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COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-5

ADOPTION OF IDINA.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The mother appeals from a Juvenile Court decree terminating her parental rights with respect to her daughter, Idina. The mother contends, among other things, that the judge erred in (1) concluding that the mother's issues with substance abuse and domestic violence rendered her unfit and likely to remain so into the indefinite future, and (2) shifting the burden to her to show that she was able to cope with Idina's special developmental needs. We agree and therefore vacate the decree with respect to the mother² and remand for further proceedings.

Background. Before Idina was born, the Department of Children and Families (department) already had a pending care and protection petition with regard to the mother and the

¹ A pseudonym.

² The child's father, to whom the mother is married, stipulated to the termination of his parental rights and has not appealed.

father's son, Jack,³ who was almost three years old at the time. The focus of that case was on the parents' substance abuse issues, the father's acts of domestic violence against the mother, and acts of abuse or neglect that led to physical injuries to Jack. The department's goal for Jack, however, was reunification with his parents.

When Idina was born, in May of 2014, the mother tested positive for opiates and oxycodone as a result of Percocet that she had been taking during her pregnancy. Idina tested positive for subutex and opiates, leading the department to file a care and protection petition and to obtain temporary custody of Idina. Upon release from the hospital, Idina was placed in a home with two foster parents, where she has remained ever since.

In July of 2014, both the mother and the father were arrested for possession of heroin. The mother began treatment at a methadone clinic in early August of 2014. Later that month, the department changed its goal for Jack to adoption and simultaneously decided that the goal for Idina was adoption as well.⁴ A judge approved the department's permanency plan for adoption of Idina in July of 2015 and again annually thereafter. See G. L. c. 119, § 29B (a) (requiring that court annually

³ A pseudonym.

⁴ It is unclear from the record whether the department had initially adopted any goal for Idina other than adoption.

review and approve permanency plan for child in department's custody).

In 2015, the parents stipulated to an open adoption of Jack. In June of 2016, the parents orally stipulated that Idina was still in need of care and protection, and the department was granted permanent custody. Although the terms of the stipulation are not in the record, the mother testified that, under the stipulation, she would be (and was) permitted increased visitation with Idina for the next six months, after which, if reunification was not underway, she could "file for a trial." In December of 2016, the mother filed a motion for the department to create a reunification plan, but the judge denied the motion. Neither the motion itself nor any statement of the judge's reasons for denying it is in the record before us, nor did the judge mention the issue in his findings.

The department moved ahead to terminate parental rights as to Idina, and the case was tried from June to September of 2018, resulting in decrees terminating both parents' rights and approving the department's plan for Idina to be adopted. Only the mother has appealed. See note 2, supra. Idina joins with the department in asking that we affirm the decree as to the mother.

Discussion. It was the department's burden to prove by clear and convincing evidence that the mother was currently

unfit to parent Idina and that Idina's best interests would be served by dispensing with the mother's consent to adoption. See Adoption of Gregory, 434 Mass. 117, 125-126 (2001). "We give substantial deference to a judge's decision that termination of a parent's rights is in the best interest of the child, and reverse only where the findings of fact are clearly erroneous or where there is a clear error of law or abuse of discretion." Adoption of Ilona, 459 Mass. 53, 59 (2011). Subsidiary findings must be proven only by a fair preponderance of the evidence. See Adoption of Quentin, 424 Mass. 882, 886 (1997).

But even where none of the subsidiary findings are clearly erroneous, it does not necessarily follow that those findings prove parental unfitness by clear and convincing evidence. See Custody of Eleanor, 414 Mass. 795, 799-800 (1993). The clear and convincing evidence standard means that, for the ultimate finding of unfitness, "[t]he requisite proof must be strong and positive; it must be 'full, clear and decisive'" (citation omitted). Adoption of Iris, 43 Mass. App. Ct. 95, 105 (1997), S.C., 427 Mass. 582 (1998).

Here, as the judge stated, the case against the mother "primarily involve[d] substance abuse and domestic violence." We therefore begin by focusing on those two issues. We then consider several other factors that the judge viewed as demonstrating unfitness.

1. Substance abuse. The judge found that the mother began receiving substance abuse treatment at a methadone clinic in August of 2014 and had continued her treatment there throughout the pendency of the case. The mother admitted that, up until June of 2015, she occasionally used heroin. The clinic regularly tested the mother for substance abuse; her last positive test for opiates was in May of 2015.

The mother was required to present herself at the clinic every day to obtain her dose of methadone for that day. In the months between February of 2017 and May of 2018, the mother missed twenty-two doses, or slightly more than one per month. Her substance abuse counselor testified, however, that she met regularly with the mother; that there was no issue with the mother consistently missing doses; that she believed some of the missed doses were attributable to the mother's work schedule conflicting with the clinic's "dosing hours"; and that, overall, the mother, with the assistance of methadone, had made a positive recovery from heroin addiction since being in the program.⁵ The mother had recently qualified to obtain doses

⁵ Clinic records showed that the mother's methadone dose had been as high as 140 milligrams per day in early 2015 but had decreased to thirty milligrams per day by the time of trial. The mother told a court investigator that she was "weaning off her methadone."

outside of regular dosing hours to accommodate her work schedule.

The mother tested positive for cannabis five times between August and October of 2016 and positive for cocaine four times between May of 2017 and January of 2018 (but negative in the three subsequent months). The judge did not credit the mother's innocent explanations (including blaming the father) for the positive cocaine tests.

In his conclusions of law, the judge considered that it was the mother's substance abuse problem at the time of Idina's birth that led to the filing of the care and protection petition. The judge also stated that the mother's attempts to blame the father for the positive cocaine tests called into question the mother's judgment in remaining in any sort of relationship with the father. The judge further alluded to concerns with mother's missing methadone doses, and her occasional positive tests for marijuana and cocaine.

Absent from the judge's conclusions, however, was any explanation of whether and how the mother's substance abuse problems, particularly as they seemingly lessened over time, rendered the mother unfit to parent Idina. See Adoption of Katharine, 42 Mass. App. Ct. 25, 31-34 (1997), citing G. L.

c. 210, § 3 (c) (xii).⁶ So far as the record shows, the mother had successfully dealt with her heroin addiction, through her reasonably (albeit not perfectly) consistent participation in her methadone program. The mother had apparently not used heroin in the three years before trial. Her five positive tests for cannabis in a three-month period almost two years prior to trial were not a significant concern. Even if her four positive cocaine tests (the most recent one coming five months before trial) could be said to evidence a "habit," it remains the case that, "[i]n the absence of a showing that a cocaine-using parent has been neglectful or abusive in the care of that parent's child, we do not think a cocaine habit, without more, translates automatically into legal unfitness to act as a parent."

Adoption of Katharine, supra at 34. "The termination of parental bonds is, after all, an 'extreme step'" (citation omitted), id. at 33, and use of illegal drugs does not support termination of parental rights absent evidence of some "linkage" between the drug use and the parent's unfitness. Id.

2. Domestic violence. In 2013, before Idina was born, the father perpetrated several domestic assaults against the mother.

⁶ As relevant here, factor xii requires a court, in determining fitness, to consider whether a parent's substance addiction "is reasonably likely to continue for a prolonged, indeterminate period" and "makes the parent . . . unlikely to provide minimally acceptable care of the child." G. L. c. 210, § 3 (c) (xii).

The mother obtained restraining orders against the father in September of 2014 (when Idina was four months old) and again in November of 2016 (when Idina was two and one-half years old). The department's service plans for the mother included engaging in domestic violence counseling and developing a safety plan regarding the father, but the mother did not consistently follow through on these tasks.

On December 24, 2016, after the mother refused to loan the father money or provide him with a ride (which the mother assumed was for the purpose of buying drugs), he threw her possessions around her bedroom. When she ignored him, he tore up their children's photographs and artwork and smashed a portrait of their family. He told her that if she telephoned the police, he would report to the department that she had beaten him. Brandishing a knife, he told her that if she did not give him money and a ride, "I'm going to make sure you never see your kids again."⁷ The mother then obtained another restraining order, which initially included a no-contact provision, but which the mother soon had amended to prohibit only abuse.

⁷ The record does not reflect, and the judge made no finding about, whether the father threatened to harm the children or instead to interfere with the mother's ability to visit them. The issue may be explored on remand to the extent the parties or the judge deem it relevant. See Care & Protection of Lillith, 61 Mass. App. Ct. 132, 140-142 (2004).

The mother testified that she had filed complaints for divorce in 2012, 2014, and 2016, but the judge did not credit this testimony. The mother was seen in the father's company in May of 2017 and again in March of 2018. The mother filed a complaint for divorce in July of 2017, but it was dismissed for lack of prosecution in January of 2018. The mother testified that that proceeding had been reopened and the divorce finalized later in 2018, but the judge did not credit this testimony.

Although there had been no violent incidents since December of 2016, the father continued to engage in threatening and harassing conduct of other kinds, often related to obtaining rides or money from the mother. He threatened to call the police and the State nursing board (from which the mother had a license) to complain about the mother's care for a relative for whom she was the guardian. In March of 2018, the mother reported that the father stole her car,⁸ and she further believed (although the judge found her story "near incomprehensible") that the father had gained online access to her bank account and

⁸ The mother testified that this occurred when he came to her house to retrieve some of his belongings. After they loaded several boxes in her car, she went back inside to make sure there were no more boxes, and when she went back outside, the father had driven her loaded car away. She believed he had found some money that she had left in the glove compartment and that he went to buy drugs. She called the police, and when the father returned with the car, they arrested him.

had stolen money from her. He had also broken into and hidden inside of her house.

Thus, at the time of trial, the mother's relationship with the father was a source of harassment, financial disruption, and emotional distress to her, and the judge found that some type of contact with the father was likely to continue. In his conclusions of law, the judge expressed concern that the mother's failure to engage in domestic violence services left her unaware of "the reality of her situation and the potential harm that could come to the child were she to be placed in [the m]other's care." He viewed the domestic violence issue as "unaddressed."

The issue was unquestionably cause for concern. "[P]hysical force within the family is both intolerable and too readily tolerated, and . . . a child who has been either the victim or the spectator of such abuse suffers a distinctly grievous kind of harm."⁹ Custody of Vaughn, 422 Mass. 590, 595 (1996).

However, there were also signs of progress since the violent incident eighteen months before trial. The mother obtained another no-contact restraining order against the father

⁹ Here, Idina was not present during the December 2016 incident.

in May of 2018, shortly before trial.¹⁰ The mother found the father's conduct "threatening," but the father was "not being physical," and she did not express any fear that the father would be violent toward her. In July of 2018, during the trial, the father was arraigned for violating a restraining order, apparently one obtained by the mother. The mother also planned to move to a new home so that the father could no longer find her.

Of course, that the father had not physically assaulted the mother since December of 2016 was not dispositive. The father's continuing controlling behaviors, and the mother's difficulty in protecting herself from them, suggested that some risk of his violent behavior remained. Nevertheless, in light of the mother's recent progress, we cannot say that the domestic violence issue, by itself or in combination with the substance abuse issue discussed supra, was enough to establish, by the requisite clear and convincing evidence, that the mother was unfit and likely to remain so, such that termination of her parental rights could be in Idina's best interests.

¹⁰ The department did not introduce in evidence the complaint or affidavit that the mother had filed to obtain this order, or any of the other previous orders except for the mother's affidavit for the December 2016 order. The existence of the May 2018 order was confirmed by the father's court activity record information (CARI) report introduced at trial.

3. Other factors considered. The judge's reliance on two other factors reinforces our conclusion that the mother's current and likely future unfitness was not established by clear and convincing evidence.

a. Bond with foster parents. The judge found that Idina had a strong, positive bond with the foster parents, and, in his conclusions of law, he discussed that bond in considerable detail in connection with one of the statutory factors relevant to whether parental rights should be terminated, G. L. c. 210, § 3 (c) (vii). That factor applies where:

"because of the lengthy absence of the parent or the parent's inability to meet the needs of the child, the child has formed a strong, positive bond with his substitute caretaker, the bond has existed for a substantial portion of the child's life, the forced removal of the child from the caretaker would likely cause serious psychological harm to the child and the parent lacks the capacity to meet the special needs of the child upon removal" (emphasis added).

G. L. c. 210, § 3 (c) (vii). The court has repeatedly emphasized that when factor (vii) is "decisive," a judge is "bound in findings to describe . . . why serious psychological harm would flow from the severance of those bonds, what means to alleviate that harm had been considered, and why those means were determined to be inadequate." Adoption of Katharine, 42 Mass. App. Ct. at 30-31. See Adoption of Zoltan, 71 Mass. App. Ct. 185, 196 (2008); Adoption of Abby, 62 Mass. App. Ct. 816,

828 (2005); Adoption of Rhona, 57 Mass. App. Ct. 479, 492 (2003).

Here, the judge discussed this factor at some length, focusing primarily on the nature of Idina's bonds with the foster parents and their ability to meet her special needs. To the extent that the judge viewed the factor as decisive, the judge was required to -- but did not -- make findings about the harm that separation from the foster parents would cause Idina. Instead, the judge relied on expert testimony that, as a general matter, early separations from substitute caretakers can cause long-term harm, the more so when a child has special needs. The expert, despite having met with Idina and the foster parents and opining that they had a healthy and secure bond, expressed no specific opinion about what would likely be the effects on Idina of separating her from the foster parents, and the judge made no finding about the effects on Idina. Nor did the judge make specific findings about what measures had been considered to alleviate any harm to Idina from such separation, and why those measures were deemed inadequate.¹¹ An assumption that Idina

¹¹ The judge credited the mother's testimony that she did not have as much of a bond with Idina as she had had with Jack. But the judge did not acknowledge mother's testimony that, if she were reunified with Idina, she expected that Idina would need increased therapy to help deal with any transition of custody, and that the mother intended to "do whatever [she] needed to do" in this regard. This included continuing any therapy or treatment arrangements that the foster parents had in place.

might be better off in the foster parents' custody is not enough; "we do not transfer a child from his or her parent to other custodians merely because the latter may provide a more advantageous environment for the child's upbringing."

Guardianship of Estelle, 70 Mass. App. Ct. 575, 580 (2007).

Moreover, as stressed in Adoption of Katharine, factor vii does not apply unless it is also found that "the parent lacks the capacity to meet the special needs of the child upon such removal." 42 Mass. App. Ct. at 31, quoting G. L. c. 210, § 3 (c) (vii). The court interpreted this phrase as referring to "the special emotional need [the child] would have in consequence" of a traumatic severance of bonds with the substitute caretaker. Adoption of Katharine, supra at 35. Findings that focus on parental shortcomings such as substance abuse, but that "do not touch on the parent['s] capacity to meet [such] emotional needs" of the child upon removal, are insufficient to support application of factor vii. Id. at 31.

Here, the judge made no specific findings on the mother's capacity in this regard. Instead, in discussing factor vii, the judge said only that he saw "nothing to indicate that [the

The mother also stated her intention to allow for a gradual transition and to maintain an ongoing relationship between Idina and the foster parents. The judge was of course not required to credit any of this testimony, but acknowledging it in some way would have increased our confidence in the judge's ultimate conclusions.

mother] is fully prepared to handle parenting a child who has" such needs. This was not only insufficiently specific, but it appeared improperly to shift the burden to the mother to prove her fitness on this issue, whereas the burden was on the department to prove the contrary. "The burden never shifts to the parent[]." Adoption of Larry, 434 Mass. 456, 470 (2001). See Guardianship of Estelle, 70 Mass. App. Ct. at 579 (parent is presumed fit, and where evidence is insufficient to show otherwise, parent's right to custody must be acknowledged).

b. Other special needs. The judge found that Idina had a range of special needs in the areas of social and emotional development and education. He then concluded, applying G. L. c. 210, § 3 (c) (vi), that, "despite [the mother's] consistent contact" with Idina since her birth,¹² "[t]here is no indication that [she] will be able to fully provide for [Idina's] complicated medical and social-emotional needs." For three reasons, this conclusion is problematic.

First, as with factor vii, the judge appeared improperly to place the burden of proof on the mother to show that she would be able to meet Idina's special needs, rather than examining whether the department had proven the mother unable to do so.

¹² The judge found that the mother's visits with Idina went well; the mother was prepared and engaged.

See Adoption of Larry, 434 Mass. at 470 (burden never shifts to parent).

Second, the judge made no factual findings and cited no evidence to support his apparent conclusion that the mother was unable to meet Idina's special needs. Such inability cannot simply be assumed from the mother's other shortcomings. Indeed, there was evidence, some of which the judge credited, that the mother had made efforts, in conjunction with the foster parents, to meet Idina's special needs.¹³ The judge was of course not required to credit, let alone give any particular weight to, all of the evidence on this point, but a fuller consideration of the issue is necessary.

Third, the department appears to have made little if any effort to familiarize the mother with Idina's needs. As we have

¹³ The foster parents updated the mother on an ongoing basis about evaluations of Idina, and a department social worker testified that the mother had "a good understanding of everything that's going on with [Idina]." The judge found that the foster parents informed the mother about the techniques they used to communicate with Idina despite her language deficits, and the mother used these techniques when she visited Idina, in what the social worker described as "a team approach." The mother further testified that one of the foster mothers was "great with keeping me involved and letting me know what's happening" regarding Idina's special needs, including sharing video recordings of Idina's appointments with an occupational therapist. The mother also testified that she was currently employed as a nanny for a family with a five year old child with special needs, and that she worked with that child's mother and teacher on meeting those needs. The mother was a licensed nurse.

noted, Idina was placed in foster care immediately upon being released from the hospital after her birth, and within four months thereafter, the department established adoption as the goal for Idina.¹⁴ Although a social worker testified that she informed the mother that there would be "concurrent planning" and "the goal can always go back to reunification," the department's service plans for the mother never included any tasks focused specifically on learning about Idina's special needs and how to meet them.¹⁵

Although the mother's claim that the department failed to make reasonable efforts toward reunification was not made to the judge and is therefore waived on appeal, see Adoption of Daisy, 77 Mass. App. Ct. 768, 781 (2010), S.C., 460 Mass. 72 (2011), it

¹⁴ That adoption was at that time deemed an appropriate goal for three year old Jack, who despite the department's involvement had suffered parental abuse and neglect over the course of several years, did not require that adoption also be established as the goal for three and one-half month old Idina. A parent's unfitness to parent one child does not rule out that parent's fitness to parent a different child. See Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 589 (1981).

¹⁵ The closest the department came was in its family action plan in effect from October of 2017 (when Idina was already nearly three and one-half years old) through April of 2018, which stated that the mother "could benefit from learning about the special needs that her daughter has," but included no tasks for the mother, or services to be provided directly or on referral by the department, aimed at accomplishing that goal. The family action plan from May of 2018, one month before trial, was identical in this regard.

is nevertheless appropriate to "consider the department's failure to make reasonable efforts in deciding whether a parent's unfitness is merely temporary." Adoption of Ilona, 459 Mass. at 61. See Adoption of Elena, 446 Mass. 24, 31-34 (2006) (judge must give due consideration to whether parent's shortcomings are temporary). Here, the judge concluded that the mother's overall unfitness was "likely to continue into the indefinite future to a near certitude." To the extent this conclusion was based on the mother's assumed inability to meet Idina's special needs, the department's lack of concerted effort to assist the mother in this regard leaves us unpersuaded that the mother's supposed deficiency was more than temporary.

Conclusion. We fully recognize that Idina has been in the same foster placement, and has been doing well there, since shortly after she was born more than six years ago, and that the foster parents are prepared to adopt her. We are therefore reluctant to delay any further the achievement of a permanent, stable home for Idina. "Stability in the lives of children is important, particularly in a case that has continued for a long period of time." Adoption of Nancy, 443 Mass. 512, 517 (2005). We further recognize that at the time of trial the mother had not completely overcome her problems with domestic violence and substance abuse; that these could pose some measure of risk to

Idina were custody returned to the mother; and that the mother's ability to meet Idina's special needs was unclear.

Nevertheless, we are constrained to conclude that here, "although the judge's findings were not clearly erroneous, the evidence on which they were based did not prove parental unfitness by clear and convincing evidence." Custody of Eleanor, 414 Mass. at 801. See id. at 802 n.12 (noting cases in which court reversed custody decision "where the properly supported findings were insufficient to prove current parental unfitness by the proper legal standard"). The proof of the mother's unfitness, at the time of trial and into the future, was not "strong and positive," or "full, clear and decisive" (citation omitted). Adoption of Iris, 43 Mass. App. Ct. at 105. We are not persuaded "to 'a high degree of probability'" (citation omitted) that the mother was, and will in the long term remain, so unfit that termination of her parental rights is in Idina's best interests. Id.

Therefore, without intimating any view on the ultimate result to be reached, we vacate the decree terminating the mother's parental rights to Idina and remand for further proceedings, which are to include but not be limited to consideration of the mother's substance abuse and domestic

violence issues, as well as the bonding and special needs concerns discussed herein.¹⁶

So ordered.

By the Court (Massing,
Sacks & Grant, JJ.¹⁷),



Clerk

Entered: January 12, 2021.

¹⁶ In view of the result we reach, we need not address the mother's arguments that the department violated her due process rights and that her trial counsel rendered ineffective assistance.

¹⁷ The panelists are listed in order of seniority.