***Committee for Public Counsel Services***

***Children and Family Law Division***

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**APPELLATE BULLETIN**

To: CAFL Appellate Panel Members

cc: CAFL Trial Panel Members

CAFL Staff

Fr: Andrew Cohen, Director of Appellate Panel, CAFL Division

 Ann Narris, Staff Attorney, CAFL Division

 Sarah LoPresti, Staff Attorney, CAFL Division

Re: Administrative Matters

 Recent Unpublished Decisions

 Practice Tip: Google Scholar

Date: December 13, 2019

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**Administrative Matters**

1. E-Filing

For impounded cases (which include child welfare appeals), e-filing is voluntary for briefs, transcripts, etc., according to the Appeals Court. But CPCS requires it, and the Appeals Court really, really, really wants you to do it. So file your next briefs electronically. The Appeals Court and Tyler Technologies, the entity that runs the e-filing portal, will answer your questions and help you through your first (and continuing) adventures in e-filing. For technical assistance with the eFileMA.com portal (issues with registration, error messages, etc.), contact Tyler Technologies at (800) 297-5377. For questions about what e-filing code to select or why your submission was rejected, contact the Appeals Court e-filing hotline at (617) 725-8725. Below are links that show you how to e-file:

<https://www.mass.gov/guides/electronic-filing-at-the-appeals-court>

<https://www.mass.gov/files/documents/2016/12/vu/e-filing-quick-tips.pdf>

1. Single Justice Practice for Trial and Appellate Panel Members

Need help with a single justice petition? We have five new model petitions and memoranda of law available in Word format, focusing on problems at 72-hour hearings. We are happy to email them to you. We also have model single justice motions and other resources on our website (also in Word format), at <https://www.publiccounsel.net/cafl/professional/single-justice-practice/>. Perhaps best of all, we have a step-by-step guide for filing petitions both electronically and by hand, at:

<https://www.publiccounsel.net/cafl/wp-content/uploads/sites/7/Guide-to-SJ-Practice-11.6.18.pdf>

Trial and appellate panel members can contact Ann Narris with any questions or to request a model petition. She can be reached at anarris@publiccounsel.net. Staff attorneys should contact Ann O’Connor, Attorney-in-Charge of the CAFL Staff Appeals Unit, for assistance, at aoconnor@publiccounsel.net.

**Recent Unpublished Decisions**

This Bulletin fills in a few missing early 2018 Rule 1:28 cases; we’ll finish up 2018 in the next Bulletin in January, and then tackle the 2019 unpublished cases.

We don’t summarize all unpublished child welfare decisions; rather, we include only those with interesting facts and/or legal issues. Then we put the summaries in the Rule 1:28 Compendium, available on our website at: <https://www.publiccounsel.net/cafl/wp-content/uploads/sites/7/Compendium-of-unpublished-decisions-10-2019.pdf>.

If we left out one of your Rule 1:28 decisions, and it has a useful tidbit in it, please let us know.

We still see Rule 1:28 decisions cited incorrectly in briefs. Remember, if you cite to a Rule 1:28 decision, 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).** Please note that we’re using the docket numbers and dates of issuance below just to make it easier for you to find the decisions online.

Rule 1:28 decisions are available two ways:

(a) Lexis/Nexis: <https://www.lexisnexis.com/clients/macourts/>. Check off that you agree to the terms of usage, and click on “Begin Searching Opinions,” then under the heading “Sources” select “MA Appeals Court Unpublished.”  To find child welfare Rule 1:28 decisions, type in the “party name” box “adoption or care or custody or guardianship.” To find a specific case, enter the case name.

(b) Google Scholar: <https://scholar.google.com/>. This is great for finding specific cases. Check the box for “Massachusetts courts,” then type in the case name. The full Rule 1:28 decision may not be under the first entry, “Adoption of Zarek,” but under the second entry, “In re Adoption of Zarek.” Why? It’s a mystery.

Here are the 1:28 summaries:

1. Adoption of Zosha*,* 92 Mass. App. Ct. 1117 (2018) (Mass. App. Ct. Rule 1:28) (Meade, Shin, and Ditkoff)

Zosha is a cautionary tale about abandonment of the case and loss of counsel. The mother participated in a May 2015 72-hour hearing but then, from July through October 2015, lost contact with her counsel and her DCF social worker. Mother’s trial counsel moved to withdraw in October, informing the trial judge that she had no contact with Mother and that her telephone messages and letters had “gone unanswered.” (**Practice tip for trial lawyers**: as a general rule, *don’t do this* unless you are really without guidance before a trial or other important hearing. In Zosha, what important hearing could possibly have been held five months into the case that required counsel to have current guidance from the client? If you must withdraw based on lack of guidance from your client – perhaps your client’s last instructions were to seek guardianship of the child by maternal grandmother, but maternal grandmother has died or is no longer interested in the child – inform the court *only* that you lack guidance from the client and need to withdraw; do not offer details about the client’s disappearance and your failed efforts to locate her.) The court struck counsel and, in June 2016, terminated the mother’s rights.

On appeal, the mother argued that the trial judge violated her right to counsel. The panel disagreed, holding that the mother had abandoned the proceeding:

With respect to the withdrawal of counsel, it is plain that at that point the mother had abandoned the proceeding, justifying allowance of the motion. Despite leaving telephone messages and sending letters, counsel had been unable to speak to the mother for four months and did not know what position she wished to take in the litigation. That the mother was not communicating with DCF and continually missing visits with Zosha further illustrates that she had abandoned the proceeding.

The mother also argued that she lacked notice of the trial and could not be meaningfully heard, but again the panel was unimpressed:

The mother was plainly aware of these proceedings, as she was personally served with a summons and then appeared at two hearings and entered into a stipulation waiving her right to a temporary-custody hearing. Yet, although she knew that her parental rights were in peril, she failed to appear at later hearings and at both trials. Thus, unlike [Adoption of Zev, 73 Mass. App. Ct. 905 (2009)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017853293&pubNum=0000523&originatingDoc=Iad188d80dc3e11e7b393b8b5a0417f3d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and [Adoption of Jacqui, 80 Mass. App. Ct. 713 (2011)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026404103&pubNum=0000523&originatingDoc=Iad188d80dc3e11e7b393b8b5a0417f3d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), on which the mother relies, she had an opportunity to be meaningfully heard but failed to avail herself of it.

The panel affirmed the termination decree.

2. Adoption of Anne, 92 Mass. App. Ct. 1125 (2018) (Mass. App. Ct. Rule 1:28) (Meade, Sullivan, and Henry)

In this case, the mother argued (for the first time on appeal) that the judge’s involvement in prior CRA and termination cases involving the mother rendered the judge biased against her.

The panel disagreed for two reasons. First, the bias claim was untimely because it wasn’t promptly raised with the judge. If counsel believes that the judge is biased, she must move for recusal right away, not at the end of trial (or later). See Demoulas v. Demoulas Supermarkets, Ltd., 428 Mass. 543, 550 (1998). And while it isn’t *always* fatal to raise judicial bias for the first time on appeal, the reviewing court – as it did in Anne – will “take [the untimeliness] into consideration.” The panel noted that “the mother's failing to move for recusal prior to the trial and then raising claims of bias in this appeal is questionable.” Anne at \*1 n. 6. Second, a judge is not biased just because she decided prior cases involving, and against, a parent unless the judge (a) decides the current case based on extra-judicial information (that is, memories of the past case, rather than evidence properly admitted in the current case), or (b) retains impressions of the parent from the prior case that are so negative that they render fair judgment in the current case impossible. Id. (citing Liteky v. U.S., 510 U.S. 541, 551 (1994). In Anne, the judge did not rely on extrajudicial information, told the mother that he maintained an open mind, and in fact treated her in an unbiased manner.

3. Adoption of Nina, 93 Mass. App. Ct. 1108 (2018) (Mass. App. Ct. Rule 1:28) (Vuono, Kinder, and Henry)

On appeal, the mother argued that the trial judge impermissibly allowed the child to testify *in camera*, out of the presence of the parties and the lawyers. A social worker testified about the child’s clinical needs and trauma history *after* the judge decided to allow the *in camera* testimony. Additionally, the judge made no specific findings about the child’s likely trauma from testifying or why special accommodations were required.

Does this sound like myriad violations of Adoption of Roni, 56 Mass. App. Ct. 52 (2002)? Roni states that judges can permit children to testify with accommodations – including *in camera* testimony – only where the children would be traumatized by giving testimony in the “traditional” manner. Roni further holds that judges should issue findings explaining how the accommodation is narrowly tailored to avoid the trauma. We know that trial judges rarely comply with Roni. And one of the reasons they stray may be that the Appeals Court is disinclined to require compliance.

In Nina, the panel noted that specific findings about the harm from testifying would have been “far preferable,” but it declined to find error. Instead, the panel found that it was “implicit that the judge determined that the child would suffer trauma if she testified with the parties and the counsel present.” Nina at \*1 (citing Roni, 56 Mass. App. Ct. at 56-57). In other words, if judges don’t make the required explicit findings, they’ll be deemed to have made them implicitly. (I am deleting the explicit eye-roll GIF here, but it’s still in here . . . implicitly.)

**Practice tips for trial lawyers:** Despite Nina’s questionable logic, the case offers valuable lessons on how trial counsel can preserve (or not preserve, as the case may be) this issue for appellate review. According to the panel,

[b]efore the child testified, the mother was given the opportunity to propose questions for the judge to ask of the child.

In Nina, it is unclear whether the mother’s attorney did, in fact, propose any questions. But if you are trial counsel and a judge offers you the chance to submit questions to a child for *in camera* questioning, provide them, even if you think that the judge won’t ask them or will ask them differently. If all you do in this situation is object but fail to participate in the question-submission process, you lose the right to argue that the questioning was unfair.

According to the panel:

[a]fter the child testified, the judge provided an audio recording of the child’s testimony to the parties. The record does not indicate that the mother requested a further opportunity to propose additional questions for the child in light of the child’s testimony.

If the child testifies in chambers and you have follow-up questions, you must tell the judge and then promptly submit the questions. Again, you lose the opportunity to argue that you weren’t treated fairly if you don’t tell the judge, “The child said some things that call for further inquiry, and as a matter of due process I’m asking to submit follow-up questions.” Your written questions (initial questions and any follow-up questions) are a vital part of your offer of proof regarding how *in camera* questioning prejudiced your client. Otherwise, the Appeals Court has no idea what you would have asked the child during live testimony. The other half of your offer of proof is your guess as to what the child would have answered in response to the questions. That, too, must be shared with the trial judge.

The panel then drops a footnote that reveals another serious problem that mother’s trial counsel didn’t object to:

The judge allowed counsel the opportunity to listen to the child’s testimony immediately after the child testified. However, the quality of the recording was poor and so the judge resumed trial and made arrangements for the parties to receive copies of the audio. The trial transcript does not indicate how much, if any, of the recording counsel listened to before trial resumed. The mother’s counsel did not object to resuming trial before the parties could listen to the audio. Later, the mother’s counsel also did not object to proceeding with closing arguments even though the mother had not yet finished listening to the entire recording. The mother's counsel did not indicate that counsel herself did not listen to the audio, and mother's counsel referenced the child's testimony in her closing argument.

If the judge conducts an *in camera* hearing and you’re not in chambers, you need the transcripts or recordings before trial resumes, and then you must read them or listen to them *with your client*. If you don’t have time to read or listen to them, or the recordings aren’t clear, you must tell the judge that you aren’t ready to resume trial and that you need a continuance. If the judge won’t continue the trial, you must object to closing the evidence before you can read the transcripts or listen to a recording so that you can provide follow-up questions to the child.

Ultimately, the mother in Nina couldn’t show harm, because she was still able to rebut DCF’s adverse allegations and the judge didn’t rely on the child’s *in camera* testimony to terminate parental rights.

One more point. If you believe that real cross-examination of the child might affect the outcome of the case, don’t accept so readily the judge’s decision to hear from the child in chambers. Argue that a less drastic accommodation might be available. Ask for a court clinic evaluation about whether the child will, in fact, be traumatized by testifying with a more limited accommodation. Or ask the court to set up a closed-circuit monitor that can show real-time questioning. If the court denies your requests, participate in the *in camera* questioning to the extent permitted by the judge, make your offers of proof (see above), and object, object, object.

6. Adoption of Zarek, 93 Mass. App. Ct. 1110 (2018) (Mass. App. Ct. Rule 1:28)

(Sullivan, Blake, and Englander)

This case is notable primarily for the judge’s observations of Father’s hygiene. Father alleged that the trial judge improperly speculated as to the cause of his appearance and body odor. The panel disagreed and held that “[t]he trial judge was permitted to consider evidence of the father’s ability to care for his own basic medical needs, and to draw appropriate inferences as to the father’s ability to care for the child’s basic physical needs.”

**The take-away for trial lawyers?** Judges can make findings – and even an unfitness determination – based on observations of your client. Explain this to a parent client (or a potential third-party custodian or pre-adoptive resource) and urge him or her – politely – to be as clean and well-dressed for court as possible; not to fall asleep in court; and – most importantly – not to be rude or disrespectful to the judge or the other parties while in court. Judicial observations are fair game for all purposes!

This is delicate stuff, and it could strain any attorney-client relationship. Please call us if you’d like some assistance strategizing about it.

7. Adoption of Questa, 93 Mass. App. Ct. 1114 (2018) (Mass. App. Ct. Rule 1:28)
(Agnes, Massing, and Neyman)

Mother appealed the termination of her rights, arguing (among other things) that the trial judge improperly made scientific conclusions about Mother’s substance use without the benefit of expert testimony. Citing evidence of Mother’s long pattern of substance use and inability to maintain sobriety, the panel dismissed the argument that expert evidence was required to “prove that her substance abuse was predictive of future events.” That says it all. There’s no need for expert testimony to prove that a parent’s substance use renders her unfit long-term for purposes of termination (provided there is evidence that will support such an inference).

**Trial counsel**: don’t let this dissuade you from using an expert to prove your case one way or the other! Parents can still use expert testimony to show that they are fit – or may soon become fit – despite a history of substance use. And parties seeking to prove that the parents’ substance use renders them unfit long-term may still benefit from expert testimony.

8. Adoption of Tatum, 93 Mass. App. Ct. 1115 (2018) (Mass. App. Ct. Rule 1:28)

(Hanlon, Massing, and Henry)

This case has some guidance on when judges can draw an adverse inference regarding parents who no-show at trial. When the father failed to appear, his attorney represented that he had spoken to the father that morning by phone and the father was having transportation problems. The trial judge did not credit this explanation, drew an adverse inference against the father, and, based on this and other evidence, terminated his rights.

On appeal, the father argued that the trial judge abused her discretion by drawing an adverse inference against him. The panel disagreed. Quoting from Adoption of Talik, 92 Mass. App. Ct. 367, 371 (2017), the panel noted that an adverse inference is permissible when a no-show parent has notice of the court date and the inference is “fair and reasonable based on all the circumstantial evidence.” Here, an adverse inference wasn’t an abuse of discretion:

[T]he judge considered the father’s explanation of his failure to attend, but was not obligated to credit it. At the time of trial, the father had not visited the children for over two months, and met with his social worker only once after the children were removed for the second time. The judge could permissibly conclude from the father’s course of conduct that his repeated absences were due not to insufficient means of transportation but rather to neglect. The judge did not abuse her discretion by drawing a negative inference against the father for his failure to appear and testify.

Judges can therefore look to a parent’s pretrial interactions with the child and DCF to determine whether that parent’s failure to appear at trial is atypical and excusable (probably leading to a continuance) or part of a pattern of neglect and disinterest (probably leading to an adverse inference).

**Practice Tip – Google Scholar**

I’m sold on Google Scholar. It may not have the functionality of the expensive legal search engines, but it’s free and it’s great for quickly finding cases.

Let’s say you’ve read the *Adoption of Tatum* summary above, and you really want to find *Adoption of Talik*, the published case cited by the *Tatum* panel. Go to:

<https://scholar.google.com/>

Check off the box for “Massachusetts Courts” and type in “Adoption of Talik.” It will be the first case listed. Within *Talik*, all cited cases have hyperlinks. All footnotes are internally hyperlinked, so you can jump around the case easily.

Want to Shepardize *Talik*? Shepard’s is part of the LexisNexis family, so you can’t technically use it on Google Scholar, but Google Scholar has a button at the top left labeled “how cited.” Click it, and you’ll see every case that cites *Talik* and the proposition that it’s cited for. Nice!

Want to search for cases using terms? Go back to the Google Scholar main page, check “Massachusetts Courts” and type “adverse inference” into the search box. (Put the term in quotes to get the two words together; otherwise, you’ll be searching for cases that contain both words, not the term.) You can sort your search by date or by court. For example, searching by date produces *Adoption of Ophira*, a Rule 1:28 decision issued just last week, which cites *Talik* in a footnote.

Many of you have been using Google Scholar for years and have tips for effective searches. Send them to us, and we’ll include them in a later Bulletin.