COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-810

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

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This case involves the welfare of two girls: Tori (born in 2011) and Cora (born in 2014). In June of 2013, the Department of Children and Families (department) removed Tori from the mother's care, and it took custody of Cora two days after she was born.[2] A lengthy series of foster placements for the girls ensued, as well as a brief unsuccessful attempt at reunification of the girls with the mother. Eventually, the girls -- both of whom had developed profound special needs -- were placed with different sets of foster parents who wished to adopt them. For the vast majority of the relevant time period, the father was incarcerated. At least partly as a consequence, the father

[1] Adoption of Cora. The children's names are pseudonyms.

[2] The department also removed three other children of the mother who had different fathers. The termination trial for one of those children was consolidated with the one for Tori and Cora, but no issues related to that child are the subject of the current appeal.

played a minimal role in the girls' day to day lives. Notably, he has not seen either girl since July of 2015.

After an initial trial in 2016, both parents were found unfit, and the girls were placed in the department's permanent custody. In 2019, the department moved to terminate the parents' rights. During the ensuing termination trial, the mother stipulated to her unfitness and to the termination of her parental rights; the father did not. Following the trial, a Juvenile Court judge issued decrees that found the girls in need of care and protection, found the father unfit, and terminated his parental rights. The judge also approved the department's placement plan under which the children would be adopted by their respective foster parents. The father timely appealed, and the judge's findings of fact and conclusions of law were docketed on May 20, 2021.

On appeal, the father principally argues that the department did not make reasonable efforts to support reunification of the girls with him. See G. L. c. 119, § 29C (recognizing department's obligation to make "reasonable efforts" designed to make it "possible for the child to return safely to his parent"). See also Care & Protection of Walt, 478 Mass. 212, 220-221 (2017).[3] Although we agree with the father

[3] Generally speaking, in order to preserve a reasonable efforts argument, a parent must raise it during the period when the

that the department did not live up to its duties in this regard, we affirm the decrees that terminated the father's parental rights and approved the department's adoption plans.

Background. The mother and father were never married, and their time together was brief. The father was barely involved as Tori's primary caretaker, and he played no caretaking role whatsoever with regard to Cora. The mother had served as Tori's primary caretaker before she was removed, and the department's reunification efforts were focused primarily on the mother.

Because the mother has stipulated to the termination of her parental rights, nothing would be gained by chronicling the evidence regarding her unfitness. Instead, we focus on the father's fitness and on the extent of the department's efforts to assist him in assuming a parental role.

As noted, the father was incarcerated for lengthy periods of time during the relevant time frame. A month after Tori was born in 2011, he was incarcerated for two years. In July of

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department is not living up to its responsibilities. See Adoption of Gregory, 434 Mass. 117, 124 (2001) ("parent must raise a claim of inadequate services in a timely manner so that reasonable accommodations may be made"). Here, however, the father had no assigned counsel between February 2016 and October 2019, and therefore some latitude is due him with respect to his failure to press such arguments in a timely manner. The department maintains that the father separately waived the issue by not pressing it at trial (when he was represented). Even if the father could have done more to press the issue at trial, the judge expressly addressed the issue, and, in any event, we exercise our discretion to address it as well.

2013, following his release from that incarceration, he had some supervised visits with Tori, but he was reincarcerated in late 2013 until February 2014. At the father's request, Tori did not visit him while he was in jail. He resumed supervised visits with Tori after his 2014 release, and he began some supervised visits with Cora after she was born. However, in early 2015, the father again was reincarcerated and he was not released until October of 2020. The beginning of that incarceration was in State custody, but in July of 2015, he was transferred into Federal custody, during which he was held in several different out-of-State prisons.

As the department emphasizes, the father's incarceration outside of Massachusetts created various not insignificant impediments and complications. For example, this meant that the department was without means to bring the girls to visit the father, or vice versa, and it complicated the department's ability to oversee any services the father was provided. The department did make some efforts to stay in touch with the father while he was in Federal custody, and to keep him generally apprised of steps that he needed to take to establish his parenting skills. The judge expressly found that such efforts were "reasonable." In fact, the judge went so far as to conclude that "the [d]epartment was ready, willing, and able to

render what assistance it could to [the f]ather and keep him apprised of his children's cases and his action plans."

We acknowledge that the department faced difficult challenges in fulfilling its responsibilities with respect to the father. We also are mindful that our review of the judge's fact finding is limited. See Adoption of Quentin, 424 Mass. 882, 886 (1997) (subsidiary findings may be reversed only if clearly erroneous). Nevertheless, we agree with the father that the department's efforts fell short of meeting its obligations. For example, it appears uncontested that after a new social worker was assigned in 2018, and for the next two years, that social worker made only the following efforts to reach out to the father: mailing various documents to the Federal institution where she was not even sure the father was incarcerated, and leaving her contact information in two

voicemail messages that were never returned.[4] In our view, the judge erred in finding such efforts reasonable.[5]

That said, "it does not follow that the father [therefore] is entitled to reversal of the decrees terminating his parental rights." Adoption of Franklin, 99 Mass. App. Ct. 787, 798 (2021), citing G. L. c. 119, § 29C. As the statute makes explicit, "[a] determination by the court that reasonable efforts were not made shall not preclude the court from making any appropriate order conducive to the child's best interest." G. L. c. 119, § 29C. In the end, "[w]hile courts protect the rights of parents, 'the parents' rights are secondary to the child's best interests and . . . the proper focus of termination proceedings is the welfare of the child.'" Adoption of Ilona, 459 Mass. 53, 61 (2011), quoting Adoption of Gregory, 434 Mass. 117, 121 (2001).

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[4] With respect to the fact that the father frequently was transferred between Federal prisons, the father points to various materials available online that suggest that Federal inmates can be located with relative ease. In response, the department moved to strike that material as beyond the trial record. We need not decide that motion, because we have not relied on the cited materials in concluding that the department failed to make reasonable efforts. Indeed, at oral argument, the department acknowledged that it could and should have done more.

[5] The subsidiary facts about what efforts the department made are not contested. Whether those efforts were "reasonable" is at least to a great extent a question of law to which ordinary deference to the fact finder is not due.

The judge's finding that the father was unfit and her conclusion that the girls' best interests would be furthered by the termination of his parental rights are sound and well-supported by the trial record. We are confident that those determinations did not turn on the level of effort that the department made toward reuniting him with the girls. In this regard, we note that much of the father's unfitness was a direct result of the lengthy absences caused by his multiple incarcerations.[6] Moreover, it is undisputed that both girls have profound special needs that the father has shown no appreciable understanding of, or ability to address.[7] While the father might have benefited from additional services had the department made more efforts while he was in Federal custody, the consequences of the department's failure to do so must be viewed in light of the father's failure to make effective use of such services and opportunities when they were made available to him at other

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[6] We agree with the father's counsel that fitness determinations do not turn on moral judgments. See Adoption of Bianca, 91 Mass. App. Ct. 428, 432 n.8 (2017). However, it remains true that the father's multiple incarcerations rendered him unavailable to parent the girls for almost all of their lives to date.

[7] Tori exhibits various significant educational and behavioral needs such as hoarding food and aggressive behavior (including stabbing another student with a pencil). Cora's needs are even more intense and include smearing her feces, acting with extreme aggression against people and property, and various kinds of unsafe behavior. She has been diagnosed with numerous mental illnesses including an unspecified psychotic disorder.

times.[8] Overall, the father has demonstrated little interest or ability in fulfilling the awesome responsibilities of being a parent, responsibilities that are particularly acute given the girls' profound special needs. Finally, both girls now are bonded with their respective foster parents, with whom they are thriving, and both would "suffer [harm] if removed from their pre-adoptive homes."[9] See Adoption of Nicole, 40 Mass. App. Ct. 259, 262-263 (1996) (bonding between child and preadoptive parents may be considered). In sum, we ultimately agree with the department and the girls that a remand based on the department's shortcomings would serve little purpose and only cause further harm. As we have often said, "it is only fair to the children to say, at some point, 'enough.'" Adoption of Nancy, 443 Mass. 512, 517 (2005). That time has come in this case.

[8] We note, for example, that in one of the brief periods in which the father was not incarcerated, the department made efforts to have the father attend a meeting related to Tori's special needs and one of Cora's doctor's appointments, and the father declined to attend both. Moreover, when released from prison in 2020, the father did not notify the department of that release. We do not view the judge's taking into account the father's own lack of efforts to maintain his relationship with the girls as amounting to improper "burden shifting."

[9] The judge credited the testimony of the department's expert who testified to the bonding between Cora and her foster parents and the harm that could befall her if removed from their care.

One issue remains. As noted, the father did not have assigned counsel for a lengthy period of time during this case, and we consequently have given the father some latitude with respect to his failure to raise his reasonable efforts arguments sooner. See note 4, supra. To the extent that the father otherwise maintains that his failure to have assigned counsel caused him additional material prejudice, we are unpersuaded. The father was assigned new counsel several months before the termination trial began, and the father has not alleged, much less demonstrated, that his counsel did not have sufficient time to counter the department's evidence or otherwise make his case.

Decrees affirmed.

By the Court (Milkey, Hand & Brennan, JJ.[10]),

Joseph F. Stanton

Clerk

Entered: May 20, 2022.

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