***[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.]***

To: CAFL Appellate Panel Support Unit

From: Intern

Date: 27 July 2015

Re: Judge calling own witnesses in termination of parental rights proceedings

QUESTION PRESENTED

In a termination of parental rights proceeding, does a judge’s decision to call a witness over a parent’s objection violate the parent’s due process rights?

BRIEF ANSWER

 Probably not. Judges may call and question witnesses on their own motion, or by motion of one of the parties, in the interest of justice. Judges have broad judicial discretion to call witnesses, although judicial discretion is not without limitations and must be exercised with restraint to avoid imposition on the rights of the parties.

DISCUSSION

1. **Judges have discretion to call witnesses at one party’s request or *sua sponte* to enable the court to make a full factual inquiry.**

“The existence of the judge's power to call witnesses generally and expert witnesses particularly seems fairly well recognized in this country.” Scott v. Spanjer Bros., Inc., 298 F.2d 928, 930 (2d Cir. 1962); Polulich v. J. G. Schmidt Tool Die & Stamping Co., 46 N.J. Super. 135, 147 (Cnty. Ct. 1957) (affirming the power and right of the judge to call expert witnesses to assist in fact finding determinations); Quincy Trust Co. v. Taylor, 317 Mass. 195, 198 (1944) (“a judge may call a witness, put questions to a witness, or refresh his judicial knowledge of a fact, even against the protest of the parties”); 9 Wigmore, Evidence in Trial Courts at Common Law § 2484 (J. H. Chadbourn rev. 1981) (“[Judicial power] implies inherently a power to investigate as auxiliary to the power to decide; and the power to investigate implies necessarily a power to summon and to question witnesses”).

In Massachusetts, a judge may call and question witnesses in the interest of justice. Massachusetts Guide to Evidence, § 614(a). “Where a court has once taken jurisdiction and has become responsible to the public for the exercise of its judicial power so as to do justice, it is sometimes the right and even the duty of the court to act in some particular *sua sponte*.” Quincy Trust Co., 317 Mass. at 198. The court has broad powers to do justice and the responsibility to act of their own volition in cases requiring further investigation and inquiry. Id. To do so, a judge may question or call witnesses, even over the motion of the parties. Id.

In child custody cases, the court’s *parens patriae* powers give the judge particularly “broad and flexible” discretion to determine the child’s best interests. Adoption of Vito, 431 Mass. 550, 557 (2000). This broad discretion allows judges to depart from “ordinary modes of trial.” Jenkins v. Jenkins, 304 Mass. 248, 252 (1939) (probate court was not required to review entire record to issue modification to original visitation decree issued by the same judge); Dumain v. Gwynne, 92 Mass. 270, 275 (1865) (in a proceeding involving child custody, the judge can require the child to be brought before him for examination); Adoption of Vito, at 557 (the judge may use her equitable and discretionary authority to determine whether post adoption contact is in the child’s best interests).

1. **Limitations exist on the judge’s broad discretion to call witnesses in order to safeguard the judge’s role as an impartial adjudicator and to protect the parties’ due process rights.**

In jurisdictions “where there is the recognized power of the trial judge to call witnesses” this power is not unlimited. Band's Refuse Removal Inc. v. Fair Lawn, 62 N.J. Super. 522, 548 (1960); United States v. Leslie, 542 F.2d 285, 288 (5th Cir. 1976) (assuring the right to cross-examination of a court called witness); Scarborough v. State, 50 Md. App. 276, 282 (1981) (setting forth five factors for consideration by the trial judge in determining the necessity of calling a witness); United States v. Karnes*,* 531 F.2d 214, 217 (4th Cir. 1976) (impartiality destroyed when judge called a witness where the prosecution’s case was insufficient as a matter of law without that witness).

The judge must carefully endeavor to only elicit and clarify facts and not take on the role of advocate for either party. “In exercising their duty to direct and clarify the evidence, judges may not…weigh in, or appear to do so, on one side or the other; the judge must avoid the appearance of partisanship.” Commonwealth v. Hassey, 40 Mass. App. Ct. 806, 810 (1996).

A judge is afforded greater latitude in bench trials, than in jury trials. Without a jury there is no risk that jurors will afford a judge called witness more credibility than those called by the litigants resulting in unfair bias. Cranberg v. Consumers Union of U.S., Inc*.,* 756 F.2d 382, 392 (5th Cir. 1985). In termination of parental rights cases, the judge is the trier of fact. Therefore, there is little risk that she will be improperly influenced by calling witnesses.

While the threshold appears high, “[t]here is a point at which the judge may cross that fine line that separates advocacy from impartiality. When that occurs there may be substantial prejudice to the rights of one of the litigants.” Band's Refuse Removal Inc., 62 N.J. Super. at 547 (quoting Ridgewood v. Sreel Inv. Corp., 28 N.J. 121, 132 (1958)). The court in Band’s Refuse Removal found that the trial judge “overstepped the permissible bounds of judicial inquiry.” Id*.* at 550. The court concluded that the judge’s “activities [extended] from investigation and preparation to the actual presentation of testimony and exhibits at the trial.” Id. Over the course of the proceedings, the judge issued letters to counsel demanding the production of certain witnesses. Id*.* at 541. The judge also exercised the court’s subpoena power to call witnesses on his own motion. Id*.* at 545. Of the 32 witnesses called to testify, “the trial judge, by his own subpoena, direction or arrangement, called 27.” Id*.* And while the right of the judge to question, qualify, or even call witnesses was not questioned the volume of judicial control was found to exceed the “bounds of judicial propriety.” Id*.* at 547. As a result, the Superior Court of New Jersey reversed and remanded for a full trial.

CONCLUSION

A judge may call witnesses on his own motion in the interest of justice. Massachusetts Guide to Evidence, § 614(a). Judicial discretion in termination of parental rights proceedings is “broad and flexible.” Adoption of Vito, 431 Mass. 550, 557 (2000). A judge does not abuse her discretion by calling witnesses on her own motion to elicit or clarify facts or evidence. Quincy Trust Co. v. Taylor, 317 Mass. 195, 198 (1944).

This latitude, however, is not without limitation. The judge’s calling of witnesses cannot be excessive relative to the contributions of counsel. Similarly, the judge cannot assist a litigant in meeting his burden. “Advocacy” of this sort may warrant a finding of abuse of discretion. Band's Refuse Removal Inc. v. Fair Lawn, 62 N.J. Super. 522, 547 (1960).