Adoption of Talik, 92 Mass. App. Ct. 367 (2017)

Summary by Katy Krywonis, CAFL Training Unit

In this case, the Appeals Court was asked to decide whether a trial judge may draw an adverse inference from a parent’s failure to appear at trial. The Appeals Court rejected the mother’s argument that due process requires the same protection against an adverse inference that is afforded to a defendant who is absent from a criminal proceeding. The Appeals Court held that a trial judge may, in their discretion, draw an adverse inference from a parent’s absence from a care and protection or termination proceeding, just as they may draw an adverse inference from a parent’s failure to testify. The Appeals Court stated that “[w]here a parent has notice of a proceeding to determine [their] parental rights and the parent does not attend or provide an explanation for not attending, the absence may suggest that the parent has abandoned [their] rights in the child or cannot meet the child’s best interests.” The Appeals Court found that there was enough evidence, including the adverse inference, for the trial judge to find that the mother was unfit and that termination of her parental rights was in Talik’s best interest.

*Facts:* Trial took place over four days. The mother had notice of the proceeding, but was not present for any of the trial dates, nor was she in contact with her attorney or DCF. She had not visited Talik in at least nine months or participated in her service plan tasks. The judge heard testimony from social workers, experts, the father, a relative from California, and one of Talik’s foster parents. The mother was present when the judge issued his decision from the bench, but did not offer any explanation for her absence or move to reopen the evidence. The judge drew a negative inference from the mother’s failure to attend and testify at trial, terminated her parental rights, and approved DCF’s plan for Talik’s foster parents to adopt him.

*Discussion:* Citing *Custody of Two Minors*, 396 Mass. 610, 616 (1986), the Appeals Court reiterated that “the full panoply of constitutional rights afforded criminal defendants does not apply in these cases.” For example, DCF is required to show only clear and convincing evidence of current unfitness, not proof beyond a reasonable doubt. Importantly, the adverse inference is not sufficient, by itself, to meet DCF’s burden of proof. DCF must still present a prima facie case of parental unfitness such that the parent may be expected to rebut the allegations. Additionally, in determining whether to exercise their discretion to draw an adverse inference, the trial judge must consider whether such an inference is “fair and reasonable based on all the circumstances and evidence before [them].” Here, the trial judge inquired into the reasons for the mother’s absence, both at a pretrial hearing and again at the start of the trial. The mother’s counsel responded that he had not had contact with the mother. The mother’s absence was just one of many factors the judge considered in finding her unfit.

*Practice tip:* Often when a parent does not appear for a court date, their attorney is put in a difficult position and may be pressured by the judge to answer questions regarding the client’s whereabouts and whether or not the client has communicated with them. If a client does not appear for trial, counsel should object to the trial going forward and request a continuance. Counsel should raise any reason for the client’s absence for the record, *if* that reason is helpful to persuade the judge to continue the trial. Counsel must always be careful not to reveal confidential information that may prejudice the client’s case (e.g. informing the court that the client is missing and has not maintained contact with counsel). Instead, one possible response to a judge’s questioning may be that counsel has no information to share with the court.

Counsel should advise parent clients at the initiation of proceedings to stay in touch with counsel and attend all court dates. The right to counsel is not absolute. If a parent does not attend court dates or maintain contact, the court may find that they have abandoned the proceedings and may strike counsel’s appearance, leaving the parent to represent themselves. If a client does not appear but has been in contact with counsel and has articulated a position, counsel should inform the court of the client’s interest in the case. If the court strikes counsel’s appearance and the parent (before termination of their parental rights) later appears and wishes to participate, counsel should be reappointed. For more on this issue, counsel should review *Care and Protection of Marina*, 424 Mass. 1003 (1997), *Adoption of Imelda,* 72 Mass. App. Ct. 354 (2008), and *Adoption of Rory,* 80Mass. App. Ct. 454 (2011).