*Adoption of Iliana*, 19-P-166, November 6, 2019 (Hand, J.) [[slip opinion](https://www.mass.gov/files/documents/2019/11/06/f19P0166.pdf)]

Summary by Katy Krywonis, CAFL Training Unit

This case addresses the statutory requirements for the admission of child sexual abuse hearsay in proceedings to terminate parental rights. The mother argued, inter alia, that the trial judge improperly prohibited her from presenting opposing expert testimony to challenge DCF’s evidence of the children’s unavailability to testify at trial and the reliability of their hearsay statements about their sexual abuse. The Appeals Court agreed and concluded that the trial judge misinterpreted the statute when she barred the mother’s experts from testifying because they were not “treating clinicians.” The Appeals Court concluded that this error prejudiced the mother; it struck the trial judge’s § 82 findings and vacated the decrees.

*Facts*: DCF filed care and protection petitions for Iliana and her half-sister, Susan, because of allegations that Iliana had been physically abused and neglected by the mother and Susan’s father. DCF was granted custody of the girls and placed them in foster care. While she was in foster care, Iliana told her therapist and her foster mother that she was sexually abused by Susan’s father and other men. Susan also told her foster parents and a trauma evaluator that her father sexually abused her. A doctor conducted forensic examinations of both girls.

Before trial, DCF moved to admit Iliana’s and Susan’s out-of-court statements about sexual abuse by the father pursuant to G.L. c. 233, § 82. The mother opposed the motion. The judge held an evidentiary hearing to determine the admissibility of the girls’ hearsay statements as required by § 82. At the start of the hearing, the judge instructed the parties that an expert witness must be, by statute, a treating clinician and advised them that she would not take expert testimony from a witness who hadn’t met, seen, evaluated, assessed, or treated the children.

During the § 82 hearing, DCF called a number of witnesses, including two experts – the doctor and the trauma evaluator. The mother sought to call two experts to rebut the testimony of DCF’s experts. The judge did not allow the mother’s experts to testify because they were not “treating clinicians.” The judge determined that Iliana’s and Susan’s statements satisfied the requirements of § 82 for admission at trial. She deemed the girls unavailable due to the traumatic effect testifying at trial would have on them and concluded that their statements were reliable.

The case proceeded to trial before the same judge. The judge’s § 82 findings were admitted as a trial exhibit. The mother again sought to call the expert she proffered at the earlier § 82 hearing to testify about the availability and reliability of Iliana’s hearsay statements. The judge did not allow the mother’s expert to testify at trial, again because she had never met Iliana and because Iliana’s statements were in evidence. The judge found the mother unfit and terminated her parental rights to both girls. The mother appealed.

*Discussion*: G.L. c. 233, § 82 is one of a trio of statutes creating exceptions to the hearsay rule for out-of-court statements made by a child, before they were ten years old, describing their sexual abuse. To be admissible in a termination proceeding, the hearsay must be offered as evidence of a material fact and be more probative on the point for which it is offered than any other evidence the proponent can reasonably procure; the person who heard the statement must testify; and the proponent of the hearsay must show that the child is unavailable to testify at trial as defined in § 82(b) and that the statement is reliable as defined in § 82(c). G.L. c. 233, § 82(a).

The statute requires a treating relationship between the expert and the child in order to establish that the child is unavailable to testify at trial and to establish that the child’s hearsay statement is reliable. Under § 82(b), a child is unavailable to testify if, as relevant here, testifying is likely to cause severe psychological or emotional trauma to the child, based on expert testimony from a *treating* mental health professional. G.L. c. 233, § 82(b)(5). Similarly, to determine reliability of the child’s out-of-court statement, the judge must consider, inter alia, the clarity of the statement, i.e. the child’s capacity to remember and give expression to the event, supported by expert testimony from a *treating* mental health professional. G.L. c. 233, § 82(c)(i).

But nothing in the statute requires that an opposing expert witness have any relationship with the child in order to challenge a claim that the child is unavailable to testify and/or that their hearsay statement is reliable. The Appeals Court explained that a judge may consider the relationship between the child and an opposing expert in assessing the weight of that expert’s testimony, but the absence of a relationship between the child and the opposing expert does not disqualify them from giving testimony. The Appeals Court noted that even though DCF’s evidence of Iliana’s and Susan’s unavailability and reliability was strong in this case, the Court could not conclude that the mother’s experts would have been ineffective at challenging it. The judge’s error was prejudicial to the mother because the girls’ hearsay statements were the only evidence that identified the father as their abuser, and without that evidence, the judge’s finding that the mother could not adequately protect them from the father was without sufficient support in the record. The Appeals Court acknowledged that the judge’s rulings raised due process concerns, but declined to address them. *See Iliana* at note 23.

However, the Appeals Court rejected the mother’s argument that the judge erred in admitting the girls’ hearsay statements that did not relate to their sexual abuse at trial because those statements were supported by other admissible evidence and so any error was harmless.

The Appeals Court also rejected the mother’s claim that the judge was biased by the testimony she heard at the pretrial § 82 hearing. It reasoned that the statute does not prohibit the same judge from presiding over both a § 82 hearing and the trial of the same case. In addition, the Appeals Court found no evidence of judicial bias in the record. Citing *Adoption of Norbert*, 83 Mass. App. Ct. 542 (2013), the Appeals Court noted that the mother did not move to recuse the judge, which suggests that she was not concerned about the judge’s bias until after an unfavorable decision was rendered.

*Practice note*: In cases involving allegations of sexual abuse, the child’s statements often appear in a myriad of documents, including 51A and 51B reports, family assessments and action plans, foster care review reports, and court investigator reports. Counsel opposing the admission of the hearsay must be vigilant in moving to strike the statements from each and every document in which they appear. If counsel fails to object to the admission of the hearsay in even one document, the objection is waived and the hearsay is admissible for all purposes. *See, e.g. Adoption of Sean*, 36 Mass. App. Ct. 261, 265 (1994).

The statutory requirements concerning a child’s unavailability and the reliability of their hearsay statements are the most frequently contested issues. For a more thorough discussion of proceedings to determine the admissibility of a child’s sexual abuse hearsay under G.L. c. 233, § 82 and G.L. c. 233, § 83 (governing the admissibility of child sexual abuse hearsay in care and protection adjudications and probate court child protection cases), counsel should read Chapter 8, § 8.2.2(i) in MCLE’s Child Welfare Practice in Massachusetts.

This case is also a good reminder that if the judge excludes your evidence, you need to make an offer of proof for the Appeals Court to evaluate whether the judge’s ruling may have prejudiced your client.