20-P-82 Appeals Court

ADOPTION OF DARLENE.[1]

No. 20-P-82.

Suffolk. January 13, 2021. - June 9, 2021.

Present: Lemire, Ditkoff, & Grant, JJ.

Adoption, Dispensing with parent's consent, Visitation rights. Minor, Adoption. Parent and Child, Dispensing with parent's consent to adoption. Practice, Civil, Adoption.

Petition filed in the Suffolk County Division of the Juvenile Court Department on June 24, 2014.

The case was heard by Helen A. Brown Bryant, J.

Kerry A. Bagnall for the mother.
Carol A. Frisoli for Department of Children and Families.
Maura J. Kiefer for the child.

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

[1] A pseudonym.

her parental rights to her daughter, Darlene.[2] See G. L. c. 119, § 26; G. L. c. 210, § 3. The mother argues that the judge's findings lack the specificity and detail required to support termination of the mother's parental rights, that the judge erred in finding that the Department of Children and Families (DCF) used reasonable efforts to reunify the child with the mother, and that the judge abused her discretion in concluding that it was in the child's best interests to terminate the mother's parental rights. We affirm.

Background. The mother was born in 1991. As a child, she was diagnosed with bipolar disorder, attention deficit hyperactivity disorder, and oppositional defiant disorder; cognitive testing placed her in the below average range, although her scores fluctuated throughout her childhood. At the age of twelve, she received an incorrect dosage of medication which she ingested for twenty-eight days, resulting in a brain injury. She was placed in DCF's custody when she was fifteen years old, and remained in its custody until she became a client of the Department of Developmental Services (DDS). She earned a certificate for completion of high school, but did not graduate because she did not pass the Massachusetts Comprehensive

[2] The father's parental rights to the child were terminated in 2017; he is not a party to this appeal.

Assessment System tests. As a teenager, she was psychiatrically hospitalized at least twice.

While pregnant with Darlene, the mother was psychiatrically hospitalized because she was "extremely labile, emotional, crying, angry, screaming" and exhibiting symptoms of bipolar disorder. During that hospitalization, a legal guardian was appointed for her.

Darlene was born in June 2014. At that time a G. L. c. 119, § 51A, report was filed based on concerns that due to the mother's history of mental illness she was not competent to care for Darlene. DCF assumed emergency custody of Darlene, who was placed in a foster home on her release from the hospital. Two months later, Darlene was transferred to the foster home where she has since resided, and it is now her preadoptive home. She has never been in the mother's custody.

Some months after Darlene's birth, the mother's guardian and DDS placed the mother at the Judge Rotenberg Center (JRC), a highly structured residential setting.

1. First trial. In February 2015, DCF changed the goal for the child from reunification to adoption. A trial on the merits of DCF's care and protection petition took place over eight days beginning in July 2016 and ending in March 2017 (first trial). On May 22, 2017, the judge issued findings and orders concluding that the mother was "presently unable and/or

unavailable" to parent Darlene as a result of her cognitive and developmental disabilities. The judge noted that the mother had shown progress during parent-child visits, but had never had unsupervised contact with Darlene or engaged in a primary caretaking role, and that the mother "need[ed] to identify and establish a plan relating to housing and her care of [Darlene] should she be awarded custody in the future." The judge awarded permanent custody to DCF, but declined to terminate the mother's parental rights. The judge found that for much of the time, DCF had failed to make reasonable accommodations for the mother as required by the Americans with Disabilities Act, 42 U.S.C. § 12132, and that DCF "placed the burden upon [the] [m]other to inform [DCF] of her required accommodations." The judge found that DCF had failed to provide the mother with a parent aide as available under DCF's own regulations, see 110 Code Mass. Regs. §§ 7.060-7.061 (2008), and that DCF's "actions and treatment of [the] [m]other during the pendency of this care and protection petition is demonstrative of its failure to make reasonable efforts to reunify the child with [the] [m]other." She concluded that although the mother was unable or unavailable to parent Darlene at that time, termination of the mother's parental rights was not in Darlene's best interests. The judge ordered that "the parties . . . develop a reunification plan of the . . . child to [the] [m]other" and that "visits between [the

mother and the child shall] occur as frequently as logistically possible and shall progress to unsupervised and overnights when appropriate."

2. Events between the first and second trials. On April 7, 2017, less than three weeks after the conclusion of the first trial, the guardianship of the mother was terminated because she "no longer [met] the standard for" it.[3]

Beginning in July 2017, the mother's supervised visits with Darlene were increased to two hours per week. After visits increased, the foster mother reported that Darlene was having tantrums, engaging in head-banging, regressing in toilet training, and sometimes said she did not want to attend visits. As required by the judge's order, DCF provided the mother with a parent aide, for six months from June through December 2017. The aide worked with the mother twice a week, which the mother testified was helpful. Because the mother was living at JRC, which was too disruptive an environment for Darlene, parent-child visits took place at public places such as a playground, shopping mall, or library. It was the mother's responsibility to plan each visit, a task she found "overwhelming." The parent aide noted that the mother "would often fixate on a frustrating

[3] The mother remained a client of DDS and had a representative payee.

issue such as housing, rather than trying to accomplish the tasks that were asked of her."

In September 2017, the mother moved for review and redetermination of DCF's care and protection petition. The motion was premature because six months had not yet passed since the first trial. See G. L. c. 119, § 26 (c). The judge allowed the motion for a review and redetermination hearing, and the case was continued for trial.

In December 2017, the mother moved to an apartment in the Elizabeth Stone House (ESH), which provided transitional housing and support services. As of the review and redetermination trial (second trial), the mother was living in that apartment, which she shared with a roommate. The apartment contained a bedroom for the child, which the mother supplied with appropriate furniture, toys, and clothing. She took multiple parenting classes. She was refilling and managing her own prescription medications. She traveled independently to her own medical and therapy appointments, and to school meetings and medical appointments for the child. At the time of the second trial, the mother was enrolled in an anger management class and two classes at a community college, which she traveled to on her own. The mother received $775 monthly in Supplemental Security Income (SSI), and testified that she could support herself and

Darlene with that income. She also engaged in a search for part-time work.

Darlene, who was four and one-half years old at the time of the second trial, was diagnosed with behavioral problems that included frequent outbursts and a short attention span. She had an individualized education plan (IEP) and needed substantial direction and a school setting tailored to her needs. When interacting with other children, her behaviors included biting and kicking. As of the second trial, she was working with an individual therapist and a therapeutic mentor and was on a wait list for a therapeutic day program.

A court investigator's report filed in January 2018, G. L. c. 119, §§ 21A & 24, noted that the mother was working hard to accomplish what DCF asked of her and was in "strong" compliance with service plan goals. Even so, the investigator expressed concerns about the mother's inability to manage money, her lack of understanding of Darlene's IEP, and tension between her and the foster mother, which the investigator attributed in part to DCF's failures to support them both. The investigator recommended that parent-child visits take place at the mother's home at ESH, a more realistic setting in which to assess her parenting ability. She noted that a bystander observing the mother and Darlene at a visit at a public play area "might not know the two were together," but it was unclear whether that was

because of the setting, Darlene's special needs, or the lack of a bond between them.

Counsel for the child then sought and obtained funds for forensic psychiatrist Virginia Merritt to evaluate the bond between Darlene and the foster mother. Among the information that Dr. Merritt considered was her observation of a March 20, 2018 parent-child visit at the mother's home that was described in detail by both Dr. Merritt and a DCF social worker. Dr. Merritt noted that during the visit, the mother spent most of the time interacting with the other adults present, and as a result of her "failure to respond to [Darlene]'s attempts to interact, [the mother] also failed to read [Darlene]'s distress and [Darlene] did not turn to [the mother] for comfort or reassurance." Dr. Merritt concluded that Darlene had a "modest attachment" to the mother, and that the mother "was attached to the idea of having a child, but not very attached to [Darlene] herself." In contrast, Dr. Merritt concluded that Darlene was "strongly attached" to the foster mother, and that removal of Darlene from the foster mother would be "psychologically . . . catastrophic." Dr. Merritt opined that the mother "does not have the empathy or maturity" that would be required to help Darlene through the trauma of a separation from the foster mother, and did not exhibit the behavior necessary to help

Darlene with her considerable developmental needs. The judge credited Dr. Merritt's opinion.

During the spring of 2018, DCF reports described the mother's consistent attempts to improve her parenting skills. However, after Dr. Merritt's bonding evaluation, DCF noted that it was seeking to terminate the mother's parental rights.

At a June 2018 visit, the mother gave Darlene a bicycle with training wheels as a fourth birthday present. But the mother did not provide Darlene with a helmet, and the DCF social worker told the mother that Darlene could not ride it without one. The mother borrowed a helmet from her roommate's three year old son, but it did not fit Darlene, so she could not ride her new bicycle. The mother then allowed the roommate's son to ride Darlene's bicycle; he rode it without the helmet and fell down a concrete stairway, hitting his head. The mother was the closest adult to the boy, but had turned her back to him when he got on the bicycle and did not show a sense of urgency when he fell.[4]

That summer, Darlene's behavior changed before and after visits with the mother: Darlene said she did not want to attend visits, her tantrums increased, and her toilet training

[4] The judge did not credit the mother's account of that visit.

regressed, so that for several days after a visit she would urinate on herself and play in her urine. As a result, in July 2018, DCF reduced parent-child visits from two hours to one hour weekly, and in August changed them to two hours biweekly. The mother complained about the reduction in visits, but during visits that summer she had no activities planned with Darlene, who resisted the mother's attempts to discipline her. The judge credited the testimony of the ongoing social worker, who described a pattern of behavior during visits in which the mother would fixate on a task such as assembling a stroller or setting up a video game, rather than prioritizing spending time with Darlene. After the visits were reduced, the mother "noticed that [Darlene] seem[ed] more distant" and felt that their "bond [was] not as strong." The mother never progressed to unsupervised visits with Darlene, and DCF denied her requests for additional time for visits.

The judge appointed a guardian ad litem (GAL) to assess visitation and future contact between the mother and Darlene. The information considered by the GAL included his observations of an August 8, 2018 parent-child visit, which was reported by both him and the DCF social worker. The GAL noted many occasions during the one-hour visit when Darlene ignored the mother or did not respond to her. The GAL concluded that although the mother had made progress in dealing with her own

issues, "there did not seem to be a meaningful connection between [the mother and Darlene] that could be further fostered and developed." He concluded that although the mother and Darlene had had regular visits over an extended period of time, "there is no indication that those visits should be either extended in time or become unsupervised," and that "unsupervised visits would be extremely traumatic for [Darlene]." As for postadoption visitation, the GAL recommended "at the maximum . . . two visits between [the mother] and [Darlene] per year."

3. Second trial. The second trial, on the mother's motion for review and redetermination, took place in October and November 2018. A decree terminating the mother's parental rights issued on December 11, 2018.

The judge based her decision to terminate the mother's parental rights "not solely on the results of the review and redetermination hearing, but on the level of progress [the] [m]other demonstrate[d] in making changes to her life regarding stability, parenting skills, and her ability to make safe decisions for herself and [Darlene]." She found that although the mother had "made progress in achieving more independent housing and ha[d] complied with her service plan tasks, her shortcomings in decision-making and her tendency to focus on issues that run contrary to [Darlene]'s safety and needs render her unfit. Additionally, [Darlene]'s best interests would be

served by the termination of [the] [m]other's parental rights, as evidenced by her long-term separation from [the] [m]other and her behavioral regressions following parent/child visits." Although the judge terminated the mother's parental rights, she found that posttermination and postadoption visitation with the mother was in Darlene's best interests and ordered two visits per year.

Discussion. "To terminate parental rights to a child and to dispense with 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). "[T]he trial judge must make specific and detailed findings demonstrating that close attention has been given the evidence." Adoption of Leland, 65 Mass. App. Ct. 580, 583 (2006). See Adoption of Nancy, 443 Mass. 512, 514-515 (2005). A finding that a parent is unfit is "not a moral judgment or a determination that the mother . . . [does] not love the child." Adoption of Bea, 97 Mass. App. Ct. 416, 417 n.2 (2020), quoting Adoption of Bianca, 91 Mass. App. Ct. 428, 432 n.8 (2017). "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" (quotations and citation omitted). Adoption of Leland, supra at 584. See Care & Protection of Bruce, 44 Mass. App. Ct. 758, 761 (1998) ("inquiry is whether the parent is so bad as to place the child at serious risk of peril from abuse, neglect, or other activity harmful to the child"). "A parent may be found unfit because of mental deficiencies, but only where it is shown that such 'deficiencies impaired her ability to protect and care for the child[].'" Adoption of Chad, 94 Mass. App. Ct. 828, 838 (2019), quoting Adoption of Quentin, 424 Mass. 882, 888-889 (1997). See Adoption of Jacob, 99 Mass. App. Ct. 258, 265 (2021).

1. Specificity of findings. The mother argues that the judge's findings lack the specificity and detail required to support the conclusion that she was unfit to parent the child, in part because they contain "contradicting" findings. See Adoption of Nancy, 443 Mass 512, 514-515 (2005). We disagree.

The judge's sixty-seven page decision set forth findings of fact in 346 numbered paragraphs, of which 274 pertain to evidence adduced at the first trial, and seventy-two pertain to evidence from the second trial. From evidence at the first trial, the judge found that DCF had failed to make reasonable efforts to reunify the child with the mother, yet found based on

evidence at the second trial that DCF had made reasonable efforts at reunification. From evidence at the first trial, the judge credited the opinion of a forensic psychiatrist that the mother had the capacity to make decisions in an informed manner and to understand high-risk situations, yet found after the second trial, crediting Dr. Merritt's opinion, that the mother did not have the empathy or maturity to read Darlene's emotions or respond to her needs. From evidence at the first trial, the judge found that Darlene had a "bond" with the mother, yet found after the second trial that Darlene had "little attachment" to the mother. From evidence at the first trial, the judge concluded that visits between the mother and Darlene should occur "as frequently as logistically possible and . . . progress to unsupervised and overnights when appropriate," yet found after the second trial that visits should occur only twice each year, quoting the GAL's opinion that "unsupervised visits would be 'extremely traumatic' for [Darlene]."

In a review and redetermination proceeding, "the judge does not start with a blank slate, but builds on findings established in the preceding stages." Care & Protection of Erin, 443 Mass. 567, 570 (2005). "The proper focus of inquiry . . . is on those facts that have undergone some metamorphosis since the previous order or are newly developed and, in consequence, alter the relationship between the biological parent and child" (quotation

and citation omitted). Id. Here, although the judge's explication of evidence from the first trial may have been lengthy, it provided the backdrop for her ultimate conclusion, showing the "metamorphosis" of the facts on the central issues in the case. That did not render her findings impermissibly contradictory.

Having carefully reviewed the record, we are persuaded that the judge's findings of fact are not clearly erroneous and that they support her conclusions of law. See Adoption of Melvin, 71 Mass. App. Ct. 706, 712 (2008). The thrust of the judge's findings was that, although the mother had made progress and had diligently performed the tasks that DCF assigned to her, as a result of her own cognitive limitations and Darlene's complex needs, the mother had not progressed to the point where she was capable of handling unsupervised visits, and likely would never progress to the point where she would be fit to gain custody of Darlene.[5] As a result, the judge ruled that it was in the best interests of Darlene to terminate the mother's parental rights,

[5] In addition, the judge was concerned about the mother's finances, noting that she was unemployed and expected to support herself and Darlene on her SSI income, relied on her representative payee to conform to a budget, and "ha[d] financial emergencies due to irresponsible spending." The judge also expressed "concerns" about whether the mother could transport Darlene to "medical and behavioral appointments" by public transportation, because she had never had the opportunity to demonstrate her ability to do so.

but ordered twice-yearly visits. The judge based that ruling in part on Dr. Merritt's opinion, which the judge credited, that Darlene had only a "modest attachment" to the mother and the mother did not have the "empathy or maturity" that would be needed to parent Darlene if Darlene were separated from the foster mother. See id. at 714-715. The judge also based her ruling on the observations of the ongoing DCF social worker, which the judge explicitly credited, about the mother's tendency during visits to pay insufficient attention to Darlene.

Also among the evidence on which the judge relied was the report of the GAL, from which the judge quoted the GAL's opinion that "unsupervised visits would be 'extremely traumatic' for [Darlene]." Although the judge did not explicitly state that she credited that opinion, she adopted the GAL's recommendation of twice-yearly visits. The GAL's opinion was consistent with that of Dr. Merritt and the observations of the ongoing DCF social worker, both of whom the judge did explicitly credit. Although it would have been helpful if the judge had explicitly credited the GAL's report, that omission does not render her lengthy findings insufficiently detailed.[6]

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[6] The mother's argument that the judge failed to consider the factors required by G. L. c. 210, § 3 (c), is without merit. The judge expressly cited the statute, and although she did not recite the factors or state which factors applied to the case, the statute does not require that precision. Cf. Custody of Kali, 439 Mass. 834, 845 (2003) (regarding factors applicable

2. Reasonable efforts. "Before seeking to terminate parental rights, [DCF] must make 'reasonable efforts' aimed at restoring the child to the care of the . . . parents." Adoption of Uday, 91 Mass. App. Ct. 51, 53 (2017), quoting Adoption of Ilona, 459 Mass. 53, 60 (2011). "This duty 'includes a requirement that [DCF] provide services that accommodate the special needs of a parent.'" Adoption of Uday, supra, quoting Adoption of Ilona, supra at 61. "However, even where [DCF] has failed to meet this obligation, a trial judge must still rule in the child's best interest." Adoption of Uday, supra, quoting Adoption of Ilona, supra.

The mother argues that the judge erred in finding that DCF made reasonable efforts to reunify Darlene with the mother. After the first trial, DCF provided the mother with the services of the parent aide for six months. During the seventeen months between the trials, DCF also provided the mother with regular supervised visits with Darlene, during which, the judge found, the mother "often relie[d] on the social workers or other collaterals . . . to keep [Darlene] safe and supervised." In addition to testimony and reports from DCF social workers about

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under G. L. c. 209C, § 10 [a], court "look[s] to the substance of the judge's findings and not to their form"). It appears that the statutory factors applicable here include, at a minimum, G. L. c. 210, § 3 (c) (iv), (vii), and (xii).

those visits, the judge considered reports of the court investigator as to a January 2018 visit, of Dr. Merritt as to one in March 2018, and of the GAL as to one in August 2018. After the second trial, the judge remained "extremely troubled" that DCF had placed Darlene in a preadoptive home when only two months old, and found that DCF's "intention from the outset was to support the adoption of [Darlene] by [the foster mother] and it consistently deprived [the] [m]other of all reunification efforts, apart from parent-child visits." Nonetheless, the judge found that DCF had made "reasonable efforts" to return the child to the mother, quoting Adoption of Lenore, 55 Mass. App. Ct. 275, 278 (2002).

It was within the judge's discretion to rule that DCF made reasonable efforts at reunification. See Adoption of Ulrich, 94 Mass. App. Ct. 668, 677 (2019) ("mere participation" in services recommended by DCF does not render parent fit, "without evidence of appreciable improvement" in ability to meet child's needs [quotation and citation omitted]). The judge ruled that the mother's "persistent shortcomings" and reliance on the social worker to keep Darlene safe at visits raised concerns that she was "unable to care for [Darlene] independently." As in Adoption of Melvin, 71 Mass. App. Ct. at 711, "[t]he problem . . . was the mother's persistent need for assistance in developing structured ways to ensure her child[]'s discipline

and care. Although she would implement suggestions when they were made . . . , she was consistently unable to come up with solutions on her own." Nor do the judge's criticisms of DCF undermine her ultimate conclusions. "Troublesome facts . . . are to be faced rather than ignored. . . . Only then is the judge's conclusion entitled to the great respect traditionally given to discretionary decisions" (quotation and citation omitted). Adoption of Leland, 65 Mass. App. Ct. 580, 583 (2006).

3. Child's best interests. The judge concluded that termination of the mother's parental rights was in Darlene's best interests. G. L. c. 210, § 3 (c). "[T]he best interests analysis . . . requires a court to focus on the various factors unique to the situation of the [child] for whom it must act." Custody of a Minor, 375 Mass. 733, 753 (1978). "The standard for parental unfitness and the standard for termination are not separate and distinct, but 'reflect different degrees of emphasis on the same factors.'" Adoption of Nancy, 443 Mass. at 515, quoting Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption, 367 Mass. 631, 641 (1975). "Because our lodestar is necessarily the best interests of the child," Adoption of Bea, 97 Mass. App. Ct. at 417, reversal is not required even if DCF should have made greater efforts to reunify Darlene with the mother.

In reaching that conclusion, the judge noted Darlene's behavioral regressions after parent-child visits, the mother's inability to put Darlene's needs above her own frustrations, and the mother's "persistent shortcomings [that] place [Darlene] at serious risk of peril" if placed in the mother's custody. See Adoption of Melvin, 71 Mass. App. Ct. at 709-710. See also Adoption of Bea, 97 Mass. App. Ct. at 427 n.26 (judge found that mother's cognitive limitations prevented her from meeting child's needs). The judge credited Dr. Merritt's opinion that "[Darlene] had a modest attachment to" the mother and was "strongly attached to" the foster mother, and that if Darlene were removed from the foster mother, it "would be psychologically as catastrophic as the death of her true mother."[7] See G. L. c. 210, § 3 (c) (vii); Adoption of Ilona, 459 Mass. at 62 n.13. Crediting Dr. Merritt's opinion, the judge found that "if [Darlene] were to be removed from [the foster mother] she would go to live with someone she knows ([m]other) but has little attachment to and who is not able to read Darlene's emotions or respond to her needs." See Adoption of Melvin, 71 Mass. App. Ct. at 712 (judge credited opinion of

[7] The mother emphasizes that the judge found that at a March 2018 medical appointment, Darlene called the mother "mommy." The judge also heard evidence that Darlene usually called the mother "mommy [first name]," and called many people "mommy," including the foster mother, the ongoing social worker, and the male GAL. Cf. Adoption of Melvin, 71 Mass. App. Ct. at 708.

psychologist that child would suffer trauma if removed from foster parent, and mother did not have "required insight" to help child cope with trauma). Contrast Adoption of Chad, 94 Mass. App. Ct. at 840 & n.22 (judge's findings did not adequately address how termination of parental rights was in children's best interests, where children had "bond and positive relationship" with mother).

Moreover, the mother's own testimony, as found by the judge, corroborated Dr. Merritt's opinion as to bonding. The mother acknowledged that if Darlene was removed from her foster home, Darlene would "have a hard time" and it would "be a drastic change." The mother testified that if she had custody of Darlene she would "need a lot of help." Asked who she would turn to for help, she named her own mother and sister, who lived in Rhode Island; the judge did not credit that testimony.

Conclusion. As the judge recognized, "[t]his is a challenging case." It is challenging "not because the proper outcome is unclear but because of the emotional toll the decision is likely to take on those whom the decision adversely affects." Adoption of Melvin, 71 Mass. App. Ct. at 714. To the best of her ability, the mother has tried to equip herself to parent Darlene, complying with nearly every task that DCF has set for her. Even so, there was clear and convincing evidence to support the judge's conclusion that the mother was not fit to

parent Darlene, given the mother's challenges and Darlene's behavioral issues and attachment to the foster mother; that the mother's unfitness was likely to continue into the indefinite future, given her only marginal improvement in parenting skills despite her long-time involvement with DCF; and that termination of the mother's parental rights and proceeding with DCF's plan of adoption for Darlene, with the postadoption visitation that the judge ordered, was in Darlene's best interests. We therefore affirm the decree.

So ordered.

DITKOFF, J. (dissenting). The Department of Children and Families (DCF) consistently failed to provide services to the mother except when ordered to do so by a judge, because of DCF's view that the mother's cognitive and developmental disabilities disqualified her from being a parent. Even when the Juvenile Court judge declined to terminate parental rights on this basis and ordered additional services, DCF provided minimal services, which it soon withdrew. Because of this, there is no way to know whether the mother, if properly supported by services, could safely parent the child. Because I believe that the proper test is whether there is clear and convincing evidence that the mother's unfitness would continue indefinitely if she were provided with appropriate services, I respectfully dissent.

1. Standard of review. To terminate parental rights, it is not enough for a judge to find that a parent is currently unfit. Rather, "[t]he judge 'must also find that the current parental unfitness is not a temporary condition.'" Adoption of Querida, 94 Mass. App. Ct. 771, 777 (2019), quoting Adoption of Virgil, 93 Mass. App. Ct. 298, 301 (2018). Accord Adoption of Inez, 428 Mass. 717, 723 (1999), quoting Adoption of Carlos, 413 Mass. 339, 350 (1992) ("the judge should explore whether 'there is a reasonable likelihood that the parent's unfitness at the time of trial may be only temporary'"); Adoption of Posy, 94 Mass. App. Ct. 748, 753 n.11 (2019) (unavailability not proper

ground for termination "where the unavailability was temporary"). "Because childhood is fleeting, a parent's unfitness is not temporary if it is reasonably likely to continue for a prolonged or indeterminate period." Adoption of Ilona, 459 Mass. 53, 60 (2011). Accord Adoption of Elena, 446 Mass. 24, 31 (2006). Accordingly, to terminate parental rights, a judge must find, not that the unfitness is permanent, but merely that the current "unfitness is likely to continue indefinitely." Adoption of Lisette, 93 Mass. App. Ct. 284, 296 (2018). Accord Adoption of Uday, 91 Mass. App. Ct. 51, 54 (2017) (findings "demonstrate clear and convincing evidence of the father's current unfitness and the likelihood that his unfitness will continue indefinitely"); Adoption of Melvin, 71 Mass. App. Ct. 706, 706 (2008) (judge concluded that mother's "unfitness was highly likely to continue indefinitely").

2. Likelihood of unfitness to continue indefinitely. The determination whether the mother's unfitness is likely to continue indefinitely here is complicated by the fact that DCF has consistently failed to provide services to the mother. "Where a parent, as here, has cognitive or other limitations that affect the receipt of services, [DCF's] duty to make reasonable efforts to preserve the . . . family includes a requirement that [DCF] provide services that accommodate the special needs of a parent." Adoption of Chad, 94 Mass. App. Ct.

828, 838-839 (2019), quoting Adoption of Ilona, 459 Mass. at 61. "What constitutes reasonable efforts . . . must be evaluated in the context of each individual case, considering any exigent circumstances that might exist." Care & Protection of Walt, 478 Mass. 212, 227 (2017).

As the judge found, within days of the child's birth, DCF decided that, "[b]ecause of [m]other's low IQ score and cognitive limitations, . . . [m]other could not parent her child." In the first eight months of the child's life, the judge found, DCF "did nothing to provide [m]other with opportunities for reunification other than parent-child visits, which [m]other consistently attended." The judge found that DCF "did little to offer [m]other services designed to correct her parental inadequacies." To the contrary, the judge found, DCF "routinely put obstacles in [m]other's way of reunification."

The judge further found that DCF "failed to offer [m]other accommodations in accordance with the Americans with Disabilities Act . . . to aid her in completing her service plan tasks or to break down her service plan tasks at her level of understanding." For example, DCF required the mother to take an anger management class but refused to provide her with a referral. Although she eventually located a class on her own, DCF changed its goal to adoption, purportedly based on her failure to complete an anger management class and the fact that

she was residing where the Department of Developmental Services (DDS) had placed her.

When the judge rejected termination of parental rights after the first trial, found that DCF had not made reasonable efforts, and specifically criticized DCF's failure to provide the mother with a parent aide, DCF provided the mother with a parent aide for slightly less than six months. The judge ordered that visits "occur as frequently as logistically possible and shall progress to unsupervised and overnights when appropriate." DCF's response to that court order was to increase the parent-child visits from two hours bimonthly to two hours per week, without ever providing unsupervised or overnight visits. This service, also, was soon taken away. After one year, DCF reduced the visits to one hour per week and then returned the visits to two hours biweekly.[1] DCF provided no additional services. Although the judge found that DCF made reasonable efforts, based solely on providing a parent aide for almost six months, I cannot agree that this was sufficient to discharge DCF's duties.

To be sure, the mere fact DCF has not made reasonable efforts "shall not preclude the court from making any

[1] The social worker testified that the visits were decreased because the foster mother reported regression by the child following visits.

appropriate order conducive to the child's best interest," including termination. Adoption of Ilona, 459 Mass. at 61, quoting G. L. c. 119, § 29C. I do believe, however, that a judge should evaluate the likelihood of the mother's remaining unfit indefinitely through the lens of whether that would occur if DCF provided appropriate services, not whether she will remain unfit if DCF continues to fail to provide appropriate services.[2] See Adoption of Ilona, supra ("A judge may consider [DCF]'s failure to make reasonable efforts in deciding whether a parent's unfitness is merely temporary").

In this regard, if the mother were provided such services, it is highly likely that she would engage in them.[3] Throughout

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[2] As an aside, I do not believe we should assume that DCF will continue to fail to provide services. In November 2020, after the United States Department of Justice determined that DCF discriminated against a mother with a developmental disability and "substantiated the allegations in numerous additional complaints from parents with physical, hearing, developmental, and other disabilities alleging that DCF failed to provide them with needed reasonable modifications, effective communication, and an equal opportunity to benefit from DCF's programs and services," DCF reached an agreement to reform its policies and procedures to ensure that persons such as the mother in this case are treated without discrimination and with reasonable accommodations for their disabilities. I see no reason to believe that DCF will not scrupulously adhere to this consent decree. I should acknowledge, however, that the judge in this case had no way of anticipating this consent agreement when she issued her findings.

[3] Indeed, the mother never declined any services offered by DCF.

this case, the mother fully complied with her service plan by securing services on her own. The mother completed three parenting classes, was able to articulate what she learned in these classes, and repeated a fifteen-week class when she did not pass the homework portion of the class. Despite DCF's lack of assistance, the mother eventually completed an anger management class, along with domestic violence classes.[4] She completed a "nine-week money smarts" program to learn about budgeting. The mother also actively sought out therapy, and took her prescribed medications independently. Further, on her own application and research, she was able to secure a placement in a reunification housing program. Cf. Adoption of Chad, 94 Mass. App. Ct. at 843 ("To be sure, there were service plan tasks that the mother did not complete. However, such noncompliance must be viewed in light of the limited efforts that DCF and DDS made to assist the mother in overcoming her demonstrated problems in completing tasks on her own once the children had been removed. The record contains several examples of unexplained failures by the assigned officials to provide

[4] The judge found that the "[m]other asked appropriate and thoughtful questions when actively seeking services in the community," such as, "Do I fit the criteria of the program" and whether the program accepted her insurance, and inquired about the costs of the program and a payment plan.

support to help the mother succeed in keeping the family together").

There is also reason to believe that there is a likelihood that, with appropriate services, the mother will be able to parent the child safely. The DCF social worker reported in May 2018 that the mother "has been improving in her parenting skills. She is learning to understand [the child's] temperament and has been adjusting to her mood swings by being more patient with [the child] which has reduced [the child's] outbursts." The judge concluded that, once provided with six months of a parent aide, the "[m]other has fared relatively well, and has made some strides in her parenting." The judge credited testimony "that [m]other would continue to improve her childcare activities with continued advice and assistance." The judge also credited the testimony of a DCF social worker that the mother "would benefit from an ongoing parent aide." As the mother at one point worked at a nursery school in Brookline with considerable success, she has a significant grounding in proper child care.

Furthermore, the mother's current unfitness is not so overwhelming as to expect it to be irremediable. The mother fixated on tasks, such as assembling a stroller or installing a video game system, at the cost of spending time with the child. The mother bought the child a bicycle but failed to supply a

helmet.[5] When the foster mother failed to dress the child warmly enough for a visit, the mother provided a coat to the child but refused to let her keep it, apparently out of frustration with recurrent issues with the foster mother's dressing of the child.[6] The child was resistant and uncooperative with the mother's attempts to discipline her. These are not the sort of grievous shortcomings that could not be remedied with appropriate services.

The judge stated, "Of highest concern to the [c]ourt is the fact that [m]other has never engaged in a primary care-taking role of [the child] for an extended or unsupervised period of time, and often relies on the social worker or other collaterals at visits to keep [the child] safe and supervised. While [m]other has made progress during parent-child visits, [m]other has never been provided the opportunity by [DCF] to demonstrate whether she has the capacity to act as a fit parent for [the child] on a full-time and permanent basis." DCF's failures, however, are not axiomatic or unchangeable features of the

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[5] Although it is true, in a sense, that the mother "allowed" her roommate's son to ride the bicycle, that boy's mother was present. The social worker testified that she too decided it was not her role to intervene. Nonetheless, it was the mother, and not the social worker or the boy's mother, who first assisted the boy after he fell.

[6] The mother admitted that she was at fault regarding this decision.

landscape. Once this is understood, the likelihood that the mother's unfitness is temporary rests, as it must, "upon credible evidence rather than mere hypothesis or faint hope." Adoption of Lisette, 93 Mass. App. Ct. at 296, quoting Adoption of Serge, 52 Mass. App. Ct. 1, 7 (2001).

3. Bonding to preadoptive mother. Dr. Merritt, whose opinion the judge credited, found that the child was strongly attached to the foster mother, and modestly attached to the mother. Dr. Merritt reported that removal of the child from the home of the foster mother would be as psychologically "catastrophic as the death of her true mother," and that the mother was unable to read the child's emotions or respond to the child's needs. Nonetheless, a bond between the child and the foster parent, "in the absence of other evidence of unfitness, cannot justify the extreme step of permanently separating the mother from her child." Adoption of Zoltan, 71 Mass. App. Ct. 185, 195 (2008). "Avoiding the likely 'trauma of separation' . . . should not be the 'determining factor for the judge.'" Adoption of Rhona, 57 Mass. App. Ct. 479, 492 (2003), quoting Adoption of Hugo, 428 Mass. 219, 230 (1998), cert. denied, 526 U.S. 1034 (1999). See Adoption of Rhona, supra ("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. It is not unexpected that bonding would occur").

I acknowledge that, in Adoption of Melvin, 71 Mass. App. Ct. at 714, we affirmed a termination of parental rights on the ground that "the mother . . . simply did not have the insight and equipment necessary to deal successfully with the psychological trauma [the child] would suffer were the bond between him and his caretakers to be severed involuntarily." In that case, however, "[DCF] had provided the mother with a variety of services, and although she had been receptive to at least some of them, she had not been able to utilize them effectively," and "the mother's marginal improvement in parenting skills despite her long-time involvement with [DCF] showed that her unfitness was highly likely to continue into the indefinite future." Id. at 712, 715. I do not read Adoption of Melvin as suggesting that a child's strong bond with a foster parent, by itself, can provide a basis for a finding of unfitness. Nor am I willing to extend it to that extent. The strength of the bond between the foster mother and the child cannot justify termination of parental rights in the absence of clear and convincing evidence that the mother's unfitness is likely to continue indefinitely.

4. Conclusion. As we stated in Adoption of Chad, 94 Mass. App. Ct. at 839, "The judge did not speak directly to the

nuanced question that the mother's situation posed: whether, with available assistance, the mother would be able to leverage the outside support" necessary to successfully parent the child. As in Adoption of Chad, I "do not presume that the answer to that question is 'yes'; in the end, it may well be that the mother's demonstrated problems with completing tasks even with some assistance prove too profound." Id. Rather, I conclude that, "at a minimum, further exploration and explication is necessary before the mother's parental rights may be terminated." Id. at 843.

It may be the case that, with appropriate services, the mother will become fit to parent the child safely. It may be the case that, even with appropriate services, she will not be able to parent the child safely. Now we will never know.

I respectfully dissent.