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19-P-1182

Appeals Court

ADOPTION OF HELGA (and a companion case¹).

No. 19-P-1182.

Essex. February 6, 2020. - May 28, 2020.

Present: Massing, Neyman, & Singh, JJ.

Parent and Child, Adoption. Evidence, Inference. Minor,
Adoption, Visitation rights. Adoption, Visitation rights.

Petitions filed in the Essex County Division of the Juvenile Court Department on June 2, 2017.

The cases were heard by Mark Newman, J., and a motion for relief from judgment was heard by him.

Ann C. Narris, Committee for Public Counsel Services, for the mother.

Richard A. Salcedo for Department of Children and Families.
Alan D. Campbell for the children.

MASSING, J. In this appeal from decrees terminating her parental rights with respect to two children, the mother contends that the trial judge erroneously applied an adverse inference from the mother's failure to attend the last two days

¹ Adoption of Julia. The children's names are pseudonyms.

of the seven-day trial. She also contends that the judge erred by terminating her parental rights in favor of adoption by the maternal grandmother, where a guardianship was a less extreme measure. Finally, she contends that the judge erred by leaving visitation to the discretion of the maternal grandmother. Discerning no legal or factual error or abuse of discretion, we affirm.²

Background. The Department of Children and Families (department) commenced these proceedings on June 2, 2017, the day after the mother was found unconscious on the floor of a bathroom in a fast food restaurant, accompanied by her two daughters, Helga and Julia, who were, respectively, eight and four years old at the time. That day, after drinking shots of vodka, the mother drove with the children to purchase heroin, and then to the restaurant, where the mother sniffed heroin in the bathroom and passed out while the girls were with her. The children screamed for help. Emergency personnel arrived and revived the mother, who was taken to the hospital. The department took emergency custody of the girls.

This was not the mother's first involvement with the department, nor the first time that Helga was removed from her

² Helga's father passed away before the trial. The paternity of Julia's putative father was not established and he is not involved in this appeal.

custody. The mother had a twenty-five year history of drug and alcohol dependence, and had drifted from one physically abusive relationship to another. When the mother was pregnant with Helga in 2008, Helga's father threw the mother down a flight of stairs, causing the mother to seek refuge in a domestic violence shelter. After Helga was born, the mother moved into her mother's (maternal grandmother) house, left, and returned after Helga's father punched her.

The mother began using drugs when she was twelve years old and was addicted to opioids by the time she was twenty-one. Her longest period of sobriety lasted approximately three years, beginning a few months after Helga was born and ending in 2011 when the maternal grandmother found a hypodermic needle, a spoon, and a bottle of vodka under Helga's bed. The maternal grandmother, acting on her own, obtained custody of Helga for the next nine months.

During this time, the mother became involved in an abusive relationship with Julia's putative father.³ He threatened and slapped the mother; the maternal grandmother frequently observed bruises on the mother during this time. When Helga was returned to the mother, she moved to Michigan with Julia's father to

³ Julia's putative father claimed paternity, but in spite of being given numerous opportunities to establish paternity, he failed to do so. We refer to him as Julia's father for ease of reference.

prevent the maternal grandmother from regaining custody of Helga. In Michigan she gave birth to Julia and then obtained a protective order against Julia's father. The mother returned to Massachusetts with the girls in 2013.

In 2014, the department received G. L. c. 119, § 51A, reports indicating that the mother was under the influence of opioids at a shelter where she was living with the children, and that Helga went to school with an empty wine bottle in her backpack.⁴ In late 2014, the mother moved into an apartment with the children and Julia's father. The cycle of domestic violence, drug and alcohol abuse in front of the children, and housing instability continued. The mother moved in and out of shelters, and at one point she relocated to Rhode Island with Julia's father; Helga attended seven different schools up to the time the children were removed in 2017. The mother was often under the influence of drugs or alcohol and, as a result, would neglect to supervise the children.

The department took custody of the children in 2017 and provided the mother with service plans to address her substance use, mental health, and domestic violence issues. The mother sporadically engaged in drug and alcohol treatment programs but repeatedly relapsed. In March 2018 she overdosed and "was found

⁴ The department investigated both reports but took no further action at that time.

unconscious in a puddle," and in June 2018 she was arrested for operating a motor vehicle under the influence. She became involved in another abusive relationship, which culminated with this man breaking into the mother's apartment and attempting to rape her. At the time of trial she was living with another man and was pregnant with her third child.

The department placed the girls in the maternal grandmother's care. In her care, the children began to attend school regularly. Helga received an individualized education program to catch her up in math and reading and to address her anger issues. The maternal grandmother also cared for Helga's severe asthma. Nine years old at the time of trial, Helga considered the maternal grandmother's home to be her "safe place" and "did not want to see her mother." Julia, five years old at the time of trial, appeared bonded with the mother and enjoyed visits with her.

The judge concluded that the mother was unfit to parent the two girls (a conclusion that the mother does not dispute), that "there is a reasonable likelihood that Mother's unfitness will continue into the indefinite future," and that the children's best interests would be served by terminating the mother's parental rights. The judge was particularly troubled by the mother's failure to engage in substance use disorder treatment and by her "dishonesty about her alcohol and drug use," which he

took as evidence that she did not appreciate the depth of her disorder or the efforts needed to address it. The judge approved of the department's plan for the maternal grandmother to adopt the children and declined to order posttermination or postadoption visitation, expressing "confidence" that the maternal grandmother "will act in [Helga] and [Julia]'s best interests" regarding visits with their mother.

Discussion. 1. Adverse inference from mother's absence at part of trial. The mother attended the first five days of trial -- August 9, August 15, September 6, September 7, and September 21, 2018 -- testifying on three of those days. The mother did not appear for the sixth day of trial on September 26, when the social worker assigned to the mother's case and the adoption social worker testified. The department asked the judge to draw an adverse inference from her absence. Counsel represented that the mother was absent from court because she was at work at a new job and unable to take time off, and that she would not be able to attend the next trial date either. The judge refused the department's request to draw an adverse inference based on the mother's absence, stating he would not penalize a parent for working instead of risking her job by coming to court. The judge asked the mother's counsel to provide evidence, at the next trial date, that she had actually been at work.

The mother was not present on the last day of trial, September 28, when the adoption social worker finished testifying and the parties gave closing arguments. With respect to the mother's absence, the mother's counsel presented conflicting information, given to him by the mother, about where the mother was supposed to be working. The judge noted that the mother's credibility had been an issue throughout the case and that he "ha[d] to be careful in terms of accepting her representation that she's at work today." The adoption social worker called the dental office where the mother was reportedly working and was told that the mother was in fact employed there and was supposed to be there that day, but had not "show[n] up for work." The judge, having "made a good faith effort to understand the circumstances of her not being here," gave the mother's counsel one last opportunity to explain the mother's absence. Counsel then contacted the mother, who told him that she was "working from home." The judge, considering the mother's "credibility and false representations made to the courts," determined that an adverse inference was warranted.

Unlike in criminal proceedings, in child custody and termination of parental rights proceedings, judges possess the discretion to draw an adverse inference concerning a parent's fitness from the fact that the parent is present at trial but does not testify. See Custody of Two Minors, 396 Mass. 610,

616-617 (1986); Adoption of Nadia, 42 Mass. App. Ct. 304, 307-308 (1997). In Adoption of Talik, 92 Mass. App. Ct. 367, 371 (2017), we extended this principle to permit an adverse inference to be drawn against a parent who, having notice of the proceedings, is absent from a child custody or termination proceeding without an adequate excuse. "Where a parent has notice of a proceeding to determine his parental rights and the parent does not attend or provide an explanation for not attending, the absence may suggest that the parent has abandoned his rights in the child or cannot meet the child's best interests." Id. at 371-372.

The mother argues that the judge erred by drawing an adverse inference in the circumstances of this case. Because she appeared, testified, and exposed herself to cross-examination, she reasons, her absence from the last two days of trial, though unexcused, had no evidentiary significance.⁵ Moreover, she claims, the judge's erroneous inference "permeated" the entire case, invalidating the judge's ultimate conclusions. To the contrary, we conclude that the judge applied the adverse inference precisely, circumspectly, and fairly.

⁵ The mother does not contest the evidentiary basis -- the social worker's hearsay statements and the statements attributed to her by her attorney -- for the judge's finding that she was not at work and was untruthful in claiming that she was.

In his thirty-seven page findings of fact, conclusions of law, and order, the judge made three references to the mother's absence. In the preliminary summary of the case, the judge stated that he "was particularly troubled by [the mother's] misrepresentations as to her whereabouts, and drew a negative inference from her failure to appear." He next referred to the mother's absence in a paragraph discussing her lack of cooperation with the department, noting that her engagement with the department was minimal, that she was not present for the final two days of trial, and that she testified that she did not wish to cooperate with her ongoing social worker. And finally, in a paragraph concerning the evidentiary significance of a parent's failure to testify, the judge noted, correctly, "This factor by itself is not sufficient to satisfy the [department's] burden, but rather has been treated as one evidentiary factor, along with other relevant factors, bearing on the issue of the parent's unfitness." The judge then stated that he drew a negative inference because the mother "did not attend the last two days of trial, nor did she present a credible reason for her failure to appear."

We review a trial judge's decision to draw an adverse inference from a parent's absence under the abuse of discretion standard. See Adoption of Talik, 92 Mass. App. Ct. at 372. "In determining whether to exercise that discretion, 'the judge as

fact finder' is to consider whether such an inference is 'fair and reasonable based on all the circumstances and evidence before' her." Id., quoting Singh v. Capuano, 468 Mass. 328, 334 (2014).

We discern no abuse of discretion. Even though the mother testified at trial, the judge could reasonably conclude that her failure to appear for the last two days, without an adequate explanation, was evidence that she was not making efforts to be reunited with her children. Perhaps that adverse inference was not particularly strong, where the mother had been present for most of the trial, as recently as one week before her two absences. Contrast Adoption of Talik, 92 Mass. App. Ct. at 372 (judge did not abuse discretion drawing inference of unfitness where "mother had not been involved with the child for at least nine months prior to the trial" and had not been in contact with counsel). But as with any other subsidiary factual finding, we must "accord deference to a trial judge's assessment of the credibility of witnesses and the weight of the evidence." Adoption of Olivette, 79 Mass. App. Ct. 141, 157 (2011). Here, the judge was also warranted in concluding that the mother gave a false reason for her absence, permitting a reasonable inference that the true reason, whatever it was, would not bear favorably on her fitness as a parent. The judge could fairly conclude, as he did, that under the totality of the

circumstances, the mother's unexcused absence for the last two days of trial was one evidentiary factor tending to show her unfitness.⁶

2. Alternatives to termination of parental rights. The mother argues that the judge failed to articulate why termination of the mother's parental rights was in the children's best interests, particularly where "less drastic alternatives," such as giving the maternal grandmother permanent custody or guardianship, were available. We discern no error or abuse of discretion. The judge's factual findings and legal conclusions were detailed and specific, demonstrating that close attention was paid to the evidence and the applicable legal standards.

"To terminate parental rights to a child, the judge must find, by clear and convincing evidence, that the parent is unfit and that the child's 'best interests will be served by

⁶ The mother relies in part on the commentary from the Massachusetts Guide to Evidence, which states with respect to § 1115(g), "No adverse inference may be drawn 'unless a case against the interests of the affected party is presented, so that failure of the party to testify would be a fair subject of comment.'" Mass. G. Evid. § 1115(g) note, at 486 (2019), quoting Adoption of Talik, 92 Mass. App. Ct. at 372. This comment means only that the adverse inference does not relieve the department of its obligation to produce other evidence of the parent's unfitness. Once, as here, the department introduces evidence of unfitness, the adverse inference may also be taken into account. See Adoption of Talik, supra ("the adverse inference drawn from a party's absence is not sufficient, by itself, to meet an opponent's burden of proof").

terminating the legal relation between parent and child.'" Adoption of Luc, 484 Mass. 139, 144 (2020), quoting Adoption of Ilona, 459 Mass. 53, 59 (2011). "Because the termination of parental rights is an 'extreme step,' we require that the judge articulate specific and detailed findings in support of a conclusion that termination is appropriate, demonstrating that she has given the evidence close attention" (citations omitted). Adoption of Nancy, 443 Mass. 512, 514-515 (2005).

"In determining whether the best interests of the children will be served by issuing a decree dispensing with the need for consent, a 'court shall consider the ability, capacity, fitness and readiness of the child's parents . . . and shall also consider the plan proposed by the department or other agency initiating the petition.'" Id. at 515, quoting G. L. c. 210, § 3 (c). "Judges also 'consider parental nominations of caretakers in an extended family, just as they do in other types of child custody cases.'" Adoption of Hugo, 428 Mass. 219, 226 (1998), cert. denied sub nom. Hugo P. v. George P., 526 U.S. 1034 (1999), quoting Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption, 22 Mass. App. Ct. 62, 69 (1986). "The judge's obligation to 'consider' a plan involves much more than simply examining it. The judge must perform a 'careful evaluation of the suitability' of the plan and must 'meaningfully . . . evaluate' what is proposed to be done for

the child." Adoption of Dora, 52 Mass. App. Ct. 472, 475 (2001), quoting Adoption of Lars, 46 Mass. App. Ct. 30, 31 (1998), S.C., 431 Mass. 1151 (2000).

A judge's determination of custody must be based on the best interests of the child, after an "even handed" assessment of the evidence. Adoption of Hugo, 428 Mass. at 225-226 & n.8. A judge's findings are entitled to substantial deference, and we will not disturb those findings unless they are clearly erroneous. See Adoption of Cadence, 81 Mass. App. Ct. 162, 166 (2012). "In addition, we defer to the judge's determinations regarding the best interests of the child, and reverse only where there is a clear error of law or abuse of discretion." Id.

The judge's findings made clear that his decision to terminate the mother's parental rights was based on the mother's "long-term housing instability, cycle of unhealthy relationships, and history of substance abuse," and his determination that the mother did not appreciate and would never take the steps necessary to address these conditions, which put the children at risk. The judge found "not only that [the] mother is unfit, but also that the best interests of the subject children would be served by entering a termination decree as to Mother's parental rights. The children are in desperate need of

stability and need to feel safe and cared for at home. The Court finds that Mother is unable to provide that stability."

The judge did not abuse his discretion in concluding that a complete severance of the mother's parental rights was in the children's best interests. The judge's findings document a contentious relationship between the mother and the maternal grandmother throughout the mother's childhood, with occasional easing of tensions when the mother needed the maternal grandmother's assistance with housing and child care. But at the time of trial, communications between the maternal grandmother and the mother were strained, with the mother exhibiting an "inability to remain civil and appropriate" with the maternal grandmother. In these circumstances, the judge could reasonably conclude that termination of the mother's parental rights was necessary because "[t]he best interests of the children would not be served by requiring the department to 'initiate multiple, repetitious litigation,' which would delay the eventual adoption or other disposition of the children into a proper environment." Adoption of Gillian, 63 Mass. App. Ct. 398, 406 (2005), quoting Adoption of Helen, 429 Mass. 856, 862 (1999).

The judge also gave full and fair consideration to the department's adoption plan -- the only plan suggested by any

party.⁷ Nothing in the statute or the case law requires the judge to investigate adoption plans not proposed by the department or the parent, or to choose "a placement which is least restrictive of familial rights." Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 376 Mass. 252, 266 (1978). Although the mother's fundamental rights are at stake, the best interests of the child are paramount. See id. at 265-266. Moreover, the evidence supports the judge's conclusion that the adoption plan suggested by the mother on appeal would not serve the children's best interests. See id. at 261. To the extent termination of the mother's rights was not an absolute prerequisite for a permanent placement with the maternal grandmother, given the mother's unfitness, her

⁷ The judge made the following findings and conclusions: "The Department has proposed that the best placement for [Helga] and [Julia] is with maternal grandmother There is no competing plan in the present case. After a careful review of this plan, the Court has determined the Department's adoption plan is in the best interest of [Helga] and [Julia]. The children are in a stable, loving home and are thriving in their current placement with [the maternal grandmother]. She loves the children very much, and they are clearly her first and only priority. She has worked tirelessly to get them the medical, educational, and therapeutic services that they need in order to flourish. The children are consistently attending school, [Helga] is engaging in therapeutic services, and both girls are highly involved with extracurricular activities. The Department has observed that [the maternal grandmother] is extraordinarily patient with [Helga] in particular, and is able to redirect [Helga]'s anger and outbursts towards appropriate behavior. Both children express that they feel safe and cared for with their grandmother."

adversarial relationship with the maternal grandmother, and her lack of desire to cooperate with the department, this case is one in which providing stability in the children's lives is properly "eased" by termination. See Adoption of Nancy, 443 Mass. at 517-518; Adoption of Thea, 78 Mass. App. Ct. 818, 825 (2011).

3. Mother's request for visitation. The mother contends that the judge abused his discretion by failing to order posttermination and postadoption visits with both children, and by denying her motion for postjudgment relief, in which she offered evidence that the maternal grandmother had not permitted visits in the six months after the trial.⁸ In the alternative, she argues that the judge failed to differentiate between the needs of the two children and abused his discretion by failing to order visits with Julia.

⁸ Contrary to the children's claim, both the appeal from the decrees and the appeal from the denial of postjudgment relief are properly before us. The mother filed timely notices of appeal after the judge issued the decrees and after the judge denied posttrial relief. Because the mother filed the motion for relief from judgment more than ten days after the decrees had entered, the motion did not stay the time for filing the notice of appeal from the judgment. See Mass. R. A. P. 4 (a) (2) (C), as appearing in 481 Mass. 1607 (2019). Accordingly, Mass. R. A. P. 4 (a) (3), as appearing in 481 Mass. 1607 (2019), nullifying a notice of appeal "filed before the disposition of any timely motion listed in Rule 4 (a) (2)," is inapplicable.

In determining whether to issue an order requiring posttermination visitation, the judge must consider two questions: "First, is visitation in the child's best interest? Second, in cases where a family is ready to adopt the child, is an order of visitation necessary to protect the child's best interest, or may decisions regarding visitation be left to the judgment of the adoptive family?" Adoption of Ilona, 459 Mass. at 63. See Adoption of Cadence, 81 Mass. App. Ct. at 168 ("an order mandating postadoption visitation requires both a conclusion that visitation would be in the child's best interests and that those interests will not be adequately served by the adoptive parent's discretion"). "The purpose of such contact is not to strengthen the bonds between the child and his biological mother or father, but to assist the child as he negotiates, often at a very young age, the tortuous path from one family to another." Adoption of Vito, 431 Mass. 550, 564-565 (2000). In reviewing this determination, "our task is not to decide whether we, presented with the same facts, would have made the same decision, but to determine whether the trial judge abused his discretion or committed a clear error of law." Adoption of Hugo, 428 Mass. at 225.

The judge found that Helga felt hostile toward her mother and "did not want to see her," whereas she felt safe with her grandmother. The judge found that Julia "appears to be bonded"

with the mother and enjoys visits with her. Nonetheless, the judge declined to order visitation with either child, leaving the matter in the maternal grandmother's discretion: "Mother's inability to remain civil and appropriate with [the maternal grandmother], coupled with [Helga]'s refusal to visit with or speak to her mother, support the Court's finding that an order of visitation is not in the best interests of the children."

We discern no abuse of discretion. The evidence gives no indication whatsoever that visits with the mother would assist Helga in her transition to adoption by her grandmother but, rather, indicates that it would make the transition more difficult. Although Julia has a bond with the mother, the judge could permissibly infer that the mother's belligerence in dealing with the maternal grandmother would deter, rather than facilitate, Julia's transition.

Conclusion. The decrees terminating the mother's parental rights, approving the department's adoption plan, and declining to order posttermination or postadoption visitation are affirmed. The order denying the mother's motion for relief from the judgment is affirmed.

So ordered.