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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1468

ADOPTION OF WYONETTA
(and a companion case¹).

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a trial in the Juvenile Court, a judge found both the father and the mother unfit to parent the children, terminated their respective parental rights, and approved the plan of the Department of Children and Families (department).² On appeal, the father argues that the judge erred in finding him

¹ Adoption of Sara. The children's names are pseudonyms.

² The mother's oldest child, Amy (a pseudonym), was also named in the petition filed by the department. Amy's biological father is deceased, and she was living in Texas with her paternal grandmother during the entire time this case was pending. The judge heard evidence regarding Amy, and found that the mother was unfit to parent her and that it was in Amy's best interests to terminate the mother's rights as to her. The department endorsed Amy's paternal grandmother in Texas as a preadoptive resource. In her brief the mother explicitly states that she "does not object" to Amy's adoption; she does not raise the issue of her parental rights as to Amy. Therefore, the mother has waived any right to appeal from the decree as to Amy, and we do not address the propriety of the termination of her parental rights as to Amy. See Barkan v. Zoning Bd. of Appeals of Truro, 95 Mass. App. Ct. 378, 389 (2019).

unfit, in terminating his rights, and in declining to enter an order of posttermination and postadoption visitation. The mother appeals, arguing that the judge erred in approving the department's insufficiently detailed permanency plan, and in finding her unfit. We affirm.

1. Background. a. The children. The mother and father share two minor children -- Wyonetta and Sara. Wyonetta (born in January 2012) was diagnosed with leukemia in November 2014, and underwent chemotherapy treatment until January 2017; her medical team at Massachusetts General Hospital continued to monitor her health while she remained in remission. In May 2018, Wyonetta suffered a relapse, and was undergoing chemotherapy treatment at the time of trial. After an easy transition to her current foster home³ in July 2016 (her foster mother is a close friend of the paternal grandmother⁴), Wyonetta began regular mental health therapy sessions; in January 2017, she was enrolled in a Head Start program where it was reported she was doing very well.

³ The department endorsed the foster mother as a preadoptive resource for both children. However, during the course of the home study the department learned that the foster mother was still married to her estranged husband; the department informed the foster mother that it would resume the home study after she dissolved her marriage.

⁴ Our reference to "paternal grandmother" hereafter is to Wyonetta's and Sara's father's mother.

Sara (born in June 2016) was removed from the mother's custody at birth when both she and the mother tested positive for cocaine. She was discharged from the hospital into the father's custody, but five days later was placed in the paternal grandmother's temporary custody (although the father remained living in the paternal grandmother's home). After removal from the paternal grandmother's custody, Sara was eventually placed in the same preadoptive home as Wyonetta, where she has remained. She has reached all developmental milestones, and attends a local daycare center.

b. Department involvement. A G. L. c. 119, § 51A, report (51A report), was filed against the mother by the hospital on June 8, 2016, when both she and Sara tested positive for cocaine at Sara's birth;⁵ the department had also learned that the mother tested positive for cocaine while pregnant with Sara. On June 10, 2016, a second 51A report was filed against the mother for the medical neglect of Wyonetta, when it was learned that neither the father nor the mother was consistently administering Wyonetta's leukemia medication (she was in a maintenance phase), putting Wyonetta at a heightened risk of the reoccurrence of the

⁵ The department was previously involved in the mother's life when in November 2014 the mother was involved in what was suspected to be an "intentional" car accident while the mother's oldest child and Wyonetta were in the car; the department learned that the mother was, at the time, experiencing suicidal ideation, and was cutting herself in Wyonetta's presence.

disease. On the same day, Sara was released from the hospital into the father's custody, and the paternal grandmother was given joint decision-making authority by the mother; the father resided with the paternal grandmother.

On June 15, 2016, the department filed its petition for removal of the children from the parents. At the hearing on the department's removal petition, the paternal grandmother was given temporary custody of Wyonetta and Sara; the father was allowed to remain living in the paternal grandmother's home, but the mother was ordered to move out. The paternal grandmother was required to supervise all visits between the mother and the children. Less than one month later, on July 9, 2016, police raided the paternal grandmother's home, executing a search warrant based on observations of multiple people entering the paternal grandmother's home to purchase drugs. The police seized from the home ninety-nine grams of cocaine found hidden in a chest in a room to which the children had access. Both the father and the mother were arrested at that time and criminally charged with the possession and distribution of cocaine.

As a result of the drug raid, the children were removed from the paternal grandmother's custody;⁶ Wyonetta was

⁶ The paternal grandmother's motion to intervene in the department's petition was denied. She also filed a petition for guardianship of the children, which was allowed to stay open and proceed concurrently with the petition; the judge ultimately

immediately hospitalized to await placement in a medical foster home, due to her physician's concern over her compromised immune system, risk of infection, and the need for strict compliance with her chemotherapy maintenance treatment. Both children were placed in separate temporary foster homes; later, the children were placed together in the current preadoptive home. On July 18, 2017, the department's goal for the children changed from family reunification to adoption.

c. The father. The father is the biological parent of both Wyonetta and Sara. He did not complete high school; after being arrested and expelled while in the ninth grade he never returned to school. The father has an extensive criminal history.⁷ At the time of his July 2016 arrest prompted by the drug raid on the paternal grandmother's home, the father already was serving two years of probation stemming from an earlier arrest in October 2015 on similar charges. While incarcerated after his 2016 arrest, the father participated in and completed a recovery program, an anger management and violence prevention program, and a parenting course. At the time of trial in June

scheduled consideration of the guardianship petition at the father's request for November 20, 2018, but that hearing did not occur for reasons not included in this record.

⁷ His criminal history is comprised of charges involving possession and distribution of controlled substances, possession of a dangerous weapon, assault and battery, and operating a vehicle while under the influence of intoxicating liquor.

and August 2018, the father remained incarcerated, with a release date of February 15, 2019 (he was eligible for parole in September 2018). The father supported the paternal grandmother having custody of the children.

d. The mother. The mother spent much of her childhood in foster care (between the ages of five and fifteen), and left high school in her senior year without graduating. She has been diagnosed with posttraumatic stress disorder, bipolar disorder, and depression, and has failed to consistently seek treatment. She has a history of substance abuse for which she has sporadically, and unsuccessfully, sought treatment.⁸ After the mother was ordered to leave the paternal grandmother's home as a condition of the paternal grandmother's custody of the children, the mother lived temporarily with various friends, and was at times homeless; the record indicates that despite the court order, the mother was regularly at the paternal grandmother's home with the children. The mother did not consistently attend her psychiatric appointments, failed to take her medication as prescribed, and allowed her health insurance to lapse. She was hospitalized for mental health or substance abuse issues on at

⁸ The mother's preferred drug was cocaine; she testified that she used it regularly to help her get up and out of bed each morning, and to help her parent her children.

least two occasions, and failed to complete substance abuse programs in which she was enrolled.

While incarcerated between September 2017 and March 2018 (for the July 2016 criminal charges that prompted the children's removal), the mother received her general education degree and participated in various programs offered by the institution, including a domestic violence program, a relapse prevention program, and a learning skills program. Upon her release in March 2018, the mother had a sufficient supply of prescribed medications and engaged in mental health treatment. The mother completed a personal development and leadership training program.

At the time of trial, the mother was on parole and probation, with conditions that she have no contact with the father and that she submit to random drug screens each week. She testified that she was not able at that time to take custody of the children because she was not financially stable; she explained that in her current living situation she "could not do it."⁹ Her stated preference was that the children stay in their current preadoptive home.

⁹ At that time the mother lived in a one-bedroom apartment with a new boyfriend; this man had a history of domestic violence. The mother testified that when she was ready to regain custody of the children, she would remain in the one-bedroom apartment and her boyfriend would move out.

e. Service plan/visitation. Both the father and the mother signed their respective department service plans on July 19, 2016.¹⁰ Between August and December 2016, the children had several supervised visits with the father at his place of incarceration (the department allowed one visit each month); in April 2017, the visits ceased due to the father's transfer to another facility. The father's next visit with the children occurred in August 2017 while incarcerated at MCI Shirley; telephone calls and visits between the father and the children were found by the department to be appropriate. The father testified at trial that prior to the children's removal he played an integral role in their day-to-day care, and that he believed that he had a close attachment to them. If he was released on parole, he testified, he would secure housing and employment, and do whatever was required to regain custody of the children, although he presented no definitive plan.

¹⁰ Under the service plans, both the father and the mother were required, among other things, to meet with the department social workers, ensure the children's medical needs were met, provide signed releases, abide by court orders and conditions of probation, create a visitation schedule and attend visits with the children, and notify the social workers of residence or telephone number changes. Additionally, the father was specifically required to resolve criminal matters and refrain from violent and criminal activity, attend court hearings, engage in individual therapy, and participate in a substance abuse evaluation. Additional tasks for the mother included attending and verifying participation in substance abuse treatment, engaging in mental health treatment, and maintaining her sobriety.

Between August 2016 and February 2017, the mother had scheduled weekly supervised visits with the children in the department office in Chelsea; she was late for three out of the seven visits. Between December 23, 2016, and January 17, 2017, she missed four visits, testifying at trial that she had experienced a depressive episode over the holidays; her therapist confirmed that during that time the mother was homeless and had not been taking her prescribed medication. Between February and July 2017 the mother confirmed¹¹ and attended all scheduled visits, and the department reported that after prompting, she equally attended to each child, and brought appropriate supplies and gifts to each visit. The mother requested that visits with the children be suspended during her incarceration (September 2017 to March 2018); after her release visits were increased to twice each month, and video calls were scheduled for three times each week.

f. Permanency plan. At the time of trial, the department's plan for the children was adoption by the current foster mother. However, the home study of the foster mother had been halted so that she could obtain a divorce from her estranged husband. In the event that the foster mother was not approved for the adoption of the children, the department

¹¹ After missing several visits, the department required the mother to call the day before visits and confirm her attendance.

planned to make a referral for adoption of the children by recruitment through the Regional Adoption Foster Care Development Unit, or alternatively, to register the children with the Massachusetts Adoption Resource Exchange.

g. Decrees. On November 30, 2018, the judge issued a "notice of decision, order of adjudication and issuance of decrees" based on the evidence presented at the three-day trial occurring on June 12 and 13, and August 3, 2018. In her subsequent findings of fact and conclusions of law, the judge found credible the testimony of the adoption social worker, the mother's expert¹² (on bonding and attachment), and the mother; the father's testimony was partially credited. Based on the factual findings, the judge concluded as to the father that (1) the father's incarceration deprived the children of his care for a prolonged period; (2) he minimized the impact of his poor decision-making on the children, especially with regard to the 2016 drug raid that caused the children's removal from the

¹² The mother's expert testified about an observed visit in June 2018 between the mother and the children, which occurred at Massachusetts General Hospital while Wyonetta was receiving her chemotherapy treatment. Based on that observation, the expert opined that the mother "efficiently and carefully" balanced her time between the two children, "paying special attention to each during a time of vulnerability," and was adept at providing affection to each child. She further opined that the mother shared a strong bond and attachment to each of the children, and that ending their relationship would be detrimental to the children.

paternal grandmother's home; (3) he failed to put forth a definitive plan to regain custody after his release from prison; and (4) he failed to express any specific knowledge as to Wyonetta's illness or medication requirements. The judge further concluded that, based on the foregoing, there was sufficient evidence to establish that the father's shortcomings would continue in the future to the detriment of the children.

The judge concluded as to the mother, among other things, that she (1) by her own admission, was currently unfit to parent the children; and (2) preferred that the children remain in their current preadoptive home. The judge similarly concluded that her findings clearly established that the mother's shortcomings would continue in the future to the detriment of the children. The judge also considered and applied, as required, the statutory factors to the circumstances of this case. See G. L. c. 210, § 3 (c).

The decrees entered on November 30, 2018, in which both the father and the mother were found unfit to parent the children, and their respective parental rights were terminated. After finding that the mother shared a strong bond with the children, the judge determined that it would be in their best interests to have posttermination and postadoption contact with the mother, but left to the department's and the adoptive resource's discretion the extent of such contact. The judge found no such

bond between the father and the children, and declined to order posttermination and postadoption contact. Sibling visitation was ordered, likewise at the discretion of the department and the adoptive resource. The department's permanency plan was approved after a finding that it was in the children's best interests. Both the mother and the father timely appealed.

2. Discussion. "To terminate parental rights to a child, the judge must find, by clear and convincing evidence, that the parent is unfit and that the child's 'best interests will be served by terminating the legal relation between parent and child.'" Adoption of Luc, 484 Mass. 139, 144 (2020), quoting Adoption of Ilona, 459 Mass. 53, 59 (2011). "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." Adoption of Querida, 94 Mass. App. Ct. 771, 777 (2019).

In determining the best interests of the children, the judge must consider, among other things, "the plan proposed by the department." G. L. c. 210, § 3 (c). "The law does not require that the adoption plan be 'fully developed' in order to support a termination order." Adoption of Varik, 95 Mass. App. Ct. 762, 770 (2019), quoting Adoption of Willow, 433 Mass. 636, 652 (2001). "In brief, in order to comply with G. L. c. 210,

§ 3 (c), the department must submit to the judge an adoption plan that is sufficiently detailed to permit the judge to evaluate the type of adoptive parents and home environment proposed and consider whether the proposal is best suited to meet the specific needs of the child[ren]." Adoption of Varik, supra at 770-771.

a. The father. The father claims three errors -- that the judge erred in (1) finding him unfit to parent, (2) terminating his parental rights to the children without first providing the father the opportunity to present evidence on his permanency plan, and (3) declining to order posttermination and postadoption visitation. We are not persuaded.

First, the judge's findings supported her conclusion that the father was unfit to parent both children, and that the unfitness was not temporary. See Adoption of Querida, 94 Mass. App. Ct. at 777, citing Adoption of Carlos, 413 Mass. 339, 350 (1992). Here, the judge weighed several factors in determining the father's unfitness. At the time of trial the father had been incarcerated for more than two years, resulting in his unavailability to parent these very young children, including one who had a medical condition requiring consistent attention and care.¹³ "Incarceration alone is not a ground for termination

¹³ Although the father was eligible for parole within a few weeks after trial, there was no stated guaranty that the father was to

of parental rights, and the compelled absence of a parent by reason of incarceration [is] to be taken into account but [does] not conclusively render a parent unfit" (quotation omitted).

Adoption of Jacqui, 80 Mass. App. Ct. 713, 718 (2011). There were, however, other compelling reasons supporting the judge's decision.

The judge also considered the father's extensive criminal record, that the father was on probation for a similar crime at the time of his arrest in July 2016, that multiple people were observed entering the paternal grandmother's home (where the children were living) to purchase drugs, and that the drugs seized by the police during the home raid in July 2016 were found in a chest accessible to the children. A judge "need not wait for disaster to happen but may rely upon past patterns of parental neglect or misconduct in determining current or future fitness." Adoption of Virgil, 93 Mass. App. Ct. 298, 301 (2018). Further, the father's failure to properly administer Wyonetta's chemotherapy medication while she was, as the father testified, in his daily care also was a consideration in determining his fitness to parent. See Adoption of Darla, 56 Mass. App. Ct. 519, 522 (2002). His failure to provide at trial a definitive plan establishing his readiness to regain custody

be released from prison any time before his February 2019 release date.

of the children upon his release from prison was further evidence that the father's unfitness was not temporary. See Adoption of Ilona, 459 Mass. at 60 ("Because childhood is fleeting, a parent's unfitness is not temporary if it is reasonably likely to continue for a prolonged or indeterminate period"). The judge properly considered the requisite factors under G. L. c. 210, § 3 (c). The record supports the judge's finding of the father's current unfitness. There was no error.

Next, although we agree with the father that the judge erred in not allowing him to present his permanency plan before disposition of the case, the father was not prejudiced.¹⁴ After determining a parent unfit, "the judge must find that the child[ren]'s best interests would be served by ending all legal relations between parent and child[ren]." Adoption of Varik, 95 Mass. App. Ct. at 767, quoting Adoption of Cadence, 81 Mass. App. Ct. 162, 167 (2012). "'That determination includes consideration of the permanency plan proposed by the department' and any such plan proposed by the parents." Adoption of Varik, supra, quoting Adoption of Cadence, supra. See G. L. c. 210, § 3 (c).

¹⁴ The father lacks standing to pursue the paternal grandmother's guardianship petition and, thus, we will not address this argument. See Guardianship of Tara, 97 Mass. App. Ct. 11, 13 (2020) (dismissing father's and children's appeal from denial of grandmother's petition for guardianship).

On the last day of trial, the judge granted the father's requested continuance (until September 19, 2018) to present evidence solely on the issue of his permanency plan -- the father intended to propose custody by the paternal grandmother in the event his parental rights were terminated. The father did not appear at the September 19 hearing due to confusion with his writ of habeas corpus; the hearing was continued until November 20, 2018, but was never held.¹⁵

On November 30, 2018, the judge issued her notice of decision, and the decrees were entered terminating the father's and the mother's parental rights. As the department argues, there are no entries on the docket between September 19 and November 30, 2018, indicating that the father submitted to the judge a home study document regarding the paternal grandmother as an exhibit in lieu of witness testimony (an option previously offered to him), or that he had filed for a further continuance of the November 20 hearing, objected to the hearing not being held, or requested that the evidence be reopened. We agree that the father's inaction during this continuation period prevents him from now raising this issue. See Hoffman v. Houghton Chem. Corp., 434 Mass. 624, 639 (2001); Adoption of Carla, 416 Mass.

¹⁵ It is unclear from the transcript if the continuance was based on the mother's retaining new counsel or the absence of the father's witnesses at the hearing. There is no information in the record as to why the November 20 hearing did not occur.

510, 515 (1993) ("The consequence of the failure properly to object at trial is to waive the issue on appeal").

Despite not having the opportunity to present his permanency plan, there was sufficient trial evidence before the judge to determine that the paternal grandmother was not a viable option to take custody of the children. "A plan proposed by a parent is not entitled to any artificial weight as opposed to alternative plans." Adoption of Oren, 96 Mass. App. Ct. 842, 847 (2020), quoting Adoption of Irene, 54 Mass. App. Ct. 613, 617 (2002). The children were removed from the paternal grandmother in July 2016 only a few weeks after custody was granted to her when police raided her home, where the children were living, and seized a substantial amount of cocaine; the raid was prompted by observations by police of multiple people entering the paternal grandmother's home to purchase drugs. Both the father and the mother (who was court-ordered out of the home) were arrested and charged with both the possession of drugs and the distribution of those drugs from the paternal grandmother's home. Based on this evidence, it was reasonable for the judge to determine that placing custody of the children with the paternal grandmother was not a viable alternative to the department's permanency plan. See Adoption of Xarina, 93 Mass. App. Ct. 800, 805 (2018). The record supports the judge's findings. See Adoption of Oren, supra at 847-848.

Finally, the judge did not abuse her discretion in declining to order posttermination and postadoption visitation between the father and the children. "The decision whether to grant posttermination visitation is within the judge's sound discretion," Adoption of Virgil, 93 Mass. App. Ct. at 307, quoting Adoption of Cecily, 83 Mass. App. Ct. 719, 727-728 (2013), and is authorized "where such visitation is in the child's best interest[s]." Adoption of Ilona, 459 Mass. at 63. When determining a posttermination and postadoption order, "[t]wo questions must be asked: 'First, is visitation in the child's best interest? Second, in cases where a family is ready to adopt the child, is an order of visitation necessary to protect the child's best interest, or may decisions regarding visitation be left to the judgment of the adoptive family?'"

Adoption of Oren, 96 Mass. App. Ct. at 848, quoting Adoption of Ilona, supra. Posttermination visitation must be "based on emotional bonding and other circumstances of the actual personal relationship of the child and the biological parent, not in the rights of the biological parent [or] the legal consequences of their natural relation." Adoption of Terrence, 57 Mass. App. Ct. 832, 839 (2003).

Here, the judge concluded that visits between the father and the children during the years of his incarceration were inconsistent, and sometimes, due to his incarceration, did not

occur at all. It was not error for the judge to determine that the fact that the children enjoyed the visits with the father that did occur, or that the children ran to the father at visits and played with him, was not "evidence of a significant attachment" between them. We defer to the judge in weighing the evidence and the credibility of the witnesses. See Adoption of Querida, 94 Mass. App. Ct. at 777. The judge could permissibly find that disrupting the relationship between the father and the children in this case would not run counter to the children's best interests; thus, declining to order posttermination and postadoption visitation with the father was not an abuse of discretion. See Adoption of Terrence, 57 Mass. App. Ct. at 839.

b. The mother. The mother argues that the department's permanency plan was not sufficiently detailed as to the benefit to the children, and that the alternative plan, in the event that the foster mother was not approved as the adoptive resource, was also insufficiently detailed. The mother also claims that the judge erred in finding her unfit. The mother's arguments are without merit.

The mother conceded at trial that she was presently unfit to take custody of the children, and that she preferred that the children remain in their preadoptive placement. Even without this concession, there was sufficient evidence presented as to the mother's unfitness to parent the children. Specifically,

the mother's inconsistent treatment of her mental health issues and substance abuse struggles detrimentally impacted the children; Sara was born with cocaine in her system, and both children were exposed to the parents' drug trafficking. See Adoption of Luc, 484 Mass. at 147. The mother failed to properly administer Wyonetta's chemotherapy medication, putting her at risk for reoccurrence of leukemia. In addition, the judge was permitted to consider the mother's intermittent utilization of services and her failure to fully benefit from them in determining whether the mother's unfitness was temporary. See G. L. c. 210, § 3 (c) (ii). See also Adoption of Garret, 92 Mass. App. Ct. 664, 673-674 (2018). The record supports the judge's determination that the mother's unfitness was not temporary and, thus, we discern no error, or abuse of discretion, in the termination of the mother's parental rights. See Adoption of Inez, 428 Mass. 717, 724 (1999) ("At some point the court must say, 'Enough,' . . . and act in the children's best interests").

In addition, the department's permanency plan was sufficiently detailed. Should the preadoptive resource not be approved after the department's home study as anticipated, adoption by recruitment would occur. "The adoption plan need not be fully developed to support a termination order; it need only provide sufficient information about the prospective

adoptive placement 'so that the judge may properly evaluate the suitability of the department's proposal.'" Adoption of Willow, 433 Mass. at 652-653, quoting Adoption of Vito, 431 Mass. 550, 568 n.28 (2000).

The judge considered the department's plan as part of her assessment in determining whether termination of the mother's parental rights was in the best interests of the children. See Adoption of Varik, 95 Mass. App. Ct. at 767. Evidence established that the children were doing very well in the preadoptive home, where they had been residing together for over one year, that all of Wyonetta's medical needs were being met and her medication regimen was being strictly adhered to, and that visits with the parents and the paternal grandmother were occurring with supervision by the preadoptive mother (a close friend of the family). The department anticipated that the preadoptive mother's divorce would be readily obtained. The department's alternative plan of recruitment should the preadoptive mother not be approved, was also sufficiently detailed for consideration by the judge, and the judge instructed the department to immediately return to the court if that scenario came to fruition. See G. L. c. 210, § 3 (c). The evidence presented regarding the department's plan was sufficient to allow the judge to evaluate the adoptive parents and the home environment proposed. See Adoption of Varik, supra

at 771. We see no error, nor an abuse of discretion, in the judge's determination that termination of the mother's parental rights was in the best interests of the children, or in the judge's approval of the department's permanency plan.

Decrees affirmed.

By the Court (Sullivan,
Kinder & Lemire, JJ.¹⁶),


Clerk

Entered: September 9, 2020.

¹⁶ The panelists are listed in order of seniority.