COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

22-P-99

ADOPTION OF HARRISON.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The Department of Children and Families (department) filed a care and protection petition in January 2016 and was granted temporary custody of Harrison in 2017. After a 2020-2021 trial, a Juvenile Court judge found the mother and father unfit, terminated their parental rights, and approved the adoption plan of the department. The mother and father separately appeal. They both argue that their due process rights were violated and that the judge erred in weighing the evidence of substance misuse, domestic violence, and housing instability against them. The mother further alleges that the judge erred in finding that her mental health issues contributed to unfitness. Lastly, the mother and father claim that the department failed to make reasonable efforts at reunification. Concluding that the judge did not make appropriate findings based on the admitted evidence

[1] A pseudonym.

that there was a nexus between the mother's and father's substance misuse, alleged domestic abuse, and housing instability, and harm to the child, we vacate the decrees and remand to the Juvenile Court for further proceedings.

Background. We recount the relevant facts, reserving certain details for later discussion. Harrison was born in July 2010. The department has been involved with Harrison since a January 2016 report pursuant to G. L. c. 119, § 51A, was filed after the mother informed staff at a hospital emergency room that she had used heroin the day prior to her appearing at the emergency room complaining of tooth pain and shoulder pain. Initially, the mother lied to the department about not knowing who Harrison's father was, delaying the department's assessment of the father until early 2017.

The department developed family action plans for the mother, starting in January 2016, and the father, starting in April 2017. In December 2017, the mother and father agreed to a stipulation that they were "currently unable, unwilling, and/or unfit to parent Harrison" and agreed that they needed time to complete work on the family action plans.

The mother and father have a history of substance misuse, domestic violence, and housing instability. Additionally, the mother has a history of mental health disorders.

Discussion. 1. Due process claims. Procedural due process requires that parties have an "opportunity to be heard at a meaningful time and in a meaningful manner" (quotation and citation omitted). Mathews v. Eldridge, 424 U.S. 319, 333 (1976). The father claims that his due process rights were violated when his attorney appeared virtually for three trial dates, and the mother claims that the judge's questioning was biased and violated her due process rights. "Objections, issues, or claims -- however meritorious -- that have not been raised at the trial level are deemed generally to have been waived on appeal." Palmer v. Murphey, 42 Mass. App. Ct. 334, 338 (1997). Neither the father nor the mother raised their due process claims at the trial court, so the claims are waived. Even if they had raised the issues below, they have not shown that their due process rights were violated.

a. Virtual representation. A hybrid format, when some witnesses and litigants appeared by Zoom[2] and others appeared in person, was an appropriate balance in this case to ensure that all parties' rights could be accommodated. In fact, the judge continued the trial in order for some of the parties to appear in person because of their lack of technological capabilities.

[2] See Adoption of Patty, 489 Mass. 630, 633 (2022) (trial "proceeded via a video conferencing platform provided by Zoom Video Communications, Inc. [Zoom]").

The parties had an opportunity to testify and were able to present evidence. Furthermore, the lawyers were allowed to cross-examine the witnesses extensively. There was no showing that any party did not have the right to speak to his or her attorney or was deprived of any rights. See Vazquez Diaz v. Commonwealth, 487 Mass. 336, 355 (2021) (no violation of attorney-client communication in virtual format where party could have asked judge to confer with counsel). As such, the parties had a meaningful opportunity to be heard at the trial. To the extent there were communication difficulties, including the father sometimes not taking his counsel's phone calls, the father does not identify any specific prejudice that resulted. Additionally, the nearly one-year delay between the third and fourth trial dates, though unfortunate, was necessary due to the COVID-19 pandemic. The father has not pointed to any specific prejudice that resulted from this delay.

On the record before us, we discern no deprivation of due process occasioned by the judge's decision to proceed with a hybrid format, any communication difficulties, or the delay between the third and fourth trial dates. See Adoption of Patty, 489 Mass. 630, 640-641 (2022) (judge has flexibility to determine how litigants have meaningful opportunity to be heard, including using video conferencing).

b. Biased questioning. At trial, the judge asked the mother many questions. There is no prohibition against a judge asking questions at a hearing or a trial as long as the judge avoids the appearance of partisanship. See Adoption of Norbert, 83 Mass. App. Ct. 542, 547 (2013). The mother's suggestion that the judge engaged in a "takeover of questioning" at trial is both hyperbolic and misleading. Unlike the judge in Adoption of Norbert, supra at 546, the judge here asked only a limited number of questions. See id. ("judge asked over 1,000 questions as compared to the approximately 725 questions asked by counsel [for all other parties] combined"). Additionally, with a limited number of exceptions, the judge used his questions permissibly to clarify the testimony and the record.[3] See

[3] Though the judge's questions as a whole did not rise to the level of bias, we do have some concern with some of the specific questions asked during trial. Asking questions in a way that conveys disbelief, rather than seeking clarification, creates a risk that "a judge's impartiality might reasonably be questioned." Commonwealth v. Morgan RV Resorts, LLC, 84 Mass. App. Ct. 1, 10 n.16 (2013). For example, when the mother was on the stand, the following questioning occurred:

> The judge: "You're asking the Court to believe that for three years you had insurance issues and you couldn't resolve your insurance issue, and that's why there was such a gap?"
>
> The mother: "Yes."
>
> The judge: "Is that what you want me to believe?"
>
> The mother: "Well, yeah, because when I'm looking for doctors, they put you on waiting lists."

Commonwealth v. Hassey, 40 Mass. App. Ct. 806, 810 (1996) (judge may ask questions to clarify evidence).

We do not find that the judge's questions and comments demonstrated any impermissible bias so as to violate due process. Cf. Adoption of Seth, 29 Mass. App. Ct. 343, 350-351 (1990).

2. Termination of the mother's parental rights. The central question in an action to terminate parental rights is whether a parent is unfit, and if so, whether termination is in the best interests of the child. See Adoption of Ilona, 459 Mass. 53, 59 (2011). Findings to support a termination of parental rights must be by "clear and convincing evidence, based

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> The judge: "Well, you had social workers. DCF had custody of your kids. You had a social worker, right? And for three years you had no insurance? Is that what you're saying?"
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> The mother: "No, I had insurance."
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> The judge: "So why didn't you have psychiatric services?"
>
> The mother: "It was only a short period of time."
>
> The judge: "No, it wasn't. Your lawyer said you were engaged in 2016 and '17, and then nothing until February of 2020. Three years."
>
> The mother: "Took three years? I -- I didn't realize it took three years, but I was on --"
>
> The judge: "Well, that's the numbers that I'm given. I mean, maybe I wrote them down wrong."

on subsidiary findings proved by at least a fair preponderance of evidence." Adoption of Darlene, 99 Mass. App. Ct. 696, 702 (2021), quoting Adoption of Jacques, 82 Mass. App. Ct. 601, 606 (2012). "We give substantial deference to a judge's decision . . . 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, supra. "Parental unfitness . . . means more than ineptitude, handicap, character flaw, conviction of a crime, unusual life style, or inability to do as good a job as the child's foster parent. Rather, the idea of parental unfitness means grievous shortcomings or handicaps that put the child's welfare much at hazard." Adoption of Darlene, supra, quoting Adoption of Leland, 65 Mass. App. Ct. 580, 584 (2006).

The judge considered evidence of substance misuse, domestic violence, unstable housing, and mental health disorders to determine that the mother was unfit.

a. Mother's substance misuse. Evidence of substance misuse is "relevant to a parent's willingness, competence, and availability to provide care." Adoption of Anton, 72 Mass. App. Ct. 667, 676 (2008). There must be a sufficient link between the parental conduct and harm to the child. See Care & Protection of Ian, 46 Mass. App. Ct. 615, 617 n.4 (1999) ("It is not enough to state that a parent has a particular condition

without detailing the ways in which that condition renders the parent unfit"); Adoption of Katharine, 42 Mass. App. Ct. 25, 33-34 (1997).

Here, "there is very little evidentiary basis compelling the connection the findings have drawn between the mother's drug use and the harm to [Harrison]." Adoption of Rhona, 57 Mass. App. Ct. 479, 483 (2003). To be sure, there was enough evidence to support the finding that the mother had a substance use disorder. The mother admitted in May 2018 to previously using heroin once or twice a week, and she tested positive for opiates in January 2019, tested positive for fentanyl in April 2019, and used marijuana throughout 2019 and 2020. However, the judge did not connect this substance use with any harm to Harrison. Because "nothing in the judge's findings draws a connection between the mother's admitted . . . drug . . . use and the child's injury, or some other failure to provide minimally acceptable care," Adoption of Zoltan, 71 Mass. App. Ct. 185, 191 (2008),[4] we conclude that a remand is necessary on this issue for

[4] The judge also found that the mother was unable to meet the goals in the department's family action plans, which required her to engage in consistent substance abuse treatment and demonstrate one year of sobriety. While "[e]vidence such as . . . the refusal of the parents to maintain service plans . . . [is] relevant to the determination of unfitness," Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 399 Mass. 279, 289 (1987), its relevance is limited when there is no nexus shown between the parents' condition and any failure to provide minimally acceptable care to the child.

the judge to determine whether, based on the admitted evidence or additional evidence presented at a new hearing, there is a nexus between the mother's substance misuse and harm to the child.

b. Domestic violence. "Violence within a family is highly relevant to a judge's determination of parental unfitness and the best interests of the child[]." Adoption of Gillian, 63 Mass. App. Ct. 398, 404 n.6 (2005). While "a judge can consider a pattern of past conduct to predict future ability and performance" (quotation and citation omitted), Adoption of Ulrich, 94 Mass. App. Ct. 668, 676 (2019), "[i]solated problems in the past or stale information cannot be a basis for a determination of current parental unfitness." Adoption of Rhona, 57 Mass. App. Ct. at 487, quoting Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 18 Mass. App. Ct. 120, 126 (1984).

Here, the judge first noted that prior to her relationship with the father, the mother was in an abusive relationship with another man. The judge found that "Mother and Father's conflict escalated to the point of domestic violence on several occasions, likely in front of Harrison while they were living in Tennessee" in or about 2014. However, there were no findings that Harrison witnessed the domestic violence in Tennessee. As was the case in Adoption of Posy, 94 Mass. App. Ct. 748, 754

(2019), "the record is devoid of police reports documenting any response to domestic violence in the parents' home, or any indication that the mother sought, or obtained, a G. L. c. 209A abuse prevention order for protection against the father." Because the police report was not in the record, there was no evidence as to who was involved in the incident in Tennessee or as to who the judge found credible.

The most recent evidence of domestic violence was from the summer of 2016, when the mother sent her adult son, Adam (a pseudonym), a picture of her bloody and bruised face and told him the father beat her up. When later confronted with the picture, the mother told the department that it was not the father who had hit her but that she was robbed by a different person. She also denied telling Adam that it was the father who had hit her. The mother subsequently did tell the department that she had told Adam that the father had hurt her, but that she did not really mean it. The judge made no determination as to which account he deemed credible.

In August 2020, the department received a police report that the mother was physically assaulted, though she denied her attacker was the father. Instead, the mother told the department that she had been struck by an intoxicated stranger who had entered her home and then left. This, however, differed from the police report, where the mother said the perpetrator

was her former boyfriend. The mother informed her therapist in February 2020 that the father "ha[d] become more verbally and emotionally abusive [due to] his drinking." She also "anticipate[d] moving out if the behavior continue[d]."[5]

This court has previously determined that "[t]he passage of four years is too long a period to rely on the predictive value of past behavior without verification -- especially when evidence contradicting the prediction is readily available." Adoption of Rhona, 57 Mass. App. Ct. at 486. Here, five years had passed between the last evidence of a domestic violence incident and the end of the trial, making the evidence stale.

The department claimed that there had been evidence since 2016 that domestic violence occurred, but it is unclear whether the judge credited any of these allegations. At trial, a social worker assigned to the case testified that she saw bruising on the mother "after [the mother and father] were both known to be in the same state and an altercation had occurred." However, there was no evidence in the record that the judge credited that

[5] In his factual findings, the judge found that the mother "informed her therapist in February of 2020 that she separated from Father due to a domestic violence incident." We agree with the father that this finding is clearly erroneous because "there is no evidence to support it, or . . . 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" (quotation and citation omitted). Adoption of Larry, 434 Mass. 456, 482 (2001).

any altercation occurred between the mother and the father. Likewise, there was evidence that the mother told her therapist about "a fight with her husband" but no evidence that the fight included physical force or any form of violence.[6] See Adoption of Posy, 94 Mass. App. Ct. at 754 (judge's reliance on "general allegation, unsupported by specific incidents, was insufficient to support a conclusion that the father had 'longstanding issues of domestic violence'").

On remand, the judge must make findings, based on the admitted evidence, regarding the alleged domestic abuse.

c. Mother's housing instability. Inability to secure adequate stable housing is a proper consideration in determining a parent's fitness. See Adoption of Anton, 72 Mass. App. Ct. at 676.

In 2015, the mother and Harrison left their home in Tennessee and had to move back to Massachusetts. The mother was homeless in 2016 while Harrison lived with the maternal grandmother. Then, in January 2017, the mother was evicted from her apartment for nonpayment of rent and lived with a friend.

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[6] The judge also found that the "Mother and Father remain unable to resolve their conflict between each other in a healthy way." Evidence to support this included the father's testimony that to resolve conflict with each other, one of the parents will "leave the house to go on a walk or go for a drive to 'cool off.'" The judge did not explain how this strategy to resolve conflict was unhealthy.

The child was brought into the department's custody in March 2017. In February 2018, the mother and father started living together before becoming homeless in 2019 due to nonpayment of rent. They secured housing in June 2020 after the maternal grandmother cosigned the lease for an apartment. The judge found that "[i]n April 2021, Mother . . . had stable housing." The department has observed the home and "found it to be fully furnished with working smoke and carbon monoxide alarms."

The judge must provide further findings, and if necessary on this issue, take additional evidence, to determine whether the mother has a housing instability problem that is ongoing or likely to recur.

d. Mother's mental health. "Mental disorder is relevant only to the extent that it affects the parents' capacity to assume parental responsibility, and ability to deal with a child's special needs." Adoption of Frederick, 405 Mass. 1, 9 (1989). There must be some nexus between a mental health disorder and abuse or neglect of the child. See Care & Protection of Bruce, 44 Mass. App. Ct. 758, 763-764 (1998).

The mother has been diagnosed with bipolar disorder, major depressive disorder, and generalized anxiety disorder. These illnesses have made the mother unable to work. Due in part to her mental health, the mother receives disability checks every month, and she and the father are able to pay the rent of their

current apartment. As with the factors above, the judge's findings did not support a nexus between the mother's mental disorders and any harm to Harrison.

Further findings on the topic, based on the evidence admitted, are required to determine whether her mental health disorders affected her ability to "provide minimally acceptable care of [Harrison]." Care & Protection of Bruce, 44 Mass. App. Ct. at 764, quoting G. L. c. 210, § 3 (c) (xii).

3. Termination of the father's parental rights. The judge considered evidence of substance misuse, domestic violence, and unstable housing to determine that the father was unfit.

a. Father's substance misuse. In May 2018, the father admitted that he had used heroin once or twice a week before his claimed sober date of April 10, 2018. Though the judge stated that the father "struggled to stay sober from illegal substances," the father had not tested positive for heroin since 2018. Between 2018 and 2020, the father tested negative for heroin at every screening. However, he stopped attending substance abuse treatment programs in August 2020. While the father admitted to using marijuana and alcohol regularly, the judge did not make findings of fact that showed a nexus between the father's substance misuse and any neglect of Harrison. There is not clear and convincing evidence that there was a

sufficient nexus between the father's substance misuse and any harm to Harrison.

We conclude that a remand is necessary on this issue for the judge to determine whether, based on the admitted evidence, there is a nexus between the father's substance misuse and harm to the child.

b. Domestic violence. In addition to the discussion supra in section 2(b), the judge relied on stale evidence of domestic violence specific to the father. He first referenced restraining orders entered against the father by two women other than the mother in 1997 and 2007. The judge then discussed two domestic violence charges against the father in Tennessee in 2012 and 2014, from which no convictions resulted. No police report was admitted in evidence at trial. The judge did not rely on any evidence since 2016 to determine the father had a current domestic violence problem. See Adoption of Rhona, 57 Mass. App. Ct. at 486.

c. Housing instability. The father's housing instability is discussed supra in section 2(c).

We conclude that a remand is necessary for the judge to determine whether, based on the admitted evidence, there is a nexus between the father's substance misuse and domestic violence and harm to the child. Additionally, new evidence may

be admitted to determine whether the father has a housing instability problem that is ongoing or likely to recur.

4. Best interests of the child. "[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.'" Care & Protection of Three Minors, 392 Mass. 704, 714 (1984), quoting Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption, 367 Mass. 631, 641 (1975). In considering the best interests of the child, "the court shall consider the ability, capacity, fitness and readiness of the child's parents . . . to assume parental responsibility, and shall also consider the plan proposed by the department or other agency initiating the petition." G. L. c. 210, § 3 (c). The judge found that eight of the fourteen factors in § 3 (c) applied to this case. We have previously discussed the judge's findings regarding subsections (ii), (iii), (iv), (vi), (viii), (ix), and (xii). As to subsection (vii) the judge found that Harrison had a strong, positive bond with his preadoptive family.

Harrison started living with his preadoptive family in July 2019. He has expressed a desire to be adopted by the family and refers to his preadoptive parents as "mom and dad." He is very close to the other children in the home and believes he is "safer" with his preadoptive family. He "expressed

concern that his parents will not be able to properly take care of him, [which would send him] back into the foster care system." The judge noted that the mother and father "lack the ability and capacity to alleviate the harm Harrison would suffer if he was removed from the pre-adoptive family."

"Although the bonding of a child with foster or adoptive parents is not a dispositive consideration, it is a factor that has weight in the ultimate balance." Adoption of Nicole, 40 Mass. App. Ct. 259, 262-263 (1996). "The bonding of children with their foster parents cannot be the dispositive factor in these cases because the very fact of placing a child in foster care during judicial proceedings would in every case determine the outcome of those proceedings." Adoption of Rhona, 57 Mass. App. Ct. at 492. To find that severing the bonds with the preadoptive family is a decisive factor, "a judge would be bound in findings to describe the nature of the bonds formed, 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.

Here, the judge made no such findings. See Adoption of Rhona, 57 Mass. App. Ct. at 492. Therefore, the judge's reliance on subsection (vii) is not sufficient to find that

severing the mother's and father's parental rights is in the best interests of the child.

5. Reasonable efforts. "When . . . terminating parental rights, a judge must determine whether the department has complied with its duty to make 'reasonable efforts . . . to prevent or eliminate the need for removal from the home.'" Adoption of Ilona, 459 Mass. at 61, quoting G. L. c. 119, § 29C. See Care & Protection of Rashida, 489 Mass. 128, 130 (2022) (Rashida II); Care & Protection of Rashida, 488 Mass. 217, 221 (2021) (Rashida I). The burden is on the department to prove by a preponderance of the evidence that it has made reasonable efforts. See Rashida II, supra at 129.

The mother's and father's arguments on appeal are akin to "[a] claim of inadequate services[, which] must be raised in a timely manner to provide the judge and the department the opportunity to make accommodations while the case is pending." Adoption of Yalena, 100 Mass. App. Ct. 542, 554 (2021).[7] Although the parents did not make any reasonable efforts arguments at trial, the judge on remand may take additional evidence and make findings on the issue.

[7] The mother suggests that she raised the claim in closing argument and her proposed findings of fact. "We are not persuaded that the mother put the department or the judge on notice of her current claim of inadequate services." Adoption of West, 97 Mass. App. Ct. 238, 243 (2020).

6. Conclusion. On the record and findings before us, there is insufficient evidence to show a nexus between the mother's and father's conditions and harm to Harrison. Although we agree with the judge that the record raises concerns about the mother's and father's fitness, further exploration and explication is necessary before either parent's rights may be terminated. Because much time has passed since the decrees were entered, and even more time has passed since the start of the trial in 2020, "[w]e are without information about the current circumstances of either parent or of the child." Adoption of Rhona, 57 Mass. App. Ct. at 493. "It may be that facts have developed in the interim . . . which might place [Harrison] at risk." Adoption of Katharine, 42 Mass. App. Ct. at 34. Therefore, an immediate termination of the child's foster care placement is not warranted. The current situation of the parents and Harrison should be evaluated before any action is taken.

We vacate the decrees terminating the parents' parental

rights and remand this case to determine the parents' current fitness and the best interests of the child.

So ordered.

By the Court (Desmond, Sacks & D'Angelo, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: November 23, 2022.

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