*Adoption of Querida*, 18-P-915, February 11, 2019 (Blake, J.)

Summary by Katy Krywonis, CAFL Training Unit

This case is a good reminder of the due process right to an impartial judge. In this appeal from decrees terminating her parental rights, the mother argued that the trial judge was biased based on statements he made during the proceedings about her behavior in court. The Appeals Court concluded that the judge’s observations of the mother during the proceedings did not disqualify him from adjudicating the matter. The judge’s orders and comments were appropriately based on impressions he formed from his role in the case, not from extrajudicial sources, and his findings and conclusions were amply supported by the record. The Appeals Court affirmed the decrees.

*Facts*: The mother had a long history of mental health issues. She engaged in “numerous outbursts” during the trial. On the first day, she yelled at the social worker during their testimony. The judge had the mother removed from the courtroom until she could compose herself. He noted that the mother was “at a hospital level of care” and that she did not “have a right to interrupt and make [the] proceeding untenable…to conduct.” The mother returned and interrupted the worker’s testimony again. The judge took a recess and arranged for the mother to see the court clinician. The trial resumed without the mother present. The judge stated that the mother’s mental health was “a great concern;” he also stated that he did not draw an adverse inference from her absence. On the next date, the mother became so agitated that the judge suspended the trial and continued it to another date. On the rescheduled trial date, the mother “became hysterical” in the restroom and was transported by ambulance to the hospital. The judge resumed the trial in her absence. DCF called four witnesses and the judge heard closing arguments. Over the Department’s and the children’s objections, the judge reopened the case for a third day of trial so the mother could testify. He explained that he was trying to balance the mother’s due process rights to have and participate in a hearing with the children’s rights to permanency and to have the hearing proceed. On that date, the mother “lost her composure” after a few questions from the DCF lawyer and was escorted from the courtroom. The judge explained for the record: “[The mother] has been escorted by two court officers from the courtroom because the Department cannot engage in a question and answer with her because her anger has been so volatile that there’s no way that counsel can engage in a cross-examination of the witness.” The proceedings ended. The judge concluded that the mother was unfit, terminated her parental rights, and declined to order posttermination contact. The mother appealed.

*Discussion*: The Appeals Court determined that the trial judge was impartial. It reasoned that the mother’s history of untreated mental illness and her behavior during the trial were directly related to her ability to care for her children. The judge could “use past conduct, medical history, and present events to predict future ability and performance as a parent.” The judge gave the mother a full opportunity to present her case. He was careful to control the trial and maintain order in the courtroom while balancing her due process rights. Furthermore, the Appeals Court noted that the mother did not file a motion to recuse or otherwise suggest that the judge was biased during the proceedings. The absence of such a motion does not necessarily mean there was no bias, but it suggests that the judge’s statements were not perceived as prejudicial or biased at the time or in the context in which they were made.

*Practice Tip*: The impartiality of the trial judge in a care and protection proceeding is critical; there is no right to a trial by jury. Particularly in cases involving possible termination of parental rights, it is important the client leave the court feeling the proceeding was a fair and impartial one. The trial judge often already knows a lot about the case as a result of presiding over the 72-hour hearing, pretrial conferences, motions, and other pretrial hearings and proceedings, and there is always a risk that the judge may have formed an opinion about the outcome prior to trial. Although it will rarely be necessary, counsel must be prepared to file a motion requesting the judge to recuse themself if there is clear evidence that the judge:

* has conclusively decided a matter before the close of evidence;
* has a conflict of interest that prevents them from deciding the matter impartially; or
* is biased against the client as a result of information obtained from an extrajudicial source.

*See* SJC Rule 3:09. A motion to recuse should be brought “at the earliest moment after knowledge of the facts demonstrating the basis for [the judge’s] disqualification.” *Adoption of Norbert*, 83 Mass. App. Ct. 542, 545 (2013), *quoting from* *Demoulas v. Demoulas Super Mkts., Inc.*, 428 Mass. 543, 549 (1998). Otherwise, the request might be dismissed as a tactical move. *See* *In re Care and Protection Summons*, 437 Mass. 224, 239 (2002).

The standard for challenging a judge’s impartiality is high, and a motion to recuse should not be undertaken lightly. For more on impartiality and motions to recuse, see Chapter 13, Trial Preparation and Conduct, § 13.7.5, in MCLE’s Child Welfare Practice in Massachusetts.