COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1189
20-P-1267

ADOPTION OF XAVIER
(and a companion case[1]).

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After two separate trials, judges of the Juvenile Court found the mother and father unfit to parent their sons, Xavier and Adam, and terminated their parental rights.[2] The father appeals from both decrees while the mother appeals from the termination of parental rights as to Adam. We affirm.

Background. We recount the relevant and mostly undisputed facts, reserving certain details for our discussion. The mother and father are the parents of Adam, born in 2011, and Xavier, born in 2016.

The mother was born in 1985. She began to struggle with mental illness in her early adolescence, receiving a diagnosis

[1] Adoption of Adam. The children's names are pseudonyms.
[2] The petition in Adoption of Xavier, A.C. No. 20-P-1189, was filed in Essex County. The petition in Adoption of Adam, A.C. No. 20-P-1267, was filed in Suffolk County. The cases were paired for argument by this court.

of bipolar disorder at age sixteen. At various times since, she has been diagnosed with schizophrenia, depression, and anxiety. Because of these illnesses, the mother has experienced several psychiatric hospitalizations; she also has a history of medication noncompliance. In addition to her mental health challenges, the mother was diagnosed with multiple sclerosis around 2006.

The mother first encountered the Department of Children and Families (DCF or department) as a child consumer. Numerous G. L. c. 119, § 51A, reports (51A report) for abuse and neglect were filed on her behalf. The mother obtained her GED and attended Roxbury Community College though she did not graduate.

In 2004, the mother gave birth to a set of twins, Charles and Robert,[3] with her then boyfriend. The twins were born prematurely, and Charles passed away a few hours after birth. Around this time, DCF became involved with the mother as a parent. In 2005 a mandatory reporter filed a 51A report alleging that the mother failed to take Robert to several doctor's appointments. The report was supported for neglect.

The mother met the father around 2010. The couple had their first child together, Adam, in 2011 and married in 2012. Their second child, Xavier, was born in 2016.

[3] Pseudonyms.

The father was born in 1978. Both as a juvenile and into adulthood, he acquired a variety of criminal charges; he was most recently charged with strangulation and assault and battery on a household member. He graduated from high school and obtained an associate's degree from Massasoit Community College. As to his employment history, it was checkered and inconsistent. He testified that he ran his own marketing company that did business with National Grid, among others, and that he also owned a landscaping company and served as the "co-CEO" of a record label.[4] At the time of the trials, the father worked as a personal care assistant to the mother,[5] helping her around the house and aiding with her medications.

Together, the mother and father share a lengthy history of domestic violence that precipitated the department's involvement in this case. Both parents have exhibited violent behavior, but more often, the mother was the main aggressor -- her tendency to react to stress with outbursts of anger was closely intertwined with her mental illness.

In July 2012, three 51A reports alleging neglect and physical abuse of Robert and Adam were filed within a period of weeks. The first two reports, which were supported, followed an

[4] Neither judge fully credited the father's testimony related to his employment.

[5] The mother is eligible for a personal care assistant because of her multiple sclerosis diagnosis.

incident in which the police responded to the scene of a domestic dispute and observed the mother in the middle of the street holding a butcher knife. The third report, which was screened in for an emergency response, alleged that the mother destroyed property and punched Robert. The father reported that the mother was not taking her medication on this occasion.

A similar incident occurred the following year, compelling DCF to action. In April of 2013, two 51A reports were filed after the mother punched the father in front of Robert and Adam, and later the same day, the parents engaged in a heated argument as Adam stood between them. These reports were supported after investigation. DCF filed a care and protection petition on behalf of both Robert and Adam as a result of this episode.

In the wake of the petition, Robert's father received permanent custody of his son while the department received temporary custody of Adam.[6]

Adam returned to live with the mother and father in May 2014. The department removed him again in July 2015 due to renewed concerns of domestic violence related neglect. Additional 51A reports, all later found to be supported, were filed in the intervening period. One such report alleged that the mother went after the father with two knives while Adam was

[6] Robert is not involved in this appeal.

in the home. In the final instance, a social worker arrived at the home to meet with the family, triggering a dispute. The mother and father began to argue. The mother sought to leave the home with Adam but could not find an appropriate place to stay. The social worker contacted the police for assistance and conducted an emergency removal. DCF subsequently filed a care and protection petition and again obtained custody of Adam, placing him with his paternal aunt.

In August 2016, the mother gave birth to Xavier. The department filed an emergency care and protection petition the next day and obtained temporary custody of Xavier. He has remained in DCF's custody since. After these events, the department attempted to work with the parents to facilitate reunification. However, by 2017 it changed the goal for both children to adoption.

From 2016 to 2018, the department struggled to maintain contact with the father and on the few occasions it was successful in making contact with him, he expressed a lack of interest in both children.

Although the mother made concerted efforts to cooperate with the department, they proved insufficient to sustain the goal of reunification. Her service plan compliance was inconsistent, and she struggled to manage her mental illness and outbursts of violence in the home. Indeed, domestic violence

between the mother and father persisted during this period, eventually culminating in the mother's arrest in December 2017 and an eight-month institutionalization at the Worcester Recovery Center Hospital (hospital).

Both parents displayed some improvements in 2018. The mother was released from the hospital in July 2018, and the father renewed contact with the department in August 2018. Most notably, there had been no reported incidents of domestic violence since the December 2017 incident. Both parents attended visitation regularly and exhibited appropriate behavior.

In 2019, judges of the Juvenile Court held two separate trials.[7] Both judges found the mother and father unfit and terminated their parental rights. These timely appeals followed.

Discussion. The decision to terminate a parent's rights requires a two-part analysis. See Adoption of Garret, 92 Mass. App. Ct. 664, 671 (2018). "First, the judge must determine whether the parent is fit to carry out the duties and responsibilities required of a parent." Id. If the judge finds the parent unfit by clear and convincing evidence, and there is

[7] The trial in Xavier's case resumed and ended in September 2019. The trial in Adam's case took place between July and December 2019 on nonconsecutive days.

no "credible evidence supporting a reasonable likelihood that the parent will become fit" in the near future, the judge next assesses whether termination of parental rights is in the best interests of the child. Adoption of Ilona, 459 Mass. 53, 59 (2011). "[T]he parental fitness test and the best interests of the child test are not mutually exclusive, but rather reflect different degrees of emphasis on the same factors" (quotation omitted). Adoption of Garret, supra, quoting Care & Protection of Three Minors, 392 Mass. 704, 714 (1984). Factors relevant to this determination include "a parent's character, temperament, conduct, and capacity to provide for the child in the same context with the child's particular needs, affections, and age" (citation omitted). Adoption of Garret, supra, quoting Adoption of Mary, 414 Mass. 705, 711 (1993). At bottom, the inquiry is whether these considerations render the parent "so bad as to place the child at serious risk of peril from abuse, neglect, or other activity harmful to the child." Adoption of Chad, 94 Mass. App. Ct. 828, 838 (2019), quoting Adoption of Zoltan, 71 Mass. App. Ct. 185, 188 (2008).

We review decisions to terminate parental rights to determine whether the trial judge "abused his [or her] discretion or committed a clear error of law." Adoption of Elena, 446 Mass. 24, 30 (2006). We give significant deference to the judge's subsidiary findings and will only disturb them if

clearly erroneous. See Adoption of Jacques, 82 Mass. App. Ct. 601, 606-607 (2012).

1. The father's appeal as to Adam. a. Sufficiency of the evidence. The father advances several arguments related to the sufficiency of the evidence. Most of these arguments amount to "a disagreement with the judge's weighing of the evidence and credibility determinations." Adoption of Don, 435 Mass. 158, 166 (2001). Ultimately, these claims fail because "[w]e do not sit as a trial court to review de novo the evidence presented by the parties." Id., quoting Adoption of Paula, 420 Mass. 716, 730 (1995).

The father broadly argues that the judge's finding of unfitness is not supported by clear and convincing evidence. Our review of the record leads us to conclude otherwise. After making 145 detailed and unchallenged findings of fact and thirty-six conclusions of law bearing on both parents' character, temperament, conduct, and capacity, the judge determined that their "grievous shortcomings" placed Adam at risk of future harm. Among the father's foremost shortcomings were (1) "his complete lack of insight into the severity of [the] mother's condition," (2) his denial of past domestic violence in the home despite strong evidence to the contrary, and (3) his refusal to participate in domestic violence related services -- all appropriate factors for the judge to consider

when assessing the father's ability to care for Adam and protect him from the mother. The judge also considered the father's near two-year absence from Adam's life, which demonstrated a lack of interest, and balanced it against his recent "minimal[]" engagement with the department. Here, the judge noted that the father had only "partially complied with his service plan and has done so most begrudgingly with contempt toward the department." The judge consequently concluded that despite his recent efforts, the father failed to show an improvement in his parenting skills or an ability to provide a safe home for Adam. Although less significant to the calculus, the judge also acknowledged the father's criminal record, which included domestic violence related charges. The judge noted that this factor was "not conclusive" but considered the history "in contrast with both parents' testimony that there [was] no domestic violence in their relationship." Finally, and in a similar capacity, the judge noted the father's "unwillingness to terminate his relationship with [the] mother and safeguard his child from her." Not only do these findings amply show unfitness and a risk of future harm from domestic violence and neglect to Adam, but they also demonstrate that the judge paid careful attention to the evidence. See Adoption of Nancy, 443 Mass. 512, 515 (2005).

The father objects to the import the judge attached to several of the above concerns: (1) his lack of insight into the mother's mental health challenges, (2) his failure to comply with DCF's service plans, and (3) his criminal record. He argues for various reasons that they do not clearly and convincingly establish his unfitness, but his contentions are unavailing given the deference we accord to the judge's weighing of the evidence. See Adoption of Olivette, 79 Mass. App. Ct. 141, 157 (2011).

The father disputes the judge's focus on his limited understanding of the mother's mental illness because the judge could not "reasonably expect that [the] father . . . should have a full understanding of the nuances of [the] mother's medical conditions." No such understanding was necessary, but the judge was entitled to give significant weight to the father's testimony denying that the mother suffered from a mental illness and attributing her "harmless" behavior to her multiple sclerosis. The judge was likewise within her discretion to find this fact highly relevant to the father's capacity to provide for Adam as it raised questions as to whether he could maintain a safe living environment and protect Adam from the mother.

The father next asserts that the judge should have given less weight to his failure to comply with his service plan because certain items, including a batterer's course and

parenting and psychological evaluations, were not adequately tailored to his parenting deficiencies. See Adoption of Yale, 65 Mass. App. Ct. 236, 242 (2005) ("We attach least significance in these circumstances to the mother's failure to comply with the department's service plans, where certain tasks in those plans do not appear related to any clearly identified deficiencies"). Yet a review of the record reveals the need for each of these services and their relationship to the father's parenting weaknesses. For instance, the batterer's course was intended to help the father "better understand the cycle of domestic violence and increase his skills to safely manage conflict within his marriage." Therefore, the judge did not err in giving the matter weight.

As to his criminal record, the father takes issue with the judge's consideration of conduct that did not result in conviction. But our cases do not prohibit a judge from assessing such conduct. See, e.g., Care & Protection of Frank, 409 Mass. 492, 495-497 (1991); Adoption of Irwin, 28 Mass. App. Ct. 41, 42-43 (1989). Moreover, the judge gave this factor negligible weight, utilizing it to contradict the father's claims that there was no domestic violence in the home.[8]

[8] The father's two most recent charges were for strangulation and assault and battery on a household member.

The father separately asserts that it was error for the judge to acknowledge his conservative Christian values while at the same time weighing his decision to stay married to the mother as a factor supporting unfitness. But the "central judgment" in a care and protection case "does not concern the father's merits or demerits, but whether, in all the circumstances (including consideration of those merits or demerits), he has the capacity to act as a fit parent." Adoption of Nicole, 40 Mass. App. Ct. 259, 262 (1996). In this regard the judge was well warranted in considering the father's unwillingness to leave the mother as a factor in the analysis, given the history of domestic violence in the home.

The father's arguments that the judge failed to adequately address favorable evidence likewise fail.[9] He argues that the judge "ignore[d]" evidence of the father's "recent gains" including the quality of his visits with Adam and the progress made in his service plan. The judge specifically acknowledged both facts, however, crediting the father for attending his recent visitations and behaving appropriately during them and for his partial compliance with the service plans. Thus, the judge did not ignore these advances but instead gave them the

[9] The father makes these claims in the context of his larger argument that the judge's findings around his failure to comply with his service plan and his two-year absence from the case do not clearly and convincingly establish parental unfitness.

weight that, in her discretion, they deserved. Not only did they fail to convince her that the father's parenting skills had truly improved, but they were also belied by her assessment of the father's attitude, which led the judge to believe his efforts were not genuine. It was within the proper performance of the judge's function of weighing the evidence and assessing the credibility of the parties, to give this evidence less weight and to determine that the information pointing to unfitness outweighed these positive developments.

Finally, the father contends that the judge improperly relied on stale evidence. Stale evidence may not form the basis for a finding of current unfitness, but a judge can use prior history for its prognostic value. See Adoption of Jacques, 82 Mass. App. Ct. at 607. Past conduct is particularly compelling on the issue of current fitness "where the evidence support[s] the continuing vitality of [the] conduct." Adoption of Larry, 434 Mass. 456, 469 (2001).

Certain types of cases may require greater assessment of a parent's past behavior. Relevant here, a parent's history of domestic violence, even if dated, may be important in assessing a parent's current or future fitness. See Care & Protection of Lillith, 61 Mass. App. Ct. 132, 139-142 (2004). This is so in light of the SJC's recognition that "physical force within the family is . . . intolerable . . . and that a child who has been

either the victim or the spectator of such abuse suffers a distinctly grievous kind of harm." Custody of Vaughn, 422 Mass. 590, 595 (1996).

With the exception of the one year preceding trial, the entirety of the parents' relationship was marked by domestic violence, and the judge was entitled to contemplate this pattern of violent and threatening behavior, which often involved weapons and occurred in front of some of the children, in predicting the future safety of the household. This conduct also garnered fresh relevance because of the parents' behavior at the time of trial, which among other things, included the father's refusal to acknowledge the family's history of domestic violence or participate in related services. Likewise, the continued vitality of domestic violence concerns made it proper for the judge to consider the parents' criminal records as evidence rebutting their denial of past conflict in the home.

b. Permanency plan. The father also argues that the judge abused her discretion when approving Adam's permanency plan and denying visitation because she predicated those rulings on an erroneous finding: that there was no evidence of attachment between Adam and the father. As an initial matter, the judge made this finding only in assessing whether to order postadoption visitation. It did not bear on the judge's approval of the adoption plan, which the judge found to be in

Adam's best interests. As to visitation, the record reflects that the judge did not clearly err in finding no significant existing bond between the father and Adam. The judge was therefore within her discretion not to order visits. See Adoption of Ilona, 459 Mass. at 65.

2. The mother's appeal as to Adam.[10] a. Sufficiency of the evidence. The mother argues that the judge's finding of unfitness is not supported by clear and convincing evidence. She also argues that the findings fail to demonstrate that Adam would be at risk of serious harm if returned to her custody. Once again, our review of the record suggests otherwise, as the judge's decision was supported by detailed findings of fact and well-reasoned conclusions of law. The key factors supporting the termination decision as to the mother were her (1) temperament, conduct, and mental stability, and (2) her lack of insight into and tendency to minimize her mental illness and past acts of domestic violence. With regard to the mother's mental health challenges, the judge considered her recent hospitalization as well as her history of refusing treatment and medication, expressing fear that these behaviors might recur. Concerning her temperament and conduct, the judge was troubled

[10] The mother challenges several findings of fact made by the judge. Because these findings did not form the basis for the judge's decision, we need not address them.

by the mother's past perpetration of domestic violence in the home and by her more recent outbursts in the DCF office and at trial. Based on these factors, the judge concluded that the "mother's temperament and conduct still pose a great safety risk to [Adam]." Specifically, the judge expressed concern about the mother's ability to manage the "everyday stress" of being a parent without resorting to violence. Compounding this concern was that the mother refused to acknowledge her past actions or engage in services related to domestic violence. Other less significant circumstances supporting the judge's decision included the mother's pattern of neglect and use of physical violence against Robert and her criminal history, which the judge considered as evidence rebutting her denial of domestic violence.[11]

Like the father, the mother contends that the judge failed to acknowledge the gains she made after her 2018 hospitalization. These claims fail for the reasons discussed above. Not only did the judge specifically credit the mother for the lack of recent domestic violence and for her service plan compliance, but it was also within the judge's proper function to accord these gains minimal weight and find them

[11] The mother's "most recent charges include assault and battery with a dangerous weapon and assault and battery on a household member."

outweighed by the evidence outlined above. Ultimately, despite the mother's recent efforts, the judge found that there had been little improvement in the mother's condition or in her ability to care for Adam. The mother's stale evidence claim fails for reasons similar to those discussed as to the father. The judge properly considered the mother's history of domestic violence and untreated mental health issues to make predictions about the future safety in the home, given the evidence before the judge suggesting that these problems persisted. This evidence included the mother's numerous court room outbursts throughout the pendency of the case[12] as well as her denials of and lack of understanding surrounding her mental illness and past domestic violence.

b. Reasonable accommodations. The mother also argues that DCF failed to provide her with the reasonable accommodations necessary to attain reunification with Adam. However, this claim is waived as the mother failed to raise it in a timely manner. See Adoption of Gregory, 434 Mass. 117, 124 (2001) ("a parent must raise a claim of inadequate services in a timely manner so that reasonable accommodations may be made. . . . [W]here . . . a disabled parent fails to make a timely claim

[12] The behavior of a parent at trial including their ability to manage their anger is relevant to parental fitness. See Adoption of Yvonne, 99 Mass. App. Ct. 574, 580 (2021).

that the department is providing inadequate services for his needs, he may not raise noncompliance with the ADA or other antidiscrimination laws for the first time at a termination proceeding").

3. The father's appeal as to Xavier. The father argues there was insufficient evidence to support a finding of current unfitness as to Xavier and that at worst, his unfitness was only temporary. We disagree. The judge made 316 detailed findings of fact and forty-five conclusions of law. Her primary concerns leading to a finding of unfitness were (1) the father's two-year absence from the case, (2) his continuing lack of cooperation with the department,[13] (3) his denials of past domestic violence in the home and of the mother's mental illness, and (4) his history of neglect of Robert and Adam.[14] The record supports these conclusions as well as the weight the judge attached to them.[15] See Adoption of Olivette, 79 Mass. App. Ct. at 157.

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[13] The father's contention that the service plan tasks had no nexus to his parenting deficiencies fails for the reasons discussed as to Adam.

[14] The judge also briefly looked at the father's criminal record, noting it was not a conclusive factor. For the reasons already discussed, we reject the father's claim that the judge could not consider his criminal record because the charges did not result in convictions.

[15] The father's additional claim that the judge erred in expressing concern whether he could simultaneously care for Xavier and the mother is without merit. This did not factor into the judge's determination that the father was unfit to parent Xavier.

The judge also did not err in rejecting the prospect that the father's unfitness was merely temporary. "Because childhood is fleeting, a parent's unfitness is not temporary if it is reasonably likely to continue for a prolonged or indeterminate period." Adoption of Ilona, 459 Mass. at 60. At the time of trial, the father continued to minimize the issues that triggered the proceedings against him, making it reasonable for the judge to conclude that his unfitness was likely to continue for a prolonged period.

The father's contention that the judge failed to recognize recent evidence in his favor is not availing because the judge specifically addressed his progress but found it insufficient to outweigh the other evidence pointing to unfitness. For instance, in considering the father's capacity to perform the obligations of a parent, the judge credited the father for his recent engagement with the department and positive visits with Xavier. Yet she went on to address the countervailing evidence that the father knew little about Xavier and showed no initiative to learn about his personality, medical care, and involvement in services. She was further troubled that the father "ha[d] never been in a caretaking role" with Xavier and had only "spent approximately eleven hours/eleven visits with him in total." In weighing all considerations, both good and bad, the judge concluded that the father's two years' absence

outweighed his year of progress because he failed to make a "realistic showing that he [was] able to appreciate or perform the obligations that would rest on him as a parent." We defer to the judge's conclusions about the proper weight to attach to these competing pieces of evidence. See Adoption of Olivette, 79 Mass. App. Ct. at 157.

The father also argues that the judge erred by considering the potential traumatic impact that reunification would have on Xavier. General Laws c. 210, § 3 (c) (vii), requires the judge to assess whether, "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." Where this factor is "decisive," we have required trial judges to make detailed findings on "the nature of the bonds formed, why serious psychological harm would flow from the severance of these 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. 25, 30-31 (1997). In a subsequent case, we posited that expert

testimony may be necessary in some instances. See Adoption of Rhona, 63 Mass. App. Ct. 117, 126-127 (2005).

The father cites Adoption of Katharine and Adoption of Rhona, arguing that the judge erred by failing to make specific findings on factor (vii), and noting that there was no expert testimony. But factor (vii) was not decisive in this case. As required, the judge merely indicated that this factor applied but at no point cited it among the primary rationales for her decision.

Finally, the father's stale evidence claim fails because the judge looked to the past evidence for its prognostic value and the current evidence suggested that the father's behaviors persisted. As discussed above, the judge properly assessed the father's absence from the case to predict and assess his current parenting abilities. This evidence had continued vitality in light of the father's continued lack of interest in learning about Xavier and his refusal to fully comply with his service plan. Likewise, the judge properly considered the parents' history of domestic violence and its impact on Robert and Adam as evidence "establishing [a] pattern of ongoing instability of the family" relevant to the father's ability to care for Xavier. Despite the father's suggestion to the contrary, fresh evidence revitalized concerns in this area, including the failure of both parents to acknowledge the presence of domestic violence and

engage in services related to it. The father's claim that the parents' history of domestic violence does not pose a risk to Xavier is unavailing in light of the judge's conclusion that the mother and father "ha[d] not adequately remedied the issue."

Decrees affirmed.

By the Court (Meade, Shin & Walsh, JJ.[16]),

Joseph F. Stanton

Clerk

Entered: October 19, 2021.

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