*[Adoption of Yvonne](http://masscases.com/cases/app/99/99massappct574.html)*[, 99 Mass. App. Ct. 574 (2021)](http://masscases.com/cases/app/99/99massappct574.html)

Summary by Andrew Cohen, Director, CAFL Appellate Panel

The trial judge terminated the mother’s parental rights based primarily on domestic violence and anger management issues, and the Appeals Court affirmed. The Appeals Court’s decision touches on several issues that may arise in future cases, including: (1) the trial judge’s decision to strike the mother’s testimony after she failed to appear and complete her direct and cross; (2) the relevance of the mother’s conduct in the courthouse to the judge’s finding of unfitness; (3) the legal standard for the trial court’s evaluation of post-trial motions; and (4) the due process right to a timely trial.

*Parent’s failure to appear and complete her examination.* The mother was called as a witness by DCF and testified about the domestic violence she experienced. But she did not show up at subsequent trial dates to complete her examination by DCF or to be cross-examined, including by her own counsel. As a result, the judge sua sponte struck her testimony, to which no party objected. *Id*. at 578 & n. 9. The Appeals Court suggested that the judge could have handled this another way: “Before striking the mother’s testimony, the judge might have inquired whether the parties who were being deprived of their right to examine the mother would have preferred that the testimony remain on the record. A party witness, having seen that her testimony has gone badly, should not be empowered to remove damaging testimony from the record merely by depriving the adverse parties of their opportunity to examine her.” *Id*. at n. 9. The takeaway for counsel? If parents fail to complete their direct and cross, judges may strike their testimony, or, if the adverse parties wish, let it stand if the partial testimony went badly for the parent. (Presumably this should also hold true for DCF; if a social worker partially testifies but then retires, moves, or passes away, thereby preventing cross-examination, the adverse parties should be able to strike the partial testimony or let it stand, at their discretion.)

*The parent’s conduct in the courthouse.* The trial judge, in his findings, described the mother’s behavior in court as “loud and defiant” at the start of trial and noted that she attempted to jump over the fourth floor railing in the courthouse. The Appeals Court stated: “A parent’s behavior during trial and her ability to manage anger are relevant to parental fitness.” *Id*. at 580 (citing *Adoption of Querida*, 94 Mass. App. Ct. 771, 775-777 (2019). There are several takeaways for counsel on this point. First, recognize that trial can be extremely stressful for parents, particularly for those who have a trauma history or have a mental or physical disability. Consider whether your client needs special accommodations (such as a support person to sit with them in the court room, or frequent breaks to help manage their emotions) while testifying or even while watching. Some clients might benefit from taking notes during trial, or using a
“fidget toy.” Second, counsel must explain to the client that the judge can consider their behavior in the courtroom when evaluating their parental fitness. Where appropriate, consider presenting expert testimony to explain how the stress of trial may trigger adverse behaviors by the client that do not occur in other settings or situations.

*Legal Standard for Rule 60(b)(6) Motions.* After the judge’s decision, the mother filed a motion for new trial (properly construed by the judge as a motion for relief from judgment because it was filed more than 10 days after the decision). The judge denied the motion because the mother “failed to show by clear and convincing evidence that the circumstances in this case [were] so ‘extraordinary’ that the relief sought should be granted.” The Appeals Court held that this was the wrong legal standard; Rule 60(b)(6) movants do *not* need to show entitlement to relief by “clear and convincing evidence.” According to the Appeals Court,

[i]n deciding a rule 60(b)(6) motion, the judge may consider whether the movant has a “meritorious claim or defense,” “whether extraordinary circumstances warrant relief,” and whether granting the motion would affect “the substantial rights of the parties.” . . . [O]btaining relief under rule 60(b)(6) requires a showing of “extraordinary circumstances.” As difficult as it is to establish extraordinary circumstances warranting relief, doing so by a preponderance of the evidence provides a sufficient basis for the judge to exercise the discretion afforded under the catchall provision.

*Id*. at 583-584 (citations and quotations omitted). So Rule 60(b)(6) movants do *not* need to show anything by clear and convincing evidence; they must simply show that the circumstances are extraordinary (which is hard enough).

*Due Process Right to Timely Trial.* Finally, appellate counsel asserted that significant delays and interruptions during the proceedings violated the mother’s due process rights. These delays included a six-day trial held over six months and a six-year delay between initiation of the care and protection proceedings and the issuance of the judge’s findings of fact.  The Appeals Court concluded that the mother’s due process rights were not violated because (a) she did not show she was prejudiced by the delays, and (b) the delays were, in part, the result of the mother's​ own conduct.  *Id.* at 585. The takeaway? If there is a long delay before trial (or between trial dates or from the end of trial to the issuance of findings), and that delay is not attributable, even in part, to the client, argue that the client’s due process rights have been violated. But do not rest on that argument; you must show prejudice. That is, you must show *how* the client or their case has been negatively affected by the delay.