1:28 DECISION OF THE WEEK

August 22, 2018

CAFL APPELLATE PANEL SUPPORT UNIT

Do you have a case where the trial judge played fast and loose with the parents' due process rights? This week we focus on a 1:28 decision where the Appeals Court vacated the termination decree and remanded to a different judge. This is a short decision but it packs a punch.

Adoption of Adina, 73 Mass. App. Ct. 1123 (2009) (Mass. App. Ct. Rule 1:28)

(Kantrowitz, Mills & Trainor, JJ.)

In Adina, the Berkshire County Juvenile Court judge granted mother a continuance of trial in order to work out a settlement. The judge excused the mother and her counsel and held a termination trial as to the father alone. Some of the evidence entered in the father's termination case concerned mother as well.

When mother's settlement negotiations fell through, she requested a trial. In response, the judge stated: "Well, I'm finding unfitness of [the] mother based on the testimony I received as to [the] father, anyhow. [The mother] can have a trial on termination of parental rights." Later, at the termination trial, the judge admitted the evidence taken in father's trial (from which mother and her counsel were absent) against the mother.

The panel found this trial by sleight of hand "troubling" in two respects:

> First, the statement gives rise to a presumption that the judge had reached a settled conclusion as to the mother's fitness before competent evidence bearing on that issue was introduced. The risk of prejudice to the mother is evident, since the critical inquiry in a termination action is whether a parent's unfitness has been established by clear and convincing evidence. *Adoption of Gillian,* 63 Mass. App. Ct. 398, 404 (2005). Second, the statement almost compels an inference that the judge based her apparent conclusion upon testimony that was (a) offered without an opportunity for the mother to make seasonable objections; (b) admitted in a proceeding in which the mother had neither standing nor direct incentive to litigate; and (c) presented in the absence of counsel for the mother and, therefore, insufficiently susceptible to effective rebuttal.

The panel determined that there was prejudice to mother because the judge found her unfit based on evidence admitted only against the father at his earlier trial. The panel did not just remand. In a clear message to the trial judge, the panel remanded to a *different* trial judge:

> For these reasons, retrial of the petition as to the mother is necessary, and the interests of justice require the substitution of a judge unfamiliar with the evidence presented at the father's trial. See *Commonwealth v. Henriquez,* 440 Mass. 1015, 1016-1017 (2003) (remand to different judge appropriate to 'restore the appearance of justice' by eliminating concern about the consideration of matters not in evidence).

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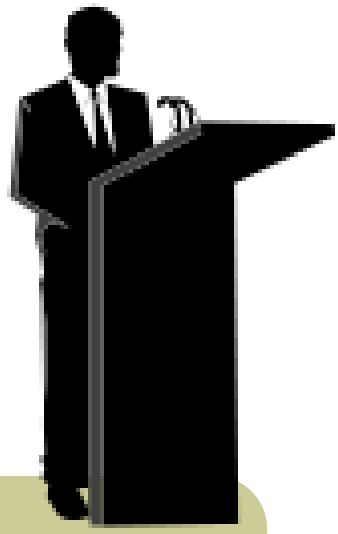
The takeaway?

Adina is a wonderful case to cite if the trial judge: (a) relies on evidence in support of an unfitness finding against a parent when that evidence was admitted only against the other parent; (b) admits evidence against a parent at the other parent's trial; (c) admits evidence against a parent when the parent and his/her counsel did not know there was a trial; or (d) admits evidence against a parent when that parent's counsel is, for whatever reason, not present.

Further, if you are alleging egregious errors below (such as bias, prejudgment, or prejudice), and you have serious doubts as to your client's chances of a fair trial before the same judge, Adina supports an argument that the remand should be to a different judge.

ALWAYS ARGUE PREJUDICE!

In its decision, the panel in Adina wrote, "The record demonstrates prejudice." This straightforward statement was followed by a recitation of some of the critical evidence that the judge relied on improperly. The panel *could* have stated that trying mother by surprise was a structural error, but it still looked to the issue of harm. So go ahead—argue structural error. But always explain to the court how the judge's grievous abuse of the adversary system prejudiced your client.



How to use a Rule 1:28 decision

An unpublished decision by the Appeals Court under Rule 1:28 is issued by a panel, whereas published decisions are reviewed and approved by all justices on the Appeals Court. Rule 1:28 decisions may be cited for their persuasive value but not as binding precedent. If you cite to a Rule 1:28 decision in your brief or motion, you must: (a) attach a copy of the decision as an addendum; and (b) cite the page of the Appeals Court reporter that lists the decision and a notation that the decision was issued pursuant to Rule 1:28. In your brief or motion, you do not need to cite the docket number, month, or day. For example: Care and Protection of Priscilla, 79 Mass. App. Ct. 1101 (2011) (Mass. App. Ct. Rule 1:28).