

1:28 DECISION OF THE WEEK

September 5, 2018

CAFL APPELLATE PANEL SUPPORT UNIT

This week we're taking a walk on the wild side and highlighting *two* Rule 1:28 decisions. Both cases address a parent's due process right to be present and participate at trial.

Adoption of Eartha, 74 Mass. App. Ct. 1108 (2009) (Mass. App. Ct. Rule 1:28) (Grasso, Katzmann, and Sikora, JJ), and ***Adoption of Titus***, 73 Mass. App. Ct. 1128 (2009) (Mass. App. Ct. Rule 1:28) (Cypher, Meade, and Rubin, JJ)

Parents have a due process right to participate at trial. Two older (but great) Rule 1:28 decisions address what happens when the court insists on starting trial when a parent is *en route* to the courthouse or is legitimately confused about the trial date or time.

In *Adoption of Eartha*, the mother notified her lawyer that she would be late to the trial. The mother took the wrong exit while driving to court. She was also bringing her own mother, who planned to testify. However, the judge was impatient to start the trial, proceeded without her, and terminated her parental rights.

The Appeals Court panel vacated the termination decree, holding that the mother lacked the opportunity to meaningfully participate when the court proceeded in her absence. By proceeding without the mother, the trial court denied her the opportunity to call witnesses and rebut the state's evi-

dence. The trial, therefore, failed to satisfy due process.

In its decision, the panel reminded us that “[d]ue process rights must be honored whenever a parent is deprived of the right to raise her child.” (citing *Custody of Lori*, 444 Mass. 316, 320 (2005)). The panel provided several other good due process case citations.

Adoption of Titus is similar. In *Titus*, the judge terminated the parents' rights without a trial. The parents thought the trial was at 11:00, but the judge called the case at 9:00. When the parents and child's counsel did not show up, the judge terminated parental rights without allowing any party to present evidence or examine witnesses. Further, the judge announced that, even if the parents had showed up, it would not have made any difference.

The panel was not amused (and we have never seen a result more telegraphed at oral argu-



ment). It noted that a termination trial must be more than a “mere gesture,” and due process must actually mean something. The panel did not just remand; it remanded to a different judge. The judge's statements suggested that the parents could not get a fair trial, and all parties are entitled to “both the assurance and appearance of a wholly impartial forum.” (citing *Graizzaro v. Graizzaro*, 36 Mass. App. Ct. 911, 912 (1994)).

Titus is a good case to cite if the judge starts a trial too early, or if parents do not show and there is *any* confusion as to the proper time for trial. It's also useful if the judge makes statements suggesting that an absent parent's testimony would not make a difference in the outcome.

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The takeaway?

If the judge intends to start trial but the absent parent client is on her way or is legitimately confused about the trial date, counsel must object and move for a continuance.

In the (most likely oral) motion, counsel should: (a) explain that the parent is on the way to court or was legitimately confused about the trial date (and the reason for that confusion), and (b) argue that parents have a due process right to meaningfully participate in their trial, and that this right is denied by starting without them.

Client not at trial?

Let us know if you have an appeal where the trial took place without a parent who was on her way to court or legitimately believed that trial was scheduled for a different day or time. In our Due Process Issue Bank, we have a long (and quite good) memo by a law student with Eartha, Titus, and lots of cases on point from other jurisdictions.

In fact, we have a lot of memos by lawyers and law students on *all sorts* of procedural due process issues, and they are yours for the taking. Check out the table of contents for our Due Process Issue Bank, which can also be found on the CAFL website under Appellate Resources.



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).