SJC-12719

ADOPTION OF LUC.[1]

Suffolk. September 6, 2019. - February 13, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Adoption, Care and protection, Dispensing with parent's consent. Parent and Child, Care and protection of minor, Adoption, Dispensing with parent's consent to adoption. Minor, Care and protection, Adoption. Evidence, Hearsay, Report of licensed social worker, Opinion, Public documents. Practice, Civil, Care and protection proceeding, Adoption, Hearsay.

Petition filed in the Suffolk County Division of the Juvenile Court Department on September 23, 2013.

The case was heard by Peter M. Coyne, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Sherrie Krasner (Sarah Unger also present) for the mother.
Brian Pariser for Department of Children and Families.
Justin D. Cohen for the child.
Andrew L. Cohen, Committee for Public Counsel Services, for Committee for Public Counsel Services, amicus curiae, submitted a brief.

[1] A pseudonym.

LOWY, J. In this case, the Department of Children and Families (DCF) filed a petition under G. L. c. 119, § 24, alleging that the child, whom we shall call Luc, and his half-sister, whom we shall call Olivia, were in need of care and protection.[2] During the trial, Stephen McMorrow, one of the DCF social workers who managed the mother's case, testified on direct examination but died before the mother had the opportunity to cross-examine him. The Juvenile Court judge then struck McMorrow's testimony but, over the mother's objection, admitted in evidence McMorrow's DCF reports and dictation notes. After trial, pursuant to G. L. c. 210, § 3 (c), the judge found that the mother was unfit, that Luc was in need of care and protection, and that termination of the mother's parental rights was in the best interests of Luc.[3] The judge then issued a decree terminating the mother's parental rights to Luc.[4]

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[2] Olivia is not a party to this appeal. At trial, the mother stipulated to her parental unavailability with respect to Olivia; the Juvenile Court judge then granted Olivia's father, who is not Luc's father, permanent custody and dismissed Olivia from the petition.

[3] The judge also found the "unknown/unnamed" father unfit and terminated his parental rights to Luc. Luc's mother was unmarried when Luc was born. Luc's father was not identified in the care and protection petition, and no one who identified himself as the father participated in the proceedings.

[4] The judge also dispensed with Luc's parents' need to consent to Luc's adoption.

The mother appealed from the judge's decision and decree, and the Appeals Court affirmed. See Adoption of Luc, 94 Mass. App. Ct. 565, 566 (2018). We granted the mother's application for further appellate review. The mother alleges that (1) the judge improperly admitted in evidence McMorrow's DCF reports and dictation notes, as well as inadmissible second-level hearsay and improper opinion evidence contained therein; and (2) the judge's findings of fact were insufficient to establish the mother's unfitness by clear and convincing evidence. On September 12, 2019, we issued an order affirming the judge's decision and decree. This opinion states the reasons for that order. We conclude that even without the challenged evidence, there was enough proof to support the judge's decree and decision, and therefore, we affirm.[5]

McMorrow's death raised numerous evidentiary issues regarding the admission of documentary evidence in care and protection cases. While we need not reach those issues to resolve this case, we recognize that the rules of evidence as applied in this area of law are hardly a model of clarity. As such, we take this opportunity to try to disentangle several important evidentiary principles, specifically with regard to hearsay. See Care & Protection of Benjamin, 403 Mass. 24, 27

[5] We acknowledge the amicus brief submitted by the Committee for Public Counsel Services.

n.5 (1988) ("It is most important to the integrity of the process and for the protection of the rights of the parties that the rules of evidence be followed in all adjudicatory stages of care and protection proceedings . . ." [citation omitted]).[6]

Background. We briefly describe how a care and protection case is initiated, followed by a summary of the judge's undisputed factual findings, reserving some findings for our discussion.

When a statutorily mandated reporter has reasonable cause to believe that a child is suffering from abuse or neglect, the mandated reporter must report such an allegation to DCF immediately, pursuant to G. L. c. 119, §§ 1, 51A (51A report).[7] Upon receipt of a 51A report, DCF must immediately screen the report to determine whether the reported allegation meets the applicable statutory and regulatory requirements. See 110 Code Mass. Regs. § 4.21 (2009).[8] Once a 51A report is "screened in,"

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[6] The issues discussed and rules announced in this opinion apply to all proceedings within a care and protection case, including termination of parental rights trials and hearings regarding permanent plans for the child.

[7] A nonmandated reporter may also file a report under this section. See G. L. c. 119, § 51A (f).

[8] The report may be "screened out" where the alleged perpetrator is not the child's caretaker, the allegation is outdated, or there are "demonstrably unreliable or counterproductive multiple reports." 110 Code Mass. Regs. § 4.21 (2009).

DCF is required to investigate the allegation and make a written determination whether the allegation is supported (51B report). See G. L. c. 119, § 51B; 110 Code Mass. Regs. § 4.21. If the allegation is supported, DCF must offer "appropriate services" to the family of any child whom it has reasonable cause to believe is suffering from abuse or neglect "to prevent further injury to the child, to safeguard his welfare, and to preserve and stabilize family life whenever possible." G. L. c. 119, § 51B (g). "If the family declines or is unable to accept or to participate in the offered services, [DCF] or any person may file a care and protection petition under [§] 24." Id. See G. L. c. 119, § 24. Moreover, if DCF has reasonable cause to believe a child is in immediate danger from abuse or neglect and that removal is necessary to protect the child from such abuse or neglect, DCF "shall take the child into immediate temporary custody[,] . . . shall make a written report stating the reasons for such a removal and shall file a care and protection case under [§] 24 on the next court day." G. L. c. 119, § 51B (e). See G. L. c. 119, § 24.

In this case, the undisputed evidence showed that the mother had a history of mental illness, including bipolar disorder and depression, for which she had been previously hospitalized. The mother informed the court investigator that, against medical advice, she had not taken medication to treat

her mental illness and that she did not need counseling. The mother also testified that she had no recollection of receiving mental health treatment in 2012, the year Luc was born. The mother also has an extensive history with DCF. At the time of trial, the mother had nine children and did not have custody of any of them.[9]

Luc was born on November 8, 2012. The following month, a nonmandated reporter filed a 51A report, alleging that the mother was neglecting Luc and Olivia. A DCF investigation conducted pursuant to G. L. c. 119, § 51B, supported the allegation. In January of 2013, DCF assigned Alba Mora as the ongoing social worker for the family. Mora spoke with the mother several times about participating in mental health services and engaging Luc in early intervention services due to Luc's cognitive, social, and motor skills deficits.[10] After several months elapsed, the mother complied, but her follow-up

[9] As to her oldest two children, the mother surrendered her parental rights and the children were subsequently adopted. The mother claimed that she was "tricked into a closed adoption," an explanation the judge did not credit.

[10] Early intervention is a Massachusetts government program that provides children who are under three years old and are born with developmental delays with programming to address such delays at no out-of-pocket cost to the family. See About Massachusetts Early Intervention (EI), https://www.mass.gov/info-details/about-massachusetts-early-intervention-ei [https://perma.cc/AR3G-5VUZ].

with early intervention was inconsistent.[11] Following an altercation between the mother and an early intervention provider, the early intervention visits were moved from the mother's home to the early intervention office, located nearby. An early intervention provider recommended that Luc have weekly visits, but the mother only agreed to one visit per month.

On September 23, 2013 (petition date), DCF filed a care and protection petition alleging that the mother neglected Luc and Olivia (petition). The court granted DCF emergency temporary custody of both Luc, who was then ten months old, and Olivia, who was almost three years old. DCF asserted that Luc and Olivia were in need of care of protection for the following reasons: (1) Luc's lack of participation in early intervention services and Olivia's lack of attendance at day care; (2) the mother lost custody of her five older children due to her untreated bipolar disorder; and (3) the mother's "lack of consistent mental health treatment and her lengthy history of similar concerns."

Following the initiation of the care and protection case, DCF drafted a service plan for the mother, with the goal of reunification. The plan required the mother, among other things, to engage in mental health and substance use disorder

[11] The mother offered several reasons for her failure to bring Luc to the visits, which the trial judge did not credit.

services and individual therapy; provide DCF with urine screens; undergo a psychological evaluation; and attend supervised visits with Luc.[12] The mother failed to comply consistently with the plan. The mother did not engage in mental health or substance use disorder treatments for several months, and once engaged, the mother neither took the recommended medication nor consistently attended individual therapy sessions. In addition, the mother failed to complete all the required urine screens. At least four of the urine screens she did complete were positive for substances for which the mother did not have a valid prescription. Moreover, one of the mother's children, born after the petition date, tested positive for cocaine at birth. The mother also failed to provide DCF with a psychological evaluation, and she did not consistently attend visits with Luc.

Approximately seven months after the petition date, on April 15, 2014, DCF changed its goal from reunification to adoption. On August 6, 2014, DCF transferred Luc's case to McMorrow. The mother's inconsistent compliance with the service plan continued throughout the pendency of the care and protection case, during which time she also gave birth to two additional children.

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[12] The mother's assigned tasks remained the same throughout the pendency of the care and protection case.

The hearings on the merits of Luc's care and protection case began on October 5, 2015, about two years after the petition date. After a trial that took place on eleven nonconsecutive days and spanned over thirteen months, the judge found that the mother was unfit, that Luc was in need of care and protection, and that it was in the best interests of Luc to terminate the mother's parental rights. Based on those findings, the judge then terminated the mother's parental rights.[13]

Discussion. To terminate parental rights to a child, the judge must find, by clear and convincing evidence, that the parent is unfit and that the child's "best interests will be served by terminating the legal relation between parent and child." Adoption of Ilona, 459 Mass. 53, 59 (2011). We give substantial deference to the judge's findings of fact and decision, and will only reverse "where the findings of fact are

[13] We recognize the substantial caseloads Juvenile Court judges must navigate; the challenges of coordinating the schedules of counsel and witnesses; the difficulty of scheduling consecutive days of trial in some, if not most, sessions; and how delays, such as the ones experienced in this case, are sometimes unavoidable. It goes without saying that such delays have a significant impact on all the parties, including, most importantly, the children. The Juvenile Court has already undertaken significant steps to expedite the resolution of child dependency cases, namely, through its Statewide launch of the Pathways differentiated case-flow management initiative. See Annual Report on the State of the Massachusetts Court System: Fiscal Year 2019, at 28 (2019).

clearly erroneous or where there is a clear error of law or abuse of discretion." Id.

1. Unfitness determination. The mother argues that the judge's findings did not establish her unfitness by clear and convincing evidence. We disagree. The evidence was compelling and more than satisfied the standard for unfitness, even without the challenged hearsay evidence.

a. Stale evidence. The mother argues that the judge improperly admitted and relied upon stale evidence regarding the mother's care of her other children to underpin twenty-four findings of fact. When assessing parental fitness, a judge must exercise great caution in considering how parents care for their other children, including the varied circumstances surrounding parents' unique relationships with each child. See Adoption of Mary, 414 Mass. 705, 711 (1993) ("Parental unfitness must be determined by taking into consideration a parent's character, temperament, conduct, and capacity to provide for the child in the same context with the child's particular needs, affections, and age"). Where a parent has had prior involvement with DCF, the judge also recognizes any steps that a parent has since taken to improve his or her parenting abilities. Nevertheless, a judge may rely upon a parent's past conduct with regard to older children to support a finding of current unfitness as to a different child, so long as that evidence is not the sole basis

for the judge's unfitness determination. See Adoption of Don, 435 Mass. 158, 166 (2001), quoting Adoption of George, 27 Mass. App. Ct. 265, 268 (1989) ("Prior history . . . has prognostic value"); Adoption of Larry, 434 Mass. 456, 469 (2001); Adoption of Paula, 420 Mass. 716, 729 (1995).

Here, the contested findings of fact were not stale. We note that several of the contested findings pertained to the mother's treatment of (1) Olivia, who was named in the same petition as Luc; and (2) Luc's younger siblings, who were the subjects of a different care and protection petition while Luc's case was pending. The concerns regarding the mother's ability to care for Olivia and Luc arose prior to the petition date, and the concerns as to the mother's younger children arose after the petition date, thus after DCF removed Luc from the mother's custody, but still during the pendency of Luc's case.[14]

As to the mother's older children, the judge properly found and relied upon the mother's ongoing pattern of untreated mental health and substance use disorders, parental neglect, and

[14] For example, the mother simultaneously did not engage Luc in early intervention services and did not bring Olivia to day care consistently, which the mother acknowledged that DCF required. This pattern continued after the petition date, when the mother failed to bring one of her younger children to day care consistently, failed to engage him in early intervention services, and missed his scheduled doctor's appointments. The mother justified the day care absences explaining, "It's up to me if I want my child to go to day care."

failure to utilize services in making his determination of parental unfitness.[15] See Adoption of Don, 435 Mass. at 166, quoting Adoption of George, 27 Mass. App. Ct. at 268 ("[The mother's] history shows failures to follow through with therapy and other forms of assistance of her children and for herself"); Adoption of Carla, 416 Mass. 510, 517 n.7 (1993). The mother's failure to engage her other children consistently in early intervention services is particularly notable here, where Luc had cognitive, social, and motor skills deficits. See Adoption of Mary, 414 Mass. at 711. After DCF removed Luc from the mother's custody, Luc attended consistent early intervention visits and made significant improvements.

The mother also argues that the judge erred by omitting any findings concerning the mother's present relationship with Luc and, in particular, that the judge omitted mention of the mother's visits or interactions with Luc during the pendency of the trial. This is incorrect. The judge properly focused on the mother's current fitness and made several findings based on the mother's trial testimony as to her visits and interactions with Luc since the petition date. The mother acknowledged that

[15] That is not to say that the past is prologue or even that history often rhymes. Ultimately, the issue is how fit this parent is to raise this child. There is always the possibility of redemption, and each adjudication must be resolved on its own merit. Nevertheless, it would defy logic here not to consider the mother's ability to care for her other eight children.

beginning in May of 2015, she was responsible for requesting visits with Luc, yet those visits remained inconsistent. For example, in October of 2015, the mother did not request a visit with Luc until October 23, and as of January 18, 2017, the mother had yet to request a visit with Luc for that month.[16] The mother explained, "I have a lot going on and will get there when I can get there." There was no error.

b. Mental health challenges and substance use disorder. The mother next argues that the judge's findings did not establish a sufficient nexus between her mental health challenges and her ability to provide for Luc, or between her substance use disorder and her ability to provide for him. We disagree.

"Mental disorder is relevant only to the extent that it affects the parents' capacity to assume parental responsibility, and ability to deal with a child's special needs" (emphasis added). Adoption of Frederick, 405 Mass. 1, 9 (1989).[17] Here,

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[16] Between September of 2013 and August of 2014, the mother's average number of visits decreased from twice monthly to monthly. The trial judge did not make any findings of fact as to whether the mother requested to visit Luc between October 23, 2015, and January of 2017.

[17] Countless children have thrived while in the care of parents facing mental health challenges. Here, the concern for the child is not that the mother has mental health challenges, but that those challenges remained largely unaddressed, and even unacknowledged, to Luc's severe detriment.

the mother was diagnosed with bipolar disorder and failed to recognize the need for or to engage consistently in treatment. Mora testified that the mother reported an inability to get out of bed and a fear of leaving her home. The mother later told a court investigator that she experienced both the manic and depressive stages of her bipolar disorder, but she repeatedly denied the need for therapy and medication.[18] Moreover, during the pendency of the care and protection case, the mother did not provide DCF with a psychological evaluation.

In addition to mental health concerns, evidence of alcohol or drug use is relevant to, but not dispositive of, "a parent's willingness, competence, and availability to provide care." Care & Protection of Frank, 409 Mass. 492, 494 (1991). Treatment "does not always work the first or even the second time, [and] relapse should not be cause for giving up on" an individual experiencing substance use disorder (citation omitted). Commonwealth v. Eldred, 480 Mass. 90, 99 (2018). Just as we should not criminalize addiction, see id., parental rights should not be terminated only because the parent has a substance use disorder. However, the parent's willingness to engage in treatment is an important consideration in an

[18] Even after DCF initiated this case, the mother still refused to obtain mental health treatment. She was similarly not engaged in services when two of her older children were the subjects of different care and protection cases.

unfitness determination where the substance dependence inhibits the parent's ability to provide minimally acceptable care of the child. See Adoption of Elena, 446 Mass. 24, 33-34 (2006), citing G. L. c. 210, § 3.

Here, the mother acknowledged her history of substance use during trial. The mother regularly failed to complete the required urine screens, and several of the urine screens that she did complete tested positive for cocaine. One of Luc's younger siblings also tested positive for cocaine at birth. Despite these concerns, the mother consistently failed to recognize the need for or engage in substance use disorder treatment.[19]

In sum, the mother's unwillingness to adhere to DCF's service plan, which required her to obtain treatment for her mental health challenges and substance use disorder, is "relevant to the determination of unfitness." See Petitions of the Dep't of Social Servs. to Dispense with Consent to Adoption, 399 Mass. 279, 289 (1987). We conclude that the judge did not abuse his discretion or commit a clear error of law in determining that the mother was unfit.

[19] For example, to explain why she did not go to the required Alcoholics Anonymous meetings, the mother stated, "I don't want anyone telling me how to run my life."

2. Inadmissible second-level hearsay and improper opinion evidence. The mother argues that the judge erred by admitting in evidence and relying on inadmissible second-level hearsay and improper opinion evidence in his decision.[20] Specifically, the mother contends that McMorrow's DCF reports and dictation notes improperly formed the basis for thirty-one findings of fact and that the judge's reliance upon those findings prejudiced her.[21]

We need not decide whether the judge erred in admitting McMorrow's documents because, even assuming error, there was no resulting prejudice. The judge relied on the contested evidence to support only thirty-one of 181 findings of fact. These thirty-one findings were not essential to the judge's decision, as they were largely cumulative of the mother's and the other social workers' testimony, and the court investigator reports,

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[20] Hearsay is defined as an out-of-court statement offered to establish the truth of the words contained in the statement. See Commonwealth v. Caruso, 476 Mass. 275, 295 n.15 (2017); Mass. G. Evid. § 801(c) (2019). Moreover, this type of out-of-court statement may contain a "second level" of hearsay, or "hearsay within hearsay." See Mass. G. Evid. § 805.

[21] The mother makes a passing argument as to four findings of fact, contending that the judge improperly considered statements within two 51B reports for their truth as to the mother's bipolar disorder diagnosis, experience of manic episodes, and hospitalizations. However, those findings could not have been prejudicial, where they were merely cumulative, as the mother reported the evidence underlying those findings to court investigators, who included them in their separately, statutorily admissible reports.

which are "part of the record" pursuant to G. L. c. 119, § 24.[22] The mother does not challenge the judge's admission of the court investigator reports on appeal.[23] Accordingly, even excising the thirty-one contested findings of fact, there was ample support, under the clear and convincing evidence standard, for the judge's decree terminating the mother's parental rights to Luc.[24]

3. Admission of documents in care and protection cases. Our decision to affirm the judge's decree based upon the sufficiency of indisputably admissible evidence dispenses with

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[22] In her reply brief, the mother argues that the judge's admission of McMorrow's documents was not harmless because as a result of the admission, the mother had to testify on her own behalf to rebut the adverse allegations asserted in McMorrow's documents. She alleges that, if McMorrow's documents had been excluded, she would not have needed to testify and then the judge would not have been able to rely on her testimony. The mother fails to cite any legal authority for this argument; thus, we decline to address it.

[23] The mother also argues that the judge erred in allowing McMorrow's supervisor, Melissa Thibodeau, to testify as to the contents of McMorrow's dictation notes and DCF reports. Even assuming the mother is correct, Thibodeau's testimony contributed to eight findings of fact, only four of which were based solely on Thibodeau's testimony. Without these findings, the judge's determination is still more than adequately supported. There was no prejudice.

[24] The mother also argues that the judge violated her due process rights by admitting McMorrow's documents as declarations of a deceased person under G. L. c. 233, § 65. Incidentally, this argument refers to an alternative basis for admission offered by the Appeals Court in this case, not the trial judge. See Adoption of Luc, 94 Mass. App. Ct. at 567-569. Given our conclusion that the evidence was sufficient to support the trial judge's determination even without McMorrow's contested documents, we need not address this argument.

the need to address the mother's challenges to the admission of McMorrow's DCF reports and dictation notes specifically. Nonetheless, we take the opportunity presented to clarify certain rules governing the admissibility of hearsay evidence in the context of care and protection cases with regard to two categories of documents filed in those cases[25]: (a) court investigator reports under G. L. c. 119, § 24;[26] and (b) DCF-created documents, which include (i) DCF-authored reports under G. L. c. 119, § 21A (DCF reports), and (ii) official records in care and protection cases (official DCF records).[27]

a. Court investigator reports under G. L. c. 119, § 24.[28] Upon the initiation of a care and protection case, "the court

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[25] In clarifying these evidentiary principles, we note that nothing we assert today changes the law of evidence for any hearsay exception, whether it be first- or second-level hearsay, aside from those we explicitly modify in this opinion. Moreover, nothing we assert today limits the applicability of other statutory or common-law hearsay exceptions in care and protection cases.

[26] The admission of court investigator reports is not at issue in this case, and although we discuss court investigator reports as a point of reference, nothing in this opinion alters the admissibility criteria for such reports.

[27] The Massachusetts Guide to Evidence articulates an "official/public records and reports" exception to the rule against hearsay. See Mass. G. Evid. § 803(8); Mass. G. Evid. § 1115(b). Our case law uses "official records" and "public records" interchangeably when discussing such records. For consistency, we use the term "official records."

[28] General Laws c. 119, § 24, states, in relevant part: "Upon the issuance of the precept and order of notice, the court

shall appoint a person qualified under [§] 21A to investigate the conditions affecting the child and to make a report under oath to the court." G. L. c. 119, § 24.[29] See Custody of Michel, 28 Mass. App. Ct. 260, 266 (1990) ("When a judge appoints an investigator under G. L. c. 119, § 24, it signifies the judge's expectation that the licensed social worker has the training and specialized knowledge which will enable the social worker to make and report acute observations about the interactions of family members . . ."). Pursuant to the statutory hearsay exception declared in G. L. c. 119, § 24, court investigator reports are a "part of the record." See Care & Protection of Erin, 443 Mass. 567, 573 & n.5 (2005), citing Custody of Jennifer, 25 Mass. App. Ct. 241, 245 (1988). See also Rule 14(C) of the Juvenile Court Rules for the Care and Protection of Children (2018). "There can, therefore, be no objection in general to the receipt and use of such reports in arriving at decisions in care and protection proceedings." Care

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shall appoint a person qualified under [§] 21A to investigate the conditions affecting the child and to make a report under oath to the court, which shall be attached to the petition and be a part of the record."

[29] Court investigator reports must be filed within sixty days after the court investigator's appointment, unless otherwise ordered. See Juvenile Court Standing Order 2-18 (2018) (time standards).

& Protection of Zita, 455 Mass. 272, 281 (2009), quoting Custody of Michel, supra at 265.

Second-level hearsay contained within court investigator reports should be "limited to factual information collected from identified sources." Custody of Tracy, 31 Mass. App. Ct. 481, 487 (1991). See Juvenile Court Department, Guidelines for Court Investigation Reports, at 1, 3-4 (reissued Nov. 1, 2013). In addition, our case law has long held that such hearsay is admissible where the opposing party has "an opportunity to refute the investigator and the investigator's sources through cross-examination and other means." Custody of Michel, 28 Mass. App. Ct. at 266. See Adoption of Paula, 420 Mass. at 724; Care & Protection of Rebecca, 419 Mass. 67, 83 (1994); Adoption of Carla, 416 Mass. at 514. For opposing parties to have that opportunity, the court investigator report must identify the sources of such second-level hearsay statements. See Custody of Tracy, supra at 486-487. See also Adoption of Sean, 36 Mass. App. Ct. 261, 263-264 (1994); Note to Rule 14 of the Juvenile Court Rules for the Care and Protection of Children. If the source of a challenged statement is not already present in court, the burden to subpoena that source rests with the party challenging the statement's admission. See Adoption of Paula, supra at 726; Care & Protection of Leo, 38 Mass. App. Ct. 237, 242-243 (1995).

b. DCF-created documents. i. DCF reports under G. L. c. 119, § 21A. In relevant part, G. L. c. 119, § 21A, states:

> "Evidence in proceedings under [§§] 21 to 51H, inclusive, shall be admissible according to the rules of the common law and the General Laws and may include reports to the court by any person who has made an investigation of the facts relating to the welfare of the child and is qualified as an expert according to the rules of the common law or by statute or is an agent of the department or of an approved charitable corporation or agency substantially engaged in the foster care or protection of children. Such person may file with the court in a proceeding under said [§§] 21 to 51H, inclusive, a full report of all facts obtained as a result of such investigation. The person reporting may be called as a witness by any party for examination as to the statements made in the report. Such examination shall be conducted as though it were on cross-examination."

Section 21A governs the admission of evidence in care and protection cases[30] and permits the admission of a separate type of report prepared and introduced in evidence by DCF. See G. L. c. 119, § 21A; Care & Protection of Zita, 455 Mass. at 280-281 (distinguishing DCF reports from court investigator reports). See also Rule 10 of the Juvenile Court Rules for the Care and Protection of Children (2018) ("[DCF] shall file a written report with the court each time the case is before a judge for hearing or report"); Goldstein, The Care and Protection Report: Some Evidentiary and Due Process Issues, 1 Mass. Fam. L.J. 69,

[30] General Laws c. 119, § 21A, also outlines the qualifications for court investigators. Our jurisprudence has, at times, conflated the admission of independent court investigator reports under G. L. c. 119, § 24 (not at issue in Luc's case), with the admission of DCF reports under G. L. c. 119, § 21A (the subject of asserted trial error here).

71 (1984) (DCF "progress reports" admissible under G. L. c. 119, § 21A). Cf. Rule 11 of the Juvenile Court Rules for the Care and Protection of Children (2018) (investigator's report in care and protection cases).

ii. Official DCF records. Official DCF records are records created by DCF employees in the course of their official duties that any party in a care and protection case may seek to admit in evidence. To date, our courts have identified several types of DCF documents as official records. See Adoption of Querida, 94 Mass. App. Ct. 771, 778 (2019) (51B reports); Adoption of Vidal, 56 Mass. App. Ct. 916, 916-917 (2002) (private entity's written assessment performed under contract with DCF); Adoption of George, 27 Mass. App. Ct. at 272-274 (service plans, case reviews, and foster care reviews). See also Mass. G. Evid. § 1115(b)(2) (same and DCF action plans, affidavits, family assessments, and dictation notes).

iii. Admissibility criteria for DCF-created documents. A parent's "fundamental liberty interest in the care, custody, and management of their children" is axiomatic. L.B. v. Chief Justice of the Probate & Family Court Dep't, 474 Mass. 231, 237 (2016), quoting Matter of Hilary, 450 Mass. 491, 496 (2008). "Due process concerns and fundamental fairness require that a parent have an opportunity effectively to rebut adverse allegations concerning child-rearing capabilities, especially in

a proceeding that can terminate all legal parental rights." Adoption of Mary, 414 Mass. at 710.[31] By providing a parent with the opportunity to effectively cross-examine the court investigator and the investigator's sources, the admissibility criteria for second-level hearsay contained within court investigator reports balance the "importance of providing needed information to the court" with fairness and due process concerns. Custody of Tracy, 31 Mass. App. Ct. at 484, 486. See Duro v. Duro, 392 Mass. 574, 580 n.9 (1984) ("Our decisions permitting judges to rely on the reports of court-appointed investigators despite their hearsay nature are linked to the opportunity of affected parties to refute incorrect information contained in such reports"). See also Care & Protection of Leo, 38 Mass. App. Ct. at 241-242 (cross-examination of court investigator and their sources provides sufficient opportunity to rebut statements contained in court investigator report); Custody of Michel, 28 Mass. App. Ct. at 266.

In the context of care and protection cases, we see no reason why the criteria for admitting second-level hearsay contained within independent, court-ordered reports written by

[31] The opportunity to rebut such evidence, however, does not bestow upon parents "the full panoply of constitutional rights afforded criminal defendants" (citation omitted). See Care & Protection of M.C., 479 Mass. 246, 256 (2018), S.C., 483 Mass. 444 (2019).

court investigators under § 24 should be stricter than the criteria for admitting hearsay contained within DCF-created documents. Interpreting our evidentiary rules to permit a more lenient admissibility standard for DCF-created documents, especially since DCF is a party to the case, would contradict the fundamental protections our law bestows upon a parent's relationship to their child. Accordingly, we now announce the following criteria for the admission of first- and second-level hearsay in DCF reports under G. L. c. 119, § 21A, and official DCF records in care and protection cases, where that hearsay does not satisfy another common-law or statutory exception.[32] See G. L. c. 119, § 21A.[33] Under what we will refer to as the Luc criteria, first- and second-level hearsay contained within DCF reports and official DCF records is admissible for statements of primary fact,[34] so long as the hearsay source is

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[32] Again, nothing we declare today has an impact on the admissibility of court investigator reports.

[33] We note that in addition to the due process considerations, what we refer to as the Luc criteria are supported by the language of G. L. c. 119, § 21A, and our interpretation thereof. Section 21A permits the admission, subject to our common law and statutes, of a DCF-created report containing facts obtained as a result of an investigation into the welfare of the child, so long as the author of the report is available for cross-examination. See Care & Protection of Zita, 455 Mass. at 280, citing Care & Protection of Bruce, 44 Mass. App. Ct. 758, 765-766 (1998).

[34] Statements of primary fact are observations, rather than opinions, made by an individual with personal knowledge, for

specifically identified in the document[35] and is available for cross-examination, should the party challenging the evidence request to do so. If the source is not already present in

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example, statements made by a witness present to hear and observe that "there was screaming or beating" or there was "no food or clean diapers in the house." Custody of Michel, 28 Mass. App. Ct. at 267.

Several examples from McMorrow's dictation notes provide additional guidance about both admissible statements of primary fact and inadmissible opinions or judgments. Statements of primary fact in the notes included the following: "[t]he visit was scheduled for noon however [the mother] did not answer the door or phone"; "[the mother] plays with both children and reads to them, brings them to the bathroom, changes [the child's] diaper"; and "on [the child's] arrival [the mother] immediately turns the television on to children's programming to entertain him, and spends time speaking to me." Improper opinion or judgments included the following: "[the mother] seems challenged to accommodate" the children with high energy levels; and "[the child] is unaffected [by his visit with the mother ending]."

Like admissible lay opinion testimony, statements of primary fact may include "words of summary description." Kane v. Fields Corner Grille, Inc., 341 Mass. 640, 647 (1961) (within judge's discretion to permit witness to describe party's actions as "boisterous" and "in an arrogant manner"). See Peterson v. Foley, 77 Mass. App. Ct. 348, 351 (2010) (lay witness who directly observes moving car may testify as to its estimated speed); Mass. G. Evid. § 701. However, summary description may not include judgment or opinion evidence that is not "rationally based on the witness's perception" or that fails to otherwise satisfy the criteria for admissible lay opinion. Mass. G. Evid. § 701. See Commonwealth v. Canty, 466 Mass. 535, 544 (2013) (lay witness may opine as to defendant's intoxication, but not as to whether defendant's alcohol consumption diminished his or her ability to operate motor vehicle safely).

[35] Identification requires that the court investigator report contain the source's full name. For example, "day care provider" alone would be insufficient.

court, the party challenging the evidence may subpoena him or her.[36] And once again, the hearsay need not meet the Luc criteria if it satisfies another, preexisting hearsay exception.[37]

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[36] It is important to note that the Luc criteria are distinct from the traditional official records exception, which permits the admission of a record of primary fact, made by a public official in the performance of his or her official duty, to prove the existence of that fact regardless of whether the public official is available for cross-examination. See Mass. G. Evid. § 803(8)(A). Unlike traditional official records, official DCF records are created by a party to the case.

Moreover, up to this point, courts in a number of our care and protection cases have applied a different version of the official records exception. See Mass. G. Evid. § 1115(b)(2) note. Compare Mass. G. Evid. § 803(8)(A). In those cases, the courts referred to and applied the "official records exception," sometimes even quoting the language in Mass. G. Evid. § 803(8)(A), while applying criteria distinct from the traditional official records exception. In one example, the court considered whether the author of the official record was available for cross-examination. In contrast, under the traditional official records exception, the availability of the out-of-court source is immaterial. See Adoption of Vidal, 56 Mass. App. Ct. at 916-917 (private entity's assessment performed under contract with DCF admissible as official record, noting author of report was available to testify and mother had opportunity to cross-examine and rebut). Cf. United States v. Phoeun Lang, 672 F.3d 17, 23-24 (1st Cir.), cert. denied, 566 U.S. 1041 (2012) (primary purpose of traditional official records exception to avoid need for public officials' testimony); Mass. G. Evid. § 803.

[37] The Luc criteria only apply to the admission of DCF reports and official DCF records in care and protection cases. The traditional official records exception to the rule against hearsay is still available for other records that qualify under the exception, which the parties in care and protection cases may seek to admit. See Mass. G. Evid. § 803(8)(A).

Conclusion. For the foregoing reasons, we issued an order on September 12, 2019, affirming the judge's decision and decree. In sum, the judge did not err in terminating the mother's parental rights to the child.

First- and second-level hearsay in DCF reports and official DCF records that does not fall within an already existing common-law or statutory hearsay exception is admissible for statements of primary fact, so long as the hearsay source is specifically identified in the report and is available for cross-examination, should the party challenging the evidence request to do so. If the source is not already present in court, the party challenging the evidence may subpoena him or her.

To the extent the Appeals Court in Adoption of George appeared to create a second-level hearsay exception for statements made by mandated reporters contained within official DCF records, that aspect of the decision was dicta. See Adoption of George, 27 Mass. App. Ct. at 274-275. There is no such second-level hearsay exception unless the Luc criteria are satisfied.