COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-634

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

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a trial in the Juvenile Court, a judge found the mother unfit to parent her sons, Callan and David, and terminated her parental rights.[2] On appeal, the mother argues that certain of the judge's findings rest on improperly admitted evidence or are clearly erroneous, and that the evidence was insufficient to support the ultimate determination of unfitness by clear and convincing evidence.[3] We affirm.

Background. We summarize the relevant facts found by the judge, reserving some details for our discussion. Concerns over

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

[2] The father's parental rights were terminated after he stipulated to his unfitness.

[3] "Despite the moral overtones of the statutory term 'unfit,' the judge's decision was not a moral judgment or a determination that the mother . . . [does] not love the child. The inquiry instead is whether the [mother's] deficiencies or limitations 'place the child at serious risk of peril from abuse, neglect, or other activity harmful to the child.'" Adoption of Bianca, 91 Mass. App. Ct. 428, 432 n.8 (2017), quoting Care & Protection of Bruce, 44 Mass. App. Ct. 758, 761 (1998).

the children's welfare led the Department of Children and Families (department) to seek, and receive, custody of the children for the first time in August 2013.[4] After the children were returned to the mother's custody in December 2014, the department received multiple reports pursuant to G. L. c. 119, § 51A (51A reports), over the following years. The subsequent investigations pursuant to G. L. c. 119, § 51B (51B reports), generally documented that the mother's apartment was clean and organized. However, the police reported that when they were called to respond to violent domestic disputes, the children were present. On one of these occasions, the mother was brandishing a taser. The department also learned that the mother had allowed a man whom she had known for "less than a month" to move into her apartment, and that she suspected this man of sexually abusing David.

The department's concerns came to a head in September 2017. Around 10:30 A.M., while the mother was asleep, the children attempted to use the microwave to cook rice. David was five

[4] The mother and her then-boyfriend had gone to a restaurant to ask for food for the children, who were with them and appeared inadequately dressed. The police arrived and arrested the mother's boyfriend on an unrelated warrant and took the children to the hospital for a "welfare check." The mother did not arrive at the hospital for two hours, prompting the department to seek emergency custody. Although the department had also been involved with the family to some extent prior to 2013, that involvement did not prompt the department to seek custody of the children.

years old at the time and spilled boiling water on his leg, sustaining a second-degree burn. The mother awoke when she heard his screams. The mother called 911, and David received treatment at a hospital emergency room. When the family returned from the hospital, department emergency response workers visited. There was no food in the apartment and the mother did not have a plan to obtain any. Nor could the mother articulate a plan for getting David to an appointment with a burn specialist on the following day. The children's teeth appeared to be "very yellow" and one of Callan's teeth was turning black. While living with their mother, the children were exposed to domestic violence, substance misuse, and sexual activity. The children were removed from the mother's custody, and in September 2017, the department filed a care and protection petition.

The judge found that the mother, who suffers from severe mental health and cognitive issues, had not made "observable changes" in her behavior.[5] Despite some participation in domestic violence services, the mother continued to have

[5] The mother has been diagnosed with posttraumatic stress disorder, bipolar I disorder, anxiety, major depressive disorder, obsessive-compulsive disorder, and attention deficit hyperactivity disorder. Additionally, the mother scored an IQ of sixty-five on the Wechsler Abbreviated Scale of Intelligence and has "severe impairments in functional abilities such as judgment, relationship capacity, knowledge about daily lifestyle needs, and how to parent."

relationships with men who were physically abusive. The mother continued to see or contact her former abusive boyfriends for help with housing, money, and transportation. At trial, the mother claimed her current boyfriend (boyfriend) was not abusive. However, the police were called twice in December of 2019 due to arguments between the mother and the boyfriend. During one argument, the mother was holding a knife that she threw to the floor. On another occasion, the mother had to leave a shelter because the boyfriend was calling "every two seconds." In addition, when the boyfriend's cousin broke into the mother's apartment and stabbed the boyfriend, the mother lied to the department about the incident.

After the children were removed, the mother struggled to maintain stable housing and at one point was living in a tent with numerous adult cats, kittens, and a bearded dragon. Inside the tent, which had an overwhelming odor of urine, police found live animals stained with urine and dehydrated. Outside the tent, the police found a trash bag containing decomposed feline remains and a crate containing two dead kittens as well as excrement and water.

The department also had concerns with the mother's behavior during visits with the children: she would often promise the children inappropriate presents, such as a kitten or cell phones, and struggled to manage the children's disruptive

behavior. The mother often ended visits early and, at times, failed to show up at all. Although the mother did engage in therapy, she did so intermittently, claiming that scheduling conflicts prevented her from maintaining consistency.

Discussion. 1. Psychological evaluation. The mother argues that her neuropsychological evaluation performed by Dr. Gabriela Szemes (Szemes report) was not admitted in evidence as part of exhibit 48 and therefore the judge relied on an unadmitted document in reaching her determination of unfitness.[6] We disagree.

The majority of the trial was remote due to the COVID-19 pandemic. On September 11, 2020, the mother's attorney moved to introduce the Department of Developmental Services "supplement" in evidence; no other party objected. The attorney for the department remarked that a portion of what the mother's attorney sought to admit was the Szemes report, and that the copy that she had received was "extremely blurry." The judge "[made] a note of that" and assured the parties that she would confirm that there was a copy of the Szemes report in the record. This exchange put counsel for the mother on notice that both the department and the judge believed the Szemes report was being

[6] The psychological evaluation was sought by the mother's attorney and undertaken with the mother's understanding that the result may be "used in [c]ourt to inform decision-making on behalf of her children."

admitted in evidence and gave her an opportunity to object or clarify that she was not offering it. When she failed to do so, she waived the issue. See Adoption of Kimberly, 414 Mass. 526, 534-535 (1993) ("The consequence of such a failure to object is to waive the objection to the [evidence]").[7]

2. Privileged records. Next, the mother argues that the judge improperly relied on privileged mental health records in reaching her conclusion regarding unfitness. We address the mother's argument as to her mental health records generally and then address her argument as to the notes of Monica Crespo dated September 15, 2017 (Crespo notes).

The record reflects that several exhibits, offered in evidence by the mother, contained communications between the mother and mental health professionals. The mother was offering these notes to establish her participation in therapy.[8] Although the mother did raise the possibility that portions of these exhibits were privileged early in the trial, she did not press the issue nor ensure that the privileged portions were redacted prior to offering them in evidence. For example, the mother

[7] Because we conclude that the Szemes report was in the record, we need not reach the question whether the record was properly supplemented pursuant to Mass. R. A. P. 8 (e), as appearing in 481 Mass. 611 (2019).

[8] The mother did not have to rely on her mental health records to prove her participation in therapy, as the department's counsel was amenable to stipulating to the facts showing her attendance.

annotated the records with "Post-it" notes, pointing to sections of the records that she believed contained privileged communications. When, however, she sought to have the records introduced as exhibits, it was by agreement with the department and without any assertion of a statutory privilege. "The psychotherapist-patient privilege is a creature of statute, and 'is not self-executing'" (citation omitted). Matter of M.S., 99 Mass. App. Ct. 247, 253 (2021). See Commonwealth v. Oliveira, 438 Mass. 325, 331 (2002) ("The patient must . . . affirmatively exercise the [G. L. c. 233, § 20B,] privilege in order to prevent the [disclosure of the communications at trial]" [citation omitted]).[9]

In any event, the mother fails to establish that the admission of these therapy notes resulted in prejudice. The mother argues that the notes allowed the judge to find that the mother maintained an abusive relationship through trial. Evidence elsewhere in the record established that the mother had been in numerous abusive relationships despite some participation in domestic violence services. As to the mother's relationship with the boyfriend through trial, evidence elsewhere in the record showed the pair had a tumultuous

[9] The mother did not have to rely on her mental health records to prove her participation in therapy, as the department's counsel was amenable to stipulating to the facts showing her attendance.

relationship, including controlling and verbally abusive behavior on the part of the boyfriend.

On the fifth day of trial, the mother sought a privilege ruling concerning the Crespo notes. The trial judge found that while the mother's privilege applied to certain statements in the Crespo notes, the objected-to statements were probative of "highly relevant issues with regard to [the mother's] parental rights" and "outweigh[ed] the interests of protecting privilege." We agree that the mother properly preserved her objection and asserted her privilege as to the Crespo notes. Even if the judge's ruling were in error, an issue we do not decide, the mother fails to establish that admission of these notes resulted in prejudice. These notes were from three years before trial and not about the boyfriend. Accordingly, their significance was marginal at best.

3. 51A reports. The mother argues that the judge impermissibly relied on information contained within the 51A reports as substantive evidence. A trial judge may rely on 51A reports only to "set the stage." Adoption of Querida, 94 Mass. App. Ct. 771, 778 (2019), quoting Custody of Michel, 28 Mass. App. Ct. 260, 267 (1990). To the extent that the judge relied on statements by Callan in a 51A report, that was error. However, we conclude there was no prejudice because the essence of the statements -- that the children were exposed to domestic

violence, substance abuse, and sexual activity -- was included in the department-created family assessment, which was admissible "for statements of primary fact, so long as the hearsay source [was] specifically identified in the document." Adoption of Luc, 484 Mass. 139, 153 (2020). Moreover, even without the specific statements in the 51A report, there was ample support for the ultimate finding of unfitness.

4. Unfitness. The mother's argument that the ultimate determination of her parental unfitness was error rests on her claim that certain of the judge's findings were erroneous and, absent those erroneous findings, parental unfitness was not supported by clear and convincing evidence. The challenged findings include that the mother was unable to attend therapy consistently, that the mother missed or cancelled early intervention appointments, and that David was sexually assaulted by the mother's roommate.

Parental rights may not be terminated unless "a judge . . . find[s] by clear and convincing evidence, based on subsidiary findings proved by at least a fair preponderance of evidence, that the parent is unfit to care for the child and that termination is in the child's best interests." Adoption of Querida, 94 Mass. App. Ct. at 777, quoting Adoption of Jacques, 82 Mass. App. Ct. 601, 606 (2012). A trial judge's determination that a parent is unfit and that termination of

parental rights is in the best interests of the child is entitled to substantial deference, and we "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). "A finding is clearly erroneous when there is no evidence to support it, or when, 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed'" (citation omitted). Custody of Eleanor, 414 Mass. 795, 799 (1993).

Assuming without deciding that certain challenged findings of the judge were clearly erroneous, there was nonetheless clear and convincing evidence supporting the finding that the mother was currently unfit to care for these children. There was significant evidence that the mother's "deficiencies 'place[d] the child[ren] at serious risk of peril from abuse, neglect, or other activity harmful to the child[ren].'" Adoption of Varik, 95 Mass. App. Ct. 762, 767 (2019), quoting Adoption of Olivette, 79 Mass. App. Ct. 141, 157 (2011).

The mother does not dispute that she suffers from complex mental health diagnoses and significant cognitive impairments that cause her to struggle to differentiate between fantasy and reality, control her emotions, and parent the children. See Adoption of Frederick, 405 Mass. 1, 9 (1989) (mental disorder

relevant to fitness if it affects capacity for parental responsibility). She later struggled to maintain housing that would be appropriate for the children, living at times in shelters, rooming houses, hotels, and various apartments. And contrary to the mother's contention, the judge did consider -- and credit -- the children's involvement with early intervention services while in the mother's care. The mother also does not challenge the finding that she was not able to properly supervise the children during visits. See Adoption of Yalena, 100 Mass. App. Ct. 542, 552 (2021). The mother continued to have relationships with abusive partners, despite her participation in domestic violence services, supporting the judge's conclusion that the mother "fails to understand . . . the significant effect [this issue has] on her ability to parent" the children.[10] Moreover, and in contravention of her

[10] For this reason, it is immaterial whether, as the mother claims, the judge erred in finding that the mother's participation in therapy was inconsistent. Even if the mother's therapy attendance had been consistent, "mere participation in the services does not render a parent fit 'without evidence of appreciable improvement in her ability to meet the needs of the child[ren]'" (citation omitted). Adoption of Ulrich, 94 Mass. App. Ct. 668, 677 (2019). Similarly, the allegations that David was sexually assaulted by the mother's roommate, which were reported by the mother, go to the mother's ability to provide a safe and supervised environment for the children, not for the truth of the matter as to the alleged assault. The fact that the mother, when she identified her new roommate as the possible assailant, could not or would not provide the roommate's name to the police similarly demonstrates the lack of a safe and supervised environment for the children.

service plan, the mother continued to have extensive involvement with the police because of violent incidents.[11] See Adoption of Garret, 92 Mass. App. Ct. 664, 673-674 (2018). It is clear that the judge's determination was based "on a constellation of factors that pointed to termination as being in the best interests of the child[ren]," and is supported by ample evidence. Adoption of Greta, 431 Mass. 577, 588 (2000).

Decrees affirmed.

By the Court (Vuono, Henry & Ditkoff, JJ.[12]),

Joseph F. Stanton

Clerk

Entered: September 19, 2022.

[11] The mother admitted to an argument at a hotel because the mother no longer wanted to be in a dating relationship with the boyfriend. The police were called to a hotel when the mother and the boyfriend were arguing; the mother had a knife and threw it down. On one occasion, the police responded after the boyfriend was stabbed in her apartment by his cousin, and the mother lied about it.

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