***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**Memorandum**

To: CAFL Appellate Panel Support Unit

From: [Law Student Intern]

Re: Improper Judicial Commentary as Grounds for Reversal

Date: December 20, 2016

1. **QUESTIONS PRESENTED**

What types of comments by a judge are so prejudicial, or so reveal prejudgment or bias, that they warrant reversal of a termination of parental rights decree? Must a claim of judicial bias based on improper judicial commentary always be raised at the trial level in order to preserve the issue for appeal, or might some comments be so egregious that they merit reversal even absent an objection or motion to recuse?

**II. DISCUSSION**

When acting as the fact-finder in a case, a judge is required to hear all of the evidence with an unprejudiced mind and cannot decide the issue until the close of the trial. *Preston v. Peck*, 271 Mass. 159, 163-64 (1930). If a judge pre-determines an issue in a trial, he has denied the parties to the case a fair and impartial judgment, and reversal of the trial court’s decision is warranted on appeal. *Id.* at 164; *see also* Mass. Const. pt. 1, art. XXIX. Judicial commentary during trial can be evidence of pre-judgment and therefore mandate reversal of the trial court’s decision. *Preston*, 271 Mass. at 164; *see also Parenteau v. Jacobson*, 32 Mass. App. Ct. 97, 102-04 (1992).[[1]](#footnote-1)

**A. Improper Judicial Commentary as Grounds for Reversal in Massachusetts**

Precedent, however, reveals that Massachusetts courts are unlikely to find that judicial commentary indicates prejudgment or warrants reversal. *See generally Haddad v. Gonzalez*, 410 Mass. 855, 863 (1991); *Correia v. Correia*, 70 Mass. App. Ct. 811, 818-19 (2007). This is particularly true in child welfare cases. *See generally Adoption of Georgia*, 433 Mass. 62 (2000); *Adoption of Norbert*, 83 Mass. App. Ct. 542 (2013).[[2]](#footnote-2)2  An appellate court may affirm, despite improper judicial commentary, if the commentary (1) was not directed toward the appellant; (2) was merely a statement of facts grounded in evidence revealed throughout the course of the trial; (3) was immediately retracted by the judge; or (4) did not alter the outcome of the case because the evidence was such that the case could not have been decided any other way. *See Georgia*, 433 Mass. 62; *Norbert*, 83 Mass. App. Ct. 542; *Adoption of Tia*, 73 Mass. App. Ct. 115 (2008).[[3]](#footnote-3) An appellate court may reverse if the judge clearly admitted prejudgment. *See Preston*, 271 Mass. 159; *Adina*, 73 Mass. App. Ct. 1123.

1. Commentary Not Directed Toward Appellant

Improper judicial commentary is not grounds for reversal if the prejudice or annoyance expressed by the comments was not directed toward the appellant and therefore did not reveal bias against the appellant. *See Norbert*, 83 Mass. App. Ct. at 546 (reversal unnecessary despite judge’s “excessively critical and inappropriate” comments because the comments were directed at DCF and not either parent).[[4]](#footnote-4)

1. Comments Mere Statement of Trial Facts

Improper judicial commentary is not grounds for reversal if the judge’s statements were assertions clearly supported by evidence garnered in the course of the trial. *Haddad*, 410 Mass. at 863 (reversal unnecessary where judge’s “harsh language” and “negative impressions” were formed from participation in the case and not from extrajudicial sources); *Commonwealth v. Clerico*, 35 Mass. App. Ct. 407, 416 (1993) (reversal unnecessary where judge’s comment assessing the credibility of an affidavit arose from information acquired while presiding over the case); *Adoption of Seth*, 29 Mass. App. Ct. 343, 351 (1990).[[5]](#footnote-5)

1. Comments Retracted by Judge

Improper judicial commentary is not grounds for reversal if the judge immediately qualified his statement by acknowledging that the trial was not complete and that the evidence may change as the trial continued. *Georgia*, 433 Mass. at 65 (affirmed despite judge’s evaluative comments about the strength of the evidence just presented to her because judge later admitted that the evidence was not yet fully presented and because judge approached the remainder of the trial with an open mind); *Correia*, 70 Mass. App. Ct. at 818-19 (affirmed despite judge’s negative comments because judge repeatedly stated that he would hear the entirety of the evidence and because isolated comments may not be read out of context in an attempt to establish bias); *Wooters v. Wooters*, 42 Mass. App. Ct. 929, 929-30 (1997).

1. Comments in Line with Substantial Weight of Evidence

Improper judicial commentary is not grounds for reversal if the comments could not have altered the outcome of the trial because the evidence substantially supported the judge’s ultimate findings. *Tia*, 73 Mass. App. Ct. at 124 (reversal unnecessary despite judge’s comments showing premature assessment of the evidence and desire for mother to settle the case because the evidence clearly indicated mother’s unfitness); *see also Murray v. Justices of Second Dist. Court of Eastern Middlesex*, 389 Mass. 508, 516-17 (1983) (affirming despite improper judicial commentary because the weight of the evidence supported the judge’s finding).[[6]](#footnote-6)

5**.** Comments that Are Clear Statement of Prejudgment Warranting Reversal

On the other hand, improper judicial commentary is grounds for reversal if the judge clearly, openly, and unambiguously announced his prejudgment, and this prejudgment foreclosed the possibility of victory by a party to the case. *See Preston*, 271 Mass. at 162 (reversing because of judge’s comment that he had made up his mind on an issue and that no amount of further testimony would alter it); *Adina*, 73 Mass. App. Ct. 1123 (reversing because of judge’s comment that he was finding the mother unfit before the mother had been given the opportunity to present evidence); *see also Parenteau*, 32 Mass. App. Ct. at 102-04 (reversing because of judge’s outright admission that defendant’s fear of bias was justifiable and that defendant likely did not have a good chance at victory with the current judge presiding over the case).

**B. Improper Judicial Commentary as Grounds for Reversal *Outside* Massachusetts**

Appellate courts in other jurisdictions have reversed custody judgments based on improper judicial commentary, specifically where that commentary: (1) constituted a significant intrusion of the judge’s personal views into the case; (2) indicated a bias against a specific party to the case formed prior to trial; (3) revealed preconceived skepticism of a witness’s credibility before the witness testified; or (4) alluded to the judge’s prejudgment of the merits before all evidence was presented.

1**.** Intrusion of Judge’s Personal Views

Improper judicial commentary may be grounds for reversal of the trial court’s decision if the judge’s statements imposed his personal views upon the proceedings and overrode an appearance of impartiality. *See Vollet v. Vollet*, 202 S.W. 3d 72, 77 (Mo. 2006) (reversing because judge’s comment that he would never incorporate an overnight guest restriction into any of his judgments created an appearance of bias); *Tindle v. Tindle*, 761 So.2d 424, 425 (Fla. 2000) (reversing because judge’s comment in a previous case that he disliked parents who called their children as witnesses indicated bias); *Buschardt v. Jones*, 998 S.W. 2d 791, 803 (Mo. 1999) (reversing because judge’s comment – that he always ruled against giving custody to a parent who lived with a member of the opposite sex to whom the parent wasn’t married – created doubt about judge’s impartiality); *In re J.A.*, 601 A.2d 69, 78 (D.C. 1991) (reversing because judge’s comments about the mother’s sex life and alternative lifestyle indicated a significant level of bias that “left an impermissible taint on the proceedings.”).

1. Comments Showing Pre-Trial Bias Against Party

Improper judicial commentary may be grounds for reversal if the commentary reveals the judge’s predetermined bias against a particular party to the case currently before him. *See In re Adoption of L.J.B.*, 610 Pa. 213, 234 (2011) (ordering recusal of original trial judge on remand because judge’s comments from and about previous trials with appellant showed antagonism toward him); *B.M. v. State*, 943 So. 2d 896, 897 (Fla. 2006) (reversing because judge’s comment in a previous case that he would send appellant to detention if appellant ever appeared before judge again indicated pre-judgment).

1. Comments Showing Preconceived Skepticism of Witness Credibility

Improper judicial commentary may be grounds for reversal if the trial judge’s comments reveal a preconceived skepticism of a witness’s credibility before the witness had the opportunity to testify. *In re Nathan B.*, 116 Conn. App. 521, 525-26 (2009) (reversing because judge’s comment before appellant’s testimony, that judge was “sick” of previously incarcerated parents like appellant who claimed to be concerned for their children, indicated bias).

4**.** Comments Alluding to Pre-Judgment of Merits

Improper judicial commentary may be grounds for reversal if the comment in question raises a doubt about the judge’s impartiality by implying that the judge decided the case before all evidence was presented. *Barnett v. Barnett*, 727 So. 2d 311, 311-12 (Fla. 1999) (reversing because judge’s comment to appellant’s counsel prior to final arguments that appellant would be better off settling than waiting for the judge’s decision could reasonably be interpreted as prejudgment).

**C. Untimely Claims of Judicial Bias**

Generally, a court will not hear an issue for the first time on appeal. *See Adoption of Mary*, 414 Mass. 705, 712 (1993)*; Norbert* 83 Mass. App. Ct. at 545; *Adoption of Gillian*, 63 Mass. App. Ct. 398, 408 (2005).[[7]](#footnote-7) When the issue is one of judicial bias, the party claiming bias has an affirmative obligation to seek recusal at the earliest practically possible moment. *See* *In re Care and Protection of Summons*, 437 Mass. 224, 239 (2002) (stating that bias claim “should have been stated at the outset. [The parents’] belated request suggests a tactical decision in the face of an adverse ruling.”); *Adoption of Darla*, 56 Mass. App. Ct. 519, 522 (2002); *Norbert* 83 Mass. App. Ct. at 545. However, a court may choose to consider an untimely claim of judicial bias “given the serious nature of the case.” *Norbert*, 83 Mass. App. Ct. at 545. Occasionally, the court will address an unpreserved argument about judicial bias without explaining its reasons for doing so. *See Georgia*, 433 Mass. at 65.[[8]](#footnote-8)

**III. CONCLUSION**

Improper judicial commentary can be grounds for reversal on appeal. However, Massachusetts has a high bar for reversal. The appellate courts often require that the judicial commentary clearly show bias and result in unjust prejudice against the appellant. Other jurisdictions are less forgiving of improper judicial commentary.

Massachusetts courts require that any bias claims be raised initially at the trial level to be properly preserved for appeal. But appellate courts may still address the issue if the rights at stake are serious (as they are in child welfare cases) or if the judge’s misconduct is serious.

*[Note: Please see other memos on judicial bias and issue preservation]*

1. Throughout this memo, unpublished Massachusetts child welfare cases relevant to the discussion will be cited in footnotes. On the issue of judicial commentary warranting reversal in a child welfare context, *see In re Adoption of Adina*, 73 Mass. App. Ct. 1123 (2009) (Mass. App. Ct. Rule 1:28). Unpublished Massachusetts court decisions decided after Feb. 25, 2008 may be cited as persuasive authority. [↑](#footnote-ref-1)
2. *See also In Re Adoption of Elwood*, 71 Mass. App. Ct. 1108 (2008) (Mass. App. Ct. Rule 1:28); *In re Oleg*, 56 Mass. App. Ct. 1103 (2002) (Mass. App. Ct. Rule 1:28). *Elwood*, as well as all other unreported Massachusetts cases decided before Feb. 25, 2008, should not be used in court as either binding or persuasive authority because of Mass. App. Ct. 1:28. However, these cases are still useful in understanding how a court may deal with child welfare issues in the future. [↑](#footnote-ref-2)
3. *See also Elwood*, 71 Mass. App. Ct. 1108; *In re Adoption of Jim*, 68 Mass. App. Ct. 1101 (2007) (Mass. App. Ct. Rule 1:28). [↑](#footnote-ref-3)
4. *See also In re Adoption of Phoenix*, 70 Mass. App. Ct. 1113 (2007) (Mass. App. Ct. Rule 1:28) (affirming; judge’s comment was improper but ambiguous, and was seemingly aimed at Mother and not the appellant-father). [↑](#footnote-ref-4)
5. *See also Adoption of Elwood*, 71 Mass. App. Ct. 1108 (affirming; judge’s description of the mother as “inept,” “dishonest,” and “self-absorbed” did not constitute bias but was within his discretion to weigh the evidence and comment on the credibility of witnesses); *Adoption of* *Jim*, 68 Mass. App. Ct. 1101 (affirming; judge’s labeling of the father as a “career criminal” was accurate and supported by the record); *Adoption of* *Oleg*, 56 Mass. App. Ct. 1103 (affirming; judge’s statement that mother had repeated disagreements with her attorneys was factual and did not show bias). [↑](#footnote-ref-5)
6. *See also Adoption of Jade*, 74 Mass. App. Ct. 1120 (2009) (Mass. App. Ct. Rule 1:28) (noting “strikingly similar” remarks made by the same judge as in *Tia* but affirming for the same reasons as in *Tia*). **[NB: In Massachusetts, Tia and Jade are the main child welfare cases about improper judicial commentary, although both were affirmed on appeal.]** [↑](#footnote-ref-6)
7. *See also Adoption of Phoenix* 70 Mass. App. Ct. 1113 (refusing to decide question of bias because the issue was not properly preserved but also deciding that, if the issue had been preserved, the judge’s comments would have been insufficient to warrant reversal). [↑](#footnote-ref-7)
8. *Elwood*, 71 Mass. App. Ct. 1108 (discussing bias issue “despite a substantial question whether the claim was preserved.”). [↑](#footnote-ref-8)