

Adoption of Dimitri, _ Mass. App. Ct. _ (2019) (Mass. App. Ct. Rule 1:28), 2019-P-0220 (Massing, Sacks & Hand, JJ.)

Dimitri – which just came out on November 8 – is one of those rare, great Rule 1:28 cases that really should have been published. But you can still cite to it if you attach it to your brief or motion. (For now, cite it as: Adoption of Dimitri, _ Mass. App. Ct. _ (2019) (Mass. App. Ct. Rule 1:28). The volume and page numbers have not yet been set.)

The Juvenile Court found five-year-old Dimitri’s parents unfit, terminated their rights, and approved DCF’s plan for adoption by the foster parents. The panel held that the trial court’s subsidiary findings did not show unfitness. The court improperly relied on Dimitri’s bond to his foster parents, and its findings failed to show that the parents would be unable to provide him stability and consistency. Even better, the panel concluded that the trial court’s determination that DCF made reasonable efforts toward family reunification lacked support. The panel vacated the termination decrees and remanded for further proceedings.

DCF provided little help to the parents during the case. It gave them no opportunity to participate in family therapy and didn’t tell them about Dimitri’s medical or school appointments, despite their repeated requests for this information. Notably, the mother retained custody of Dimitri’s two sisters, and the trial judge expressly found that she was fit to raise them. The parents had visited consistently with Dimitri since his removal at the age of ten months, and they had demonstrated full compliance with their service plan tasks for more than a year. In finding the parents unfit, the trial court relied on their supposed lack of “insight” into Dimitri’s needs without explaining what sort of insight they lacked. This was especially problematic given the barriers DCF created to the parents’ acquiring such insight.

In terminating the parents’ rights, the trial court relied on several factors, including Dimitri’s bond to the foster parents. But because the panel knocked out as unsupported each of those factors other than bonding, it determined that the bonding factor was “decisive” for the judge. Dimitri at *4 (“This leaves factor (vii) as the only remaining factor in G.L. c. 210, § 3(c), that the judge determined to be applicable. Hence we think it can fairly be termed “decisive,” even though it was not the only factor relied upon.”). And because bonding was a decisive factor, the trial judge erred as a matter of law by failing to make the detailed findings required under § 3(c)(vii). The judge’s findings failed to detail *why* serious psychological harm would ensue by separating Dimitri from his foster family, *what means* to alleviate that harm had been considered, and *why* those means were determined to be inadequate. Id. (citing, *inter alia*, Adoption of Katharine, 42 Mass. App. Ct. 25, 30-31 (1997), and Adoption of Zoltan, 71 Mass. App. Ct. 185, 195-196 (2008)).

The panel also found error in the trial judge’s “wholesale adoption” of the testimony of DCF’s bonding expert without identifying specific statements by the expert upon which it relied. The panel pointed to gaps and equivocation in that expert’s testimony as to how reunification with the parents might affect Dimitri. The panel also noted the staleness of the expert’s information;

the record showed significant improvement in the relationship between Dimitri and his parents after the expert had evaluated Dimitri. (The panel also noted the fact that the parents' expert had observed 10 visits, while DCF's expert had only observed one. Id. at *5 n. 14)

Dimitri also has great reasonable efforts language:

Here, the judge determined that the department had made reasonable efforts to return Dimitri to his parents, but did not set forth the basis for his determination. No subsidiary findings that support that determination are readily apparent, but there are plainly others that undercut such a determination [including the foster mother's "counterproductive involvement in and control over visits between Dimitri and his parents" and the family therapist's refusal to help the mother]. The lack of an explanation or reconciliation of those findings leaves us unable to say that the determination was properly supported.

The unexplained finding and contrary evidence caused the panel to further lose faith in the trial court's ultimate decision:

The judge's unexplained finding that the department used reasonable efforts here causes us to question the judge's conclusions that both parents' unfitness "is likely to continue into the indefinite future" and that the child's best interests would be served by termination. In certain respects, at least, it is fair to say that the parents here were on an upward trajectory.

Termination reversed! The panel noted that either parent could raise the reasonable efforts issue on remand.

Congratulations to David Cohen, Staff Attorney, CAFL Appellate Unit, and Michael Penta, appellants' counsel in Dimitri.