20-P-1117 Appeals Court

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

No. 20-P-1117.

Hampden. May 4, 2021. – June 29, 2021.

Present: Milkey, Lemire, & Singh, JJ.

Parent and Child, Adoption, Dispensing with parent's consent to adoption, Care and protection of minor, Custody, Custody of minor. Minor, Adoption, Care and protection, Custody. Adoption, Care and protection, Dispensing with parent's consent. Department of Children & Families. Practice, Civil, Care and protection proceeding, Adoption.

Petitions filed in the Hampden County Division of the Juvenile Court Department on June 1, 2016.

The cases were heard by Carol A. Shaw, J.

Jeanne M. Kaiser for the children.
Madeline Weaver Blanchette for the mother.
Adelaida P. Jasperse for Department of Children and Families.

MILKEY, J. This care and protection proceeding involves the welfare of two girls who were nine and twelve years old at

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

the time of trial. A Juvenile Court judge found the mother unfit and terminated her parental rights. On appeal, the daughters and the mother do not challenge the judge's determination of unfitness. Instead, they argue that termination was not warranted because it would render the daughters "legal orphans" without any realistic chance of being adopted. In support of that argument, the daughters and the mother point out that because the older daughter had reached twelve years of age, she could prevent any adoption from occurring. See G. L. c. 210, § 2. For the reasons that follow, we conclude that the judge did not abuse her discretion in terminating the mother's parental rights, and therefore affirm the decrees.

Background. At an initial best interests trial in August of 2018, the mother stipulated to her unfitness through counsel. The judge found the daughters in need of care and protection and transferred permanent custody of them to the Department of Children and Families (department). The judge subsequently scheduled a review and redetermination proceeding to consider the department's request to terminate parental rights. This time, the mother did not stipulate to her unfitness. However, neither did she attend the scheduled trial, and the judge permissibly drew from this an adverse inference regarding her

ability to care for the daughters.[2] See Adoption of Helga, 97 Mass. App. Ct. 521, 525-526 (2020); Adoption of Talik, 92 Mass. App. Ct. 367, 371-373 (2017).

At the trial's conclusion, the judge issued decrees that, inter alia, found the daughters in continued need of care and protection, found the mother unfit, kept permanent custody with the department, and terminated the mother's parental rights.[3] Roughly three months later, the judge approved the department's permanency plan for adoption by recruitment.

Discussion. 1. Unfitness. Because the daughters and the mother do not challenge any of the judge's relevant subsidiary findings, or her ultimate finding that the mother was unfit, little would be gained by reciting in detail the nature and extent of the mother's unfitness. For present purposes, it suffices to say that the mother suffers from both untreated mental illness and significant unresolved substance use issues (formerly involving "crack" cocaine, Percocet, and OxyContin; now involving alcohol), she has an extensive criminal record

[2] The mother's counsel reported that the mother was in another court in order to "clear a warrant." However, after court personnel determined that no such warrant was pending, counsel acknowledged the possibility that no warrant had yet been issued. In any event, the mother no longer claims she had any justification for missing the trial.

[3] The judge also terminated the parental rights of the father with his consent. He is not a party to this appeal.

(including multiple incarcerations), and she never has been able to provide the daughters with a safe and stable home.[4]

Nor do the daughters and the mother challenge the judge's finding that the mother's "unfitness would continue into the indefinite future to a near certitude." In fact, the daughters acknowledge the apparent "unlikelihood that mother would recover from her alcoholism in sufficient time to care for [them]." There is minimal evidence in the record that the mother has attempted to, much less been able to, overcome her grievous parental shortcomings. Finally, we note that after the department was granted permanent custody of the daughters in August of 2018, the mother made minimal efforts to visit them.[5]

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[4] It bears noting that the mother's inability to care for her daughters may be due to her substance use disorder and mental illness, not an absence of affection. As we previously have stated:

> "Despite the moral overtones of the statutory term 'unfit,' the judge's decision was not a moral judgment or a determination that the mother . . . do[es] not love the child. The inquiry instead is whether the parent['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).

[5] The daughters' foster mother allowed them to initiate supervised telephone calls to the mother, something they "rarely" did. The record reveals one unsupervised late-night telephone call, which the record suggests the daughters initiated.

2. Termination. a. Best interests. In order to demonstrate that the judge erred in terminating the mother's parental rights, the daughters and the mother must show that the judge abused her considerable discretion in concluding where the daughters' best interests lay. See Adoption of Helga, 97 Mass. App. Ct. at 527. 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). We are nonetheless mindful that "[u]nfitness does not mandate a decree of termination." Adoption of Imelda, 72 Mass. App. Ct. 354, 360 (2008).

At the time of trial, the daughters were in long-term foster care with someone described as a family friend.[6] Although the foster mother told the department that she was unwilling to commit to adoption or guardianship, counsel for the father relayed that the foster mother was willing to care for the children "as long as necessary." The daughters and the department have treated the current placement in similar fashion, namely, as one that -- while far from ideal -- provides the daughters relative stability.

[6] At oral argument, the parties represented that the daughters remain in that placement.

The daughters argue that, as a matter of fact, it is so unlikely that they ever will be adopted that the department's adoption plans are "illusory." They, and the mother, further maintain that any potential benefits from termination are outweighed by the negative impacts resulting from the combination of cutting off all hope of reunifying the family and from rendering the daughters legal orphans. In other words, the daughters and the mother argue, again as a matter of fact, that the costs of termination outweigh any benefits it would provide.

Nothing in the record indicates that the daughters or the mother raised their current cost-benefit arguments in the trial court. Indeed, while the testimony revealed that the older daughter did not want to be adopted and that both daughters had declined to participate in various adoption recruitment efforts, the record does not make clear that the daughters even formally opposed termination at trial. Nonetheless, the department does not argue that the daughters and the mother thereby waived the argument, and especially in light of the stakes involved, we exercise our discretion to reach it. See Adoption of Flora, 60 Mass. App. Ct. 334, 340 n.10 (2004). However, our review of this argument is limited to the factual record established at trial.

The evidence supporting the daughters' and the mother's portrayal of the balance of termination's costs and benefits is

thin at best. At the outset, we recognize that even in circumstances where termination will render children legal orphans, the children may benefit from the permanence and stability that termination creates. Adoption of Nancy, 443 Mass. 512, 517 (2005) ("these children deserve permanence and stability, which will be eased by termination of their [mother's] rights"). See Adoption of Jacques, 82 Mass. App. Ct. 601, 610 (2012).

Termination also makes adoption possible, and an appropriate adoption would benefit the daughters. The daughters argue that their chances of adoption are so limited that the possibility is best ignored, but we are not persuaded. As the department accurately points out, the record reflects that neither child presents behavioral problems or other significant special needs,[7] that these two children are particularly resilient, and that they generally present well for adoption. Even accepting arguendo that -- holding all else equal -- older children on average face reduced chances of being adopted, no record evidence even suggested the degree of that effect.[8] In

[7] The younger daughter has an individualized education plan for some developmental delays in speech and language, but nothing suggests that she has any profound learning disabilities. In fact, she is described as a "role model in the classroom."

[8] The daughters and the mother attempt to plug this evidentiary gap by citing factual statements included in various

short, the record provides a basis for some degree of guarded optimism about the daughters' adoption prospects, and it does not support the daughters' position that their adoption prospects are only illusory.

To be sure, because the older daughter has reached an age at which her consent is required for adoption, she now effectively is able to prevent an adoption from occurring. See G. L. c. 210, § 2. In other words, the older daughter has the power to render her claims of being unadoptable a self-fulfilling prophecy. However, there was no evidence requiring the judge to treat the older daughter's views as immutable, particularly where the older daughter was only twelve years old. Also, there was evidence that she would begin therapy "any day now" to discuss issues such as adoption. Accordingly, the older daughter's voiced aversion to being adopted did not preclude the judge from considering whether termination of the mother's parental rights nevertheless was in the older daughter's best interests. Cf. Adoption of Nancy, 443 Mass. at 518 (children's opposition to termination not "outcome determinative").

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articles or reports. This material was not part of the trial record, and we therefore allow the department's motion to strike it. See Adoption of Inez, 428 Mass. 717, 721-722 (1999) (appellant may not rely on factual material not before trial judge).

Turning to the other side of the cost-benefit ledger, the daughters and the mother are unable to point to evidence that demonstrates that termination would have the dire consequences to the daughters that they predict. It is true by definition that termination of their parents' rights will render the daughters legal orphans, and that if they are not adopted, that status would continue. But "[a]lthough a factor, the absence of imminent adoption prospects does not, by itself, invalidate a decision to terminate parental rights." Adoption of Jacques, 82 Mass. App. Ct. at 610, citing Adoption of Nancy, 443 Mass. at 516-518. Notably, where we have expressed concerns about creating "legal orphans," there has generally been "an enduring parent-child relationship" that termination would unnecessarily destroy. Adoption of Ramona, 61 Mass. App. Ct. 260, 265 (2004). Cf. Adoption of Flora, 60 Mass. App. Ct. at 340-342. Here, by contrast, the mother currently plays next to no role in the daughters' lives; the daughters seem to have little interest in her playing a larger role; and no evidence suggests that this will change. Cf. Adoption of Ilona, 459 Mass. at 59, quoting Adoption of Inez, 428 Mass. 717, 723 (1999) (evidence must show "reasonable likelihood that the parent will become fit," not merely "faint hope"). The mother's ability to dramatically turn her life around remains, at best, a hypothetical possibility. Even in the highly unlikely event that she did so, the

termination of her parental rights would not -- as the daughters and the mother claim -- necessarily prevent her from having appropriate contacts with the daughters and thereby playing a meaningful role in their lives. Rather, the judge committed the question of future visitation with the mother to the discretion of the daughters' legal custodian. Just as terminating a marital relationship by divorce does not preclude the divorced parties from maintaining a positive relationship thereafter, so too the severing of parental rights does not per se preclude the mother from playing such a role.

The daughters and the mother are left to argue that the termination of the mother's parental rights in and of itself would amount to a psychological "loss" that the daughters should not have to suffer. The existence and degree of such an effect on the daughters from the mere change in the mother's legal status is not established by the trial record. Nor is such harm self-evident.

With these considerations in mind, we conclude that the judge did not abuse her discretion in concluding that termination of the mother's parental rights was in the daughters' best interests. The daughters currently are in a relatively stable placement, the mother plays no appreciable role in the daughters' lives, and the daughters and the mother cannot point to evidence that termination necessarily presents

downsides that outweigh the value of permanence and stability. See Adoption of Nancy, 443 Mass. at 517.

The daughters and the mother relatedly argue that while the judge expressly found that termination was in the daughters' best interests, she did not make adequate subsidiary findings evaluating the costs and benefits of termination, or fully explain why she believed termination was warranted. We agree that the judge's analysis of the separate question of termination was relatively sparse, but nevertheless conclude that the daughters and the mother have demonstrated no reversible error. For one thing, the judge can hardly be faulted for failing to address specific issues that the parties did not raise, such as the extent to which the daughters' ages diminished their adoption prospects. For another, "[a]lthough it would be better practice specifically to state the reasons that termination is in the child's best interest, such specificity is not required." Adoption of Nancy, 443 Mass. at 516. At least in the circumstances before us, where termination was not a close question, we conclude that remanding the case for further findings and explanation is not necessary.

b. Adequacy of adoption plan. "In determining the best interests of the child, the judge must consider, among other things, 'the plan proposed by the department.'" Adoption of Varik, 95 Mass. App. Ct. 762, 770 (2019), quoting G. L. c. 210,

§ 3 (c). A placement plan does not need to be "'fully developed' in order to support a termination order, but it must provide 'sufficient information about the prospective adoptive placement "so that the judge may properly evaluate the suitability of the department's proposal."'" Adoption of Varik, supra, quoting Adoption of Willow, 433 Mass. 636, 652 (2001). See Adoption of Paula, 420 Mass. 716, 722 n.7 (1995) ("A fully developed adoption plan, while preferable, is not an essential element of proof in a petition brought by the department under G. L. c. 210, § 3"). "In determining the sufficiency of the plan, the judge may consider evidence and testimony presented at trial regarding unfitness and the child's best interests, in addition to the written plan." Adoption of Varik, supra, citing Adoption of Willow, supra at 653, and Adoption of Stuart, 39 Mass. App. Ct. 380, 393 (1995).

The daughters and the mother argue that the department's adoption plan was so inadequate that the judge abused her discretion in terminating the mother's parental rights. We disagree. The department's written plan set forth the department's firm intention to present the daughters as a sibling pair (something the daughters emphatically support). It also set forth various recruitment actions that the department had already taken and further actions it would take. Furthermore, while the written plan did not specify what type of

family would make an appropriate adoption resource, there was testimonial and documentary evidence of the daughters' adaptability, resilience, and lack of special needs. Given that evidence, there was no need to limit the types of adoptive resources to be considered. See Adoption of Jacob, 99 Mass. App. Ct. 258, 274 (2021) (no need for adoption plan to detail particular type of adoptive parents or home environment where child had no specific needs). Contrast Adoption of Varik, supra at 766, 771 (department plan deemed inadequate for failure to "detail [child]'s specific ongoing needs" or "describe[e] the kind of home environment and adoptive family makeup that ideally would best meet" those needs). Thus, the judge did not abuse her discretion in terminating the mother's parental rights despite the plans arguably being less than "fully developed." Id. at 770.

Of course, the department must follow through on its planned efforts. However, the daughters, with and through counsel, will have the opportunity to hold the department to its expressed intentions in future review and redetermination proceedings. See Adoption of Daisy, 77 Mass. App. Ct. 768, 783 (2010), S.C., 460 Mass. 72 (2011).

Decrees affirmed.