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SJC-13178

CARE AND PROTECTION OF ZEB.<sup>1</sup>

Bristol. January 10, 2022. - June 7, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,  
& Georges, JJ.

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

Petition filed in the Bristol County Division of the Juvenile Court Department on July 16, 2019.

The case was heard by John S. Spinale, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Sherrie Krasner for the mother.

Jennifer L. Kernan for Department of Children and Families.

Susan E. Taylor for the child.

BUDD, C.J. A Juvenile Court judge terminated the mother's parental rights to Zeb and granted permanent guardianship to the

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<sup>1</sup> A pseudonym.

child's paternal grandmother. We transferred the mother's appeal from the Appeals Court sua sponte to determine whether the Juvenile Court properly exercised its authority in terminating the mother's parental rights where the Department of Children and Families (department) did not have physical custody of the child when they petitioned for termination. For the reasons explained infra, we affirm the decree terminating the mother's parental rights and the order awarding permanent custody to the grandmother.

Background. We present the facts as found by the trial judge, reserving some details for later discussion. The mother was raised by her maternal grandmother after her own mother died of an overdose when the instant mother was less than two years old. As a child, she was diagnosed with bipolar disorder, depression, and attention deficit hyperactivity disorder. The mother began using marijuana daily at age twelve and began using other drugs at age seventeen.

The department first became involved with the mother in 2015 during her pregnancy with Zeb's older sibling. The department filed a care and protection petition on behalf of Zeb's sibling in 2017, and the mother's parental rights were terminated in 2019. During the majority of her pregnancy with Zeb, the mother used from three to four bags of heroin daily. On discovering she was pregnant, the mother began buying

Suboxone<sup>2</sup> on the street but used heroin three days before giving birth when she had no Suboxone.

On the day the mother gave birth to Zeb in July 2019, her blood tests were positive for cocaine, opiates, Suboxone, fentanyl, and marijuana. Hospital staff maintained a nurse in the delivery room at all times due to concerns that both parents<sup>3</sup> appeared to be under the influence. Zeb tested positive for fentanyl, exhibited signs of opiate withdrawal, and was placed on a morphine drip for eight days. Based on these observations, hospital staff contacted the department to report suspected abuse and neglect of Zeb.

A department response worker met with the mother at the hospital four days after Zeb's birth to discuss the abuse and neglect allegations and subsequently filed a petition requesting custody of Zeb while he still was hospitalized. A Juvenile Court judge granted the department temporary custody despite the

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<sup>2</sup> Suboxone is the brand name of a medically based treatment product containing buprenorphine and naloxone, prescribed for the treatment of opioid dependence. United States Food and Drug Administration, Information About Medication-Assisted Treatment, <https://www.fda.gov/drugs/information-drug-class/information-about-medication-assisted-treatment-mat> [<https://perma.cc/7AMX-6LQU>].

<sup>3</sup> At all relevant times, actions concerning the care and protection of Zeb and termination of parental rights sought against the mother were equally sought against the father. The father did not file notice challenging the decree and is not a party to this appeal. Thus, this opinion only recounts facts relating to the mother and her claims on appeal.

mother's request at the hospital that Zeb be placed with his paternal grandmother. The mother appeared in court a few days later, signed an action plan with the department, and again requested that Zeb be placed in the grandmother's care. The judge placed Zeb into unrestricted foster care. The mother waived her right to a custody hearing on August 26 and stipulated that the grandmother be given conditional custody as Zeb's primary caretaker pending a final hearing on the care and protection matter.

On January 13, 2020, when Zeb was still in the grandmother's custody, the department filed a notice of intent to request that the Juvenile Court terminate the mother's parental rights pursuant to G. L. c. 210, § 3. A trial on the underlying care and protection petition proceeded on February 27. Although the mother's counsel was present, the mother did not appear. At trial, the department requested that the judge terminate the mother's parental rights and award permanent custody to the grandmother. The mother's counsel requested that the judge grant permanent guardianship to the grandmother without termination of rights. On July 15, 2020, the judge issued a decree terminating the mother's parental rights after finding her unfit and ordered conditional permanent custody to the grandmother.

Discussion. The mother argues that the judge exceeded his statutory authority in terminating her parental rights because the department did not have care or custody of Zeb at the time of filing for termination; thus, the petition was not properly before the judge. In the alternative, she argues that the termination of her rights was reversible error.

1. Statutory framework for termination of parental rights. When it appears that a child is not receiving adequate care and protection, the department may file a petition with the Juvenile Court to summons the child's parent "to show cause why the child should not be committed to the custody of the department or why any other appropriate order should not be made." G. L. c. 119, § 24. If a judge in the Juvenile Court finds that parental unfitness has been demonstrated by clear and convincing evidence, the judge is authorized to "adjudge that the child is in need of care and protection," and to "make any other appropriate order . . . about the care and custody of the child as may be in the child's best interest." G. L. c. 119, § 26 (b). See Adoption of Nancy, 443 Mass. 512, 516 (2005), and cases cited. This includes the termination of parental rights under G. L. c. 119, § 26 (b) (4), where the judge determines that "the parent's unfitness is such that it would be in the child's best interests to end all legal relations between parent and child." Id. at 515. To do so, the judge must "consider the

ability, capacity, fitness and readiness of the child's parents . . . to assume parental responsibility, [as well as] the plan proposed by the department or other agency initiating the petition." G. L. c. 210, § 3 (c).<sup>4</sup>

2. Analysis. a. Judicial authority to terminate parental rights. The mother argues that termination of her parental rights was erroneous because the department failed to follow the proper procedures pursuant to G. L. c. 210, § 3, which provides for the adoption of children without parental consent. Specifically, the mother asserts that in order for the department to petition for the termination of parental rights, it must have "care or custody" of the child:

"The department of children and families . . . may commence a proceeding, independent of a petition for adoption, . . . to dispense with the need for consent of any person named in [G. L. c. 210, § 2,] to adoption of the child in the care or custody of the department" (emphasis added).

G. L. c. 210, § 3 (b). The mother argues that because the department did not have "care or custody" of Zeb when it petitioned to terminate her parental rights, the issue was not properly before the court and, thus, the judge did not have authority to act on the request.<sup>5</sup> This argument fails.

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<sup>4</sup> Section 26 (b) (4) instructs judges to refer to and apply the legal test set forth in G. L. c. 210, § 3.

<sup>5</sup> The mother refers to this alleged misstep as the department's failure to meet one of the "standards" required for termination of rights pursuant to G. L. c. 210, § 3. As

Although G. L. c. 210, § 3, enumerates certain procedures the department must follow in some instances when petitioning a judge to terminate parental rights, it is not the provision that gives a judge presiding over a care and protection petition the authority to terminate parental rights. Instead, as discussed supra, that power derives from G. L. c. 119, § 26. Even assuming that the better practice in this case would have been for the department to have sought termination by amending its original petition under G. L. c. 119, § 26 (b), the issue is ultimately moot because the judge here had authority to terminate the mother's parental rights notwithstanding any specific request to do so.<sup>6</sup> See G. L. c. 119, § 26 (b).

b. Correctness of the judge's decision. The mother contends that even if the judge had the authority to terminate her parental rights, he erred in doing so because the department's permanency plan lacked detail and because the judge did not properly assess the mother's future potential to care for Zeb.

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explained supra, § 3 specifically references the well-known "best interests of the child" standard. See Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption, 367 Mass. 631, 641-644 (1975) (discussing "best interests" standard of G. L. c. 210, § 3).

<sup>6</sup> We do not reach any conclusions as to the necessary and proper procedures that may apply for a petition to terminate parental rights outside of a concurrent care and protection proceeding, such as pursuant to G. L. c. 210, § 3 (a) or (b).

i. Permanency plan. The mother attacks the department's plan for Zeb, which calls for permanent guardianship to be awarded to the grandmother, as "deficient" and "utterly devoid of specifics." This argument is unavailing.

To begin, as the mother failed to raise an objection to the permanency plan at trial, the matter is waived. See Adoption of Willow, 433 Mass. 636, 651 (2001); Adoption of Carla, 416 Mass. 510, 515 (1993). Moreover, the mother had supported placing Zeb from his birth with the grandmother. This sentiment was reaffirmed through her counsel at trial:

"[C]learly the best interest of the child is with the paternal grandmother where that child is. The paternal grandmother wants guardianship, and hopefully the court approves that guardianship. . . . The guardianship should be allowed."

Indeed, the mother makes clear in her brief that it is the termination of her parental rights to which she truly objects, not the grandmother's appointment as Zeb's permanent guardian.

Furthermore, the department's plan appropriately was detailed. The plan, along with the voluminous exhibits and the grandmother's testimony, demonstrated Zeb's close bond with the grandmother, his progress made with early intervention services, and the grandmother's appropriate exercise of judgment regarding Zeb's medical care and safety. The department also submitted a proposed adoption plan, should the grandmother unexpectedly become unable to maintain guardianship. The judge did not err.



Cf. Adoption of Willow, 433 Mass. at 652 ("The [permanency] plan need not be fully developed to support a termination order; it need only provide sufficient information about the prospective [permanent] placement 'so that the judge may properly evaluate the suitability of the department's proposal'" [citation omitted]).

ii. Potential fitness to parent Zeb. The mother does not dispute that Zeb was in need of care and protection at the time of trial. However, she essentially contends that the judge's determination to sever her legal ties to Zeb was hasty where termination occurred only seven months after the initial filing of the care and protection petition and there was inadequate evidence of her future unfitness such that it was in Zeb's best interest to terminate her parental rights. We disagree.

We acknowledge that "there is a significant difference in impact on both the parent and the child between an award of custody in a care and protection proceeding, which primarily addresses only current fitness and is reviewable every six months . . . , and the 'extreme step' of terminating the parent and child's legal relationship." Adoption of Carlos, 413 Mass. 339, 350 (1992). As such, "it is appropriate for a judge to consider whether, on the basis of credible evidence, there is a reasonable likelihood that the parent's unfitness at the time of trial may be only temporary." Id. "Because childhood is

fleeting, a parent's unfitness is not temporary if it is reasonably likely to continue for a prolonged or indeterminate period." Adoption of Ilona, 459 Mass. 53, 60 (2011).

Here, the judge thoughtfully considered the mother's future potential for fitness and properly concluded that there "is a strong indication that [her] shortcomings will continue undiminished in the future with an attendant harmful effect on the child." In support of this conclusion, the judge made detailed findings relating to the mother's criminal record, mental illness, and substance abuse. In addition, the judge found that not only did the mother demonstrate an inability to acknowledge her mental health needs and address her substance use disorder, but also over the course of the previous seven months, the mother demonstrated minimal engagement with Zeb and noncompliance with supportive programming designed to address her deficiencies. Even assuming that some of the judge's subsidiary factual findings are not entirely accurate,<sup>7</sup> there was

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<sup>7</sup> We note that the judge made a finding that Zeb was "abandoned," which is defined in G. L. c. 210, § 3 (c), as "being left without any provision for support and without any person responsible to maintain care, custody and control because the whereabouts of the person responsible therefor is unknown and reasonable efforts to locate the person have been unsuccessful." The record does not support a finding that Zeb was abandoned within the meaning of § 3 (c). However, as discussed supra, the over-all record amply supports the judge's conclusion that termination of the mother's parental rights is in Zeb's best interest. Adoption of Helen, 429 Mass. 856, 859-860 (1999).

overwhelming evidentiary support for the finding that the mother continued to "engage in . . . self-destructive behavior" and failed to make "any efforts to further engage in treatment or services with the [d]epartment." See Adoption of Nancy, 443 Mass. at 514-515 (judge's findings shall not be disturbed unless clearly erroneous). The mother's arguments to the contrary amount to little more than a general objection to the judge's failure to adopt her view of the evidence. See Adoption of Quentin, 424 Mass. 882, 886 n.3 (1997).

Where the judge's detailed findings based on the evidence support the conclusion that the mother likely would not become fit to parent in the future,<sup>8</sup> the judge was warranted in terminating the mother's parental rights. See Adoption of Elena, 446 Mass. 24, 30-31 (2006), and cases cited (standard of review for termination of parental rights is abuse of discretion or clear error of law).

We emphasize that the intent is not to punish the mother for her shortcomings (especially given the widespread

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<sup>8</sup> The mother contends that based on certain of the findings and conclusions, the judge impermissibly shifted the burden to her to prove that her parental rights should remain intact. We disagree. The department presented an abundance of evidence of the mother's present unfitness, as well as evidence that the situation unlikely was to be temporary. Where the mother stipulated to her lack of fitness, the judge merely observed that the mother additionally chose not to present evidence of her potential future fitness to parent.

acknowledgment that the path to sobriety is rarely linear, nor is it achieved overnight). But a judge considering termination also must consider the child's unqualified right to permanency and stability and cannot hinge predictions of future fitness determinations on a "faint hope" that the parent will become fit at some indeterminate time. Adoption of Ilona, 459 Mass. at 59-60.

Conclusion. For the reasons explained supra, we affirm the decree terminating the mother's parental rights and the order awarding permanent custody to the grandmother.

So ordered.