

ADOPTION OF BENTLEY (and two companion cases [FN1]).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

On February 28, 2001, pursuant to G. L. c. 119, § 24, the Department of Social Services (DSS) filed a petition in Juvenile Court, alleging that Bentley and Gail were in need of care and protection. A Juvenile Court judge held an emergency hearing and awarded temporary custody of the two children to DSS. At the seventy-two hour hearing, the children's mother waived her right to a hearing, and custody of the children remained with DSS. On September 8, 2004, the mother agreed to grant DSS permanent custody of Bentley after signing a stipulation and engaging in a colloquy with the judge.

On February 17, 2005, DSS's petition was amended to add a younger sibling, Mary, who was immediately placed in DSS's temporary custody. The mother regained custody of Mary at the seventy-two hour hearing, subject to conditions. However, on March 23, 2005, a judge removed Mary from the mother's custody and again placed her in DSS's temporary custody.

There was a trial on the merits of the care and protection petition over several days between October of 2006 and May of 2007, during which DSS sought the termination of the mother's parental rights to the three children. On August 3, 2007, the judge issued a decision dispensing with parental consent to the adoption of all three children. The mother and Bentley appeal. [FN2]

Background. We summarize the judge's findings as to the termination of parental rights. The findings are supported by the evidence. See *Adoption of Quentin*, 424 Mass. 882, 886 (1997).

1997-2001. The mother is the biological parent of Bentley, born in 1994, Gail, born in 1998, and Mary, born in 2003. The mother gave birth to five other children who are not the subjects of this proceeding: Tom, born in 1992, Lisa, born in 2000, Sam, born in 2001, and twins Kathy and Lily, born during this proceeding in January of 2007. [FN3] Since 2001, Tom, Lisa, and Sam have lived with the mother's adoptive parents in New Hampshire. The mother was adopted when she was seven years old, although she lived in group homes from the time she was eleven until she was emancipated at age seventeen. At the time of the trial, the mother had custody of the twins and was living in Lewiston, Maine.

The three children who are the subject of this appeal have different fathers. The mother lived with Bentley's father for approximately three months. During that time, the mother and Bentley's father often verbally and physically fought in front of Bentley and Tom. Bentley's father was in jail when Bentley was born and has since moved to Arizona. For five years after Bentley's birth in 1994, Bentley's father had no contact with either Bentley or the mother.

The mother lived with Gail's father for a short period while she was pregnant with Gail. The relationship

was fraught with physical and verbal abuse, resulting in the police being called to the residence multiple times for domestic disputes. The mother and Gail's father ended their relationship shortly before Gail was born and, at the time of trial, the mother and Gail's father were not in contact. Gail's father was not involved in Gail's care, although his parents have had temporary custody of Gail, and are her preadoptive parents.

The mother had an on-again, off-again relationship with Mary's father between 1997 and 2002, living with him for brief periods of time. Mary's father is also the putative father of Lisa and Sam. At the time of trial, the mother and Mary's father had no contact.

DSS first became involved with the family in July of 1997, after a G. L. c. 119, § 51A, report (51A report) was filed alleging neglect of Tom and Bentley. The report was later substantiated. In 1998, DSS received three 51A reports alleging that the mother left Tom, Bentley, and Gail alone without supervision, alleging physical abuse of Bentley, and alleging neglect because Tom was chronically absent from school. Although the report of abuse of Bentley was not supported, the mother admitted to occasionally leaving her children unattended.

In January of 1999, three separate 51A reports were filed by mandated reporters alleging physical abuse and neglect of Bentley. The reporters claimed that the mother delayed in bringing Bentley to the emergency room for twenty-four hours after he received a burn on his hand and that she only treated the wound with salt. The allegation of neglect was substantiated because the mother did not provide proper treatment for Bentley's injury.

Two additional 51A reports alleging neglect were filed and substantiated in 1999. The first involved an incident of domestic violence in the home involving the mother. The second was precipitated by Gail's leaning out an unscreened window. Another 51A report alleging the mother's multiple arrests for assault and drug use was 'screened for follow-up' in 1999.

In 2000, DSS substantiated a 51A report alleging neglect of Tom, Bentley, and Gail due to a physical dispute between the mother and Mary's father witnessed by the children. In a subsequent home visit by a DSS social worker, Bentley stated that Tom sometimes 'wiggled' on Bentley and Gail by straddling them, both with and without clothes, a behavior they learned from watching television. On this particular occasion, the mother had caught Tom 'wiggling' on his brother and hit him with an object from the bathroom. The worker noted Tom had dried blood on his face. The mother said that '[Tom] has tried to put his penis into [Bentley's] backside.' Bentley further stated that he does not feel safe in the home with the mother and Mary's father because they fight. The allegations of neglect of Bentley and Gail were substantiated, as was the allegation of physical abuse of Tom. DSS filed a care and protection petition on behalf of Tom, Bentley, and Gail and obtained temporary custody of them in March, 2000.

The children were returned to their mother in late 2000. However, the mother did not regularly engage in services provided by DSS and was living with Mary's father, despite DSS's requirement 'that he not be

anywhere near [the] mother or her children.' The domestic disturbances between the mother and Mary's father continued and the police were called to their home over thirty times in the following months. The mother admitted to fearing for her life at the hands of Mary's father and was aware that he had a history of sexual offense convictions, yet she continued her relationship with Mary's father, and had two more children with him: Sam and Mary.

In January of 2001, the mother placed Tom and Lisa with her adoptive parents in New Hampshire and moved into a hotel with Bentley and Gail. [FN4] When space became available in a Worcester battered woman's shelter, the mother relocated. The mother then moved into a battered woman's shelter in Brockton. She was asked to leave when, after she was confronted about slapping and crying heard from her room, she barricaded shelter staff into an office and refused to leave. Bentley stated that he had been crying because the mother was trying to force him to put on dirty underwear.

The mother then moved to a shelter in Lawrence. She was asked to leave again, however, due to aggression toward other shelter residents, failure to supervise the children, and continued contact with Mary's father. As a result, a 51A report was filed and substantiated.

2001-2007. DSS filed the instant care and protection petition on behalf of Bentley and Gail in February of 2001. When DSS went to the Lawrence shelter where the mother was living to remove Bentley and Gail, the mother became threatening to the police and DSS workers. The following day, she blocked a staff member in a room and threatened to kill him/her. The police were called.

In March and April of 2001, two 51A reports were filed alleging sexual abuse of Bentley by Mary's father and neglect by the mother. According to the reporters, Bentley, then age seven, had reported to his mother that Mary's father had sexually assaulted him in the shower, but that the mother did not act. The second report alleged that the mother was aware that Mary's father repeatedly sexually assaulted Bentley but did nothing. These reports were screened out because Mary's father no longer had access to Bentley, but were referred to the District Attorney's office.

In December of 2004, DSS received its first 51A report with respect to Mary, alleging that the mother was not properly feeding Mary, using drugs, and fighting with her boyfriend in Mary's presence. The mother initially misled DSS in their investigation of the report by stating that she was living in a shelter, when in fact she was living in Lowell. When a DSS worker went to investigate the allegation of neglect, the mother initially ignored the knocks until the Lowell police arrived. Although the mother would not allow anyone inside, the worker observed Mary's diaper to be soiled with feces and falling to her knees. The 51A report was supported, and DSS amended the petition to include Mary in February of 2005.

Although Mary was initially removed from the mother, she was returned under strict conditions from DSS to cooperate with DSS, allow random home visits, provide adequate medical care, and enroll Mary in a day care program. Within two weeks, in March of 2005, DSS received a 51A report alleging neglect and physical abuse of Mary due to Mary's allegedly swollen lip. When a DSS investigator, accompanied by the Lowell police,

went to the mother's home, the mother refused to allow them inside. The mother was eventually persuaded to bring Mary down and Mary appeared physically healthy. However, the allegation of neglect was supported because the mother had been ordered to allow home visits. Mary was placed in foster care on March 23, 2005.

Service plans. DSS has provided the mother with at least eleven service plans since February of 1998. Initially, the goal of the plans were to stabilize the family, but then changed to reunifying the separated family and long-term substitute care for Bentley. The mother was required to, among other things, provide basic care for the children, attend individual therapy and take any prescribed medications, bring the children to their therapy sessions, participate in a domestic violence support group, meet monthly with social workers, and keep DSS apprised of her current address.

The mother sporadically followed her service plan, but her constant failure to keep DSS apprised of her current telephone number hindered contact between DSS and the mother. Although the mother claimed to have participated in many of the parenting classes and support groups, she had no documentation to prove her attendance as required. Furthermore, her threatening and violent behavior, which resulted in a restraining order being issued, prevented the mother from entering the DSS offices.

Visitation. When the children were removed from the mother in 2001, the service plans included visits, ranging from biweekly to monthly. However, the mother did not consistently visit the children.

The mother visited Bentley three times between November of 2001 and October of 2003 while Bentley was at Riverside, a residential treatment facility for emotionally disturbed children. At a subsequent meeting in November of 2003, the mother threw a vacuum cleaner at a social worker and had to be escorted from the premises. When Bentley was transferred to a second treatment center, Cornerstones, the mother did not visit until February of 2005. The mother's last visit with Bentley was in August of 2005. Cornerstone's social worker testified that he had trouble contacting the mother and that her contact with him was sporadic.

The mother visited Gail approximately six times between September of 2004 and July of 2005, although she was permitted monthly visitation. At the mother's last visit in July of 2005, the mother became agitated and started yelling in front of Gail, which resulted in the issuance of a restraining order against the mother. The mother could have visited Gail at an alternative supervision site, but she did not complete the intake form.

The mother has only visited Mary twice since her removal in March of 2005. As of March of 2007, Mother had not visited with Bentley, Gail, or Mary for approximately two years. The mother does not take responsibility for her failure to visit, blaming DSS and her attorneys. [FN5]

The children have had sporadic sibling visitation. After the last sibling visit, Bentley had to be hospitalized. His counselor believed that he needed more time to prepare for visits with his siblings.

Bentley's father visited Bentley twice and made sporadic telephone contact while Bentley was at Riverside. Upon Bentley's father's return to Lowell in 2002, he petitioned the court for appointment of counsel and contacted DSS about initiating visits with Bentley. However, Bentley's father's contact was not consistent until October of 2006, when he had supervised telephone calls with Bentley, leading to a visit in December of 2006.

Bentley. At the time of trial, Bentley was thirteen years old and had resided in two successive residential treatment facilities since his removal in 2001 (Riverside and Cornerstones). He has a significant history of psychological and social issues stemming from trauma and neglect. He was diagnosed with severe attention deficit hyperactivity disorder and treated with Aderol and Clonidine. Bentley's current treatment is based on the understanding that he was sexually abused while in the mother's care. [FN6] Bentley was initially unable to go to the bathroom alone and could not fall asleep without a staff member present. He also suffered from enuresis and encopresis three to four times a week. At school, Bentley often became involved in altercations with his peers and could become uncontrollable in the classroom.

After extensive treatment, Bentley has improved considerably. He is now able to fall asleep and use the bathroom independently, with decreased incidents of enuresis and encopresis. Although his behavior at school has also improved, he continues to have difficulty making friends and isolates himself from his peers. Bentley has difficulty regulating his mood and therefore requires routine and consistency.

The judge found that Bentley had made enough progress to consider transferring him to a specialized foster home. Bentley has stated that he wants a permanent home, but that he does not want to be adopted. He vacillates between wanting to see his mother and not wanting contact with her.

The mother does not understand Bentley's special needs or know why he is in a residential facility. She believes that he has medical needs but concluded that it was related to concentration.

Gail. At the time of trial, Gail was nine years old and had been living with her paternal grandparents for approximately six years. DSS's plan for Gail is to sponsor her adoption by her paternal grandparents.

Initially, Gail acted aggressively, displayed inappropriate sexual behavior and had nightmares, screaming 'no maime' [sic] or 'don't hurt me.' She would become scared when her clothes were taken off. Gail acted out particularly before visits with her mother and had to be assured by her social worker that she would stay during the visit and afterwards be returned to her grandparents. After living with her grandparents, Gail's behavior issues at home subsided and are not currently an issue. Gail's health issues, caused by premature puberty and being overweight, have also improved with Gail losing twenty-one pounds with the help of an endocrinologist and a nutritionist.

In the third grade, with no identified special needs, Gail's primary problems are social. She is not in therapy, but is being assisted by the school's adjustment counselors. Gail stated that she no longer wants

to visit with her mother.

Mary. At the time of trial, Mary was four years old and had been living in her preadoptive home since December of 2005. DSS's plan for Mary is to sponsor her adoption by her preoperative family. Although developmentally on target, Mary has social and emotional issues, and suffers from complex posttraumatic stress disorder. Although her behavior has slightly improved, Mary needs constant supervision and structure. Standard of review. Before parental rights can be terminated, 'the judge must find by clear and convincing evidence that a parent is presently unfit to provide for the welfare and best interests of the child.' Adoption of Mary, 414 Mass. 705, 710 (1993). The judge must make specific and detailed findings demonstrating that close attention has been paid to the evidence. Adoption of Nancy, 443 Mass. 512, 515 (2005). 'Absent a showing that the judge's findings are clearly erroneous, they are left undisturbed.' Adoption of Mary, supra. Here, only one of the judge's 198 factual findings are challenged, therefore, the others are accepted as true. [FN7]

'When reviewing a decision to terminate parental rights, [a reviewing court] must determine whether the trial judge abused his discretion or committed a clear error of law.' Adoption of Elena, 446 Mass. 24, 30 (2006). In these cases, 'much must be left to the trial judge's experience and judgment.' Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption, 367 Mass. 631, 646 (1975). '[T]he judge's assessment of the credibility of the witnesses and the weight of the evidence is entitled to deference.' Adoption of Elena, supra at 31.

'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.' Adoption of Mary, 414 Mass. at 711. 'Evidence such as the failure of the parents to keep a stable home environment for the children, the refusal of the parents to maintain service plans, visitation schedules, and counseling programs designed to strengthen the family unit are relevant to the determination of unfitness.' Petitions of the Dept. of Social Servs. to Dispense with Consent to Adoption, 399 Mass. 279, 289 (1987).

Relying on detailed findings, the judge concluded that the mother had exposed her children to years of abuse and neglect. The judge found that the children witnessed multiple instances of domestic violence. He noted that the mother continued her relationship with Mary's father, 'knowing that it was harmful to herself and her children for five years,' even after discovering that he had a history of arrests for sexual offenses. The children stated that they were afraid of Mary's father and likely suffered emotional distress as a result of living in the violent home. The mother's refusal to terminate violent relationships reflects on her ability to protect her children from further abuse. See Adoption of Mary, 414 Mass. at 711. The judge also properly considered that the mother has her own unresolved anger management issues, manifesting itself in multiple instances of violent and threatening behavior toward and around the children.

The trial judge's conclusion is also supported by the ample evidence of the children's special needs. A

child's 'special needs are relevant because they bear on whether this particular mother . . . can be a fit parent to this particular child.' Adoption of Abigail, 23 Mass. App. Ct. 191, 193 (1986). Here, the mother has no understandings of the children's psychological and emotional needs. Her ignorance of Bentley's special needs is particularly troubling because he has been in an institutionalized setting since his removal and the mother has had contact with his therapists.

Finally, 'a lengthy separation between parent and child, the growth of emotional ties between the child and a different custodian, and the effect of a forced return of the child to the biological parents are all factors that should be weighed by the judge, with no one factor being determinative.' Adoption of Frederick, 405 Mass. 1, 7 (1989). The judge found that the mother 'wilfully failed to visit the Children for over two years.' When the mother had occasionally visited the children in the past, her presence caused Bentley and Gail anxiety and fear. See Care & Protection of Three Minors, 392 Mass. 704, 713 (1984) (that the mother was 'erratic and unreliable in her visits to' her children was an appropriate factor to consider in determining unfitness). Although the mother blamed DSS and her attorneys for her failure to visit the children, 'the judge's assessment of the weight of the evidence and the credibility of the witnesses is entitled to deference.' Custody of Eleanor, 414 Mass. 795, 799 (1993). Where there was no evidence that DSS hindered the mother's visits with the children, the conclusion must be accepted. [FN8]

We hold that the judge's decision to terminate the mother's parental rights is based on appropriate considerations of the evidence. The judge could properly conclude that the mother had never met 'the children's needs and, because that was unlikely to change in the foreseeable future, the best interests of the children would be served by terminating' her parental rights.

Adoption of Gillian, 63 Mass. App. Ct. 398, 405 (2005). Therefore, the judge did not commit error in terminating the mother's parental rights.

No visitation order. The mother and Bentley argue that the judge erred in failing to order any posttermination visitation between the them. Once the judge determines that a parent is unfit, it is within the judge's discretion to grant both posttermination and postadoption visits. See Adoption of Vito, 431 Mass. 550, 564 (2000). The best interests of the child rather than rights of the parent are determinative in allowing posttermination visitation. Adoption of Abigail, 23 Mass. App. Ct. at 199-200. The 'decision not to order postadoption visitation will be reversed only for abuse of discretion.' Adoption of Lenore, 55 Mass. App. Ct. 275, 283 (2002). Here, there was no such abuse of discretion as to Gail and Mary.

Bentley also contends that the judge erred in failing to consider posttermination visitation with his siblings, his mother, his father, and his maternal grandparents. See Care & Protection of Three Minors, 392 Mass. at 718; G. L. c. 119, §§ 23 and 26(5). It does not appear that the trial judge considered the issue of posttermination visitation, particularly with respect to Bentley. The record shows that, although Bentley has mixed feelings about living with his mother, he has a 'special bond' with his siblings Sam and Lisa and that they had pleasant visits over the holidays in 2004 and 2005. The record also reveals that

Bentley has some relationship with his maternal grandparents and that they have expressed an interest in maintaining the relationship with him. Although a trial judge is not required to make extensive findings on the issue of visitation if he already has made specific and detailed findings regarding the child's best interests and parental unfitness, here, the issue of parental, sibling, and grandparent visitation with respect to Bentley should be explored further. See *Adoption of Vito*, 431 Mass. at 563-564 & n.25; *Adoption of John*, 53 Mass. App. Ct. 431, 439 (2001). See also *Adoption of Pierce*, 58 Mass. App. Ct. 342, 347 (2003).

Conclusion. We affirm the decree terminating the mother's parental rights and remand the matter for further findings relative to posttermination visits between Bentley, his siblings, his father, his mother, and his maternal grandparents.

So ordered.

By the Court (Berry, Smith & Rubin, JJ.)

Entered: July 1, 2008.

FN1. Adoption of Gail and Adoption of Mary. The names are pseudonyms.

FN2. The children's fathers' rights were also terminated. They did not participate in the trial and have not appealed.

FN3. All the children's names are pseudonyms.

FN4. The mother placed Sam with her adoptive parents later in 2001, one month after he was born. Tom, Lisa, and Sam continued to live with their grandparents at the time of trial.

FN5. During the pendency of this petition, the mother has been appointed five attorneys and at least three guardians ad litem.

FN6. The judge found, based on the preponderance of the evidence, that Bentley was sexually abused by Mary's father while in the mother's care and that the mother continued to have a relationship with Mary's father even though she was aware of the abuse. See note 7, *infra*.

FN7. Bentley argues that factual finding 174, that Bentley was sexually abused by Mary's

father, is in error because it is based on improperly admitted hearsay. Bentley does not contest the portion of the finding that concludes that the mother continued her relationship with Mary's father even after she was aware of sexual assault allegations against him. See note 6, supra.

Although the admission of this testimony without complying with the procedures set forth in G. L. c. 233, §§ 82 & 83, may have been in error, it was clearly harmless. We can be confident that any inadmissible hearsay did not affect the trial judge's decision because when discussing the statutory factors in the conclusions of law, the judge focused on the mother's years of abuse and neglect; the judge did not rely on the finding that Bentley had been abused. Compare *Adoption of Tina*, 45 Mass. App. Ct. 727, 734 (1998). The trial judge's remaining findings clearly demonstrate parental unfitness. See *Adoption of Carla*, 416 Mass. 510, 517-520 (1993) (unfitness shown even if some evidence should have been excluded); *Adoption of Sherry*, 435 Mass. 331, 336 (2001) ('we need not disturb a judgment when error did not affect the outcome').

FN8. We see no merit to the mother's argument that DSS failed to make reasonable efforts to strengthen the family unit. See *Adoption of Lenore*, 55 Mass. App. Ct. 275, 278 (2002).