20-P-876 Appeals Court

ADOPTION OF FRANKLIN
(and two companion cases[1]).

No. 20-P-876.

Bristol. April 7, 2021. - June 28, 2021.

Present: Milkey, Hand, & Grant, JJ.

Department of Children & Families. Adoption, Dispensing with parent's consent, Visitation rights, Standing. Minor, Adoption, Visitation rights. Parent & Child, Dispensing with parent's consent to adoption. Judgment, Relief from judgment.

Petitions filed in the Bristol County Division of the Juvenile Court Department on June 6, 2016.

The cases were heard by James P. Harrington, J., and a motion for relief from judgment was heard by him.

Michael S. Penta for the father.
Jennifer L. Kernan for Department of Children and Families.
Christine Hamilton-Queiroz for Bruce.
Morgan A. Russell for Franklin and Cora.

[1] Adoption of Bruce and Adoption of Cora. The children's names are pseudonyms.

MILKEY, J. This case involves the welfare of three children born in 2004, 2008, and 2009. In June of 2016, while the father was incarcerated, the Department of Children and Families (department) removed the children from the mother's care. One year later, the mother died from a drug overdose.

Between the removal of the children and the trial on the termination of the father's parental rights, the department allowed only one visit between the father and children and then unilaterally terminated visitation. The father was released from incarceration in February of 2018, just days before the termination trial began in the Juvenile Court. After trial began, the father filed a motion seeking immediate restoration of visitation. As detailed infra, the trial judge effectively tabled consideration of that motion until it became moot.

On September 25, 2018, after the close of trial, the judge issued decrees that found the children in need of care and protection, found the father unfit, and terminated the father's parental rights. The judge also approved the department's plan under which all three children would be adopted by their then-foster parents (foster parents). The father timely appealed, and the judge eventually issued his findings and conclusions of law in July of 2019.

Meanwhile, shortly after the close of trial and before the decrees even entered, the circumstances of the middle child,

Bruce, changed. In short, Bruce was placed in institutional care, and the foster parents, who had planned to adopt all three children, decided not to adopt him. Once the father learned of that change, he filed a motion for relief from judgment with respect to Bruce. After the trial judge denied that motion in part for lack of standing, the father appealed that order, and his appeals were consolidated. Bruce filed his own appeal, largely aligned with the father's, and the other two children participated as appellees. We conclude that in light of the fact that the department violated its regulations by unilaterally terminating visitation, and in light of Bruce's changed circumstances, a remand is appropriate to reexamine whether an order providing for visits between the father and Bruce is warranted. We otherwise affirm the decrees terminating the father's rights and the order denying the father's motion for relief from judgment.

Background. 1. The removal of the children. The department first became involved with the father and mother in 2004 when their oldest child, Franklin, tested positive for methadone at birth. Both parents had a long history of substance abuse, including with heroin and opioids, and the mother eventually died of a drug overdose in 2017. Although the father denied using heroin after 2003, the judge discredited that testimony and found that the father used heroin as recently

as 2015 (at which time the father began a multiyear jail sentence).

The father has a lengthy criminal history, including multiple charges for dealing drugs, which he admitted he had done in the presence of the children.[2] He collected swords and knives, to which the children had access, and he has a history of violence. For example, the father admitted that on one occasion when a woman annoyed him by knocking on his door and refusing to leave, he chased her with a sword that he used to damage her car. In 2008, he was charged with assault with intent to murder and related charges after a witness to a stabbing identified him as the perpetrator. The police found the father with multiple weapons, including a double-edged sword that had blood on it. He was held without bail following a dangerousness hearing, although the charges eventually were dismissed. In total, the father has been incarcerated twice since the children were born.[3] For the alleged 2008 stabbing, he was held for three months. For a 2015 drug conviction, he was incarcerated from June of 2015 to February of 2018.

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[2] One of the children was present when the father was arrested with 35.2 grams of heroin, which led to his last incarceration.

[3] Before the children were born, the father spent an unclear number of years in jail in Puerto Rico, where his family moved when he was fourteen.

When not incarcerated, the father had an itinerant lifestyle and often was absent from the family. Notably, he lived at over fourteen different addresses between 2004 and 2015. Even when he was living with the family, the father had only limited involvement in taking care of the children. There also was robust evidence of his neglect and abuse of the children. The father inflicted physical punishment on the children on a daily basis, hitting them with a belt or toy car track that he called the "whipper." He and the mother would sometimes leave the children alone, including overnight, even when the oldest child was only seven years old.

While the mother was pregnant with Bruce, the parents separated for a time. When Bruce was born in 2008 testing positive for methadone and exhibiting signs of drug withdrawal, he and his older brother, Franklin, were removed from the mother's custody. The parents reunited, and the children were returned to their care after about six months. A daughter, Cora, was born in 2009.

After being convicted of possession of heroin with intent to distribute, the father began serving a jail sentence in June of 2015. As noted, in June 2016, while the father was incarcerated, the children were removed from the mother's custody. The following month, Franklin and Bruce were placed with the foster parents, and Cora joined them there two months

later. In early 2017, prior to the mother's death, the department changed its goal for all three children to adoption by the foster parents.

2. Visits with the father. During the beginning of the father's most recent incarceration, the mother periodically would bring the children to visit him. The mother stopped bringing the children for visits after November of 2015. In December 2016, the father told the department's ongoing social worker that he had not seen the children in over a year, and wanted visits with them. Even so, and despite Bruce and Cora -- then eight and seven -- also expressing an interest in such visits, the record reflects minimal effort by the department to provide the father visits with the children for months after removing them from the mother's custody.[4] While in March of 2017, at one of the ongoing social worker's regular meetings with the father at the Plymouth County house of correction, the father told her that he did not want the children to visit him at that time because he was on a hunger strike and did not want the children to see him in a debilitated condition, by May 2017, the father told the ongoing social worker that he wanted to resume visits with the children. She told him that she would

[4] In late January 2017, the foster father expressed his concerns to the ongoing social worker about Bruce having visits with the father, because Bruce had said, "My dad has killed people and I'm going to tell him to kill you when I see him."

discuss with the children whether they were interested in visits.

All three children voiced their interest in visiting the father, and a visit between the children and the father finally took place on July 31, 2017. The father maintains, with some evidentiary support, that the visit went reasonably well under inherently difficult circumstances -- three young children whose mother had just died visiting their incarcerated father after a lengthy absence and having to speak with him separated from him by a glass barrier, using a telephone. The department maintains that the visit did not go well: the ongoing social worker who supervised the visit testified that Bruce was disruptive and defiant on the car ride to the jail, all three children were difficult to manage during the visit, and the father did not express his condolences to the children for the mother's death, even after Bruce commented that he missed the mother.[5] Even so, the social worker acknowledged that the father asked the children how they were doing and told them that he missed and loved them.

Following the July 31, 2017 visit, Bruce was very upset and said he wanted to live with the father, and was worried that if

[5] At trial, the father testified that he was uncomfortable with the topic of the mother's death, and had not wanted the children to know that she had died.

he was adopted by the foster parents he would not be able to see the father again. His behavior, and to some extent that of the other children, also took a turn for the worse. Bruce began to defecate on the floor, to hear voices, and to become frightened of being alone. The father and Bruce argue, with at least some force, that this decompensation may have been due to causes other than the visit, such as the mother's recent death or, for that matter, Bruce's being deprived of visits with the father. The department took the position that the visit was the cause of Bruce's decompensation.

Within one week after the July 31 visit, the department decided not to allow further visits between the children and the father. The decision was made by the ongoing and adoption social workers and the management team at the department's office, after consultation with the department's trial counsel. The department never sought approval of its decision from a judge, and did not notify the father of that decision.[6] The father meanwhile wrote each of the children a letter in August 2017.[7] Bruce's behavior continued to deteriorate, and he was

[6] To the contrary, the department's biannual family action plan nominally continued to state that the assigned social worker would "[p]rovide visitation between the children and parent when deemed appropriate."

[7] The father had also written such letters in December 2016 and March 2017. The department withheld the December 2016

hospitalized twice and placed in community-based acute treatment (CBAT) programs on four occasions through February of 2018.

The father was released from incarceration on February 8, 2018, four days before the termination of parental rights trial began. The trial ran a total of thirteen largely nonconsecutive days over the next six months. On March 2, 2018, the father filed an abuse of discretion motion requesting that visitation be restored. This prompted the department to file a motion seeking court ratification of its decision to suspend visitation. Over the father's objection, the judge tabled consideration of the dueling motions regarding visitation, and stated that he was folding those issues into the ongoing trial.

At trial, all three children were represented by the same attorney, who advocated for termination of the father's parental rights.[8] As to posttermination visits with the father, the children's counsel told the judge that he had consulted with each child and visits "are a strong probability" for Franklin and Cora, but that Bruce "is going to require a little bit more attention for contact." On the last day of trial, August 13,

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letter from the children because in it the father blamed the mother for the children's being in the department's custody.

[8] After trial, the children were assigned a single appellate counsel. However, after the conflicting interests between Bruce and the other children became apparent, appointed counsel was allowed to withdraw, and new counsel were appointed.

2018, the judge stated on the record that the adoption plan was reasonable and appropriate and that "the [d]epartment's made reasonable efforts," but the docket does not reflect any formal ruling on the father's motion for visitation or the department's motion to suspend visitation.

3. The father's postrelease circumstances. When he was released from incarceration, the father went to a residential treatment center for substance abuse for approximately four months. The father did well in that setting, and his peers and staff elected him as "head houseman." At the conclusion of his program, the father had the option of staying on there, but chose not to do so. At that point, he essentially was homeless and often slept in different places from night to night. By the time he testified, the father recently had secured part-time employment at near the minimum wage. He acknowledged that his housing instability and economic circumstances meant that he was incapable of assuming custody of the children at that time. Still, the father felt he was making progress and expressed his hope that he someday would be in a position to assume custody.

4. Posttrial developments. On September 25, 2018, the judge issued decrees terminating the father's parental rights as to all three children. The father filed a timely appeal of the decrees, and the judge issued findings and conclusions of law in July of 2019. The judge ordered one annual visit between the

father and Franklin (which was consistent with Franklin's preferences), and left visitation between the father and the other children to the discretion of the foster parents. According to the judge's findings and conclusions, Bruce was "thriving" with the foster parents, who were still planning on adopting him.

The judge's July 2019 findings do not address the fact that Bruce's condition had begun to deteriorate further even before the trial had concluded. On the final day of trial, August 13, 2018, counsel for the department informed the judge that Bruce had been taken to a hospital emergency room; that same day, the judge approved the administration of antipsychotic medication to Bruce on an emergency basis.[9] Two weeks after trial ended, Bruce was placed in an intensive residential program, and the foster parents eventually decided not to proceed with adopting him.[10]

After learning of these developments, the father on May 5, 2020, filed a motion for relief from judgment seeking to reopen

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[9] Following trial (but before the decrees issued), the judge ordered and received a report about Bruce from a guardian ad litem concerning antipsychotic medication, but that report is not before us. Unreflected in the trial transcript, but revealed by an affidavit subsequently provided by the assigned adoption social worker, is the fact that Bruce had had multiple additional CBAT placements during the course of the trial.

[10] The foster parents informed Bruce of their decision on March 14, 2019; it is not clear from the record when they made that decision.

the proceedings with respect to Bruce. The father based this motion not only on Bruce's changed circumstances but also on alleged improvements in his own. Specifically, the father submitted an affidavit stating that he now had obtained a stable living situation (residing with a girlfriend and her daughter at a particular address), had secured gainful employment at two jobs until being laid off due to the global pandemic, and had remained drug free and out of trouble with the law since his release from jail two years earlier. Although the father expressed his interest in proving that he was capable of regaining custody of Bruce, he did not request such relief in his motion. Instead, he sought only that the judge vacate the termination of his parental rights with respect to Bruce and order the resumption of visitation with him. In the father's words, "it is important for Bruce to know he is loved and he is wanted."

In response to the father's motion, Bruce supported the resumption of visits on a monthly basis. In fact, the record reflects that since trial, Bruce repeatedly and consistently had expressed to his caregivers his desire to visit the father. Adopting a wait-and-see approach regarding long-term options, Bruce took the position that it was premature to address the reopening of the termination of the father's parental rights.

For its part, the department opposed the father's motion. The department argued that the judge should reject the father's motion on two threshold grounds: (1) the father lacked standing given that his rights had been terminated, and (2) the motion was not filed within a reasonable period of time. The department also argued that the judge could deny the father renewed visitation based on the lack of a demonstrated bond between him and Bruce, without actually addressing whether such a bond existed. Although the department argued in cursory fashion that renewing visitation was not in Bruce's best interests, that passing argument was not grounded in the detailed affidavit that the department filed with its opposition. In fact, while that affidavit documented some ongoing concerns about the relationship between the father and Bruce,[11] it did not state that, or explain why, resuming visitation on appropriate terms would harm Bruce. Instead, the affidavit recommended conditions that should be placed on any resumed visitation. The affidavit also recounted the department's various unsuccessful efforts to find Bruce a suitable alternative adoption placement.

[11] For example, the affidavit, which was from the currently-assigned adoption social worker, noted that Bruce to some extent blamed himself for abuse he suffered at the hands of the father.

After a telephonic conference, the judge denied the father's motion, and explained his reasoning in a seven-page memorandum. The judge passed over whether the motion had been timely filed, but ruled that the father lacked standing to seek reopening of the proceedings. He additionally stated that he would not have reopened the proceedings even if the father had standing. The judge dismissed the father's claims of self-improvement as "self-serving," and stated that the father's affidavit still did not demonstrate an understanding of how his actions negatively had affected Bruce.

With respect to renewing visitation, the judge concluded that, again, the father lacked standing, and that "re-introduction of [the f]ather at this time would appear to be counter-productive to the child's recent and tentative gains, particularly where [the f]ather has been unable or unwilling to acknowledge his responsibility for the harm caused to [Bruce] by his behaviors." The judge also expressed concern that the father had missed his last scheduled visit with Franklin.

Discussion. The appeals filed by the father and Bruce are based in great part on the department's alleged failure to make reasonable efforts to reunify the family. See Care & Protection of Walt, 478 Mass. 212, 220-221 (2017), quoting G. L. c. 119, § 29C (recognizing department's obligation to make "reasonable efforts" designed to make it "possible for the child to return

safely to his parent"). These arguments in turn are based primarily on the department's limited efforts to provide the father visitation while he was incarcerated, and its unilateral decision to terminate visitation following the one visit held on July 31, 2017.[12] Given that those issues were the subject of the abuse of discretion motion that the father filed on March 2, 2018, we begin by addressing the judge's handling of that motion.[13]

1. The father's abuse of discretion motion. The department's regulations expressly require that the department

[12] The father additionally argues that he suffers from mild cognitive disabilities that make it hard for him to keep track of dates and times and that the department failed to make reasonable efforts to address these issues. A department social worker testified that the father did not make the department aware of his diagnosis. Although the father testified that he did do so, nothing required the judge to credit that testimony. The judge accepted that the father suffered from cognitive shortcomings, but made no findings on whether the department was timely informed of these issues. Because the finding of unfitness would stand even if the judge's specific factual findings relating to the father's cognitive disabilities were omitted, the issue is immaterial.

[13] We do not need to resolve at this stage whether any order on the abuse of discretion motion is independently reviewable. See Adoption of Talik, 92 Mass. App. Ct. 367, 374-375 (2017) (noting but not deciding question whether mother's appeal from denial of abuse of discretion motion, which had challenged child's pretrial placement, was moot). However, the judge's handling of that motion potentially has independent import for issues that remain live: unfitness, termination, and posttermination visitation. See Adoption of Ilona, 459 Mass. 53, 61 (2011) ("judge may consider the department's failure to make reasonable efforts in deciding whether a parent's unfitness is merely temporary").

"make all reasonable efforts to work in cooperation with incarcerated parents to promote a healthy relationship with their children, and to avoid permanent separation." 110 Code Mass. Regs. § 1.10 (2008). Those self-mandated "efforts shall include regular visitation at the correctional facility." Id. Moreover, regardless of whether parents are incarcerated, the department's regulations prohibit it from terminating visitation "unless the matter is brought before a judge, and the judge makes specific findings demonstrating that parental visits will harm the child or the public welfare." 110 Code Mass. Regs. § 7.128 (2008). This requirement reflects the fact that "[t]erminating parental visits 'is a ruling of such significance to the parties that . . . the same standards which apply to permanent custody decisions should apply to such a ruling.'" Adoption of Rhona, 57 Mass. App. Ct. 479, 489 (2003), S.C., 63 Mass. App. Ct. 117 (2005), quoting Custody of a Minor (No. 2), 392 Mass. 719, 726 (1984). That showing must be made by clear and convincing evidence. Adoption of Rhona, supra. See L.B. v. Chief Justice of the Probate & Family Court Dep't, 474 Mass. 231, 242 (2016) ("Visitation, like custody, is at the core of a parent's relationship with a child; being physically present in a child's life, sharing time and experiences, and providing personal support are among the most intimate aspects of a parent-child relationship").

The department unquestionably violated these regulatory obligations in the case before us. Putting aside the limited nature of the department's efforts to foster visitation with the father between June of 2016 (when the department obtained custody of the children) and July 31, 2017 (the one and only visit), it is undisputed that the department thereafter terminated visitation without obtaining judicial approval.[14] See Adoption of Linus, 73 Mass. App. Ct. 815, 817 (2009) (suspension of visits for seventeen months for one child and five months for another constituted violation of regulation). The department did not request judicial approval to terminate visitation until the father forced the issue by filing his motion to resume visitation. On multiple occasions we have admonished the department for terminating visitation without notice, and then trying to leverage the subsequent deterioration in the parent-child relationship in judicial proceedings. See id. at 822; Adoption of Rhona, 57 Mass. App. Ct. at 490. Cf. Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption, 16 Mass. App. Ct. 607, 612 (1983), S.C., 391 Mass. 113 (1984).

[14] The department does not argue that its decision "[t]hat we should not schedule any more visits, between the children and their the father" after July 31, 2017, was anything less than a termination of visits, or that its inclusion of a purported visitation provision on the January 2018 family action plan meant that visits had not been "terminate[d]" within the meaning of 110 Code Mass. Regs. § 7.128; indeed, the department's brief does not cite to that regulation at all.

Such conduct is "unseemly." Adoption of Linus, supra at 822, quoting Adoption of Rhona, supra. Petition of the Dep't of Social Servs. to Dispense with Consent to Adoption, supra.

Had the department moved in August 2017 to terminate visitation, the judge could have held a hearing at which he could have assessed, based on the testimony of the relevant social workers, therapists, and others, whether further visitation was in each child's best interests as events were unfolding. The department's actions deprived the children, and the father, of that opportunity. When the father later pressed the issue by filing his motion, the judge stated that he would incorporate the issues raised by that motion and the department's cross-motion into the trial on the merits. While that decision plainly was well-intentioned, it had the effect of compounding the department's error by denying the father a separate and timely hearing on his motion. Cf. Adoption of Rhona, 57 Mass. App. Ct. at 490 & n.13. It is at least doubtful that the department could have shown, by clear and convincing evidence, that continuing to prohibit visitation during the lengthy trial was necessary to prevent harm to the children. In any event, the delay deprived the father and the children of any opportunity to have visitation resume in the interim and,

potentially, for the father to demonstrate that he could have positive interactions with the children.[15]

At trial, the judge repeatedly questioned whether there would be testimony from a mental health professional treating any of the children, and the father's counsel noted the lack of such evidence. The department did not call any treatment provider; rather, its counsel argued that the judge should retroactively condone the department's termination of parent-child visits based on the testimony of the adoption social worker and the foster mother. The docket does not reflect even after-the-fact approval of the department's termination of visitation, much less the specific judicial fact finding that must accompany a termination of visitation.[16] The net result was

[15] The department blames the father for not filing his motion sooner and suggests that he thereby waived the issue. But the father filed his motion shortly after he was released from incarceration when trial testimony made clear that the department had suspended visitation. Nor has the department explained how the father should have known of its unilateral decision. The department violated the very procedures that would have given the father notice, and there is no evidence that the department otherwise informed him of it.

[16] To be sure, the judge did note in his eventual July 2019 findings that the department terminated visitation based on the perception of the ongoing social worker and her supervisor that the one and only visit had caused a significant negative effect on the children. However, the record reflects numerous reasons to question the validity of the department's conclusion. At a minimum, it is not obvious that the department would have made the required showing.

that the father's motion to restore visitation was held in abeyance until it became moot.

Although we agree with the father that the department violated its regulations in terminating visitation without court approval and that the judge erred by postponing consideration of the father's motion to restore visitation, it does not follow that the father is entitled to reversal of the decrees terminating his parental rights. See G. L. c. 119, § 29C ("A determination by the court that reasonable efforts were not made shall not preclude the court from making any appropriate order conducive to the child's best interest").[17] See also Adoption of Ilona, 459 Mass. 53, 61 (2011). To address whether such relief is appropriate, we need to examine the grounds on which the judge determined the father to be unfit and terminated his parental rights, and what role, if any, the absence of

[17] Based on the same statute, the father makes a procedural argument that the judge failed to make specific written findings as to whether the department had made reasonable efforts to reunify the family. The judge did make such a finding, orally, on the record. Further, because the Legislature has decreed that a finding that the department failed to make reasonable efforts does not preclude termination, see G. L. c. 118, § 29C, it follows that the absence of a finding on that issue does not necessarily require a remand. Here, we have concluded that the department failed to live up to its responsibilities to encourage visitation, and so a remand for the judge to make findings on the reasonableness of the department's efforts would serve no purpose.

visitation up to that point played in those decisions. We therefore turn to those issues.

2. Parental fitness. "While a decision of unfitness must be supported by clear and convincing evidence, a judge's findings will be disturbed only if they are clearly erroneous" (citation omitted). Adoption of Paula, 420 Mass. 716, 729 (1995). The judge issued fifty-eight single-spaced pages of findings and conclusions of law. Notwithstanding the sheer volume of subsidiary findings, the father and Bruce are hard-pressed to identify any individual findings that are clearly erroneous. Any limited factual errors or inconsistencies that the father and Bruce are able to show are arguable and of minimal consequence. See Care & Protection of Olga, 57 Mass. App. Ct. 821, 825 (2003) (affirming termination decree where clearly erroneous findings were "not central to the ultimate conclusion of unfitness"). For example, one finding states that the father did not request visitation after his release from incarceration on February 8, 2018, when -- as the judge plainly was aware -- the father filed his motion seeking to restore visitation on March 2 of that year.

Beyond asserting that the judge erred in his fact finding, the father and Bruce argue that the judge failed to acknowledge and weigh facts that lay in the father's favor. See Adoption of a Minor (No. 2), 367 Mass. 684, 688 (1975) ("Troublesome facts,

pointing to a conclusion contrary to that reached by the department or the judge, are to be faced rather than ignored"). Having reviewed the judge's findings and the voluminous trial record, we conclude that the findings overall are fair and balanced. Even granting that the judge's findings did not acknowledge or highlight some factors lying in the father's favor, the evidence of the father's unfitness was overwhelming. That evidence included the father's physical abuse of the children, his history as a drug dealer (an occupation he openly pursued in front of the children), his own substance abuse, his failure "to recognize how his substance abuse and drug dealing affected his children," and his extreme housing instability both before and during trial.

We further conclude that the absence of recent visitation played a minimal role in the termination of the father's rights. While the judge did note that the father had seen the children only once since November of 2015, this seems to have played a limited role in the judge's finding of unfitness or in his decision to terminate the father's rights. To the contrary, as the judge emphasized, the "[f]ather has never been a source of stability for the children. Even prior to his [most recent] incarceration and the [c]hildren's removal, [the f]ather failed to maintain a consistent presence in their lives and has been unable to maintain a stable, nurturing, and secure home for

[the] children." As noted, far from claiming at trial that he currently was in a position to regain custody of the children, the father himself acknowledged that he was not. The evident affection that the father has toward the children does not negate his unfitness to parent them.[18]

Nor do we discern clear error in the judge's finding that the father's unfitness was "likely to continue into the indefinite future to a near certitude." This is not a case involving a young parent overwhelmed by the new responsibilities of parenthood. The father was forty-five years old by the time of trial. Moreover, in addition to the three children who were the subject of the care and protection petition and a fourth child who died as an infant, the father had four children from previous relationships, with whom the father maintained little or no relationship.[19] The fact that the father was able to point to some hopeful signs of a potentially more stable future did not preclude the judge from concluding that the father's

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[18] "Despite the moral overtones of the statutory term 'unfit,' the judge's decision was not a moral judgment or a determination that the [parents] do not love the child." Adoption of Bianca, 91 Mass. App. Ct. 428, 432 n.8 (2017). "The inquiry instead is whether the parents' deficiencies or limitations 'place the child at serious risk of peril from abuse, neglect, or other activity harmful to the child.'" Id., quoting Care & Protection of Bruce, 44 Mass. App. Ct. 758, 761 (1998).

[19] The father's first child was born when he was fourteen.

unfitness was likely to continue indefinitely. See Adoption of Ilona, 459 Mass. at 59-60 ("Even where a parent has participated in programs and services and demonstrated some improvement, we rely on the trial judge to weigh the evidence in order to determine whether there is a sufficient likelihood that the parent's unfitness is temporary").

3. Termination. Of course, "[u]nfitness does not mandate a decree of termination." Adoption of Imelda, 72 Mass. App. Ct. 354, 360 (2008). At the same time, with the passage of time, it becomes increasingly important that a child obtain a stable, safe, and nurturing home environment. As our cases long have recognized, it is unfair to leave a child in limbo indefinitely. Adoption of Nancy, 443 Mass. 512, 517 (2005) ("it is only fair to the children to say, at some point, 'enough'"). 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. at 61, quoting Adoption of Gregory, 434 Mass. 117, 121 (2001).

With these overarching principles in mind, we conclude that the judge did not err in determining, based on the trial record, that the best interests of the children lay in the father's rights being terminated and their being adopted by the foster parents, with whom they had lived since 2016. Franklin and Cora

generally were thriving in that setting, and Franklin -- the only child to testify at trial -- expressed his strong desire to be adopted by the foster parents. Granted, even based on the evidence available to the judge at trial, Bruce presented somewhat different circumstances. He was not thriving in the care of the foster parents, he already had been hospitalized twice and placed in CBAT programs four times, and he was in a hospital emergency room on the last day of trial. Nevertheless, the foster parents still were slated to adopt him, and given the overwhelming evidence of the father's unfitness, the judge did not abuse his discretion in finding that Bruce's best interests required terminating the father's parental rights. The change in Bruce's circumstances did not require revisitation of the issue of the father's unfitness. See Adoption of Xarina, 93 Mass. App. Ct. 800, 805 (2018) ("The department is not required to retry a parent's unfitness in the event the proposed plan for a child changes"). See also Adoption of Nate, 69 Mass. App. Ct. 371, 376 (2007).

4. Visitation. The father argues that he is entitled to an order for visitation with Bruce and Cora. Because we conclude that the father was in any event entitled to have the question of visitation with Bruce reopened after Bruce's preadoptive placement fell through (see infra), we pass over the

question of visitation with Bruce for the moment. We focus instead on visitation with Cora.

The father argues that the trial judge abused his discretion in ordering visitation for Franklin but not the younger children. We disagree. Franklin was eleven when the father began serving his most recent incarceration, and thirteen at the time of trial. In his uncommonly mature trial testimony, Franklin specifically stated that he did not want frequent contact with the father, but wanted contact on an annual or so basis for two reasons: he wanted to be able to let the father know that he was doing well, and he did not want to "throw [the father] away." Such testimony provided a sound basis for the judge to order annual visits between the father and Franklin. Cora did not testify at trial, and is much younger than Franklin; she was five years old when the father was incarcerated and nine years old at the time of trial. Given her different circumstances, we discern no abuse of discretion in the judge's treatment of Franklin relative to Cora.

The father additionally argues that the trial judge miscalculated what was in Cora's best interests because the trial judge mistakenly accepted that the July 2017 visit caused the children's decompensation. This argument about Cora's best interests, whether true or not, is misdirected. Even where a trial judge "finds that visitation is in the child's best

interest," the judge need not necessarily order visitation. Adoption of Ilona, 459 Mass. at 65-66. Here, the judge did not prohibit visits between the father and the younger children; he merely left this issue to the discretion of the foster parents. As the judge found, the foster parents demonstrated their willingness to allow contact between the children and extended family (albeit the mother's). Cora herself is content with this outcome. In such cases, judges generally may "leav[e] 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 [the child's] best interest." Adoption of Ilona, supra at 66. Cf. Adoption of Oren, 96 Mass. App. Ct. 842, 850 (2020) (remanding for further consideration of postadoption visitation where there were no findings "concerning the willingness of the preadoptive family to support visitation"). Thus, the judge did not abuse his discretion.

5. The father's motion for relief from judgment as to Bruce. Bruce's circumstances changed profoundly after trial, once the foster parents decided not to adopt him. He remains in institutional care, and as the affidavit of the department's adoption social worker reflects, his prospects for adoption by a different family have at least dimmed. The father, through his motion for relief from judgment, sought to reopen the proceedings as to Bruce based on this change of circumstances

and on claimed improvements in the father's own situation.[20] Before turning to the motion's merits, we must address the two threshold issues that the department raised below.

a. Timeliness of the father's motion for relief from judgment. The department argued in the trial court, and maintains on appeal, that the father's motion for relief from judgment as to Bruce should be denied on the ground that the motion was not timely. Although the judge passed over that question, we address that issue in light of our authority to affirm on "any ground apparent on the record that supports the result reached in the [trial] court." Gabbidon v. King, 414 Mass. 685, 686 (1993).

The father purported to file his motion for relief from judgment pursuant to Mass. R. Dom. Rel. P. 60 (b) and Mass. R. Civ. P. 60 (b), 365 Mass. 828 (1974).[21] Although those rules do not, strictly speaking, apply to care and protection cases, we look to such rules by analogy. See Adoption of Yvonne, 99 Mass.

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[20] It also bears noting that Bruce has now turned twelve, the age at which his consent is required to any adoption. See G. L. c. 210, § 2. We have considered this a relevant factor in examining whether reopening termination proceedings was warranted. See Adoption of Cesar, 67 Mass. App. Ct. 708, 716 (2006).

[21] Although the father specifically cited to Mass. R. Civ. P. 60 (b) (5), and Mass. R. Dom. Rel. P. 60 (b) (5), which encompass claims that it would no longer be equitable to apply a judgment prospectively, the catch-all provisions of rule 60 (b) (6) would appear to provide a better fit.

App. Ct. 574, 582 (2021), and cases cited. Under those rules, a motion for relief from judgment in any event must be filed within a "reasonable time." In arguing that the father's motion was untimely, the department points to the nineteen-month gap between the termination decree, entered September 25, 2018, and the father's motion for relief from judgment, filed May 5, 2020. However, that delay must be viewed in context.

The father filed his motion after learning that the foster parents had decided not to adopt Bruce, and that Bruce had been placed in institutional care. In his April 22, 2020, affidavit in support of the motion, the father averred that he learned of the change in Bruce's circumstances "recently" from his appellate attorney. Although the affidavit does not provide further specificity as to when the father learned of the foster parents' decision, the docket reflects that the father's appellate attorney did not file her notice of appearance until February 7, 2020. In any event, the department has not asserted -- much less demonstrated -- that the father's statement that he learned of Bruce's change in circumstances only "recently" is untrue. The detailed affidavit of the adoption social worker that the department filed in opposition to the father's motion makes no claim that the department made any effort to inform the father about the profound change in Bruce's circumstances. Rather, the judge's findings of fact reflect that -- even though

Bruce had been transferred to institutional care shortly after trial -- the trial judge himself still was unaware when he made those findings that the foster parents were no longer going to adopt Bruce.[22] In addition, the department has not claimed that it, or Bruce, in any way has been prejudiced by any delay in the father's filing of his motion. Indeed, Bruce supports the father's efforts to resume at least some visitation. Considering all of these circumstances, we are unwilling to say that the father's motion was not filed within a reasonable time.

b. The father's standing. The department also argued that because the father's parental rights were terminated by the decree that his motion for relief from judgment sought to reopen, he lacked standing to press such a motion. The judge accepted the argument, but we do not. Although the department no longer appears to press the standing issue on appeal, we

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[22] Bruce had been transferred to institutional care on August 28, 2018, which was one month before the termination decree issued. The department has an obligation to keep a judge informed that a planned adoption has unraveled, and we have admonished the department for failing to live up to that obligation. See Adoption of Cesar, 67 Mass. App. Ct. at 714; Adoption of Scott, 59 Mass. App. Ct. 274, 278-279 (2003); Adoption of Terrence, 57 Mass. App. Ct. 832, 841 (2003).

By statute, the department need not inform a parent whose rights have been terminated that a planned adoption has fallen through. See Adoption of Scott, 59 Mass. App. Ct. at 278, citing Adoption of Willow, 433 Mass. 636, 646 (2001). The parties have not briefed whether the department is relieved of that obligation when the termination decree enters or only when it is upheld on appeal. We pass over that question.

recognize that our own cases have not always been clear about this issue. We take this opportunity to reiterate the applicable law.

While concluding that the father lacked standing, the judge nevertheless noted that we previously have recognized that parents whose rights have been terminated can prosecute posttrial motions. He distinguished those cases as raising "extraordinary" factual circumstances. This reasoning conflated the threshold question of whether a parent has standing to bring a posttrial motion for relief from judgment with the substantive question of what a parent must show to prevail on such a motion. Compare Adoption of Cesar, 67 Mass. App. Ct. 708, 714-716 (2006), with Adoption of Nate, 69 Mass. App. Ct. 371, 376 (2007).

It is true that once a parent's rights have been fully and finally terminated, that parent then lacks standing to participate in additional proceedings regarding the child's welfare. See Adoption of Malik, 84 Mass. App. Ct. 436, 438-441 (2013) (parent whose rights have been terminated has no right to participate in posttermination permanency hearing). However, that principle decidedly does not mean that as soon as a termination decree has entered, the parent loses the ability to seek redress from aspects of the decree through ordinary posttrial proceedings. Rather, where a parent is challenging a

decree entered following a best interests trial, the parent retains standing to challenge the decree, whether on appeal or through an appropriate posttrial motion in the trial court, so long as that litigation remains live. See Adoption of Douglas, 473 Mass. 1024, 1026 (2016) ("The department's suggestion that the biological parents are presently without standing to challenge on appeal the judge's visitation orders, because their parental rights were terminated after the hearings concluded, is without merit"). See also Adoption of Rico, 453 Mass. 749, 757 n.16 (2009) (rejecting department's argument "that because [the father's] parental rights have been terminated and he has not appealed from that decision to this court, the father no longer has standing to challenge the judge's visitation order," where father had properly appealed visitation order); Adoption of Cesar, 67 Mass. App. Ct. at 715. Even where termination of parental rights has been affirmed on appeal, but the case has been remanded for reconsideration of issues concerning posttermination visitation, parents retain standing to participate in remand proceedings. Adoption of Zak, 90 Mass. App. Ct. 840, 842-844 (2017).[23] Of course, whether a parent can

[23] In concluding that the father lacked standing to prosecute his motion for relief from judgment, the judge relied in great part on Adoption of Nate, 69 Mass. App. Ct. at 376. There, a mother who had stipulated to termination of her parental rights nevertheless sought to vacate the termination decree based on posttrial developments. Id. at 373-375.

prevail on the merits of a motion for relief from judgment and thereby reopen the best interests proceedings is another matter. We turn then to that issue.

c. Merits of the father's motion for relief from judgment. A decision denying a motion for relief from judgment and to reopen a decree terminating parental rights is entitled to great deference, and "'a judge's decision [to deny such a motion] will not be overturned, except upon a showing of a clear abuse of discretion,' especially 'where, as here, the motion judge was the same judge who . . . entered the decrees' (quotation and citation omitted)." Adoption of Yvonne, 99 Mass. App. Ct. at 582, quoting Adoption of Quan, 470 Mass. 1013, 1014 (2014). "[O]btaining relief under rule 60 (b) (6) requires a showing of 'extraordinary circumstances'" (citation omitted). Adoption of Yvonne, supra at 584. The evidence of the father's unfitness at the time of trial was overwhelming, and the subsequent improvements in his situation comparatively modest.[24] This is

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Although we upheld the judge's rejection of those efforts, we did not say that she lacked standing to bring the motion. Id. at 374-377. To the contrary, we suggested that had her circumstances been more compelling, she might have succeeded on her motion even though she had stipulated to termination of her rights. Id. at 375.

[24] We agree with the judge that in both Adoption of Cesar, 67 Mass. App. Ct. at 708, and Adoption of Theodore, 36 Mass. App. Ct. 274 (1994), the relevant parent was able to demonstrate a far greater posttrial improvement than the father has done here. In Adoption of Cesar, the "mother had moved to New York

not to say that the father's situation has not appreciably improved, or that we agree with the judge's dismissing the father's recounting of such improvements as "self-serving." But even the father has acknowledged, as recently as his April 2020 affidavit in support of his posttrial motion, that he still was not yet in a position to parent Bruce. Thus, despite the significant change in Bruce's situation, the judge did not abuse his considerable discretion in refusing to vacate the termination of the father's parental rights.

We reach a somewhat different conclusion, however, with regard to visitation. Where, as here, "no preadoptive family has yet been identified, and where a principal, if not the only, parent-child relationship in the child's life remains with the biological parent," the situation is more likely to warrant posttermination visitation. Adoption of Vito, 431 Mass. 550, 563-564 (2000). The question posed by the motion for relief from judgment was whether that earlier decision should be

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to be near her family, terminated her relationship with her former boyfriend, obtained steady employment, successfully completed treatment for substance abuse (and been drug and alcohol free for more than three years) and, with the department's agreement, regained custody of two of Cesar's older siblings[, and] [h]er social worker in New York described her recovery as a 'miracle.'" 67 Mass. App. Ct. at 709. In Adoption of Theodore, the mother's unfitness had been due to her "unwillingness or her inability to disassociate herself from [the mentally ill father]," and she was able to demonstrate that she had severed all relations with him. 36 Mass. App. Ct. at 356-357.

revisited now that adoption by the foster parents, and perhaps by any family, was no longer viable. For at least three reasons, we think that the judge gave that question inadequate consideration.

First, the judge's initial decision not to order posttermination and postadoption visitation was premised in part on Bruce's imminent adoption by the foster parents, with whom he had thrived for a time. Bruce has now been in institutional care for over two years, and the department has been unsuccessful in finding an alternative adoption placement. If a family is not found for Bruce, and he is not allowed to visit with the father, there may simply be no parent-child relationship available to Bruce.[25] The disintegration of his preadoptive placement has also presumably interfered with another key familial relationship -- that is, Bruce's relationship with his siblings.[26]

Second, the initial decision also relied on Bruce's imminent adoption in a subtler way: the adoption would have

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[25] Of course, in the event that Bruce were not adopted before he turned eighteen, if he and the father wished, nothing would prevent the father from adopting him at that time.

[26] Regardless of whether the judge decides on remand to restore visitation between Bruce and the father, the remand will provide an opportunity to address the need for and manner of an order for any visits between Bruce and his siblings. See G. L. c. 119, § 26B (b).

given the foster parents control over Bruce's visitation with the father. Cf. Adoption of Ilona, 459 Mass. at 59-60 (in appropriate circumstances, judge may "leav[e] the issue of visitation to the sound judgment of loving adoptive parents"). Now, instead, such visitation decisions are left in the department's hands, notwithstanding that the department did little to maintain contact between the father and Bruce while the father was incarcerated, and then indisputably violated its regulations by unilaterally and silently ending all visitation (a development that arguably contributed to Bruce's downward trajectory).

Third, although the judge made no findings with respect to whether a bond between the father and Bruce existed, there is at least some evidence that a bond between Bruce and the father persisted in the face of daunting odds, even long after trial. Visitation may be appropriate "where the evidence readily points to significant, existing bonds between the child and a biological parent, such that a court order abruptly disrupting that relationship would run counter to the child's best interests." Adoption of Vito, 431 Mass. at 563.[27] As the affidavit of the department adoption social worker makes clear,

[27] The quoted language from Adoption of Vito, 431 Mass. at 563, appears in a discussion of postadoption visitation. It is even more pertinent to posttermination visitation where an adoption may never occur.

Bruce consistently has voiced his desire to visit the father, and the father consistently has voiced his desire to be part of Bruce's life. The question whether this evidence is indicative of a "significant" bond deserves special attention given that the judge's previous error in postponing until trial the father's abuse of discretion motion effectively denied the father opportunities for visits that might have demonstrated a bond.

None of this is to say that the possibility of renewed visitation does not raise some significant concerns. Clearly, any visitation order at a minimum would need to be "carefully and narrowly crafted to address the circumstances giving rise to the best interests of the child." Adoption of Vito, 431 Mass. at 564. Our point is not that the judge abused his discretion by failing to order visitation, but instead that he failed adequately to give the visitation issues the due consideration they deserved in light of Bruce's current situation and the department's past infractions. Bruce is a child whose current prospects for adoption are limited, whose need for stability is great, who has expressed interest in exploring a relationship with the father, and who was previously improperly deprived of appropriate opportunities to explore such a relationship. While the father may be an exceptionally flawed parent, he was able to make a preliminary showing that his presence in Bruce's life

potentially could be positive. At the same time, the affidavit of the department's adoption social worker conspicuously refrained from setting forth any opinion on whether renewing visitation was against Bruce's best interests.[28] Cf. Commonwealth v. Goodreau, 442 Mass. 341, 353 (2004) (judge properly discredited attorney's affidavit that was "conspicuously silent" on "crucial point"). Given all these factors, this case involves the kind of extraordinary circumstances in which reopening the issue of posttermination visitation is appropriate. We therefore remand for a fuller examination of the issue of visitation.

Disposition. The portion of the judge's order denying the father's motion for relief from judgment regarding visitation between the father and Bruce is vacated. With regard to the decree terminating the father's parental rights as to Bruce, we vacate the portion of that decree related to posttermination visitation and remand the matter for reconsideration of whether such visitation is warranted. We otherwise affirm the order

[28] The department may have drafted the affidavit to avoid stating an opinion that might render the affidavit inadmissible absent an evidentiary hearing. See Mass. G. Evid. § 1115(b)(2)(B) (2021). However, that the affidavit did not establish whether Bruce's best interests would be furthered by renewing visitation underscores the need for live testimony on the issue.

denying the father's motion for relief from judgment and the decrees themselves.[29]

So ordered.

[29] To the extent that any other arguments, such as the propriety of the foster parents' testimony, have not been explicitly addressed, "they 'have not been overlooked. We find nothing in them that requires discussion.'" Commonwealth v. Brown, 479 Mass. 163, 168 n.3 (2018), quoting Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).