19-P-223 Appeals Court

ADOPTION OF OREN.[1]

No. 19-P-223.

Essex. November 8, 2019. - January 21, 2020.

Present: Green, C.J., McDonough, & Englander, JJ.

Minor, Adoption, Visitation rights. Parent and Child, Adoption, Dispensing with parent's consent to adoption, Custody. Adoption, Dispensing with parent's consent, Visitation rights. Evidence, Child custody proceeding.

Petition filed in the Essex County Division of the Juvenile Court Department on December 22, 2015.

The case was heard by Kerry A. Ahern, J.

Megan Deeley, Committee for Public Counsel Services, for the mother.
Julia E. Kobick, Assistant Attorney General, for Department of Children and Families.
Chetan Tiwari for the child.

GREEN, C.J. The mother appeals from a decree entered by a judge of the Juvenile Court finding her unfit and terminating

[1] A pseudonym.

her parental rights to the child.[2] The mother also appeals from the judge's failure to issue a specific order regarding postadoption visitation.[3] We affirm the decree, but remand for further proceedings regarding postadoption visitation.

Background. We summarize the judge's findings of fact, supplemented by uncontroverted evidence from the record. The mother first became involved with the Department of Children and Families (department) in 2014, when she was fourteen, after her mother (maternal grandmother) filed a child requiring assistance (CRA) petition, G. L. c. 119, § 39E, after the mother ran away to New York. The mother was returned to Massachusetts and placed in a residential program. She ran away to New York again, and became pregnant with the child; she was fourteen at the time and the father was seventeen or eighteen. The child was born in Massachusetts in August 2015, when the mother was fifteen years old. Following the birth of the child, multiple G. L. c. 119, § 51A, reports (51A reports) were filed because the mother ran away to New York with the child, her whereabouts were unknown, and it was not known if she had the supplies to care for the child. After the department initiated an emergency

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[2] The father did not appeal from the termination of his parental rights.

[3] Though the child did not file a notice of appeal, he maintains that it is in his best interests for the judge to determine the amount and form of postadoption contact.

response to the 51A reports, the mother returned to Massachusetts with the child. Another 51A report was filed in December 2015, alleging that the mother and father were using marijuana while the child was in their care and that the mother had missed a scheduled doctor's appointment for the child. The department filed this care and protection petition (petition) in December 2015, and was granted temporary custody of the child.

The mother dropped out of school in eighth grade. After the department took custody of the child, the mother moved to New York and enrolled in a school that allowed her to attend classes part time and work part time. At the time of trial, the mother was eighteen years old and had moved back to Massachusetts. She had not completed high school, and was not enrolled in any school. She had no stable residence; sometimes she stayed with the maternal grandmother, and a maternal aunt said that the mother could live with her.

The mother's most recent family action plan included the following tasks: meet with her social worker monthly, attend school, sign all necessary releases, attend individual therapy, attend foster care reviews, attend all court proceedings, and complete a parenting class. She did not complete a parenting class and did not attend therapy, though she was given the option of accomplishing both tasks in New York or in Massachusetts. Her attendance at school was inconsistent. She

was mostly compliant with the remaining family action plan tasks.

The judge characterized the mother's visits with the child as "sporadic." The visits were originally scheduled on a weekly basis, but the mother often missed visits because of transportation issues while she lived in New York. The department began to schedule two-hour visits every two weeks to reduce her travel time. The child called the mother by her first name. The mother was appropriate during the visits, but she sometimes had to be redirected from using her cell phone to spend time with the child. When the maternal grandmother joined the mother for visits with the child, the maternal grandmother took care of him. The maternal grandmother visited the child monthly while the petition was pending.

At trial, which was held in May and June of 2018, the parties put forward competing placement plans for the child, who was then two years old. The mother requested that the child be placed with the maternal grandmother, while the department advocated for placement with the preadoptive parents, with whom the child had lived since December 2017. The judge found that the mother was currently unfit, and that such unfitness was likely to continue into the indefinite future. The judge also determined that the department's adoption plan was in the best

interests of the child, and concluded that "[v]isitation with [m]other is in the sole discretion of the pre-adoptive parents."

Discussion. 1. Termination of parental rights. "To terminate parental rights to a child and to dispense with parental consent to adoption, a judge must find 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 Jacques, 82 Mass. App. Ct. 601, 606 (2012). "[A] judge must 'evaluate whether the [parent is] able to assume the duties and responsibilities required of a parent . . . .'" Adoption of Nancy, 443 Mass. 512, 514 (2005), quoting Adoption of Mary, 414 Mass. 705, 710 (1993). "Parental unfitness is determined by considering a parent's character, temperament, conduct, and capacity to provide for the child's particular needs, affections, and age." Care & Protection of Vick, 89 Mass. App. Ct. 704, 706 (2016).

The mother argues that the department did not meet its burden to prove parental unfitness by clear and convincing evidence. We disagree. The judge considered the required factors set forth in G. L. c. 210, § 3 (c), and found factors

(ii), (v), (vi), (vii), and (viii) applicable to her determination that the mother was unfit.[4]

The mother's unfitness resulted from a "constellation of factors." Adoption of Greta, 431 Mass. 577, 588 (2000). At trial, the mother "acknowledged that she was very young when she had [the child] and made a regrettable choice about not being involved with his care during his first years of life." She admitted at trial that she started to miss scheduled visits with the child in the summer of 2016, and the judge found that "[s]he missed many visits throughout the course of this petition. The majority of her visits occurred the last eight weeks before trial." She had no stable housing; at the time of trial she was staying with the maternal grandmother and her alternative plan was to live with her aunt. See Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 399 Mass. 279, 289

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[4] Some of the mother's challenges to the judge's findings "amount to no more than dissatisfaction with the judge's weighing of the evidence and [her] credibility determinations." Adoption of Quentin, 424 Mass. 882, 886 n.3 (1997). Even if some of the judge's findings are erroneous, "the judge's over-all conclusion of parental unfitness is [nonetheless] fully supported by the record." Adoption of Helen, 429 Mass. 856, 860 (1999).

We agree with the mother, however, that failure to obtain substance abuse treatment, mentioned in the judge's "case summary," could not be a basis for a finding of unfitness since there was no such requirement in the family action plan, and the judge specifically concluded that G. L. c. 210, § 3 (c) (xii) ("alcohol or drug addiction"), did not apply to this case.

(1987) (lack of "stable home environment" valid consideration in unfitness determination). She did not complete a parenting class, nor did she participate in individual therapy,[5] both of which were required by her family action plan. See Adoption of Serge, 52 Mass. App. Ct. 1, 8 (2001) ("The mother's lack of meaningful participation in recommended services was also relevant to the question of her fitness"). She offered no "specific or realistic plan for assuming full time care of [the child]," id., and instead "want[ed] to keep [the child] with [the maternal grandmother]." As of the trial, the mother had not finished high school, though she had plans to do so, and then "join the [A]rmy."[6] The judge found that the mother "is unable to place the needs of the subject child over her own desires."

The fact that the mother was unable to complete her family action plan tasks and maintain consistent visits with the child

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[5] The department included participation in individual therapy in the mother's family action plan because she "had expressed feelings of depression to her social worker."

[6] The judge told the mother at the end of the trial, "So joining the military would not be conducive to you parenting [the child]." The mother argues that her "desire to possibly join the military was not a proper consideration in the court's assessment of parental fitness." While we agree that the mother's potential plan to enlist in the Army would not have been an appropriate basis for finding her unfit, we are satisfied that the judge's decision was well supported by the other factors she properly considered in determining the mother's unfitness. See G. L. c. 210, § 3 (c).

during the more than two years that the petition was pending supported the finding, based on clear and convincing evidence, that the mother remained unfit and her unfitness would continue into the future. "The record contains no credible evidence demonstrating [the mother's] maturation that would have warranted the judge to conclude that [the mother] was only temporarily unfit." Adoption of Inez, 428 Mass. 717, 723 (1999) (mother, who was fifteen years old when child was born and department obtained custody, continued to be sporadic in her visits with child and unstable in her life at time of trial). See Adoption of Carlos, 413 Mass. 339, 350 (1992) (judge should "consider whether, on the basis of credible evidence, there is a reasonable likelihood that the parent's unfitness at the time of trial may be only temporary"). "Minor parents should not retain parental rights until their maturation is sufficiently complete while adult parents are given no opportunity to 'mature.' . . . At some point the court must say, 'Enough.'" Adoption of Inez, supra at 724. See Adoption of Elena, 446 Mass. 24, 31 (2006), quoting G. L. c. 210, § 3 (c) ("the court shall consider the ability, capacity, and readiness of the child's parents" before terminating parental rights).

"[W]hile we appreciate that the mother has made commendable efforts and has shown concern and affection for [the child], we conclude that the judge did not abuse [her] discretion or commit

a clear error of law in determining that the mother is unfit, that her condition is not temporary, and that termination of her rights is in [the child's] best interests." Adoption of Jacques, 82 Mass. App. Ct. at 609.[7]

Having determined that the judge did not abuse her discretion in terminating the mother's parental rights, we consider the mother's contention that the judge erred in approving the department's proposed placement rather than the mother's proposal to place the child with the maternal grandmother. We begin by observing that "[a] plan proposed by a parent is not entitled to any artificial weight as opposed to alternative plans." Adoption of Irene, 54 Mass. App. Ct. 613, 617 (2002).

The mother's plan proposed placing the child with the maternal grandmother, as to which the judge made detailed findings. The maternal grandmother has three other children (in addition to the mother) who lived with her -- two sons aged sixteen and thirteen and a daughter aged four. She had lived in four different apartments since the filing of this petition. At

[7] At the end of the trial, before announcing her decision, the judge addressed the mother: "I was impressed with your growth and your maturity and how you've progressed over the years, despite all the adversarial issues that have come up with your life. And I think that you are going to be a success. But right now, I don't think that you are able to parent [the child]." We agree with the judge's sentiments.

the time of trial, she had an open CRA case involving her sixteen year old son. In 2017, her first application to be considered a placement option for the child was denied because she did not have her own apartment and was living with her sister. The department did not approve her application to have the child placed with her in the apartment she was living in at the time of trial because the child would have to "share a room with his four year old aunt[, which] goes against the [d]epartment regulations." The judge concluded that "[a]lthough it is clear that [the maternal grandmother] loves and cares about her grandson, she has had difficulties parenting and providing structure and guidance for her own children . . . . It does not appear to this [c]ourt that she is in a position to take on another very young child."

The child was placed in multiple foster homes after he was removed from the mother's care, and he has had difficulty when transitioning from one placement to another. Since he has been with the preadoptive parents, he has been "doing very well," and calls them "Mommy" and "Daddy." The preadoptive parents live in the same community as the child's previous placement, and he attends the same daycare center, where he is described as "happy and playful."

The child "deserve[s] permanence and stability, which will be eased by termination of [the mother's] rights." Adoption of

Nancy, 443 Mass. at 517. The record supports the finding that the department's proposed plan for adoption by the preadoptive parents is in the best interests of the child, and we see no abuse of discretion in approving that placement instead of one with the maternal grandmother. See Adoption of Zak, 87 Mass. App. Ct. 540, 545-546 (2015).

2. Postadoption visitation. An order of "visitation between a child and a parent whose parental rights have been terminated" is authorized "where such visitation is in the child's best interest." Adoption of Ilona, 459 Mass. 53, 63 (2011). Two questions must be asked: "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?" Id. "[O]nce a preadoptive family has been identified, a judge must balance the benefit to the child of an order of visitation that will provide assurance that the child will be able to maintain contact with a biological parent, with the intrusion that an order imposes on the rights of the adoptive parents, who are entitled to the presumption that they will act in their child's best interest. . . . A judge should issue an order of visitation only if such an order, on balance, is necessary to protect the child's best interest." Id. at 64-65. See Adoption

of Cadence, 81 Mass. App. Ct. 162, 168 (2012) ("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").

In Adoption of Ilona, the judge found that there was "a significant attachment" between the child and the mother, and that it was in the child's best interests to continue contact between them. 459 Mass. at 63. "In addition, the judge found that the preadoptive mother was supportive of continued contact between Ilona and her mother, and would continue to allow such contact unless it began to harm Ilona." Id. at 66. In those circumstances, the judge "did not abuse his discretion in leaving the issue of visitation to the sound judgment of loving adoptive parents who will be in the best position to gauge whether such visits continue to serve Ilona's best interest, rather than issuing a specific visitation order setting forth the frequency and extent of such visits." Id.

By contrast, in Adoption of Rico, 453 Mass. 749, 753, 759 (2009), the Supreme Judicial Court held that a Juvenile Court judge abused her discretion by failing to order posttermination visitation after finding that visitation would be in the child's best interests, in circumstances where the child had just lost his placement with a preadoptive family and had no placement

with a family waiting to adopt him. Though, as Adoption of Ilona, 459 Mass. at 65-66, makes clear, "Adoption of Rico, supra, did not establish the principle that a judge must order visitation whenever the judge concludes that visitation is currently in the child's best interest" (emphasis added), it serves as an illustration of the circumstances in which an order for visitation is warranted.

In the present case, after the judge announced her decision to terminate the mother's rights, she said,

> "So, I do want to talk about post termination and post adoption visits because I do think that [the mother] and [maternal grandmother] are important parts of [the child's] life and I do want to hear from the parties as to what post termination and post adoption visits should look like. Because I do think it's appropriate. . . . They do seem to have a bond. . . . I think it's important to have that continued contact. This is a very young child who has a relationship with these two women in his life."

In her written decision, however, the judge made no findings whether postadoption visitation would be in the best interests of the child, did not enter a specific order of postadoption visitation, and simply concluded summarily that "[v]isitation with [m]other is in the sole discretion of the pre-adoptive parents." The mother and the child argue that the judge erred in failing to enter an order for postadoption visitation.

In the absence of findings similar to those in Adoption of Ilona, 459 Mass. at 66, concerning the willingness of the preadoptive family to support visitation (and, hence, the

likelihood that visitation of the sort acknowledged by the judge to be in the child's best interests would occur), or other explanation why an order for postadoption visitation was not warranted despite evidence that visitation would be in the child's best interests, we are without a basis to evaluate on the present record the contention by the mother and child that the judge abused her discretion in failing to include a specific order for postadoption visitation in her decision.[8] Accordingly, we remand the case for the judge to consider this issue and make

[8] We note that the record is ambiguous on the question of the willingness of the preadoptive family to allow postadoption visitation. The mother and the child assert that the preadoptive mother indicated at trial that she was not in favor of postadoption visits, and instead preferred that postadoption contact occur exclusively by means of cards, letters, and photographs. The preadoptive mother was asked at trial, "So, you are open to an open adoption with cards, letters and photos, is that right?" She answered, "Yes." She was not asked whether she was in favor of visits. The department's written adoption plan stated that "[a]t this time [the preadoptive parents] have agreed to provide contact between [the mother] and [the child] through an open adoption, with visits, pictures and letters." The department's adoption worker also testified that the preadoptive parents were "willing to do two visits per year." As we have observed, the judge made no findings addressing the willingness of the preadoptive family to support postadoption visitation, and furnished no explanation for her conclusion that no order for postadoption visitation was necessary to meet the child's best interests.

appropriate findings.[9] The judge may hear further evidence if she deems it necessary.[10]

Conclusion. The decree finding the child in need of care and protection, G. L. c. 119, § 26, and terminating the mother's parental rights, G. L. c. 210, § 3, is affirmed. The case is remanded for further proceedings regarding postadoption visitation.

So ordered.

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[9] There is no issue regarding visitation during the posttermination, preadoption period. The parties agreed that, prior to adoption, the mother would continue weekly visits with the child, which would then be "tapered."

[10] To be clear, we do not suggest that an order for postadoption visitation would necessarily be required if the judge finds (consistent with her comments at trial) that continued visitation would be in the child's best interests. However, in cases such as the present one, in which there is strong evidence that continued contact would be in the child's best interests, the judge should ordinarily make a specific finding whether postadoption visitation would be in the child's best interests and (if it would) consider and explain whether or not an order for postadoption visitation is warranted.