COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-429

ADOPTION OF CHET.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a trial, the judge found by clear and convincing evidence that the father was unfit to parent Chet, that the father's unfitness was likely to continue into the indefinite future, and that the Department of Children and Families (DCF) had made reasonable efforts to reunify the child with the father. The judge concluded that it was in Chet's best interests to terminate the father's parental rights, thus freeing the child for adoption by the foster parents.

The father appeals, arguing that the judge erred in concluding that the termination of his parental rights, and adoption of the child by the current foster parents, were in the child's best interests. The father also contends that the judge erred in finding that DCF had made reasonable efforts at reunification, and that the judge abused her discretion in

[1] A pseudonym.

disregarding the court investigator's report and in allowing DCF's motion to reopen the evidence. We affirm.

Background. The judge found the following facts. The mother and the father's six- or seven-year relationship ended while the mother was pregnant with Chet. When Chet was born in July 2015, he tested positive for marijuana; DCF became involved shortly thereafter when the results of the drug test were reported pursuant to G. L. c. 119, § 51A.[2] DCF reported in its subsequent investigation under G. L. c. 119, § 51B, that according to the mother, the father came to the hospital one time after the child's birth and informed the mother that he wanted paternity testing before he became involved. The DCF investigator initially was not able to reach the father; however, she later spoke with him and reported that he believed the baby was his and that he wanted to be involved in the child's life and was visiting the child at the mother's residence when he was not working.

On January 27, 2016, when Chet was approximately six months old, DCF filed a care and protection petition after he was exposed to gun violence and substance use in the mother's home.[3]

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[2] The mother admitted to smoking marijuana during her pregnancy.

[3] On January 26, 2016, police officers responded to a report that shots had been fired in the area near the mother's apartment. When the mother opened the door in response to the police, the officers observed that she appeared to have just awakened; her eyes were bloodshot, and she reeked of stale alcoholic

On January 29, 2016, after an initial temporary custody hearing, the mother waived her right to a seventy-two hour hearing and the judge continued the father's hearing until February 12, 2016. DCF was awarded temporary custody of the child.

At the February hearing, the judge continued DCF's custody of the child. The judge noted that the father was a putative, noncustodial father who doubted his paternity. Furthermore, according to the mother, the father had only seen the child twice in the previous two months; he smoked marijuana, had a temper, and kept aggressive dogs in his home. DCF placed the child in foster care and, as of the time of trial, he had been in foster care for twenty-six months.[4]

On July 21, 2016, DCF changed the goal for the child from permanency through reunification of the family to permanency through adoption. On September 16, 2016, the father appeared in court and stipulated to his current unfitness and that the child was in need of care and protection. On December 16, 2016, following a permanency hearing, the judge approved DCF's

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beverages. At about the same time, the mother acknowledged to the DCF social worker that she was dating a gang member. The social worker testified that the mother had a "serious drug and alcohol problem" at that time. Two months later, the mother "was assaulted and subjected to a violent beating, and she required multiple surgeries."

[4] On April 12, 2018, one day after the evidence closed, the mother appeared in court with counsel and filed a surrender of her parental rights. She is not a party to this appeal.

proposed permanency plan for adoption. The father's social worker testified she had informed the father that the goal for the child depended on the father's engagement in services, along with resulting positive changes, and that the father's engaging in his service plan would help.[5]

Trial began on March 28, 2018, and the evidence closed on April 11, 2018. The judge found that, as of March 28, when the trial began, the father had not completed any of the tasks on his service plan. Those tasks included, among other things, that the father obtain safe and stable housing; participate in regular visits with the child; meet with a social worker monthly; take parenting classes; engage in anger management, mental health counselling, and a substance abuse evaluation; complete a visitation journal; and complete a budget and reunification plan. Specifically, the father did not visit consistently with the child or meet consistently with DCF. According to DCF, the father had not located adequate housing for himself and the child; he did not attend any parenting classes or therapy; and he failed to complete a substance abuse evaluation, or to update his budget or visitation journal (which contained only one entry).

[5] On December 1, 2017, over one year after DCF initiated the case, the father's paternity was established; a second permanency hearing was held and the judge once again approved DCF's plan of adoption.

The judge determined that the father was unfit and terminated his parental rights; she concluded that the father's lack of effort indicated a lack of will to parent and concluded that a parent who lacks the will to parent will always put the child at a significant risk for neglect. The judge found that termination of the father's parental rights was in the child's best interests, and a decree entered accordingly. The father timely appealed.

The father now argues that the judge's finding of unfitness was based on clearly erroneous subsidiary findings regarding his failure to cooperate with DCF and engage in services. He also argues that the record is clear "that [the f]ather and his child loved each other."

As an initial matter, we agree that the record is clear that the father loves his son. We also agree, and the judge acknowledged, that visits between the two went well and that the child appeared to enjoy them and called the father "Daddy." In addition, the record revealed a number of positive factors in the father's life, including his work toward a degree in personal training, which involved training clients part time in connection with that program. Moreover, the judge noted that, at the time of trial, the father's sister had moved out of the paternal grandmother's home, thereby creating sufficient space for the child. The judge concluded, however, based on her 193

findings of fact, that those factors were far outweighed by other evidence supporting the father's unfitness.

Discussion. "'To terminate parental rights to a child and to dispense with parental consent to adoption, a judge must find by clear and convincing evidence, based on subsidiary findings proved by at least a fair preponderance of evidence, that the parent is unfit to care for the child and that termination is in the child's best interests.' Adoption of Jacques, 82 Mass. App. Ct. 601, 606 (2012). The judge 'must also find that the current parental unfitness is not a temporary condition.' Adoption of Virgil, 93 Mass. App. Ct. 298, 301 (2018). As it is within the purview of the judge to weigh the evidence, assess the credibility of witnesses, and, accordingly, make findings of fact, the judge's subsidiary findings will remain undisturbed unless shown to be clearly erroneous. See Adoption of Jacques, supra at 606-607." Adoption of Querida, 94 Mass. App. Ct. 771, 777 (2019). After careful review, we see no abuse of the judge's considerable discretion here, or any error of law.

The father first contends that the judge's finding that he did not comply with the task of finding "safe and stable housing" is clearly erroneous because DCF applied improper "foster home regulations" to the paternal grandmother's home. Providing the child with safe and stable housing was part of the father's service plan from the time that DCF became involved in

the case. However, throughout the case, the father was not forthcoming with DCF regarding his living arrangements.[6] His social worker testified that, in August 2016, she tried to contact the father by sending letters to his last known address and by calling all known telephone numbers. The father did not respond until January of 2017, when he informed the social worker that he was living with a friend[7] and that he would find suitable housing by October 2017. In December 2016, the father knew that the child's permanency plan had been changed to adoption and that reunification depended on the father's engagement in services and demonstrating positive change. For all of 2017, however, the social worker did not know where the father was living.[8]

As of the time of trial, the father indicated that he was still looking for a one- or two-bedroom apartment. He provided no specifics about those efforts. The judge found that the father's assertion that he was looking for housing was not true and that the father was intentionally dishonest about where he resided during most of the time the case was pending.

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[6] The record indicates that in January 2016, when DCF filed the care and protection petition, the father was living with his then-girlfriend.

[7] The father did not agree to share the address with the social worker.

[8] In January 2018, the social worker found out that the father had been living with the paternal grandmother.

Furthermore, the record indicates that the judge explicitly considered the fact that, at the time of trial, there was space available for the child at the paternal grandmother's home; however, the judge concluded that the "development was too little too late and [did] not serve to overcome" the father's (or the paternal grandmother's) parenting defects. See Care & Protection of Walt, 478 Mass. 212, 231 (2017) ("a judge must determine what is reasonable in light of the particular circumstances in each case; the health and safety of the child must be the paramount concern").

The father also argues that the judge abused her discretion in finding that little or no weight should be given to the court investigator's report. The record indicates the judge considered the substance of the investigator's report and found the father's statements contained therein were self-reported and, at times, misleading. Accordingly, the judge did not give at least that portion of the report significant evidentiary weight; that choice was within her discretion. See Care & Protection of Bruce, 44 Mass. App. Ct. 758, 765-766 (1998).

The father argues that there was no evidence that his social use of marijuana placed the child at risk or hampered his own work or academic performance. Accordingly, the father contends, his assigned task to obtain a substance abuse evaluation was not related to any clearly identified

deficiencies, and his failure to complete the task should not have been accorded any weight. We disagree. DCF requested that the father obtain a substance abuse evaluation based on his admission that he smoked marijuana, that he arrived at a meeting with DCF under the influence of marijuana, and on the fact that DCF encountered a strong odor of marijuana at the entry of the father's residence.[9] Furthermore, on April 14, 2018, following the trial, the father was charged with driving while intoxicated.[10] The judge found that unsafe driving and repeated smoking of marijuana during the day showed that the father was not fit to be a primary caretaker for the child. We see no error in the judge's finding that the request that the father undergo a substance abuse evaluation was reasonably related to assessing the father's ability to parent the child, and the

[9] This occurred in February 2018, after the father informed DCF that he was living with the paternal grandmother.

[10] We also agree with the judge that this admittedly unresolved charge, despite the presumption of innocence, underscored and supported DCF's request that the father undergo a substance abuse evaluation. Cf. Care & Protection of Frank, 409 Mass. 492, 495 (1991). We have previously recognized that the trial record in an action such as this may be reopened when circumstances warrant it. See Adoption of Cesar, 67 Mass. App. Ct. 708, 715-716 (2006). Given the nexus between the task assigned to the father to undergo a substance abuse evaluation and the crime charged, and the overriding importance of determining the best interests of the child based on current circumstances, we also conclude that the judge committed no abuse of discretion or other error of law in reopening the proceedings to admit that evidence.

father's refusal to submit to an evaluation was probative on the issue of his fitness.

The judge found that the other tasks assigned to the father were reasonably related to remedying parenting defects and the father failed to complete any of the tasks. For instance, DCF initially offered the father weekly visits with the child, but after the father missed several visits, DCF reduced the visits to biweekly, then to once a month. The father had missed three of the monthly visits. Based on this, the judge reasonably found that the father had failed to maintain significant and meaningful contact with the child.

In addition, during visits with the child, DCF observed that the father did not always have a realistic understanding of the child's developmental stages. As a result, DCF requested that the father attend parenting classes and a father's group. The father did not attend any classes or groups. Moreover, during a foster care review hearing in the summer of 2016, the father had an outburst, which, in connection with information provided by the mother regarding the father, prompted DCF to request that the father engage in mental health counselling and anger management. The judge found that the father did not believe he needed counselling and never complied with the assigned task.

Finally, DCF requested that the father keep a budget and a visitation journal. The judge found that, while keeping a budget or visitation journal, standing alone, were not major issues, when considered with all the evidence at trial, failure to do so showed the father's lack of effort to reunify with the child. See Adoption of Carla, 416 Mass. 510, 519 (1993).

The judge ultimately found that the father's minimal efforts to work on his service plan tasks, combined with the missed visits, were evidence that the father had a propensity for neglect of the child. Furthermore, the fact that the father was unable to complete those tasks over two years supported the finding, based on clear and convincing evidence, that the father remained unfit and his unfitness would continue into the future. We are satisfied that the judge did not err in determining that it was in the best interests of the child to terminate the father's parental rights.

The father also argues that the judge erred in concluding that DCF's plan of adoption by the current foster parents was in the best interests of the child. Specifically, he contends that the judge failed to give the father's proposed custody plan due consideration and instead relied on impermissible factors in concluding that adoption was in the child's best interests. We disagree.

In accordance with G. L. c. 210, § 3, the judge was required to consider the plans proposed by both the department and the father, "and then determine which placement will serve the best interests of the child." Adoption of Dora, 52 Mass. App. Ct. 472, 474-475 (2001). See Adoption of Hugo, 428 Mass. 219, 226 & n.9 (1998), cert. denied sub nom. Hugo P. v. George P., 526 U.S. 1034 (1999). "A plan proposed by a parent is not entitled to any artificial weight as opposed to alternative plans." Adoption of Irene, 54 Mass. App. Ct. 613, 617 (2002).

The father's proposed custody plan called for the placement of the child in a guardianship with the paternal grandmother.[11] The judge found that, although the paternal grandmother sought guardianship of the child, she did not intend to parent him; she intended that the father would be the primary caregiver. As discussed, supra, this created a substantial risk of neglect for the child and did not serve his best interests. Furthermore,

[11] The paternal grandmother was presented to DCF as a possible resource when the child was first placed in foster care; DCF denied placement with her because her then-roommate would not participate in a DCF home study. In April 2016, the paternal grandmother moved to another address with her daughter and one of her daughter's sons. At the time of trial, another of the daughter's sons was in a residential program and did not reside with the paternal grandmother. An ensuing home study concluded that the home did not have enough space for the paternal grandmother to foster the child. DCF informed her that for the child to be placed with her, her daughter and her daughter's son would have to move out. In May 2017, DCF closed the placement matter as that had not happened.

the judge found that the paternal grandmother displayed a lack of planning for a safe, supervised home for the child[12] and that she would not understand the purpose behind or follow court orders. The judge also took issue with the paternal grandmother's testimony that despite not knowing the issues facing her daughter's son who was in a residential program, and the possible safety risk posed to the child if the daughter's son returned home, the paternal grandmother would welcome him back into her home and permit him to share a bedroom with the child.

At the time of trial, the child had been in foster care for over two years with two different families. The child's preadoptive parents provide the child permanency and stability. They met all of DCF's financial and safety standards; both were employed, and neither parent had prior involvement with DCF. The preadoptive parents lived with the child in a three-bedroom house where the child had his own room. Furthermore, the child sought affection from the preadoptive parents and seemed to be "really settled."

[12] The judge found that the paternal grandmother does not have a clear understanding why DCF was involved with the father and the child; that she did not know why DCF removed the child from the mother; that the paternal grandmother's intent was that the father could watch the child while she was at work; and that she had not thought about visitation with the mother.

The record supports the finding that DCF's proposed plan for adoption by the preadoptive family is most consistent with the child's best interests. Accordingly, we see no abuse of discretion in denying placement with the paternal grandmother. See Adoption of Zak, 87 Mass. App. Ct. 540, 545 (2015).

Decree affirmed.

By the Court (Meade, Hanlon & Kinder, JJ.[13]),

Joseph F. Stanton

Clerk

Entered: November 13, 2019.

[13] The panelists are listed in order of seniority.