 178 of the acts of 2011 to allow a

parent or police officer to file a CHINS on a sexually exploited child, but that amendment was not carried over to the new FACES law.

There are reports that technical amendments to the new FACES law will include the return of "sexually exploited child" to the definition of a "child requiring assistance."

Even without the provision for a "sexually exploited child" application, it still remains possible for a parent, legal guardian, or custodian to file a stubborn or runaway application to take advantage of the diversion allowed by c. 119 s. 39L.

For a fuller description of the sexual trafficking law, please refer to the memo at the CAFL website, at http://www.publiccounsel.net/practice_areas/cafl_pages/cafl_news.html.

4. The new law changes who may file applications for assistance.

The new law eliminates the ability of police officers to file petitions in runaway or stubborn child cases, but allows "custodians" of children to file runaway and stubborn applications, as well as parents and legal guardians.

The addition of the word "custodian" to the list of persons who may file would appear to confirm the practice of allowing the Department of Children and Families to file an application for assistance for a child who has run away while in DCF custody.

The new law also appears to make clear that the person filing a runaway or stubborn petition must have custody of the child. "A parent, legal guardian, or custodian of a child having custody of such child, may initiate an application for assistance...." C. 119 s. 39E.

The new law no longer requires a school attendance officer to file a school-based application, but rather provides that a "school district" may file a school-based application. This raises questions as to who would be the proper person to authorize the filing and to appear in court for the school district, and whether the school district would need to be represented by an attorney. See c. 119, s. 39E.

5. The new law imposes requirements for school districts filing applications for assistance

The new law requires that specific statements be filed with all school-based applications. With truancy applications, the school must state "whether or not the child and the child's family have participated in the truancy prevention program, if one is available, and a statement of the specific steps taken under the truancy prevention program to prevent the child's truancy." With habitual school offender applications, the school must state "the specific steps taken by the school to improve the child's conduct." C. 119, s. 39E.

6. The new law requires the clerk's office to provide information in writing to petitioners who are filing an application, to let them know the possible ramifications of an application to the court.

Consistent with the emphasis of the new FACES statute on the provision of services to the family before an application for assistance is filed with the court, the clerk's office is to inform the petitioner of the services available to the family. The clerk's office is also mandated to prepare and provide to each petitioner "educational material" relative to available services. For parents, guardians, and custodians, the clerk is also to provide "informational materials" that explain the court process and the possibility of changes in the custody of the child.

One of the goals of the new statute is to focus on the entire family and provide short-term intervention, rather than a system that entangles the child and family in the child welfare system for an extended period of time.

Note that many of the services that are to be described in these materials are not yet in place. See c. 119 s. 39E.

7. The new law requires the court to schedule a preliminary hearing within 15 days of the application being filed.

Upon filing of an application, the court has to schedule a date for preliminary hearing "as soon as possible, but not later than 15 days after the request is presented to the clerk for filing," and must appoint counsel for the child. At the preliminary hearing, the court can dismiss the application, refer the matter to probation for informal assistance, or accept the application and schedule a "fact-finding hearing."

The new law should change the prior practice of some courts to allow informal assistance without the child appearing in court and without the appointment of counsel. The new law should also change the prior practice in some courts of waiting until after the preliminary hearing to appoint counsel. The new law clearly requires a preliminary hearing in all cases, and the appointment of counsel prior to that hearing.

The court may issue a summons to the child to appear at the preliminary hearing, and if a summons is issued to the child the court shall issue a summons to the parents. If the child fails to obey the summons, the court may issue a warrant to allow the child to be taken into "custodial protection." (Custodial protection is discussed infra.) See c. 119 s. 39E.

8. The new law requires that children be notified of their right to counsel upon filing of an application, and have counsel at the preliminary hearing.

The new law provides for appointment of counsel for the child upon the filing of the application: "When an application for assistance stating a child and family are in need of assistance is initiated the

child shall be informed that he has a right to counsel at all hearings, and if said child is not able to retain counsel, the court shall appoint counsel for said child." C. 119 s. 39F

9. The new law provides that parents have the right to counsel at any hearing "regarding custody of the child."

The new law expands the right to counsel for parents, providing for counsel at any hearing regarding custody of the child. Because temporary custody of the child can be granted to DCF at the preliminary hearing, parents should now have the right to counsel at that hearing. The case of Matter of Hilary, 450 Mass. 491 (2008), only provided for counsel at the dispositional hearing, if custody of the child could be granted to DCF. So the new law allows for the provision of counsel for the parents at a much earlier stage of the proceeding.

10. The new law shortens the informal assistance period to 90 days, which may be extended for one additional 90 day period.

The informal assistance offered under the new law is essentially the same as it was under the old law, except that it will be much shorter, with a maximum of 180 days, instead of the twelve months maximum under the prior law (two six-month periods).

A difference from the old statute will be that counsel will have been appointed for the child, and should keep track of the progress of the case during the informal assistance period. Consistent with the client's wishes, counsel should advocate during the informal assistance period for the provision of services so that the case can ultimately be dismissed. C. 119 s. 39E

11. The new law eliminates the prior bail provision of the CHINS statute, but instead permits the court to release the child on conditions or grant temporary custody to DCF in certain circumstances, for no longer than 45 days.

The prior bail section of the CHINS statute has been repealed, and replaced with a new provision that allows the court to grant temporary custody to DCF at the preliminary hearing under certain circumstances.

The prior bail statute only applied to stubborn child petitions, if the child was likely not to appear at the adjudicatory hearing. Like the prior bail statute, the new temporary custody provision should be used only in stubborn child applications where it is determined that the child is likely not to appear at future hearings. Consistent with the client's wishes, counsel should object to the use of the temporary custody provision in any case which is not a stubborn child case. And counsel should also object if there is no showing that the child is likely not to appear at the fact finding or disposition hearing.

Unfortunately, in drafting the statute, an extra word ["or"] was added to the statute that could possibly be used by the juvenile court to allow temporary custody in two situations: if it is a stubborn application,

"or" if the child is likely not to appear at the fact finding or disposition hearing. (See the exact language below.) But the addition of the word "or" makes the sentence grammatically incorrect, and counsel should resist attempts to use this provision in any case which is not a stubborn child case.

Because it is a custody order, the court must make a written certification and determination of reasonable efforts, as it does in care and protection cases. The new law requires that before a child can be placed in temporary custody the court must find that DCF has made reasonable efforts to prevent removal "or there is an immediate risk of harm or neglect which precludes the provision of preventative services as an alternative to removal." This appears different from the care and protection statute, which allows the court to make a "no reasonable efforts" finding and still grant DCF custody. Counsel should contest the reasonable efforts findings in cases where the child is objecting to being placed in the temporary custody of DCF.

The court is required to make all determinations at the temporary custody stage by a preponderance of the evidence, akin to a 72 hour hearing in a care and protection case. The temporary custody can last for a maximum of 15 days, and can be extended only twice, for a total maximum of 45 days.

As discussed above, before holding a preliminary hearing where the child may be placed in the temporary custody of DCF, the court must appoint counsel for the parent.

Any appeal of the placement of a child in the temporary custody of DCF is by G.L. c. 231 s. 118 to a single justice of the Appeals Court. (The prior bail statute provided for a bail appeal to the Superior Court.)

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"If the court finds that a child stated to require assistance by reason of repeatedly refusing to obey the lawful and reasonable commands of such child's parents, legal guardian or custodian or [sic] is likely not to appear at the fact finding or disposition hearing, the court may order the child to be released upon such terms and conditions as it determines to be reasonable or, if the standards below are met, may place the child in the temporary custody of the department of children and families. The court shall not order the child to be placed in the custody of the department of youth services. Prior to the court granting temporary custody to the department of children and families, the court shall make a written certification and determination that it is contrary to the best interests of the child for the child to be in the child's home or current placement and that the department of children and families has made reasonable efforts to prevent removal of the child from the child's home or the existing circumstances indicate that there is an immediate risk of harm or neglect which precludes the provision of preventative services as an alternative to removal. An order placing a child with the department under this section shall be valid for not more than 15 days upon which the child and the child's parents, legal guardians or custodians, represented by counsel, shall be brought again before the court for a hearing on whether such order should be continued for another 15 day period based on the preponderance of the evidence. If the court decides to continue said order, it shall note in writing the detailed reasons for its decision; provided, however that no child shall be placed with the department under this section for more than 45 days." C. 119 s. 39H

12. The new law permits the petitioner or any other party to move to dismiss the application at "any time prior to a hearing to determine the disposition of a request for assistance."

The new law attempts to address the issues raised in the case of Matter of Gail, 417 Mass. 321 (1994), as to when a parent can dismiss an application. While the legislative intent was to allow the parents more control over how far to go with an application, the final language leaves much to the discretion of the court. But at least up until the dispositional hearing, the parent can file a motion to dismiss the request for assistance, and the court must entertain the request. Any other party to the case can also file a motion to dismiss. Counsel for the child should consider filing a written motion to dismiss with supporting material that would satisfy the requirements of the statute.

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"At any hearing to determine whether a child and family require assistance, said child and the child's attorney shall be present and the parent, legal guardian or custodian shall be given an opportunity to be heard. The petitioner and any party may file a motion to dismiss the request for assistance at any time prior to a hearing to determine the disposition of a request for assistance. The judge, upon a filing of a motion to dismiss, may order that the request for assistance be dismissed upon a showing that the dismissal is in the best interests of the child or if all parties agree to the dismissal. A probation officer may at any time recommend to the court that the request for assistance be dismissed upon a showing that dismissal is in the best interests of the child." C. 119, s. 39G

13. The new law restricts the ability of police to "arrest" children requiring assistance and mandates the police to follow strict procedures when they do take children into "custodial protection."

The new FACES law does not refer to the power to "arrest" children requiring assistance, but rather considers that the child is taken into "custodial protection." The new law requires law enforcement to immediately notify the parent when a child is taken into "custodial protection", and does not allow the police to take the child to the police station. A child may be taken into custodial protection only if the child has failed to obey a summons or has run away from home.

Upon being taken into custodial protection, the first call the officer shall make is to immediately notify the parent or custodian, including DCF if they have custody. In consultation with the probation officer, the police officer shall then immediately make diversion efforts, in the following order of preference:

1. To the parent, guardian, or custodian, upon the written promise of that person to bring the child to court on the next court date;

2. To a temporary shelter forthwith and with all reasonable speed and without first being taken to the police station house; or

3. Directly to the juvenile court, but only if the officer certifies that he could not do 1 or 2.

A child in custodial protection may not be confined in shackles or similar restraints or in a court lockup facility in connection with any proceedings under sections 39E to 39I, inclusive.

Notwithstanding the foregoing requirements for placement, any such child who is taken into custodial protection shall, if necessary, be taken to a medical facility for treatment or observation.

The application for assistance automatically issues when a child has been taken into custodial protection, if it has not previously issued, and the court then determines whether a fact-finding hearing should be scheduled or the matter should be referred for informal assistance.

C. 119, s. 39H; C. 119 s. 39E.

14. The new law prohibits children who require assistance from being confined in shackles or placed in a court lockup at any time.

No status offender should be confined in shackles or placed in court lockup after the effective date of the new FACES statute.

This provision should go into effect for all cases on November 5th and counsel should ensure that it is followed scrupulously.

15. The new law eliminates the de novo process and the right to a jury trial; but maintains the beyond the reasonable doubt standard for adjudication.

The right to a jury trial on status offenses is eliminated in the new law. The "fact-finding hearing" is a bench trial, and there is no trial de novo. (We hereby mourn the last remnant of trial de novo in the Commonwealth of Massachusetts!)

The adjudication must still be determined beyond a reasonable doubt.

The new law does not specify any timeframes for the fact-finding hearing, the conference, or the disposition hearing. The time standards currently in effect for CHINS cases allow six months from the preliminary hearing to the adjudication and disposition of a case.

After the fact-finding hearing, the new law mandates a conference and a disposition hearing. But there is no provision in the new law for a continuation of temporary custody beyond 45 days. Counsel should object to the court placing the child in temporary custody pending the conference and disposition in cases where the child is opposed to it, and where the total time in custody would last beyond 45 days. The status offense law is construed narrowly and additional terms are not read into the statute.

Continued bail or temporary custody was not required under the prior bail statute because the adjudication and disposition were done at the same time. Now the statute requires a conference before disposition. Query whether the court will attempt to hold some of these court events on the same day.

C. 119 s. 39G

16. The new law, following adjudication, requires the court to convene a conference to discuss appropriate treatment, services, placement and conditions for the child, with written recommendations from the probation officer; and provides that a dispositional hearing be held only after the conference.

Before the court can hold a disposition hearing, it must convene a conference in which the judge may participate. The probation officer is required to present written recommendations at the conference.

There is also an opportunity for counsel to provide written recommendations at the conference.

The conference allows an opportunity for counsel, whether representing the child or a parent or guardian, to bring to court all collaterals that are involved with the family to provide information about the needs of the child and family.

Counsel should strategize their presentation at the conference, and determine whether collaterals should be summonsed to appear, or records should be summonsed to present to the court.

Counsel for both children and parents should also remember that up until the disposition hearing, they may file a motion to dismiss the application, as discussed above.

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"Upon making a finding that a child requires assistance after a fact finding hearing, the court shall convene and may participate in a conference of the probation officer who conducted the preliminary inquiry, a representative from a family resource center or other community-based services program, if involved with the family, the petitioner, a representative from the child's school, the child's parent, legal guardian or custodian, the child and the child's attorney, a representative of the department of children and families, if involved with the family, and any other person who may be helpful in determining the most effective assistance available to be offered to the child and family. The probation officer shall present written recommendations and other persons at the conference may present written recommendations to the court to advise the court on appropriate treatment and services for the child and family, appropriate placement for the child, and appropriate conditions and limitations of such placement." S. 39G

17. The new law reduces the time an initial disposition order may remain in effect from 6 months to 120 days; and provides that a disposition order may be renewed after that for only 90 days, for a maximum of 3 additional 90 day periods (this means a disposition order can only last for a maximum of 390 days).

The disposition provisions of the new law essentially mirror the old law, except that the timeframes for a disposition order are drastically reduced, and the maximum amount of time that an order can last is 390 days. **The entire matter must be dismissed at the end of the 390 days.** Query whether this will result in the filing of a new application, as sometimes happens now at age 16 when a school-based application must be dismissed and a parent will file a stubborn petition.

As was held by the SJC in the Matter of Angela, 445 Mass. 55 (2005), the "fact-finding hearing" and the dispositional hearing and extension hearings require evidence to be heard, and must follow the rules of evidence.

Counsel should be prepared to argue in all existing cases that this provision applies retroactively, and that all current cases where the child has a dispositional order that has been in effect for more than 390 days should be dismissed. Attorneys should review all their current cases, determine those cases in which dispositional orders have been in effect for more than 390 days, and then determine whether their client wants the case to be dismissed.

18. The new law provides that an appeal of any order (final or interlocutory) must be filed with a single justice of the Appeals Court under G.L. c. 231, sec. 118.

In an effort to expedite appeals from the new FACES statute, the new law provides that an appeal of any order must be filed under G.L. s. 231 s. 118, which is an interlocutory appeal to the single justice of the Appeals Court. The new law appears to require that an appeal of a final order must also be taken under c. 231 s. 118, as opposed to the regular appellate process.

The new law also provides that all such appeals, whether final or interlocutory, shall proceed under the Mass. Rules of Appellate Procedure, which otherwise have not been used in cases under c. 231 s. 118. As appeals filed under c. 231 s. 118 go to a single justice of the Appeals Court, they have their own set of rules which do not follow the Rules of Appellate Procedure. As these provisions for appeals do not make sense in light of the appellate rules, the appellate process in the new law is likely to be changed by the legislature with technical amendments. So stay tuned!

Any attorney who is appealing from a final order under the new statute should contact Andrew Cohen at the CAFL office in Boston.

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"A child, parent, legal guardian or custodian may appeal from any order or determination made under sections 39E to 39H, inclusive. Pending the appeal, the court shall retain jurisdiction and may enter any order under this chapter to meet the needs of the child. Notwithstanding any general or special law to the contrary, the appeal shall be to the appeals court under section 118 of chapter 231 and shall proceed under the Massachusetts Rules of Appellate Procedure that govern child welfare cases." S. 39I

19. In addition, the new law changes the interlocutory appeal process in all juvenile court cases. All interlocutory appeals in all juvenile court cases must now be filed with the single justice of the Appeals Court under G.L. c. 231, sec. 118, and not in the SJC under G.L. c. 211, sec. 3, as was required previously.

All interlocutory appeals from the juvenile court department, in all juvenile court cases, will now be heard in the Appeals Court. The petition will be filed with the single justice of the Appeals Court.

Because this avenue is now available, it will no longer be available to file a petition in the SJC under c. 211 s. 3.

20. The new law prohibits records from being maintained in CORI or CARI, and requires the court to order expungement of all records in certain circumstances.

The new law prohibits these cases from being entered into the state Criminal Offender Record Information (CORI) system, or the Court Activity Record Index (CARI) system, as CHINS cases are now.

Counsel should argue for retroactive application of this provision and should request upon dismissal that the court remove all records pertaining to the case and expunge all records from CORI and CARI.

"[N]o record pertaining to the child involved in the proceedings shall be maintained or remain active after the application for assistance is dismissed." S. 39E

And in those circumstances where an application is dismissed before a "fact-finding hearing," the new law provides that "the court shall enter an order directing expungement of any records." Counsel should ensure that such an order enters. S. 39E

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"Proceedings pursuant to sections thirty-nine E to thirty-nine I, inclusive, shall not be deemed criminal proceedings and any record of these proceedings, including the filing of an application for assistance and creation of a docket, shall not be entered in the criminal offender record information system. Notwithstanding any general or special law to the contrary, no record pertaining to the child involved in the proceedings shall be maintained or remain active after the application for assistance is dismissed. The identity and record of any child for which an application for assistance is filed shall not be submitted to the department of criminal justice information services, criminal offender record information system, court activity record index or any other criminal record information system." C. 119 s. 39E

"When an application for assistance is dismissed under this section [s. 39E], the court shall enter an order directing expungement of any records of the request and related proceedings maintained by the clerk, the court, the department of criminal justice information services, the court activity record index and the probation department that directly pertain to the application for assistance." S. 39E

21. Counsel should be prepared to argue that the provisions of the new law are retroactive, if that is consistent with the goals of your client. Counsel should also be prepared to argue that the provisions of the new law are not retroactive, if that position is consistent with the goals of your client.

The new FACES law does not specify whether its provisions are retroactive. More research and analysis need to be done on this issue. We encourage attorneys to send us any motions they file concerning retroactivity of the new law so that we can share them with others (after redacting any personal identifying information of course).

Here are some basic principles of retroactivity to help you get started on your motions:

"Generally statutes are prospective in their operation unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects when considered in the light of the subject-matter, the pre-existing state of the law and the effect upon existent rights, remedies and obligations." Goes v. Feldman, 8 Mass .App. Ct. 84, 87-88 (1979).

In determining retroactivity, courts distinguish between changes made to substantive rights and changes made to procedures. Certain types of hearings, the timing of such hearings, and the rules of evidence for such hearings generally fall within the category of procedural changes. The rules regarding retroactivity of procedural changes are pretty clear. In City Council of Waltham v. Vinciullo, 364 Mass. 624 (1974), the Supreme Judicial Court held that courts must look to the state of the proceedings on the effective date of the statute. If they have gone past the procedural stage to which the relevant statutory provision pertains, then there is no retroactive effect; if they have not, there may be retroactive effect. See also Smith v. Freedman, 268 Mass. at 40-42 (shift in burden of proof given retroactive effect); Goes v. Feldman, 8 Mass. App. Ct. 84, 88-89 (1979). In the FACES context, if your child client has been adjudicated and placed in DCF's custody (for the first time) immediately before November 5, the court should schedule the first review hearing for 120 days, not six months (because the review hearing has not yet occurred).

What is "substantive" as opposed to "'procedural" is not always clear. "[L]egislation limiting or increasing the measure of liability, while arguably remedial in the broad sense of that word, generally is considered to impair the substantive rights of a party who will be adversely affected by the legislation.'" Smith v. Massachusetts Bay Transp. Auth., 462 Mass. 370, 374-375 (2012). While the new FACES legislation does not change "liability," certain provisions affect the substantive rights of both parents and children.

The case law suggests that the following procedural and remedial portions of the new law could be given retroactive effect:

- The expanded provisions for right to counsel for children and parents;
- The shortened timeframes for informal assistance and for holding a preliminary hearing;
- The new provisions for "custodial protection" rather than "arrest";
- The new provisions for "temporary custody" rather than "bail";
- The prohibition on children being held in shackles or placed in court lockup or the police station;
- The provision which permits any party to move to dismiss prior to the disposition hearing;
- The provision which calls for a conference to be held before the disposition hearing;

- The provisions which reduce the timeframes of dispositional orders, and require the disposition order to end in 390 days;
- The provisions for appeal under c. 231 s. 118; and
- The provisions that require records to be expunged or removed in certain circumstances, and prohibit cases from being entered into CORI or CARI.

The case law also suggests that certain provisions affecting substantive rights should not be applied retroactively to petitions filed before November 5, 2012 under the old CHINS law:

- Eliminating the right to trial by jury and appeal de novo;
- The provision for "temporary custody" rather than "bail", if you determine that you would rather have the old "bail" provisions apply to your case; and
- The reduced time limit for informal assistance, if your client would like to continue with informal assistance beyond the new 180 day limit.

Some of the legislative changes are both procedural and substantive. For example, the 390-day maximum disposition duration is procedural (because it changes the timing of review hearings) and substantive (because it deprives children and parents of their substantive liberty interest in family integrity). The issue of retroactivity is important if your child client has already been in DCF custody for more than 390 days as of November 5. Must the court dismiss the case immediately? If your child client has been in DCF custody for 300 days as of November 5, 2012, must the court dismiss the case at the next 90-day review hearing? The answers to these questions aren't clear. They will depend on both your zealous advocacy and each judge's interpretation of the new law.

Please feel free to contact us to discuss strategy for your case.