COMPENDIUM OF UNPUBLISHED CHILD WELFARE DECISIONS

2008-2024

Noteworthy Unpublished Massachusetts Child Welfare Decisions

By the CPCS/CAFL Appellate Panel Support Unit

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Last updated: May 2024

HOW TO USE THIS COMPENDIUM

The CAFL Appellate Panel Support Unit has written and assembled practice-driven summaries of unpublished child welfare decisions. We've organized them by topic (see Table of Contents, below). Some cases may be included in more than one section of the Compendium. At the start of each topic, we've identified *some* (but not all) published legal authority (statutes, cases, Rules of Appellate Procedure, etc.). Always start with published sources! We hope to update this Compendium annually.

Many of the decisions mentioned below are very interesting – so interesting, in fact, that we think they should have been published. Others are worth noting only for one small point, or even a line in a footnote that says something that no published case has said. We've included decisions in this Compendium of both types, because sometimes a case that speaks to one minor point is all you need to help you win.

CITING AN UNPUBLISHED DECISION IN YOUR CASE

Note: Under the Massachusetts Appeals Court Rules, unpublished decisions released before **July 1, 2020** should be cited as "Rule 1:28," and decisions released after should be cited "Rule 23.0."

An unpublished decision by the Appeals Court under Rule 23.0 (formerly rule 1:28) is issued by a three-judge panel, whereas published decisions are reviewed and approved by all justices on the Appeals Court. Rule 23.0 decisions may be cited for their persuasive value but not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n. 4 (2008). Under the Rule, you can only cite to unpublished decisions that post-date Chace (February 26, 2008). If you cite to a Rule 23.0 decision in your brief or motion, you must:

(a) attach a copy of the decision as an addendum,
(b) cite the page of the Appeals Court reporter that lists the decision and the year, and
(c) include a notation that the decision was issued pursuant to Rule 23.0.

Example: Care & Protection of Priscilla, 79 Mass. App. Ct. 1101 (2011) (Mass. App. Ct. Rule 1:28). [You do not need to cite the docket number, month, or day.]

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72-HOUR HEARING

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 119, § 24
G.L. c. 119, § 29C
Care & Protection of Robert, 408 Mass. 51 (1990)
Care & Protection of Manuel, 428 Mass. 527 (1998)
Care & Protection of Perry, 438 Mass. 1014 (2003)
Custody of Lori, 444 Mass. 316 (2005)
Care & Protection of Lillian, 455 Mass. 333 (2005)
Care & Protection of Sophie, 449 Mass. 100 (2007)
Care & Protection of Zita, 455 Mass. 272 (2009)
Care & Protection of Walt, 478 Mass. 212 (2017)

Adoption of Keating, 72 Mass. App. Ct. 1119 (2008) (Mass. App. Ct. Rule 1:28). The panel affirmed the termination of a father's parental rights primarily because he wasn't around at the start of the case and didn't make more of an effort to get involved. If you represent an appellee child, it is a good decision to cite if the parent in your case learns that the child has entered care but is too leisurely in his efforts to contact DCF or visit the child.

Notably, the panel affirmed the temporary custody order to DCF at the 72-hour hearing. Indeed, it is surprising that the panel addressed the issue at all. There has always been some debate about whether the Juvenile Court's decision at the 72-hour hearing stage is reviewable at the appeal of the final judgment or whether that decision is moot. The panel did not address the mootness issue (to the extent it was an issue at all), and instead decided the temporary custody decision on its merits. The panel noted the standard – the child is suffering from serious abuse or neglect and that immediate removal is necessary – and held that the Juvenile Court properly "removed" the child from father (who had never had custody to begin with). The "serious abuse or neglect" did not seem all that serious: the father allowed the child to remain with mother even though he knew the mother hfad a substance use disorder, and he had minimal contact with DCF once he had notice the child was in care. The panel held that the removal was proper because the father "d[id] not know enough" about the case to have custody. That is a pretty low threshold to uphold an emergency removal.

"ABUSE OF DISCRETION" MOTIONS

Adoption of Patience, 73 Mass. App. Ct. 1102 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/interlocutory relief").

ADOPTION PLANS

COMPETING PLANS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Adoption of Hugo, 428 Mass. 219 (1998)
Adoption of Dora, 52 Mass. App. Ct. 472 (2001)

Adoption of Chase (No. 1), 74 Mass. App. Ct. 1112 (2009) (Mass. App. Ct. Rule 1:28) (see further discussion at "findings/evenhanded analysis of the evidence").

The panel in this case reversed a termination decree because the trial court failed to consider recent favorable evidence about the father.

The panel could have stopped there, but instead it went on to address the judge's choice of plan, and held that the judge abused her discretion in choosing the maternal aunt and uncle's plan (they had been allowed to intervene) over the father's plan that paternal grandfather take the child. The judge failed to make an even-handed assessment of the plans:

> Here the judge consistently drew negative inferences from evidence concerning the paternal grandfather when the same, or worse, evidence pertained to the maternal aunt and uncle. For example, the judge concluded that paternal grandfather is physically and financially unable to care for the children. These conclusions represented an aggressively negative interpretation of the facts, without the assistance of expert testimony and contrary to the paternal grandfather's direct testimony and the fact that he is raising his own young children. At the same time however, the judge drew no negative inference from the fact that, at the time of trial, both the maternal aunt and uncle were unemployed. . . . The judge did not consider the fact that the department would not financially support adoption by the maternal aunt and uncle where it would with the paternal grandfather.

Don't you love the phrase "aggressively negative interpretation of the facts"? Use it liberally in your appeal! The panel also suggests that, in weighing competing plans, DCF's financial support of one resource (at least where both resources have financial problems) is a factor meriting consideration.

The Chase panel remanded to a different trial judge. This suggests that the panel believed this trial judge, on remand, would be unable to fairly weigh the evidence against father or give an even-handed assessment of the competing plans. If the trial judge in your case has exhibited similar "bias," consider asking for a remand to a different judge, citing Chase and Adoption of Titus, 73 Mass. App. Ct. 1128 (2009) (Mass. App. Ct. Rule 1:28), for support.

Adoption of Chad, 75 Mass. App. Ct. 1114 (2009) (Mass. App. Ct. Rule 1:28). In Chad, the Juvenile Court terminated father's rights and selected DCF's adoption plan (adoption by pre-adoptive parents, who were the caretakers at the time of trial) over father's competing plan (guardianship by paternal

grandmother). The panel affirmed the Juvenile Court's decree terminating the father's rights. But it vacated the court's approval of DCF's adoption plan, remanded for consideration of a new plan, and expressly allowed father to participate in the remand proceedings. Here, DCF's plan for adoption by the pre-adoptive parents fell through after trial. (The panel does not explain why it fell through or how this event was brought to its attention.) The panel held: "In view of the failure of the specific plan proposed for [the child], we consider it appropriate for the judge to evaluate once again the plan proposed by the father and any new plan prepared by the department[.]"

What is surprising here is that DCF seems to have "covered" itself in the event of disruption of the placement because its plan was for adoption by the pre-adoptive family or through recruitment. But in a footnote, the panel stated, "[d]espite the department's contention at oral argument that the plan was a general one, we view the plan approved by the judge at the time of trial to be adoption by the preadoptive parents."

In a competing plan case, if the placement chosen by the judge disrupts post-trial, Chad may be useful in obtaining a remand for "re-evaluation" of the "losing" plan even if DCF has specified "recruitment" as a back-up plan. On the other hand, if you represent a child and the child supports termination even if the placement disrupts, you should urge the court to "Chad-proof" its plan-approval findings. Such Chad-proofing language might look like this: "I have considered the possibility that the placement with the Child's current pre-adoptive family might disrupt after trial and that the Department may have to recruit a family. The Department has indicated that the Child's needs will be best served by a family that _____. I find that the Department's recruitment plan, even as a "back-up" to adoption by the current pre-adoptive parents, is preferable to X's competing plan, will better serve the Child's interests than will X's plan, and will serve the Child's best interests."

Adoption of Kiara, 76 Mass. App. Ct. 1111 (2010) (Mass. App. Ct. Rule 1:28). The trial court chose DCF's plan for adoption by the foster parents and rejected the mother's two competing kinship plans. According to the panel, "the trial judge . . . identified detrimental factors regarding the two kinship placement alternatives. Both of the families proposed by the mother were virtual strangers to Kiara, each having met Kiara only once before. Both kinship plans, as presented at trial, would have permitted frequent visits by the mother, allowing for a level of postadoption contact with the mother that the trial judge did not condone."

Kiara provides guidance to trial attorneys on two points. First, make sure your "competing plan" resource has as much contact with the child as possible from as early in the case as possible. If DCF is not facilitating such contact, pepper the judge with motions for visitation with the resource. Do not allow your resource to be a "virtual stranger" to the child. Second, if your resource is willing to give a parent plenty of post-adoption contact (which is often what makes the resource attractive to begin with), consider whether the judge sees that as positive or negative. If you believe that the judge would find such contact *not* to be in the child's best interests, urge the resource (with your client's permission) to either (a) permit very limited contact or (b) leave such contact up to the judge. Otherwise, as in Kiara, such openness might be held against the resource.

Adoption of Liz, 79 Mass. App. Ct. 1103 (2011) (Mass. App. Ct. Rule 1:28). In Liz, the panel upheld the Juvenile Court's choice of DCF's proposed adoption plan (a local foster family) over the father's proposed adoption plan (a relative in Puerto Rico). The case is important for trial practitioners because of

some language in footnote 5 about the Interstate Compact on the Placement of Children. Social services in Puerto Rico rejected the relatives in Puerto Rico because their home was too small. The relatives did not challenge the rejected homestudy, and the trial court held their "tepid interest" against them. The panel suggested that the trial court could properly take this into account. (There is no discussion of what such a challenge by the relatives would entail. An appeal within Puerto Rico social services? An appeal to a court? Not all "receiving states" have an appellate mechanism for rejected homestudies.). Accordingly, if you represent a parent or child who is proffering an out-of-state resource that has been rejected under the ICPC, you should urge the resource to appeal, if only to show the resource's serious and continued interest in the child.

In the same footnote, Liz suggests that the trial court could have chosen the father's plan and placed the child in Puerto Rico *despite* the rejected homestudy:

> It is no cause for concern that the home study based its recommendation, in part, on its conclusion that the father's relative's home had inadequate space to accommodate both Liz and her brother. . . . Indeed, the judge was clear that he meant to rely on the information contained in the report, but not its conclusions, explaining: "the home study comes into evidence, for whatever it says, with the recognition that the denial of this home study does not bar placement of the child in Puerto Rico if I find that to be in the child's best interest.' In any event, the judge did not place particular significance on the adequacy of space in the father's relative's home in reaching his conclusion as to Liz's best interests. He relied instead (as described above) on the many other advantages he identified as weighing in favor of placement with the preadoptive family, and the various disadvantages (other than adequacy of space) he viewed as associated with placing the child with the father's relative

Many trial courts are unclear about whether they can choose an adoption plan for a resource that has been rejected by the receiving state under the ICPC. Liz suggests – quite properly, in our view – that the court can make a placement or custody decision in the best interests of a child regardless of an out-of-state agency's decision about that placement.

Adoption of Zaria, 79 Mass. App. Ct. 1114 (2011) (Mass. App. Ct. Rule 1:28). I have not yet seen a child welfare decision, published or unpublished, where a panel explicitly slams a trial judge for being biased. But Zaria comes mighty close.

In Zaria, the child appealed the judge's decision approving DCF's adoption plan (adoption by pre-adoptive parents who had previously adopted the child's half-sibling) rather than the child's plan (guardianship by her long-term foster mother). The panel determined that the trial judge both abused his discretion and committed an error of law in determining that the DCF plan was in the child's best interests, vacated the decision, and remanded to a different judge.

The panel was particularly disturbed by the trial judge's findings regarding the testimony of the court investigator. The judge qualified her as an expert in bonding but then vituperatively discredited virtually all of her testimony. Judges are, of course, free to credit or discredit lay or expert testimony. But the judge in Zaria took it too far:

> The fact that the judge did not believe [the investigator] was manifest throughout his findings, but his findings border on a dislike that went beyond merely an appropriate determination of credibility and resulted, inappropriately, in the judge making extensive findings concerning [the investigator] both personally and professionally. This time and energy would have been better spent in findings directed to determining the child's best interests.

The judge was unfair to the investigator in other ways. DCF moved the child from her long-term foster home to its pre-adoptive family four days before trial. The judge faulted the investigator and discredited her report because she failed to interview the new family and observe the child in the new home. But the investigator was never given the opportunity to do so, because DCF refused to allow her access to the new home and pre-adoptive parents, and the judge (despite child's counsel's request) would not order DCF to give her such access.

The trial judge appeared to give dispositive weight to Zaria's placement with her half-brother, a child she had never met until four days before trial. The panel held that, while a sibling relationship is an important factor in determining the best interests of a child, it cannot be given dispositive weight. See Adoption of Hugo, 428 Mass. 219, 230-231 (1998) (even where siblings spent time together and expressed a desire to live together, sibling relationship is not dispositive). Giving it dispositive weight was an error of law.

The panel also called out DCF for its heavy-handed attempts to influence the judge's choice of placement, moving Zaria just four days before trial with an "unusually short transition period" consisting of just a few visits and no overnight visits. According to the panel,

> [this] process…illustrated the potential abuse of DCF's enormous inherent power to manipulate the evidence to achieve its own determinations and goals…. There was no clinical evaluation or an evaluation of any kind by DCF regarding the possibility of a bond between the child and [her former foster mother] or any harm the move could impose…. No visitation was allowed, an internal appeal was denied, and DCF prohibited the child's representative from evaluating her while in the [new pre-adoptive parents'] custody. [Citations omitted]

The panel went on to criticize the judge for relying exclusively on the "uncorroborated and self-serving testimony" of the pre-adoptive mother to find that the child was thriving in her custody after only a couple of weeks. This was particularly egregious because the judge, at the same time, discredited the testimony of the court investigator regarding the strong bond between the child and her former foster mother. The judge's weighing of testimony was therefore an abuse of discretion. What the panel had left of the judge's decision – favoring placement with a half-sibling above all else – was an error of law. The panel vacated the trial judge's decision and remanded the case to a different judge.

This case is very helpful for counsel opposing a placement that occurs on the eve of trial with minimal transition. It is also helpful to counsel if the trial judge has refused to credit testimony from an investigator, GAL or expert who has sought, but been denied, access to information bearing on the child's best interests. Finally, it gives ammunition to a request for remand to a different judge in a case where the trial judge appears to have been systematically biased in a particular party's favor.

Adoption of Herman, 81 Mass. App. Ct. 1109 (2012) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/post-trial motions").

Adoption of Lucia, 85 Mass. App. Ct. 1127 (2014) (Mass. App. Ct. Rule 1:28). In Lucia, the panel held that the Juvenile Court abused its discretion in choosing the DCF plan over the father's plan because the trial judge made several clearly erroneous findings and failed to make other important findings. Specifically, the trial court failed to make findings about the foster parents' ability to care for the child long-term, the viability of the foster parents' "succession plan" should they be unable to do so, and whether the number of biological and foster children in the foster parents' home impacted their ability to care for the subject child. The panel remanded for further findings on those issues. The panel rejected the father's argument that there should be a presumption that kinship adoption serves a child's best interests. The panel also declined to express any opinion about which plan actually served the child's best interests.

Adoption of Amanda, 87 Mass. App. Ct. 1138 (2015) (Mass. App. Ct. Rule 1:28). This is a great competing plan case. The Appeals Court emphasized the importance of the ages, preferences, and circumstances of older children when considering which plan is in their best interests. In Amanda, the older children, Amanda and Beth, argued that the judge erred in approving DCF's plan for adoption by their foster parents over their plan of placement with their maternal grandmother. The Appeals Court agreed:

> With respect to the best interests of children, at issue in determining the proper placement . . ., the judge was required to assess the significance of the fact that Amanda and Beth are unlikely to be, and oppose being, adopted. This is especially so when at trial . . . Amanda was eleven years old and Beth was ten years old, and on remand at least one of them will be old enough to block an unwanted adoption. [Citations omitted.]

The panel also noted the judge's failure to make findings on the girls' instability, lack of treatment, and academic deterioration while in DCF's custody. The panel further criticized DCF's position that the grandmother was an inappropriate placement because she had a fourteen-year-old outstanding warrant for resisting arrest; this, the panel suggested, should not be an absolute bar to consideration of her as a placement resource. As a result, the panel vacated the portions of the decrees approving DCF's proposed adoption plans and remanded for further proceedings on the choice of plan.

Adoption of Yolanda, 89 Mass. App. Ct. 1126 (2016) (Mass. App. Ct. Rule 1:28). In Yolanda, the judge terminated rights, but never linked his findings to the c. 210, § 3 factors. The panel found this to be problematic but harmless. In footnote 10 it stated:

> Despite our conclusion, we reiterate that '[o]rdinarily a judge should both reference the statutory requirements and explain their impact.' Custody of Kali, 439 Mass. 834, 845 (2003). This approach further clarifies the careful and thorough analysis that should be performed by a judge when such important rights are at stake, which promotes confidence and trust in the judicial system.

Another great quote! Use it whenever a judge's failure to make specific findings casts doubt on his or her "careful and thorough analysis," leading to a lack of "confidence and trust in the judicial system."

Yolanda was also a competing plan case. The mother asked for the DCF home finder files about the pre-adoptive parents, but the trial court refused to order the agency to turn them over. The panel found no abuse of discretion. The trial court had held a hearing on the motion and found that the mother's request was a "fishing expedition" to attack DCF's plan. In addition, there had been no "threshold showing by affidavit or sworn testimony" that there was something in the records warranting their release. The trial judge also found that the records weren't relevant or necessary to the mother's case.

Consider this a roadmap for requests for home finder files. Include an affidavit explaining what you think you'll find in them and how those records are relevant to the court's best-interests inquiry on the competing plans. That's the best – and perhaps the only – way to show harm from the failure to turn the records over.

But what if you don't know what's in the home finder files? What if you really *are* fishing and grasping at straws? Try a couple of arguments that go something like this:

- The court will surely run CORIs on any plan resources your client proposes; DCF may have already done so if you proffered that resource to DCF pre-trial. Moreover, DCF will search its records for your plan resource's history, if any, with DCF (even as a child). Why should *DCF* have more information on your competing plan resource than you have on DCF's plan resource? That's not fair. Why should the court have more information about *your* plan resource than about DCF's resource? That's even more unfair. I'm not sure this rises to the level of a due process violation, but if you utter the magic words "due process" and "fundamental fairness" a lot as you object to the judge's rulings, this will preserve the argument on appeal.

- Even more compelling, how can the court make a balanced best-interests determination when it has unequal information about the competing resources? Courts do get tipped on appeal if they fail to consider all relevant best-interests factors.

- If your fairness and best-interests arguments for turnover of the unredacted home finder records fail, you can ask for the files redacted of all identifying names, addresses, and social security and other numbers. This greatly diminishes the pre-adoptive parents' privacy concerns. Alternatively, ask for permission to review the records in chambers, without your client. You can promise that you will ask the judge to release to you only those (redacted) portions of the file that are truly relevant to the best-interests analysis. If even that fails, ask that *the judge* to review the home finder records in chambers. As a result, you may not know what's in them, but at least the judge will know, and that's almost as good. Most judges aren't shy about questioning adoption workers about CORI waivers for, and the DCF history of, pre-adoptive parents. If the judge refuses to order DCF to turn over the home finder records and instead gives you one of these second- or third-best alternatives, don't simply accept it. Object again, follow the court's instructions, and then renew your objection, explaining why the court's alternative wasn't satisfactory (assuming, of course, that it wasn't). This last part is your offer of proof about how you've been harmed by the order. Why must you jump through all of these hoops? Because if the record reflects that you agreed to the judge's alternative, failed to object to it, or failed to explain to the judge why the alternative was insufficient, you will have waived any objection to the court's orders.

Adoption of Desdemona, 90 Mass. App. Ct. 1106 (2016) (Mass. App. Ct. Rule 1:28). This competing plan case offers a valuable lesson for trial lawyers regarding issue preservation. At trial, father presented

paternal aunt and uncle (who were living in Puerto Rico at the time of trial) as his proposed adoptive resource for the children. Father argued on appeal that the trial judge erred in not allowing paternal aunt and uncle to testify by telephone from Puerto Rico. The panel ultimately held that this was not an abuse of the judge's discretion because (1) the father only put the paternal aunt and uncle on his proposed witness list the day before trial, and permitting them to be called as witnesses would prejudice the other parties; and (2) father's counsel informed the judge that the aunt and uncle had little to say by telephone, stating, "I don't really have anything to add that would be much different from what's in the adoption plans, but I have them available to be cross-examined if anyone would like to do so." (There was a third reason, too, but that one is contrary to the published case law. According to the panel, the judge did not have to examine the paternal aunt and uncle because he based his decision not on a true comparison of the two plans but on the "demonstrated benefits of keeping the children with a current placement that was working so well." In other words, the kids were doing well with the current foster parents so they shouldn't be moved. That reasoning is clearly wrong under Hugo and Dora. The trial court must balance the merits of all proposed plans and pick one. Courts cannot decide that the current placement wins because the kids are already there and doing well. That issue was addressed squarely in Hugo, which the panel did not cite and apparently did not read.)

Desdemona has two important takeaways for trial counsel. First, you must put your witnesses on the witness list in a timely fashion, especially if those witnesses are your competing plan resources. Second, it is not enough to ask the court to permit your witness to testify at trial via telephone and object if that request is denied; you must also make an offer of proof as to what the witness would testify about and how the failure to allow the witness to testify will prejudice the client. Absent that offer of proof, neither the trial court nor an appellate court can evaluate the necessity of the request or the harm from denying the request.

Adoption of Jacqueline, 90 Mass. App. Ct. 1114 (2016) (Mass. App. Ct. Rule 1:28). In Jacqueline, the father proffered his parents as an adoptive resource for the child. He argued that the trial court erred in failing to suspend the trial *sua sponte* in order to address concerns about his parents' home study. The trial judge, he argued, learned during cross-examination of the MSPCC evaluator that the home was faulty. Although the judge "quietly questioned the methodology and validity" of the home study, he did not continue the trial or take any steps to remediate the deficiencies of the home study.

The panel was not convinced. Despite the trial judge's concerns about the home study, he reasonably determined that he had sufficient evidence to find that DCF's adoption plan was best for the child. Here, as in Desdemona, the problem was issue preservation. The father did not ask for a continuance in order to conduct a more thorough home study. He also did not object to the trial concluding before the home study concerns were alleviated.

What does Jacqueline teach us? If you are proffering a competing plan, make sure before trial that you have solid evidence about your proposed resource. If more information is needed, ask for a continuance and object to trial beginning (or concluding) until you can get that information. Then, assuming the judge denies your motion to continue, make an offer of proof about what the missing evidence would be. The objection, the motion to continue, and the offer of proof are all needed in order to preserve the issue for appeal.

Adoption of Nell, 87 Mass. App. Ct. 1125 (2015) (Mass. App. Ct. Rule 1:28). In this case, the mother, who had intellectual disabilities, anxiety, PTSD, and other conditions, conceded her unfitness but appealed the termination of her parental rights. At trial, the mother proposed an arrangement where a family friend would be the guardian for both the mother and the child, who also had significant developmental delays. The judge found that the proposed caretaker was not capable of addressing the child's needs and instead approved DCF's recruitment plan for the child. The mother argued that the judge abused his discretion in failing to consider a plan to recruit a caretaker for both the mother and child, especially in light of the recognized bond that they shared.

This is a very clever argument! Unfortunately, it wasn't preserved. The panel held that the judge did not abuse his discretion because the mother never requested that the judge consider a plan other than the specific one she proposed. Although a judge *can* fashion a plan different from one proposed by any party, a judge is not *required* to address every possible arrangement for the child. If a parent wants a judge to consider alternative plans, the parent must propose such plans at trial.

Adoption of Maisie, 94 Mass. App. Ct. 1117 (2019) (Mass. App. Ct. Rule 1:28) (see discussion at "guardianship").

SUFFICIENCY OF PLAN

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 210, § 3(c)
Adoption of Stuart, 39 Mass. App. Ct. 380 (1995)
Adoption of Gabrielle, 39 Mass. App. Ct. 484 (1995)
Adoption of Lars, 46 Mass. App. Ct. 30 (1999)
Adoption of Dora, 52 Mass. App. Ct. 472 (2001)
Adoption of Thea, 78 Mass. App. Ct. 818 (2011)

Adoption of Maeve, 72 Mass. App. Ct. 1109 (2008) (Mass. App. Ct. Rule 1:28), is a good reminder of the importance of preserving the record. Challenges to the sufficiency of an adoption plan must be raised at trial, or at least raised in the trial court by a post-trial motion:

> [Appellant-father's] sole argument on appeal is that the department's adoption plan was not sufficiently detailed to permit the trial judge properly to evaluate its suitability and that the trial judge did not appropriately assess the adoption plan. James raised no objection below to the adoption plan submitted by the department and raises this issue for the first time on appeal. Therefore, his challenge to the plan is waived. See Adoption of Leland, 65 Mass. App. Ct. 580, 588 (2006).

Nevertheless, the panel goes on to address the challenge on the merits. It had no merits, but the panel does a good job summarizing the case law on sufficiency of an adoption plan:

> Even were we to address his argument, James would not prevail. Pursuant to G. L. c. 210, § 3(c), in addition to considering the issue of parental unfitness, the judge must consider

> the adoption plan proposed by the department before terminating parental rights. See *Adoption of Vito*, 431 Mass. 550, 568 n.28 (2000). 'The judge's obligation to 'consider' a plan involves much more than simply examining it. The judge must perform a 'careful evaluation of the suitability' of the plan and must 'meaningfully . . . evaluate' what is proposed to be done for the child.' *Adoption of Dora*, 52 Mass. App. Ct. 472, 475 (2001), quoting from *Adoption of Lars*, 46 Mass. App. Ct. 30, 31 (1998), S. C., 413 Mass. 1106 (2000). 'If the plan is not adequate, the judge may reject it and deny [the department's] petition.' *Adoption of Dora*, supra. See *Adoption of Vito*, supra at 568. Accordingly, both this court and the Supreme Judicial Court have recognized that a decree under G. L. c. 210, § 3(c), may issue even if a specific adoptive family has not been identified, as long as the adoption plan provides sufficient "information with respect to the 'prospective adoptive parents and their family environment so that the judge may properly evaluate the suitability of the department's proposal.'" Id. at 568 n.28, quoting from *Care & Protection of Three Minors*, 392 Mass. 704, 717 (1984).
>
> Here, the adoption plan identified a specific family as the adoptive placement for Maeve; noted the bond that had developed between Maeve and the preadoptive parents; detailed Maeve's developmental needs as well as her medical needs; and found that these needs are being met by the preadoptive parents.

Adoption of Richard, 77 Mass. App. Ct. 1103 (2010) (Mass. App. Ct. Rule 1:28). Adoption plans need not specify adoption as the goal, they need not be in writing, and they only need "some detail" about the proposed home for the child. Any missing detail in a written plan can be remedied by testimony from the adoption worker. That's why this case is interesting. In Richard, the DCF adoption plans were little more than expressions of goals and stated that adoption assessments would be undertaken for the children. There was no record information on the characteristics of recruited adoptive families who would be capable of meeting the particular needs of the children, individually or together. Accordingly, there were no plans which meaningfully could be evaluated, and the panel was "constrained to remand for further proceedings and findings on this issue."

How nice! This means that DCF's adoption plan must provide some information about the child's actual needs and the type of home needed to meet those needs. A non-particularized recruitment plan is insufficient. And, needless to say, a plan to come up with a plan isn't good enough either.

Adoption of Gareth, 89 Mass. App. Ct. 1114 (2016) (see discussion at "appellate procedure/post-trial motions").

Adoption of Quest, 92 Mass. App. Ct. 1110 (2017) (Mass. App. Ct. Rule 1:28). Be careful what you agree to in the name of expediency!

In Quest, Mother no-showed for trial. The DCF ongoing and adoption workers testified and the adoption plan was offered in evidence. The judge terminated Mother's rights and continued the case for further hearing on post-adoption contact. Two months later, Mother appeared, moved to vacate the termination decree, and requested a new trial; according to Mother, she had been prevented from attending trial by an abusive partner. The judge allowed Mother's motion.

At the retrial, Mother's counsel agreed that the judge could consider the testimony of both DCF social workers from the original trial on the issue of post-adoption contact. DCF's recruitment adoption plan was not offered in evidence. At the conclusion of the retrial, the judge terminated Mother's rights and found that DCF's adoption plan was in Quest's best interests. In her findings, the judge acknowledged DCF's failure to enter its adoption plan in evidence at the retrial, but stated that "she was taking judicial notice from the original trial that the department's plan was adoption by recruitment."

On appeal, Mother argued (among other things) that DCF never offered an adoption plan at the retrial, and, therefore, the court erred in determining that termination served the child's best interests. The panel agreed – partially – noting that the "adoption plan entered in evidence in the original trial was not a matter of which judicial notice could be taken." But the panel held that Mother failed to preserve this issue by not objecting to the absence of a plan at the retrial. (This reasoning is dubious, at best. A plan is part of DCF's affirmative proof that adoption serves the child's best interests, and it is mandated by statute. A parent shouldn't be required to object to the lack of a plan any more than a parent should be required to object to DCF's failure to prove unfitness.) Further – and more importantly – the panel held that, in any event, Mother was not prejudiced by the judge's consideration of a plan that wasn't in evidence because counsel had agreed to the admission in evidence of the DCF social workers' testimony from the prior trial, and that prior testimony included discussion of DCF's plan of adoption by recruitment.

Adoption of Dara, 94 Mass. App. Ct. 1106 (2018) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/outside the record").

APPELLATE PROCEDURE

ADEQUATE BRIEFING

Adoption of Wilhelmina, 75 Mass. App. Ct. 1111 (2009) (Mass. App. Ct. Rule 1:28). Wilhelmina does not offer much, but the last footnote is a reminder about the importance of fully briefing issues you care about:

> FN2. In response to a question raised by the court during oral argument, the father's attorney indicated that the father's due process rights were also violated by the decision of the trial judge to allow the mother's attorney to be present during [the father's] trial. In his brief, this argument is not included in the "Issues Presented on Appeal," as required by Mass. R. A. P. 16(a)(2). "The appellate court need not pass upon questions or issues not argued in the brief." Mass. R. A. P. 16(a)(4) . . . The argument is inadequately discussed in the brief and "does not assist the court with meaningful citation of authority and cannot be said to rise to the level of acceptable appellate argument." *Larson v. Larson*, 30 Mass. App. Ct. 418, 428 (1991).

Because the issue was inadequately addressed, the panel did not address it. Accordingly, if you have a viable issue, include it in your "Issues Presented" and fully flesh it out in your brief. (I am *not* saying that, in this case, the due process argument was viable and should have been more fully fleshed out – it may have been a toss-off argument.) Don't rely on any argument that you haven't fully briefed.

CHANGE OF POSITION ON APPEAL

Adoption of Yancy, 86 Mass. App. Ct. 1118 (2014) (Mass. App. Ct. Rule 1:28). This case is interesting only because of DCF's positional flip-flop on appeal. At trial, DCF argued that the parental rights of both mother and father should be terminated. The trial court disagreed and gave the father custody. On appeal, DCF changed position and supported the judge's decision.

DCF does not like it when children change positions on appeal. Why? Because, when this happens, it usually means that the children no longer support DCF's position. DCF even files the occasional motion to strike a child's brief on this basis. But here it's DCF that flip-flopped. If you represent a child who has changed position on appeal and DCF moves to strike your brief, Yancy would be a good case to cite in you opposition.

DISMISSAL OF APPEAL

Adoption of Maura, 89 Mass. App. Ct. 1101 (2016) (Mass. App. Ct. Rule 1:28). This case is noteworthy because of footnote 2, which suggests a preference of the Appeals Court for how counsel should move to dismiss an appeal. In Maura, the mother filed a motion to withdraw her appeal following the filing of briefs and panel assignment. The panel denied her motion without prejudice and directed her to re-file her request as a "stipulation of dismissal with prejudice signed by all parties." Because the mother did not comply, the panel decided the appeal.

Maura suggests that, once a panel is assigned to the case, a party seeking to dismiss his or her appeal should get all parties to sign a stipulation of dismissal with prejudice. (Of course, this procedure might just have been the preference of this panel – Cohen, Meade, and Agnes – and the chief of that panel has since retired. Counsel might also be able to file a "motion to dismiss appeal with prejudice.")

Adoption of Ulon, 75 Mass. App. Ct. 1103 (2009) (Mass. App. Ct. Rule 1:28) (see further discussion at: right to counsel). In a footnote, the panel explains that, even though the parties may agree there was error below, the panel judges must "review the matter and satisfy [themselves] that an error occurred." Accordingly, in those rare circumstances where DCF agrees that remand is a foregone conclusion and briefing and/or argument are unnecessary, the parties cannot simply "drop" a docketed appeal. Rather, they must present an agreed-to motion to dismiss or a stipulation for dismissal to the panel and allow it to choose whether to dismiss the appeal or decide it.

INTERLOCUTORY RELIEF

Adoption of Patience, 73 Mass. App. Ct. 1102 (2009) (Mass. App. Ct. Rule 1:28), offers one tip to trial lawyers and one to appellate lawyers. On the trial side, the case highlights the importance of truthfulness in filling out homestudy applications. In Patience, DCF removed a child from paternal aunt after 15 months of good care when it learned that the aunt had lied in the homestudy about her own DSS history as a child, her adoption after years in care, her psychiatric hospitalizations as a teenager, and her delinquency charges (which were continued without a finding and then dismissed). Mother filed an "abuse of discretion" motion asking the Juvenile Court to return the child, which the Court denied. On appeal, the panel was clearly critical of the short shrift DCF gave the child's best interests when it hastily removed her. Nevertheless, it held that the decision to remove the child was not an abuse of discretion. (I'm left

with the impression that, had the panel reviewed the matter de novo, it might have reversed; however, as we all know, the "abuse of discretion" standard is very hard to meet.) The lesson for trial lawyers: if you are supporting your client's friend or relative as a foster/pre-adoptive placement, that person had best be truthful on the homestudy application, even regarding juvenile matters that, in other contexts, would be considered stale or private.

For appellate lawyers, Patience has a procedural lesson. The Juvenile Court denied mother's abuse of discretion motion at the same time it denied the aunt's guardianship petition and chose DCF's adoption plan (recruitment) over the mother's plan of guardianship by the aunt. The Court's denial of the guardianship petition and choice of plan are each "final" orders, and appealable as such to an Appeals Court panel. The Juvenile Court's denial of the abuse of discretion motion, however, is generally considered an interlocutory ruling, appealable only to a single justice. DCF on appeal argued that the mother could not bring before the panel her appeal of the Juvenile Court's denial of her abuse of discretion motion. The panel disagreed, and noted that, under the circumstances of this case, where the abuse of discretion motion was denied at the same time as the final judgments, the appeal of the motion was properly before the panel. This case is worth citing, therefore, if you want the panel to review an interlocutory ruling (*i.e.*, on placement or visitation) that the trial court made at or near the time of the termination or other final judgment.

LATE DOCKETING

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Mass. R. App. P. 10(c) (2019)

Adoption of Ferris, 90 Mass. App. Ct. 1111 (2016) (Mass. App. Ct. Rule 1:28). The mother appealed the dismissal of her appeal for failure to timely docket. Interestingly, the panel addressed the merits of the appeal and suggested that it would *always* do so in our cases absent specific findings showing the parent's inexcusable neglect:

> Although the propriety of dismissal is what brings this case before us, the mother, [DCF], and the child have fully briefed the merits of the appeal from the decree. In view of the mother's right to the effective assistance of counsel, see Care & Protection of Stephen, 401 Mass. 144, 148-149 (1987), and the absence of specific and detailed findings indicating that the mother's failure to timely docket her appeal was due solely to her own inexcusable neglect and not that of her attorney, we vacate the order dismissing the appeal "in order that so vital a matter for parent[ ] and child shall not fail of a review here on the merits." Custody of a Minor (No. 3), 16 Mass. App. Ct. 998, 999-1000 (1983).

The panel affirmed the termination decree after consideration of the underlying merits. If your appeal is from the dismissal of an appeal based on a late notice of appeal or late docketing (or other procedural problem), (a) cite Ferris in support of an argument that the panel should address the underlying merits, and (b) fully brief the merits, not just the propriety of the dismissal of the appeal.

K.C.C. vs. C.D., 95 Mass. App. Ct. 1109 (2019) (Mass. App. Ct. Rule 1:28), is a stark illustration of the obligations of trial and appellate counsel to communicate with each other about assembly of the record.

A plaintiff filed a complaint in equity to establish paternity in the Probate and Family Court. The judge granted summary judgment for the defendants, and the plaintiff appealed. The plaintiff's trial counsel *and* appellate counsel had both filed appearances and were listed on the docket. The register's office sent the notice of assembly of the record *only* to trial counsel. When trial counsel received the notice, she assumed appellate counsel had it as well and did not notify her. Appellate counsel did not learn that the record had been assembled until one day after the deadline to enter the appeal.

Appellate counsel moved to enter the appeal late, but a single justice denied the motion. On appeal from that decision, the plaintiff argued that the failure of the register's office to send the notice of assembly to his appellate counsel constituted "good cause" for his late filing. The panel disagreed, noting that while it would have been "preferable" if the register's office had notified all counsel of record, the single justice did not err in concluding that "trial counsel's failure to communicate receipt of the notice of assembly to appellate counsel is not sufficient reason to warrant a finding of excusable neglect."

The panel did not reach the merits of the case.

The takeaway for trial counsel? Trial counsel *must* let appellate counsel know that he or she received a notice of record assembly. Don't assume that appellate counsel received the notice, even if appellate counsel has filed an appearance. In fact, trial counsel should *immediately* send appellate counsel *everything* issued by the trial court or clerk's office after the appeal is filed. The consequences for failure to do so can be dire.

The takeaway for appellate counsel? Appellate counsel should tell trial counsel to let them know ASAP if they receive *any* mail from a clerk's office. Appellate counsel should also consider sending a letter to the trial court clerk's office asking the clerk to send them notice of assembly directly. Is this really necessary if appellate counsel has filed a notice of appearance? In most cases, no. But K.C.C. shows us that the belt and suspenders approach can't hurt.

MOOTNESS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Care & Protection of Erin, 443 Mass. 567 (2005)
In re F.C., 479 Mass. 1029 (2018) (case not moot because "a person who has been wrongfully committed or treated involuntarily has 'a surviving interest in establishing that the orders were not lawfully issued, thereby, to a limited extent, removing a stigma from his name and record.'")

Care & Protection of Nadil, 74 Mass. App. Ct. 1126 (2009) (Mass. App. Ct. Rule 1:28). Nadil has an interesting conclusion regarding children who have turned 18 during the pendency of an appeal of a permanent custody decree:

> During this appeal, Nadil reached his eighteenth birthday, and his appeal is, therefore, moot. See Care & Protection of Erin, 443 Mass. 567, 568, 573 (2005); G. L. c. 119, § 26. . . . Nadil's appeal is dismissed, not on the merits, but because it is moot.

This means, for all practical purposes, that parents have no means to challenge an unfitness finding regarding a 17-year-old child. Does it matter? After all, at 18 the child can (theoretically) live wherever he or she wants. On the other hand, an unfitness finding is a "stain" that stays with the parent forever. Further, although Adoption of Zita, 455 Mass. 272 (2009), states that findings regarding one child are not admissible in a later trial regarding another child, many judges admit them anyway. (In addition, the Mass. Guide to Evidence suggests – incorrectly – that prior findings involving a different child are admissible in a later proceeding.) If an unfitness finding was based on improper or insufficient evidence, shouldn't the parent have some recourse to an appellate court to review it and "undo" the damage? Moreover, if the child is mentally ill or developmentally delayed and is subject to guardianship proceedings at his or her 18th birthday, the petitioning agency may use the parent's unfitness finding to beat back any attempt by the parent to prevent guardianship of the child. It seems unlikely that a parent can convince a Probate Court judge that she is capable of caring for a cognitively-limited 18-year-old because the Juvenile Court's unfitness finding regarding her 17-year-old is now "moot." The Appeals Court does not address any of these arguments in Nadil.

Note that the trial court in Nadil had not terminated parental rights; Nadil was in DCF's permanent custody. Nadil is silent as to what happens to a termination decree upon the child's 18th birthday. But the Appeals Court did not make us wait long for some kind of answer . . .

Adoption of Karina, 74 Mass. App. Ct. 1126 (2009) (Mass. App. Ct. Rule 1:28). A footnote in Karina – a case in which a father's parental rights were terminated as to six children – answers the "mootness" question left open by Nadil. The result appears to be the same, only the panel stated that it would not address the issue for "jurisdictional" reasons:

> FN2. There are six children in the family. Because the three oldest children have reached the age of eighteen, there remains jurisdiction only over the youngest children (Karina, Mary, and Sarah). G. L. c. 119, § 24. See Adoption of Peggy, 436 Mass. 690, 696 (2002).

Although the panel did not mention this issue further, the footnote suggests that it affirmed the termination as to the three younger children and did not address the termination as the older three (for lack of jurisdiction to do so).

There has never been any doubt that the Juvenile Court lacks jurisdiction to terminate rights to "children" over the age of 18. But this is the first time an appellate court has suggested that it lacks jurisdiction to *review* a termination decree once a child turns 18. This is even more problematic than the Court's ruling in Nadil that a permanent custody adjudication is moot and unreviewable when the child turns 18. Termination "survives" a child's 18th birthday in one important way; parents whose rights have been involuntarily terminated as to one child may lose the right to have DCF make reasonable efforts toward reunification as to siblings of that child. G.L. c. 119, § 29C. Massachusetts' DCF never goes that route, but the agencies in other states do so regularly. Accordingly, even if the 18-year-old immediately returns home to the "terminated" parent, that parent still has an interest in appellate review of an improperly-entered termination decree. It is unclear whether the panel in Karina was presented with this argument.

Care & Protection of Zella, 82 Mass. App. Ct. 1102 (2012) (Mass. App. Ct. Rule 1:28). In this case, all the parties agreed that the trial court's finding of unfitness against the father was not supported by the evidence. However, DCF argued that the case was moot because the child was living with her father in New Jersey and the mother and father had obtained joint legal custody of the child through a proceeding in New Jersey. The panel disagreed: "As it is unclear what, if any, effect the erroneous finding may have on the proceedings in New Jersey, we decline to hold that the matter is moot." The panel reversed the trial court's orders and dismissed the care and protection proceedings.

Good! A panel finally recognized that an unfitness finding might have relevance in another proceeding, even one in another state. Zella is a great decision to cite if your appeal has similar facts. Ask that the judgment be vacated/reversed; dismissal of the appeal as moot may not serve your client's long-term interests. Zella also provides a nice response to the nonsense of Nadil and Karina.

OUTSIDE THE RECORD

Guardianship of Killian, 79 Mass. App. Ct. 1130 (2011) (Mass. App. Ct. Rule 1:28). For those attorneys regularly arguing child welfare appeals before the Appeals Court, it will come as no surprise that the panels are increasingly willing to consider information outside the appellate record to ensure that children's best interests are protected. In this case, a Probate and Family Court judge vacated a temporary guardianship and returned custody of Killian to his mother. The mother had been in a relationship with a man who had physically abused Killian, but the judge credited her testimony that she no longer had contact with him. After the decision, the former guardians (the child's grandparents) and the child moved to reopen the evidence, claiming that they had observed the abusive man at the mother's home. The judge was "disturbed" by this and stated that if, in fact, the man was present at the home, "that changes this case significantly." Despite making this comment, the judge refused to hold an evidentiary hearing on the motion to reopen. The trial court docket sheet noted that there were affidavits submitted by the grandparents and the child detailing the mother's contact with the abusive man, but the record wasn't clear if the judge ever saw the affidavits, and they were not included in the appellate record. The grandparents and child appealed the judge's refusal to reopen the evidence.

The issue should have been deemed waived: there was no evidence the judge had considered the affidavits and they weren't in the record, so technically there was nothing for the panel to review. But when children's safety is at issue, panels are much, much more flexible. In a footnote, the panel said:

> FN7 It may be that the petitioners and the child never brought the affidavits to the judge's attention; in other circumstances, we might have found that the issue was not sufficiently presented to the judge below and therefore was waived. However, given the judge's acknowledged concern for this child's safety, we decline to do so here.

The panel vacated the order denying the motion to reopen the evidence and remanded the case just "to be sure" that the judge "has the benefit of all of the facts in deciding whether to reopen the evidence or reconsider his decision."

Killian is thus a good case to cite in support of a motion to enlarge the record on appeal or some other procedural motion to permit an appellant (or appellee) to argue evidence that wasn't before the trial court, particularly if it bears on child safety.

Adoption of Dara, 94 Mass. App. Ct. 1106 (2018) (Mass. App. Ct. Rule 1:28). Are all post-trial changes in placement – including approvals and denials of adoption and guardianship applications – fair game at oral argument? Dara suggests that they are.

On appeal, the mother argued that the adoption plan was not sufficiently detailed. The plan didn't identify a specific adoptive family, but the panel noted that it didn't need to. See Adoption of Dora, 42 Mass. App. Ct. 472, 47 (2001). DCF's adoption plan for the children stated that DCF would seek a home that would keep the siblings together. By trial, the foster parents had expressed an interest in adopting but had not yet completed the assessment process. Because they had expressed this interest, the trial judge properly made findings about the children's bond to the foster parents and comfort in the home. All of that was in the record.

But then . . . in a footnote, the panel mentioned that, during oral argument, counsel for DCF stated that the foster family had since been approved as an adoptive resource. The footnote suggests that the panel found this type of update permissible under current case law. See Dara at fn. 8 (citing Custody of Deborah, 33 Mass. App. Ct. 913, 913-914 (1992) (although developments after termination trial are not reviewed on appeal, it is vital for counsel to inform appellate court as to issues which may make appeal moot), and Adoption of Terrence, 57 Mass. App. Ct. 832, 840-41 (2003)).

What do we do with such a footnote? I think we run with it. If you can make an argument that post-trial factual developments either (a) moot the trial court's decision on an issue, or (b) moot the adverse party's argument on an issue, feel free to do so either at oral argument or in a Rule 16(l) letter. Be prepared to cite to Dara's footnote 8 (and Deborah and Terrence) to show the panel that you are not improperly arguing facts outside the record.

Adoption of Ophira, 96 Mass. App. Ct. 1111 (2019) (Mass. App. Ct. Rule 1:28). There are two minor points of interest in Ophira. First, "current" unfitness means the end of trial (or close of evidence). The mother's appellate attorney argued that the judge did not adequately focus on the mother's recent sobriety. But the panel pointed out in its decision, "as the mother acknowledged at oral argument, the judge's ultimate finding that she was not fit to regain custody of Ophira *as of the end of the trial* is difficult to challenge." (emphasis added). So "current" means as of the end of trial, not earlier. See also Adoption of Linus, 73 Mass. App. Ct. 813, 821 (2009) (parents not currently unfit: "from February, 2006, *through the end of trial* in August, 2007, they had housing suitable for the two boys.") (emphasis added).

And second, appellate counsel for the child must always know – and be prepared to tell the panel – about the child's current placement: "At our request, Ophira's lawyer provided an update at oral argument that Ophira currently was placed with the maternal great-aunt." Don't *volunteer* this kind of outside-the-record information to the panel (unless it's clear on the docket; the panel can take notice of the contents of the trial court's docket. See Jarosz v. Palmer, 436 Mass. 526, 530 (2002)). But know it, just in case the panel asks.

POST-TRIAL MOTIONS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Adoption of Scott, 59 Mass. App. Ct. 274 (2003)
Adoption of Edgar, 67 Mass. App. Ct. 368 (2006) (holding that trial court properly granted DCF's motion for reconsideration of post-adoption visitation order)
Adoption of Cesar, 67 Mass. App. Ct. 708 (2006) (holding that trial court improperly refused to re-open evidence to consider post-trial changes)
Adoption of Nate, 69 Mass. App. Ct. 371 (2007)
Adoption of Rory, 80 Mass. App. Ct. 465 (2011) (granting motion for relief from judgment based on denial of due process)
Adoption of Ulrich, 94 Mass. App. Ct. 668 (2018) (addressing the procedure for filing a post-docketing motion to stay the appeal/for leave to file a motion for post-judgment relief in the trial court)

Adoption of Eddie, 72 Mass. App. Ct. 1109 (2008) (Mass. App. Ct. Rule 1:28) (see discussion at "post-judgment contact").

Adoption of Joshua, 72 Mass. App. Ct. 1117 (2008) (Mass. App. Ct. Rule 1:28), reminds us that challenges to trial judges' denials of post-trial motions face long odds. In Joshua, the appellant-mother argued that the trial judge should have reopened the evidence to permit her to conduct further testing and evaluation. The panel was not swayed:

> [T]he judge's decision to deny the mother's motion to reopen the evidence to conduct a psychological and parenting evaluation was not an abuse of his discretion as alleged by the mother. Posttrial motions to reopen the evidence will only be allowed in 'extraordinary circumstances.' Adoption of Nate, 69 Mass. App. Ct. 371, 376 (2007), quoting from Adoption of Scott, 59 Mass. App. Ct. 274, 277 (2003). Unlike the decision to admit a posttrial psychological evaluation in Petition of Worcester Children's Friend Society to Dispense with Consent to Adoption, 9 Mass. App. Ct. 594 (1980), the mother here made no offer of proof that the results would have affected the judge's findings or that she had been unable to seek an independent evaluation prior to or during trial. *Id.* at 600-601.

Joshua makes clear that post-trial motions must be accompanied by detailed offers of proof. Such proof will generally be the actual documents that would be admitted at the post-trial hearing (or should have been offered or admitted at trial), affidavits from witnesses as to the substance of their testimony at the hearing, or evaluations that would be presented at the hearing. Counsel must also explain in the post-trial motion how the evidence in the offer of proof would change the outcome of the case. In some cases, counsel may need to explain why the evidence was not, or could not have been, offered at trial.

Adoption of Zol, 78 Mass. App. Ct. 1115 (2010) (Mass. App. Ct. Rule 1:28). Zol, like Joshua, makes it painfully clear that it is very hard to tip a trial judge's denial of a motion for post-trial relief. After terminating mother's rights, the trial judge ordered a clinical evaluation regarding post-termination and post-adoption visitation. The clinician found a strong bond between mother and child and recommended generous visitation, but the judge only ordered two visits per year. The mother filed a motion for new trial

or to reopen the evidence, arguing that the evidence of parental unfitness was stale, the mother's unfitness was temporary, and the evaluation (which the judge did not read) recommended more frequent visitation. The trial court held that the motion did not present "extraordinary circumstances" warranting a new trial or reopening the evidence and denied the motion. Mother appealed.

The panel affirmed, noting that it reviews a trial judge's denial of a motion for new trial for abuse of discretion. Here, although the evidence of unfitness dated from six months or more before the trial, there were some ongoing problems such as unsanitary conditions and mother's continued involvement with the violent father. Accordingly, despite mother's pre- and post-trial improvements, the panel could not find that the judge abused her discretion in denying the motion. The panel also held that the order for two visits per year, despite the recommendation for more visits in the evaluation, was not an abuse of discretion.

"Extraordinary circumstances" and "abuse of discretion" are hard standards to meet, especially where they intersect. That is, the judge, in ruling on a motion for new trial, for relief from judgment, or to reopen the evidence, has discretion to determine whether extraordinary circumstances exist. The panel distinguished Adoption of Cesar, 67 Mass. App. Ct. 708, 716 (2006), by noting that extraordinary circumstances existed in that case because "all problems leading to care and protection [were] resolved" at the time of the motion. In Zol, not all problems had been resolved, although what remained was pretty minor. Perhaps a *de novo* review might have led to a remand, but the bar is much higher for an abuse of discretion review, and the panel could not find that denial of the motion was an abuse of discretion.

One baffling element to Zol, however, is the panel's holding that the judge did not abuse her discretion in denying the request for more visits even though she failed to consider the evaluation that she, herself, ordered. (See footnote 9). If the judge considered the evaluation but determined that it did not establish extraordinary circumstances, such a determination would be hard to question on appeal. But how can it *not* be an abuse of discretion for a judge to decide that an evaluation doesn't raise extraordinary circumstances when she never even read it? Aren't judges at least required to *read* evidentiary submissions? As the King sings in the musical The King and I, it "is a puzzlement."

Adoption of Liam, 80 Mass. App. Ct. 1101 (2011) (Mass. App. Ct. Rule 1:28). Just because a parent is unfit does not mean that a child's best interests are served by termination. The problem with that principle has always been finding good cases to illustrate it. Liam is such a case. It is also a helpful case if parent and child both seek reunification and the parent has made late progress in getting his or her act together.

In Liam, the mother and child appealed the termination of mother's parental rights and the denial of their joint motion to vacate the decree. They argued that while mother could not be reunited with the child at the time of trial, termination was not in the child's best interests and was premature. They further argued that the judge erred in denying the motion to vacate without a hearing given the mother's changed post-trial circumstances.

The panel affirmed the trial judge's decision that the mother was unfit at the time of trial. But it reversed the denial of the motion to vacate, vacated the termination decree, and remanded the matter for further proceedings to determine whether termination remained in the child's best interests. The panel cited several "unusual circumstances" that led to this "rare" disposition: (1) this was not a case of "continuous unceasing unfitness" by mother, but rather one where the mother had shown herself unable to sustain long-

term stability; (2) the mother and child shared a significant emotional relationship, and continued contact and visitation by the mother was found to be in the child's best interests; (3) the child was placed with his maternal aunt who, although willing to adopt, had given no indication that adoption or termination was a matter of urgency; (4) there was no evidence that returning the child to the mother would be disruptive to him or that the parties would not work together to effectuate a smooth transition; and (5) the evidence of post-termination changes in the mother's circumstances included affidavits from "neutral" persons (an employer and a social worker).

While these circumstances may be "unusual," they aren't rare. Liam is helpful if several of these factors are present in your case and there is evidence that the parent can currently parent the child. Note that the panel, on its own initiative, asked the parties for memoranda "on the procedural issues connected with obtaining factual information concerning Liam's current best interests and the mother's fitness." In other words, the panel wanted current information not in the appellate record. DCF failed to provide it, and the panel noted this failure. Liam, at n. 3. The takeaway for attorneys? If the panel wants it, provide it. But don't offer information outside the record at oral argument unless so requested.

Adoption of Herman, 81 Mass. App. Ct. 1109 (2012) (Mass. App. Ct. Rule 1:28). In Herman, the trial judge chose the adoption plan supported by mother and DCF (adoption by maternal grandmother in New Jersey) over the child's plan (adoption by long-term foster parents). The child's request for a stay was denied by the trial court but granted by a single justice of the Appeals Court. A year later, the child moved to reopen the evidence in the trial court because the court hadn't yet issued findings. The court denied the motion to reopen. The trial judge waited an additional six months (totaling 18 months after judgment) to issue findings.

The child appealed the denial of the motion to reopen. The panel in Herman vacated the order placing the child with the grandmother. The panel was concerned that so much time had passed between the termination decree and the issuance of findings that circumstances might have changed dramatically. For example, the child was two at the time of trial and had lived with his foster family since he was six months old. By the time the trial judge issued her findings, the child was four and still with the foster family. The panel noted, "moving a child at two years old is different than moving him at four." Id.

While the remand order was couched in terms of "exploration" and "inquiry" into new developments since trial, the panel also suggested that the trial judge erred in weighing the two plans. The trial judge had failed to consider the grandmother's listing on DCF's Registry of Alleged Perpetrators. The trial judge had also given too much weight to grandmother's New Jersey ICPC homestudy that failed to adequately explore and explain the criminal record of the grandmother's youngest son. A second homestudy was ordered but "apparently nothing came of it." The panel suggested that this, too, "might be worthy of exploration."

Kudos to child's trial counsel (whose actions are not mentioned in the decision) for preserving the *status quo* following trial. Had trial counsel not aggressively sought a stay pending appeal, the child would have been moved to New Jersey and the outcome of the appeal might have been different. As Herman illustrates, zealous post-trial advocacy can make or break a case.

The takeaway? If the judge in your case has not issued findings for a year or more after the termination decree, and new circumstances – or just the passage of time – raise questions about whether the judge's

order still serves the child's best interests, Herman may help your effort to reopen the evidence. Needless to say, it will be easier to convince a trial judge to reopen the evidence, or to convince a panel to remand for more evidence, if the "passage of time" evidence concerns the choice of adoptive/guardianship resource rather than a parent's fitness.

Adoption of Irving, 83 Mass. App. Ct. 1118 (2013) (Mass. App. Ct. Rule 1:28). In this case, the father appealed the termination decree and the single justice's denial of his motion for leave to move for relief from judgment. The panel affirmed both orders.

Two aspects of Irving are noteworthy. In the middle of trial, the father moved for Indigent Court Costs Act funds for a homestudy of the father's parents and sister. The trial judge insisted that the motion be heard in open court rather than *ex parte*. The father argued on appeal that this forced him to reveal his trial strategy to DCF. The panel held that the judge handled the motion appropriately for three reasons. Two of these reasons make sense: first, by the middle of trial, all parties already knew the father's strategy and that the father wanted homestudy funds; and second, the court didn't need the homestudies because it already had enough evidence to evaluate the father's placement resources. Fair enough.

But the final reason – "[t]he plain language of G.L. c. 261 only requires a hearing; it does not require an ex parte hearing" – sets a dangerous precedent (thankfully blunted by the fact that Rule 1:28 decisions are not binding in any other proceeding). Commonwealth v. Dotson, 402 Mass. 185 (1988), requires that, in criminal cases, courts hear most motions for funds *ex parte*: "Prosecutors serve neither the judicial process nor the interests of justice by impeding the indigent defendant's efforts to obtain funds pursuant to G. L. c. 261, § 27C. We take this opportunity to state that the prosecution has no proper role to play in a defendant's motion for defense funds unless the judge requests the prosecution's participation." Id. at 187. Historically, we have assumed that Dotson applies to care and protection cases as well, and that DCF has no role in a motion for funds. But, as noted above, the panel in Irving disagreed. In addition, it observed in a footnote that "[Dotson] has not been extended to care and protection proceedings." This reasoning could be troubling if adopted by the juvenile courts in our cases.

The father also claimed that the single justice erred in denying his motion for leave to seek relief from judgment in the trial court. In support of his motion, the father argued that Annie Dookhan tested and certified the drug sample underlying his most recent criminal conviction. The father asserted that if a lower court were to vacate his conviction, then much of the judge's factual findings as to his unfitness would be unsubstantiated. The panel disagreed, noting that even without the tainted conviction there was overwhelming evidence of father's criminal record, history of substance abuse, and lack of demonstrated interest in the child that rendered him unfit. The takeaway on this point? A "Dookhan" motion for relief from judgment may be viable in our cases, but relief from judgment will only be granted if, absent the tainted conviction, there was insufficient evidence of parental unfitness.

Custody of Catherine, 86 Mass. App. Ct. 1124 (2014) (Mass. App. Ct. Rule 1:28). After trial, the judge gave permanent custody of two children to the mother, found the father unfit, but did not terminate his rights. Three months later, after the father was arrested and charged with parental kidnapping, DCF moved for reconsideration under Mass. R. Civ. P. 60(b)(2) based on newly discovered evidence. The trial court scheduled a hearing for three months after that (for a total of six months after the initial custody order), and terminated the father's rights at that hearing.

The father argued that DCF was required to wait six months after the initial custody order and petition for review and redetermination under G.L. c. 119, § 26(c). The panel disagreed, stating, "we do not read the six-month repose period for care and protection proceedings to apply to termination proceedings." It is unclear what this statement actually means. Does it mean that other statutory provisions in chapter 119 don't apply to termination proceedings? We are left to guess.

The panel went on to state that "although the text of the rule does not refer to motions for reconsideration or to reopen the evidence, DCF's motions, in substance, were properly considered under rule 60(b)(2)." That is, no matter what a post-trial motion is titled, it is really a Rule 60(b) motion and should be construed as such. This makes sense; it is almost impossible for any of the parties to file timely post-trial motions under Rules 52 or 59. Only the one-year deadline in 60(b) is practicable.

In a footnote, the panel noted that, even if it were error for the trial court to reopen the evidence (or grant relief from judgment), the error was harmless, because the hearing took place six months after the initial custody order. That would have satisfied G.L. c. 119, § 26(b).

Adoption of Danielle, 88 Mass. App. Ct. 1116 (2015) (Mass. App. Ct. Rule 1:28) (see further discussion at discussion at "findings/child-specific analysis"). This case has an extraordinarily complicated procedural history, most of which is of no interest to casual readers. Worth noting, however, is the panel's willingness to bifurcate the appeal as to each child (without any party making such a request), and its recognition that the change in one of the children's circumstances warranted a Rule 60(b) hearing as to that child only.

In Danielle, the mother of two girls (ages 16 and 11) appealed the trial court's approval of the DCF adoption plans. After trial, the older girl's placement disrupted and she no longer wanted to be adopted. The mother asked the Appeals Court single justice for leave to file a 60(b) motion based on the older child's changed circumstances. The single justice denied her request because staying the appeal would prejudice the younger child who wanted to be adopted. The panel concluded that the single justice did not abuse her discretion because concern about the younger child was warranted. But given the panel's affirmance of all aspects of the younger child's case, delay for that child was no longer a problem. Accordingly, it stayed the appeal relating to the older child and granted the mother leave to file her 60(b) motion within 10 days of the decision. The panel ordered the juvenile court to act on the motion within 45 days, and the panel retained jurisdiction over the appeal.

Danielle suggests that siblings' different positions and interests may call for child-specific orders from the panel – that is, a de facto bifurcation of the appeals. If one child wants speedy permanency but the other wants an evidentiary hearing on the disposition, the plan, or visits, counsel should consider asking the panel to grant independent relief for each child. In that way, neither child will be prejudiced, and the matters can be disposed of more quickly.

Adoption of Abraham, 89 Mass. App. Ct. 1101 (2016) (Mass. App. Ct. Rule 1:28). After trial, the judge adjudicated the child in need of care and protection but did not terminate parental rights. Later, DCF filed a "motion to present additional evidence," arguing that the parents had committed perjury at trial. The DCF motion did not reference a particular rule. The judge reopened the evidence and terminated parental rights. The father appealed.

The panel held that DCF's motion could be analogized to a motion for relief from judgment under Rule 60(b)(3), which allows relief from judgment on the basis of "fraud . . . misrepresentation, or other misconduct," or to a motion for new trial under Rule 59, which allows relief from judgment based on newly discovered evidence which by due diligence could not have been discovered before or during trial. DCF alleged, and the judge explicitly found, that the mother and father gave false testimony about their relationship throughout the trial, and the testimony had influenced the judge's original decision. A trial judge's decision to reopen evidence can only be set aside upon a "clear showing of an abuse of discretion." See Pina v. McGill Dev. Corp., 388 Mass. 159, 166 (1983). There was no abuse of discretion here.

The panel also disagreed with the father's argument that the judge erred in admitting evidence of the father's relapse at the reopened trial. The father failed to object to the evidence at trial, and therefore it was properly admitted for all purposes. The panel affirmed the termination decree.

Adoption of Enoch, 89 Mass. App. Ct. 1109 (2016) (Mass. App. Ct. Rule 1:28). The mother and children appealed from the trial court's termination of mother's rights and its denial of their Rule 60(b)(6) motion to vacate the termination decree. Only the latter appeal is of note. The Rule 60(b)(6) motion was based on DCF's lack of definite placement plans for the children; as a result, according to the appellants, the decrees provided "neither stability nor permanency[.]" The panel disagreed and concluded that the trial judge did not abuse his discretion in denying the motion. According to the panel, a Rule 60(b) motion is not the appropriate mechanism to address a lack of progress by DCF in implementing a permanency plan; the proper procedure is to address the issue at a permanency hearing under G. L. c. 119, § 29B.

Adoption of Gareth, 89 Mass. App. Ct. 1114 (2016) (Mass. App. Ct. Rule 1:28). Judges have broad discretion to revisit judgments based on pre-trial incidents that weren't raised at trial. In Gareth, after a 16-day trial, the judge found the mother currently unfit but declined to terminate her rights because DCF's plan was not in the best interests of the child. However, one month before the close of trial, the mother attacked her disabled sister and got into a fight with police. (DCF didn't know about this incident at the time of trial.) When DCF brought the incident to the judge's attention, the judge reopened the evidence and terminated mother's rights.

The panel held that this was permissible:

> We have previously recognized that the trial record in these types of actions can be reopened when circumstances warrant it. Given the seriousness of the new incident and the overriding importance of determining the best interests of children based on current circumstances, the judge committed no abuse of discretion or other error of law in reopening the proceedings here. (Citations omitted)

The takeaway? If DCF misses something bad about a parent at trial but discovers it later, that bad information is fair game for a motion to reopen the evidence. The traditional rule for motions to reopen based on newly-discovered evidence – if the "new" evidence was discoverable before trial with reasonable diligence, the movant is out of luck – doesn't seem to apply. Clearly, the juvenile court doesn't have to wait for a review and redetermination to revisit an earlier adjudication.

Does Gareth apply if the information is *favorable* to the parent? I don't see why not. If you learn after trial about a favorable, significant, pre-trial event, consider filing a motion to reopen the evidence along

with an affidavit explaining how the event (a) escaped your attention prior to trial, and (b) bears on the best interests of the child. Cite to Gareth; it's worth a try.

M.S-H. v. A.L., 95 Mass. App. Ct. 1123 (2019) (Mass. App. Ct. Rule 1:28). In this case, the mother sought to vacate an open adoption agreement in the Probate and Family Court. During a colloquy, the judge

> determined that the mother's consent to the agreement was knowing and voluntary. See Adoption of John, [53 Mass. App. Ct. 431, 435 (2001)] ("What is required is that the judge make an appropriate inquiry to establish that the parent's consent was knowing and voluntary"). During the colloquy, the mother informed the judge that she understood the terms of the agreement, that she found the terms reasonable and fair, that she had an opportunity to consult with her attorney, and that she had signed the agreement freely and voluntarily. There was no evidence of mental insufficiency or intoxication at the time of consent. See id. at 435-436.

Later, the mother testified at an evidentiary hearing on her motion for reconsideration that she did not sign the agreement voluntarily. According to the mother, her attorney coerced her into doing so by telling her that, if she didn't, she would never see her child again.

The judge credited the mother's representations made during the colloquy and discredited her testimony given at the evidentiary hearing. In support of her claim, the mother submitted text messages between herself and her attorney. Although the panel did not recite the contents of the text messages, it noted that the messages "do not paint trial counsel in a flattering light." Nonetheless, it found that they did not compel a finding of coercion. The attorney had advised the mother that she would not win if she went to trial and that she had a better chance of establishing visits if she entered into an open adoption agreement. According to the panel, since the record did not include the transcripts from relevant pretrial hearings, there was no evidence before it that the attorney's advice was faulty.

There are two takeaways here. First, an open adoption agreement is not involuntary (or the product of coercion) just because the parent's attorney described the agreement as the only way for the parent to obtain visitation. Second, if appellate counsel is attempting to show that trial counsel coerced or misled the parent into signing by incorrectly describing the client's chances of success, appellate counsel must include evidence showing that the parent did, in fact, have a chance of success.

Adoption of Yancey, 89 Mass. App. Ct. 1133 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/ineffective assistance of counsel").

Adoption of Cassius, 93 Mass. App. Ct. 1120 (2018) (Mass. App. Ct. Rule 1:28) (see discussion at "ineffective assistance of counsel").

STAY PENDING APPEAL

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Mass. R. App. P. 6 (2019)
Adoption of Duval, 46 Mass. App. Ct. 916 (1999) (holding that stays pending appeal of termination decrees out of the juvenile court require a showing of a meritorious issue)
Commonwealth v. Montgomery, 53 Mass. App. Ct. 350 (2001)
Adoption of Ulrich, 94 Mass. App. Ct. 668 (2018) (discussing procedure for filing a post-docketing motion with the single justice seeking to stay the appeal and leave to file a post-judgment motion in the trial court)

Adoption of Major, 93 Mass. App. Ct. 1123 (2018) (Mass. App. Ct. Rule 1:28). The parents filed Rule 60(b) motions for relief from judgment, including affidavits from the parents showing that the children's adoptive placements disrupted, the circumstances in the parents' home had improved, and they had successfully been raising another child. The trial judge denied the motions, and the parents appealed. The panel affirmed.

According to the panel, the motion judge was not required to credit these "self-serving affidavits," especially in the absence of evidence that the parents could meet the children's special needs. The lesson? Where possible, attach more than just parent affidavits in support of a 60(b) motions. Attach other documentary evidence, such as school records, medical records, pictures, brochures describing services, and/or affidavits from fact witnesses or experts. Parent affidavits, by themselves, are almost never enough.

Adoption of Herman, 81 Mass. App. Ct. 1109 (2012) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/post-trial motions").

TIMELY APPEAL

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 119, § 27 (30-day deadline to file appeal of permanent custody adjudication)
G.L. c. 231, § 118 (30-day deadline to file interlocutory appeal to single justice of Appeals Court)
Mass. R. App. P. 4 (2019)
Adoption of Donald, 44 Mass. App. Ct. 857 (1998) (holding that termination of parental rights appeals fall not under G.L. c. 119, § 27 but under Rule 4, and the 30 days specified in the Rule can be enlarged by court order)

Adoption of Vincenzo, 73 Mass. App. Ct. 1106 (2008) (Mass. App. Ct. Rule 1:28). The mother in Vincenzo was found unfit after an initial phase of trial but did not appeal. Then, less than three months later, the judge terminated her rights at what appears to have been a second phase of trial, and she did appeal. The panel, at footnote 4, held that this was sufficient for the mother to challenge the original unfitness finding:

> We decline to adopt the department's approach that the mother's failure to object below 'to the evidence presented by the Department, and [to] contest the premise that she was unfit,' precludes our consideration of her unfitness on appeal. Whether to terminate parental rights is a two-step process: (1) 'a determination that the parent is currently unfit,' and (2) 'a determination that termination is in the best interests of the child.' *Adoption of Imelda,* 72 Mass. App. Ct. 354, 360 (2008). In the present case, the judge found the mother unfit on June 29, 2007, and determined that the mother's rights should be terminated on September 13, 2007. The mother was not required to appeal from the June 29, 2007, finding in order 'to preserve [her] right[] to appeal the finding of unfitness when [her] parental rights were terminated.' *Adoption of Gillian,* 63 Mass. App. Ct. 398, 402 n.4 (2005).

Counsel should not assume that this footnote means that a later appeal permits challenges to all previous unfitness findings (that is, at prior care and protection trials). The panel probably means only that, where the court intends for a termination trial to take place in two parts (unfitness and "best interests"/choice of plan), a timely appeal after the conclusion of the second part is sufficient to preserve the right to appeal the initial unfitness determination.

Adoption of Samira, 81 Mass. App. Ct. 1138 (2012) (Mass. App. Ct. Rule 1:28). What is "good cause" for an appellate court to extend the time period for filing a notice of appeal? Samira tells us what "good cause" is *not*: drug use. The mother (who was not present at trial) waited eight months from the denial of her motion for new trial/amendment of judgment before filing a notice of appeal. In the interim, the child was adopted. The only reason proffered by the mother for the delay was that she had a drug problem. The single justice granted mother leave to file a late notice of appeal. The child and DCF appealed. The panel reversed, holding that this did not furnish "good cause" under Mass. R. App. P. 14(b).

Adoption of Camille, 91 Mass. App. Ct. 1110 (2017) (Mass. App. Ct. Rule 1:28). Camille is an appeal from the dismissal of Mother's appeal of a decree terminating her parental rights. Mother failed to file an affidavit of indigency (presumably in support of her motion for appointment of appellate counsel and her motion for fees and costs) for several months after filing her timely notice of appeal. The delay was caused by her out-of-state incarceration and problems with mail at the facility. (Mother's trial counsel had filed a detailed and uncontroverted affidavit outlining the reasons for the delay.) Nevertheless, the children moved to dismiss the appeal, and the judge dismissed it for failure to prosecute. On appeal, DCF jumped on board and argued that the judge properly dismissed the appeal because the delay prejudiced the children's right to "stability." DCF also argued that the court properly dismissed the appeal because it lacked merit.

The Appeals Court disagreed. Section 27B of G.L. c. 261 (the Indigent Court Costs Act) provides that, "[u]pon *or* after commencing . . . any civil, criminal or juvenile proceeding or appeal in any court, . . . any party *may* file with the clerk an affidavit of indigency [in support of a motion for fees and costs.]" (Emphasis in opinion, added to statute). Accordingly, a contemporaneous filing of an affidavit of indigency is not required – the statute does not use the word "shall" – when filing a notice of appeal. In addition, parents have a due process right to the care and custody of their children that cannot be impinged upon without due process, and due process includes the right to be heard in a meaningful manner. The trial judge's action here deprived Mother of an opportunity to be heard on appeal in a meaningful manner. Finally, the trial judge reasoned that Mother had not shown excusable neglect with respect to her affidavit

of indigency. The panel held that this was an abuse of discretion. Mother's counsel's uncontroverted affidavit laid out many reasons why the delay was attributable to factors beyond Mother's control.

The panel vacated the order dismissing the appeal. In a footnote, it refused to address DCF's argument that the appeal lacked merit: "[I]t would be difficult to [express an opinion on the merits of the appeal] as the mother's motion for appellate counsel and production of a transcript and other materials necessary to decide such an appeal was denied." Well said! How could the panel assess the merits of the appeal without a transcript and without counsel's arguments on Mother's behalf?

This is a great decision for many reasons, and it offers several practice pointers for parents' and children's counsel. For trial attorneys, it's always best practice (and the most efficient use of your time) to have your client sign both the notice of appeal and an affidavit of indigency (in support of the motion for appointment of appellate counsel and motion for fees and costs) at the same time. If you can't file your client's affidavit of indigency along with your various appellate motions, submit an affidavit of counsel explaining the delay. For children's counsel (if supporting termination), don't be so fast to jump on the dismissal bandwagon. Instead, work with parent's counsel on an agreed-upon date for the filing of the affidavit (or whatever else is late), then get the court to order that agreed-upon date as a deadline. For appellate counsel, remember that appeals are delayed for many reasons that are not the client's fault. Explain those problems to the trial court and/or the Appeals Court single justice. Invoke due process. Cite to Camille. Circumstances beyond a client's control should not deprive the client of an opportunity to be meaningfully heard on appeal.

Adoption of Hamilton, 96 Mass. App. Ct. 1109 (2019) (Mass App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/ineffective assistance of counsel").

DE FACTO PARENT

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Youmans v. Ramos, 429 Mass. 774 (1999) (finding that Probate and Family Court's broad equitable powers authorized it to grant visitation rights to a de facto parent)
E.N.O. v. L.M.M., 429 Mass. 824 (1999) (defining de facto parenthood)
Care & Protection of Sharlene, 445 Mass. 756 (2005) (suggesting that the de facto parent concept applies to child welfare proceedings, although the step-father was not a de facto parent in the case)
A.H. v. M.P., 447 Mass. 828 (2006) (declining to apply estoppel principles as creating parental rights where the party claiming such rights is not a de facto parent)

Adoption of Ted, 87 Mass. App. Ct. 1108 (2015) (Mass. App. Ct. Rule 1:28) (see further discussion at "trial and procedural due process/ineffective assistance of counsel"). Ted argued that the trial judge erred by failing to address the issue of whether Ted's stepfather was his "de facto father" for the purposes of ordering post-termination visitation. The panel agreed, noting that there was evidence that Ted's stepfather played a significant role in Ted's life; indeed, the stepfather was Ted's primary caretaker before Ted was removed from the home. The panel remanded the matter because, given the evidence, the judge should have determined whether the stepfather served as Ted's de facto father, and, if so, whether post-termination visitation was appropriate.

Ted is therefore a great case for to cite when arguing for post-termination or post-adoption visitation with someone who is, or might be, a de facto parent.

EVIDENCE

For a discussion of evidence-related issues that apply in child welfare matters, see Chapter 12 of the MCLE Child Welfare Manual.

ELECTRONIC OR DIGITAL EVIDENCE (SOCIAL MEDIA)

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Commonwealth v. Williams, 456 Mass. 857 (2010)
Commonwealth v. Purdy, 459 Mass. 442 (2011)
Commonwealth v. Amaral, 78 Mass. App. Ct. 671 (2011)
Commonwealth v. Phelps, 89 Mass. App. Ct. 1104 (2016)

Adoption of Nash, 89 Mass. App. Ct. 1123 (2016) (Mass. App. Ct. Rule 1:28). Nash has a nice discussion about the admissibility of electronic (Facebook) messages. The mother and her former friend (the pre-adoptive parent) had negative interactions on Facebook, and the mother sought to introduce the electronic messages. The judge declined to admit them, noting that "it wasn't clear [from the messages] who was saying what," and cited concerns about their reliability. The panel held that this was not an abuse of the judge's discretion:

> To establish their admissibility, the proponent of electronic messages must demonstrate that there is sufficient evidence to permit the finder of fact (in this case the judge), to conclude that it is more likely than not that the messages were authored by the person the proponent (here the mother) claims was the author. See *Commonwealth v. Purdy*, 459 Mass. 442, 447 (2011); *Commonwealth v. Oppenheim*, 86 Mass. App. Ct. 359, 367 (2014). See also Mass. G. Evid. 901(b)(11) (2016). The mother claims that the judge erred by concluding that she did not meet her burden to establish that the Facebook messages were authentic. The mother relies on *Commonwealth v. Foster F.*, 86 Mass. App. Ct. 734, 737 (2014), in support of her argument. That case is distinguishable, however, because the proponent of the evidence there not only presented an affidavit from a keeper of the records, but also "confirming circumstances" providing a basis for concluding that the records were authentic. *Ibid.* In this case, the expert witness testified that he accessed the mother's Facebook account to pull metadata from the messages, but because the mother was no longer Facebook "friends" with [the pre-adoptive mother], the data showed an unknown account as the originator of the messages claimed to be from [the pre-adoptive mother]. The expert acknowledged in response to the judge's questioning that the messages could have been altered prior to the expert accessing the account. (Citations shortened).

Fair enough. But how *might* the mother have authenticated the Facebook messages? The judge would probably not have ordered the pre-adoptive mother to turn over her computer or even her account information, had the mother so requested. What does that leave in terms of authentication? Electronic messages can also be authenticated using old-fashioned methods – that is, the "confirming circumstances" mentioned above. The easiest way would have been to have the pre-adoptive mother confirm on direct or cross that she had written the messages. Another way might have been for the mother to show that the pre-adoptive mother often used certain terms, phrases, or nicknames used in the messages. Still another way might have been to prove that only the pre-adoptive mother would have known of the content of her messages. In any case, the mother needed to prove that it was more likely than not that the messages were, in fact, from the pre-adoptive mother. She couldn't here, despite the expert testimony. For more information on electronic evidence, see the "Evidence" chapter in the two-volume Child Welfare Practice in Massachusetts treatise by Amy Karp, at § 8.2.1(i).

Adoption of Grayson, 103 Mass. App. Ct. 1102 (2023) (Mass. App. Ct. Rule 23.0). (see discussion at "trial and procedural due process/right to trial").

HEARSAY

Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 233, §§ 20, 82
Care & Protection of Rebecca, 419 Mass. 67 (1994)
Care & Protection of Sophie, 449 Mass. 100 (2007)
Care & Protection of Zita, 455 Mass. 272 (2009)
Care & Protection of Leo, 38 Mass. App. Ct. 237 (1995)
Adoption of Daisy, 77 Mass. App. Ct. 768 (2010)
Adoption of Olivette, 79 Mass. App. Ct. 141 (2011)

Adoption of Penn, 73 Mass. App. Ct. 1124 (2009) (Mass. App. Ct. Rule 1:28). Penn is a fascinating decision in which the trial court's many evidentiary errors turned out to be harmless because there was sufficient properly-admitted evidence of father's unfitness (based on sexual abuse and criminal history). First, the judge erred when he ruled that he would consider the § 51A and B reports solely to "set the stage" but then made findings based on those reports. Second, the judge erred in his conduct of the G.L. c. 233, § 82 hearing (sexual abuse hearsay from children under 10):

> [T]he judge concluded at the outset of the hearing that the middle child and youngest child were 'not competent to testify because of age and that they aren't available because of competency.' In so deciding the judge short-circuited the inquiry required by § 82. The fact that the child is under the age of ten triggers the inquiry into unavailability; in turn, one avenue to determine unavailability is a finding of incompetence to testify. By equating the fact that the child was under ten with incompetence -- and therefore unavailable -- the judge made his conclusion inevitable, rather than the result of inquiry.

Judges often err in conducting § 82 hearings. Counsel should carefully review the statute and the "Evidence" chapter in Amy Karp's Child Welfare Practice in Massachusetts to determine whether the judge conducted the hearing properly. If there was error, counsel should ask the following questions: If the judge conducted the hearing incorrectly, did the appellant properly preserve all objections? Was the sexual abuse hearsay entered in evidence anywhere else without objection? Was there any other properly-admitted evidence of sexual abuse that did not involve the hearsay statements? And even if all sexual abuse evidence is "tainted," was there enough other evidence of unfitness to support an unfitness finding?

Adoption of Sidona, 76 Mass. App. Ct. 1127 (2010) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/ineffective assistance of counsel").

Care & Protection of Patience, 83 Mass. App. Ct. 1104 (2012) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/interlocutory relief").

Adoption of Ervin, 83 Mass. App. Ct. 1114 (2013) (Mass. App. Ct. Rule 1:28). This case discusses the admissibility of SORB files in termination proceedings. Here, the father argued that the judge erred in admitting his SORB file under the "business records" exception because records in the file were not authored by SORB employees and because the documents contained inadmissible hearsay.

The Appeals Court disagreed. The panel held that the SORB file was properly admitted as a business record because it was made in the regular course of business and not to prove a fact at trial. According to the panel, G.L. c. 233, § 78 requires only that the record was made in good faith; who created it is "immaterial." In footnote 3, the panel noted that the business records of any business would include documents made by others that are compiled and maintained by the business (thereby suggesting that such "held" or "collected" records would also be business records).

With all due respect to the Ervin panel, this is not the law on business records. The fact that a business collects, compiles, or files the records of another business (or of an individual who does not work for the business) does not make those "outside documents" business records, regardless of the good faith of the author. Someone in the business must "make" the record in the regular course of business. (If the maker works in another business, the original business must rely on the records of the maker's business in the ordinary course of its business, the way a car manufacturer relies on the various parts manufacturers. This situation was not at play in Ervin.) Section 78 of c. 233 provides:

> [A] writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall not be inadmissible in any civil or criminal proceeding as evidence of the facts therein stated because it is transcribed or because it is hearsay or self-serving, *if the court finds that the entry, writing or record was made in good faith in the regular course of business* and before the beginning of the civil or criminal proceeding aforesaid and that *it was the regular course of such business to make such memorandum or record* at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. G.L. c. 233, § 78 (emphasis added). A record cannot be "made in the regular course of business" by someone who does not work for that business.

The SJC held in Wingate v. Emery Air Freight Corp that the author of a "business record" must either have a business duty to report information accurately or must be relying on others in the business who have a like duty to report. Reports authored by "outsiders," and even reports by employees that rely on information relayed by "outsiders," cannot be business records because the outsiders do not have an obligation to report accurately to the business. 385 Mass. 402, 406-07 (1982). See also NationsBanc Mtge. Corp. v. Eisenhauer, 49 Mass. App. Ct. 727, 733-35 (2000) (where records made by one business were transferred to another, latter business unable to admit the records under business records exception because records were made by former business). The SJC in Wingate reasoned that "there was no evidence that the plaintiff or anyone else with personal knowledge and a duty to report had relayed the information to the preparer of the record or to someone under a business duty to inform the preparer of the record, so that the intermediary's statement would itself be a part of the business record-keeping process." 385 Mass. at 407. The report at issue in Wingate was therefore not a business record.

The mental health evaluations and other reports in the SORB file were not written by SORB employees, nor were they based on data compiled by SORB employees in the regular course of their business. They were not written by someone with a business obligation to convey accurate information to SORB. Accordingly, they could not have been business records at the Ervin trial unless DCF laid a foundation for them as business records of the *authors'* business (as opposed to SORB). This was not the case.

Let's take a more typical example. Brockton Home Health Aides (BHHA) records are not DCF business records just because BHHA sends them to DCF and DCF keeps them in its files, even if it regularly does so. That is, the mere fact that DCF keeps the BHHA documents in its files does not give them any indicia of reliability. Of course, the BHHA records might be the business records of BHHA if someone from that agency (or someone else who knows that agency's business practices) lays a proper foundation.

All told, you should not rely on Ervin for its business records analysis.

The panel did agree with the father that the police report contained within the SORB file should not have been admitted, because the police report contained hearsay. See Julian v. Randazzo, 380 Mass. 391, 394 (1980) (statements in police reports made by bystanders may be inadmissible as "second level" or "totem-pole" hearsay). But such admission was harmless error because there was ample other evidence of father's unfitness. (Note that even here the panel's reasoning is inconsistent with well-established, black-letter law: the police report shouldn't have been admitted at all because (a) it wasn't a SORB business record, and (b) no police officer laid a foundation for the report.)

Adoption of Addison, 86 Mass. App. Ct. 1119 (2014) (see discussion at "trial and procedural due process/preservation of error").

Adoption of Bella, 86 Mass. App. Ct. 1121 (2014) (Mass. App. Ct. Rule 1:28). In Bella, the trial judge relied, among other things, on hearsay statements in a § 51B report to support her conclusion that the mother was unfit. In one finding, quoted directly from a § 51B report, the hearsay declarant is identified as "staff from MGH and Spaulding Rehabilitation"; no one is named. The issue of the admissibility of hearsay in 51Bs is still undecided (although, at the time of printing, the SJC was considering it in Adoption of Luc). Nevertheless, even if the same rules apply to 51Bs as apply to court investigator reports (dubious, at best), here, the hearsay should not have been permitted even in a court investigator report. Hundreds of staff work at MGH and Spaulding. It is difficult to understand how this satisfies the requirement that

the hearsay declarant be identified or identifiable. Nevertheless, the panel found this sufficient.

Adoption of Valerio, 88 Mass. App. Ct. 1111 (2015) (Mass. App. Ct. Rule 1:28) (see discussion at "evidence/pleadings").

HOME STUDIES

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 119, § 26(b)(2)(i)
G.L. c. 210, § 5A
Adoption of Cadence, 81 Mass. App. Ct. 162 (2012)

Adoption of Gerard, 87 Mass. App. Ct. 1122 (2015) (Mass App. Ct. Rule 1:28). In this case, Gerard's mother and stepfather filed an adoption petition in the Probate and Family Court. The trial judge terminated the biological father's parental rights and approved the adoption. The biological father appealed. One of the father's arguments on appeal was that the judge erred in failing to order, or explicitly waive the requirement, of a home study under G.L. c. 210, § 5A. The statute permits the court to waive the required home study when the petition for adoption is filed by a parent. Here, the petitioners filed a motion requesting that the judge waive the home study, but the judge never ruled on the motion. The panel determined that, although the judge failed to rule on the motion, it was clear from his favorable comments about the petitioner's home that he "constructively waived" the home study requirement. Thus, the failure to either order or explicitly waive the home study did not constitute reversible error.

Note that this might still be a good issue in cases where the petitioner is not a parent and the judge does not have information about the home.

Adoption of Yolanda, 89 Mass. App. Ct. 1126 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "adoption plans/competing plans").

Adoption of Jacqueline, 90 Mass. App. Ct. 1114 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "adoption plans/competing plans").

IMPROPER EVIDENCE

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Adoption of Helen, 429 Mass. 856 (1999)
Care & Protection of Zita, 455 Mass. 272 (2009)
Adoption of Parker, 77 Mass.App.Ct. 619 (2010)

In **Care & Protection of Kieran, 73 Mass. App. Ct. 1117 (2009) (Mass. App. Ct. Rule 1:28)**, the appellant mother argued that the judge improperly relied on evidence stricken from the record. The panel

affirmed the permanent custody adjudication, noting that "the evidence contained in the stricken report appeared elsewhere in properly admitted evidence." Nothing earth-shaking here, but it serves as a reminder that whenever we argue about evidentiary errors, we must show that (a) the error was preserved by an objection, (b) the evidence did not come in properly elsewhere, (c) the error led to a particular finding or findings, and (d) without that finding or findings, the court lacked clear and convincing evidence of unfitness or its decision might have been different – that is, there was harm.

Adoption of Xanthus, 74 Mass. App. Ct. 1105 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/preservation of error").

Care & Protection of Patience, 83 Mass. App. Ct. 1104 (2012) (Mass. App. Ct. Rule 1:28). (see discussion at "appellate procedure/interlocutory relief").

Adoption of Addison, 86 Mass. App. Ct. 1119 (2014) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/preservation of error").

Adoption of Ilene, 87 Mass. App. Ct. 1106 (2015) (Mass. App. Ct. Rule 1:28). After an earlier trial, the court found both parents unfit and terminated their parental rights. However, the trial judge made findings based on information that she had previously struck from the record. The Appeals Court remanded that case. On remand, the judge entered a new order simply stating that the "evidence which was stricken at trial shall be removed from the Court's Findings of Fact and Conclusions of Law and Orders." On appeal, all parties agreed that this order did not remedy the errors; portions of the amended findings still relied on the stricken evidence, and the supported findings did not prove unfitness by clear and convincing evidence. The Appeals Court vacated the decision and remanded for a new trial on the merits.

The takeaway? You may never see a case of lazy trial judging quite like this, but Ilene shows clearly that a remand for flawed findings requires that the trial judge do more than simply reissue the findings with a few minor tweaks.

Adoption of Quan, 91 Mass. App. Ct. 1102 (2017) (Mass. App. Ct. Rule 1:28). In Quan, the parents argued on appeal that the trial procedure – using oral proffers by DCF counsel in lieu of testimony from the DCF ongoing and adoption workers to establish the uncontested facts of the case – violated their due process rights. The panel agreed that this was error. Because trial counsel did not object to the procedure, the panel considered whether the case presented "exceptional circumstances" warranting relief but concluded that there was "no manifest injustice warranting a new trial" and affirmed. The circumstances did not warrant a new trial because all counsel had stipulated to the content of the proffers and had an opportunity to cross-examine the workers, but declined. Still, the panel's warning language in Quan is worth repeating:

> Although we discern no cause in the present case to disturb the decrees, we observe that the proffer procedure employed by the judge, though perhaps offering some benefit of efficiency, is of concern. The fundamental rights at stake in a proceeding to terminate parental rights are significant, and proffers by counsel simply cannot furnish the same depth of evidence that live testimony from the witnesses themselves would provide. While we recognize the need to manage busy court calendars, in circumstances such as those in the

> present case, where the witnesses were present and available to testify, the substitution of proffers for live testimony should be avoided, or at least limited to relatively minor portions of their testimony, barring exceptional circumstances.

The takeaway for trial counsel? Cases shouldn't be tried by oral proffer, even if the contents of the proffer are agreed upon, unless the information covered by the proffer is minor (*i.e.*, "The parties will stipulate to the proffer that Mother's upstairs neighbor, Ms. Jones, would testify that she never heard any yelling or loud noises from Mother's apartment.") If DCF attempts to try the case by oral proffer, object and explain how the live testimony will likely differ from the proffer and why it matters to the case. That is the best way to preserve this issue for appeal.

For appellate counsel, the quote above from Quan can be cited whenever the trial judge employed a "time-saving" or docket-management procedure that abridged the client's due process rights.

In **Adoption of Emmett, 92 Mass. App. Ct. 1118 (2017) (Mass. App. Ct. Rule 1:28)**, the trial court terminated father's rights largely based on his extensive substance use history. Although DCF presented plenty of evidence of the father's problem, he continued to deny it through trial. The trial court found the father unfit, in part, because he refused to participate in a substance abuse treatment program, a substance abuse evaluation, or drug testing. The trial judge drew a negative inference from the father's "largely unexplained refusal to cooperate with DCF." The panel affirmed, citing Care & Protection of Vieri, 92 Mass. App. Ct. 402, 406 (2017).

But wait just a minute! Does Vieri actually stand for the proposition that a judge can draw a "negative inference" from a parent's refusal to cooperate with DCF (by, for example, not participating in a substance abuse evaluation)? Not really. In that case, DCF proved that the mother had a chaotically messy home. The mother claimed that the conditions had since been ameliorated, but she refused to allow DCF to enter the home to verify that assertion. According to the Appeals Court, the trial judge could therefore infer – negatively – that the conditions had not, in fact, been ameliorated.

The problem is that Vieri (and now Emmet) use the term "negative inference" loosely (and, I would say, unnecessarily). The term "negative inference" or "adverse inference" is used for a party in a civil action (including a parent in a care and protection case) who fails or refuses to testify, either by claiming Fifth Amendment privilege or merely failing to appear. See Adoption of Quinn, 54 Mass. App. Ct. 117, 123-24 (2002). In Vieri and Emmet, the parents appeared and testified. The parents in both cases didn't cooperate with DCF and failed to explain to the court *why* they didn't cooperate. But that's not really a failure to testify – it's just a failure to cooperate. And we know that failure to cooperate with DCF is, by itself, not a basis of unfitness if the cooperation isn't required to ameliorate a parenting deficiency. See Adoption of Yale, 65 Mass. App. Ct. 236, 242 (2005).

What both Vieri and Emmet probably mean is this: after DCF presents evidence of a long-standing problem, the burden then shifts to the parent to show that the problem no longer exists; if the parent fails to make that showing – either by refusing to cooperate with DCF or failing to offer some other explanation to the court – the court can infer that the problem persists. That inference may be unfavorable to the parent, but it is not an "adverse inference" or "negative inference" in the Fifth Amendment failure-to-testify context. It's just a plain old inference.

For trial counsel, don't let the Appeals Court's conflation of unfavorable inference and "adverse inference" confuse you or your trial judge. Emmett and Vieri do not hold that a judge can draw a "negative inference" from a parent's lack of cooperation with a service plan. DCF must first prove that the parent has a problem that requires the service; then, if the parent doesn't cooperate with the service (or explain why cooperation wasn't necessary), the court can hold the lack of cooperation against the parent. (But, of course, the court could do that long before Vieri and Emmet.)

Brown v. Solon, 96 Mass. App.1115 (Mass. App. Ct. Rule 1:28) (see discussion at "visitation").

PLEADINGS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Care & Protection of Manuel, 428 Mass.527 (1998)
Care & Protection of Zita, 455 Mass. 272 (2009)
Lambley v. Kameny, 43 Mass. App. Ct. 277 (1997) ("[T]he label attached to the pleading or motion is far less important than its substance")

Colorio v. Marx, 72 Mass. App. Ct. 328 (2008) (Mass. App. Ct. Rule 1:28), a divorce/separation agreement case, has good language about how the substance of a pleading is more important than the label or caption of the pleading. This is useful in those circumstances where trial counsel filed the wrong type of motion, or captioned the motion improperly, but was clearly seeking the appropriate relief in the body of the motion. For example, trial counsel might have captioned a motion, "Motion for Relief from Judgment," when he was really looking for a new trial. If the motion asked for a new trial, the court should construe it as a motion for new trial regardless of its caption.

In many ways, the language in Colorio is similar to the SJC's language in Care & Protection of Manuel, 428 Mass. 527, 532, 534 (1998), in which the Court construed the child's motion for a § 25 hearing as a request for a 72-hour hearing under § 24:

> Although captioned as such (and argued throughout this appeal as such), the child's motion is not, in substance, one for a hearing under § 25 but, rather, one for a seventy-two hour custody hearing under § 24 asking the court once again to consider awarding temporary custody of him to his paternal grandparents. Manuel did not waive his right to a temporary custody hearing in 1997 simply because he cited the wrong statutory provision. See generally *Lambley v. Kameny, 43 Mass. App. Ct. 277, 280, 682 N.E.2d 907 (1997)* ("the label attached to a pleading or motion is far less important than its substance").
>
> We think it plain that Manuel requested a "custody" hearing, not a "placement" hearing. He asked the judge to consider awarding custody of him to the paternal grandparents. He did not ask the court to extend its previously issued emergency order transferring legal custody of him to the department and for the department then to exercise its custodial prerogative of selecting his place of residence by placing him with the grandparents -- something the department consistently had stated it would not do. Put

> simply, the child asked the court to consider a specific legal custodian for him other than the department.

Substance trumps an incorrect caption.

Adoption of Joshua, 72 Mass. App. Ct. 1117 (2008) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/post-trial motions").

Adoption of Maura, 89 Mass. App. Ct. 1101 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/dismissal of appeal").

Adoption of Quan, 91 Mass. App. Ct. 1102 (2017) (Mass. App. Ct. Rule 1:28) (see discussion at "evidence/improper evidence").

STALE EVIDENCE

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Adoption of George, 27 Mass. App. Ct. 265 (1989)
Care & Protection of Ian, 46 Mass. App. Ct. 615 (1999)
Adoption of Rhona, 57 Mass. App. Ct. 479 (2003)
Adoption of Linus, 73 Mass. App. Ct. 815 (2009)

Care & Protection of Oliana, 72 Mass. App. Ct. 1115 (2008) (Mass. App. Ct. Rule 1:28). In Oliana, the panel suggests that almost nothing is stale, no matter how old, if the complained-of conduct (however defined) is ongoing:

> The mother argues that the evidence on which those findings are based are [sic] too stale to be relevant to the instant petition. However, past conduct can be relevant to the issue of current parental unfitness if demonstrated to be an ongoing pattern. See *Adoption of Diane,* 400 Mass. 196, 204 (1987) ('The judge could properly rely upon prior patterns of ongoing, repeated, serious parental neglect, abuse, and misconduct in determining current unfitness'); *Adoption of Mario,* 43 Mass. App. Ct. 767, 773 (1997). Those findings discuss events dating back to 1975 and detail instances of severely unclean living conditions, exposure of the children to physical abuse, and neglect, that establish a pattern of conduct that continued in the mother's parenting of Oliana and Jason.
>
> The mother continued to keep a dirty home and was neglectful of the children in 2001. Numerous people detailed the unhygienic and unsanitary conditions of the household in 2002. The mother permitted the father to expose the children to pornographic material that same year. The mother allowed contact with the father who repeatedly threatened to kill her in front of the children. In 2004, the apartment in which the family lived was found to be without heat, and with 'broken glass and feces spread all over the kitchen floor.' Although the judge noted that the mother had made some improvements since the filing of

> the petition at issue here, his findings regarding the mother's pattern of conduct were not clearly erroneous.

Two things are notable about this decision. First, the evidence the panel found not to be stale was over 30 years old. Second, dirty home conditions apparently can satisfy the requirement of a "pattern of ongoing, repeated, serious parental neglect."

Adoption of Esme, 94 Mass. App. Ct. 1106 (2018) (Mass. App. Ct. Rule 1:28), is a lesson in the danger (to counsel) of the court's admission of evidence *de bene*. The mother argued on appeal that the judge erred in admitting certain hearsay statements about the subject child's sexualized behavior. The trial judge had admitted some of the statements *de bene* during trial, but "Mother failed at the close of evidence to renew her objections[.]" Therefore, the statements were properly in evidence. **Let this be a reminder to trial counsel** – if the judge admits any evidence *de bene*, you must renew your objection before the close of evidence. If you don't, the evidence is in.

The father also argued that the trial judge relied on stale evidence of past abuse of other children to find him currently unfit. The panel disagreed:

> The father's current unfitness was supported by clear and convincing evidence. Contrary to the father's argument, the judge did not rely on stale evidence, but rather, relied on the father's current status as a level three sex offender, designating him as a high risk to reoffend, and the prognostic value of his criminal history earning him this classification. See Adoption of Jacques, 82 Mass. App. Ct. 601, 607 (2012). Because the father targeted prepubescent victims, he "pose[s] an even higher risk of reoffense and degree of dangerousness." 803 Code Mass. Regs. § 1.33(3) (2016). In addition, as the judge noted, the father's sex offender classification allows him to be with John "only at times when Mother or someone else in the household was available to supervise." (Emphasis in original)

Esme suggests that any level three sex offender – or at least any level three sex offender who has offended against young children – is currently unfit. This is a reach; an administrative agency's determination of current risk cannot substitute for the court's own factual assessment. Further, here, the father's convictions were 13 years old when DCF filed the petition. Although the panel cites to Jacques for its holding about sex offender status and current unfitness, Jacques is not a sex offender case and has no factual similarity whatsoever to Esme.

What should you do with Esme if your case concerns a level three sex offender parent with older offenses? (If your case features recent offenses, it is the offenses – not the sex offender level – that will render the parent unfit.) If you are supporting termination, cite Esme for the proposition that the parent's sex offender status shows (or contributes to a showing of) current unfitness. If you represent the parent or a child seeking reunification, try to distinguish your case factually from Esme. For example, the child in Esme showed signs of sexual abuse, and the evidence suggested that the father may have been the perpetrator. In addition, the father in Esme offended against his own six-year-old daughter and another relative. Your case may lack such awful facts.

EXPERTS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Daubert v. Merrill Dow Pharmeceuticals, Inc., 509 U.S. 579 (1993) (defining standards for admission of scientific evidence)
Department of Youth Services v. a Juvenile, 398 Mass. 516 (1986) (allowing expert to base opinion on facts or data not in evidence where independently admissible and are permissible basis for expert to consider)
Commonwealth v. Lanigan, 419 Mass. 15 (1994) (adopting Daubert)
Adoption of Sherry, 435 Mass. 331 (2000) (holding that opinions held by non-testimonial/consulting experts are attorney work product)
Canavan's case, 432 Mass. 304 (2000) (applying abuse of discretion standard when reviewing admission of scientific evidence)
Adoption of Willamina, 71 Mass. App. Ct. 230 (2008) (requiring attorneys to object to impermissible expert evidence at trial)

Adoption of Wendy, 82 Mass. App. Ct. 1102 (2012) (Mass. App. Ct. Rule 1:28). This case has a very important tip for trial counsel, and a warning to appellate counsel, regarding challenges to expert testimony. In Wendy, the mother argued that DCF's experts relied on inadmissible evidence when forming their opinions. The panel made it clear that a party opposing expert opinions must attack the bases of such opinions at the trial level, not for the first time on appeal:

> To the extent that the mother believed that the testimony of the experts was of a "mixed foundation" of admissible and inadmissible evidence, "the recommended approach would [have been] for the mother's counsel to request a voir dire." Adoption of Seth, 29 Mass. App. Ct. 343, 353 (1990). This option was neither requested nor utilized.

What do you do if trial counsel hasn't objected to the improper expert testimony? If that testimony made a difference to the outcome (and should have been objected to), raise the issue in a motion for new trial.

Adoption of Jerrold, 74 Mass. App. Ct. 1121 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "findings/even-handed analysis of the evidence").

Adoption of Zaria, 79 Mass. App. Ct. 1114 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "adoption plans/competing plans").

Adoption of Ezra, 84 Mass. App. Ct. 1102 (2013) (Mass. App. Ct. Rule 1:28) (see discussion at "judicial bias").

Adoption of Calvin, 85 Mass. App. Ct. 1105 (2014) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/ineffective assistance of counsel").

Adoption of Becky, 88 Mass. App. Ct. 1107 (2015) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/discovery").

Adoption of Beatrix, 89 Mass. App. Ct. 1132 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "parental unfitness/disabilities").

Care & Protection of Anders, 93 Mass. App. Ct. 1118 (2018) (Mass. App. Ct. Rule 1:28) (see discussion at "parental unfitness/parental unfitness generally").

Adoption of Loughlin, 74 Mass. App. Ct. 1128 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "parental unfitness/bonding with substitute caretakers").

Adoption of Questa, 93 Mass. App. Ct. 1114 (2018) (Mass. App. Ct. Rule 1:28). 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.

Adoption of Dimitri, 96 Mass. App. Ct. 1108 (2019) (Mass. App. Ct. Rule 1:28) (see further discussion at "reasonable efforts"; "unfitness/bonding with substitute caregivers"; "findings/sufficiency"), is one of those rare, great Rule 1:28 cases that really should have been published. 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.

The panel 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 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.)

Adoption of Elise, 97 Mass. App. Ct. 1111 (2020) (Mass. App. Ct. Rule 1:28). Sometimes, the panel just gets the law wrong. While the SJC didn't take this case on FAR, that doesn't validate the panel's mistake.

In Elise, the mother argued that the trial court improperly failed to discuss favorable testimony from mother's expert in her findings. The panel disagreed. It reasoned that the judge was not bound to adopt the expert's opinion, the opinion was not binding on the trier of fact, and the expert's opinion was contradicted by other evidence that supported the unfitness finding. The panel "cannot conclude that the judge abused her discretion in failing to adopt or explicitly weigh the expert's opinions regarding the mother's parenting capabilities."

So much is wrong with the panel's analysis. First, that wasn't the mother's argument. Mother didn't argue that the judge erred in failing to *adopt* the expert's opinion; she argued that the judge failed to *consider or make any reference* to it. Second, the trial court's failure to even note the expert testimony cannot be a tacit rejection of it, because it could just as well be a failure to remember it or acknowledge its existence, which are *not* acceptable. That's why the judge – at the very least – needed to make a finding like this: "I have heard mother's expert and I reject her testimony regarding X and Y as not credible, because [one or more reasons]." That's not what the judge did here. While judges are never bound by expert's opinions, and they can accept or reject expert testimony in whole or in part, judges can't simply pretend that an expert didn't testify, and they can't forget that the expert testified. Further, the cases cited by the panel offer no support for its conclusion. Indeed, the failure to even note the testimony of an expert favorable to a parent is a failure to carefully consider evidence *and* a failure to make detailed findings, both of which are reversible errors.

Finally, the panel's conclusion in Elise directly contradicts **Adoption of Dimitri, 96 Mass. App. Ct. 1108 (2019) (Mass. App. Ct. Rule 1:28)**. In Dimitri, the panel 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, because the panel could not ascertain whether the judge had paid careful and close attention to the evidence. See also **Adoption of Jerrold, 74 Mass. App. Ct. 1121 (2009) (Mass. App. Ct. Rule 1:28)** (holding that the judge selectively crediting the negative testimony and ignoring positive testimony of the parents' experts showed a lack of even-handed analysis and attention to the evidence).

How can a judge's findings show careful consideration and close attention to the evidence when they fail to mention the expert at all?

FINDINGS

Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Adoption of Hugo, 428 Mass. 219 (1998) (judge must make specific and detailed findings of fact demonstrating that close attention was given to the evidence)

CHILD-SPECIFIC ANALYSIS

Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Adoption of George, 27 Mass. App. Ct. 265 (1989)
Adoption of Oliver, 28 Mass. App. Ct. 620 (1990)
Adoption of Melvin, 71 Mass. App. Ct. 706 (2008)

Adoption of Andreas, 78 Mass. App. Ct. 1119 (2011) (Mass. App. Ct. Rule 1:28). Andreas is a great case to support the proposition that a parent must be unfit with respect to *each* subject child. The trial court found mother unfit and terminated her rights as to Andreas, Edward and Lionel. The panel affirmed as to the first two boys based largely on mother's inability to meet their behavioral and psychological needs. But with respect to Lionel, who was younger and had no special needs, the panel vacated the termination:

> [W]e conclude that, taken as a whole, the judge's subsidiary findings, even if supported by the evidence, do not support his ultimate conclusions that the mother is currently unfit to parent Lionel and that termination of her parental rights was in this child's best interests. Lionel was removed from the mother's care when he was only eighteen months old and has remained in department custody since that time. He has been living with his preadoptive parents since March, 2008, and he is bonded to his preadoptive parents and has little, if any, bond with the mother. However, Lionel does not suffer from any behavioral or emotional difficulties, and the evidence of the mother's unfitness to parent Lionel is much weaker than it is with respect to Andreas and Edward.

The fact of Lionel's stable placement in a pre-adoptive home was not enough to show that mother was unfit as to him:

> The judge's determination that the mother is unfit to parent Lionel appears to be based primarily on the circumstances of Lionel's stable placement and his lack of connection to the mother. Moreover, in concluding that the mother is currently unfit to parent Lionel, the judge failed to consider the mother's parenting ability, or lack thereof, to parent Lionel and her other children, without the additional burden of caring for Andreas and Edward. It is clear from the judge's findings that the primary factor bearing on the determination of

> unfitness was the mother's inability to care for the additional three children at issue, two of whom present significant challenges.

Courts, then, must look not just to a parent's ability to care for each child but to that parent's ability to care for each child *alone* without the burden of caring for the others (assuming they are not to be returned).

The panel remanded for further findings based on the mother's current circumstances. Because it recognized that mother appeared to no longer have the "grievous shortcomings" necessary to be found unfit, it signaled to the parties and the trial court that the evidence on remand should focus on bonding as set forth in G.L. c. 210, § 3(c)(vii), that is,

> the nature of the bond between Lionel and his substitute caretakers, if serious psychological harm would flow from the severance of those bonds, what means were considered to alleviate that harm, and which of those means would be adequate. . . . Finally, the mother's capacity, or lack thereof, to meet Lionel's needs upon removal from his caretakers should be addressed.

The panel also remanded regarding post-termination and post-adoption visitation between mother and Andreas, which the trial court declined to order. While there was no evidence of a bond or other compelling interest suggesting visits between mother and Edward,

> . . . Andreas appears to have a stronger bond to the mother than the other two children, having spent the first five years of his life in her care. Although the evidence indicates that the mother is unable to provide the structured environment that Andreas requires from a full-time care-giver, the evidence does not support the conclusion that the termination of visitation is in his best interests. In contrast to the evidence that visitation was traumatic for Edward, Andreas seemed to suffer most as a result of the termination of contact with the mother (he required hospitalization in the month following removal), and he has expressed his desire for visitation to continue. Considering, also, that the department has been unable to place Andreas with a preadoptive family, the judge's denial of visitation was an abuse of his discretion.

Andreas is therefore a good case to cite when the judge refuses to order post-termination visitation for a child who is not in a pre-adoptive home and wishes to visit with a birth parent.

Adoption of Danielle, 88 Mass. App. Ct. 1116 (2015) (Mass. App. Ct. Rule 1:28) (see further discussion at "appellate procedure/post-trial motions"). This case, addressed in detail above under "Appellate Procedure – Post-trial Motions," features a sua sponte bifurcation of appeals for two siblings. The panel need not delay permanency for one sibling if a post-trial motion is appropriate for the other sibling. If one child wants speedy permanency but the other wants an evidentiary hearing on the disposition, the plan, or visits, Danielle suggests that counsel can ask the panel to grant independent relief for each child. In that way, neither child will be prejudiced, and the matters can be disposed of more quickly.

Adoption of Maggie, 100 Mass. App. Ct. 1133 (2022) (Mass. App. Ct. Rule 23.0). Our lawyers frequently argue that the trial judge erred in terminating parental rights to multiple children in a sibling

group without making a specific unfitness determination as to each child. In Maggie, this argument was a winner.

The principle that a parent may be fit to raise one child but unfit to raise another is well-established in Adoption of Ramona, 61 Mass. App. Ct. 260 (2004) (citing Custody of a Minor, 21 Mass. App. Ct. 1 (1985)). In Maggie, the panel agreed with the appellant-daughter (Maggie) that the trial judge made insufficiently specific findings to conclude that the mother was unfit to parent her, independent of the mother's fitness to parent her brother (Andrew). According to the panel:

> [u]nlike Andrew, who was removed from the mother's custody as an infant, Maggie lived with the mother until DCF removed her at the age of seven in 2017. Prior to her removal, in 2014, Maggie was up to date medically, verbal, working with service providers in the community, and bonded with the mother. As of 2017, she was enrolled in the Head Start Program and doing well in school, with good attendance and no behavioral issues. Since then, the mother has continued to visit her consistently and successfully, in contrast to her difficulties managing Andrew during those same visits. Maggie is much older than Andrew and has not been diagnosed with autism. Therefore, the mother may not require the same particularized caretaking skills to meet her needs.

The best part of Maggie is this conclusion: "The trial judge in her findings essentially treated Maggie and Andrew as a unit, without particularized findings as to the mother's ability to meet Maggie's individual needs in a context in which she would not also have to care for Andrew." That is, a parent must be unfit to care for each child considered in a vacuum, without the other children; it is not enough for a judge to find a parent unfit for an entire sibling group. (Of course, this argument loses force if the reason for the parent's unfitness clearly covers all children, such as perpetration of sexual abuse.)

The panel vacated the decree as to Maggie but affirmed the decree as to Andrew.

DELAY IN FINDINGS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Juv. Ct. Rule 19(d)
Juv. Ct. Standing Order 1-10 (specifying that adjudication and TPR determinations shall be made no later than thirty days after the close of evidence)
Juv. Ct. Standing Order 2-18 (time standards) ("Decision and Written Findings: within ninety (90) days from the close of evidence")
Care & Protection of Three Minors, 392 Mass. 704 (1984) (noting that a judge's six-month delay in issuing findings left the children "in limbo" and dimmed his memory of the testimony)
Care & Protection of Martha, 407 Mass. 319(1990) ("[A]n extraordinary and prejudicial delay in custody proceedings, not attributable to the parents, in some circumstances could rise to the level of a violation of due process")
Adoption of Don, 435 Mass. 158 (2001) (holding that delay in findings was not a violation of due process where parents failed to demonstrate prejudice)
Adoption of Rhona, 57 Mass. App. Ct. 479 (2003) (finding that parents were prejudiced by two-year delay before entry of findings where parent-child bond was allowed to continue to deteriorate without visitation during that time)
Adoption of Bianca, 91 Mass. App. Ct. 428 (2017) (holding that delay in assembly of record and transcript did not render the facts stale where mother failed to demonstrate prejudice)

Adoption of Monique, 76 Mass. App. Ct. 1117 (2010) (Mass. App. Ct. Rule 1:28). Monique clarifies that the trial court's delay in issuing findings does not provide grounds for vacating a decree absent a showing of harm from the delay:

> [Mother] argues that the trial judge erred by delaying to issue written findings and rulings for approximately one year after the conclusion of trial[.]
> . . .
> [This] argument[] founder[s] because the mother has failed to present any evidence of harm. Although it is true that the judge's written findings and rulings did not issue for approximately one year after the close of evidence, the decree entered shortly after the conclusion of trial, when the evidence was fresh in the judge's mind and there could be no question regarding his 'ability to remember witness demeanor and credibility.' *Adoption of Rhona,* 57 Mass. App. Ct. 479, 486 (2003). The mother has not indicated in any meaningful way how the delay affected the judge's findings or conclusions. For this reason, the mother has not persuaded us that the delay in issuing written findings (although certainly undesirable) resulted in any harm.

Clearly, it is more productive to argue that there was a delay in issuing the termination decree itself. That delay suggests that the judge may have terminated based on faulty recollection of witness testimony or demeanor (an argument lost if the trial is primarily based on documentary evidence). If all you have, though, is delay in issuing the findings, you will have to show harm in that the findings do not reflect the actual testimony and the delay hampered the judge's ability to "pay close attention to the evidence."

Adoption of Neesa, 78 Mass. App. Ct. 1126 (2011) (Mass. App. Ct. Rule 1:28). Neesa is interesting primarily for the panel's comments about delay:

> We are quite troubled that two and one-half years elapsed between the beginning of trial and the judge's issuance of findings and conclusions. The long duration of this and other similar proceedings often borders on unconscionable treatment of the parties and inhibits effective appellate review. We also note that these delays are frequent, expected, and outside the practical ability of individual judges to control given the case volume and resource constraints of the Juvenile Court.

"Unconscionable treatment" – what a great phrase! The panel was also concerned about the time that elapsed between the end of trial and the issuance of findings. But the delay did not constitute a violation of due process because the mother did not show any resulting harm:

> Although we are troubled by the judge's failure to act within six months of the conclusion of the trial and the ten-month delay between the entry of termination decrees and the issuance of findings and conclusions, the mother has made no showing of prejudice resulting from these delays.

Accordingly, if you are raising delay (of trial, of issuance of findings, of assembly, etc.) in your appeal, you must explain in detail how your client was prejudiced by the delay.

Adoption of Herman, 81 Mass. App. Ct. 1109 (2012) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/post-trial motions").

Adoption of Darian, 83 Mass. App. Ct. 1113 (2013) (Mass. App. Ct. Rule 1:28). Darian is another case that suggests how appellants should address a trial court's long delay in issuing findings. In this case, the trial court waited two years after the termination decree to issue findings. The mother argued that this violated her due process rights. The panel disagreed, noting that while Juvenile Court Standing Order 1-04 III.C (2004) states that judges should issue findings within 90 days after the close of evidence, here the mother failed to show any prejudice by the delay. "The mother did not seek to 'reopen evidence to allow all parties to submit relevant, updated information concerning parental fitness' in the two years before findings were issued." Darian (citing Adoption of Rhona, 57 Mass. App. Ct. 479, 486-87 (2003)).

Accordingly, if you represent an appellant and the judge has waited a long time to issue findings, you should file a motion to reopen and present the trial court (and the Appeals Court, through an appeal of the trial court's denial of your motion) with all of the new facts that merit relief. Of course, such a post-trial motion is only appropriate where the facts have changed for the better for your client (and, perhaps, for the worse for the child).

Adoption of Marta, 81 Mass. App. Ct. 1132 (2012) (Mass. App. Ct. Rule 1:28). In Marta, the mother argued that her due process rights were violated by the gap of one year between trial and the entry of findings and conclusions. The panel disagreed. The mother failed to show that the outcome of the case would have been different had the findings been issued quicker. (Citing Adoption of Don, 435 Mass. 158, 170 (2001)).

To be fair, there are probably only a few ways that delayed findings *ever* make a difference. Bonding is one; if the evidence of unfitness is fatally slim, but the judge waits a year or more before issuing the findings, the parent is much more likely to be found unfit on remand based on the child's bonding with pre-adoptive parents. But that's tough to argue in the first appeal, and very unsympathetic to argue on the second appeal (of the termination decree on remand). Another way to show harm from delayed findings is to show that the findings were so erroneous that they reflect poor recollection of the evidence. You would need quite a few incorrect (or at least a few wildly incorrect) findings to show this. Similarly, you could argue that the findings relied extensively on subtle credibility determinations based on witness demeanor or tone that no judge could reasonably remember a year or more after trial. Adoption of Rhona supports this argument. And while Marta doesn't cite Rhona for this proposition, it is worth noting it here:

> While "trial judges have great discretion to assess the credibility of witnesses, based on their opportunity to observe the witnesses' demeanor during trial ... it is all the more crucial we be assured that the judge actually remembers what the witnesses were like." *Care & Protection of Three Minors, 392 Mass. 704, 705 n.3, 467 N.E.2d 851 (1984).* We establish no per se rule or presumption concerning the length of time after which the accuracy of a judge's findings may be called into question. However, a lapse of three and one-half years after trial began and two years after trial ended strains the outer limits of any judge's ability to remember witness demeanor and credibility. In this case, a number of the judge's findings are contradicted by the evidence, suggesting that such limits were exceeded.

Rhona, 57 Mass. App. Ct. 479, 486 (2003).

The panel in Marta also suggests another way that delayed findings might prejudice a parent, although it's a very different kind of prejudice. Delayed findings might prejudice a parent if there were post-trial/pre-findings changes in circumstances that better reflect the parent's current fitness. In Marta, the mother didn't file a motion to reopen (which may not have been warranted), and this proved fatal: "[A]though she did bring the delay to the attention of the judge, the mother did not seek to 'reopen evidence to allow all parties to submit relevant, updated information concerning parental fitness.'" Marta (citing Rhona, 57 Mass. App. Ct. at 486-87).

The takeaway? If you are raising the issue of delay in issuance of the findings, you must prove harm to the appellant either by (a) showing that the delayed findings reflect faulty memory or (b) filing a motion to reopen the evidence showing that the findings, when issued, were stale and did not reflect current parental unfitness.

ERRONEOUS

Adoption of Akeem, 74 Mas. App. Ct. 1107 (2009) (Mass. App. Ct. Rule 1:28). In Akeem, the panel appears to have tossed the due process requirement for specificity of findings out the window. Three times the panel invokes the concept that clearly erroneous findings may nevertheless be supported because they are accurate "in spirit."

For example, the panel suggests that failure to visit is "emotional abuse." In certain circumstances, that may be so. But we leave to the trial judge the privilege (and responsibility) of making factual findings that certain parental conduct is abusive or neglectful. Here, the trial judge did not make any finding that

the mother's failure to visit the child constituted "emotional abuse." Instead, the panel made that essentially factual determination based on its own review of the evidence.

It is especially troublesome that the panel cites to Eleanor in support of the notion that erroneous findings can be supported based on a "we-know-what-the-trial-court-really-meant" analysis. Eleanor has no such language; rather, it stands for the opposite proposition: "The judge's findings in a custody proceeding must be specific and detailed so as to demonstrate that close attention has been given the evidence[.]" 414 Mass. at 799. Still, if you are an appellee who is trying to support "close enough" findings, Akeem is the case to cite.

Adoption of Opal, 81 Mass. App. Ct. 1138 (2012) (Mass. App. Ct. Rule 1:28). This case is of little interest other than a footnote. The judge made several findings of fact relevant to G.L. c. 210, § 3(c)(vii) (parental unfitness based on the child's bonding with substitute caretakers, harm to the child from removal, and the parent's inability to ameliorate the harm after removal). But in her conclusions of law, she wrote that the factor didn't apply. So did that factor apply or didn't it? More importantly, can the panel affirm a termination based (at least in part) on a factor that is supported by the facts but which the judge doesn't rely on in the conclusions of law?

The answer appears to be "yes." The panel noted, "[t]he judge wrote that [factor (vii)] was inapplicable. However, from the factual findings related to Opal's relationship with her foster parents, it is clear [the judge] considered this factor in her decision." Id. at n. 4. This suggests that if a judge's fact findings are sufficient to satisfy a factor of § 3(c), the panel can consider it even if the judge didn't conclude that the factor applied (and even if the judge expressly found that the factor didn't apply). That is, the fact findings trump the conclusions of law. Good to know if you are an appellee seeking to support a termination (or other order) that appears to have decent findings but poor conclusions of law.

Adoption of Emmett, 92 Mass. App. Ct. 1118 (2017) (Mass. App. Ct. Rule 1:28) (see discussion at "improper evidence").

Adoption of Sabrina, 93 Mass. App. Ct. 1116 (2018) (Mass. App. Ct. Rule 1:28). The panel affirmed the termination of the mother's rights. Still, the case is noteworthy for the panel's willingness to find clear error in a number of the judge's findings and to call out several "mischaracterizations" in the findings that weren't clearly erroneous but were "misleading." According to the panel,

> [a] few of the judge's findings on trivial matters were clearly erroneous, but we will also assume there was clear error in the finding that the mother failed to monitor the child's weight. As discussed above, it might well be reasonable to read the judge to have mischaracterized some of the evidence concerning both the mother's ability to care for the child and her mental health status. For present purposes, we will also assume that the judge's decision contains the negative mischaracterizations we have identified.

For example, the trial court found that the mother failed to monitor the child's weight, which was important in a failure-to-thrive case. This was clearly erroneous, because the child's doctor called the mother "very appropriate and knowledgeable," the mother fed the child in the correct manner, and the child's loss of weight was due to her medical condition, not the mother's actions. Still, all of the erroneous or misleading findings were harmless.

What, exactly, is a "mischaracterization" or a "misleading finding"? I think it's a finding that isn't clearly erroneous but also isn't quite fair. Perhaps an example is, "Mother missed many visits leading up to trial." If mother missed 2 visits out of 50, that finding would be clearly erroneous. If mother missed 20 out of 50, it would *not* be clearly erroneous. If she missed 8 out of 50, it also wouldn't be clearly erroneous – 8 is "many," after all – but it might be a "misleading finding" if the court later uses the "many" missed visits to find that the mother had essentially abandoned the child before trial, or if the mother had a good excuse for some of the missed visits. Sabrina, I think, allows appellate counsel to argue that findings might not be clearly erroneous but might nevertheless be unfair or misleadingly slanted against a parent. And while a handful of misleading findings in Sabrina didn't affect the outcome, a slew of them in a different appeal might cast the ultimate unfitness determination in doubt. Other good Rule 1:28 cases on misleading findings, or a judge's aggressively negative take on the evidence, include: Adoption of Zaria, 79 Mass. App. Ct. 1114 (2011) (Mass. App. Ct. Rule 1:28), Adoption of Chase (No. 1), 74 Mass. App. Ct. 1112 (2009) (Mass. App. Ct. Rule 1:28), and Adoption of Jerrold, 74 Mass. App. Ct. 1121 (2009) (Mass. App. Ct. Rule 1:28). Check them out!

Mother also challenged the judge's failure to order post-termination and post-adoption visitation. She argued that (a) the absence of an explicit finding that visitation would not be in the child's best interests, coupled with (b) DCF's statement that it would "consider recruiting a pre-adoptive family that is receptive to an open adoption agreement," constituted an implicit finding that visitation would be in the child's best interests. Clever! But the panel was not impressed. The mother did not request post-termination or post-adoption visitation at the trial level, and the judge's finding that the mother and the child lacked a bond was not clearly erroneous.

EVEN-HANDED ANALYSIS OF THE EVIDENCE & ADDRESSING FAVORABLE FACTS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Petition of the Dept. of Public Welfare to Dispense with Consent to Adoption, 376 Mass. 252 (1978)
Adoption of Ramona, 61 Mass. App. Ct. 260 (2004)
Adoption of Imelda, 72 Mass. App. Ct. 354 (2008)

Adoption of Chase (No. 1), 74 Mass. App. Ct. 1112 (2009) (Mass. App. Ct. Rule 1:28) (see further discussion at "adoption plans/competing plans"). In Chase, the panel reversed and remanded a termination decree based on the trial judge's failure to consider recent favorable evidence about a father. The panel notes that the failure to consider such evidence speaks not just to the ultimate unfitness inquiry, but to the degree of deference the appellate court affords the trial judge's findings:

> While a judge's evaluation of witnesses' credibility and the weight of the evidence are accorded great deference, *Adoption of Quentin,* 424 Mass. 882, 886 (1997), where, as here, the judge ignored or overlooked significant evidence favorable to the father, the judge's findings are not entitled to the same deference. See *Petition of the Dept. of Pub. Welfare to Dispense with Consent to Adoption,* 376 Mass. 252, 260 (1978).

This is a very helpful reminder for appellants who are challenging particular findings. While fact findings in most cases are reviewed for clear error, this high standard may be lowered somewhat if you can show that the judge ignored significant evidence favorable to your client.

Adoption of Jerrold, 74 Mass. App. Ct. 1121 (2009) (Mass. App. Ct. Rule 1:28). Jerrold is one of the best – perhaps the best – of the 1:28s, and it is unfortunate that it is unpublished. In Jerrold, the panel vacated the termination decrees as to both parents because the judge did not make an even-handed assessment of the evidence. According to the panel, "the evidence does not appear to have been treated fairly and difficult facts do not appear to have been fairly considered. It is clear that close attention has not been paid to the evidence."

The panel found it particularly disturbing that the judge credited aspects of the testimony of the parents' experts that showed the parents in a poor light but discredited the same experts' testimony that spoke well of the parents:

> From the outset, it is troubling that the testimony of the mother's and father's witnesses are consistently credited by the judge when their testimony is negative in regard to the parents and consistently discredited when their testimony is positive. This pattern was applied to [three of the parent's experts].
>
> The judge determined that [the psychologist's] inability, or failure, to access medical records and collaterals impacted negatively on the credibility of her assessments of the mother. However, notwithstanding these assessments of the psychologists's [sic] credibility, the judge finds her opinions regarding the mother's trauma history and mental health issues to be credible, but only 'to the extent that they [reflect negatively on mother's ability to parent].' Similarly, [her] testimony is credited when she opines that the mother has failed to adequately address substance abuse treatment and trauma issues. Her testimony is again credited when she testified that the mother has not followed the recommendation that her treatment must include a psychiatrist to prescribe and monitor her medications. These findings of credibility, however, are immediately preceded by the contradictory finding that [the psychologist] is incapable of making a 'complete assessment of [the] [m]other's significant mental impediments and substance abuse issues.' (citations to findings omitted).

The panel noted that the trial judge discredited the psychologist's favorable opinions in part because she failed to consider the parents' domestic violence history. "The problem," however, according to the panel, "is that there is virtually no evidence of domestic violence in the record before us." The judge treated an experienced substance abuse counselor similarly: "The judge again credits her negative observations concerning the mother, such as the mother's not having dealt with her mental health issues. . . . However, the judge discredited [her] testimony that the mother is successfully dealing with her substance abuse issues."

The panel cited Adoption of Stuart, 39 Mass. App. Ct. 380, 382 (1995), for the proposition that judges cannot ignore "troublesome facts." The judge here did just that:

> Conclusions of law 6, 8, 13, and 14 are based on the judge's determination that the mother was inconsistent in her substance abuse treatment, but this conclusion was only possible because the judge discredited the testimony of every professional involved in the assessment or treatment of the mother. Conclusion of law 13 states that the mother is at a high risk for relapse. There is no expert testimony in the record however to support this conclusion. In fact, all the expert testimony that the judge discredited supported the opposite conclusion. Other findings and conclusions suffer from a similar lack of record support, misrepresentation, or wholesale disregard for evidence favorable to the mother or father.

Perhaps the most interesting aspect of Jerrold is the suggestion (I'm not sure it rises to the level of a holding) that the case merited remand based in part on DCF's failure to provide reasonable efforts to reunify the family. The panel starts by criticizing DCF for filing a notice of intent to terminate parental rights while continuing to generate service plans with a goal of maintaining an intact family.

> The service plans themselves put burdens on the family while offering little or no assistance to achieve that goal. . . . When, for example, the father became sober after a lengthy inpatient detoxification and treatment and was in compliance with his service plan, the department offered no assistance to the father nor attempted to keep the family intact. The department offered no help in assisting the father to understand his son's special needs, yet the judge held this lack of understanding against the father.

A significant number of the judge's conclusions of law are predicated on issues, such as homelessness, that DCF could have assisted with, but did not, or on the implications of findings that are themselves erroneous, such as the finding concerning domestic violence.

Even if the panel did not remand specifically because of DCF's lack of reasonable efforts, trial counsel may find this language extremely helpful in any "abuse of discretion" or other motion seeking reunification services. It may also be helpful in pushing DCF – informally, when addressing service plan tasks with social workers, or formally, either at a foster care review or in court – to educate a parent about the child's special needs.

The panel remanded to a different judge. This is becoming more and more common when the reversal/remand is based on serious questions of the judge's ability or willingness to treat the parties or evidence fairly. See Adoption of Chase (No. 1), 74 Mass. App. Ct. 1112 (2009), and Adoption of Titus, 73 Mass. App. Ct. 1128 (2009) (Mass. App. Ct. Rule 1:28).

Jerrold is a good case to cite if the trial judge in your case has "selectively" credited expert testimony in a particular direction. It is also helpful if the judge has discredited a favorable expert based on the expert's failure to consider an "important" fact when there is little or no evidence of that fact. Finally, it is useful to cite, along with Care & Protection of Elaine, 54 Mass. App. Ct. 266 (2002), in any "reasonable efforts" argument.

Adoption of Zaria, 79 Mass. App. Ct. 1114 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "adoption plans/competing plans").

Care & Protection of Bancroft, 86 Mass. App. Ct. 1120 (2014) (Mass. App. Ct. Rule 1:28) (see discussion at "parental unfitness/domestic violence").

Adoption of Amanda, 87 Mass. App. Ct. 1138 (2015) (Mass. App. Ct. Rule 1:28) (see discussion at "adoption plans/competing plans").

Adoption of Beatrix, 89 Mass. App. Ct. 1132 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "parental unfitness/disabilities").

GENERALLY

Guardianship of De La Cruz, 86 Mass. App. Ct. 1106 (2014) (Mass. App. Ct. Rule 1:28) (see discussion at "immigration issues").

Guardianship of Quillay, 90 Mass. App. Ct. 1110 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "immigration issues").

Adoption of Kaleah, 90 Mass. App. Ct. 1113 (2016) (Mass. App. Ct. Rule 1:28). In Kaleah, the trial judge entered "supplemental" findings regarding post-termination and post-adoption visitation – a topic she had addressed in the original decision – after the mother had filed her brief. The panel stated that, ordinarily, the entry of an appeal strips the trial court of jurisdiction over the matters addressed in the judgment on appeal. In Kaleah, however, "neither party has raised a question about the judge's authority to enter her supplemental findings, or challenged her orders on visitation." Accordingly, the panel granted leave to the trial judge, nunc pro tunc, to enter her supplemental findings.

Once an appeal has been docketed in the Appeals Court, the trial court should not be entering new findings or orders on the matters addressed in the underlying judgment. Permanency hearings and review and redetermination hearings are an exception to this rule. Those hearings are authorized by statute, so the court can hold them and enter any appropriate orders thereafter, regardless of the appeal. See Custody of Deborah, 33 Mass. App. Ct. 913, 913-14 (1992).

Adoption of Omari, 87 Mass. App. Ct. 1102 (2015) (Mass. App. Ct. Rule 1:28). Omari explains what proper findings of fact should look like:

> "We note that a finding of fact 'is the judge's declaration that it is a fact….Findings of fact are drawn from, and consistent with, the evidence and are not merely a recitation of the evidence….Findings of fact are factual deductions from the evidence, essential to the judgment in the case. Such findings should be stated clearly, concisely and unequivocally, and be worded so that they are not susceptible of more than one interpretation.' " (Citing Care & Protection of Yetta, 84 Mass. App. Ct. 691, 694 n.7 (2014), quoting Commonwealth v. Isaiah I., 448 Mass. 334, 339 (2007)).

The panel noted that, although the trial judge enumerated 341 paragraphs in his "findings of fact," many of those paragraphs were "merely recitations of the testimony" and did not resolve inconsistencies in the evidence, weigh the evidence, or resolve credibility issues. Nevertheless, the panel found that the judge's

proper findings and conclusions of law were sufficient to establish the parents' unfitness clearly and convincingly.

What do we take from Omari? Cite it whenever the trial judge in your appeal has hundreds of facts beginning with, "The social worker, Sarah Jones, testified that . . ." or "According to mother . . ." or "The 51B states that . . ." These aren't "findings"; they are merely recitations of the evidence, and not worthy of any deference.

Adoption of Ilene, 87 Mass. App. Ct. 1106 (2015) (Mass. App. Ct. Rule 1:28) (see discussion at "evidence/improper evidence").

Adoption of Ursala, 89 Mass. App. Ct. 1120 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "parental unfitness/parental unfitness generally").

Adoption of Yolanda, 89 Mass. App. Ct. 1126 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "adoption plans/competing plans").

SUFFICIENCY

Adoption of Colette, 78 Mass. App. Ct. 1110 (2009) (Mass. App. Ct. Rule 1:28). In Colette, the Juvenile Court made only 25 findings of fact, 12 of which pertained to the appellant-mother. There was disputed evidence about whether mother had a mental illness, but the judge made no findings on the subject. DCF agreed with the appellant-mother that the findings were "less than ideal" but argued that the panel should make its own findings from certain uncontested and clearly established facts in the record.

The panel declined to do so, based on the fact that several of the facts were contested by the mother, and the judge did not make any credibility determinations. The panel left it to the judge on remand to make "specific and detailed findings" regarding fitness and to take additional evidence "if [the judge] deems it necessary." The panel also retained jurisdiction of the matter, presumably to address any appeal following the new trial or new findings. (Interestingly, the panel stated that the findings, albeit sparse, showed that the child had been in DCF custody for her entire life, mother had an extensive criminal record of violent offenses, and mother was not compliant with services. Mother also inconsistently visited the child, and when she did visit she caused the child distress. This seems like enough evidence to terminate to me, but the panel suggested that a mere 12 findings, however grim, are insufficient.)

Colette is a good case for an appellant-parent to cite if the trial judge's findings are sparse (especially as to that parent). It may also be helpful to cite in the event you want the same panel to retain jurisdiction of the appeal after remand.

Adoption of Grayson, 77 Mass. App. Ct. 1108 (2010) (Mass. App. Ct. Rule 1:28). Grayson is a good case to cite if the trial judge's findings relied improperly on evidence taken at an earlier hearing. In that case, the judge referred in her termination findings to the fact that she had reduced the mother's visitation after an earlier evidentiary hearing:

> [Mother argues that] she had no notice [that the earlier hearing] was the beginning of trial "and that the judge would rely on that evidence to extinguish her fundamental right to parent." See *Care & Protection of Zita,* 455 Mass. 272, 281-284 (2009) (improper for judge to rely on information regarding parents learned during an earlier proceeding). In support of this argument, the mother notes that in her findings of fact . . . the judge referenced the earlier evidence as follows: "The Court conducted a lengthy evidentiary hearing on the issue of suspension of visits between [Grayson] and Mother, the testimony was overwhelming that the visits were harmful to [Grayson]."

The panel held, however, that the judge's finding did not reveal that she had in fact relied on the evidence from the visitation hearing:

> But, as the mother concedes, "similar" evidence was presented at trial regarding the harm her visits caused Grayson. The mother is unable to make a convincing case that the judge did in fact rely on the earlier evidence or that any such reliance would have been of material consequence. Unlike *Care & Protection of Zita, supra* at 284, this is not a case where reliance on the earlier evidence "permeated" the judge's findings and ultimate conclusions. Nor is it a case where "it is impossible for this court to say with confidence that the result would have been the same if the judge had not considered that evidence."

So why is this so good? It is good because it suggests strongly that if the judge had, in fact, relied on the evidence from the visitation hearing, if such reliance were of "material consequence," and if the result might have been different without the earlier evidence, the panel might have reversed.

If you represent a party at the trial level seeking termination, do not let the court rely on evidence taken at a 72-hour hearing, a visitation motion, or a § 82 hearing (unless all parties assent). Instead, *re-offer* at trial the same evidence that was admitted in the earlier hearing. That way the appellant cannot argue that the judge improperly relied on evidence admitted prior to trial.

Adoption of Tatum, 93 Mass. App. Ct. 1115 (2018) (Mass. App. Ct. Rule 1:28) (see discussion at "failure to visit").

Adoption of Dimitri, 96 Mass. App. Ct. 1108 (2019) (Mass. App. Ct. Rule 1:28) (see further discussion at "experts"; "unfitness/bonding with substitute caregivers"; "reasonable efforts"), is one of those rare, great Rule 1:28 cases that really should have been published. 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 unfitness basis other than bonding, it determined that bonding was "decisive" for the judge: "[t]his 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. (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 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.)

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.

Guardianship of Jayce, 94 Mass. App. Ct. 1111 (2018) (Mass. App. Ct. Rule 1:28). The paternal grandmother had been appointed permanent guardian of Jayce, who had significant medical needs. The mother was granted liberal visitation, and there was no finding of unfitness. When their relationship deteriorated, the mother moved to remove the paternal grandmother as guardian. The judge stated the proper standard for removal of a guardian – that the guardian bears the burden of proving by clear and convincing evidence that the mother remains unfit, under Guardianship of Kelvin, 94 Mass. App. Ct. 448, 453-54 (2018) – but denied the motion. The mother appealed, contending that, while the judge may have stated the correct standard, she in fact shifted the burden to the mother based on two aspects of her decision:

> First, the judge stated that "[t]here was no expert testimony offered by [the m]other as to the potential impact on the child of a change in custody to [the m]other." Second, the judge stated that the mother's "ability to be consistent and to follow through has never been demonstrated by [the m]other in any meaningful way."

As a preliminary matter, the appellee-child argued that the mother waived her burden-shifting argument, but the panel disagreed:

> The mother had no reason to raise her burden-shifting argument in the Probate and Family Court because the judge articulated the correct burden of proof on a petition for removal of a guardian. It was not until the judge released her decision that the issue arose, prompting the mother to challenge the purported error on appeal. The mother was not required to first file a motion for a new trial as counsel for Jayce seems to suggest.

This makes great sense. Sometimes an issue can't be raised first at the trial level because the mistake is only evident from the judge's findings. In such cases, appellate counsel need not return to the trial court on a Rule 60(b) motion (although counsel may choose to do so).

Then, the panel thoughtfully considered possible interpretations of the judge's statements. On the one hand, they could be interpreted to impermissibly shift the burden to mother to prove her fitness; but on the other hand, they could permissibly reflect the mother's failure to rebut evidence of unfitness presented by the guardian. The panel *could* have opted for the permissible interpretation and let the trial court off the hook, but it didn't:

> Given these different, but equally plausible, interpretations of the judge's reasoning, we cannot say with confidence whether or not the judge erroneously shifted the burden of proof to the mother. It follows that we are unable to determine whether the judge properly concluded that the guardian had proved, by clear and convincing evidence, that the mother is currently unfit to parent Jayce. Consequently, a remand for further proceedings is necessary.

This, too, makes great sense. If an appellate court lacks confidence that the judge correctly applied the law, it should send the case back.

Are your findings ambiguous about burden-shifting or another important issue? Cite Jayce and ask for a remand. Specify that the remand include evidence of current unfitness and best interests. A remand solely for clarification of the judge's intentions will likely end in a predictable – and adverse – result.

Adoption of Harrison, 102 Mass. App. Ct. 1101 (2022) (Mass. App. Ct. Rule 23.0). In Harrison, the panel vacated the decrees terminating the mother's and father's parental rights and remanded to the Juvenile Court for further proceedings. According to the panel, the trial judge did not make sufficient findings showing a nexus between the parents' substance use, domestic violence, and housing instability, and harm to the child.

Published cases going back 30 years require that a trial court, before finding a parent unfit, make findings showing a nexus between a parent's substance use or mental health problems and harm to a child. *See* Adoption of Yale, 65 Mass. App. Ct. 236, 241 (2005)(substance use); Adoption of Katharine, 42 Mass. App. Ct. 25, 33-34 (1997) (substance use); Adoption of Abby, 62 Mass. App. Ct. 816, 826 (2005) (mental health issues). Harrison's facts may be helpful to bolster a nexus argument that is primarily based on the published cases.

While domestic violence is an important issue that trial judges must consider under Care and Protection of Lillith, 61 Mass. App. Ct. 132, 142 (2004), no published case explicitly calls for findings regarding a nexus between domestic violence and harm to the child in the unfitness context. Because of this gap, trial judges in our cases rarely make specific findings on how domestic violence has impacted the child at issue; they simply presume that it renders a parent unfit no matter the factual circumstances. This is particularly problematic when the parent whose rights are at issue is purely a victim of domestic violence. Here, the panel held that the older, vague evidence of domestic violence was too stale, and it lacked a sufficient nexus to current harm to the child. Harrison is the only case (to date) that calls for a nexus between domestic violence and harm to the child.

Adoption of Jillian, 101 Mass. App. Ct. 1122 (2022) (Mass. App.Ct. Rule 23.0). Parents in child welfare appeals often have many issues, but those issues do not necessarily render a parent unfit. In Jillian, the panel vacated the termination decrees as to the father and remanded for additional findings. The judge's findings failed to show a nexus between the father's history of domestic violence, substance use, and mental health issues and his ability to parent the child.

In Jillian, mother's three children were removed due to domestic violence, substance abuse, and mental health issues. Jillian and Daniel were placed in the custody of their father, Greg; Edward, the mother and father's child, was placed in foster care. Mother and father's relationship involved significant domestic violence and both parents suffered from substance abuse and mental health issues. Mother repeatedly either denied or minimized the violence between them and neither party addressed these issues or worked with DCF in any meaningful way. In addition, mother made repeated false allegations of violence against Greg, even after their relationship ended. The trial court terminated mother's parental rights to all three children, and granted permanent custody of Jillian and Daniel to their father, Greg. The trial court also terminated the father's parental rights to Edward.

The appeals court affirmed the termination of mother's parental rights, rejecting her argument that because the children were in the custody of a parent, termination was not necessary. "The mere fact that Jillian and Daniel are in the custody of their father, Greg, does not diminish their 'unqualified right to

permanency and stability.'" (citing Care and Protection of Zeb, 489 Mass.783, 788-89 (2022)). The panel further noted that given the mother's repeated false accusations against Greg, termination is in the best interest of the children as it would prevent mother from initiating periodic review and redetermination proceedings to disrupt the children's stable placement.

The Appeals Court vacated the decrees against father, despite the trial court's findings of domestic violence, substance abuse, mental health issues, and failure to cooperate with DCF. The panel agreed with the father that the trial judge's findings did not show how any of these issues, even if they existed, were connected to his ability or lack of ability to parent Edward. In doing so, the panel recognized that the evidence in the record might, in fact, contain enough to show father's unfitness by clear and convincing evidence, but it was for the trial judge to draw the connections and show the nexus between father's shortcomings and harm to the child, not the panel. The panel remanded the case for further clarification of the judge's findings, stayed the present custody arrangements, and directed the trial judge to make explicit findings.

GRANDPARENTS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 119, § 1
G.L. c. 119, § 26B(a)
G.L. c. 176, § 78
110 CMR §§ 7.101(3), (5), (8)
The Fostering Connections to Success and Increased Adoptions Act of 2008, 42 USC § 671 (2008)
Troxel v. Granville, 530 U.S. 57 (2000)
Blixt v. Blixt, 437 Mass. 649 (2002)
Adoption of Gabrielle, 39 Mass. App. Ct. 484 (1995)

Adoption of Parnell, 75 Mass. App. Ct. 1111 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "post-judgment contact").

Adoption of Samir, 78 Mass. App. Ct. 1104 (2010) (Mass. App. Ct. Rule 1:28). In Samir, the trial judge failed to order post-adoption visitation with a grandmother who shared a significant bond with the child. Both mother and child argued on appeal that this was error. DCF opposed a visitation order (your tax dollars hard at work) even though it conceded at oral argument that visitation between the child and his grandmother had been taking place post-trial. The panel sent it back:

> The judge, having found 'a significant bond' between the child and the grandmother, has the discretion to consider, in the best interests of the child, whether some form of contact is appropriate, and if so, the conditions, nature, scope, and frequency of any such contact. In light of this, that portion of the decree pertaining to visitation between the child and the grandmother is vacated and remanded for further proceedings.

This case is further support for the court's power (indeed, its obligation) to order post-termination and/or post-adoption visitation between a child and any family member with whom the child shares a significant bond.

Care & Protection of Zerlinda, 84 Mass. App. Ct. 1129 (2014) (Mass. App. Ct. Rule 1:28) (see discussion at "ICPC").

GUARDIANSHIP

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 190B, § 5-204
Guardianship of V.V., 470 Mass. 590 (2015)
L.B. v. Chief Justice of Prob. & Family Court Dep't, 474 Mass. 231(2016)
Guardianship of K.N., 476 Mass. 762 (2017)
Guardianship of Clyde, 44 Mass. App. Ct. 767 (1998)
Guardianship of Yushiko, 50 Mass. App. Ct. 157 (2000)
Guardianship of Estelle, 70 Mass. App. Ct. 575 (2000)
Guardianship of Phelan, 76 Mass. App. Ct. 742 (2010)
Guardianship of Kelvin, 94 Mass. App. Ct. 448 (2018)

Care & Protection of Ilsa, 83 Mass. App. Ct. 1105 (2013) (Mass. App. Ct. Rule 1:28). Just because a parent assents to a guardianship doesn't mean the court can't find that parent unfit. In Ilsa, the father argued on appeal that the trial court need not have found him unfit because he assented to the paternal aunt's petition for guardianship on the second day of trial. The panel disagreed. Although the father visited with the child regularly, he conceded that he lacked suitable housing for her. The panel held that the trial judge "properly could conclude that, as the father, himself, has admitted, he is not presently able to assume parental responsibility for Ilsa."

If you are trial counsel for a child who wants a guardianship, you might wish to press for a parental unfitness finding even if the parent(s) consent. It is more difficult to challenge a guardianship based on parental unfitness than one based purely on consent. A parent can withdraw consent, but cannot withdraw an unfitness finding.

Care & Protection of Averell, 83 Mass. App. Ct. 1137 (2013) (Mass. App. Ct. Rule 1:28). Following a trial in 2006, the Juvenile Court found the father unfit and appointed the children's paternal uncle and his wife as the children's permanent guardians. In 2012, the court found the father unfit again after a review and redetermination hearing, but did not terminate his parental rights. The Appeals Court affirmed, and noted that the father was free to seek review and redetermination every six months. The panel used some interesting language about reasonable efforts, suggesting that DCF had to continue offering father reunification services going forward:

> [E]ven after an adjudication of unfitness, the department has the obligation under G.L. c. 119, § 1, to encourage the use by [the father] of all available resources to promote the strengthening and encouragement of family life[.] See G.L. c. 119, § 29C; Care &

> Protection of Elaine, 54 Mass. App. Ct. 266, 274 (2002)." [internal quotations omitted]. The fact that the children are currently placed with loving guardians does not mean that DCF may permissibly ignore efforts to strengthen the family further.

It is unclear in Averell whether the trial court had ever held a permanency hearing or whether the permanency goal, prior to entry of the guardianship, was guardianship or reunification. If the goal had been guardianship, presumably DCF's reasonable efforts would have to be directed to maintaining the guardianship, not reunifying the children with the father. Nevertheless, Averell is a good case to cite if you represent a parent seeking services or visitation after entry of a guardianship decree.

In **Adoption of Maisie, 94 Mass. App. Ct. 1117 (2019) (Mass. App. Ct. Rule 1:28)**, the trial judge found the parents unfit and terminated their rights, "thereby freeing the children to be adopted by their maternal grandmother."

The problem? Adoption wasn't the plan; guardianship was. Although there was no permanency or adoption plan in the record that would have documented the parties' intentions, both the maternal grandmother and the DCF social worker testified that their plan was for guardianship. The judge did not mention guardianship in her findings. The panel vacated the termination, noting that "the judge failed to meaningfully consider and evaluate that guardianship was the goal for the children."

Most importantly, the panel noted that guardianship and adoption are very different outcomes, and that guardianship doesn't require termination: "The ramifications of a guardianship versus an adoption are different and we cannot conclude, based on the judge's findings, whether she would have terminated the parents' rights in the event of guardianship rather than adoption."

If guardianship was proposed in your case at the trial level, but the judge terminated without making findings about it, Maisie is worth citing.

IMMIGRATION ISSUES

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Immigration and Nationality Act, 8 U.S.C.A. § 1101(a)(27)(J)
Adoption of Peggy, 436 Mass. 690 (2002)
Guardianship of Penate, 477 Mass. 268 (2017)
Hernandez-Lemus vs. Arias-Diaz, 480 Mass. 1002 (2018)

Guardianship of De La Cruz, 86 Mass. App. Ct. 1106 (2014) (Mass. App. Ct. Rule 1:28). This case is worth mentioning because it reinforces the importance of the trial judge making independent findings of fact and providing a basis for those findings. The child submitted proposed findings in an effort to obtain Special Immigrant Juvenile (SIJ) status. The trial judge adopted some, but not all, of the juvenile's proposed findings. (The un-adopted findings would have helped the child obtain the desired immigration status). The judge did not explain why she refused to adopt the remaining findings, which the panel noted were fully supported by the record. Because the judge received no testimony and made her findings based

entirely on documentary evidence, the panel did not accord her findings any special deference. Instead, because of the particular circumstances presented, the panel issued its own findings and rulings and remanded the matter with an order to enter those findings and rulings forthwith.

This is a great case for attorneys seeking SIJ status for their clients. For the rest of us, it's a reminder that trial court findings based solely on documentary evidence are not entitled to deference.

Guardianship of Quillay, 90 Mass. App. Ct. 1110 (2016) (Mass. App. Ct. Rule 1:28). Quillay is helpful for trial attorneys representing children seeking special immigrant juvenile (SIJ) status under the Immigration and Nationality Act, 8 U.S.C. §1101(a)(27)(J). Trial judges are sometimes hesitant to make the required finding that reunification with one or both of the juvenile's parents is "not viable due to abuse, neglect, or abandonment" when the child has been safely reunified with a non-offending parent and is not currently suffering from abuse or neglect.

Here, the trial court appointed an adult sibling as the child's guardian, but denied an accompanying motion for special findings because the child failed to demonstrate the "exigent circumstances to warrant entry of findings of abuse and abandonment." The panel held that the trial court applied an incorrect legal standard. According to the panel, motions for SIJ special findings should be "evaluated under the best interests of the child standard" and do not include a requirement that the petitioner show exigent circumstances. Because the record on appeal consisted entirely of documentary evidence, the panel was "in as good a position as the probate judge was to decide questions of fact." Bluhm v. Peresada, 5 Mass. App. Ct. 766, 766 (1977). Because the evidence was uncontested, the panel made its own special findings on the child's SIJ status.

Adoption of Andreas, 78 Mass. App. Ct. 1119 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "parental unfitness/deportation").

J.C. v. M.T., 92 Mass. App. Ct. 1111 (2017) (Mass. App. Ct. Rule 1:28) and **Tejada v. Lemus, 92 Mass. App. Ct. 1111 (2017) (Mass. App. Ct. Rule 1:28)**

This pair of decisions reversed the Probate and Family Court's denials of motions for special findings necessary to establish a child's eligibility to apply for special immigration juvenile (SIJ) status. Although these cases predate the SJC's decision in Hernandez-Lemus vs. Arias-Diaz, 480 Mass. 1002, 1003 (2018) (clarifying that "a judge simply may not decline to make findings; he or she must make the findings – whether favorable or not"), they are helpful because they suggest an alternative pathway for trial counsel to secure timely SIJ findings. In each case, the panel reversed the trial court's denial of the motion for findings but also, in light of the time-sensitive nature of the requests, considered the uncontested documentary evidence and issued the requested findings itself (and ordered the trial court to enter a decree incorporating those findings forthwith).

What does this mean? It means that, if the trial judge denies your motion for special findings, you could ask an Appeals Court single justice to enter them instead of remanding to the trial court. But only make such a request if it is truly time-sensitive.

If you represent a child who is seeking SIJ status and you need to file a motion for special findings, reach out to CAFL Training Director Amy Karp (akarp@publiccounsel.net) for materials to assist you.

INTERSTATE COMPACT ON PLACEMENT OF CHILDREN (ICPC)

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

110 CMR §§ 7.507(4), 7.503(8)
Custody of Quincy, 29 Mass. App. Ct. 981 (1990)
Adoption of Warren, 44 Mass. App. Ct. 620 (1998)

In addition, if you have an ICPC issue concerning an out-of-state parent, contact Andrew Cohen, CAFL Director of Appeals, for more material from other states.

Adoption of Liz, 79 Mass. App. Ct. 1103 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "adoption plans/competing plans").

Care & Protection of Zerlinda, 84 Mass. App. Ct. 1129 (2014) (Mass. App. Ct. Rule 1:28). After both parents stipulated to unfitness in November 2007, the court granted DCF custody of the child, and DCF placed the child in the grandmother's home in New Hampshire pursuant to the ICPC. In March 2011, New Hampshire DCYF determined that the grandmother's home was no longer a suitable placement, and DCF removed the child. The grandmother did not appeal the DCYF's decision. Instead, one year later, the grandmother moved to intervene in the Juvenile Court proceeding in Massachusetts, claiming that DCF interfered with her right to visit the child. Her motion was denied, and she appealed. The Appeals Court affirmed, noting that the grandmother failed to identify a constitutional, statutory, or common law principle indicating a right to intervene. The panel further held that intervention is not the appropriate alternative to an action seeking review of an administrative decision. The panel noted that the grandmother could petition for visitation with the child pursuant to G. L. c. 119, § 26B, but she had not done so.

There are a couple of takeaways from Zerlinda. First, relatives aggrieved by out-of-state agency decisions must appeal those decisions under that state's rules; our Appeals Court is not the proper venue to appeal out-of-state agency decisions. Second, potential intervenors should first exhaust other remedies before claiming that intervention is all that remains. Had the grandmother in Zerlinda moved for visitation under G.L. c. 119, § 26B or petitioned for guardianship and been denied, she would have had a stronger argument for intervention.

INDIAN CHILD WELFARE ACT (ICWA)

★ Always cite to statutes and published cases before citing to Rule 23.0 decisions:
Adoption of Arnold, 50 Mass. App. Ct. 743 (2001).
Adoption of Leonard, 103 Mass. App. Ct. 419 (2023).

Adoption of Irma, 103 Mass. App. Ct. 1106 (2023) (Mass. App. Ct. Rule 23.0). The facts of Irma are complicated, but what makes the case interesting is the ICWA issue.

Mother claimed on appeal that DCF didn't adequately investigate available evidence of the children's connection to a Native American tribe, and that the trial judge ignored the children's status as Indian Children and failed to conduct an independent inquiry under ICWA. Because several 51A reports and an assessment implicated ICWA (referencing mother's affiliation with a Cherokee tribe), she argued that DCF had "reason to know" the children may be Indian Children.

A child is an "Indian Child" under 25 U.S.C. § 1903(4) if they are:

1. A member of an Indian tribe; or
2. Eligible for membership in an Indian tribe and . . . the biological child of a member of an Indian tribe.

In Irma, DCF sent letters to three federally recognized tribes and the Eastern Regional Bureau of Indian Affairs that covered the area where mother claimed a connection. All of the tribes responded stating that the children were not Indian Children under ICWA. "Because the mother denied tribal membership, and there is no claim that any of the biological fathers were members of an Indian tribe, the children did not qualify under the second avenue." Accordingly, DCF complied with ICWA.

ICWA imposes notice and inquiry obligations not just on DCF but also the court. The trial judge had an affirmative obligation to ask whether the children were Indian Children, which the judge did in 2019. The mother denied such status, as she did to DCF in 2017. While the panel recognized that merely asking a party may not be enough where there is "reason to know," the judge was permitted to "rely on facts or documentation indicating a Tribal determination of membership or eligibility for membership in making a judicial determination as to whether the child is an "Indian child." 25 C.F.R. § 23.108(c). The letters from the Tribes that the children were not Indian Children under ICWA were sufficient, and there was no error in failing to conduct a further inquiry.

Adoption of Nora, 103 Mass. App. Ct. 1109 (2023) (Mass. App. Ct. Rule 23.0). Nora was briefed before the Appeals Court issued its decision in Adoption of Leonard, 103 Mass. App. Ct. 419 (2023), but it was argued after Leonard was decided. In Leonard, the panel held that DCF's expert witness - who was qualified by the trial judge as an expert in "Native American cultures and traditions" based on her knowledge and experience in ICWA and tribal customs - was *not* qualified to testify about the likelihood of "serious emotional or physical damage to the child" if he were returned to his mother, as required by ICWA.

DCF's "expert" in Nora was the same one the agency used in Leonard, and appellate counsel argued successfully that the Leonard decision controlled and required remand. The panel gave the trial judge discretion to take additional evidence on remand regarding mother's current unfitness and the child's best interest. But, unsurprisingly, the panel urged a speedy decision given the child's age, the fact that she is now in a pre-adoptive home, and the considerable amount of time that had passed between filing of the petition and the remand order.

JUDICIAL BIAS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Adoption of Tia, 73 Mass. App. Ct. 115 (2008)
Adoption of Norbert, 83 Mass.App.Ct. 542 (2013)

In addition, if you have a case concerning judicial bias, contact Andrew Cohen, CAFL Director of Appellate Panel, for more material from other states.

Adoption of Jade, 74 Mass. App. Ct. 1120 (2009) (Mass. App. Ct. Rule 1:28). This case is very much like Adoption of Tia, 73 Mass. App. Ct. 115 (2008), in which the (same) judge made statements about the weight of the evidence before trial had concluded and also urged settlement during trial. Here, the panel determined that the judge's comments did not, in context, show prejudgment. Like Tia, the Court in Jade held that the evidence "so substantially supported the judge's findings and conclusions that the mistakes do not warrant reversal." The panel quoted Tia, however, that "when a judge raises the question of settlement in the midst of trial in cases such as these, she creates needless complication." The panel also noted in its conclusion that the judge's comments were "inappropriate and to be avoided[.]" Jade, like Tia, may be helpful to cite in a closer case if the trial judge makes comments about the case or urges settlement prior to the close of evidence.

Adoption of Zaria, 79 Mass. App. Ct. 1114 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "adoption plans/competing plans").

Adoption of Ezra, 84 Mass. App. Ct. 1102 (2013) (Mass. App. Ct. Rule 1:28). In Ezra, the trial court terminated the father's rights because he couldn't meet his son's special needs. The father claimed that the trial judge was biased because he interrupted father's cross-examination of expert witnesses. The Appeals Court acknowledged that "the number of interruptions became exceptional and risked the appearance of partiality." [Note: This is the same trial judge who aggressively questioned witnesses in Adoption of Norbert.] However, because the interruptions sought clarification (not preferred answers) and there was no jury, there was no prejudice. The panel noted that, while the father claimed that he was denied the opportunity to challenge DCF's expert testimony or solicit useful testimony, he failed to point to specific instances. The trial judge challenged DCF's experts' assessments on several points. As a result, the panel determined that the judge's interruptions did not deny the father the opportunity to rebut adverse allegations of unfitness.

This is a bit tough to swallow. Is the panel saying that the father wasn't denied the opportunity to challenge DCF's experts because the judge did it for him? That can't be right. What if the father wanted to challenge the DCF expert in other ways? If the judge is a true neutral fact-finder, how can his questioning adequately replace the adversarial questioning that is the hallmark of our trial system? Still, the case has an important takeaway for trial counsel. If a judge interrupts trial counsel's questioning and asks his/her own questions, trial counsel must resume where he/she left off. Don't let the judge throw you; if you have an examination agenda (which you should), keep to it. If the judge won't allow further questioning, trial counsel must object and preserve the issue by making an offer of proof (what counsel would have asked, what the

witness's expected answers would be, and why those answers matter). Trial counsel must also object if the judge asks either objectionable questions or questions that may elicit objectionable answers. That is, the judge's questions must be treated like the questions of counsel. It is difficult to object to a judge's questions, but you must do so in order to preserve the issues.

Adoption of Ray, 86 Mass. App. Ct. 1104 (2014) (Mass. App. Ct. Rule 1:28). Following a trial, the Juvenile Court found the father unfit and terminated his parental rights. The father argued that the judge's side-bar comments about settlement deprived him of a fair trial. The Appeals Court disagreed. The comments in question occurred after eight days of a nine-day trial. At that time, only the potential admission of a police report and limited rebuttal testimony by father remained. The panel noted that, unlike Adoption of Tia, 73 Mass. App. Ct. 115 (2008), where the judge had erred by assessing the strength of the evidence well before the evidence had closed, the challenged comments here came at the end of the trial after the judge had access to all of the evidence and occurred within a conversation where counsel for both parents indicated that their clients were considering open adoption agreements. Though the panel thought it would have been "more prudent to discuss settlement options after the questions regarding father's potential rebuttal testimony and the certified police report were resolved," the panel was satisfied that the comments did not compromise the fairness, or the appearance of fairness, of the trial.

Adoption of Vince, 86 Mass. App. Ct. 1113 (2014) (Mass. App. Ct. Rule 1:28). This case is the *fourth* time (!) the Appeals Court has considered whether a particular trial judge's questioning of witnesses was inappropriate and prejudicial. This case and its predecessors – Adoption of Norbert, 83 Mass. App. Ct. 542 (2013); Adoption of Ezra, 84 Mass. App. Ct. 1102 (2013) (Mass. App. Ct. Rule 1:28); Adoption of Nurit, 71 Mass. App. Ct. 1104 (2008) (Mass. App. Ct. Rule 1:28); and Adoption of Terrill, 70 Mass. App. Ct. 1115 (2007) (Mass. App. Ct. Rule 1:28) – suggest that judicial questioning, even excessive or inappropriate questioning, does not constitute structural error unless the trial judge was biased. Absent a showing of bias – which, if pervasive, would not require a showing of harm – an appellant must show that the judge's questioning prejudiced the appellant.

In Vince, the panel agreed that it was error for the judge to ask questions that were adversarial in nature. But the panel held that the error was not structural, citing Adoption of Seth, 29 Mass. App. Ct. 343, 351 (1990) (affirming termination decree, because judge's "extraordinary" questioning was not prompted by bias but rather his impatience with counsel's inability to properly pose questions). The panel went on to determine that the error was not prejudicial to the appellant; the evidence supporting the termination decree was overwhelming.

Vince is also interesting because it applies the "substantial risk of miscarriage of justice" standard to the unpreserved error. See Preservation of Error and Objections, below.

Care & Protection of Polly, 92 Mass. App. Ct. 1103 (2017) (Mass. App. Ct. Rule 1:28) (see discussion at "post-judgment contact"). During a settlement discussion prior to completion of the trial and prior to mother's testimony, the judge made negative comments about Mother's credibility. Also, before hearing any evidence on these points, the judge commented that Mother's divorce seemed to be a sham and that her injuries might have been caused by her ex. The panel criticized the judge, stating that, as in Adoption of Tia, 73 Mass. App. Ct. 115, 119-124 (2008), her comments were "troubling and should not have been made." Although the panel determined that her decision was supported by the record, it noted that "commenting on issues of fact and the credibility of a witness well before that party has testified are

precisely the type of statements that can sow seeds of doubt as to the fairness of the trial." Good language, to be sure, but a remand to a different judge would have made a stronger statement.

Adoption of Jed, 73 Mass. App. Ct. 1120 (2009) (Mass. App. Ct. Rule 1:28), is a reminder that parents' bad behavior at trial can be used against them. In Jed, the father left the courtroom during trial several times, slamming the door behind him. The judge noted this as evidence of the father's continuing anger management problem. The father argued on appeal that the judge should have recused himself after these observations, but the panel disagreed. "A judge need not ignore what he sees and observes at trial. See Commonwealth v. Adkinson, 442 Mass. 410, 415 (2004) (claimed bias or prejudice requiring recusal must arise from extrajudicial source, not matters learned from participation in the case)." This is an important lesson for trial counsel: remind the client that he is on display in court, and that everything he does can and will be used against him.

Adoption of Felicity, 74 Mass. App. Ct. 1105 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "jurisdiction").

Adoption of Jermaine, 80 Mass. App. Ct. 1107 (2011) (Mass. App. Ct. Rule 1:28). Jermaine is yet another aggressive-judicial-questioning bias case. In Jermaine, the father appealed the termination decree, arguing that the judge questioned witnesses "to such an extent that he relieved the department of its burden of proof." The judge elicited opinions from a psychologist, including the bases for her opinions, before the DCF attorney reached those topics. Nevertheless, the panel disagreed with the father, finding that most of the judge's questions were confined to "follow-up questions aimed at eliciting more details concerning hard facts such as when or where an event occurred, or the sequence or chronology of events." Judges are entitled to question witnesses in order to obtain clarification or eliminate confusion.

The panel did issue a vague warning, however, that might be useful to cite in another case with an active judicial questioner:

> [A]s the father correctly states, at times the questioning went into substantive areas that would have been best left to the department's attorney to develop in the first instance . . . [While a judge can elicit factual information], the judge must be cautious about stepping in too far too soon -- particularly where the testimony that is elicited may become the basis for the judge's ruling on the merits of the case. Examination in the first instance is best left to the parties' attorneys, and the judge should defer questioning the witnesses until such examination appears necessary.

The panel concluded that there was no prejudice from the judge's questioning, because "all of the testimony elicited by the judge would have been admitted had the questioning been done by the department's attorney instead."

That reasoning seems pretty thin to me. What if the DCF attorney *wouldn't* have elicited that testimony? What if the DCF attorney hadn't prepared for trial? What if the DCF attorney had gone in another direction? Can a judge offer *documents* in evidence on her own initiative because those documents would have been admissible if offered by a party? Wouldn't the panel's reasoning permit this? A troubling case, but ultimately helpful if you represent an appellee-child who is defending a judgment issued by an actively-questioning judge.

Adoption of Leroy, 92 Mass. App. Ct. 1122 (2019) (Mass. App. Ct. Rule 1:28) Yet another case about judicial questioning! Father argued that the trial judge improperly asked "numerous and assertedly result-oriented questions of certain witnesses." The panel rejected Father's bias claim but was still critical of the judge's questioning. While judges are permitted to question witnesses, they may only do so to clarify answers or eliminate confusion; they aren't allowed to weigh in on, or appear to weigh in on, one side or the other. See fn. 20 (citing Adoption of Norbert, 83 Mass. App. Ct. 542, 547 (2013)). The judge warned counsel that he was going to ask questions:

> [He] informed all counsel at the start of the trial that he expected to engage in such questioning; that he did not intend to interfere with counsel's opportunity to present their own cases; that if they found any of his questioning objectionable, they should object; and that there would be no consequences for doing so.

(This wasn't generosity, of course; it's the law. Attorneys are not only welcome to object to judges' questions, they *must* in order to preserve those objections for appeal, however difficult that might be.) The panel wasn't impressed with the judge's warning:

> Such a statement, while helpful, still leaves counsel in a difficult position. It is not a substitute for exercising restraint and sensitivity in asking witnesses questions only when necessary to clarify the judge's understanding of the evidence. Here, at times, the judge's interventions may have been more overbearing than necessary.

The example given of the judge's "overbearing" intervention is scary:

> FN21. It was unnecessary for the judge, in overruling the mother's objection to the department's question about the father's substance abuse, to suggest that the mother's counsel was "cross[ing] an ethical line and represent[ing] another party, [and] I might as well have [the father's counsel] leave." The judge's initial decision to overrule the objection on substantive grounds was sufficient. Continuing on to suggest that an evidentiary objection constituted an ethical violation needlessly risked chilling counsel's advocacy.

This is, to be frank, downright bizarre on the part of the trial judge. There are many reasons why one parent's counsel might legitimately object to questions designed to elicit hearsay about the other parent's problems. Maybe the parents live together, and one parent's problems are a contributing factor in the other parent's fitness calculus; maybe DCF is alleging that the objecting parent knew (or should have known) about the other parent's problem; or maybe the objecting parent wants the child to live with the other parent. Perhaps the trial judge here was just confused about counsel's strategy, but that is no reason to raise the ugly specter of an ethics violation.

Adoption of Adina, 73 Mass. App. Ct. 1123 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/right to trial").

Adoption of Titus, 73 Mass. App. Ct. 1128 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/right to trial").

Adoption of Eartha, 74 Mass. App. Ct. 1108 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/right to trial").

Adoption of Anne, 92 Mass. App. Ct. 1125 (2018) (Mass. App. Ct. Rule 1:28). 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 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.

Adoption of Fabiana, 94 Mass. App. Ct. 1108 (2018) (Mass. App. Ct. Rule 1:28). When judges say things that suggest bias, you must move to recuse the judge right away. If you wait until the end of trial (or you never raise the issue at the trial court), you've probably waived the issue. See Demoulas v. Demoulas Super Markets, Inc., 428 Mass. 543, 549 (1998). This is what happened in Fabiana. After the first day of trial, in response to the parties' announcement that they had reached a tentative settlement,

> the judge indicated that, based on the evidence he had heard so far, "there's certainly enough evidence to keep [the child] in the custody of the Department of Children and Families at this time. I didn't feel as though there was enough evidence to terminate your parental rights." He also stated that, although he had not heard all the evidence, he "had an idea as to how this thing was going to go. And I don't think it would have been favorable for you to get on the witness stand and start answering questions to which you don't really want to answer." The judge also commented that it would not favor the mother that the child did not live with her, stating also that the court process was designed so that if the mother did "not put her daughter first, [her parental] rights ultimately [would] be terminated."

Courts have held that comments like these show judicial bias or, at a minimum, give the appearance of bias. See Adoption of Tia, 73 Mass. App. Ct. 115 (2008). Presumably, the mother's trial counsel didn't move to recuse because a settlement was imminent. Alas, no settlement was reached, and the hearing continued. And before it continued, no one moved to recuse the judge.

The panel determined that the issue was not preserved because the mother never objected to the judge hearing the rest of the trial (that is, she never moved for recusal). While unpreserved bias claims may still

be raised in "exceptional circumstances," there was nothing exceptional here. Although the mother argued that the near-settlement at that point was indeed exceptional, the panel faulted her for not objecting once the settlement failed and the hearing continued. The panel affirmed the termination decree.

Note that an Appeals Court panel did address unpreserved claims of judicial bias in Adoption of Vince, 86 Mass. App. Ct. 1113 (2014) (Mass. App. Ct. Rule 1:28), discussed in our Compendium. In Vince, the panel applied a "substantial risk of miscarriage of justice" standard to unpreserved error. Is that standard different than "exceptional circumstances"? In practice, probably not. Still, appellate counsel should cite to Vince and Fabiana if the bias claim is unpreserved, and argue that both tests are satisfied.

The take-away for trial lawyers? Move to recuse as soon as the judge makes a statement showing bias. Are you – like the lawyers in Fabiana – waiting for a settlement, which would make an incendiary motion like this unnecessary? Fair enough. But as soon as the settlement fails and the hearing continues, file your motion. Otherwise you'll have waived the objection (except in the most egregious circumstances).

JURISDICTION

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Massachusetts Child Custody Jurisdiction Act, G.L. c. 209B
Uniform Child Custody Jurisdiction and Enforcement Act (which applies to all states except MA)
Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A
Adoption of Yvette, 71 Mass. App. Ct. 327 (2008)
Adoption of Anisha, 89 Mass. App. Ct. 822 (2016)

Adoption of Felicity, 74 Mass. App. Ct. 1105 (2009) (Mass. App. Ct. Rule 1:28), offers another warning to trial counsel: be careful what you say in court, and remember to object to anything said by opposing counsel that you disagree with, even if you are not in trial. In Felicity, the Juvenile Court properly took emergency jurisdiction of a child while the mother and child were traveling from Maine (their home state) through Massachusetts to New York. However, under G.L. c. 209B, § 2, after the emergency "ended," jurisdiction of the case lay in Maine unless Maine declined jurisdiction. Throughout the case, it was never clear if Maine officials were formally asked to take jurisdiction, or whether Maine took any action whatsoever. All that was clear was that the lawyers talked about it in court:

> [T]he mother and father asked the Juvenile Court to transfer jurisdiction to Maine. A judge of the Juvenile Court agreed that Maine should assume jurisdiction and stated on the record that she could issue the necessary orders and ask for contact with the appropriate court in Maine. . . . [Later in court], the father's attorney represented that Maine was refusing to take the case. The mother's attorney was present and did not object to this representation.
> . . .
> Given that the father had sought the transfer to Maine, such a representation would not have been in his client's interest. The mother had also sought the transfer to Maine, and the mother's attorney did not object to this representation, as she would have been expected

> to do if it were false. The judge concluded that Maine had declined jurisdiction and that the case was properly before the Juvenile Court. Under these circumstances, we agree.

That a court can properly assume jurisdiction based on informal statements by counsel is a scary concept. (And Felicity is on very shaky ground after Adoption of Bill, below, although both cases are unpublished.) Still, the message from Felicity is important: trial counsel must be very vigilant about objecting to statements made by opposing counsel, even if those statements are not proffered as evidence or made at trial. Although the panel does not explain its reasoning, it appears to state that counsel's failure to object to other counsel's adverse statements may be construed as an adoptive admission (or admission by silence) of a statement against interest. Be particularly wary of adverse statements made by counsel "allied" with your client's position.

Does the wackiness of Felicity have your attention? Good, because it's not the first time an appellate court has given great weight to counsel's silence following a factual assertion by opposing counsel.

In Adoption of Peggy, 436 Mass. 690, 700 n. 12 (2002), the SJC appears to find that notice of the care and protection proceedings was given to the Indian consulate under art. 37 of the Vienna Convention on Consular Relations, 21 U.S.T. 77, 101, 102 (1963), because "[c]ounsel for the child asserted at oral argument, without challenge, that the child's paternal grandmother had contacted the Indian consulate 'one year ago.'" Accordingly, whether opposing counsel's statement is made during trial court proceedings or oral argument, you should object to it (or, in the case of oral argument, dispute it in a post-argument letter to the panel).

Adoption of Yannis, 78 Mass. App. Ct. 1111 (2010) (Mass. App. Ct. Rule 1:28). Yannis is noteworthy only because it briefly addresses the Massachusetts Child Custody Jurisdiction Act (MCCJA), G.L. c. 209B, §§ 2(a)(3) and (4), and the Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A. The panel's analysis of the statutes is not worth repeating here – it held that neither statute divested Massachusetts of jurisdiction to terminate the father's rights – but you should be aware of the case because so few appellate decisions address these statutes.

Adoption of Bill, 94 Mass. App. Ct. 1120 (2019) (Mass. App. Ct. Rule 1:28). Bill vacated a termination decree on jurisdictional grounds. California was the child's "home state," and the trial court failed to secure a proper declination of jurisdiction from California, so it lacked jurisdiction to terminate. DCF argued that its counterpart in California refused to get involved with the family, and this refusal was all the "declination" from California that Massachusetts needed. The panel was (quite properly) unimpressed:

> DCF has not identified any statutory or precedential authority, nor are we aware of any, which confers to the child welfare agency of a State the authority to decline jurisdiction for the courts of that State. That authority rests solely with a State court of competent jurisdiction. Because there is no evidence in this case, either by way of a letter or other form of communication, that a court in the State of California has either declined jurisdiction or affirmatively conferred jurisdiction on Massachusetts, the judge here lacked jurisdiction to enter any permanent orders pertaining to the child. Accordingly, we vacate the decree. (Citations omitted.)

This is all well and good when there are pending proceedings in the home state, so that there is a judge to write to, call, or email. But in Bill there was no pending action in California. How does the judge or agency secure a judicial declination from the home state when nothing is pending? Does the local judge call or write to the home state's Supreme Court? To the chief judge of the trial court (if there is such a position)? To *any* judge in the home state who handles dependency/family law matters? To any judge in the city/county where the child used to live? Is there a designated UCCJEA judge to write to who figures this out? While the panel probably reached the right decision, it's also clear that trial judges have no guidance on the issue.

Note that subject matter jurisdiction cannot be agreed upon or waived by the parties, and it can be raised at any point. In Bill, trial counsel never objected based on lack of subject matter jurisdiction; the issue was raised for the first time on appeal.

Adoption of Kelsey, 100 Mass. App. Ct. 1132 (2022) (Mass. App. Ct. Rule 23.0). As the panel stated, Adoption of Kelsey is a "cautionary tale." When the termination decision was issued, the subject children had been living in Massachusetts for seven years. The panel held that Massachusetts did not have jurisdiction under G.L. c. 209B, § 2(a)(1) because New York would have had jurisdiction under § 2(a)(1) as the children's "home state." Because New York was the children's home state, it was New York's decision whether to take jurisdiction or decline it, and the Massachusetts court lacked jurisdiction. Fortunately, this problem could be cured. The panel, in an earlier appeal of this matter, remanded the case so that the judge could inquire with New York. New York ultimately declined jurisdiction, and the panel treated this as a *nunc pro tunc* declination so that the Massachusetts juvenile court had jurisdiction to terminate parental rights. The key part of Kelsey, besides the panel's analysis of the MCCJA, is this warning:

> The failure of the parties to raise the jurisdictional questions in the trial court at the outset of these proceedings has created substantial uncertainty in the lives of the children, and families, affected by this case. The Supreme Judicial Court long ago held that "[u]nder the statute, a court must determine whether it has the power to exercise jurisdiction in a custody proceeding and, if so, whether it should exercise that power under the standards provided in the statute. A court may not undertake a custody hearing until both of these determinations have been made." Custody of Brandon, 407 Mass. 1, 5-6 (1990). Courts of course must be attentive to this, particularly in cases where children have recently moved to, or may simply be visiting, Massachusetts. But the parties, and particularly DCF, which appears constantly in these cases and can be expected to have intimate familiarity with the statute governing jurisdiction, should draw the trial court's attention to jurisdictional concerns where they have not explicitly been addressed.

While this warning is important – obviously, trial lawyers should bring jurisdictional problems to the trial court's attention as soon as possible – this should not dissuade appellate counsel from raising a winnable jurisdictional argument. Subject matter jurisdiction under c. 209B is one of the few issues that can be raised at any time and isn't waived by the failure to raise it at the trial level.

Adoption of Vickie, 99 Mass. App. Ct. 1118 (2021) (Mass. App. Ct. Rule 23.0). In Vickie, the father argued that the Juvenile Court lacked jurisdiction because South Carolina was the child's home state when the care and protection petition was filed. The panel concluded that neither South Carolina nor

Massachusetts had "home state" jurisdiction. Because no state had "home state" jurisdiction, the next step was to look at "default jurisdiction" under G.L. c. 209B, § 2(a)(2). The panel concluded that Massachusetts had "default jurisdiction":

> A court has default jurisdiction when no State has home State jurisdiction and "it is in the best interest of the child that a court of the [C]ommonwealth assume jurisdiction." G. L. c. 209B, § 2 (a) (2). The exercise of default jurisdiction is in the child's best interests if "(i) the child and his or her parents, or the child and at least one contestant, have a significant connection with the [C]ommonwealth, and (ii) there is available in the [C]ommonwealth substantial evidence concerning the child's present or future care, protection, training, and personal relationships." G. L. c. 209B, § 2 (a) (2). Vickie and both of her parents had significant connections to Massachusetts. The mother lived in Massachusetts prior to meeting the father and the couple began their relationship here. The father has moved between Massachusetts and South Carolina for much of his life. More importantly, the father returned to Massachusetts in June 2017, and intended to remain here so that he could reunite as a family with the mother and Vickie. In addition, the department, an agency of the Commonwealth, became involved in Vickie's life shortly after she began living in Massachusetts.
>
> There was also substantial evidence concerning Vickie's present and future care and protection in Massachusetts. As noted, the department investigated allegations of neglect and placed Vickie in appropriate foster care. Thereafter, the department was responsible for Vickie's well-being and was in a position to monitor the father's ability to care for Vickie. Given these circumstances, we conclude that the Juvenile Court properly exercised default jurisdiction pursuant to G. L. c. 209B, § 2 (a) (2)

While DCF's attention to the child and her parents after it seized custody seems a dubious factor in determining default jurisdiction, the other reasons seem pretty solid. If, in your appeal, no state has "home state" jurisdiction, Vickie should be a valuable case.

LANGUAGE ACCESS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 221C
110 CMR §§ 1.06, 1.09
42 U.S.C. § 2000d et seq. (title VI of the Civil Rights Act)

Adoption of Ivy, 91 Mass. App. Ct. 1128 (2017) (Mass. App. Ct. Rule 1:28). Ivy addresses three issues concerning interpreters. First, if a parent believes that he needs an interpreter, he must ask the court for one. In Ivy, the Father argued on appeal that the court erred in failing to *sua sponte* give him an interpreter for a care and protection stipulation. The panel disagreed. The father had lived in the United States for 14 years, attended an English-speaking vocational school and obtained HVAC licensure, and answered questions during the colloquy with more than "yes or no" answers. In addition, both Father and his

attorney affirmed that Father understood the stipulation. Father never asked for an interpreter.

Second, the court has broad discretion in determining whether a parent needs an interpreter, and discretionary calls by trial judges are rarely overturned on appeal. The panel held that the trial judge did not abuse his discretion in failing to appoint an interpreter for Father *sua sponte* based on the facts noted above.

The third issue concerns prejudice. Under certain circumstances, the absence of an interpreter for a parent might be a structural error that requires a new trial without resort to a harmless error analysis. But not in this case. In Ivy, nine months after Father's stipulation, the court held a termination trial. At the start of *that* trial, Father requested a Swahili interpreter. The judge granted the request, and Father had an interpreter for the entire termination trial. According to the panel, even if Father should have had an interpreter for the stipulation, the lack of one didn't prejudice Father. The stipulation was not admitted as an exhibit at the termination trial, the judge's termination findings did not rely on the stipulation, and Father was able to fully defend his rights at the termination trial with an interpreter, which cured any defect.

Here are some rules of thumb regarding clients whose first language isn't English. If your client needs an interpreter, ask for one right away. If your client *might* need an interpreter, err on the side of asking for one. File a motion for funds for an interpreter to help you converse with your client outside of court. And, of course, make sure the client understands the finer details of what you (and the judge) are saying, not just the basic ideas.

PARENTAL UNFITNESS

BONDING WITH SUBSTITUTE CARETAKERS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 210, § 3(c)(vii)
Adoption of Frederick, 405 Mass. 1 (1989)
Adoption of Nicole, 40 Mass. App. Ct. 259 (1996)
Adoption of Katharine, 42 Mass. App. Ct. 25 (1997)
Adoption of Daniel, 58 Mass. App. Ct. 195 (2003)
Adoption of Rhona, 63 Mass. App. Ct. 117 (2005)

Adoption of Loughlin, 74 Mass. App. Ct. 1128 (2009) (Mass. App. Ct. Rule 1:28). Loughlin is a great 1:28, in which the panel vacated a termination because the findings were not supported by the evidence and failed to satisfy the requirements of c. 210, § 3. The trial court terminated mother's rights primarily based on her history of drug use and the strong bond between the child and the pre-adoptive parents (the child had lived with them for 27 months of his 34-month life). However, the panel held that there was no evidence to support the judge's conclusion that the mother was likely to continue to abuse drugs "for a prolonged indeterminate period":

> [T]he judge stated that the mother's substance abuse issues had not been remedied despite her participation in a variety of services. Although the judge was entitled, as he did, not to credit the mother's testimony that she had not relapsed prior to [selling drugs, leading to her incarceration], there was no affirmative evidence of drug use subsequent to the birth of the child. Indeed, the judge did not make a finding that the mother had relapsed prior to her incarceration but, rather, "seriously question[ed] Mother's sobriety when she was actively selling the drugs that she previously abused."

The judge may have "seriously questioned" the mother's sobriety, but judicial doubts are not the same as evidence, and here the evidence was lacking.

Absent supported findings of substance abuse, all that remained to support the unfitness conclusion was the child's bond to the pre-adoptive parents. The judge found that the child had a strong bond to the pre-adoptive parents and that the child would be harmed by removing him from them. But the panel held that this was not enough.

DCF's bonding evaluation had looked at the bond between the child and pre-adoptive parents, but not at the child's attachment to his birth mother. Further, there was testimony from DCF's expert that it is "always desirable" "to see both bio-parents and foster parents to help [him] make a better judgment of where a child ought to be." Significantly, earlier in the case the mother had moved for her own bonding evaluation, which the trial court denied. Perhaps signaling the apparent unfairness of this denial, the panel held that, on remand, "the judge should order such [a parent-child bonding] assessment in order to assist him in making his findings." (Note: This is a good case to attach to a motion for reconsideration if the trial judge denies your motion for funds for your own evaluation to counter an adverse DCF evaluation.)

The panel vacated the termination and remanded, specifying that a mother-child bonding assessment and more specific findings about bonding "are required." The panel also suggested (but did not require) that the parties could submit to the trial court additional evidence regarding parental fitness that had arisen post-trial.

Although the panel did not base its decision on visitation issues, it suggested that monthly visits with incarcerated parents is insufficient: "Despite departmental regulations designed to encourage the maintenance of bonds between children and their incarcerated parents, see 110 Code Mass. Regs. § 1.10 (2000), once the department changed its goal to adoption, it allowed the mother only one hour per month of visitation with the child." This is not a ringing endorsement for change, but trial counsel might cite Loughlin in an "abuse of discretion" motion to show that the Appeals Court suggested that the current once-per-month policy is contrary to DCF's own regulations.

Adoption of Soledad, 79 Mass. App. Ct. 1107 (2011) (Mass. App. Ct. Rule 1:28). In Soledad, the panel vacated the decree terminating the mother's parental rights because there was insufficient evidence of unfitness. The mother's parental rights were previously terminated as to all three subject children in 2007, but by agreement that decree was vacated in 2009 because of insufficient evidence. However, DCF reinstated its petition in late 2009, and mother's parental rights were again terminated. This decree was based primarily on mother's continued association with the children's father who had an extensive criminal record and substance abuse history.

The panel held that the trial judge's reliance on mother's continued contacts with father was defective for two reasons. First, there was no evidence linking father's criminal history with abuse or neglect of the children. Second, during the period in question – between the first and second termination decrees – the children were never exposed to father by mother because she herself was denied contact with them by DCF and the court. The panel noted:

> Even were we to accept an automatic imputation of adverse effect on the children from contact with the father, we reject the department's argument that the parents' association with each other allows the inference that the mother would expose the children to their father in the event she were given the opportunity.

But DCF wouldn't give up, and argued that mother was unfit for violating the terms of her service plan, which forbade contact with father. The panel was unimpressed: "To the extent the assertion that the mother failed to comply with her service plan is based on her contact with the father, it merely restates the same complaint and adds nothing to the department's case for termination." The panel also rejected DCF's argument as "circular" that mother "invited" termination of her rights by contacting father because she had been warned that DCF considered such contact detrimental to the children and grounds for termination.

This is all great stuff. But the best of all concerns a huge problem – unfitness based on bonding with foster parents. According to the panel,

> [t]he most troubling aspect of the record before us are the findings, which we accept as supported, that the children have established close bonds with their preadoptive families. This factor speaks directly to the children's best interests, but we cannot allow it to dictate the result. The self-fulfilling nature of this circumstance, if allowed to prevail, permits the postponement of an insufficient case to act as an automatic cure to defects in the department's case as long as children are simply separated from their parents for a long enough period of time. We cannot endorse such a result. See *Adoption of Zoltan,* 71 Mass. App. Ct. 185, 195 (2008), quoting from *Adoption of Rhona,* 57 Mass. App. Ct. 479, 492 (2003) ('The bonding of children with their foster parents cannot be the dispositive factor in these cases because the very fact of placing a child in foster care during judicial proceedings would in every case determine the outcome of those proceedings').

This may be the best response to the "attachment to foster parents = unfitness" argument in any case, published or unpublished.

Adoption of Serafina, 80 Mass. App. Ct. 1114 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "paternity").

Adoption of Dimitri, 96 Mass. App. Ct. 1108 (2019) (Mass. App. Ct. Rule 1:28) (see further discussion at "experts"; "reasonable efforts"; "findings/sufficiency"), is one of those rare, great Rule 1:28 cases that really should have been published. 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: "[t]his 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. (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)).

CRIMINAL CONVICTIONS

Adoption of Fabiano, 72 Mass. App. Ct. 1115 (2008) (Mass. App. Ct. Rule 1:28) (see discussion at "parental unfitness/incarceration").

Adoption of Soledad, 79 Mass. App. Ct. 1107 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "parental unfitness/bonding with substitute caretakers").

Adoption of Esme, 94 Mass. App. Ct. 1106 (2018) (Mass. App. Ct. Rule 1:28) (see discussion at "evidence/stale evidence").

DEPORTATION

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

110 CMR § 1.12
Adoption of Astrid, 45 Mass. App. Ct. 538 (1998)
Adoption of Fran, 54 Mass. App. Ct. 455 (2002)
Adoption of Posy, 94 Mass. App. Ct. 748 (2019)

Adoption of Andreas, 78 Mass. App. Ct. 1119 (2011) (Mass. App. Ct. Rule 1:28). There is an interesting footnote in Andreas, fn. 4, which states: "We agree with the father's argument that the judge's reliance on the father's immigration detention to conclude that he had abandoned the children was misplaced. Deportation has not been deemed grounds for the termination of parental rights nor does deportation constitute abandonment." Along with Adoption of Posy, 94 Mass. App. Ct. 748 (2019), this footnote is something to grab onto if the trial court relied heavily on your parent-client's immigration/detention status.

DISABILITIES

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

110 CMR §§ 1.08, 1.09
42 U.S.C. § 12132 (the Americans with Disabilities Act)
29 U.S.C. § 794 (section 504 of the Civil Rights Act)
Adoption of Gregory, 434 Mass. 117 (2001) (but see the Sarah Gordon findings, where the U.S. Department of Justice and U.S. Department of Health and Human Services say that Massachusetts state courts got it wrong in Gregory)
Care & Protection of Ian, 46 Mass. App. Ct. 615 (1999) (nexus needed between cognitive disability and neglect)
Adoption of Ilona, 76 Mass. App. Ct. 481 (2010)
Care & Protection of Laurent, 87 Mass. App. Ct. 1 (2015)
Adoption of Chad, 94 Mass. App. Ct. 828 (2019)

Adoption of Beatrix, 89 Mass. App. Ct. 1132 (2016) (Mass. App. Ct. Rule 1:28). Beatrix belongs in the pantheon of great Rule 1:28 decisions. The panel vacated the termination decree of a mother with cognitive limitations based largely on the failure of the trial judge to make "the necessary even-handed assessment" of the evidence. Specifically, the judge's findings (1) improperly focused on mother's past unfitness; (2) failed to address uncontroverted evidence of mother's progress and current fitness; (3) did not include "a well-founded reason for rejecting the parenting assessment performed at the department's request"; and (4) were internally inconsistent.

The DCF-required parenting assessment was largely positive about mother. The judge rejected it because the evaluator's background "focused on trauma, not parental functioning," and he had failed to speak to

the maternal grandmother. The panel found that this rationale was not supported by the record. The evaluator had conducted more than fifty parenting assessments, many of those for DCF, and the maternal grandmother was living in Florida, was estranged from mother, and had no knowledge of the mother's current circumstances. According to the panel, "here the bases for discounting [the evaluator's] opinion reflect an uneven assessment of the evidence."

In addition, the panel noted that the absence of findings on the mother's weekly visits with the child was significant, considering the "voluminous records" and favorable testimony of witnesses who observed the visits. While the judge was free to discredit the records and testimony, "she failed to address this evidence." The failure to explain her scant visitation findings, and the "incomplete characterization of the uncontroverted evidence before her," rendered the judge's conclusion unsupportable.

The panel noted that the judge placed an inordinate amount of weight on an incident that was eight years old and mother's noncompliance with services at that time, but failed to make findings as to the many years of mother's more recent compliance with services and perfect visitation attendance. According to the panel, "given the dated nature of the evidence of the mother's past parenting issues, and in light of the mother's improved cooperation with the department, it was unduly speculative, without more, to conclude that the mother's past conduct is predictive of the mother's conduct in her current, significantly changed, circumstances."

Beatrix also has great language regarding DCF's obligation to provide services to accommodate parents with disabilities. DCF and the judge placed great weight on the mother's failure to complete a services journal; further, according to the trial judge, what the mother wrote in that journal "failed to provide any insights as to whether she understood Beatrix's needs." The panel was unimpressed. "A journaling requirement for a cognitively impaired parent seems particularly inappropriate, especially where the parent's inability to complete it with a requisite level of insight is viewed as a failure to comply with that aspect of the service plan." The panel specifically took the opportunity "to note the department's ongoing obligation to make 'reasonable efforts to strengthen and encourage the integrity of the family.'" DCF had concerns about the mother's cognitive abilities, "yet her service plan failed to include services which could assist the mother in light of her impairment." On remand, the panel instructed that "the department is required to follow its regulations, which include the creation of an appropriate service plan for the mother."

The panel vacated the termination decree and remanded for further proceedings. It also specifically retained jurisdiction of any appeal from any future decree – that is, it wanted to make sure that the trial judge didn't steamroll the mother again.

Adoption of Dalila, 92 Mass. App. Ct. 1126 (2018) (Mass. App. Ct. Rule 1:28) (see discussion at "reasonable efforts").

Adoption of Clara, 97 Mass. App. Ct. 1105 (2020) (Mass. App. Ct. Rule 1:28). In this case, the father argued that DCF failed to accommodate his disability – deafness – and therefore prematurely terminated his parental rights. First, the good stuff in Clara: the panel acknowledged that the father qualified for protections under the ADA and that it was DCF's responsibility to provide the father with services that accommodated his needs.

Now the not-so-good stuff: the father claimed that DCF's failure to accommodate his deafness hindered his ability to reunify with the children. The panel disagreed. First of all, like the trial judge, it didn't believe that the father needed additional or better communication-related services:

The judge did not credit the father's testimony that he experienced problems communicating with the department, which he claimed even occurred with the use of ASL interpreters . . . [T]he father said that he had "no problem" dealing with the hearing community, and it was easier to communicate with his friends because he was more interested in those conversations, and he was more reluctant to talk about his parental rights. While ASL interpreters were not always available, the father told the department that it was not necessary to have interpreters for each visit with the children.

Second, the panel noted that DCF did provide some services. DCF referred father to a therapist serving the deaf and hard-of-hearing community; it made some referrals for ASL interpreters; and it used a case manager from the Massachusetts Commission for the Deaf and Hard of Hearing who participated in DCF meetings. And while DCF failed to secure interpreters for many visits and meetings, the panel held that these omissions were not the cause of the father's failure to complete and benefit from service plan tasks. Rather, father's failures were due to his own "inconsistency" and "violent nature." "The department's obligation to make reasonable efforts to accommodate the father's disability was ultimately contingent upon the father's fulfillment of his responsibilities, including service plan compliance." The panel affirmed the termination decree.

The takeaway? Make sure that your disabled parent client is clear from the start about the nature of his or her disability and the accommodations needed. Further, all parents, whether disabled or not, must participate – or try to participate – in the relevant services they are offered. Here, father's inconsistent participation in some services rendered incredible his claim that he would have participated in and benefited from others.

DOMESTIC VIOLENCE

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Custody of Vaughn, 422 Mass. 590 (1996)
In re Grella, 438 Mass. 47 (2002)
Adoption of Ramon, 41 Mass. App Ct. 709 (1996)
Care & Protection of Lillith, 61 Mass. App. Ct. 132 (2004)
Adoption of Imelda, 72 Mass. App. Ct. 354 (2008)

Adoption of Idina, 99 Mass.App.Ct. 1106 (2021)(Mass.App.Ct. Rule 23.0). (see discussion at "trial & procedural due process/burden shifting")

Adoption of Will, 78 Mass. App. Ct. 1109 (2010) (Mass. App. Ct. Rule 1:28). In Will, the panel affirmed the termination of a father's rights based on his history of domestic violence against female partners and his unwillingness to engage in any services to address his violence and anger problems. The father had no history of abusing or neglecting the child, and visited with him consistently. The panel noted that this was not a typical case of termination of parental rights under G. L. c. 210, § 3:

> It presents no evidence that the father has engaged in substance abuse or recent criminal activity, nor clear evidence that he has ever physically abused, endangered, neglected, or failed to support Will financially. We do not doubt the father's genuine love and affection for the child. He consistently attended scheduled supervised visits with Will while the child was in DCF custody and generally was attentive to and playful with him during these visits. Nonetheless, these facts do not negate the overwhelming evidence that his perpetration of domestic violence and lack of anger control, compounded by his apparent unwillingness or inability to change, render him currently unfit to parent a child.

Will contains a thorough analysis of parental unfitness based on domestic violence. It provides an excellent blueprint for an appellee arguing in favor of termination of the rights of a violent parent who refuses to engage in services.

Adoption of Yale, 83 Mass. App. Ct. 1137 (2013) (Mass. App. Ct. Rule 1:28). [Note: This case is unrelated to the published decision Adoption of Yale, 65 Mass. App. Ct. 236 (2005).] As we know from Custody of Vaughn, 422 Mass. 590 (1996), children do not have to be the victims of domestic violence to suffer harm. Children who witness domestic violence, even those who present as entirely unaffected, have suffered "a distinctly grievous kind of harm." Id. at 595. There need be no specific showing of harm from witnessing it. But this case takes it a step further. Here, there was no evidence that the child (who was two months old at removal) was exposed in any way to domestic violence. But given the past history of violent disputes between the parents (who were separated at the time of trial), the Appeals Court noted, "[t]he judge does not have to wait until the child actually observes the domestic violence" in order to protect the child from future harm.

Care & Protection of Bancroft, 86 Mass. App. Ct. 1120 (2014) (Mass. App. Ct. Rule 1:28). The mother and her younger child, Bancroft, appealed the judge's unfitness determination. (The mother also appealed the termination of her parental rights as to her older child.) The trial judge relied heavily on the mother's past abusive relationships. At trial, the mother testified that her current boyfriend was not abusive. There was no evidence to the contrary. But the judge discredited her testimony and found that she "did not have sufficient information" to determine whether the current boyfriend was abusive. The mother argued that this constituted improper burden shifting, but the panel disagreed, stating, "[t]he judge was entitled to discredit mother's uncontroverted testimony and determine that the record lacked credible evidence on this issue."

Judges, of course, cannot find facts based purely on discrediting witnesses. *See* Atkinson v. Rosenthal, 33 Mass. App. Ct. 219, 224 (1992) ("disbelieving evidence does not establish the contrary proposition"); Kunkel v. Alger, 10 Mass. App. Ct. 76, 86 (1980) ("It is settled that mere disbelief of testimony does not constitute evidence to the contrary."). Accordingly, a judge can't make a finding: "Father testified that he never used drugs, but I don't find him credible, so he did use drugs." (A judge *can* do this if there is other evidence that the father used drugs.) But Bancroft is a bit different. The judge here didn't find that the boyfriend was abusive as a result of discrediting the mother's testimony that he wasn't. Rather, the judge found that there was *no* evidence about whether the boyfriend was abusive, because the only evidence on point came from the mother and she didn't believe the mother. That is permissible. Judges don't have to believe witnesses just because there is no evidence to the contrary.

Adoption of Benedict, 97 Mass. App. Ct. 1112 (2020) (Mass. App. Ct. Rule 1:28), is an excellent reversal. Domestic violence does not always call for termination!

In Benedict, the judge's decision to terminate both parents' rights rested on two instances of domestic violence perpetrated by the father on the mother years before trial as well as the mother's continued denials that domestic violence occurred. The panel reversed as to the termination of the mother's parental rights and affirmed as to the termination of the father's.

There were two police responses in 2015 and 2016. The mother kicked the father out of the home. Both parents stipulated to their current unfitness later in 2016, but the children were allowed to remain with the mother. The children were removed and placed in foster care in 2017, when the mother met with DCF, reported feeling depressed and suicidal, and asked if the father could come home. DCF thereafter sought termination of parental rights. At trial in June 2018, the father was still out of the family home, although the parents continued to consider themselves a couple. Evidence showed that the mother was in compliance with her service plan, and she testified that, if the children were returned to her, the father would not be allowed to be alone with them. The court terminated both parents' rights.

In reversing as to mother, the panel noted that the judge's findings lacked "the link between that past history [of violence] and the judge's prediction 'with near certainty' that, despite [the father moving out], neglect of the children would occur if the mother regained custody." Notably, the panel relied heavily on Adoption of Katharine, 42 Mass. App. Ct. 25 (1997), a case involving parents who were admitted cocaine users, though there was no evidence that the use negatively impacted the children. In Benedict, the last of the two incidents of domestic violence occurred over two years before trial. There was no evidence that past domestic violence or the mother's continued relationship with the father had any negative impact on the children.

Before Benedict, the Katharine/nexus argument had never been successful in the domestic violence context (at least in an appellate decision). Benedict is worth citing to support the argument that a history of domestic violence is not a basis for termination of parental rights – at least as to the victim-parent – unless that history shows a likelihood of future harm to the child.

Another interesting part of Benedict: the panel reversed the termination of the mother's rights even though it affirmed the termination of the father's rights, *and they were still a couple*. In most cases, the unfitness of one parent translates directly to the unfitness of the other if they are in a relationship. But here, the mother had successfully imposed limits on the father's exposure to the children, and the judge did not discredit the mother's testimony that she would not allow the father to be unsupervised in the presence of the children. On this record, there was simply not enough evidence for the judge to properly conclude that the mother could not protect the children.

FAILURE TO VISIT

Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 210, § 3(c)(iii), (x)
Adoption of Mario, 43 Mass. App. Ct. 767 (1997)
Adoption of Fran, 54 Mass. App. Ct. 455 (2002)
Adoption of Zoltan, 71 Mass. App. Ct. 185 (2008)

Adoption of Xena, 48 Mass. App. Ct. 1109 (2009) (Mass. App. Ct. Rule 1:28) (see further discussion at "trial and procedural due process/discovery"; "releases"). This is a good case about "unfitness for failure to visit." The panel noted:

> The record reflects, and the judge implicitly found, that the mother failed to visit the children during the six months preceding trial and that she made no visits during the pendency of the trial (thereby missing an additional two scheduled monthly visits). The children were five years old at the time. The judge also found that the mother could provide no adequate explanation for this prolonged absence. . . . [E]ight consecutive months of missed visitation is itself strongly suggestive of parental unfitness. . . . [T]he judge's concern about the fitness of a parent who would allow such time to elapse without visiting her children was reasonable. Moreover, it was not just the lack of visitation itself that concerned the judge. The mother frequently neglected to inform the department when she would not be visiting the children as scheduled.

The panel was aware that the mother had some colorable reasons for failing to visit the children, but was unimpressed by them.

Adoption of Akeem, 74 Mas. App. Ct. 1107 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "findings/erroneous").

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

INCARCERATION

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

110 CMR § 1.10 (special consideration for incarcerated parents)
Custody of a Minor (No. 2), 392 Mass. 719 (1984)
Adoption of Sarah, 31 Mass. App. Ct. 906 (1991)
Adoption of Nicole, 40 Mass. App. Ct. 259 (1996)
Adoption of Whitney, 53 Mass. App. Ct. 832 (2002)

Adoption of Fabiano, 72 Mass. App. Ct. 1115 (2008) (Mass. App. Ct. Rule 1:28), is a good case to quote if you are seeking to show unfitness based on incarceration and/or pending criminal charges. The father in Fabiano did not abuse the child.

> However, as a result of his criminal history, the father has spent considerable time in prison and has been unavailable to parent the child. When the child was born in 2001, the father was in Federal prison serving a five-year sentence. Although the father was not in prison during trial, he faced pending charges consisting of a firearm violation, 'intimidation, attempt to commit a crime, conspiracy, assault with a dangerous weapon, threatening and assault.' If convicted, the father will almost certainly be sentenced to more jail time. While incarceration in and of itself is not grounds for termination of parental rights, a judge may look at the father's unavailability to parent the child due to incarceration as a factor in determining unfitness. See *Adoption of Nicole,* 40 Mass. App. Ct. 259, 262 (1996).

Adoption of Loughlin, 74 Mass. App. Ct. 1128 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "parental unfitness/bonding with substitute caretakers").

Adoption of Zena, 87 Mass. App. Ct. 1136 (2015) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/notice").

Adoption of Bethany, 79 Mass. App. Ct. 1117 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "post-judgment contact").

MENTAL HEALTH

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 210, § 3(c)(xii)
Adoption of Frederick, 405 Mass. 1 (1989)
Care & Protection of Bruce, 44 Mass. App. Ct. 758 (1998)
Adoption of Betsy, 69 Mass. App. Ct. 907 (2007)
Adoption of Willamina, 71 Mass. App. Ct. 230 (2008)

Care & Protection of Barney, 78 Mass. App. Ct. 1118 (2011) (Mass. App. Ct. Rule 1:28). In Barney, the judge found mother unfit but declined to terminate her rights. Rather, because of her long mental health history and refusal to cooperate with services, he ordered that she "undergo a full psychiatric and psychological evaluation" in order to "determine the feasibility of a reunification/transition plan for the child including the reinstatement of supervised visits with her son." Mother appealed. The panel affirmed the finding of unfitness and, without explanation, held that the judge had properly ordered the evaluations.

Courts don't usually make orders for evaluations after a care and protection adjudication, but the basis for such an order may lie in G.L. c. 119, § 26(b): "If the child is adjudged to be in need of care and protection, the court may . . . make any other appropriate order, including conditions and limitations, about the care and custody of the child as may be in the child's best interests[.]" The judge in Barney grounded the evaluation order in the potential future care and custody of the child. If you represent a child in a mental-health-based permanent custody trial, and you are hoping to (a) gather evidence that will help in a subsequent termination trial or (b) figure out if the parent can ever get her mental health issues addressed so as to care for the child, bring Barney to the court's attention and ask the judge to order evaluations using similar language to that of Barney.

Adoption of Neil, 84 Mass. App. Ct. 1107 (2013) (Mass. App. Ct. Rule 1:28) (see discussion at "visitation").

Adoption of Ferdinand, 103 Mass. App. Ct. 1101 (2023) (Mass. App. Ct. Rule 23.0). Ferdinand is a disturbing adverse inference case. In Ferdinand, the panel affirmed the Juvenile Court's decision finding mother unfit and terminating her parental rights based, in part, on her failure to rebut adverse allegations of ongoing mental health issues. It was undisputed that mother suffered from PTSD, OCD, anxiety, depression, and chronic sleep disorder. She sought out and engaged in treatment, and may have even benefitted from her participation. But here's the key in terms of the adverse inference. The mother signed releases that only allowed her providers to give DCF limited information about her mental health treatment, *and* mother failed to offer evidence at trial to rebut DCF's allegations regarding her mental health. As a result, the trial judge drew a negative inference from her refusal to be more forthcoming about her treatment.

> Here, the burden to prove the mother's mental health issues was properly placed on DCF. DCF entered evidence showing that the mother has suffered from a history of posttraumatic stress disorder, obsessive compulsive disorder, anxiety, depression, and a chronic sleep disorder. The judge was entitled to credit this evidence and to consider it in her overall evaluation of the

> mother's fitness. DCF provided the mother with ample opportunity to address these issues through participation in mental health treatment programs, and the mother could have rebutted DCF's allegations by showing compliance with these programs or any other efforts the mother engaged in to address and improve her overall mental health. There was no error where the judge took note of the mother's failure to participate in DCF's efforts to address her mental health challenges as part of its holistic evaluation of her fitness in the context of mental health treatment. A judge may permissibly draw an adverse inference from the refusal to provide mental health treatment records to DCF. See Adoption of Bea, [97 Mass. App. Ct. 416, 419 n. 9 (2020)] (judge drew adverse inference from mother's refusal to provide results of psychological evaluation to DCF). Thus, there was no error with respect to any negative inference drawn from the mother's refusal to sign releases enabling DCF to monitor her mental health treatment.

Ferdinand makes clear that, once DCF offers sufficient evidence that a parent suffers from mental health issues and needs treatment, a parent cannot sit back and refuse to rebut the allegations by arguing confidentiality. Releases are fine to prevent a DCF fishing expedition, but they'll lead to an adverse inference if DCF can prove that treatment and improvement is necessary.

Care and Protection of Waylon, 102 Mass. App. Ct. 1119 (2023) (Mass. App. Ct. Rule 23.0). (see discussion at "visitation").

NEGLECT

Adoption of Nicola, 72 Mass. App. Ct. 1110 (2008) (Mass. App. Ct. Rule 1:28), in the text and at footnote 11, spends some time detailing prenatal neglect as a basis for terminating rights. Needless to say, this is a politically sensitive topic. There is a fine line between showing neglect of a fetus by ingesting drugs and using the same facts merely to show a pattern of past drug abuse. Many other states use prenatal drug ingestion as a basis for termination. But most cases in Massachusetts use it just to show a pattern of past drug use. This 1:28 creeps into more delicate territory by coupling the prenatal drug use with failure to receive prenatal care – something that really doesn't suggest part of a pattern. The relevant language in Nicola is below. I leave it to panel members to use it as they see fit.

> The judge further found that the mother's substance abuse problem led to her neglect of four successive children, three of whom suffered from withdrawal symptoms and medical complications at birth, including Nicola. Despite her knowledge of these consequences on two of her children, the mother received no prenatal care while pregnant with Nicola and admits to using six bags of heroin a day throughout the pregnancy. As a result, Nicola suffered medical complications.
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> Likewise, there was no error when DSS changed the service plan goal to adoption within two months of Nicola's birth. See Adoption of Elena, 446 Mass. 24, 32 n.5 (2006) ('[t]here is no specified period of time the department must afford a parent to comply with a service plan before changing the goal to adoption'). Here, the mother had neglected three older children and had shown a similar pattern of neglect toward Nicola by failing to receive any prenatal care during the pregnancy and through her continued substance abuse and other

> conduct, including the shoplifting for which she was incarcerated. (Citations to record omitted.)

Care & Protection of Bess, 71 Mass. App. Ct. 1116 (2008) (Mass. App. Ct. Rule 1:28), is worth discussing if only because there are not many educational neglect cases. The panel affirmed a judgment requiring that the child be enrolled in school. This one is pretty extreme:

> In brief, the child, who is now fifteen years old, has never attended any school nor has she ever been home schooled. Instead, she engages in 'self-learning,' a process by which she is responsible for determining the content, manner, and method of her own education. The mother has repeatedly refused to allow the Department of Social Services (DSS) to meet with or evaluate the child. In addition, although she is aware that she is required to submit a plan for approval to the Wareham school district should she wish to educate her child at home, she has refused to do so.
>
> General Laws c. 76, 1, requires every child between ages set by the Board of Education to be enrolled in a public or an approved private school. A child may also be 'otherwise instructed in a manner approved in advance by the superintendent or the school committee.' G. L. c. 76, 1. A parent who wishes to educate his or her child at home must obtain approval of a home schooling plan before removing the child from public school. *Care & Protection of Charles,* 399 Mass. 324, 337 (1987). . . . The Juvenile Court judge properly found that the mother in this case was not in compliance with c. 76 and had refused to bring herself into compliance with the law's requirements.
>
> . . . The mother was fully aware of the requirements of c. 76 and made no claim or showing that she was unable to comply with the statute's requirements. Instead, the mother chose not to comply with the compulsory education statute and refused to provide any information to the Wareham school department or to DSS concerning the manner, method, or content of her child's education. In short, she impeded, and continues to impede, the 'substantial State interest . . . in the education of its citizenry.' *Care & Protection of Charles,* 399 Mass. at 334.

Bess is a good case to cite for an appellee child if the parent is home-schooling the child but not following the statutory and regulatory mandates for home-schooling.

Care & Protection of Oliana, 72 Mass. App. Ct. 1115 (2008) (Mass. App. Ct. Rule 1:28) (see discussion at "evidence/stale evidence").

C.L. v. Department of Children and Families, 92 Mass. App. Ct. 1120 (2017) (Mass. App. Ct. Rule 1:28). DCF supported an allegation of neglect against Mother for putting her children "in the middle of a contentious divorce proceeding" and for filing unsubstantiated 51A reports against Father. Mother appealed through the fair hearing process and lost. She then sought relief in the Superior Court under G.L. c. 30A, § 14, lost again, and appealed to the Appeals Court.

On appeal, the panel reviewed whether DCF presented substantial evidence to support its conclusion that there was "reasonable cause to believe" Mother neglected the children. The panel affirmed. Here, Mother

instigated false claims against Father by mandated reporters. She also sought medical attention for the children to validate her allegations against Father, and a school counselor and DCF investigator believed that the children had been coached and rehearsed. "The destabilizing impact of involving one's children in false allegations of abuse and neglect is self-evident." Although the Mother argued that DCF's 51B investigation was incomplete or unfair, she had a chance to supplement it at the fair hearing but didn't; she even failed to testify. The fair hearing officer could therefore properly draw a negative inference.

What do we take from C.L.? First, false reports of neglect are a form of neglect! Second, if you ask for a fair hearing and have a chance to submit evidence, do it. And if you have a chance to testify at that fair hearing, do it, or the fair hearing officer can draw an adverse inference from your failure, just like a judge.

In **Gilbert v. Department of Children and Families, 97 Mass. App. Ct. 1117 (2020) (Mass. App. Ct. Rule 1:28)**, DCF supported a § 51A alleging neglect of a 16-year-old by the mother because the child was locked out of the mother's apartment. A fair hearing officer affirmed the decision. Mother appealed to Superior Court under G.L. c. 30A, § 14. The Superior Court judge allowed DCF's motion for judgment on the pleadings, and this appeal followed.

Mother's persistence earned her a rare reversal; the panel found that there was no substantial evidence to support a reasonable cause to believe that the mother was neglectful. The panel noted that the fair hearing officer relied on hearsay statements in the 51A and 51B reports that did not relate to primary fact, namely, unidentified sources who stated that Mother locked the child out of the home on a regular basis. Although fair hearing officers can rely on hearsay, that hearsay must be reliable. In this case, there was no evidence that the hearsay was reliable. The admissible evidence showed only that the mother had locked the child out of the house *during the hours when the child was supposed to be in school*, as a way to prevent her from leaving school early. "There was no evidence that the child was placed in danger by the mother's actions; that she suffered any physical harm as a result of being excluded from the home during school and after-school hours; or that she became 'truly terrified' when she could not access the apartment." The panel made some common-sense observations about the lack of danger, like noting that the child could have simply used restroom facilities at a fast food restaurant or the school or waited at the public library.

Additionally, the panel noted that it could not give deference to DCF's assessment as to what degree of supervision was "minimally adequate" or "essential" because DCF offered no evidence to that effect about 16-year-old children or this child in particular.

The takeaways? A challenged 51B support decision must be based on reliable evidence; if it's based on hearsay, that hearsay should be from identified sources and shown by the proponent to be reliable. And if DCF is alleging a neglectful failure to supervise an older child, DCF must show what kind of supervision is necessary for a child of that age and for the particular child in question.

Care and Protection Nico, 102 Mass. App. Ct. 1107 (2023) (Mass. App. Ct. Rule 23.0) (see additional discussion at "trial and procedural due process/ineffective assistance of counsel").
Nico nicely reiterates the need for a nexus between a parent's mental illness and their ability to parent:

> While it is true that "[m]ental disorder is relevant only to the extent that it affects the parents' capacity to assume parental responsibility, and ability to deal with a child's special needs," Adoption of Luc, 484 Mass. at 146, quoting Adoption of Frederick, 405 Mass. 1, 9 (1989), we nevertheless must ask whether the child is at "serious risk of peril from abuse,

> neglect, or other activity harmful to the child" as a result of the mother's condition. Care & Protection of Bruce, 44 Mass. App. Ct. 758, 761 (1998).

Here, the mother's mental health issues did have a nexus to her ability to safely parent the child:

> With regard to the mother's claim that the department did not show a nexus between the mother's ability to care for the child and her mental health issues, we are not persuaded. The evidence showed that the mother is delusional, that she was frequently hospitalized for same, and that she was irrationally antagonistic to the child's father and the father of another of her children. The mother's characterization of her delusional thoughts as "lifestyle decisions" or "unconventional behavior" rings hollow, in light of the consistent and pervasive evidence that supports the judge's conclusion that "she lacks basic insight into the seriousness of her mental health struggles."

Additionally, although the panel didn't discuss it, Nico also provides a good example of a case where the court didn't terminate one parent's rights where the court granted custody to the other parent.

PARENTAL UNFITNESS GENERALLY

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 210, § 3(c)
Santosky v. Kramer, 455 U.S. 745 (1982)
Custody of a Minor, 389 Mass. 755 (1983)
Adoption of Mary, 414 Mass. 705 (1993)
Custody of Eleanor, 414 Mass. 795 (1993)
Adoption of Abby, 62 Mass. App. Ct. 816 (2005)

Adoption of Ursala, 89 Mass. App. Ct. 1120 (2016) (Mass. App. Ct. Rule 1:28). Ursala teaches an important lesson about harmless error (not to mention the Appeals Court's continued use of unusual name spellings). The panel noted that the judge's findings about mother's mental health were clearly erroneous. (Good work by mother's counsel!) Under pressure, DCF acknowledged at oral argument that, if the judge's unfitness finding depended on those findings, reversal would be appropriate. But, in the end, the panel held that the judge's findings showed mother to be unfit based not just on her mental health but on her history of substance abuse, her deficient care of Ursala, and her inability to meet Ursala's special needs.

The lesson? You may be able to successfully attack one factual basis for an unfitness finding, but unless you can attack all (or at least most) bases – such that the ultimate conclusion of unfitness is not based on clear and convincing evidence – the error you've fought so gallantly to prove will ultimately be harmless. Unfitness may be conceptualized as a stool that rests on a number of legs, each leg representing a parenting deficiency. You can knock out one or two legs, but if the stool is still standing when you're done, the judgment will be affirmed. That doesn't mean you have to knock out *all* of the legs – a very wobbly stool

may show that the unfitness determination isn't based on clear and convincing evidence. But you have to take your sledgehammer (saw?) to as many legs as possible. Okay – end of metaphor.

Guardianship of Verity, 89 Mass. App. Ct. 1124 (2016) (Mass. App. Ct. Rule 1:28). This case – a mother's petition to remove a guardian – has good language about what parental unfitness is *not*.

The trial court found the mother unfit and dismissed her petition to remove the grandmother as guardian. In support of the unfitness finding, the judge found that the mother made some "infelicitous posts" on Facebook "reflective of parental frustration." The panel was not convinced, and held that "[t]he kind of occasional venting of frustration through social media on display here does not amount to a 'grievous shortcoming[.]" Indeed, "[a] few unseemly comments on social media over a period of months fall far short of a showing that terminating the grandmother's guardianship would place Verity at serious risk of peril." The trial judge also relied on mother's "immaturity" because she didn't want to give the grandmother much post-removal visitation if she successfully terminated the guardianship. The panel again disagreed: "While desirable, it is not necessarily realistic to expect parties battling for custody to maintain reasonable perspective in the heat of that battle." What a great quote! Our parent clients say all sorts of uncharitable things about pre-adoptive parents and guardians in the heat of battle, and they are often found unfit because of it. Verity provides your response.

While the mother in Verity displayed some signs of immaturity and poor judgment, that evidence was insufficient to prove unfitness. The panel reversed the judge's order dismissing the mother's petition to terminate the grandmother's guardianship.

Care & Protection of Anders, 93 Mass. App. Ct. 1118 (2018) (Mass. App. Ct. Rule 1:28). The trial judge found six-year-old Anders in need of care and protection in July 2017. The Appeals Court reversed. The panel found that "[t]he judge's findings do not suffice to show that the department met its burden of proving parental unfitness by clear and convincing evidence."

The 1:28 decision was primarily fact-based. The protective concerns that led to Anders' removal focused on statements the child made in a SAIN interview. But by the time of trial, the concerns were about mother's ability to manage Anders' behavior.

The panel noted that most of Anders' behavioral issues concerned his interactions with his brother, who was no longer in the home. In addition, the mother had complied with her service plan tasks and visited Anders consistently. A neuropsychologist evaluated mother and found her to be bright and without deficits in her judgment. The panel noted that the judge "did not mention the neuropsychologist's report in her findings."

According to the panel, "the few missteps committed by mother do not establish by clear and convincing evidence that she is unfit." While the judge was justifiably concerned by mother's failure to keep Anders on a wait-list for behavioral therapy, Anders was still attending other therapy on a weekly basis.

DCF argued that because this was not a termination case, the trial judge could reunify Anders with his mother in the future. The panel was not persuaded, and it reaffirmed that in a care and protection proceeding, just as in a termination case, the burden of proof on DCF to prove current unfitness is "heavy." Proof must be "strong and positive; it must be 'full and decisive.'" Citing Care & Protection of Elaine, 54

Mass. App. Ct. 266, 271 (2002), and Adoption of Iris, 43 Mass. App. Ct. 95, 105 (1997), *S.C.*, 427 Mass. 582 (1998).

Anders is a great case to cite when the evidence of parental unfitness is weak. It serves as a reminder to trial judges that DCF's burden to prove unfitness is substantial, even in a permanent custody adjudication. It is also helpful in circumstances where the judge has, without explanation, disregarded expert testimony that is favorable to your client.

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

PHYSICAL ABUSE

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Adoption of Larry, 434 Mass. 456 (2001)
Adoption of Iris, 43 Mass. App. Ct. 95 (1997)
Adoption of Lorna, 46 Mass. App. Ct. 134 (1999)
Adoption of Abby, 62 Mass. App. Ct. 816 (2005)

Adoption of Hilda, 76 Mass. App. Ct. 1109 (2010) (Mass. App. Ct. Rule 1:28). In Hilda, the child suffered a traumatic brain injury. The parents did not acknowledge that the injury was inflicted and did not take any steps to learn how to provide for the child's medical needs. What is most interesting about the case is that the trial judge did not determine that a particular parent inflicted the injury. He also did not find that either mother or father was unfit for inflicting the injuries and the other was unfit for failing to protect the child (see Adoption of Larry, 434 Mass. 456 (2001)). In Hilda, the trial judge found the parents unfit because they did not (a) acknowledge the injuries were inflicted, (b) leave the home where the injuries occurred, and (c) educate themselves about the injuries and the child's needs and therefore could not meet those needs.

If you represent an appellee-child, Hilda is a good case to cite if there is little or no evidence that a particular parent (or either parent) inflicted the child's injuries and all you can rely on to show unfitness is the parents' failure or inability to address the child's medical needs going forward.

Care & Protection of Nita, 83 Mass. App. Ct. 1113 (2013) (Mass. App. Ct. Rule 1:28). The trial court found that the father did *not* sexually abuse Nita. DCF agreed that he didn't do it. Nevertheless, the court

found the father unfit because the child *believed* that her father sexually abused her, feared him, and wanted nothing to do with him. The court found that, despite the father's best efforts, he was unable to alter the child's views (and resulting needs), and was therefore unfit.

The Appeals Court acknowledged that this was an unusual case and emphasized that, even after an adjudication of unfitness, DCF is obligated to continue to provide services to the father. See G.L. c. 119, § 1; G.L. c. 119, § 26; Care & Protection of Elaine, 54 Mass. App. Ct. 266, 273-274 (2002). The takeaway? Even if a parent didn't do anything wrong, if the parent is unable to meet the child's emotional needs (however those needs might have arisen), the parent may be unfit.

POVERTY

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

110 CMR § 1.11
Custody of a Minor (No.2), 378 Mass. 712, 719 (1979)
Petition of the Department of Public Welfare, 383 Mass. 573 (1981)
Adoption of Linus, 73 Mass. App. Ct. 815 (2009)

Adoption of Serafina, 80 Mass. App. Ct. 1114 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "paternity").

RACE AND CULTURE

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Adoption of Irene, 54 Mass. App. Ct. 613 (2002)

Adoption of Vladimir, 79 Mass. App. Ct. 1116 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "post-judgment contact").

SUBSTANCE USE

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 210, § 3(c)(xii)
Commonwealth v. Pelligrini, 414 Mass. 402 (1993) (finding that the legislature recognized prenatal exposure to controlled substance is probative of neglect)
Adoption of Elena, 446 Mass. 24 (2006) (finding unfitness was not temporary despite recent progress in treatment, based on lengthy history of substance use)
Adoption of Katharine, 42 Mass. App. Ct. 25 (1997) (holding that absent evidence that parents had been neglectful or abusive in the care of their children, parents' cocaine habits, without more, did not render them unfit)
Adoption of Serge, 52 Mass. App. Ct. 1 (2001) (noting that relapse is part of recovery)
Adoption of Zoltan, 71 Mass. App. Ct. 185 (2008) (requiring nexus between past substance use and inability to safely parent child)

Adoption of Nicola, 72 Mass. 1110 (2008) (Mass. App. Ct. Rule 1:28) (see discussion at "parental unfitness/neglect").

Adoption of Ariston, 92 Mass. App. Ct. 1112 (2017) (Mass. App. Ct. Rule 1:28), is painful for parents who have achieved sobriety before trial after a long struggle with substance use disorder. In Ariston, the father had a two-decade substance use problem and an extensive criminal history related to his addiction. But, as of trial, he had been sober for more than a year. The panel detailed the father's extensive treatment:

> [While incarcerated,] the father detoxed "cold turkey." The father began to engage in services and successfully completed an intensive, one-month addiction program. On his own initiative, the father attended two Alcoholics Anonymous (AA) meetings per week and GED prep classes. When he entered a lower security facility, the father attended similar classes for two months. While incarcerated, the father attended up to four AA meeting per week, though only required to attend one. Following his release from incarceration in October, 2015, the father continued to engage in substance abuse counseling and was screened for substances multiple times per week, the results of which were all negative. When the father was released from the treatment program, his counselor noted that the father engaged in treatment with a "positive attitude" and his participation was "excellent," concluding that the father should have a "successful re-entry into society." At the time of trial, the father had been sober for thirteen months and was able to maintain full-time employment. He was attending three AA meetings per week, a weekly relapse prevention meeting, and GED prep classes. The father was able to articulate a detailed relapse prevention plan that would maintain his sobriety.

This dad was pretty impressive! Still, the panel thought otherwise, noting that he had previously had "brief periods of sobriety, when he was using suboxone, from a few months up to one year." (Although one could argue that previous periods of sobriety demonstrate commitment to recovery, the panel clearly

took this fact to show that a year of sobriety was simply part of father's pattern, and relapse was inevitable.) Further, his sobriety at the time of trial was only because he was incarcerated and on probation:

> Although the father has made laudable strides toward sobriety and self-improvement, the judge did not abuse her discretion in concluding that his long-standing past behaviors were reliable prognosticators of his current and future fitness. The father has no record of sobriety outside his incarceration and the regulated context of his postrelease probation. The children should not have to face further risk while waiting to see if the sobriety the father achieved and sustained during the period immediately preceding trial are sustained once he is freed of the sanctions and close oversight provided by the conditions of his probation.

The takeaway? Trial judges are free to give limited weight to a parent's recent sobriety if it comes while the parent is incarcerated and on probation, particularly if it is weighed against a long period of earlier drug use.

Adoption of Questa, 93 Mass. App. Ct. 1114 (2018) (Mass. App. Ct. Rule 1:28) (see discussion at "experts").

TRAUMA HISTORY

Adoption of Blaine, 89 Mass. App. Ct. 1106 (2016) (Mass. App. Ct. Rule 1:28). This case gives us a chance to discuss an issue that pops up in many appeals: the appellant-parent's own abuse or trauma history. In a footnote in Blaine, the panel notes:

> We acknowledge that the record indicates that the mother was subjected to severe trauma during her own childhood, including sexual abuse by her own father. We are not insensitive to the lasting impact that such trauma has had on the mother and on her ability to parent her own children. We also acknowledge, however, that this history cannot and should not be used to excuse or justify the mother's behavior, as an adult, that threatened the safety of her children.

Unfortunately, a parent's own abuse history is common in our cases. But is it worthwhile to discuss it in your Facts section? Does it make the parent more sympathetic? Does it evoke feelings of pity in the panel? Feelings of disgust? Or does it bore the panel because it is irrelevant to the issue before them? This panel acknowledged mother's history but took pains to note that it didn't influence them favorably toward her. I suspect that this would be the message from all of the Appeals Court justices. If so, it makes little sense to discuss a parent's own abuse history in a brief unless it is necessary to explain an important point in the Argument. That, I think, is rarely the case.

PATERNITY

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 209C, §§ 6 et seq. (presumption of paternity and required joinder as a party)
G.L. c. 210, § 4A (adoption rights of fathers of children born out of wedlock)

Adoption of Ynez, 75 Mass. App. Ct. 1111 (2009) (Mass. App. Ct. Rule 1:28), offers an important lesson to trial attorneys representing putative fathers. DCF filed the petition in Ynez in January 2006, and paternity wasn't adjudicated until September 2006. On appeal, the father argued that DCF committed gender discrimination because it placed the child with a maternal kinship placement and refused to consider any paternal kin. The panel found the argument specious. According to the panel, DCF was entitled to ignore paternal kin because there was no paternity adjudication at that time. Accordingly, if you represent a putative father and he wants his kin to take the child, obtain a paternity adjudication as soon as practicable.

Adoption of Serafina, 80 Mass. App. Ct. 1114 (2011) (Mass. App. Ct. Rule 1:28). This is a great case, and it's a pity it wasn't published. But thanks to Rule 1:28, you can still freely wave it in front of trial judges and appellate panels alike.

In Serafina, the panel vacated the termination decree and remanded to the trial court. The trial judge placed great weight on the fact that it took sixteen months for the putative father to establish paternity. Although the DCF attorney, shortly before trial, told the judge that the delay wasn't the father's fault, the judge blamed him anyway and heavily cited father's "lack of interest in his paternity" in several conclusions of law.

The panel agreed with the father that many of the paternity-related findings were clearly erroneous. Much of the delay wasn't the father's fault: he was not appointed counsel for almost a full year after the child's birth; his court-appointed attorney failed to order genetic testing due to vacation, illness, or the mistaken belief that it had already been ordered; the DCF attorney failed to schedule the testing due to vacation; and DCF misplaced relevant documents for three months. The panel noted that "[i]t is incumbent on the courts no less than DCF to ensure that neither children nor parents are penalized for the defective operation of a system into which they have been drawn involuntarily." What a great quote!

The trial judge also based the termination on father's employment circumstances: "Father's main focus, instead of being on [the child] and working toward reunification, has been, and continues to be, on his job." The court blamed father for working long hours. The panel acknowledged the catch-22 parents face in these cases: a parent is unfit if he doesn't work hard enough to provide financial security for a child, and he's unfit if he works too hard seeking financial security. (And, of course, if he works hard enough to provide financial security, DCF may move to strike his counsel.). The panel held that the father's work circumstances did not qualify as clear and convincing evidence of unfitness.

Finally, the trial judge based the termination on the child's bonding with pre-adoptive parents. But after trial, a 51A report was filed on the pre-adoptive parents and the placement disrupted. While that

information wasn't before the trial court or part of the appellate record prior to argument (See "Post-trial Information and Oral Argument," below), the panel was receptive to father's request to enlarge the record to include information about the problems and disruption. The panel was clearly displeased (at argument as well) with the position taken by DCF and the appellee-child about enlarging the record: "Both the department and the child's counsel objected to enlargement of the record. We fail to see how this posture advances the best interests of the child." Serafina, at n. 5. Of course, "this posture" was solid appellate practice – why agree to enlarge the record this late in the game and allow the panel to consider a potentially dispositive fact? – but it felt like a game of "hide the (best interests) ball" to the panel. That's never a good impression to make. The panel vacated the termination decree and remanded for further proceedings.

C.D. v. S.M., 82 Mass. App. Ct. 1122 (2012) (Mass. App. Ct. Rule 1:28). This case restates the test for challenging the paternity of a child born to a married woman, originally set forth in C.C. v. A.B., 406 Mass. 679, 689-90 (1990): "[A] person alleging himself to be the father of a child born to a married woman is not entitled to produce evidence of paternity unless he can first show by clear and convincing evidence that he has a substantial parent-child relationship with the child." In this unpublished case, the plaintiff requested that the Appeals Court modify the C.C. v. A.B. standard based on modern trends in society and law. The panel declined to do so. The trial court found that the plaintiff had eight months prior to the mother's death to develop a substantial parent-child relationship with the child, and he failed to do so. The judge properly dismissed the equity complaint.

Adoption of Bonnie, 92 Mass. App. Ct. 1128 (2018) (Mass. App. Ct. Rule 1:28). This case, along with C.D. v. S.M., 82 Mass. App. Ct. 1122 (2012) (Mass. App. Ct. Rule 1:28), concerned the paternity of a child born to a married woman. As in C.D. v. S.M., the panel found that the putative father's failure to establish a substantial parent-child relationship was fatal to his standing to assert parental rights:

> "[A] man is presumed to be the father of a child and must be joined as a party [in any care and protection action] if: (1) he is or has been married to the mother and the child was born during the marriage, or within three hundred days after the marriage was terminated by death, annulment or divorce." G.L. c. 209C, § 6(a)(1)., inserted by St. 1986, c. 310, § 16. Where, as here, the mother was married to another person at the time of the child's birth, in order for the putative father to have standing to assert parental rights, he is required to show by clear and convincing evidence that there was a "substantial parent-child relationship," or that he had not yet formed one due to action (or inaction) by the mother. *C.C. v. A.B.*, 406 Mass. 679, 689–690 (1990). The putative father has done neither here.

The putative father therefore had no standing to assert parental rights to the child. In addition, there was a legal father – the mother's husband – who stipulated to a termination of his parental rights. Although DCF had moved to strike the putative father from the petition, the trial court denied the motion and tried the case solely as to the putative father. And, even though the putative father had no legal rights to the child, the court terminated his rights *anyway*. The panel vacated the decree, holding that the trial court lacked jurisdiction to terminate the parental rights that the putative father did not possess.

Why would a putative father care about a termination of his non-existent rights? It is a stain on his reputation, to be sure. But, more importantly, it might cost him reasonable efforts for later (or other) children. Section 29C of c. 119 provides that DCF shall provide reasonable efforts to prevent removal and to return a child home except where, among other things, "the parent's consent to adoption of a sibling

of the child was dispensed with under [G.L. c. 119, § 26, or G.L. c. 210, § 3], or the parent's rights were involuntary terminated in a case involving a sibling of the child[.]" DCF usually provides services in such circumstances anyway, but why risk it?

PERMANENCY (§ 29B) HEARINGS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 119, § 29B
42 U.S.C. § 675(5)(H) (transition plan requirements for young adults "aging out" of foster care)
Massachusetts Trial Court Rules and Guidelines, Rule VI "Uniform Rules for Permanency Hearings"

Care & Protection of Halona, 91 Mass App. Ct. 1119 (2017) (Mass. App. Ct. Rule 1:28). In Halona, Mother argued that the Juvenile Court erred in precluding her from presenting evidence at a § 29B permanency hearing. The panel agreed: "[T]he judge's failure to allow Mother to present evidence was an error that affected the integrity of the hearing." It vacated the findings and judgment from the permanency hearing, remanded the case to the Juvenile Court for a hearing where Mother would be given an opportunity to present evidence, and ordered that the case be assigned to another judge. The panel does not explain why the case should be heard by another judge, but remands to different judges don't usually happen unless a panel is convinced that the same trial judge can't rule on the case fairly on remand.

If a trial judge in your case is reluctant to take evidence at a permanency hearing – as it often is when the permanency hearing pre-dates the trial – you must object and make an offer of proof as to what evidence you would elicit at that hearing. Also, give the court a copy of Halona.

PRIVILEGE

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 112, §§ 129, 135
G.L. c. 233, § 20
Commonwealth v. Lamb, 365 Mass. 265 (1974)
Commonwealth v. Goldman, 395 Mass. 495 (1985)
Adoption of Diane, 400 Mass. 196 (1990)
Commonwealth v. Seabrooks, 433 Mass. 439 (2001)
Adoption of Sherry, 435 Mass. 331 (2001)
Adoption of Serena, 64 Mass. App. Ct. 260 (2005)
P.W. v. M.S., 67 Mass. App. Ct. 779 (2006)

Adoption of Yancey, 89 Mass. App. Ct. 1133 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/ineffective assistance of counsel").

POST-JUDGMENT CONTACT (POST-TERMINATION AND POST-ADOPTION VISITATION)

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 210, §§ 6C-6e (permitting open adoption agreements)
Adoption of Helen, 429 Mass. 856 (1999)
Adoption of Vito, 431 Mass. 550 (2000)
Adoption of Rico, 453 Mass. 749 (2009)
Adoption of Ilona, 459 Mass. 53 (2011)
Adoption of Flora, 60 Mass. App. Ct. 334 (2004)
Adoption of Oren, 96 Mass. App. Ct. 842 (2020)

Adoption of Karinna, 72 Mass. App. Ct. 1107 (2008) (Mass. App. Ct. Rule 1:28), is a great case addressing post-termination visitation when the goal is guardianship. The panel held that the same standard for post-termination visitation applies regardless of whether the goal is adoption or guardianship:

> Despite the father's arguments to the contrary, there is nothing in the nature of a guardianship, as opposed to an adoption, that warrants a different standard for posttermination contact. Cf. *Adoption of Helen,* 429 Mass. 856, 864 (1999) (applying best interest standard to question of posttermination parental visitation pending appeal).

Adoption of Rieko, 72 Mass. App. Ct. 1117 (2008) (Mass. App. Ct. Rule 1:28), has two things to recommend it. First, it serves as a reminder that, when you argue that the trial court made evidentiary errors, you must show (a) exactly what the wrongly-admitted evidence was and why it was error to admit it, (b) how the wrongly-admitted evidence tainted one or more findings, and (c) how the tainted findings made a difference to the outcome. If you can't show (a) through (c), any errors were harmless:

> As to [mother's] claim that the failure of the judge to act promptly on her motions in limine to exclude evidence deprived her of due process, she has not made an argument within the meaning of Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975). Not only did she not specify in her argument what evidence she tried to exclude, but she also did not point to any specific prejudice suffered by the late rulings. Cf. *King v. Driscoll,* 418 Mass. 576, 585 n.8 (1994).

Second, Rieko shows that parents and children can convince panels to remand cases for hearings on post-termination and post-adoption visitation if the evidence shows a significant parent-child attachment and the trial court ignored the evidence. In Rieko, the appellants marshaled the evidence showing a bond between children and mother. Perhaps more importantly, they also used DCF's own statements, including admissions in DCF's brief, against it:

> The judge's finding that the children had no attachment to the mother . . . was clearly erroneous. . . . [T]he record is replete with evidence of the children's bond with the mother. . . . [T]he department social worker . . . testified that there was no question that the mother

> and the children were affectionate towards each other. (Tr. 1, Day 2, 89) The department's assessment worker . . . observed that the children were very happy to see the mother at a supervised visit in June, 2004 and that the three appeared very affectionate toward one another. . . . The court investigator's report . . . indicates that . . . a department social worker on the case from November, 2004, until December, 2005, and the grandmother recognized the children's love for their mother. . . . While no visits took place from July 2, 2004 until March, 2005, department social workers supervising subsequent visits typically described the children as very excited to see their mother and affectionate with her.
>
> . . .
>
> Even the department in its brief acknowledged the bond between the mother and the children. (Department's Br. 35) ('[T]here is no doubt that Children love their mother and enjoy seeing her several times a year'). Furthermore, nothing in the record on appeal indicates that the department opposed posttermination visitation. On the contrary, . . . an adoption worker for the department[] recommended that the children should have visitation with the mother.

Sometimes DCF gives you a gift, and generously admits an important fact in your case. The quote in DCF's brief, above, is such a gift. Cite DCF's own admissions with glee, as often as possible. But remember to be careful what you say in your brief or motion; whatever you concede may come back to haunt you. See G.L. c. 231, § 87 ("In any civil action, pleadings shall not be evidence on the trial, but the allegations therein shall bind the party making them."); Liacos, § 8.8.3, at 501; Mass. Practice, Evidence, § 801.8. And even if the court does not consider the adverse party's statement as an admission, quoting the statement can be very persuasive (or, at least, very satisfying if you don't like DCF's attorney).

Note that Adoption of Ilona, 459 Mass. 53 (2011), has changed the test for post-adoption visitation. Visits must serve the child's best interests and an order must be necessary. Rieko is still helpful, but be careful.

Adoption of Parnell, 75 Mass. App. Ct. 1111 (2009) (Mass. App. Ct. Rule 1:28). Parnell is a great case for post-adoption visitation and, of greater note, post-adoption *grandparent* visitation.

The trial judge acknowledged the bond between mother and children and ordered a plan with "at least one visit per year." According to the panel, this was insufficient under Adoption of Rico, 453 Mass. 749 (2009):

> This language merely proposed minimum parameters for visitation, and otherwise relegated the issue to the department's discretion. Such an order not only deprives the children of the security of a 'relationship with a person who has been shown to be critical to [them],' *id.* at 757, but also leaves no clearly defined avenue of relief should the eventual plan prove unsatisfactory. . . . Thus, absent a defined order by the judge setting forth the parameters of visitation, any recourse available to the children from the department's plan would be burdensome and uncertain. See *Adoption of Rico, supra.* While we recognize that the judge in this case endeavored to set a baseline for the mother's visitation, our case law requires a more complete disposition. In light of these considerations, we reaffirm the proposition, set forth in *Rico,* that the issuance and guidelines of a postadoption visitation order are the province of the trial judge, and are not to be left to the department or the adoptive parents.

Great stuff. Rico and Parnell clearly require judges to be very specific in their post-adoption visitation orders. (Be careful – Ilona has changed the test for post-adoption contact. Visits should only be ordered where such an order is necessary.)

What is particularly interesting about Parnell is the panel's ruling on post-adoption grandparent visitation. In Parnell, the children had a bond with the grandmother, but the court did not issue a specific visitation order.

> [W]e find that the judge's failure to issue a visitation order for the maternal grandmother was also error. Though the trial judge found that a significant bond had formed between the maternal grandmother and the children, he merely "suggest[ed]" that the department aid the adoptive parents in establishing guidelines for monthly contact. We find such action to be insufficient. To the contrary, as indicated above, a finding that visitation with a grandparent is in the best interests of the child must be accompanied by an explicit order from the judge setting forth the specific parameters of that visitation.

DCF argued that there was no statutory basis for such visitation. The panel found this "unconvincing":

> Though G.L. c. 119, § 26(B)(a) expressly creates a right to visitation for grandparents while a child is in foster care, the absence of statutory language governing postadoption visitation does not preclude such visitation. This determination is the province of the trial judge, and is to be determined by the best interests of the child

This, I believe, really opens the door to post-adoption visitation orders for relatives who are important to the child.

In a footnote, the panel reminds us that children who are approaching the age of 12 can block an adoption. If those children condition their approval of an adoption on post-adoption visits with birth family, courts should pay attention.

> [The failure of the parties to agree to post-adoption contact] is additionally troubling because Parnell is about to mark his twelfth birthday and will then be able to object to his adoption. G. L. c. 210, § 2. Counsel represented at oral argument that Parnell's position on the adoption is dependent on regular contact with his mother and grandmother.

The panel remanded the case for specific post-termination and post-adoption visitation orders with mother and grandmother.

Adoption of Bode, 75 Mas. App. Ct. 1113 (2009) (Mass. App. Ct. Rule 1:28). Bode makes clear that a bond between birth-parent and child is *not* enough to merit a post-adoption visitation order if visits are not in the child's best interests. The child's refusal to visit with his mother seems to have been an important, if not dispositive, factor:

> Here, the judge found that a bond exists between the mother and Bode, but given Bode's recent refusals of visitation with the mother, future visitation was best left to the discretion

> of the adoptive parents. The record and findings made support that conclusion. We discern no abuse of discretion in the judge's decision to leave visitation in the present case to the discretion of the child's adoptive parents.

Needless to say, it's very hard to get an order for post-termination or post-adoption visits if the child doesn't want them.

Adoption of Gennaro, 75 Mass. App. Ct. 1114 (2009) (Mass. App. Ct. Rule 1:28). The judge found that the children enjoyed being with their biological father, loved him, were comfortable with him, were affectionate toward him and were excited to see him. For reasons that defy easy explanation, the judge nevertheless declined to order post-adoption contact. The panel remanded:

> In the circumstances where the judge did make findings of fact regarding the children's bond with the father, it appears that those findings should have been considered when determining whether an order for posttermination or postadoption visitation should have issued. . . . Accordingly, we remand for further proceedings on the question whether it is in the children's current best interests to have posttermination and postadoption visitation.

The panel also Instructed the judge to "consider" the rules for ordering post-adoption and post-termination contact set forth in Adoption of Rico, 453 Mass. 749, 758-59 (2009). Accordingly, if your trial judge has terminated parental rights but made good findings about love and bonding between the child and parent, he or she should either (a) issue an order for visitation, or (b) explain why the child's best interests would not be served by visitation despite the favorable findings.

Note that Ilona adds an additional requirement: the order must be necessary.

Adoption of Vladimir, 79 Mass. App. Ct. 1116 (2011) (Mass. App. Ct. Rule 1:28). In Vladimir, the trial court issued an order for post-adoption visitation between father and child. DCF and the child appealed, arguing that there was no bond and no other evidence that visits served the child's best interests. The panel agreed and reversed the order.

Vladimir was two at trial. The father was incarcerated before Vladimir's birth and was serving a 20-year sentence. There were several visits at the prison. Although the trial judge acknowledged that there was no bond between father and child, she nevertheless ordered post-termination and post-adoption visitation because: (1) allowing the child to develop a relationship with his biological father would "assist him in negotiating the path between his adoptive and biological families"; (2) visitation would "enable the child to identify with his father's racial and cultural heritage"; and (3) visits would allow the child "to understand his father's criminal past… thus helping the child to develop a more pro-social manner than his father did." The trial judge also placed much weight on DCF's failure to provide visits sooner.

The panel found these reasons to be either "overly speculative or inapplicable to the circumstances of the case." The child had never lived with the father, so there was no "path" between families to negotiate, and there was no evidence to support a finding that the child had emotional needs regarding racial or cultural heritage or his father's criminal past.

The takeaway? There has to be *some* evidence that post-termination and post-adoption visitation is in the child's best interests; good intentions (even those backed by clinical studies) alone don't suffice. Counsel must *show* that racial/cultural identity is important for the child or that the child has identity or self-esteem issues that will be aided by contact.

Adoption of Zol, 78 Mass. App. Ct. 1115 (2010) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/post-trial motions").

Adoption of Andreas, 78 Mass. App. Ct. 1119 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "findings/child-specific analysis"; "parental unfitness/deportation").

Adoption of Ido, 95 Mass. App. Ct. 1106 (2019) (Mass App. Ct. Rule 1:28) (see discussion at "sibling placement and visitation").

Adoption of Ariadne, 95 Mass. App. Ct. 1117 (2019) (Mass. App. Ct. Rule 1:28)) (see discussion at "trial & procedural due process/ineffective assistance of counsel").

Adoption of Bethany, 79 Mass. App. Ct. 1117 (2011) (Mass. App. Ct. Rule 1:28). This case is interesting for its post-termination visitation order. The judge ordered four visits per year between the children and parents, but specified that "there shall be no legal obligation on the part of the legal guardians or adoptive parents to transport any of the subject children to any prison facility, substance abuse treatment facility or other such residential program for visits." The panel affirmed this order:

Here, the judge has not abused her discretion by crafting an order that seeks to balance competing factors relevant to the best interests of the children. Visiting a parent in jail or in a substance abuse program could be a stressful or anxiety-producing situation for any child. In addition to these general concerns, the judge made specific factual findings that raised concerns about the potential impact of such visits on these particular children. In light of these specific concerns and the parents' history of drug abuse and incarceration, the judge's order represented a reasonable and limited restriction on posttermination visitation while still providing for the children's need for a sense of security in their relationship with their biological parents.

While most children do just fine with prison visits (and would much rather visit parents in prison than have no visit at all), the facts of this case did suggest that the children were disturbed by visits to the father in prison. Bethany, at n. 14.

Adoption of Eddie, 72 Mass. App. Ct. 1109 (2008) (Mass. App. Ct. Rule 1:28), clarifies that appellant-*children*, aggrieved by the trial court's failure to order post-termination or post-adoption visitation, are free to raise the issue in the trial court after conclusion of the appeal:

> [W]e perceive no error in the trial judge's determination that posttermination visitation was not in the children's best interests. The trial judge considered the issue, noted that the judge would ordinarily be inclined to order such visitation, but found that in the circumstances of this case (which include those set out above concerning the mother's conduct during visits) visitation was not in the children's best interests. On appeal, Eddie seeks posttermination contact of a limited nature (not visitation). We note that Eddie can still seek

> an order for posttermination contact should he wish to file such a motion with the trial court.

Although the panel does not state that children can seek such visitation at § 26 review and redetermination or § 29B permanency hearings, those are certainly effective procedural vehicles for getting the issue back before the trial court. But children's counsel need not wait for review and redetermination or a permanency hearing; counsel can simply file a motion. If your trial judge insists on waiting for one of those hearings, show her Eddie.

Adoption of Elian, 81 Mass. App. Ct. 1101 (2011) (Mass. App. Ct. Rule 1:28). Post-adoption visitation orders do NOT require excruciating detail. As the panel in Elian held, the trial judge need not identify the dates that post-termination visitation should occur. Here, the judge entered an order specifying the frequency, duration, location, and conditions of visitation. The exact dates were left to the discretion of DCF. The panel felt that this was sufficient.

Adoption of Van, 83 Mass. App. Ct. 1128 (2013) (Mass. App. Ct. Rule 1:28). The panel in Van affirmed the termination of the mother's parental rights but remanded the case for further consideration of the question of post-termination contact. The panel cited Adoption of John, 53 Mass. App. Ct. 431, 439 (2001), for the proposition that the judge is not required to make extensive findings regarding post-termination visitation if the judge's unfitness findings address factual issues bearing on visitation within the context of those findings. (John is often improperly cited by DCF for the proposition that the judge need not make findings on post-termination visitation if the judge has made extensive findings *on unfitness*. But John clearly states that specific post-termination visitation findings need not be made if the judge has already made findings about visitation in the unfitness context – after all, why should the judge have to make two sets of visitation-related findings?) In Van, however, the trial judge's unfitness findings did not address visitation, the children's attachment to the mother, or the children's best interests regarding ongoing contact with mother. The panel also considered the children's ages, their request for continued visits with the mother, and the "impermanent nature" of their current placements in reaching its decision to remand the post-termination visitation issue to the trial court.

Adoption of Beatrice, 84 Mass. App. Ct. 1128 (2014) (Mass. App. Ct. Rule 1:28). In Beatrice, the trial judge found the mother unfit and terminated her parental rights. The judge further determined that post-termination visitation was in the best interests of the child, but she refused to enter a specific visitation order. Instead, she made it clear that she would impose a visitation order if the parties could not agree on its specific terms. Rather than negotiate with the parties and bring any dispute back to the trial court, the mother appealed, arguing that the judge was obligated under these circumstances to issue a specific order. The mother further claimed that termination of her parental rights was premature because the issue of visitation had not been resolved. The Appeals Court affirmed the termination decree and further held that the issue of visitation was not properly before it because the mother had already effectively prevailed on the visitation question.

In a footnote, the panel commented that the mother retained standing to pursue a post-termination visitation order in the trial court, because the judge here clearly expressed her intention to order visits and allow the mother access to the court for that purpose. However, the panel went on to state that the mother would not retain such rights indefinitely.

Adoption of Hannon, 89 Mass. App. Ct. 1118 (2016) (Mass. App. Ct. Rule 1:28). In Hannon, the panel affirmed the finding of unfitness but remanded because the trial judge failed to make findings as to the existence or extent of a bond between the mother and child when addressing post-adoption visitation. The court stated that a judge should consider whether there is a significant, existing bond with the biological parent whose rights have been terminated. "While the judge is not required to make extensive findings on the parent-child bond, she is required to make some findings . . . . The judge in this case did not make any findings as to the existence or extent of the bond between the mother and Hannon." Accordingly, remand was appropriate "for reconsideration of that portion of the decree addressing postadoption visitation[.]"

Adoption of Olav, 89 Mass. App. Ct. 1125 (2016) (Mass. App. Ct. Rule 1:28). Olav suggests that the trial court must evaluate post-termination and post-adoption visitation separately, particularly as to children whose adoption prospects are unclear. In Olav, the children had not been placed in pre-adoptive homes. The judge left post-adoption visits to the discretion of the adoptive parents, and the panel held that this was proper. (This is an odd decision, considering there were no pre-adoptive parents identified.) But the panel held – without meaningful explanation or analysis – that the judge's failure to consider the propriety of post-*termination* visits required remand. Olav therefore suggests – albeit weakly – that judges must consider making orders for post-termination visits whenever a parent or child so requests and the child is not in a pre-adoptive home.

The judge also failed to order po"t-termination or post-adoption sibling visits, instead leaving it to the discretion of the (as yet unidentified) adoptive parents. The panel, not surprisingly, held that this was an error and remanded on this issue as well.

Use Olav at the trial level to try to pry a post-termination visitation order from a judge, particularly if the child has no pre-adoptive home. At the appellate level, Olav might help you convince a panel that the trial judge erred in failing to order post-termination visits.

Care & Protection of Polly, 92 Mass. App. Ct. 1103 (2017) (Mass. App. Ct. Rule 1:28) (see further discussion at "judicial bias"). In Polly, Mother appealed the juvenile court's unfitness finding and its failure to order visitation with her twin daughters after awarding permanent custody to Father. The panel affirmed the court's unfitness finding, but remanded for further proceedings on the visitation issue.

The trial judge refused to order visits because permanent custody was awarded to Father; as a result, she believed that visits were purely left to his discretion. The panel disagreed. Parents retain the residual right of visitation if their rights aren't terminated, see Care & Protection of Thomasina, 75 Mass. App. Ct. 563, 573 (2009), and they are "entitled to visitation with their child so long as the visits are not harmful to 'the welfare of the child and the public interest.'" Adoption of Rhona, 57 Mass. App. Ct. 479, 488 (2003), quoting G.L. c. 119, § 35. Whether to order visits is squarely within the judge's discretion, but the failure to exercise that discretion was error. See Lonergan-Gillen v. Gillen, 57 Mass. App. Ct. 746, 748-49 (2003). Because the judge refused to consider the issue, the panel remanded.

Trial judges often decline to enter visitation orders when permanent custody is awarded to a parent – usually the previously-non-custodial parent – and say that the parents should deal with the issue themselves in the probate and family court. Polly clearly states that this is improper; the juvenile court can and should enter a visitation order if it is in the best interest of a child. If your parent client's rights

have not been terminated – or if you represent a child who wants visits with a parent whose rights have not been terminated – ask for that order, citing Polly.

Adoption of Stacey, 92 Mass. App. Ct. 1105 (2017) (Mass. App. Ct. Rule 1:28). Mother argued that the trial judge erred in not ordering post-termination and post-adoption visitation. Although the panel ultimately addressed the merits of Mother's visitation argument (and affirmed), it noted that the issue of post-judgment visitation was unpreserved because Mother failed to request it at trial. So this is just a reminder to trial counsel – if you don't ask for post-termination and post-adoption visits at trial, and the judge doesn't order any, the issue is waived on appeal.

How do you ask for post-termination and post-adoption visits while you're fighting for your client to maintain her parental rights? Try this: "Your Honor, I ask that you order post-termination and post-adoption visits between the child and my client in the event you decide to terminate her rights. Of course, I'm arguing today that you should *not* terminate her rights because DCF can't meet its burden, but, as you know, in order to preserve this issue, the case law requires that I raise this issue with you." Explain to your client ahead of time that you need to say this to the judge so that your client doesn't think you're conceding anything. Then make sure you back up your request for visits by presenting evidence that there is a bond between the client and the child, that visits do, in fact, serve the child's best interests, and that an order is necessary.

Adoption of Iola, 74 Mass. App. Ct. 1121 (2009) (Mass. App. Ct. Rule 1:28) (see further discussion at "termination of parental rights/legal orphan"). Iola references Adoption of Rico, 453 Mass. 749, 754-758 (2009), and suggests that, because the child had a strong attachment to his father, post-adoption visitation in this situation "may have been required as a matter of law." The decision also makes clear that children can always ask the trial court for more visitation with the "terminated" parent: "If any of the children, including Lewis, desire even greater visitation in the future, they may petition the Juvenile Court." The panel does not speak to whether the parent can do so.

Adoption of Sabrina, 93 Mass. App. Ct. 1116 (2018) (Mass. App. Ct. Rule 1:28) (see discussion at "erroneous findings").

Adoption of Zelden, 96 Mass. App. Ct. 1107 (2019) (Mass. App. Ct. Rule 1:28). Zelden lived with his mother and siblings for the first five years of his life. When Zelden was five, he and his siblings were taken into DCF custody due to his mother's substance use disorder. The children ultimately went home and the case was closed. A couple of years later, when he was seven, Zelden was removed again and placed back in foster care. Mother continued to struggle with her substance use disorder.

While he was in foster care, Zelden visited with his mother weekly and maintained a strong bond with her. Although he did well with his foster family, he testified at trial that his first choice would be to go home to his mother, but if he could not, he wanted to see his mother twice a week.

After the trial, the judge terminated the mother's rights and ordered four post-adoption visits between them annually. Both Mother and Zelden challenged this post-adoption visitation order. They argued that four visits a year was a random number and not enough to meet Zelden's needs and serve his best interests.

The panel agreed and reversed the trial judge's decision concerning post-adoption visits, because the trial judge "did not provide a rationale, or specific findings, as to this part of the decree." In other words, nowhere in the judge's findings did he explain *why* four visits was best for Zelden. (Does this sound familiar? How often do trial judges order one or two post-adoption visits annually, as if pulling those numbers out of thin air?)

The panel reversed, noting that the best interest of the child is the overarching consideration when dealing with visitation issues. The court must consider the child's age and also the child's emotional bond with his parent. Although the court found a strong bond between Zelden and his mother, and that it was in Zelden's best interest to visit her, the judge created a "significant reduction in Zelden's contact with the mother, from 52 visits a year to only four[,]" without explanation.

There are two key takeaways from Zelden on the subject of post-adoption contact. First, Zelden testified at trial and told the judge that he wanted to see his mother frequently after adoption. This was important to the panel. If you have a child client who wants lots of post-adoption contact, get that information on the record, preferably via live testimony from the child. If live testimony is impossible, but you know the child wants more contact, ask the court to appoint a GAL (or send the probation officer) to interview the child for the express purpose of getting that information before the court.

Second, where the child wants more visits than the pre-adoptive family seems willing to allow, a visitation order is likely necessary. The panel was concerned that the pre-adoptive parents only favored two visits per year. The second prong of Ilona—that an order for post-adoption visits is necessary—is satisfied if the judge lacks assurance that the child's need for contact will be met by his adoptive parents.

Adoption of Xuan, 94 Mass. App. Ct. 1116 (2019) (Mass. App. Ct. Rule 1:28). What do you do if the evidence shows a parent-child bond and a history of good visits and phone calls, but the judge makes no findings – or only clearly erroneous findings – about the bond and denies a request for post-adoption contact? Cite Xuan!

In Xuan, the father sought post-termination/post-guardianship contact at trial but was denied, even though he had kept in touch with his son during the case, including during his incarceration. The father and the child appealed the denial of contact. While the panel affirmed the judge's decision to terminate father's parental rights, it vacated the order declining to provide for post-termination contact and remanded for further proceedings on the topic.

> The trial judge held that post-termination contact did not serve the child's best interests. But there was no evidence to support this determination. Rather, the judge's decision was solely "based on the Departmen''s recommendation" that there be no contact. However, the Department presented no evidence to support that recommendation, other than its (non-evidentiary) closing argument, in which Department counsel stated, "[t]he Department is looking for termination of parental rights of [the father]. . . . No post-termination/post-guardianship contact, judge. No phone calls." But closing argument isn't evidence.

The judge found "no discernable bond" between the father and the child. But the findings didn't actually show no bond; rather, they were silent on the issue, and there was, in fact, evidence of a parental bond. Father spoke to his son every Sunday while he was incarcerated.

Best of all, the panel recognized that visits aren't the only form of post-termination contact. The panel was critical of the trial court for failing to "address any other form of contact between the father and the child, such as cards or letters to the child," which the mother had obtained in an open/structured guardianship agreement. The panel remanded for further proceedings on post-termination contact.

Note: On remand, the judge issued additional findings that considered the visitation and contact that had occurred, again found that there was no evidence of any bond, and declined to order visitation or contact. The panel affirmed that ruling in **Adoption of Xuan [II], 95 Mass. App. Ct. 1103 (2019) (Mass. App. Ct. Rule 1:28)**. Still, Xuan is a great case to cite for your post-adoption contact argument.

Adoption of Ferdinand, 103 Mass. App. Ct. 1101 (2023) (Mass. App. Ct. Rule 23.0). The trial judge in Ferdinand entered two very different post-adoption visitation orders just a few months apart. This is okay if there had been a change in circumstances during that time, see Adoption of Edgar, 67 Mass. App. Ct. 368, 372-73 (2006), but that hadn't happened here. The panel remanded for clarification on the trial court's inconsistent orders and allowed for (but did not require) new evidence regarding the child's best interest due to the passage of time.

REASONABLE EFFORTS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 18B (DCF enabling statute)
G.L. c. 119, § 1
G.L. c. 119, § 29B
G.L. c. 119, § 29C
110 CMR §§ 1.02 (4)-(9)
Petition of the Dept. of Pub. Welfare to Dispense with Consent to Adoption, 376 Mass. 252 (1978).
Care & Protection of Walt, 478 Mass. 212 (2017)
Care & Protection of Rashida I., 488 Mass. 217 (2021)
Care and Protection of Rashida II., 489 Mass. 128 (2022)
Adoption of Gregory, 434 Mass. 117 (2001)
Adoption of Ilona, 459 Mass. 53, 61 (2011)
Adoption of Gabrielle, 39 Mass. App. Ct. 484 (1995)
Care & Protection of Elaine, 54 Mass. App. Ct. 266 (2002)
Adoption of Lenore, 55 Mass. App. Ct. 275 (2002)
Adoption of Daisy, 77 Mass. App. Ct. 768 (2010)

Adoption of Jerrold, 74 Mass. App. Ct. 1121 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "findings/even-handed analysis of the evidence").

Adoption of Laverne, 74 Mass. App. Ct. 1121 (2009) (Mass. App. Ct. Rule 1:28). This case is, in many respects, the flip-side of Jerrold. In Laverne, the parents argued that DCF failed to make reasonable efforts to help them address their medical and psychiatric problems. The panel disagreed, and found the

argument irrelevant: "In any event, that the department did not do all for which a parent believes there is entitlement in terms of reunification-related services, or in undertaking reasonable efforts to assist the parent, is not a defense to a termination of parental rights."

The mother claimed that DCF sabotaged her case. A footnote suggests that, as to visitation, it may well have done so. Most disturbingly, the panel suggests that the only action it could take is an "admonition" to the agency:

> There were, the record reflects, flaws in the department's implementation of a weekly visitation plan for the parents during the pendency of the proceedings. These flaws led to counsel for the mother and father having to file a series of motions for such weekly visitation. . . . [T]he problems in providing visitation were continuing and criticism of the department's failure to provide for the requisite visitation is warranted. However, even though an admonition to the department is warranted as the problems with implementing visitation continued, this does not alter the appropriateness and legality of the final decrees terminating the parental rights of the father and mother.

If you represent an appellee child, this case may be helpful to cite – along with Adoption of Lenore, 55 Mass. App. Ct. 275 (2002), and Adoption of Gregory, 434 Mass. 117, 122 (2001) – in response to an argument that DCF failed to provide the parents with reasonable efforts or failed to provide them with regular visitation.

Adoption of Shoshana, 74 Mass. App. Ct. 1126 (2009) (Mass. App. Ct. Rule 1:28) (see further discussion at "visitation"). Shoshana makes clear that "no reasonable efforts/inadequate services" arguments cannot be raised for the first time on appeal. It also gives trial counsel a roadmap for how and when to raise these issues prior to termination:

> The father claims that the department did not provide adequate services to him. He raises this issue for the first time on appeal, but "a parent must raise a claim of inadequate services in a timely manner so that reasonable accommodations may be made." *Adoption of Anton,* 72 Mass. App. Ct. 667, 676- 677 (2008), quoting from *Adoption of Gregory,* 434 Mass. 117, 124 (2001). The father did not file any motion nor raise any objection regarding either services or his service plans in the Juvenile Court. See *Care & Protection of Issac,* 419 Mass. 602, 610-611 (1995). Additionally, the father never availed himself of the department's internal grievance procedure regarding the department's service planning. 110 Code Mass. Regs. §§ 6.07 (1993) & 10.06 (2000). The father cannot raise these alleged deficiencies for the first time on appeal. See *Petition of the Dept. of Social Servs. to Dispense with Consent to Adoption,* 392 Mass. 696, 697 (1984); *Adoption of Mary,* 414 Mass. 705, 712 (1993). Finally, once the Juvenile Court judge approved the goal of adoption for the child, the department was no longer obligated to make reasonable efforts to reunify the family. G. L. c. 119, §§ 29B & 29C.

There is nothing novel about this issue-preservation reasoning. You can't raise any issue on appeal (other than subject matter jurisdiction, certain ICWA issues, and a meager handful of other things) unless it has been raised at the trial level. So don't argue DCF's lack of reasonable efforts on appeal unless the trial

attorney raised some kind of ruckus – even a tiny ruckus – about insufficient services before the trial court.

In the language quoted above, was the panel suggesting that a services-related fair hearing or grievance might have sufficed to preserve the issue for appeal? I don't think so; the panel reviews trial court decisions, not DCF's internal appellate decisions. Indeed, a trial judge might not have any idea that a parent or child filed a grievance or sought a fair hearing. Rather, I think the panel was merely noting that the father didn't give the trial judge notice of the problem *and also* didn't give DCF notice of the problem.

Adoption of Francis, 78 Mass. App. Ct. 1128 (2011) (Mass. App. Ct. Rule 1:28). This case is noteworthy only because it states, in no uncertain terms, that a parent waives any argument on appeal that she didn't receive adequate services unless she used DCF's internal grievance system or filed an "abuse of discretion" motion regarding services. If your client didn't raise the services issue below, it's not worth arguing it on appeal.

Adoption of Carissa, 79 Mass. App. Ct. 1119 (2011) (Mass. App. Ct. Rule 1:28). The panel in Carissa makes a very bold statement, but that bold statement may be wrong. The panel affirmed the termination decree after determining that DCF provided the parent with adequate services. That isn't the interesting part. What's interesting is that the panel deemed lack of services a potentially viable defense to termination.

But before getting to the language of this odd little 1:28, we need to spend a moment on the language of the published SJC cases that actually control the issue.

We have generally viewed Adoption of Gregory, 434 Mass. 117 (2001), and Adoption of Ilona, 459 Mass. 53 (2011), as foreclosing any defense to termination based on DCF's failure to provide services. In Gregory, the SJC held that parents cannot raise the agency's failure to follow the Americans with Disabilities Act (ADA) as a defense to termination of parental rights. 434 Mass. at 122. In Ilona, the SJC said all sorts of good thing about the agency's obligation to provide services tailored to the needs of parents. But then it expanded on Gregory and suggested that the failure to provide services shouldn't interfere with termination of parental rights:

> Where a parent [has special needs] that affect the receipt of services, the department's duty to make reasonable efforts to preserve the natural family includes a requirement that the department provide services that accommodate the special needs of a parent. *See Adoption of Gregory*, 434 Mass. 117, 122, 747 N.E.2d 120 (2001). The department must "match services with needs, and the trial judge must be vigilant to ensure that it does so." *Adoption of Lenore*, *supra* at 279 n.3.
>
> When committing a child to the custody of the department or terminating parental rights, a judge must determine whether the department has complied with its duty to make "reasonable efforts . . . to prevent or eliminate the need for removal from the home." G. L. c. 119, § 29C. A judge may consider the department's failure to make reasonable efforts in deciding whether a parent's unfitness is merely temporary. *See Adoption of Carlos*, 413 Mass. at 350. However, even where the department has failed to meet this obligation, a trial judge must still rule in the child's best interest. "A determination by the court that

> reasonable efforts were not made shall not preclude the court from making any appropriate order conducive to the child's best interest." G. L. c. 119, § 29C. While courts protect the rights of parents, "the parents' rights are secondary to the child's best interests and . . . the proper focus of termination proceedings is the welfare of the child." *Adoption of Gregory*, *supra* at 121.

Ilona, 459 Mass. at 61 (certain citations omitted). Accordingly, even if DCF fails to make reasonable efforts, the court can terminate parental rights if the child's best interests so require.

Ilona doesn't say that DCF's failure to provide services is irrelevant. There is some wiggle room: if the child's best interests are not necessarily served by termination (or even by an immediate trial), and DCF hasn't made reasonable efforts, the court *may* consider DCF's failure in deciding whether a parent's unfitness is merely temporary. And if the parent's unfitness is merely temporary, termination is generally inappropriate. The word "may" in Ilona is pretty weak; the court has broad discretion in determining both best interests and whether the services DCF failed to provide could, if offered, meaningfully improve the parenting of the temporarily-unfit parent. Still, a case can be made on appeal that the judge abused his discretion in failing to consider a meritorious motion to continue or in improperly determining that unfitness wasn't temporary. Both are uphill battles.

That brings us to Carissa. The panel *seems* to ignore Ilona (which came out two months before Carissa), and it interprets Gregory narrowly:

> The department and Carissa argue that the mother waived her claim of inadequate services because she raised the argument for the first time at the termination proceeding, citing *Adoption of Gregory*, 434 Mass. 117 (2001). *Gregory* states that a parent, who fails to make a timely claim for inadequate services, "may not raise *noncompliance with the ADA or other antidiscrimination laws* for the first time at a termination proceeding" (emphasis added). *Id.* at 124. *Gregory* does not address a claim for inadequate services as a direct defense to unfitness. Therefore, we do not address waiver, and we resolve this claim on the merits.

Carissa, at n. 5. On the merits, the panel held that DCF did, in fact, provide adequate services. Carissa is not necessarily wrong. But, as discussed above, Gregory and Ilona render "inadequate services" a defense to unfitness only in the narrowest of contexts. So cite Carissa with care. And make sure the issue was preserved below, with thorough testimony (or offers of proof) regarding (a) the services that weren't offered and should have been offered, (b) the availability of those services, (c) how the parent would have benefited from those services, and (d) how long it would have taken – and will take – for the parent to achieve that benefit with those services. Without all of that information in the trial record, an appellate argument based on "no reasonable efforts" stands no chance whatsoever.

Adoption of Zollie, 79 Mass. App. Ct. 1121 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "visitation").

Care & Protection of Averell, 83 Mass. App. Ct. 1137 (2013) (Mass. App. Ct. Rule 1:28) (see discussion at "guardianship").

Adoption of Beatrix, 89 Mass. App. Ct. 1132 (2016) (Mas. App. Ct. Rule 1:28) (see discussion at "parental unfitness/disabilities").

In **Adoption of Dalila, 92 Mass. App. Ct. 1126 (2018) (Mass. App. Ct. Rule 1:28)**, the panel upheld the judge's finding that DCF had made reasonable efforts. It noted, though, that "DCF surely paid insufficient attention to the mother's cognitive limitations." Although the social worker helped the mother apply for DDS services, she "did not know what services DDS might have offered and failed to follow up on the issue." Sounds good so far. The problem, however, was that the court never heard what other actions the DCF social worker *could* have taken:

> However, other than criticize DCF's parenting plan for providing inadequate services and suggesting "specific programs to deal with people with developmental delays," the mother did not show what additional services she could have obtained from DDS or how they might have improved her parenting abilities more than the tailored services that DCF did offer.

The panel's reasoning here is a little muddy. It's unclear if DCF's failure to follow up on DDS services was cured by the other "tailored" services it offered. But, in any event, if you are arguing about DCF's lack of reasonable efforts at the trial level, don't just complain about how little DCF has done. Instead, (a) complain about how little DCF has done, *and also* (b) present evidence about what relevant services are available to the parent, *and also* (c) present testimony from a therapist, substance use counselor, or other expert about how the parent might benefit from those services. Most important of all, don't wait for trial to make these arguments. File motions for services as early (and as often) as possible, preferably long before trial.

Adoption of Dimitri, 96 Mass. App. Ct. 1108 (2019) (Mass. App. Ct. Rule 1:28) (see further discussion at "experts"; "unfitness/bonding with substitute caregivers"; "findings/sufficiency"), is one of those rare, great Rule 1:28 cases that really should have been published. 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.

Dimitri 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.

Adoption of Vicky, 93 Mass. App. Ct. 1120 (2018) (Mass. App. Ct. Rule 1:28). The mother appealed the termination of her parental rights, arguing that DCF failed to make reasonable efforts to reunify the family. The mother didn't raise the issue before trial, and the panel held that the issue was waived. The panel also held that the trial court was under no obligation to address the reasonable efforts issue *sua sponte*.

A dumb, boring Rule 1:28 decision? Not even close. Vicky is a great case about reasonable efforts. First, the panel explained what the mother could have done at the trial level to preserve the issue:

> A parent may pursue a claim of inadequate services either through an administrative fair hearing or grievance process under department regulations or by commencing a separate action alleging discrimination under the ADA.

This isn't very special; it comes right out of Adoption of Gregory, 434 Mass. 117, 124 (2001). But then the panel explained what "pursue a claim" (or "raise a claim" per Gregory) means. It doesn't mean to see one through to conclusion. Rather, it means merely to initiate one:

> We do not agree with the mother's argument that these remedies would have been too time-consuming to have afforded effective relief in this case (in which thirteen months elapsed between the department's emergency petition and the trial), and accordingly that her failure to pursue them should be excused. Merely initiating either type of claim would have put the department on formal notice that the mother believed the department's services and efforts were inadequate, giving the department an opportunity to review those issues and make any adjustments it deemed advisable.

Interesting! For this panel, an inadequate-services claim prior to trial is solely an issue of *notice* to DCF so that DCF has a chance to fix the problem; it is not intended to force the parties to litigate the matter administratively or in federal court. But the case gets even more interesting in the next paragraph:

> Moreover, the mother could have raised her claims of inadequate services or lack of reasonable efforts through a motion alleging that the department had abused its discretion filed in the Juvenile Court while the case was pending. See Adoption of Daisy, 77 Mass. App. Ct. at 781. If the judge had determined that the department was not making reasonable efforts, "he had the equitable authority to order the department to take reasonable remedial steps to diminish the adverse consequences of its breach of duty." Care & Protection of Walt, 478 Mass. 212, 228 (2017). Even if such a determination came "too late to order the department to fulfill its duty to make reasonable efforts to eliminate the need for removal, [it need not have been] too late to ensure that the department fulfilled its duty to make it possible for the child to return safely to [her mother] or to attempt to hasten the time when that reunification would become practicable." Id. at 229. The mother did not pursue this course here.

Yes, that's right – Vicky applies Walt to mid-case/pre-trial reasonable efforts to return a child home. What does this mean? It means that, sometime before trial (preferably long before), you can file a motion for more/different services or ask the court to determine that DCF isn't making reasonable efforts toward reunification. If the court agrees, it has the equitable authority to order DCF to make those efforts *at any point during the case*, not just immediately after removal or after the 72-hour hearing. We know from Walt that the court's equitable authority extends to specific orders for visits and services. This is big!

For trial lawyers, the key to preserving the reasonable efforts issue for appeal lies in the case's Conclusion: "The reasonableness of the department's efforts not having been litigated below, we will not determine the issue on appeal." So *litigate* reasonable efforts at the trial level. Ask for administrative review to put DCF on "formal notice." Raise the issue at the pre-trial conference. Best of all, file a motion seeking more or different services. If you lose, you've preserved the issue for appeal. If you win, Vicky says clearly that the court has equitable authority to order the services or visits you're seeking.

A final note. In a footnote, the panel states that the mother's trial counsel told the judge that the mother was "AWOL," had been "missing for months," and had "made it very clear . . . she is not coming back until she is 18 and she is not going to contact anyone[.]" Please don't do this. If your client has not contacted you for months and no-shows for trial, do not throw her under the bus. If a judge asks, "Where is your client?" you can answer, "She's not here, Your Honor. I'm afraid that's all I can tell you." And then ask for a continuance. Don't volunteer information that can be used against the client. (If you truly have no guidance from your client – for example, your last contact with her was months ago and her position was for custody of the child to be given to a relative who has since died – you can tell the court that you have no guidance from your client and ask to withdraw.) Of course, if you really expected your client to be present at trial because she has attended every hearing, you prepared her for trial, and her absence has thrown you for a loop, you are implicitly authorized to say more in order to help secure a continuance (or to avoid an adverse inference against your client).

Adoption of Harry, 103 Mass. App. Ct. 1102 (2023) (Mass. App. Ct. Rule 28.0). Harry is interesting only because of a brief reference to the preservation of an appellant-parent's reasonable efforts argument. The panel notes, in some detail, that reasonable efforts must be preserved by pre-trial motion, in time for the judge and DCF to do something about the services issues. Neither parent did so.

We repeat the panel's reasoning only because this is so important:

> "It is well-established that a parent must raise a claim of inadequate services in a timely manner." Adoption of Daisy, 77 Mass. App. Ct. 768, 781 (2010), S.C., 460 Mass. 72 (2011). "The parent should assert the claim 'either when the parenting plan is adopted, when [s]he receives those services, or shortly thereafter.' " Adoption of West, 97 Mass. App. Ct. 238, 242 (2020), quoting Adoption of Gregory, 434 Mass. 117, 124 (2001). "A parent cannot raise a claim of inadequate services for the first time on appeal, as the department would not have had the opportunity to address it." Adoption of West, supra at 242. Because the mother did not raise her reasonable efforts claim before trial, it is waived on appeal.

But here is the good part about Harry. The panel stated: "We will treat the father's claim as having been raised in the trial court because the judge explicitly found that the father raised concerns that the department was not doing anything to support him and or reunify the children with him." So the reasonable efforts argument is preserved if the judge actually finds that the parent had raised concerns about services, support, and other reasonable efforts. Trial counsel can't count on this, of course; there's no way to know if the judge will make such a finding. But, for appellate counsel, a finding of this nature should be enough, per Harry, to preserve the reasonable efforts issue.

RELEASES

Adoption of Xena, 73 Mass. App. Ct. 1116 (2009) (Mass. App. Ct. Rule 1:28) (see further discussion at "trial and procedural due process/discovery"; "parental unfitness/failure to visit"). Xena is interesting because it suggests that a parent's failure or refusal to provide DCF releases is a factor in the unfitness determination. The panel noted ample support for the finding that

> the mother failed substantially to provide unconditional release forms necessary for the department to coordinate its efforts with and obtain critical information from certain of the mother's service providers. The judge reasonably concluded that this failure impeded the department's ability to assess the mother's fitness and, to the extent it prolonged their tumultuous foster care experience, harmed the children.

This is quite a bold conclusion: the mother's refusal to sign releases harmed the children by extending their time in care. Still, bold or not, counsel for a child seeking termination might wish to cite Xena for the proposition that a parent is free to refuse to sign releases, but that refusal may be used against him. (Perhaps this is not surprising in light of the fact that courts can draw an adverse inference from a parent's refusal to testify. If courts can do that, they should be able to draw an adverse inference – although Xena does not use that term – from a parent's refusal to cooperate with DCF. I am not aware of any published case that addresses this point as clearly as Xena does.)

Adoption of Neil, 84 Mass. App. Ct. 1107 (2013) (Mass. App. Ct. Rule 1:28). When DCF asks your parent client to sign open releases, we urge you to push back and offer "limited" releases (attendance, perhaps subjects covered, etc.). But what happens if DCF's case rests on a parent's complicated mental

health diagnosis, and it claims that its lack of open releases has hampered its ability to offer appropriate services or measure the parent's progress? Sometimes your decision to offer DCF only limited releases comes back to bite you. Xena, above, falls into this category. Neil does, too.

In Neil, the mother had a long history of complicated mental health issues. Her DCF social worker asked her several times to provide open releases, but she gave the agency only limited releases. Her service plans called only for "releases." As a result, at two foster care reviews during the year before trial, the mother was found to be in full compliance. DCF nevertheless argued at trial that the mother wasn't following the service plan because she knew the agency wanted and needed open releases. The trial court agreed, and found that the mother's failure to provide the open releases, together with her mental health issues, rendered her unfit. The panel affirmed. According to the panel, the mother should have been aware that her mental health and its implications for her ability to parent were central issues in this case. She also should have known that her failure to sign open releases could have negative implications.

That said, what does Neil tell us about trial practice? Based on reports from the trial front, DCF has interpreted Neil to mean that it can ask for, and parents must provide, open releases in all cases. But I think Neil is more limited than that. In Neil, the mother had long-standing mental health issues, and her problems persisted for years. She insisted that DCF hadn't provided her with appropriate services, but she didn't help the agency determine what her needs were, choosing instead to keep them private. Under those circumstances, the mother's failure to disclose to DCF the full extent of her mental health problems was a proper subject for comment and consideration by the court. If the mother (and her trial counsel) truly wished to keep her mental health issues away from DCF – a very reasonable desire in most cases – it was incumbent on her trial counsel to (a) retain an expert for mother to assess her mental health needs (using ICCA funds) and (b) ensure, to the extent possible, that the mother was attending appropriate services identified by that expert. Then, at trial, the mother's refusal to give DCF access to her mental health providers would be irrelevant (or, at least, less relevant). Neil should not be read to give DCF carte blanche to go on a fishing trip through a parent's mental health records by insisting on open releases for all providers, particularly where the parent's mental health is not alleged to interfere with her parenting.

REVIEW AND REDETERMINATION

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 119, § 26
Adoption of Helen, 429 Mass. 856 (1999)
Care & Protection of Erin, 443 Mass. 567 (2005)

Adoption of Piers, 84 Mass. App. Ct. 1118 (2013) (Mass. App. Ct. Rule 1:28). This case reminds us that *all* parties seeking review and redetermination – including DCF – have the initial burden to present "some credible evidence that circumstances have changed since the initial determination." See Care & Protection of Erin, 443 Mass. 567, 572 (2005). In Piers, the father argued for the first time on appeal that DCF did not meet its initial burden when it petitioned for review and redetermination nine months after the father stipulated to his unavailability because he was incarcerated. The father argued that neither his nor the children's circumstances had changed during those nine months, and DCF was well aware at the

time of the initial adjudication that the father would not be available to care for the children for at least two years. However, the father did not make this objection at the time of the review and redetermination hearing, and thus he waived it. The panel noted that, even if father hadn't waived the argument, DCF had, in fact, met its burden. The takeaway? Counsel should always object when the petitioning party hasn't met its initial burden in order to preserve the issue for appeal.

Adoption of Rhonda, 90 Mass. App. Ct. 1124 (2017) (Mass. App. Ct. Rule 1:28). Rhonda suggests that the trial court can schedule a termination trial less than six months after a parent is adjudicated unfit at a care and protection trial, and that the termination trial is not a "review and redetermination" under G.L. c. 119, § 26(c) but a separate proceeding. In Rhonda, DCF filed a motion requesting dates for a termination trial pursuant to G.L. c. 210, § 3 the day before the care and protection trial was conducted. The next day, the trial court adjudicated mother unfit and the child in need of care and protection, and then scheduled a termination trial for four months later. The court terminated Mother's rights at the later trial. Mother argued on appeal that DCF's motion for termination trial dates was, in fact, a petition for review and redetermination under G.L. c. 119, § 26(c), which could not be heard sooner than six months after the care and protection adjudication. The panel disagreed, reasoning that, while a termination proceeding and care and protection proceeding usually are consolidated, they are "separate and distinct inquiries." As a result, the six-month waiting period under § 26(c) for reconsideration of a care and protection adjudication did not apply.

The reasoning here is befuddling. While a care and protection case and a termination case *can* be separate proceedings – *i.e.*, if the care and protection petition is filed in juvenile court and the termination petition is filed in the probate and family court – they *aren't* separate proceedings in the juvenile court under c. 119 and weren't separate in Rhonda. Termination is just another dispositional option under c. 119, § 26, and the c. 210, § 3 factors are simply incorporated into the juvenile court judge's c. 119, § 26 termination analysis. DCF shouldn't be allowed to skirt the plain language of c. 119, § 26(c) just because it decides to call the next trial a "termination trial" instead of a "review and redetermination."

That said, attorneys should be aware that DCF might cite to this badly-reasoned decision and seek a "termination trial" less than six months after adjudication. If your client is stipulating to the adjudication in order to buy more time, that extra time should be specifically set forth in the stipulation. After Rhonda, counsel can't guarantee that the "termination trial" – that is, what *should be* the review and redetermination hearing – will be six months later.

Care & Protection of Leif, 82 Mass. App. Ct. 1118 (2012) (Mass. App. Ct. Rule 1:28). In this case, 14-year-old Leif and his mother appealed the Juvenile Court's determination that mother was unfit. Leif had special needs. His foster placement disrupted shortly before trial, and he was placed in residential care where his condition deteriorated. Although the panel affirmed the lower court's decision to commit Leif to DCF's permanent custody, it noted that G.L. c. 119, § 26(b) allows the judge to enter "an appropriate order" to meet the child's needs, especially when the treatment the child is receiving in DCF custody is not in his or her best interests. The panel went on to say:

> A judge in such circumstances may seek additional evidence, including expert testimony, to determine whether the foster placement itself is causing the further harm to the child or whether his or her behavior is simply an expression of a preexisting emotional or

> psychological condition, and to determine whether some order might be crafted to allow for a disposition…that might mediate these effects.

The panel invited the trial court to "explore" how DCF was caring for Leif in a review and redetermination. The panel also stressed the role of Leif's trial counsel: "We assume that counsel representing Leif in the court below will remain in the case to ensure that Leif's interests are fully protected." The panel got this right. It is critical for children's attorneys to take an active role in dispositional proceedings, as well as in all permanency and post-adjudication hearings. Someone must keep an eye on DCF.

Adoption of Alvin, 73 Mass. App. Ct. 1112 (2008) (Mass. App. Ct. Rule 1:28) (see further discussion at "sibling placement and visitation"). Alvin clarifies how easy it is to meet the initial burden of production for a review and redetermination under Erin (at least if the movant is DCF). Here, the mother's lack of service plan compliance and the children's bonding to pre-adoptive parents was enough:

> The department bore the ultimate burden to prove that the children were in need of care and protection, including showing that the mother remained unfit. However, because the department filed the petition for review and redetermination . . ., the department also bore an initial burden to produce some credible evidence that circumstances had changed since the initial determination. That initial burden was met here by the evidence that the mother's compliance with her service plan had deteriorated, and by evidence that Charles and Julie had bonded with their respective pre-adoptive families. (Citations omitted).

Care and Protection of Umeko, 102 Mass. App. Ct. 1117 (2023) (Mass. App. Ct. Rule 23.0). Umeko provides an extreme example of the principle that a parent's fitness or unfitness must be evaluated according to the specific needs of the child. Here, the father's only true deficit was that his child required residential care and the father didn't fully grasp the gravity of the child's special needs. This was not a termination case, and the panel seemed to recognize that the slender read of unfitness in a permanent custody case like this needed further explanation (also suggesting that it might not have passed muster in a termination case). The panel noted "that the department did not seek a termination of the father's parental rights and that the permanency plan remains reunification of the child with the father. To that end, the judge encouraged the father "to continue working with [the child] and [the residential facility] toward an eventual reunification and the filing of a review and redetermination petition, when appropriate, in the future."

Umeko could be helpful in supporting an argument that termination is not necessary, and a parent should have an opportunity to move for review and redetermination when he has a better grasp on his child's special needs. On the flipside, Umeko should be helpful for appellee-children in a permanent custody appeal where the parent, as of trial, struggled with recognizing or meeting the child's special needs, and this struggle was about all that showed the parent's unfitness.

SIBLING PLACEMENT AND VISITATION

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

The Fostering Connections to Success and Increased Adoptions Act of 2008, 42 USC § 671 (2008)
G.L. c. 119, §23(c)
G.L. c. 119, § 26B(b)
Duclos v. Edwards, 344 Mass. 544 (1962)
Freeman v. Chaplic, 388 Mass. 398 (1983)
Adoption of Three Minors, 392 Mass. 704 (1984)
Adoption of Rico, 453 Mass. 749 (2009)
Care & Protection of Jamison, 467 Mass. 269 (2014)
Care & Protection of Two Minors, 12 Mass. App. Ct. 867 (1981)
Adoption of Gabrielle, 39 Mass. App. Ct. 484 (1995)
Adoption of Lorin, 50 Mass. App. Ct. 561 (2000)
Adoption of Galvin, 55 Mass. App. Ct. 912 (2002)
Adoption of Pierce, 58 Mass. App. Ct. 342 (2003)
Adoption of Zander, 83 Mass. App. Ct. 363 (2013)
Adoption of Garret, 92 Mass. App. Ct. 664 (2018)

Adoption of Wally, 73 Mass. App. Ct. 1107 (2008) (Mass. App. Ct. Rule 1:28), reminds us that parents cannot argue for sibling visitation if they did not do so at the trial level. At footnote 4, the panel states, "[o]n appeal, the mother raises the issue of sibling visitation between Wally and Darius. The issue is waived as she did not raise it at trial. See *Adoption of Gillian,* 63 Mass. App. Ct. 398, 408 (2005)." That footnote also states that parents don't have standing to ask for sibling visitation, but that statement is simply wrong; after all, how you can waive an argument you don't have standing to make?

Adoption of Alvin, 73 Mass. App. Ct. 1112 (2008) (Mass. App. Ct. Rule 1:28) (see further discussion at "review and redetermination"). In Alvin, the Appeals Court affirmed the Juvenile Court's refusal to order sibling visitation because visits were not in the children's best interests:

> [T]he record demonstrates that Alvin's negative behaviors escalated when he lived with Charles; that Alvin and Charles were moved to separate homes due to their challenging behavior when together; that when exposed to Charles, Alvin 'became extremely anxious, refused to complete work, ran from the classroom, and became aggressive towards adults'; and that Alvin also began exhibiting increased aggression and sexually reactive behaviors when he was with Charles.

Only in the rarest of circumstances (in my very biased opinion) should a sibling visitation request be denied. These facts are, indeed, pretty bad. But the facts in Alvin may be helpful to counsel in other cases. Chances are that the facts in other sibling visitation appeals are not as bad as they are in Alvin. "Alvin," counsel can argue, "constitutes the kind of facts warranting a denial – anxiety, aggression and sexually reactive behavior following a visit – unlike this case, where the only negative behavior exhibited by the siblings after visits is . . . ."

Adoption of Gerald, 73 Mass. App. Ct. 1116 (2009) (Mass. App. Ct. Rule 1:28), is not noteworthy other than for its remand for sibling visitation orders. The trial court did not expressly order sibling visitation, but it "encouraged" it based on the close relationship between Gerald and his older half-brothers. The child appealed, seeking a more specific sibling visitation order. The panel agreed that more than "encouragement" was required:

> By encouraging postadoption visitation, the judge implicitly found that sibling visitation would be in Gerald's best interests, but failed to address whether visitation would be 'reasonable and practical.' Accordingly, we remand the matter to the trial judge to make findings and rulings as to whether sibling visitation between Gerald and his half-brothers, Sam and Barry, is reasonable and practical and, if so, to make explicit the schedule and means by which such visitation is to occur. See *Adoption of Rico,* 72 Mass. App. Ct. 214, 221, further appellate review granted, 452 Mass. 1103 (2008).

Although this is a great case, counsel must still request sibling visits. Courts might not need to order it otherwise, even if it would serve the siblings' best interests, per Adoption of Garret, 92 Mass. App. Ct. 664 (2018).

Adoption of Richard, 77 Mass. App. Ct. 1103 (2010) (Mass. App. Ct. Rule 1:28) (see further discussion at "trial and procedural due process/ineffective assistance of counsel"). It boggles the mind that trial judges still enter generic orders such as, "all siblings shall have visits." Such an order, of course, is useless and virtually unenforceable. More importantly, it does not protect children's rights to contact with their brothers and sisters. The panel in Richard took this seriously and remanded:

> [T]he judge's further conclusion that it is in the best interests of the children "to maintain contact with one another through visitation, if they are not adopted together," is inadequate. A judge is required to "consider whether sibling visitation should be ordered, given the practicalities of the situation and the best interests of the children in question, [as well as] to decide how such visitation should be implemented." *Adoption of Galvin,* 55 Mass. App. Ct. 912, 913 (2002). "[S]uch sensitive matters must be committed to a judge's neutral decision-making rather than being left to the discretion of parties." *Id.* at 914. See G. L. c. 119, § 26B, inserted by St. 2008, c. 176, § 84, effective July 8, 2008. A remand is required to determine the terms and conditions of such visitation.

Still, as noted above, someone must *ask* for sibling visits, or the issue might be waived, per Adoption of Garret, 92 Mass. App. Ct. 664 (2018).

Adoption of Lin, 81 Mass. App. Ct. 1128 (2012) (Mass. App. Ct. Rule 1:28). The trial court approved plans specifying that two brothers would be adopted by different families. The plans did not address sibling visitation, and the court's findings did not address why the boys couldn't be placed together. The panel remanded to the trial court for further findings on the issues of sibling visitation and the possibility of joint placement. According to the panel, G.L. c. 119, § 26B(b) required findings on these issues. This is fascinating, because we usually think of § 26B(b) only as the "sibling visitation" statute. But the statute requires that the court "ensure that children placed in foster care shall have access to and visitation with siblings . . . ." We had assumed "access to" meant phone calls and letters, but the panel in Lin (based on a clever argument by child's counsel) interpreted it to mean "placement." And the trial court's failure to

explain how joint or separate placement of the boys served their best interests required remand.

Lin is a helpful case if you represent a child who is aggrieved by placement apart from a sibling and the court fails to make specific findings explaining why joint placement doesn't serve their best interests.

Adoption of Danielle, 88 Mass. App. Ct. 1116 (2015) (Mass. App. Ct. Rule 1:28) (see discussion at "findings/child-specific analysis"; "appellate procedure/post-trial motions").

Adoption of Chandler, 89 Mass. App. Ct. 1106 (2016) (Mass. App. Ct. Rule 1:28). In this appeal, the two oldest of four children claimed that the trial judge abused his discretion in only ordering four post-termination sibling visits per year. Neither of the two was in a pre-adoptive home. The judge concluded that an order for more than four annual sibling visits "would place too high a burden on prospective adoptive parents" and would "deter them from adopting." The judge based this conclusion on vague testimony from a DCF social worker that "rigorous" visitation terms "can be a bit of a barrier for [adoptive resources] to keep up with[.]"

The panel concluded that the trial judge abused his discretion. According to the panel, the older siblings lived together for much of their lives and shared a special bond; if they never found permanency, all they had was each other. Most significantly, the panel noted that "DCF has failed to articulate any reason why an order for more frequent *preadoptive* visitation between [the older children] would be a barrier to adoption or otherwise would not be in their best interests." (emphasis added) The panel remanded the case to the trial court with instructions to fashion an order that "practically and reasonably, in the judge's discretion, provides additional preadoption visitation" between the two oldest siblings.

Adoption of Osma, 94 Mass. App. Ct. 1119 (2019) (Mass. App. Ct. Rule 1:28). In Osma, the mother argued that the judge erred by not ordering sibling visitation. The child's paternal aunt in Virginia planned to adopt her. The judge terminated parental rights and ordered post-adoption visitation at the discretion of the adoptive parents. The judge found that it was the "customary routine" of the pre-adoptive parents to visit Massachusetts approximately twice a year for the child to visit the parents and that such visits "would continue," thereby rendering an order unnecessary.

The entirety of the panel's discussion of sibling visitation is as follows:

> "If siblings are separated through adoption, a judge 'shall, whenever reasonable and practical based upon the best interests of the child, ensure that the children ... shall have access to and visitation with siblings." Adoption of Zander, 83 Mass. 363, 367 (2013), quoting G. L. c. 119, § 26B(b). The judge's order provides that "the parents are encouraged to include [the child's] sisters . . . in [parent-child post-adoption] contact to ensure that the child maintains contact with these siblings." We interpret this to require that when the preadoptive parents visit Massachusetts, all reasonable and practical steps must be taken to ensure that the child has visitation with her siblings.

The panel's interpretation of the trial court's non-order is generous. (In fact, I can't imagine that the pre-adoptive parents ever interpreted the trial court's "encourage[ment]" as an order at all. A better response by the panel would have been a remand for clarification and amendment of the order.) Further, the panel's reasoning in Osma contrasts with that of the panel in Adoption of Gerald, 73 Mass. App. Ct. 1116 (2009)

(Mass. App. Ct. Rule 1:28). In Gerald, the panel remanded for a more specific sibling visitation determination and scheduling order by the trial court.

The takeaway for trial and appellate counsel? If a post-termination, post-adoption, or sibling contact order is vague or ambiguous – as part of the findings/conclusions or a separate order – take it back to the trial judge immediately on a motion for clarification or motion to amend. Don't wait for the Appeals Court to attempt to divine the trial judge's intentions. Parents and children are entitled to clear, unambiguous orders, especially those that are intended to survive (and be enforceable) after adoption.

Adoption of Ido, 95 Mass. App. Ct. 1106 (2019) (Mass App. Ct. Rule 1:28). Ido concerned the youngest six of the mother's twelve children. One of the six, Jane, challenged the termination of her mother's rights because her pre-adoptive placement disrupted. DCF knew that the placement had disrupted at the time the decree was entered but never informed the judge. However, neither Jane nor the mother moved to reopen the evidence or for reconsideration. As a result, the panel affirmed the termination decree.

Jane also challenged the denial of post-termination and post-adoption visitation. Here, the panel did consider the disruption of Jane's pre-adoptive placement, noting that the lack of an identified pre-adoptive family, together with the termination of the mother's parental rights, were "precisely the circumstances in which an order for posttermination as well as postadoption contact may be appropriate and warranted." Ido (citing Adoption of Rico, 453 Mass. 749, 755 (2009)). The panel vacated the decree for further consideration of post-termination and post-adoption visitation.

Finally, Jane challenged the lack of sibling visitation. The judge declined to order any because it was not reasonable or practical; there were 12 children, three over the age of 18, and they lived in "various homes, placements, and [states]." Instead of an order, the judge indicated that he "expected" DCF, as well as future adoptive parents and custodians of the children, "to collaborate with each other in order to maintain sibling contact and visitation consistent with each child's best interests." In a footnote, the panel diplomatically explained why this "expectation" was insufficient:

> We sympathize with the judge's position, being presented with the formidable task of ensuring sibling visitation in this complex circumstance. But it is precisely in these complicated scenarios where children are most at jeopardy of losing sibling contact; and, although the department may have its independent obligation to ensure sibling visitation under the statute, see Adoption of Garret, 92 Mass. App. Ct. 664, 679-681 (2018), any future adoptive parent is not so obligated. See Adoption of Zander, 83 Mass. App. Ct. at 367. An "expectation" that a future custodian of the children will cooperate with sibling visitation falls short of an order requiring such visitation.

According to the panel, "[t]here is nothing in this record to suggest that an order for posttermination and postadoption sibling visitation would not be in the best interests of these children. To the contrary, there is strong record support for the closeness of the entire sibling group. Notably, all six children are in favor of a sibling visitation order." Ido (citations omitted).

Well said! The panel remanded for consideration of sibling visitation orders. Ido is a great case to cite when a judge uses logistical complications as an excuse not to order sibling visits.

TERMINATION OF PARENTAL RIGHTS

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 210, § 3(c)
Adoption of Helen, 429 Mass. 856 (1999)
Adoption of Willow, 433 Mass. 636 (2001)
Adoption of Nancy, 443 Mass. 512 (2005)
Adoption of Imelda, 72 Mass. App. Ct. 354 (2008)
Adoption of Thea, 78 Mass. App. Ct. 818 (2011)

CHILD'S WISHES

Adoption of Iola, 74 Mass. App. Ct. 1121 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "post-judgment contact"; "termination of parental rights/legal orphan").

Adoption of Donato, 75 Mass. App. Ct. 1115 (2009) (Mass. App. Ct. Rule 1:28 (see further discussion at "trial and procedural due process/right to counsel"). The child freed for adoption was almost 17 and did not want to be freed from his mother or adopted. The panel was unmoved:

> Donato . . . knows and loves his mother despite her parental limitations and will likely interact with her on his own terms upon emancipation.
>
> We acknowledge that viewed from the child's perspective the termination of his mother's parental rights creates the uncomfortable perception that his mother is no longer his mother. . . . Without minimizing Donato's concerns, we agree with the judge that the mother's parental unfitness is likely to continue indefinitely and certainly will not be resolved before Donato is emancipated. So considered, the judge did not err in concluding that it is in Donato's best interests that the mother's parental rights be terminated, thereby preventing her from seeking review and redetermination were the matter to remain a care and protection proceeding with permanent custody with the department.

Frankly, I am baffled by this. The panel never explained the trial court's (or its own) reasoning as to how the child's best interests were served by termination. From the decision, it appears that termination served no purpose other than to keep the mother from seeking review and redetermination. If that were the trial court's goal, it seems awfully weak to me. Here, there was only one, or at most two, more review and redeterminations to be held before the child turned 18 (assuming the mother would have requested them). Is avoiding one or two hearings sufficient reason to terminate? That the mother's unfitness would "continue indefinitely" has nothing to do with whether it served the child's bests interests to lose her for the next year until he turned 18. In any event, Donato drives one more nail into the coffin of the argument that termination does not serve the best interests of older children who want to maintain a relationship with birth parents and do not want to be adopted.

Adoption of Renee, 99 Mass. App. Ct. 1117 (2021) (Mass. App. Ct. Rule 23.0). Renee contains important language about the interests of older children in these proceedings. In this appeal, Renee, the oldest child (an appellant), argued that termination of the mother's rights was not in her best interests because Renee (1) was not in a pre-adoptive home, (2) desired to return to the mother, with whom she had a significant relationship, and (3) was almost of the age where she could withhold her consent to adoption. Some of these concerns were raised late in the proceedings. Nevertheless, the panel concluded that the case presented "special circumstances" to warrant meaningful appellate review, given the gravity of the stakes involved. The panel vacated the order terminating the mother's rights to Renee: "Here, neither Renee's wishes nor the statutory significance of her age was put before the judge. Accordingly, we cannot discern whether and what impact those factors would have had on the judge's analysis. A remand for further consideration of, and findings regarding, those factors is appropriate." This is important guidance for judges, trial lawyers, and appellate lawyers.

The panel in Renee also remanded the case on the issue of post-termination visitation. Because the judge applied an incorrect "irreparable injury" standard, rather than a "best interests" test, it was unclear whether the judge correctly determined the issue. The panel noted that the children were not in pre-adoptive homes at the time of trial, and that continued visitation with the biological parents "can provide support and continuity."

LEGAL ORPHAN

Adoption of Iola, 74 Mass. App. Ct. 1121 (2009) (Mass. App. Ct. Rule 1:28) (see further discussion at "post-judgment contact"). In Iola, the panel affirmed the termination of a father's parental rights based on his "grievous neglect" of the child. The father and the child, who was 12 and wanted to return to his father, both appealed. The panel was not convinced that the child's legal ability to block an adoption should alter the result:

> Lewis notes that he is now old enough that he must give his consent if he is to be adopted. See G.L. c. 210, § 2. He argues that he will not consent to his own adoption and that the termination of the father's parental rights will thus leave him a legal orphan.
>
> We understand Lewis's arguments[.] . . . . Nonetheless, while Lewis may block his adoption, this is not determinative of either the father's fitness or Lewis's best interests, especially considering the judge's finding that Lewis's intellectual ability makes it difficult for him to comprehend his environment and potential harm.

This language does not foreclose a "legal orphan" argument, but it does present a hurdle. If you represent an appellant-child who is 12 or older and does not want parental rights terminated, you may have to distinguish your case from Iola by showing that (a) your client does not have meaningful intellectual limitations, and/or (b) the facts present a closer case on the issue of unfitness.

Adoption of Paulette, 75 Mass. App. Ct. 1106 (2009) (Mass. App. Ct. Rule 1:28), drives another nail into the coffin of the "legal orphans" argument. The younger child in Paulette suffered brain damage from abuse that took place "under [mother's] watch." Mother did not argue on appeal that she was fit to care for him, but rather that he was unadoptable and that termination would wrongly render him a "legal orphan." The panel was having none of it:

> [Eugene's] current condition does self-evidently present serious challenges to adoption. But as the Supreme Judicial Court has made plain, the absence of imminent adoption prospects does not by itself invalidate a decision to terminate parental rights. *See Adoption of Nancy,* 443 Mass. 512, 516-518 (2005). Moreover, concerns about creating "legal orphans" are generally based on trying to avoid unnecessarily destroying an "enduring parent-child relationship." *See, e.g*., *Adoption of Ramona,* 61 Mass. App. Ct. at 265. Here, given that Eugene was two months old at the time he was permanently injured and removed from the home and the mother has hardly seen him since, there is simply no appreciable bond between the boy and the mother. We discern no error in the judge's decision to terminate the mother's rights as to Eugene.

Perhaps I am too cynical, but the panel seems to be saying that the Juvenile Court is free to create "legal orphans" for those children without strong attachments to birth parents. But, from a child-centered approach, wouldn't it be better to keep the mother "in the loop" for a child like Eugene, who is extremely unlikely to be adopted? The mother may not offer him much other than an occasional visit, but isn't something better than nothing?

There is a silver lining to the panel's reasoning. It suggests that the legal orphan argument may still have legs in those cases where there is "an enduring parent-child relationship" and (obviously) no identified pre-adoptive family. In other words, courts shouldn't take a child who has *some* attachment figure and turn him into a child with *no* attachments whatsoever.

Adoption of Zach, 86 Mass. App Ct. 1118 (2014) (Mass. App. Ct. Rule 1:28). This case is particularly sad because it suggests that "legal orphan" status can be good for a child even in the absence of any identifiable harm from contact with a birth parent. In Zach, the mother and daughter (age 11) conceded the mother's unfitness but argued that termination was inappropriate because the daughter had no adoption prospects and would likely be left a legal orphan. No evidence suggested that contact with the mother harmed the daughter; indeed, the judge ordered post-adoption contact. According to the panel,

> While we fully acknowledge that becoming a legal orphan is an undesirable outcome for any child, permanence and stability may be "eased" by the termination of parental rights, even where the child will become a legal orphan. *Adoption of Nancy*, 443 Mass. at 517. *See Adoption of Paula*, 420 Mass. 716, 722 n.7 (1995) ("A fully developed adoption plan, while preferable, is not an essential element of proof in a petition brought by the department under G. L. c. 210, § 3"). Here, a continuing legal tie to the mother, whose fitness could not reasonably be foreseen, would be at odds with the goal of stability for the daughter.

No doubt there are cases where a child is better off without any parent than with a dangerous or destabilizing parent. But in this case, there was no evidence that contact with the mother destabilized this child – if such evidence existed, the trial court wouldn't have ordered regular post-adoption contact – or that termination would actually "ease" permanency for the child (other than easing the child toward permanent legal orphan status).

But befuddlement over the language in Zach only gets us so far. What does Zach teach us about legal orphan cases? It teaches us that more must be done at the trial level to show the court that termination will not serve *that particular child's* best interests. Parents' or child's counsel should retain a mental health expert (using ICCA funds) who will testify that (a) the child does not want to be adopted; (b) the child will *not* be stabilized by terminating parental rights; (c) the child will suffer harm if her loss of a parent isn't mediated by the gain of a new permanent, loving caretaker, which is unlikely or impossible in this case; and (d) care by a foster parent, program, or facility will harm the child long-term if she is legally deprived of the only loving caretaker she will ever have. The child's therapist can also testify to this. Better yet, use the child's therapist *and* an expert. CAFL Administration has some materials on the bleak outcomes for legal orphans. Please use it to educate your trial judge and the Appeals Court.

SUA SPONTE TERMINATION OF PARENTAL RIGHTS

Adoption of Golda, 76 Mass. App. Ct. 1102 (2009) (Mass. App. Ct. Rule 1:28). Golda addresses whether courts can (or, at least, should) terminate parental rights when none of the parties is seeking termination. In Golda, neither DCF nor the custodial father sought to terminate mother's rights. To mother's surprise, the juvenile court terminated her rights anyway. She moved for reconsideration, but the court denied her motion.

Section 26 of G. L. c. 119 allows courts to terminate parental rights as a dispositional option upon a finding of unfitness, and the summonses sent to parents note this possibility. Theoretically, termination is always "on the table." Still, if no one is seeking that relief, the court's authority to enter it should not trump the parties' reasonable expectations that only "lesser" dispositions are at play. The panel in Golda vacated the decree because

> [s]erious problems may be created whenever a judge bases a decision on an issue that is not before the court.' *Messina v. Scheft,* 20 Mass. App. Ct. 945, 946 (1985). See *National Med. Care, Inc.* v. *Zigelbaum,* 18 Mass. App. Ct. 570, 579 (1984). A judge should decide only those issues or matters that are before the court. That did not occur here. Therefore, in order to accomplish justice in this matter, the judge should have allowed the mother's motion for reconsideration.

Accordingly, if your client's rights were terminated when no party was seeking that result, Golda may be helpful to cite in a motion for reconsideration or for a new trial. (Note that Golda does not address whether termination would have been "before the court" if the judge had announced at the pretrial and trial that he or she might terminate rights as a disposition even if no one was seeking that relief.)

TRIAL & PROCEDURAL DUE PROCESS

CHILD TESTIMONY

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Commonwealth v. Allen, 40 Mass. App. Ct. 458 (1996)
Adoption of Roni, 56 Mass. App. Ct. 52 (2002)

Adoption of Penn, 73 Mass. App. Ct. 1124 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "evidence/hearsay").

Care & Protection of Indihar, 78 Mass. App. Ct. 1108 (2010) (Mass. App. Ct. Rule 1:28). Indihar is interesting because it addresses some rarely-mentioned language in G.L. c. 119, § 21A, that evidence in a care and protection case "may include testimony of the child" but only "after consultation with counsel." The mother and a second child (Beth) argued that the permanent custody adjudication should be reversed because the judge failed to take testimony from Beth about her preference to be returned home to mother. (It is not clear from the decision whether the judge quashed a subpoena for Beth to testify or merely indicated that he would not allow her to testify.) The judge did "consult[] with counsel" for Beth, who informed him that Beth's position fluctuated, that it would be traumatic for her to testify, and that she could not adequately convey her position to the court. (There does not appear to have been any "evidence" of these facts other than counsel's apparently uncontested proffers.) Under these circumstances, and based on the use of the word "may" in § 21A, the panel held that it was appropriate for the judge not to take Beth's testimony.

This may be a helpful case if you represent a younger or developmentally-delayed child and you wish to prevent her from testifying. But if child's counsel *wants* the child to testify, the child has a fixed position in the case, the child would not be harmed from testifying, and the child can convey her position to the judge, the court should hear from the child.

Note that Indihar addresses the situation where counsel wishes to bring a child's position to the court's attention. It does not speak to a parent's right to rebut adverse allegations made by children when their statements are admitted through documentary evidence; in such circumstances, Adoption of Roni, 56 Mass. App. Ct. 52 (2002), controls.

Adoption of Harry, 87 Mass. App. Ct. 1128 (2015) (Mass. App. Ct. Rule 1:28). The appellant-parents' main argument on appeal centered on the manner in which the trial judge took testimony from the father's daughter from a previous relationship, Kathryn. The judge excluded both parents from the courtroom during Kathryn's testimony. The mother's and father's attorneys were allowed to be present, but they were only allowed to submit questions through the judge. The parents argued that this violated their due process rights. The Appeals Court disagreed. The panel held that the process allowed the parents sufficient opportunity to rebut Kathryn's allegations of abuse. The panel further reasoned that the parents had ample opportunity to call additional witnesses and present other evidence to rebut the allegations.

The parents also argued that the judge erred by not making an explicit finding that the method for taking Kathryn's testimony was tailored to prevent trauma to Kathryn. The panel again disagreed, noting that the judge's determination that Kathryn would suffer trauma was "implicit," given Kathryn's history and the concerns of her psychiatrist. Explicit findings were not necessary.

Although Harry appears to be contrary to the holding in Adoption of Roni, 56 Mass. App. Ct. 52, 55 (2002), it is consistent. Roni stands for the proposition that modifications for children's testimony should "ordinarily" be supported by written findings regarding trauma to the child. Id. But "ordinarily" is not "always"; indeed, in Roni, the Court held that the judge implicitly made findings of trauma based on testimony from the children's therapists.

Adoption of Nina, 93 Mass. App. Ct. 1108 (2018) (Mass. App. Ct. Rule 1:28). 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 (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.

COLLOQUY AND WAIVER

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Care & Protection of Manuel, 428 Mass. 527 (1998)
Care & Protection of Erin, 443 Mass. 567 (2002)
Adoption of John, 53 Mass. App. Ct. 431 (2001)

Adoption of Farah, 75 Mass. App. Ct. 1116 (2009) (Mass. App. Ct. Rule 1:28). The panel in Farah clearly lays out the rules for termination colloquies. The father in Farah argued that his stipulation for judgment should be vacated because, among other reasons, he did not admit unfitness in his colloquy and there was no documentary or testimonial evidence of his unfitness. The panel disagreed. All that is required for a valid colloquy "is that the judge make an appropriate inquiry to establish that the parent's consent was knowing and voluntary." (citing Adoption of John, 53 Mass. App. Ct. 431, 435 (2001)).

What is an "appropriate inquiry"? In Farah, the judge inquired into the father's "understanding of the decision [he] was making and the voluntary nature of [his] assent." His questioning elicited that the father "was not under the influence of alcohol, drugs, or medication that would effect [sic] his thinking; was not forced by anyone to sign the stipulation; and was satisfied with his attorney." That was sufficient. The absence of "evidence" of the father's unfitness was irrelevant. While there must be a "factual basis in the record" to support a finding of unfitness (G.L. c. 210, § 3(c)) even with a stipulation and colloquy, the "factual basis" may be established through reports, such as court investigator reports, that are "before the judge" even if not entered in evidence.

Care & Protection of Yevgeny, 81 Mass. App. Ct. 1134 (2012) (Mass. App. Ct. Rule 1:28). In Yevgeny, the father waived his right to a trial and stipulated to the children's permanent custody with DCF. The father argued that his waiver wasn't "knowing and voluntary" because the judge did not explain during the colloquy that the father was stipulating to unfitness. The panel disagreed. While the judge did not mention "unfitness" in the colloquy, the term had been discussed many times during the proceedings, and the panel found it implausible that the father didn't realize that this was part of his stipulation. The panel noted that while an explicit mention of unfitness during the colloquy "would have been advisable," it was not required. Id. at n. 8.

The father next argued that the judge erred in failing to issue findings to support the stipulation. The panel cited Care & Protection of Erin, 443 Mass. 567, 572-73 (2002), for the proposition that, while "the factual basis for the initial determination of unfitness ideally should appear somewhere in the record," it was not required.

The father also argued that he was confused and depressed and therefore unable to validly stipulate to anything. The panel noted that "[e]motion and stress caused by the situation . . . are not sufficient to render a stipulation void." Id.

Finally, the panel noted that, to vacate his stipulation and reopen the judgment, the father needed to show a chance of success on the merits. He failed to do so.

Adoption of Alexandra, 83 Mass. App. Ct. 1101 (2012) (Mass. App. Ct. Rule 1:28). In this case, the father stipulated to the termination of his parental rights. On appeal, he argued that the stipulation wasn't knowing and voluntary because he didn't understand it. Earlier in the proceedings, the trial court found the father to be incompetent to assist his attorney and appointed him a guardian ad litem. During the father's colloquy, the judge asked him if he had had the chance to discuss the stipulation with his lawyers. The father answered "no." The panel noted that the father "possibly misunderst[oo]d the thrust" of the [question.]" The trial judge, according to the panel, should have clarified the father's response; if the answer remained "no," he should have given the father a chance to review it with counsel. (Trial counsel should also have insisted on clarification – you cannot let a "no" answer like that pass unexamined when your client is being questioned in a colloquy.) Nevertheless, the panel found no error in accepting the father's stipulation. The record showed that the stipulation had been drafted a month earlier. The father had that month to consult his attorney, and the content of the stipulation suggested that father had, in fact, consulted his attorney.

Needless to say, this case presents an ocean of waving red flags. Can an incompetent parent stipulate to unfitness? If the parent has a GAL/next friend, shouldn't the GAL/next friend be signing the stipulation and answering the colloquy (or be questioned under oath)? How can a court infer a "knowing and voluntary" waiver from a parent who is incompetent and has a GAL/next friend, especially where it isn't clear that the parent even understands whether he spoke to his attorney about the stipulation? Here, the GAL/next friend didn't testify; rather, she "represent[ed] in open court that the surrender stipulation was something the father was 'doing freely and voluntarily today.'" The panel held that this provided "sufficient assurance, notwithstanding the judge's lapse, that the father's rights were fully protected." Accordingly, Alexandra is the best case to cite for the proposition that an incompetent parent with a GAL can stipulate to termination; that the incompetent parent can be given a colloquy; and that the GAL can sign and orally approve a stipulation terminating an incompetent parent's rights.

Father also argued on appeal that his stipulation should have been revoked because it was conditioned on the plan of adoption by the paternal grandmother, but that plan fell through. The stipulation provided that the father "surrenders his rights as [the child's] father . . . to free [the child] to be adopted by her paternal grandmother." It also provided that the father "stipulates to a surrender of his paternal [sic] rights as to [the child]" and "supports the adoption of [the child] by her paternal grandmother." While it did not expressly "condition" the surrender on adoption by his mother, it is difficult to read it any other way; this incompetent man clearly expected his mother to adopt the child in return for giving up his rights. The fact that DCF agreed with this plan at the time of the stipulation and colloquy supports this; the agency only changed its mind after rights were terminated. Nevertheless, the panel had a different interpretation:

> We take the father's statements in the surrender stipulation at face value, and acknowledge that they indicate a concern for the child and a recognition of his own current inability to provide for her needs. The surrender stipulation is not, however, conditioned on an order appointing the paternal grandmother as guardian or adoptive parent, no matter how desirable the father may view that outcome. We therefore do not need to address whether our law, under which the paramount concern is the child's best interests, would enforce such a condition.

Frankly, I find the panel's acceptance of the father's stipulation "at face value" baffling. This father was incompetent and didn't even remember if he spoke to his lawyer about the stipulation. Even father's attorney and GAL didn't seem to grasp the nuances between "conditioning" his surrender, surrendering his rights "in order to free a child for adoption" by his mother, and surrendering his rights and "supporting" adoption by his mother. How could *this* father grasp those nuances? His intent was obvious: he was surrendering the child so his mother could adopt, not with a hope she would adopt. Regardless, the panel's last sentence – expressing some doubt about the enforceability of a conditioned surrender – is important. The panel's final footnote suggests where it would come on out this question: "We note however that the stipulation of parental unfitness is not rationally or causally related to the identity of the adoptive parent or guardian."

The takeaway? If your client wants to expressly condition a surrender on adoption or guardianship by his chosen resource, use clear language: "Father agrees to the termination of his parental rights on the express condition that his mother adopt the child. If, for any reason, Father's mother does not adopt the child, or if the court is considering approving a plan where Father's mother is not the designated adoption resource for the child, his surrender shall be vacated and his parental rights reinstated." Is such a condition enforceable? Does it contravene any public policy? Hard to say, but it's worth a try. As we've seen in Alexandra, language that is even remotely ambiguous regarding a parent's intent won't work.

Adoption of Bjorn, 84 Mass. App. Ct. 1101 (2013) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/right to counsel").

Adoption of Penrod, 88 Mass. App. Ct. 1106 (2015) (Mass. App. Ct. Rule 1:28). The mother signed a stipulation and "affidavit of voluntariness," agreeing to the termination of her parental rights, then she left the courthouse. Her attorney filed the stipulation and affidavit, and the court terminated the mother's rights. Mother later filed a motion to withdraw the stipulation and vacate the decree. After the judge denied the motion, she appealed. She argued that the court erred in terminating her rights without a colloquy and that her trial counsel was ineffective for failing to object to the lack of a colloquy and for submitting the signed paperwork after she had left the building.

The panel disagreed. The affidavit showed that the mother's stipulation was knowing and voluntary, the trial attorney had reviewed the stipulation with her line by line, and there is no requirement for a trial judge to conduct an oral colloquy to confirm that entry into a stipulation is knowing and voluntary. See also Adoption of John, 53 Mass. App. Ct. 431, 435 (2001). Because there is no requirement for a colloquy, the trial attorney was not ineffective for failing to insist on one. The panel refused to address whether the trial attorney was ineffective for submitting the signed paperwork in mother's absence because the mother had not raised it in her motion to vacate the decree.

What should we take from Penrod? If your client is stipulating to judgment, review any stipulation with her line by line, and make sure you have enough time to answer all of her questions. While a colloquy isn't essential, it is still good practice – and protective of counsel's interests – to ask the judge to conduct one. Listen closely to the judge's questions (and the client's answers) during the colloquy. Make sure the judge inquires as to whether the client understands the consequences and finality of the stipulation, particularly whether there are any contingencies about placement or post-adoption contact. Most stipulations have no such contingencies, but many stipulating parents believe otherwise. Also make sure that the judge asks whether the client has reviewed the stipulation with counsel and whether the client is

satisfied with counsel's explanation of the document. Are these self-serving questions? Yes, but a healthy measure of self-protection is warranted; most challenges to stipulations involve allegations by parents that their trial counsel failed to review the stipulation with them or failed to explain it to them adequately.

Care and Protection of Hamid, 97 Mass. App. Ct. 1118 (2020) (Mass. App. Ct. Rule 1:28), provides a thorough examination of the rare circumstance where DCF obtains an order to forego life-sustaining medical treatment over the objection of a parent. Hamid and Beth, referenced below, are good resources for counsel in a DNR case.

In this case, a 17-month-old child was hospitalized after a near-drowning and found to have "no signs of higher-level consciousness." DCF took temporary custody. A judge appointed a medical GAL for the child. After several months, DCF moved for an order directing the child's medical providers to forego life-sustaining treatment, extubate him, and focus on the child's comfort. The father supported the motion, but the mother did not.

The panel noted that the judge correctly applied a substituted judgment standard: "In making a substituted judgment determination, the court dons the mental mantle of the incompetent and substitutes itself as nearly as possible for the individual in the decision-making process . . . [T]he court does not decide what is necessarily the best decision but rather what decision would be made by the incompetent person if he or she were competent." Hamid (citing Care and Protection of Beth, 412 Mass. 188, 194 (1992) (internal quotation omitted)). The panel found that the judge had carefully considered each applicable factor, including expert testimony and the GAL's report. According to the panel, the judge's findings gave appropriate weight to the mother's treatment recommendation and did not give more weight to the father's. Finally, although the DCF Commissioner failed to check a necessary box on the form providing DCF's recommendation as required by G. L. c. 119, § 38A, that failure amounted to a scrivener's error.

CONTINUANCE

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

In re N.L., 476 Mass. 632 (2017) (due process mandates continuance of civil commitment hearing when counsel needs additional time to prepare defense, including obtaining a psychiatric evaluation)

Adoption of Titus, 73 Mass. App. Ct. 1128 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/right to trial").

Adoption of Eartha, 74 Mass. App. Ct. 1108 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/right to trial").

DISCOVERY

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Bigley v. Alaska Psychiatric Inst., 208 P.3d 168 (Alaska 2009) (counsel must be provided records when petition to involuntarily medicate is filed and prior to 72-hr hearing)
Adoption of Iris, 43 Mass. App. Ct. 95 (1997) (reversing on other grounds and reprimanding DCF for failure to provide timely discovery)
Adoption of Paula, 420 Mass. 716 (1995)

Adoption of Xena, 48 Mass. App. Ct. 1109 (2009) (Mass. App. Ct. Rule 1:28) (see further discussion at "releases"; "parental unfitness/failure to visit"). Xena addresses the frustration attorneys feel when DCF fails to provide them with the file, or a complete file, in a timely fashion. However, the panel noted that, in this case, "no prejudice inured to the mother from these regrettable practices because none of the evidence sought would have refuted the bases upon which the judge found unfitness in this case." Accordingly, if you are raising as an appellate issue DCF's failure to provide the file (or a specific portion of the file), you must show how the information sought would have made a difference in the case. That is, you must show prejudice!

Adoption of Becky, 88 Mass. App. Ct. 1107 (2015) (Mass. App. Ct. Rule 1:28). This case offers a valuable lesson for trial lawyers regarding issue preservation. The mother and Becky lived with mother's friend and boyfriend. The boyfriend sexually abused all of the friend's children and Becky. The friend's children were removed and, after mother refused to take Becky for a trauma evaluation, Becky was also removed. Mother's rights were later terminated based in part on her refusal to believe that Becky had been sexually abused.

The mother argued on appeal that the trial court erred in denying her motion for access to her friend's DCF file, which contained information about sexual abuse. She needed the file in order to prepare for cross-examination of Becky's clinical trauma evaluator. According to the panel, the issue had not been preserved because the "mother failed to object to the [trauma evaluator's] testimony or move to strike it." At trial, mother cross-examined the trauma evaluator but "did not claim below and has not demonstrated on appeal that access to [key portions of the friend's DCF file] was necessary to the mother's case."

Accordingly, it is not sufficient to move for access to, or turnover of, files of this nature. Once the judge denies the motion (or after DCF fails to provide the documents), counsel must object to proceeding without the files, object to any witness testimony relevant to the missing information, move to strike any testimony relevant to the missing information, and explain to the court how the missing information is relevant to the client's case.

While the circumstances of this case were unusual, its lesson is relevant to more common file requests, including requests for updated DCF files and home-finder/home-study files about foster- and pre-adoptive parents. For example, if the trial judge denies counsel's motion for the pre-adoptive family's home-finder file, counsel should object to hearing any testimony from or about the pre-adoptive parents and move to strike any testimony from or about them. Counsel must also explain to the trial judge, as an offer of proof, how the files are relevant to the client's case and how the failure to turn them over will prejudice the client.

As Becky teaches us, a motion for the files, by itself, does not preserve the issue that the court erred in not ordering their turnover.

Adoption of Yolanda, 89 Mass. App. Ct. 1126 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "adoption plans/competing plans").

Care and Protection of Peony, 103 Mass. App. Ct. 1111 (2023) (Mass. App. Ct. Rule 23.0). This case is relevant because of a brief mention about issue preservation in the context of discovery. The judge ordered that the pro se mother could only have access to certain documents in chambers. Later, on appeal, the mother argued that this discovery order violated due process. The panel found that the issue was waived:

> On appeal, the mother's principal argument is that due process and fundamental fairness compel the conclusion that discovery disclosures were inadequate. However, the mother neither objected to the procedure nor made any related motions prior to or during trial. The issue is waived. See McLaughlin v. American States Ins. Co., 90 Mass. App. Ct. 22, 33 n.17 (2016). "An issue not raised or argued below may not be argued for the first time on appeal" (citation omitted). Carey v. New England Organ Bank, 446 Mass. 270, 285 (2006). See Adoption of Donald, 52 Mass. App. Ct. 901, 901 (2001) ("As a general practice we do not consider issues, particularly constitutional ones, raised for the first time in this court" [citation omitted]). Here, the judge gave the mother ample opportunity to object to the discovery plan, but the mother never did.

The lesson for trial counsel? If you don't like *any* discovery order or limitation, you must object at trial or, better yet, before trial, or the issue is waived.

DISMISSAL OF TRIAL PROCEEDING

Care and Protection of Ruth, 94 Mass. App. Ct. 1119 (2019) (Mass. App. Ct. Rule 1:28). Ever had a care and protection case where the children have gone home, the parents are doing well, and the petition should just be dismissed? Even then, it's not uncommon for DCF to object to dismissal, arguing that the court lacks authority to dismiss a case over DCF's objection before trial. (Why does DCF object to dismissal when things are going well? The agency usually tells the judge that it wants to monitor the situation. But it's often waiting for the parent to mess up; if the parent does, the case is ripe for trial.) Ruth provides some support when seeking a dismissal over DCF's objection. While this case isn't relevant to final appeals, it's a great case for single justice petitions and trial practice.

In Ruth, the father appealed a C&P dismissal where the children were in the custody of their mother. He wanted the court to monitor the case, arguing that as soon as the case closed things would revert to the way they were before the case started. The allegations against mother included medical neglect, lack of supervision, and a dirty home. DCF, on the other hand, reported that the children—who had returned home just a month into the case—were doing well with their mother and that she was engaged in services. DCF sought dismissal of the C&P and planned to keep the clinical case open for a year.

The father objected and wanted a trial on the merits. The motion judge appointed a GAL to investigate father's concerns. The GAL, after interviewing 16 collaterals, agreed with DCF that the protective concerns had abated and recommended that the case be dismissed. DCF again moved to dismiss and the father again objected. The trial judge allowed DCF's motion.

The Appeals Court panel affirmed the pretrial dismissal of the petition over the father's objection, holding that the father could continue the proceedings independent of DCF and press his concerns before the judge." However, the father was required to articulate a concern regarding the mother's present unfitness; allegations of the mother's past inadequacies were not enough to survive a motion to dismiss. "In the absence of any argument on appeal concerning present deficiencies in parenting by the mother," there was no error in dismissing the petition. Here, even if the father had proven his case, he still would not prevail.

So the juvenile court can dismiss a case pre-trial over the petitioner's (or a putative petitioner's) objection!

INEFFECTIVE ASSISTANCE OF COUNSEL

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Commonwealth v. Sefarian, 366 Mass. 89 (1974)
Care & Protection of Stephen, 401 Mass. 144 (1987)
Adoption of Holly, 432 Mass. 680 (2000)
Care & Protection of Georgette, 439 Mass. 28 (2003)
Adoption of Flora, 60 Mass. App. Ct. 334 (2004) (although the poor conduct of child's counsel is not labeled as IAC by the Appeals Court, the Appeals Court remanded largely based on counsel's poor performance)
Adoption of Yvette (no. 1), 71 Mass. App. Ct. 327 (2008)
Adoption of Azziza, 77 Mass. App. Ct. 363 (2010)
Adoption of Ulrich, 94 Mass. App. Ct. 668 (2019)

Adoption of Nona, 74 Mass. App. Ct. 1120 (2009) (Mass. App. Ct. Rule 1:28). If you are raising the issue of ineffective assistance, you generally must first raise it in a motion for new trial before the trial court. Appellate counsel can raise the issue for the first time on appeal "only if the alleged deficiencies appear indisputably on the record." Id. (citing Care & Protection of Stephen, 401 Mass. 144, 150 (1987)). Here, they did not.

Because trial counsel's deficiencies will almost *never* be obvious to an appellate court, we urge appellate counsel to file a motion for new trial with all appropriate affidavits any time the issue appears to be meritorious. If the appeal is already docketed, you will need leave from the single justice to file your motion. This process is addressed in Adoption of Ulrich, 94 Mass. App. Ct. 668 (2019) (referring to a motion for a stay of appellate proceedings, rather than a motion for leave from the single justice, but it is

the same thing). Such leave is more likely to be granted if you (a) attach to your motion for leave a copy of the new trial motion and affidavits, or (b) explain the bases of your motion for new trial in gory detail in the motion for leave. CAFL Administration has model new trial motions and affidavits if you are interested.

Adoption of Sidona, 76 Mass. App. Ct. 1127 (2010) (Mass. App. Ct. Rule 1:28). Sidona is a cautionary tale for trial and appellate attorneys. In this case, the child disclosed that a family friend sexually abused her. The parents did not believe her and testified that they would allow the friend to care for her in the future. The parents argued that the sexual abuse did not occur or, if it did, the friend was not the perpetrator. The child did not testify, and the parents' trial counsel failed to object to child sexual abuse hearsay that named the friend as the perpetrator. The Juvenile Court terminated parental rights. Appellate counsel briefed the issue of ineffective assistance of counsel but did not file a motion for new trial. The panel affirmed the termination decree and found the lack of a new trial motion determinative on the issue of ineffective assistance:

> The parents argue that, had their attorneys objected to this evidence, the trial judge would have excluded it because the necessary foundational requirements had not been established. However, the silence of the record on foundation merely reflects the fact that there was no objection to the admission of the testimony; it does not establish that no foundation existed. In other words, the absence of a foundation from the record does not mean that the department could not have established the necessary foundation in response to an objection at trial, had an objection been made. Without an evidentiary record of the sort that would be developed on inquiry into the question incident to a new trial motion, it is speculative to imagine whether a proper foundation could or could not have been established. Whether such evidence would have been excluded upon objection accordingly is unclear on the present record and must be determined through the vehicle of a new trial motion.

There are two important lessons from the case. First, if you are trial counsel, you *must* object to hearsay that harms your client's interests, particularly child sexual abuse hearsay, and move to strike it from every source offered in evidence. This lesson is an absolute, unless you have strong strategic reasons for allowing the hearsay to come in. If you fail to object to and move to strike extremely damaging hearsay, (a) the hearsay is in evidence for all purposes, and (b) chances are great that, unless your strategic reasons were compelling, appellate counsel will raise the issue of ineffective assistance. Second, if you are appellate counsel, you *must* file a motion for new trial in the trial court. If your appeal has already been docketed, you must ask the single justice for leave to file the new trial motion, and you should probably attach the proposed new trial motion and affidavits to your request for leave (see Adoption of Ulrich, above). In the motion for new trial, you must not only explain that trial counsel failed to object/move to strike, but also provide the reasons why the objection or motion would have had merit and how trial counsel's failures prejudiced the client.

Adoption of Paige, 76 Mass. App. Ct. 1128 (2010) (Mass. App. Ct. Rule 1:28). Be careful citing to Rule 1:28 decisions. Sometimes panels interpret published decisions in slightly wacky ways. In the context of a motion for new trial for ineffective assistance of counsel, the panel in Paige cites Care & Protection of Georgette, 439 Mass. 28, 34 (2003), for the proposition that, "even where trial counsel's conduct falls measurably below professional standards, no new trial will be granted where evidence of a parent's unfitness is overwhelming."

This cite to Georgette isn't quite right (even though many 1:28s and published cases repeat it). After all, what if the evidence is overwhelming *because* trial counsel did not file any motions in limine, cross-examine any DCF witnesses, or call any witnesses on the client's behalf? In such cases, *of course* the evidence of unfitness would be overwhelming, but the overwhelming evidence would mean nothing. And Georgette does not, in fact, stand for the proposition cited by the panel. In Georgette, appellate counsel for two children (Georgette and Lucy) argued that their trial counsel was ineffective for failing to present their custodial wishes (to go home) to the court:

> We note that, even if Lucy's trial counsel had advocated against her, she has failed to demonstrate any prejudice based on the overwhelming proof of the father's unfitness. As explained by the Appeals Court:
>
> "The trial judge was well aware of Georgette's and Lucy's stated (if intermittent) desires regarding their father (through testimony, presentations by their now-maligned trial counsel, and lobby conferences). Given the overwhelming evidence of the father's unfitness (as well as the clear and convincing evidence of the two girls' special problems and needs in substantial consequence thereof), which persuaded both the trial judge and the motion judge that it was not in Georgette's and Lucy's best interests to be returned to his care, it is implausible that the most zealous and impassioned arguments by any trial counsel to give their custody to the alcoholic and unrepentant father who had neglected and had physically or sexually abused them would have realistically accomplished any change in the result." Id. at 34-35.

The SJC in Georgette did *not* say that motions for new trial were destined to fail in the face of overwhelming evidence of unfitness. Rather, it said only that there was nothing counsel for the *children* could have done to rebut the overwhelming evidence against the *father*. Presumably, father's counsel objected to the agency's evidence, cross-examined the agency social workers, and presented his own evidence. Further, the father's appellate counsel did not allege ineffective assistance. The evidence against him was (again, presumably) properly admitted to show his unfitness. Under those facts, there was nothing children's counsel could do that would have made any difference with respect to a finding of the father's unfitness. But that is very different from what the Appeals Court panel in Paige said, and the panel, in misquoting Georgette, got it wrong.

Be warned! DCF (and other appellees) often cite to Georgette for the proposition that, in the face of overwhelming evidence of unfitness, no IAC action has merit. To combat this, you'll need to explain that Georgette does not, in fact, stand for this proposition.

Adoption of Richard, 77 Mass. App. Ct. 1103 (2010) (Mass. App. Ct. Rule 1:28) (see further discussion at "sibling placement and visitation"). The father asserted that his trial counsel was ineffective for failing to call witnesses, failing to introduce evidence, and mocking the father's disability. Unfortunately, appellate counsel did not file a motion for new trial. As in the cases above, this was fatal to the claim:

> "[T]he preferred method of resolving factual disputes concerning the conduct of the original trial is for the aggrieved party to file a motion for a new trial." *Care & Protection*

> *of Stephen,* 401 Mass. 144, 150 (1987), quoting from *Commonwealth v. Saferian,* 366 Mass. 89, 90 n.1 (1974). The father acknowledges that a motion for a new trial is not necessary where the factual basis of the ineffectiveness claim "appears indisputably on the trial record," but he has not provided the factual basis which permits us to resolve his claim on appeal. *Commonwealth v. Adamides,* 37 Mass. App. Ct. 339, 344 (1994). Accordingly, we do not review such a claim for the first time on appeal.

Accordingly, appellate counsel *must* file a motion for new trial if arguing ineffective assistance unless trial counsel's errors are manifest in the transcript.

Adoption of Natalia, 80 Mass. App. Ct. 1113 (2011) (Mass. App. Ct. Rule 1:28). This case is a helpful reminder about how to make an offer of proof when asserting ineffective assistance of counsel:

> The father claims ineffective assistance of counsel based on trial counsel's failure to call several expert witnesses or admit additional documents. The father argues that the witnesses would have added to his credibility and shown the benefits received from services. However, the father's appellate counsel fails to identify who the witnesses would have been or what new information would have been shared, making a finding of prejudice impossible.

If you are going to raise IAC for failing to call witnesses, you must identify the witnesses trial counsel should have called and the content of their omitted testimony. This is best done by securing affidavits from those witnesses as to what their testimony would have been. If you are arguing IAC for failing to offer documents, you must attach the documents and explain why they are important. Otherwise, the panel cannot assess whether the failure to offer this evidence was harmful, and you cannot satisfy the second prong of the Saferian standard.

Adoption of Trina, 84 Mass. App. Ct. 1123 (2013) (Mass. App. Ct. Rule 1:28). In Trina, one trial attorney represented four siblings. When it became clear that Trina, the oldest child, had a different position than her siblings, the attorney withdrew as to Trina but continued representing the younger children. Successor counsel to Trina (who wanted to return home) did not object to former counsel remaining on the case on behalf of the younger children (who wanted parental rights terminated). On appeal, Trina, mother, and father argued that it was a conflict of interest for Trina's former counsel to remain on the case and advocate against her position, and that Trina and her parents should therefore be given a new trial. Trina also argued that her successor trial counsel was ineffective for, among other things, failing to object to her former counsel's actions and inactions.

The panel did not address the conflict-of-interest issue; rather, it determined that the issue had been waived because it was not raised by Trina's successor trial counsel prior to trial. (It was raised by the appellants' appellate counsel in a motion for new trial, but the panel did not consider this sufficient to preserve the issue.) As to the IAC claim, the panel declined to address the first prong of Saferian (whether counsel's performance fell below that of a reasonably fallible attorney). The panel instead addressed the second prong, and held that Trina was not prejudiced by successor counsel's performance because the evidence of parental unfitness was overwhelming. (See Paige, above.) But the panel signaled its distress about the case in its conclusion:

> If the procedural background and facts were slightly different, the result of this case may too have been different. It appears that the judge here acted in conformity with a stated policy that allows continued representation of the remaining children following the withdrawal of representation of one of the children. Compare *Care & Protection of Georgette*, 439 Mass. 28, 35-37 (2003) (discussing problem of single attorney representing multiple children with differing interests). Such a policy may need to be reassessed in future cases if the issue is preserved and presented in a timely manner by the party directly affected.

The "stated policy" the panel refers to is unclear. But what trial counsel in Trina did, and what the trial judge blessed, is not uncommon in Juvenile Court trial practice.

CAFL Trial Performance Standard 1.4 provides that, in the event of a positional conflict between child clients, trial counsel "may" have to "withdraw as to one, some, or all of the children." The Standard does not specify when counsel *must* withdraw as to one, some, or all; that is a fact-specific inquiry. But we generally recommend that attorneys who represent siblings with positional conflicts withdraw as to all of them as soon as the conflict becomes apparent. (When in doubt, counsel should contact a mentor, CAFL administration, or the BBO for guidance.)

Rule 1.9(a) of the Mass. Rules of Professional Conduct – which was raised by appellate counsel for Trina and her parents but was not addressed by the panel – is instructive. Rule 1.9(a) provides that "[a] lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." Trina and her sibling were involved in the same matter; their interests were materially adverse (Trina wanted to go home, the others wanted parental rights terminated); and no effort was made to obtain (or obtain a ruling on) Trina's consent. In any event, withdrawal as to all children probably would have been a better choice for trial counsel in Trina; no one wants his or her decisions in this regard turned into the subject to an appeal.

Trina also teaches us that, in most cases, successor counsel should discuss the conflict issue with prior counsel immediately. If you are successor counsel, and it's in your client's interests, encourage prior counsel to withdraw voluntarily from the other children. If prior counsel will not withdraw, you should (if it's in your client's interests) consider filing a motion to disqualify prior counsel. The motion must be filed in a timely fashion, preferably well before trial. The failure to raise the issue may, depending on the facts of the case, constitute IAC.

Adoption of Calvin, 85 Mass. App. Ct. 1105 (2014) (Mass. App. Ct. Rule 1:28). The mother appealed the termination of her parental rights as to two of her children, Calvin and Gail, alleging IAC. The mother argued that her trial counsel knowingly called a medical expert witness who testified using outdated medical and forensic theory and testified, contrary to mother's own testimony, that Calvin sustained injuries consistent with child abuse. The mother argued that the court would not have terminated her rights if not for this expert testimony. In support of her claim, the mother pointed to a subsequent termination trial concerning another of her children in which the trial judge did not hear from this expert and concluded that neither the mother nor her boyfriend abused Calvin.

The Appeals Court affirmed the termination. The panel held that trial counsel's decision to call the expert wasn't manifestly unreasonable, because the expert's opinion "might form a basis for an argument that the injuries were inflicted at times when Calvin was not in his mother's care, or that she was not the perpetrator." According to the panel, even if permitting that expert to testify was poor lawyering, it was harmless under the second prong of Saferian because the expert's testimony was cumulative of the evidence submitted by DCF.

One aspect of Calvin is, quite frankly, baffling. While the expert's opinion "might" have furthered trial counsel's strategy, the panel's use of the word "might" strains credulity. In fact, it was not consistent with trial counsel's strategy. Trial counsel never argued that the child was abused but mother didn't do it; trial counsel argued that the child's injuries were accidental. As such, proffering the expert's opinion – that the child was abused but mother didn't do it – was not really a strategic decision at all; it was a mistake and manifestly unreasonable. The panel should have identified it as such.

Adoption of Yancey, 89 Mass. App. Ct. 1133 (2016) (Mass. App. Ct. Rule 1:28). The mother appealed the termination of her parental rights and the denial of her Rule 60(b) motion for relief from judgment. The panel affirmed both trial court orders. This case is useful only for the panel's discussion of the trial judge's denial of mother's request for an evidentiary hearing on her 60(b) motion claiming IAC.

Mother alleged that her trial counsel advised her not to attend the trial. This, she argued, constituted IAC and deprived her of an opportunity to be heard. Mother and trial counsel submitted affidavits that contained significant factual differences. Despite the discrepancies, and the fact that both mother and her trial counsel were present to testify, the judge denied mother's request for an evidentiary hearing on her 60(b) motion.

The panel noted that the trial judge was "clearly troubled by the attorney-client privilege ramifications of having trial counsel testify" and erred in stating that the privilege would limit the evidentiary hearing to little more than a "one-sided consideration of mother's live testimony." The panel explained that the hearing would not have been restricted in this way; when a party claims IAC, the attorney-client privilege is waived as to any communications relevant to the claim. The panel remanded for clarification from the judge about the bases for his denial of the 60(b) motion. A week later the trial judge issued findings explaining his rationale, which was that the mother's affidavit was "self-serving and not credible." The panel held that this was not an abuse of discretion and affirmed the denial of the 60(b) motion.

The lesson from Yancey? It is very hard to win a 60(b) motion when the relevant facts come down to a he-said/she-said spat with trial counsel, because the judge will likely determine that the parent is less credible than her trial counsel. In a he-said/she-said scenario, appellate counsel will have to come up with other evidence to corroborate the parent's claims. (Such evidence was probably not available in Yancey.)

Adoption of Ted, 87 Mass. App. Ct. 1108 (2015) (Mass. App. Ct. Rule 1:28) (see further discussion at "de facto parent"). In Ted, the mother claimed that her trial attorney was ineffective and that his substandard performance was rooted in an employment-related conflict of interest. Unbeknownst to the mother, her trial attorney had applied to DCF and was interviewed for a position during the pendency of the case. The panel held that this was only a potential, not actual, conflict of interest, and that the mother therefore had to show prejudice. The panel determined that the mother suffered no prejudice, but it

explained that any doubts by counsel whether to disclose "should have been resolved in favor of disclosure."

Adoption of Cassius, 93 Mass. App. Ct. 1120 (2018) (Mass. App. Ct. Rule 1:28), is a father's appeal of a step-parent adoption petition. The father had been convicted of two counts of indecent assault and battery and he later pled guilty to rape of a child. The court terminated the father's rights.

The father moved for a new trial based on ineffective assistance of counsel. His counsel, he argued, should have presented expert testimony to prove that he was at low risk to offend and that he had taken responsibility for his past bad behavior. Appellate counsel retained a forensic psychologist post-trial who drafted a report and would have testified to father's improvement and low risk. The father moved for an evidentiary hearing on his IAC claim. The trial judge denied the motion, ruling that none of the evidence offered in support of the motion would have altered his decision. The panel held, in light of the evidence at trial, that the judge did not abuse his discretion either by denying the motion for new trial or by denying the father's request for an evidentiary hearing.

The take-away? While the facts of Cassius are bad, father's appellate counsel did the right thing procedurally. If you're going to argue that trial counsel was ineffective for failing to offer important expert testimony, you must secure that testimony yourself from an expert and present it to the trial court in the form of a report or affidavit. That report or affidavit becomes your offer of proof – and, hence, your factual record on appeal – if the trial court refuses your request for an evidentiary hearing. Without it, the panel cannot assess whether trial counsel's failure to introduce the expert testimony constituted IAC.

Of course, you need to file a motion for Indigent Court Costs Act (ICCA) funds for an expert in this context, and some judges are hesitant to order funds for a post-trial expert. Call CAFL administration and we'll help you if your trial judge is dubious about the right to such funds.

In **Adoption of Ariadne, 95 Mass. App. Ct. 1117 (2019) (Mass. App. Ct. Rule 1:28)**, the mother did not appear at trial but contacted her attorney ten days later to explain that she had relapsed and had been in a drug treatment facility. The court drew a negative inference from her absence. She asked her attorney to file a motion to reopen the evidence so that she could testify and explain her absence to the judge. The attorney "resisted," explaining that, in his judgment, it would not be in her best interest to reopen the evidence to admit she had relapsed. He ultimately agreed to try to reopen the evidence for the limited purpose of offering a letter from the mother's treatment program. The attorney prepared a draft motion but would not proceed unless the mother signed a version specifying that the motion was filed "against the advice of undersigned counsel."

Later, appellate counsel moved to stay the appeal to allow mother to move for a new trial based on ineffective assistance of counsel (IAC). The single justice denied the motion, ruling that the mother was unlikely to succeed on the IAC claim. Mother appealed, and that appeal was consolidated with the mother's direct appeal.

The panel held that the single justice did not abuse her discretion when she determined that mother was unlikely to succeed in her IAC claim. That may well be true – perhaps the mother could not satisfy the second prong of the IAC test by showing that the result would have been any different had counsel done what she'd asked. But the panel chose to address the first prong, as well, and here is where it gets strange.

The panel held that it was "not manifestly unreasonable for counsel to resist reopening the evidence to allow the mother to present further proof that her substance abuse was ongoing and interfered with her ability to attend to Ariadne's needs." Now *that* is bizarrely unfair, because the mother clearly didn't intend to offer additional proof of her problems; she intended to offer evidence as to why she wasn't at trial, so that the court could reconsider its adverse inference. What conceivable strategy by counsel was served by not letting the mother explain her absence? Further, what evidence could the mother have introduced at a reopened hearing that could have *hurt* her case? After all, she had lost her parental rights; letting her tell her story couldn't have prejudiced her case, and it might have helped in some way, if only by letting her know that she had had a chance to be heard. (It does not appear that the judge had ordered post-adoption contact which the mother might have lost had the evidence been reopened. *That* might have represented a viable strategic decision.)

For trial counsel: If a parent fails to show for trial and the judge terminates parental rights, don't push the parent away if she later shows up and asks to reopen the evidence. Call CAFL administration, and we can discuss your options.

Adoption of Hamilton, 96 Mass. App. Ct. 1109 (2019) (Mass App. Ct. Rule 1:28). If you file a post-trial motion and lose, you must file a notice of appeal and then move to consolidate that appeal with the appeal of the underlying judgment. If you don't, the panel won't consider the issues in the post-trial motion.

In Hamilton, the appeal was stayed so that the mother could file a Rule 60(b) motion on the basis of constructive denial of counsel and ineffective assistance of counsel. The trial judge denied the 60(b) motion following a hearing, but the mother did not file an appeal from that denial. The only appeal before the panel, therefore, was the appeal of the termination decree. The panel confined its analysis to the trial record; it did not look to any evidence elicited at the 60(b) hearing.

The panel did consider parts of the mother's argument because certain facts bearing on IAC were clear in the trial record. At trial, mother's counsel told the court that he could not locate the mother and hadn't spoken to her in months. (Please don't do that! See discussion in **Adoption of Zosha, 92 Mass. App. Ct. 1117 (2018) (Mass. App. Ct. Rule 1:28)**.) He nevertheless cross-examined the social worker, elicited some favorable testimony, and objected to certain questions posed by opposing counsel. According to the panel, there was no evidence that counsel had abandoned the mother prior to trial. Further, based on the facts of the case, even if counsel had been ineffective – which the panel declined to find – better lawyering would not have made a difference.

The panel noted that counsel may have failed to satisfy certain CPCS performance standards, but this was not dispositive. Rather, as published cases show, counsel's failure to follow CPCS performance standards is only one "among a variety of factors" considered in the IAC analysis. See Care and Protection of Georgette, 439 Mass. 28 (2003), and Adoption of Nancy, 443 Mass. 512 (2005).

The takeaway? If you lose a motion for new trial or relief from judgment, you must file a notice of appeal (and, if there is an underlying appeal, move to consolidate the two appeals). That way, the evidence elicited at your new trial hearing (or set forth in your motion, if you don't get an evidentiary new trial hearing), can be considered by the panel.

Care and Protection Nico, 102 Mass. App. Ct. 1107 (2023) (Mass. App. Ct. Rule 23.0). The case looks at Zoom trials; in this case, the trial satisfied the protocols the SJC set forth in Patty. According to the panel, videoconferencing did not per se render counsel's assistance ineffective because the trial judge ensured that safeguards were in place to allow Mother to have meaningful contact with her attorney during the Zoom proceedings.

NOTICE

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Adoption of Holly, 432 Mass. 680 (2000)
Adoption of a Minor, 471 Mass. 373 (2015)
Adoption of Hannah, 33 Mass. App. Ct. 542 (1992)
Adoption of Hugh, 35 Mass. App. Ct. 346 (1993)
Adoption of Zev, 73 Mass. App. Ct. 905 (2009)

Adoption of Ilan, 73 Mass. App. Ct. 1116 (2009) (Mass. App. Ct. Rule 1:28). In Ilan, DCF didn't serve the father with notice of the proceeding until eight months after filing the petition. The father alleged a due process violation – he did not get counsel in a timely fashion and he missed the early custody hearings – and the panel agreed:

> We agree that the father was entitled to service much sooner than he received it. The record demonstrates that, at the time the petition was filed, the department regarded the father as Ilan's second parent and was aware of the father's address. Under these circumstances, the father should have been served around the time that service was effected upon the mother. G. L. c. 119, § 24. We acknowledge that an adjudication of paternity had not yet occurred at the time of the petition. Notwithstanding, § 24 plainly requires, in connection with service of process, that a 'reasonable search' be conducted when the whereabouts or identity of a parent is unknown. Unfortunately, that duty was not discharged by the department in this case.

It was an error to serve the father late, but it was a harmless one:

> In this case, however, the failure to serve the father in a timely fashion was harmless. He had counsel about five months before trial, so he had reasonable time to mount a defense. The father himself intentionally delayed his involvement in the case (so as not to have to pay child support), so having counsel earlier wouldn't have made a difference. Finally, because father was unfit by clear and convincing evidence at trial, missing the earlier hearings made no difference.
>
> To be sure, the department's failure to serve the father before December, 2006, was a grave dereliction. While we do not condone the delay that occurred in this case, neither are we persuaded that it resulted in any material prejudice to the father. . . . Because the due process violations that occurred did not materially compromise the father's preparation for and participation in the trial as to custody, the outcome of that trial rendered moot any antecedent deficiencies.

It is reassuring that the panel considered DCF's eight-month delay in giving notice to father a "grave dereliction" of its duties and a due process violation. In other circumstances, where the parent without notice is more actively engaged with the child pre-petition, this language could prove helpful.

It is distressing, however, to read the panel's conclusion that, because the father was unfit by clear and convincing evidence at trial, his loss of an opportunity for a 72-hour hearing was meaningless. At that earlier stage, father may have been fit; he may have had relatives who could care for the child; and the child would not have bonded to foster parents (as he had by the time of trial). Whatever happened to Care & Protection of Orazio, 68 Mass. App. Ct. 213 (2007), which stressed the importance of the 72-hour hearing and how it should not be bypassed for trial? Ilan suggests that, if DCF fails to give notice and violates a parent's due process rights, it is of no consequence if the parent is ultimately found unfit. Such a rule might be a good result for child's counsel who is, for whatever reason, opposing a parent and supporting termination. But it sends a bad message to DCF that its statutory and constitutional mandate to track down known parents can be violated with little risk.

Adoption of Zena, 87 Mass. App. Ct. 1136 (2015) (Mass. App. Ct. Rule 1:28). In Zena, the mother surrendered her parental rights, but DCF did not notify the father of the proceedings until 2 ½ years later. The father appealed the decree terminating his rights, arguing that DCF's delay in notifying him violated his due process rights.

The father was in jail for most of Zena's life. He learned of Zena's birth while incarcerated. When he was out of jail on parole, he made no attempt to establish his paternity or develop a relationship with Zena. His only contact with Zena was when he appeared at the residential program where mother was residing with Zena and threatened the mother. Shortly thereafter, DCF removed Zena from the mother's custody. Although DCF was aware of the father's existence, it did not notify him of the case until more than two years later. The father appeared in the Juvenile Court at that time and was adjudicated Zena's father. DCF offered him a service plan, but he refused to cooperate. He later represented himself at a seven-day trial.

According to the panel, DCF's delay in notifying the father did not prejudice him and did not, therefore, violate his due process rights. Although DCF could have located the father sooner and failed to follow its own standards, the father could show no prejudice. He had many months to prepare for trial, had access to all of DCF's exhibits, and fully participated at trial. The father was afforded all the process he was due once he became involved in the proceedings.

Adoption of Arizona, 75 Mass App. Ct. 1113 (2009) (Mass. App. Ct. Rule 1:28), offers some help with the problem of disappearing parent clients who know about the case but not about the date of the termination trial. In Arizona, the mother received in-hand service of the care and protection summons (which includes a warning that parental rights may be terminated), but disappeared several months later while the goal was still reunification. DCF later filed a notice of intent to seek termination and served it on mother's counsel. Mother's counsel announced to the court, "I haven't had any contact with my client in some time, and I have no position." (NB: Please *never* do this. First, don't suggest to the court or the other parties that your client has been "gone" for a long time. Your statements can be used as evidence, if offered by an adverse party, against your client. Second, if your missing client opposed the initial care and protection petition and wanted custody, she almost certainly opposes the termination of her parental

rights. There may, of course, be positions that you have no guidance on without your client's active participation in the case, but I'll go out on a limb and say that this is not one of them.)

The panel noted that due process may require that a parent get notice of a termination trial date above and beyond the initial summons:

> This circumstance -- where an absent parent has not been in touch with either the department or her counsel for many months, and where the department has changed its goal during that absence to include termination of parental rights -- might require a judge, upon proper request, to take additional steps to insure that the parent is apprised of the action that may be taken with respect to her fundamental rights. However, we need not address that issue in this instance because no such request was made by counsel.

If you represent a missing parent who does not know about the termination trial date, raise Arizona and ask the court to order DCF to provide new notice.

Adoption of Vitaly, 76 Mass. App. Ct. 1129 (2010) (Mass. App. Ct. Rule 1:28). In Vitaly, the father claimed that he did not receive notice of the trial date. His trial counsel sent him three letters, all to the proper address. The father claimed that he only received one of them. None of the letters contained the actual trial date, but each referred to the father's open care and protection case and mentioned the trial.

According to the panel, the judge did not have to credit father's claim about receiving only one letter, and even if he did, "the one letter he received was enough to put him on inquiry notice." Id. (citing Adoption of Hannah, 33 Mass. App. Ct. 542, 543-44 (1992)). The judge also credited the DCF social worker that she informed father of the trial date. So even if father did not receive written notice of the trial date, he had both "inquiry notice" (from counsel's letter) and "actual notice" (from DCF), both of which satisfied due process. Id. (citing Adoption of Pearl, 34 Mass. App. Ct. 308, 312 n. 5 (1993)).

If you represent an appellee-child, Vitaly is a helpful case to rebut an argument that the appellant-parent did not receive notice of trial.

Adoption of Zosha, 92 Mass. App. Ct. 1117 (2018) (Mass. App. Ct. Rule 1:28) (see discussion at "right to counsel").

PRESERVATION OF ERROR AND OBJECTIONS

Adoption of Felicity, 74 Mass. App. Ct. 1105 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "jurisdiction").

Adoption of Maeve, 72 Mass. App. Ct. 1109 (2008) (Mass. App. Ct. Rule 1:28) (see discussion at "adoption plans/sufficiency of plan").

Adoption of Wally, 73 Mass. App. Ct. 1107 (2008) (Mass. App. Ct. Rule 1:28) (see discussion at "sibling placement and visitation").

Adoption of Xanthus, 74 Mass. App. Ct. 1105 (2009) (Mass. App. Ct. Rule 1:28), serves as a reminder that un-objected-to evidence comes in for all purposes:

> The father's challenge to finding no. 11, which states, "[the child] has been diagnosed with probable Fetal Alcohol Syndrome," is likewise without merit. References to a diagnosis of Fetal Alcohol Syndrome appear in records admitted as exhibits and in reports filed by DCF representatives. A record "admitted in evidence without objection [is] in evidence for all purposes of the case." *Sheehan v. Goriansky,* 321 Mass. 200, 206 (1947). See *Adoption of Willamina,* 71 Mass. App. Ct. 230, 235 n. 11 (2008) ("The report was entered without limitation or objection, and the [reference] contained therein was accordingly admitted for all purposes").

If you are trial counsel, remember that whatever you let in without objection is, with few exceptions, fair game for a finding by the trial court.

Adoption of Orlan, 74 Mass. App. Ct. 1127 (2009) (Mass. App. Ct. Rule 1:28), has an important lesson for trial attorneys. When a witness gives an improper answer, do not merely object; move to strike the answer. The panel makes this clear in a footnote:

> FN9. At the beginning of an answer relating to a question about the June 2008, incident between the mother and her boyfriend, a DCF social worker testified that the mother had been drinking at the time. At the conclusion of the answer, the mother objected and the objection was sustained. In light of the fact that there was no request to strike, however, it is not actually clear how much of the social worker's testimony the judge intended to exclude. For purposes of this appeal, we assume that the mother is correct in her assumption that judge intended to strike the social worker's testimony about the mother's drinking.

The panel was generous in this assumption because it was affirming the termination on other grounds. But in other cases, counsel's failure to move to strike an improper answer may be a crucial error.

Adoption of Wilhelmina, 75 Mass. App. Ct. 1111 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/adequate briefing").

Adoption of Nani, 76 Mass. App. Ct. 1121 (2010) (Mass. App. Ct. Rule 1:28). In Nani, the father surrendered his parental rights and was later convicted of sexually abusing his daughter. He filed a motion for reconsideration seeking post-adoption visitation, which the court denied. On appeal, the panel criticized the trial judge for denying the father's motion based solely on DCF's evidence. The judge refused to allow the father to call his only witness at the hearing:

> COURT: If you want a hearing, the only hearing is to put these dockets [sic] into evidence and say that there is no visitation based upon those court orders, period. . . . You can appeal that.
>
> FATHER'S ATTORNEY: Judge, I do have -- I do have a witness here who is Mr. -- who has known [the father] for 18 years.

> COURT: It doesn't matter.
>
> FATHER''S ATTORNEY: He was his employer and he has personal knowledge of the relationship that [the] father has -- had with the children at the time.
>
> COURT: No, it's not relevant. It's not relevant.

The panel was not amused. In footnote 4, the panel stated:

> We do not condone the judge's comments, which left her open to the charge that she was deciding the matter without hearing both sides. Cf. *Commonwealth v. Coleman,* 390 Mass. 797, 802 (1984) ("When a judge decides an issue in a case before listening to all the relevant evidence which a party presents, we have reversed the decision"); *Adoption of Tia,* 73 Mass. App. Ct. 115, 121-122 (2008) ("finder of fact must keep an open mind until all the evidence is presented and both sides have rested").

Nevertheless, the panel determined that nothing in father's offer of proof or in his argument on appeal suggested that visitation would be in the children's best interests and affirmed the trial court's denial of the motion for reconsideration.

For trial attorneys, this case highlights the importance of making offers of proof. Here, father's counsel made an offer of proof; it just wasn't enough to overcome the overwhelming evidence against father. Had the facts of Nani been different, however, and had the testimony of the proffered witness been more compelling, the judge's refusal to allow father to present the witness might well have led the panel to reverse.

Adoption of Natalia, 80 Mass. App. Ct. 1113 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/ineffective assistance of counsel").

Guardianship of Caleb, 83 Mass. App. Ct. 1114 (2013) (Mass. App. Ct. Rule 1:28). This case involved a guardianship action in Probate Court between the paternal and maternal grandparents of the child. The Court granted guardianship of the child to the maternal grandparents, and the paternal grandmother appealed. The paternal grandmother raised a number of issues on appeal, but only one is worth mentioning because it emphasizes the importance of making the *right* objections at trial in order to preserve the record for appeal.

The paternal grandmother argued on appeal that the judge erred in appointing a GAL who had served as the child's attorney or GAL/next friend (the panel isn't clear which) in earlier paternity and guardianship actions, and that therefore the GAL was biased. The panel deemed the issue waived because the paternal grandmother did not object to the appointment of the GAL on that ground. This illustrates the importance of noting specific grounds for objections and not simply making general objections. See Hoffman v. Houghton Chemical Corp., 434 Mass. 624, 639 (2001) (plaintiffs failed to identify alleged errors with specificity, and thus they did not preserve their appellate rights).

In a footnote, the panel also noted that the paternal grandmother failed to establish that the two roles of the GAL created a conflict of interest. What does this mean? It means that just because a particular GAL (or court investigator) appointment raises an actual or potential conflict of interest, counsel for an aggrieved party is not relieved of the obligation of *explaining* the conflict to the court and showing how it is unfair to the client.

Adoption of Trina, 84 Mass. App. Ct. 1123 (2013) (Mass. App. Ct. Rule 1:28) (see discussion at "trial & procedural due process/ineffective assistance of counsel").

Adoption of Vince, 86 Mass. App. Ct. 1113 (2014) (Mass. App. Ct. Rule 1:28). In Vince, the mother raised judicial bias based on improper judicial questioning, but the issue wasn't preserved below. Interestingly, the panel in Vince applied the "substantial risk of miscarriage of justice" standard to address the issue of improper judicial questioning, because it was not raised below. This is the criminal standard for most unpreserved errors. *See* Commonwealth v. Alphas, 430 Mass. 8, 13 (1999).

Other than a footnote in Adoption of Yannis, 78 Mass. App. Ct. 1111 n. 4 (2010) (Mass. App. Ct. Rule 1:28) (because panel addressed jurisdictional problem, trial counsel's failure to raise it below was not ineffective because there was no substantial miscarriage of justice), no child welfare case has expressly labeled the standard as "substantial risk of miscarriage of justice." Our cases have used an "exceptional circumstances" standard. *See* Adoption of Mary, 414 Mass. 705, 712 (1993) (declining to reach merits of arguments on post-adoption visitation and ineffective assistance of counsel because "there has been no showing made of exceptional circumstances"); Care & Protection of Stephen, 401 Mass. 144, 150 (1987) (holding that absent exceptional circumstances, claims of ineffective assistance of counsel will not be reviewed for the first time on appeal). And the Appeals Court has used an "inconsistent with substantial justice" standard for unpreserved error in a non-child-welfare custody case, White v. White, 40 Mass. App. Ct. 132, 143 (1996) (remanding custody judgment where judge relied on *in camera* interview of adult child, even though error was not raised below, because judgment was inconsistent with "substantial justice").

Are these similar-sounding standards really different? Perhaps not. But Vince (and, perhaps, the Yannis footnote) opens the door for us to cite to the vast criminal jurisprudence on unpreserved error.

Adoption of Addison, 86 Mass. App. Ct. 1115 (2014) (Mass. App. Ct. Rule 1:28) (see further discussion at "trial and procedural due process/preservation of error"). In Addison, the mother objected to the admission of DCF status report/letters on one basis at trial, but switched to a different argument – that the letters addressed a different child in a prior proceeding – on appeal. The court rejected her argument:

> On appeal, the mother posits that the letters in question do not comport with the requirements established by Adoption of Bruce, as they refer to Robert, a different child from a different case. However, "[a] party may not raise an issue before the trial court on one ground, and then present that issue to an appellate court on a different ground." Adoption of Astrid, 45 Mass. App. Ct. 538, 542, 700 N.E.2d 275 (1998). *See* Adoption of Flora, 60 Mass. App. Ct. 334, 340 n.10, 801 N.E.2d 806 (2004). Therefore, the mother failed to properly preserve for appeal the evidentiary issue regarding the unsworn letters, and we need not consider it here.

The takeaway? Even if an issue is preserved on one ground below, the Appeals Court may refuse to address it if counsel raises a different ground on appeal.

Adoption of Becky, 88 Mass. App. Ct. 1107 (2015) (Mass. App. Ct. Rule 1:28) (see discussion at "experts").

Adoption of Abraham, 89 Mass. App. Ct. 1101 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/post-trial motions").

Adoption of Desdemona, 90 Mass. App. Ct. 1106 (2016) (Mass. App. Ct. Rule 1:28) (see discussion at "adoption plans/competing plans").

Guardianship of Geneva, 91 Mass. App. Ct. 1119 (2017) (Mass. App. Ct. Rule 1:28). The probate and family court found Father unfit and awarded permanent guardianship of Geneva to her paternal grandparents. Father appealed. The case is of little interest other than as a reminder of the importance of issue preservation.

Father argued on appeal that the trial judge erred in keeping the evidence open for the purpose of admitting results of a drug test but failing to provide him with an opportunity to present rebuttal evidence. The panel concluded that father waived this argument by not raising it at trial:

> The judge stated at the start of trial that he intended to "keep the evidence open for the sole purpose of getting the results of a drug test." The father did not object. Although he did raise an objection later in the trial, it is clear that he was objecting not to the judge's decision to keep the evidence open, but to the underlying order that he submit to a drug test. Moreover, when the test results were received, the father did not ask the judge for the opportunity to submit additional evidence. The father thus failed to preserve his objection to the admissibility of the results. *See Adoption of Kimberly*, 414 Mass. 526, 534-535 (1993).

What can we make of this? When the judge enters an unfavorable procedural order, you must object. But objecting alone is often not enough to properly preserve the issue. If the judge reopens the evidence for DCF, you must object *and* insist that you (a) have an equal right to reopen to present evidence favorable to your client, and (b) have a meaningful opportunity to rebut DCF's evidence as a matter of due process.

Adoption of Nell, 87 Mass. App. Ct. 1125 (2015) (Mass. App. Ct. Rule 1:28) (see discussion at "adoption plans/competing plans").

In **Adoption of Ulyssia, 92 Mass. App. Ct. 1109 (2017) (Mass. App. Ct. Rule 1:28),** an incarcerated father was involuntarily absent on the first day of trial. The judge declared a mistrial on that basis, but not before DCF admitted exhibits 1-16. At retrial, DCF assumed that exhibits 1-16 were in evidence already and began to enter new exhibits starting at 17. The docket for the second trial indicated that exhibits 1-16 had been entered. The transcript did not specifically mention exhibits 1-16 being offered, but it showed plenty of discussion about exhibit numbers among the judge, clerk, and counsel. At no

point did the father's attorney question why the numbering of the new exhibits began at 17 or make any objection. At this second trial, the judge terminated the father's rights.

On appeal, the father argued that exhibits 1-16 were not properly admitted at retrial because they had only been admitted at the trial that ended in a mistrial, and that the judge's reliance on them was erroneous. The panel disagreed. It noted that, at retrial, the docket reflected the admission of exhibits 1-16, and called the docket entry "prima facie evidence of what happened."

> [D]ocket sheets are part of the court records and may be presented as prima facie evidence of the facts recorded therein." Northeast Line Constr. Corp. v. J.E. Guertin Co., 80 Mass. App. Ct. 646, 651 (2011), quoting from Commonwealth v. Podoprigora, 46 Mass. App. Ct. 928, 929 (1999). See Commonwealth v. Denehy, 466 Mass. 723, 727 (2014), quoting from Savage v. Welch, 246 Mass. 170, 176 (1923) ("Docket entries 'import incontrovertible verity' and 'stand as final' unless corrected by the court"). Here, a contemporaneous docket entry indicates that Exhibits 1–16 were admitted at the new trial. Far from contradicting such prima facie evidence of what happened, the transcript reinforces that the parties understood that Exhibits 1–16 were in evidence.

The lesson? When in doubt about exhibits at a re-trial or a continued trial, ask the clerk or the judge to clarify. Perhaps the father in Ulyssia would have had a viable due process argument had his trial counsel objected to admission of the old exhibits at the second trial.

Care and Protection of Peony, 103 Mass. App. Ct. 1111 (2023) (Mass. App. Ct. Rule 23.0) (see discussion at "trial and procedural due process/discovery").

Adoption of Harry, 103 Mass. App. Ct. 1102 (2023) (Mass. App. Ct. Rule 28.0) (see discussion at reasonable efforts").

RIGHT TO COUNSEL

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 119, § 29
Care & Protection of Marina, 424 Mass. 1003 (1997)
Adoption of Olivia, 53 Mass. App. Ct. 670 (2002)
Adoption of Rory, 80 Mass .App. Ct. 454 (2011)
Adoption of Talik, 92 Mass. App. Ct. 367 (2017)

Adoption of Ulon, 75 Mass. App. Ct. 1103 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/dismissal of appeal"). Ulon may be a one-paragraph Rule 1:28 decision, but it is noteworthy for making Commonwealth v. Means, 454 Mass. 81 (2009), applicable to child welfare cases. In Means, the defendant sent a letter to his attorney, threatening to harm him and his family. The attorney withdrew. The defendant asked for a new attorney, but the trial court refused, ruling that, by his egregious conduct, the defendant forfeited the right to counsel and would have to proceed *pro se*. The defendant

was convicted of various crimes and appealed. The SJC reversed and remanded based on the improper denial of counsel.

According to the SJC, there are three ways a defendant can waive the right to counsel: express waiver, waiver by conduct, and forfeiture. Id. at 89. An express waiver "must be voluntary" and involve "an informed and intentional relinquishment of a known right." The judge must make a careful inquiry on the record. There can be no waiver by "silence." Id. at 89-90. "Waiver by conduct" occurs when a defendant moves to remove his attorney without good cause, the motion is denied, and the judge warns the defendant that he will lose his right to an attorney if he engages in "dilatory or abusive conduct" toward the lawyer. If he then engages in the very misconduct he was warned not to commit, the misconduct may be treated "as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel." The "dilatory or abusive conduct" by the defendant need not be violent, but it must be "highly disruptive of orderly or safe court proceedings." Most importantly, there can be no waiver by conduct unless the trial judge has given the defendant an express warning about the consequences of his actions and the consequences of proceeding without counsel. Id. at 91-92. Finally, "forfeiture of counsel" is "an extreme sanction in response to extreme conduct that imperils the integrity or safety of court proceedings." The sanction recognizes that some misconduct is "so serious that it may justify the loss of [a defendant's] right to counsel even if he was not warned that his misconduct may have that consequence." Id. at 92. Threats or acts of violence against counsel or others may, noted the SJC, justify invoking the doctrine of forfeiture of counsel. Id. at 93. But it should be invoked only as "a last resort in response to the most grave and deliberate misconduct." Id. at 95.

In Means, the defendant did not expressly waive his right to counsel, and he could not have waived counsel by his conduct because the judge had not expressly warned him of the consequences of that conduct. The only inquiry was whether the defendant's threats made in the letter justified forfeiture of counsel. The SJC did not address this directly, and instead reversed and remanded (to a different judge) based on the procedural inadequacy of the judge's hearing on the forfeiture. Because the sanction is so severe, the judge should have held an evidentiary hearing to determine the totality of the circumstances of the threats, the defendant's capacity to proceed *pro se*, and other issues bearing on the appropriateness of the sanction. It was unclear whether the judge's decision would have been the same had he held an appropriate evidentiary hearing on the forfeiture, and remand was therefore necessary. Id. at 97-100.

In Ulon, the mother had four attorneys, all of whom withdrew based on a "breakdown of communications." The judge refused to appoint her a new attorney and required her to proceed to trial *pro se*. DCF and child conceded prior to argument that this failed to satisfy the Means test for forfeiture of counsel. The panel agreed and remanded for a new trial.

Adoption of Donato, 75 Mass. App. Ct. 1115 (2009) (Mass. App. Ct. Rule 1:28 (see further discussion at "termination of parental rights/child's wishes"). Donato clearly sets forth the rules for how courts should determine whether a parent is competent to waive counsel. The mother chose to proceed to trial *pro se* after firing her fifth attorney, and the juvenile court terminated her rights. On appeal, she argued that the decree should be vacated because she was incompetent to waive counsel. The panel disagreed:

> The mother has the burden of proving the invalidity of her waiver of counsel by a preponderance of the evidence. See *Adoption of William,* 38 Mass. App. Ct. 661, 664 (1995). The test for competence to waive counsel may contain an additional ingredient

> beyond that for determining competence to stand trial. See *Commonwealth v. Simpson,* 44 Mass. App. Ct. 154, 165 (1998) (competence to waive counsel encompasses not only a rational and factual understanding of the proceeding but also an awareness of magnitude of the task and disadvantages of self-representation).
>
> The mother does not argue that she lacked a rational or a factual understanding of the proceeding or its potential consequences. See *Commonwealth v. Crowley,* 393 Mass. 393, 399 (1984). Nor does she argue that she lacked the ability to understand the nature of the proceedings, the magnitude of the rights at stake, the undertaking confronting her, and the advantages that she was foregoing by waiving counsel and representing herself. See *Commonwealth v. Means,* 454 Mass. 81, 89-90 (2009) (describing factors that bear on competence to waive counsel). Rather, she asserts that her mental illness rendered the colloquies insufficient and required the judge to conduct a separate hearing into her competence to waive counsel and represent herself. Indeed, the mother contends that the judge should have sought the advice of experts in mental health before permitting her to waive counsel. We disagree. See *Commonwealth v. Moran,* 388 Mass. 655, 659 (1983).

A valiant – albeit unsuccessful – argument by appellate counsel! If nothing else, this part of Donato shows appellate counsel (a) what to look for in the transcript of a counsel-waiver colloquy and (b) how to argue the issue in a motion for new trial/relief from judgment or on appeal.

Adoption of Bjorn, 84 Mass. App. Ct. 1101 (2013) (Mass. App. Ct. Rule 1:28). In this case, the mother contends, among other things, that the judge violated her right to counsel by permitting her to proceed *pro se* without a valid waiver of counsel. Specifically, the mother argued that the judge should have conducted a colloquy to determine that her waiver was knowing and voluntary. The Appeals Court disagreed. Although the panel noted that a colloquy is the preferable course of action, other facts in Bjorn showed that the mother's waiver was knowing and voluntary. Most significantly, "the mother had ceased her relationships with four attorneys, three of whom the court had appointed." The fourth attorney, who remained as standby counsel, informed the judge by affidavit that the mother had instructed her to withdraw. The panel further noted that the mother had an opportunity to present her case, cross-examine witnesses, and give a closing argument. Overall, the panel held that the evidence of unfitness was overwhelming and "formal representation would not have achieved a different result."

Adoption of Zosha, 92 Mass. App. Ct. 1117 (2018) (Mass. App. Ct. Rule 1:28). 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), and Adoption of Jacqui, 80 Mass. App. Ct. 713 (2011), 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.

Adoption of Yelena, 94 Mass. App. Ct. 1103 (2018) (Mass. App. Ct. Rule 1:28). On the seventh day of trial, the mother's trial attorney (her fourth) moved to withdraw. The mother, who had been found competent to stand trial by the court clinic, wished to represent herself. The trial court denied the motion, and the panel ruled that this was not an abuse of discretion:

> We review the judge's denial of a motion to discharge counsel for abuse of discretion. See Kiley, petitioner, 459 Mass. 645, 649 (2011); Adoption of Olivia, 53 Mass. App. Ct. 670, 675 (2002). This discretion is especially broad when the request is made on the eve of trial or later. See Commonwealth v. Tuitt, 393 Mass. 801, 804 (1985). Before allowing an attorney's motion to withdraw, the trial judge "must be confident that [the moving party is] adequately aware of the seriousness of the [proceedings], the magnitude of [her] undertaking, the availability of advisory counsel, and the disadvantages of self-representation" (quotation omitted). Adoption of William, 38 Mass. App. Ct. 661, 665 (1995).

The judge was not confident that the mother satisfied this test, and the panel agreed: "The judge had presided over numerous pretrial conferences and six days of trial, in which he heard the mother testify. He was in the best position to assess the mother's ability to represent herself." In addition, the panel noted the many delays caused by the mother's panic attacks and failure to appear, as well as other delays caused by a lack of Russian-speaking interpreters. Further, although the mother had been found competent to stand trial, the judge recognized that competency to represent oneself is different.

The panel also rejected the mother's argument that the judge should have given her standby counsel, because the mother failed to request standby counsel at trial.

Trial counsel: If your parent client wants you to withdraw so she can appear *pro se* at trial, but she wants standby counsel to help her, ask for that relief specifically.

Adoption of Brianna, 2022-P-0922 (July 5, 2023) (Mass. App. Ct. Rule 23.0). Brianna is a great case on the right to counsel. In Brianna, mother's first lawyer withdrew for personal reasons and mother asked her second lawyer to withdraw after two years because she felt he wasn't available to her and she wanted her first lawyer back (which was not possible). Instead, the judge appointed a third attorney who mother disliked because she "recognized" the attorney from earlier court appearances. The trial judge warned mother that if she fired her third attorney she would have to be *pro se*. She kept the attorney. Six months later, when mother complained again, the trial judge repeated her warning and mother said, "for shits and giggles, I can go pro se." The judge warned her not to do so, and the mother then agreed to keep her third attorney. Instead of letting her keep the attorney, however, the trial judge said, "I'll split the difference," and told mother that her third attorney would just serve as standby counsel. After that, mother several times told the judge she really wanted a lawyer and didn't want to be pro se, but the judge ignored her.

The Appeals Court reversed and held that mother should have had real counsel, as opposed to standby counsel. The trial judge failed to determine how knowing and intelligent her waiver was; failed to explain to mother what being pro se actually meant; and failed to inquire about mother's educational level. Further, mother's "shits and giggles" comments suggested a lack of understanding of the seriousness of what was at stake. Finally, mother repeatedly asked for counsel after the judge gave her standby counsel. Accordingly, her waiver wasn't knowing and voluntary.

DCF's argument that mother waived her right to counsel based on her misconduct for firing her lawyers was not persuasive. Waiver by conduct happens when a judge warns a party that certain serious misconduct will lead to the loss of counsel, and then the party does it anyway. As to mother, firing one lawyer and going back and forth about another didn't amount to waiver by conduct.

The panel also rejected DCF's argument that mother had not been denied counsel because she had standby counsel. Standby counsel is not "half a lawyer"; standby counsel is only there to help a pro se when the pro se asks for help, and does not protect the party's right like real counsel. Since mother was entitled to real, full counsel, she was improperly denied her right to counsel. And because denial of counsel is a fundamental due process violation, the panel made no inquiry into whether the lack of counsel prejudiced the mother. The decree was void and the case remanded for a new trial (with counsel for mother).

Adoption of Velma, 103 Mass. App. Ct. 1113 (2023) (Mass. App. Ct. Rule 23.0). In Velma, mother argued the trial judge violated her right to counsel by (a) failing to hear her counsel's motion to withdraw prior to trial, (b) improperly concluding that mother's waiver of counsel was valid, and (c) failing to reconsider the validity of her waiver when mother's standby counsel questioned her competency on the fourth day of trial. The panel held that mother waived the first argument when she failed to object to the court's deferral of the motion to withdraw and clearly stated her intent to represent herself. The panel rejected mother's second argument, giving deference to the trial judge's findings of fact after an extensive colloquy with mother that she was competent and her waiver was knowing and

voluntary. As to the mother's argument regarding competency to waive counsel, the panel disagreed. The trial judge had the opportunity to observe mother through the initial colloquy and four days of trial, and it was not an abuse of the trial judge's discretion to decline to conduct further inquiry into mother's competency.

Adoption of Igor, 103 Mass. App. Ct. 1105 (2023) (Mass. App. Ct. Rule 23.0). In Igor, the mother argued structural error when the trial judge allowed her to represent herself. At the beginning of the case, the trial judge ordered a competency screening of the mother to determine her ability to participate in the proceedings. The same judge presided over every hearing thereafter, and, when mother sought to represent herself, the judge ordered an additional competency screening, conducted a multi-day competency hearing, and held two colloquies to determine whether mother knew the obligations, risks, and potential consequences of representing oneself at trial. The panel found no error in the judge's determination that mother was competent to waive counsel. While mother may not have represented herself well during the trial, the question is not competency to represent oneself, but rather competency to waive the right to counsel. Citing Commonwealth v. Haltiwanger, 99 Mass. App. Ct. 543 555 (2021).

Care and Protection of Hadassah, 101 Mass. App. Ct. 1119 (2022) (Mass. App. Ct. Rule 23.0). By her conduct, the mother in Hadassah waived her right to appointment of counsel after firing and failing to communicate with her two previous attorneys. Despite the trial judge's urging, mother insisted on representing herself, but in the middle of trial requested a third attorney, which the judge considered a delay tactic. Instead of leaving mother without counsel at all, the trial judge eventually appointed a third attorney as "legal advisor" (the equivalent of "standby counsel") to assist mother in preparing for trial and presenting her case, including instructing her on the mechanics of objecting, examining and cross-examining witnesses, and filing pleadings. The panel found no error.

RIGHT TO TRIAL

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

Care & Protection of Orazio, 68 Mass. App. Ct. 213 (2009)

Adoption of Ivy, 91 Mass. App. Ct. 1128 (2017) (Mass. App. Ct. Rule 1:28) (see discussion at "language access").

Adoption of Adina, 73 Mass. App. Ct. 1123 (2009) (Mass. App. Ct. Rule 1:28). Sometimes you really, really wish a Rule 1:28 decision had been published. Adina is one of the most egregious examples of a judge playing fast and loose with parents' due process rights that I have ever seen, and the Appeals Court caught it.

In Adina, the Juvenile Court judge granted mother a continuance of trial in order to work out a settlement. The judge excused the mother and her counsel and held a termination trial as to the father alone. Some of the evidence entered in the father's termination case concerned mother as well. When mother's settlement negotiations fell through, she requested a trial. In response, the judge stated: "Well, I'm finding unfitness

of [the] mother based on the testimony I received as to [the] father, anyhow. [The mother] can have a trial on termination of parental rights." Later, at the termination trial, the judge admitted the evidence taken in father's trial (from which mother and her counsel were absent) against the mother.

The panel found this trial by sleight of hand "troubling" in two respects:

> First, the statement gives rise to a presumption that the judge had reached a settled conclusion as to the mother's fitness before competent evidence bearing on that issue was introduced. The risk of prejudice to the mother is evident, since the critical inquiry in a termination action is whether a parent's unfitness has been established by clear and convincing evidence. *Adoption of Gillian,* 63 Mass. App. Ct. 398, 404 (2005). Second, the statement almost compels an inference that the judge based her apparent conclusion upon testimony that was (a) offered without an opportunity for the mother to make seasonable objections; (b) admitted in a proceeding in which the mother had neither standing nor direct incentive to litigate; and (c) presented in the absence of counsel for the mother and, therefore, insufficiently susceptible to effective rebuttal.

The panel determined that there was prejudice to mother because the judge found her unfit based on evidence admitted only against the father at his earlier trial. The panel did not just remand. In (what I take to be) a clear message to the trial judge, the panel remanded to a *different* trial judge:

> For these reasons, retrial of the petition as to the mother is necessary, and the interests of justice require the substitution of a judge unfamiliar with the evidence presented at the father's trial. See *Commonwealth v. Henriquez,* 440 Mass. 1015, 1016-1017 (2003) (remand to different judge appropriate to 'restore the appearance of justice' by eliminating concern about the consideration of matters not in evidence).

Adina is a wonderful case to cite if the trial judge (a) relies on evidence in support of an unfitness finding against a parent when that evidence was admitted only against the other parent, (b) admits evidence against a parent at the other parent's trial or when the parent and his/her counsel did not know there was a trial, or (c) admits evidence against a parent when that parent's counsel is, for whatever reason, not present. Further, if you are alleging egregious errors below (such as bias, prejudgment or prejudice), and you have serious doubts as to your client's chances of a fair trial before the same judge, Adina supports an argument that the remand should be before a different judge.

Adoption of Titus, 73 Mass. App. Ct. 1128 (2009) (Mass. App. Ct. Rule 1:28). Here, the judge terminated the parents' rights without a trial. The parents thought the trial was at 11:00, but the judge called the case at 9:00. When the parents and child's counsel did not show up, the judge terminated parental rights without allowing any party to present evidence or examine witnesses. Further, the judge announced that, even if the parents had showed up, it would not have made any difference.

The panel was not amused (and I have never seen a result more telegraphed at oral argument). It noted that a termination trial must be more than a "mere gesture," and due process must actually mean something. The panel did not just remand; it remanded to a different judge. The judge's statements suggested the parents could not get a fair trial, and all parties are entitled to "both the assurance and

appearance of a wholly impartial forum." (citing Graizzaro v. Graizzaro, 36 Mass. App. Ct. 911, 912 (1994)).

Titus is a good case to cite if the judge starts a trial too early, or if parents do not show and there is *any* confusion as to the proper time for trial. Titus might also be useful if the judge makes statements suggesting that an absent parent's testimony would not make a difference in the findings.

Adoption of Eartha, 74 Mass. App. Ct. 1108 (2009) (Mass. App. Ct. Rule 1:28), is a good due process case. In Eartha, the mother argued that she was denied her right to a trial and to cross-examine witnesses. The judge started the termination trial while the mother was en route to the courthouse, and no party – including DCF – offered any testimony or documentary evidence. The trial court terminated mother's rights based on the evidence offered at an earlier permanent custody trial. The panel agreed with mother:

> When the matter was called at 9:38 *A. M.,* the mother was not present. Several minutes later, the mother's parental rights were terminated, and court was adjourned, with no party provided with the opportunity to present or cross-examine witnesses or to introduce any exhibits in evidence. The mother's counsel informed the judge that the mother was on her way to the court, that the mother took the wrong exit because it was her first time driving to the court, and that the mother was bringing her own mother with her to testify to the mother's ability to care for the child. In short, the mother was unable to testify, to call any witnesses, or to rebut the department's allegations against her before the trial judge terminated her parental rights. She thus had no meaningful opportunity to litigate.

Even DCF conceded that the mother's due process rights were violated. The panel vacated the termination and remanded for a new trial. It also specified that the judge's decision at that new trial must be based solely on evidence presented by DCF at the new trial (so that there would be no taint from the findings from on the trial without the mother).

Adoption of Daria, 74 Mass. App. Ct. 1102 (2009) (Mass. App. Ct. Rule 1:28). Daria does not offer much, but it does give trial counsel some ammunition to seek a "speedy" (or at least a speedier) trial. In many courts, it is hard to get more than a few hours each month for trial, and a trial that might take only three days if heard on sequential, full days ends up stretched out for a year. In a footnote, the panel in Daria expressed its displeasure about this:

> This is not the first time we have encountered this unfortunate practice of extending the period of the trial over a long period. Hearings were held in 2006 on December 4, 5, and 8 and in 2007 on January 10 and 19; February 16; March 26 and 28; April 18, 20, and 25; May 30; and August 22. This procedure makes the trial more difficult for the parties, the lawyers, and the judge and probably lengthens the trial. We disapprove of dragging out the trial in this manner.

If you are seeking a faster trial date (or to avoid a one-hour-per-month trial), it may help to cite to Daria and provide a copy of it to your trial judge.

Adoption of Monique, 76 Mass. App. Ct. 1117 (2010) (Mass. App. Ct. Rule 1:28) (see discussion at "findings/delay in findings").

Adoption of Yolane, 92 Mass. App. Ct. 1116 (2017) (Mass. App. Ct. Rule 1:28). Dozens of trial dates spread out over a year or more – an hour here, two hours there, weeks or months in between trial dates. You know the story. Is the Appeals Court as concerned about this as we are? It wasn't in Yolane.

The trial in Yolane took place on 70 (!) nonconsecutive days and spanned 14 months. In response to Mother's argument on appeal that her due process rights were violated because of the length of trial, the panel noted that these delays were "outside of the practical ability of the judge to control given the case volume and resource constraints of the Juvenile Court." That is, the panel gave the Juvenile Court a pass.

But there is something of value here. Although the panel ultimately found that the delay did not prejudice Mother, it suggested steps a trial judge could take – and therefore what trial counsel can ask for – when faced with this kind of anticipated scheduling nightmare. The panel suggested that it "may be appropriate for a trial judge to seek leave from the Chief Justice of the Juvenile Court to be assigned a block of time" to conduct a complicated or lengthy trial and to have the "day-to-day activities of the court" assigned to another judge during that time.

What can trial counsel do with these suggestions? Ask the trial judge to do exactly what the panel suggested in Yolane – in fact, attach Yolane to a "motion for special assignment." In your motion, ask the trial judge to ask the Chief Justice to (a) give your judge a "block of time" and (b) assign "day-to-day activities of the court" to another judge. Or ask the judge to ask the Chief to assign another judge specifically for your trial. Give it a try!

Adoption of Anya, 84 Mass. App. Ct. 1128 (2014) (Mass. App. Ct. Rule 1:28). DCF obtained custody of Anya a week after her birth. The mother then disappeared for four months. Two months later – a total of six months after DCF filed the care and protection case – the Juvenile Court terminated the mother's parental rights. On appeal, the mother argued that six months between removal and termination was too short a time and violated the Adoption and Safe Families Act ("ASFA"). She also argued that she had insufficient time to perform the tasks on her service plan. (The panel noted that the mother hadn't visited the child or engaged in services during most of that time.) The mother further argued that her less-than-90-minute termination trial was too brief and violated her due process rights.

The Appeals Court disagreed. It affirmed the termination decree, reasoning that ASFA did not impose restrictions on the speed with which DCF could initiate termination proceedings. Additionally, the panel noted that, while the trial was short, it did not violate mother's right to due process; mother had counsel, the opportunity to testify and cross-examine DCF's witnesses, and the opportunity to present her own witnesses and evidence (which she did not take advantage of).

The takeaway? A termination trial six months after filing – at least in the context of a parent who fails to visit or engage in services – does not violate ASFA, chapter 119, or due process.

Adoption of Arizona, 75 Mass App. Ct. 1113 (2009) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/notice").

Adoption of Vitaly, 76 Mass. App. Ct. 1129 (2010) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/notice").

Brown v. Solon, 96 Mass. App.1115 (Mass. App. Ct. Rule 1:28) (see discussion at "visitation").

Adoption of Bedelia, 94 Mass. App. Ct. 1103 (2018) (Mass. App. Ct. Rule 1:28). The father did not appear at trial. Counsel for the father objected to going forward, but the judge started trial anyway. The panel affirmed; the father "offered no reason or explanation for his absence at trial and made no claim that it was caused by circumstances out of his control."

The lesson for trial lawyers? If your client no-shows at trial, you must give a compelling reason for his absence (such as incarceration, verifiable hospitalization, localized tornados, etc.) and ask for a continuance. If you don't offer a good explanation for the client's absence, the court can proceed without him. In any event, please don't do what the trial lawyer did in Adoption of Vicky, 93 Mass. App. Ct. 1120 (2018) (Mass. App. Ct. Rule 1:28) (see discussion at "reasonable efforts").

Adoption of Beatrice, 95 Mass. App. Ct. 1118 (2019) (Mass. App. Ct. Rule 1:28), is notable for the following footnote:

> At the outset of trial, the judge commented that "this is scheduled for a five-day trial. I do want to tell you that, if we're not finished on Friday, that I will call a mistrial. I don't have any more time to give to the case than what I've got right now and you'll have to start over again. So just keep that in mind." Although we understand the importance of case management in the trial court, these comments by the judge were insensitive at best. In the future, it would be better to instruct counsel more tactfully as to the anticipated trial schedule, especially in light of the important rights of the parties at stake in these types of cases.

Beatrice, at n. 11. The judge's comments here didn't ultimately matter to the Appeals Court; it still affirmed. Still, what can you do when a judge says something like this and you really think that you need more time than the judge is allotting? A recent case – **Adoption of Yolane, 92 Mass. App. Ct. 1116 (2017) (Mass. App. Ct. Rule 1:28)** – gives some guidance. Ask the trial judge to ask the Chief Justice of that court to (a) give your judge a "block of time" and (b) assign "day-to-day activities of the court" to another judge. Or ask the judge to ask the Chief to assign another judge specifically for your trial. It's worth a try.

Adoption of June, 103 Mass. App. Ct. 1105 (2023) (Mass. App. Ct. Rule 23.0). In June, the mother appealed on several grounds. But the only one of interest is her argument that the trial judge erred in allowing the father, who had stipulated to the termination of his rights, to participate in her termination trial and cross-examine her. According to the panel, trial judges have discretion to permit this:

> Though a parent who has terminated parental rights [*sic*] does not have a right "to determine the child's future," a judge may exercise their discretion to allow the parent to participate at trial. Adoption of Malik, 84 Mass. App. Ct. 436, 438, 441 (2013) (parent who had stipulated to termination of her parental rights allowed to participate in permanency hearing to determine which of two adoption plans was in child's best interests). Allowing the father to advance his position was not a "clear error of judgment" but rather a reasoned decision made to help the judge determine which outcome – DCF's open adoption plan or custody with the mother -- was in the best interests of June. (Other citations omitted).

Accordingly, parents who stipulate to termination may – and, if they care, should – ask trial judges to allow them to participate at the other parent's termination trial, citing June. This makes the most sense in the context of a parent who (a) would rather have the child adopted by their choice of adoptive resource than returned to the other parent, and (b) wishes to preserve an open adoption agreement, as was the case in June.

Adoption of Grayson, 103 Mass. App. Ct. 1102 (2023) (Mass. App. Ct. Rule 23.0). Unlike the Zoom trial in Adoption of Patty, 489 Mass. 630 (2022), the Zoom trial in Grayson was done correctly.

Although there were some technical difficulties with the Grayson Zoom trial, the judge

> informed the parents that if either of them needed an opportunity to speak to counsel, "you have that opportunity. Just let me know." See Adoption of Patty, 489 Mass. at 645-646 ("An explanation of what a breakout room is and how it can be requested and used during a trial should be part of the instructions provided before the commencement of a virtual trial"). The judge explained what the parties should do in the case of technical difficulties: "[I]f you are trying to talk and you don't think I can hear you ..., just raise your hand and let me know that you need something." Contrast id. at 647 ("If discussions had occurred in advance of the hearing, the parties and the court might have been better prepared to enact a troubleshooting plan to try to overcome the technological issues that presented"). During trial, the judge also told the lawyers that they could use the screen-share function on the Zoom video conferencing platform to show documents to witnesses. See id. at 646 (describing Zoom screen-share function).

Because these safeguards were sufficient under Patty, the panel found no due process violation.

The father also argued that he lacked access to exhibits during his testimony, but the panel disagreed. The judge had warned the father that he could not view screen-shared documents unless he testified from a private location – the father had testified from a warehouse at work – but the father refused to do so. (Father's counsel had given him hard copies of the documents beforehand, but the father didn't seem to have them during his testimony.) The father then essentially logged out of the trial and never came back. According to the panel, "[i]f [the father] had sought to clarify something in the exhibits or to have access to them when he testified, he could have instructed his own lawyer to recall him and cross-examine him. His failure to do so did not amount to a violation of his due process rights."

The lesson? Parents – and presumably all witnesses – must Zoom in from private rooms (if ordered to do so by the judge), and they can't simply leave a Zoom trial in frustration and then argue that it violated their due process rights.

In addition, the panel addressed whether the SJC's Luc protocols (regarding the admissibility of hearsay in DCF records) apply to children's hearsay:

> Essentially, the father asks us to carve an exception out of Adoption of Luc when the hearsay statements were made by children. In enunciating the doctrine, the Supreme Judicial Court plainly anticipated that it would apply to statements of children contained in

> DCF reports. In Adoption of Luc, supra at 152, the court cited Care & Protection of Leo, 38 Mass. App. Ct. 237, 241-242 (1995), in which this court ruled admissible hearsay statements of a child contained in DCF investigator's report so long as the father had the opportunity to call the child as a witness. We decline to treat the hearsay statements of children differently from those of any other witness.

Accordingly, Luc applies to hearsay statements made by children. If the child is identified, the hearsay is a primary fact (observation), and the child can be subpoenaed, the remedy is to subpoena the child. That was not done in Grayson.

BURDEN SHIFTING

Adoption of Idina, 99 Mass. App. Ct. 1106 (2021) (Mass. App. Ct. Rule 23.0). Massachusetts cases have long held that it is improper for judges to shift the burden to parents to prove that they are fit; the burden always rests with DCF to prove that the parent is unfit. But the cases on this point are decades-old, *see* Adoption of Larry, 434 Mass. 456 (2001); Adoption of Lorna, 46 Mass. App. Ct. 134 (1999), and tend to discuss what does *not* constitute improper burden-shifting. Idina is valuable because it shows what improper burden-shifting *is*. In Idina, the panel vacated the decree terminating the mother's parental rights and remanded the case for further proceedings because the judge improperly shifted the burden to the mother "to show that she was able to cope with Idina's special developmental needs." This is a particularly important point considering many of the children in the child welfare system have special needs.

Idina also has powerful language about the need to show a nexus between a parent's issues with substance use and domestic violence and harm to the child.

VISITATION

★ Always cite to statutes and published cases before citing to Rule 1:28 decisions:

G.L. c. 210, §§ 3(c)(iii), (x) (visits after removal are a relevant factor)
Care & Protection of Walt, 478 Mass. 212 (2017)
Adoption of Mario, 43 Mass. App. Ct. 767 (1997)
Care & Protection of Ian, 46 Mass. App. Ct. 615 (1999)
Adoption of Fran, 54 Mass. App. Ct. 455 (2002)
Adoption of Zoltan, 71 Mass. App. Ct. 185 (2008)
Petition of the Dep't of Soc. Servs. to Dispense with Consent to Adoption, 399 Mass. 279 (1987)

Adoption of Eddie, 72 Mass. App. Ct. 1109 (2008) (Mass. App. Ct. Rule 1:28) (see discussion at "post-judgment contact").

Adoption of Keating, 72 Mass. App. Ct. 1119 (2008) (Mass. App. Ct. Rule 1:28) (see discussion at "appellate procedure/mootness").

Adoption of Shoshana, 74 Mass. App. Ct. 1126 (2009) (Mass. App. Ct. Rule 1:28) (see further discussion at "reasonable efforts"). Shoshana speaks to the viability of "inadequate visitation" arguments raised for the first time on appeal:

> [T]he father raises the issue of visitation for the first time on appeal. He did not object to visits occurring once a month, even when he was not incarcerated. Visits were provided when he was in jail. The child was moved to the home of the maternal grandfather in Georgia, but the father never objected to that move or the basis of decreased contact with the child. The father never sought to increase visits nor did he allege that visits had been wrongfully terminated or otherwise claim that the department had abused its discretion.

The onus is, thus, on trial counsel to fight for more frequent visitation. And if DCF is seeking to suspend or termination visitation, trial counsel must object and fight for visits to be reinstated. If trial counsel does not raise inadequate visitation in the Juvenile Court, the Appeals Court is unlikely to consider the issue.

Adoption of Anya, 84 Mass. App. Ct. 1128 (2014) (Mass. App. Ct. Rule 1:28) (see discussion at "trial and procedural due process/right to trial").

Adoption of Zollie, 79 Mass. App. Ct. 1121 (2011) (Mass. App. Ct. Rule 1:28). Zollie has some excellent language relating to DCF's obligation to make efforts to facilitate parent-child visits. Here, the father was working full-time and initially requested that his weekly visit with the child take place on the weekend. The DCF worker told him the visit would have to take place on a weekday between 9:00 a.m. and 5:00 p.m. Father told the worker that he could be available on Fridays. The worker told him that Friday was her duty day, so visitation would only be possible when another worker was available to supervise. Over the next 2 ½ months, DCF only found a worker to supervise visits twice.

The panel was not pleased, and this displeasure is eminently quotable:

> Particularly in light of the requirement that DCF make every effort toward encouraging the integrity of the family, we think the father makes a substantial argument that DCF's efforts to facilitate visitation with his child were inadequate. Further, given the centrality of the parent-child bond to the decision to terminate parental rights, there is a substantial argument that, where a parent is working – as is desirable – and is willing and able to visit with his child on weekdays, DCF performs inadequately when it enables those visits to take place only twenty percent of the time.

The panel affirmed the termination decree because there was other substantial evidence (unrelated to visits) proving the father unfit. Still, the language above is great support for a visitation motion where a parent or child is not getting regular visits because of a worker's inflexible schedule. Zollie also dovetails nicely with Carissa (see discussion at "reasonable efforts") in an argument that DCF has rendered a parent temporarily unfit by failing to facilitate enough visits, and therefore trial should be continued until more visits can take place.

Adoption of Carissa, 79 Mass. App. Ct. 1119 (2011) (Mass. App. Ct. Rule 1:28) (see discussion at "reasonable efforts").

Adoption of Mindy, 85 Mass. App. Ct. 1115 (2014) (Mass. App. Ct. Rule 1:28). Mindy is an interesting case about pre-trial suspension/termination of visitation. The child entered DCF custody in September 2010. The mother had supervised visits with the child until DCF suspended visitation in November 2011, citing the child's negative reactions to visits. DCF waited until January 2012 to file a motion to terminate visitation, and the judge did not hear the motion until trial in March 2012. Following trial, the judge terminated mother's parental rights and terminated visitation. On appeal, the mother argued that DCF violated its own regulations by suspending visitation prior to court approval, and that the five-month delay between suspension and trial was prejudicial. The mother also argued that the judge erroneously admitted evidence from witnesses about the child's negative reactions to visits.

The Appeals Court affirmed. The panel held that, while DCF may have violated its own regulations concerning the suspension of visitation, this violation was insufficient to merit vacating the termination decree absent a showing of prejudice (which mother could not show in this case). On the issue of "improper" witness testimony, the court held that the testimony was properly admitted because it involved "firsthand observations and discussions with the child[.]" The latter were properly admitted only to show the child's state of mind.

Mindy teaches us two things. First, for trial counsel, bring DCF's (improper) suspension of visitation to the trial court's attention immediately. If the trial court refuses to rule on your motion to resume visits – or delays ruling – file a single justice petition under G.L. c. 231, § 118. Second, for appellate counsel, if you are arguing that DCF's suspension/termination of visitation harmed your client's chances at the termination trial, you must show prejudice.

Brown v. Solon, 96 Mass. App.1115 (Mass. App. Ct. Rule 1:28). An incarcerated father appealed from a Probate and Family Court judgment that denied his request for an in-person visitation order. Mother did not appear or file any response. At a pretrial conference, the judge asked Father to explain why it was in the children's best interests to visit him at MCI Cedar Junction, given that she was familiar with "what it looks like, what it sounds like, what it smells like." The Father's response was later described by the panel as "poignant":

> I'm their father. I've been involved. I've had positive, healthy, pro-social relationships with both of my children since their birth. ... It's in their best interest because it allows us to preserve the continuity of our relationships. It's in our best interests because it allows me to help them contextualize some of their fears and perceptions of abandonment that they may have about me not being there. It allows me to be affectionate with them, express my love to them face to face, which is - what's - the value of that goes far beyond a text message, or a letter, or a phone call.

The judge told Father that she intended to issue a ruling that day, rather than go forward with a trial on his complaints as he had requested. She did so, finding that Father had failed to meet his burden of establishing that parenting time was in the best interests of the children.

On appeal, Father claimed he was deprived of due process when denied the opportunity to present evidence. The panel agreed, noting that "[t]he only factor that the judge appears to have considered is the father's incarceration, which cannot be dispositive. See, e.g., G. L. c. 210, § 3 (c) (xiii) ("Incarceration in and of itself shall not be grounds for termination of parental rights")." And as the father had argued, "being physically present in a child's life, sharing time and experiences, and providing personal support are among the most intimate aspects of a parent-child relationship. For a parent who has lost (or willingly yielded) custody of a child temporarily to a guardian, visitation can be especially critical because it provides an opportunity to maintain a physical, emotional, and psychological bond with the child during the guardianship period, if that is in the child's best interest." (citing L.B. v. Chief Justice of the Probate & Family Court Dep't, 474 Mass. 231, 242 (2016); Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. at 574, 594 (ordering immediate reinstatement of incarcerated mother's child visitation rights).)

It concluded, "[t]he generalities expressed by the judge about what MCI-Cedar Junction may look, sound, and smell like, without more, were plainly insufficient to justify denying the father his fundamental liberty interest 'in his relationship with his child[ren]. Youmans, 429 Mass. at 784.' "

The panel vacated the judgment, remanded, and required the immediate establishment of a visitation schedule pending the final determination of the issue.

One other note: the trial judge took no action on Father's motion for impoundment. The panel also remanded for a hearing on that motion – a hollow victory for Father, as the appeal is captioned with his full name.

Adoption of Renee, 99 Mass. App. Ct. 1117 (2021) (Mass. App. Ct. Rule 23.0). Renee contains important language about the interests of older children in these proceedings. In this appeal, Renee, the oldest child (an appellant), argued that termination of the mother's rights was not in her best interests because Renee (1) was not in a pre-adoptive home, (2) desired to return to the mother, with whom she had a significant relationship, and (3) was almost of the age where she could withhold her consent to adoption. Some of these concerns were raised late in the proceedings. Nevertheless, the panel concluded that the case presented "special circumstances" to warrant meaningful appellate review, given the gravity of the stakes involved. The panel vacated the order terminating the mother's rights to Renee: "Here, neither Renee's wishes nor the statutory significance of her age was put before the judge. Accordingly, we cannot discern whether and what impact those factors would have had on the judge's analysis. A remand for further consideration of, and findings regarding, those factors is appropriate." This is important guidance for judges, trial lawyers, and appellate lawyers.

The panel in Renee also remanded the case on the issue of post-termination visitation. Leaving post-termination visitation to the discretion of the adoptive parents, the trial judge found no evidence of a significant existing relationship between the children and mother, such that the children would be "irreparably harmed" if disrupted. The panel noted post termination visitation is not determined by irreparable injury, but rather the over-all best interests of the child based upon emotional bonding and other circumstances of the parent-child relationship. The question is whether visitation would assist in

negotiating the often "tortuous path from one family to another". citing Adoption of Vito, 431 Mass. 550, 562 (200). The panel noted that the children were not in pre-adoptive homes at the time of trial, and that continued visitation with the biological parents "can provide support and continuity." Because the judge applied an incorrect "irreparable injury" standard, it was not clear whether the relevant best interest considerations were weighed in declining to order post-termination visitation.

Care and Protection of Waylon, 102 Mass. App. Ct. 1119 (2023) (Mass. App. Ct. Rule 23.0). The panel affirmed the adjudication based on the mother's mental health issues. The nexus was clear in the context of the child's adverse reaction to and after virtual visits. After the mother had made certain statements to the child at the virtual visits, including not to trust anyone in his foster home, the boy was "so upset that he ran out of the social worker's car and into the street." The mother also told him, during a visit, "I know people are trying to kill me, but I am not going anywhere. I know they're trying to kill us." Mother did not admit she had a mental health problem and did not fully participate in treatment. According to the panel, the "nexus between the mother's mental health and her fitness as a parent was evident in Waylon's reactions to his virtual visits with the mother. See Adoption of Querida, 94 Mass. App. Ct. 771, 777 (2019) ("mother's inappropriate behavior at visits [was] directly related to her fitness")." Waylon is, therefore, a good case to cite as an appellee if the parent's conduct at visits – or the child's reaction to the parent's statements or actions at visits – is an important basis for the unfitness finding.