

BURDEN OF PROOF



Figure out:

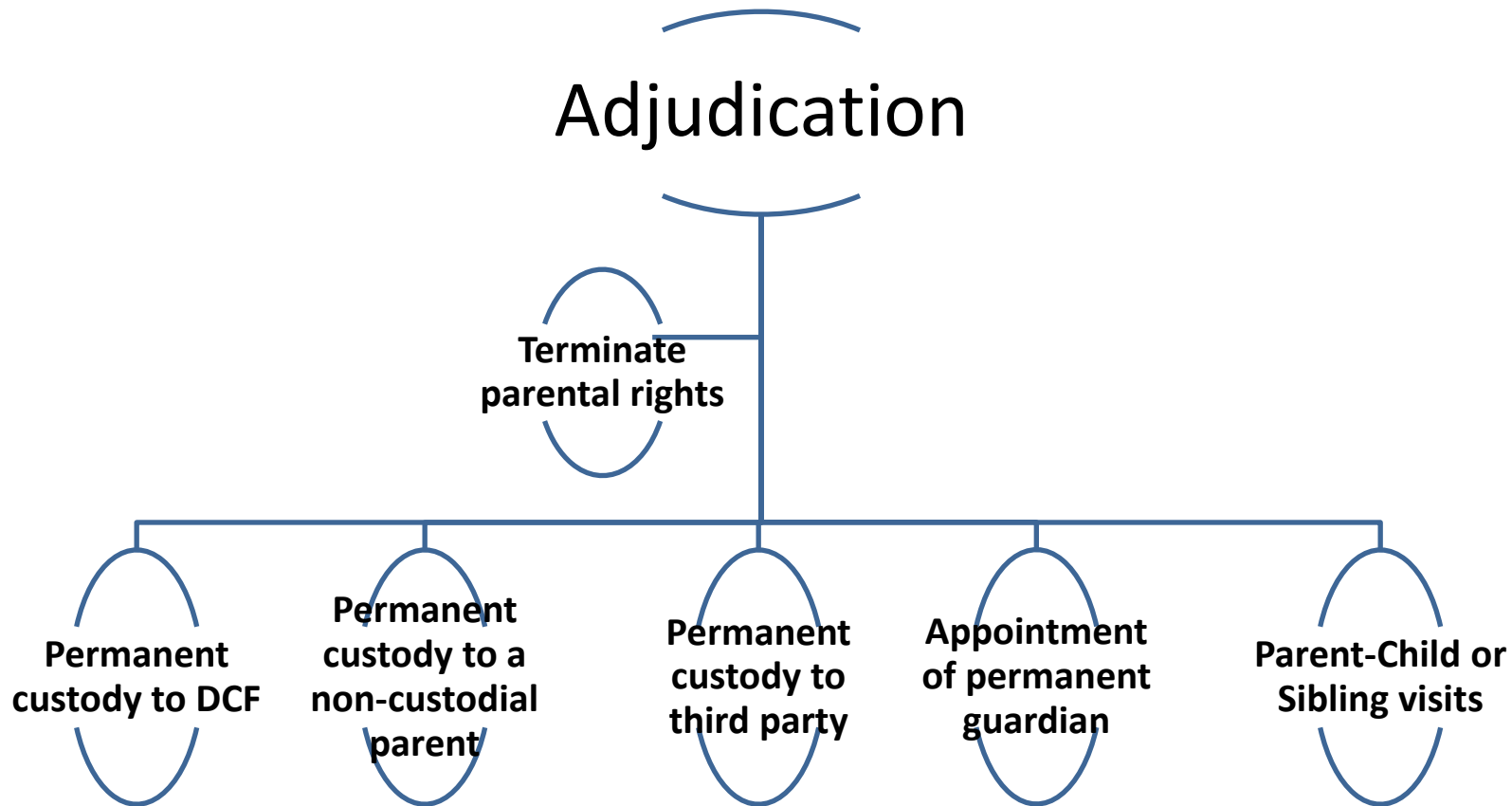
1. What has the trial court ordered?
2. What parts of the order has the client appealed from?
3. What parts of the order have DCF or other parties appealed from?
4. What is standard/burden of proof for each of the issues subject to appeal?

G.L. c. 119 § 26

–Dismiss; or

–Adjudicate Children in Need of
Care and Protection

Dispositions *after* Adjudication





FUNDAMENTAL RIGHT TO RAISE CHILD

14th Amendment US Constitution &
Article 10 Massachusetts Declaration
of Rights

Care & Protection of Manuel, 428 Mass. 527 (1998)
Care and Protection of Robert, 408 Mass. 52 (1990)



Burden of Proof Legal Sources

- Chapter 119, § 26
- Chapter 210, §§ 2 & 3
- Chapter 190B
- U.S. Supreme Court
- Massachusetts Appellate Courts
- Other states?

Care and Protection Adjudication

Who: DCF or other petitioner

What: The parent is currently *unfit* to further the child's best interests.

Adoption of Carlos, 413 Mass. 339(1992)

How much: Clear and convincing evidence.

Guardianship



Current unfitness + Best Interests

Clear & convincing

TERMINATION OF PARENTAL RIGHTS

1. Parent currently unfit to further the child's best interests, and
 2. It is in the child's best interests for parental rights to be terminated; and
 3. Proposed plan is in child's best interests.
- Adoption of Nancy 443 Mass 512, 515 (2005)

Clear & Convincing Evidence

Termination of Parental Rights



Review & Redetermination (R&R)

- If child in DCF custody or placed with legal guardian
- No less than 6 months from date of order
- Parties (except parent whose rights terminated) may ask for R & R of child's current needs
- All same disposition options available

Review & Redetermination (R&R):

- Party petitioning has initial burden to show change of circumstances
- Then burden same as at initial trial
- Current unfitness + **BIOC** (if seeking **TPR**)
- But not “blank slate”

WHAT IS CLEAR & CONVINCING EVIDENCE?

Beyond a reasonable doubt

CLEAR and CONVINCING

Preponderance of evidence

Reasonable cause

Clear and convincing evidence is evidence which is “strong, positive and free from doubt” and “full, clear and decisive.” Stone v. Essex County Newspapers, Inc., 367 Mass. at 871.

The evidence of unfitness must be “highly probably true.” In re G.P. (Mass. Nov. 5, 2015)

QUANTUM OF PROOF
SUBSIDIARY FINDINGS OF FACT

Fair preponderance of the evidence.

Adoption of Quentin 424 Mass 882,
886 (1997)

Care and Protection of Laura 414
Mass 788, 793 (1993)

Indian Child Welfare Act ICWA

Higher/different standard of
proof

Placement/adoptive
preferences

Required notice to tribe/right
to intervene



WHAT IS PARENTAL UNFITNESS?

The idea of parental unfitness means grievous shortcomings or handicaps that put the child's welfare much at hazard.

Adoption of Greta, 431 Mass. 577 (2000)

G.L. c.210, §3

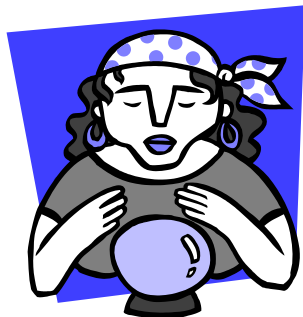
- abuse/neglect
- failure to maintain contact
- length of time in care
- bonds with substitute caretaker
- parental conditions
- parent unavailable
- failure to remedy problems

CURRENT UNFITNESS

- Court should not rely solely on old evidence E.g., *Adoption of Rhona*, 57 Mass. App. Ct. 479 485-86 (2003) (4 yr old evidence of drug use too stale to be predictive)
- Court must consider “recent positive gains” *Adoption of Ramona* 61 Mass app. Ct. 260 (2004)
- But recent gains may be too little, too late. *Adoption of Serge*, 52 Mass. App. Ct. 1, 7

PROGNOSTIC EVIDENCE

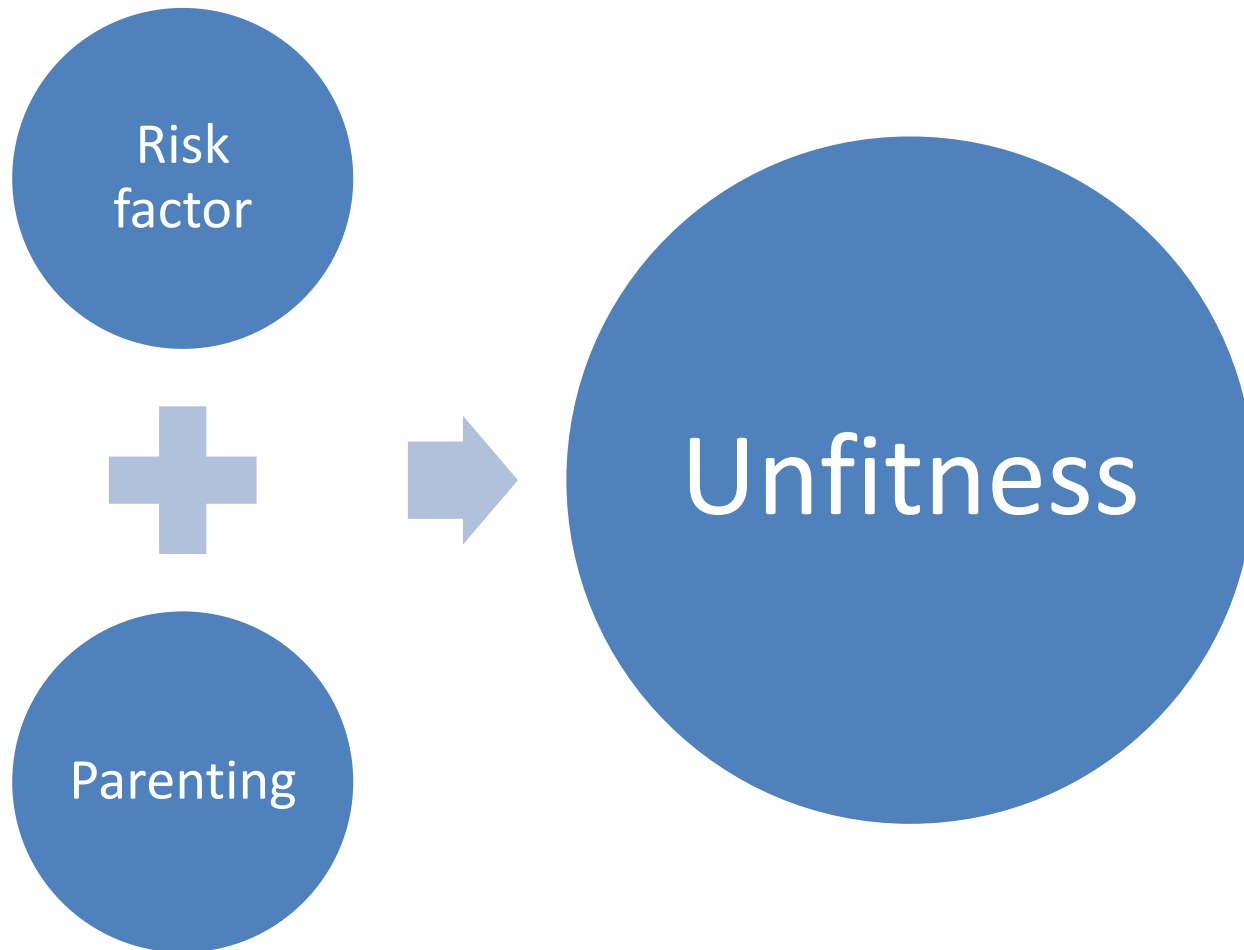
- Court may properly base a finding of current unfitness on older evidence that is “prognostic” of the parent’s future fitness. *Adoption of Paula*, 420 Mass 716, 729 (1995)
- Trial judge can “properly rely upon prior patterns of ongoing, repeated, serious parental neglect, abuse, and misconduct in determining current unfitness” *Adoption of Diane*, 400 Mass. 196, 204 (1987).





It is **NEVER** a question of whether the foster home is better than the parents.
C&P of Zelda, 26 Mass. App. Ct 869, 872 (1989)

NEXUS



- But, the court and DCF need not wait for inevitable disaster before acting to protect the child.
- *Adoption of Mario*, 43 Mass. App. Ct. 767, 772 (1997)



Child-Specific Assessment



REASONABLE EFFORTS

- Failure to provide reasonable efforts is not a defense to TPR. *Adoption of Gregory*.
- Must raise issue before trial. *Gregory; Adoption of Ilona*
- But see *Care and Protection of Elaine*
- Argue termination not in child's best interests
- Ineffective assistance of counsel?
- Violations of Americans with Disabilities Act



NOT UNFITNESS

- Placing child with a suitable caretaker
- Living in Poverty
- Use of corporal punishment
- Alternative lifestyles
- Homelessness

MOST COMMON EVIDENCE OF UNFITNESS

- Substance Use
- Mental Illness
- Physical Abuse
- Sexual Abuse
- Failure to Protect child from Abuse
- Exposure to Domestic Violence

MOST COMMON EVIDENCE OF UNFITNESS

- Incarceration/Parental Unavailability
- Neglect –supervision, nutrition, education , medical, emotional
- Abandonment
- **Failure to cooperate with or benefit from services**
- **Failure to maintain meaningful visits**
- **Irreparable harm caused by severing a child's bond to substitute caretaker**

Service Compliance

- Judge may consider parent's failure to cooperate with services. *Pet. of DSS to Dispense with Consent to Adoption.*
- Not enough to show up, parent must show he benefited from services. *Adoption of Gregory.*
- But may not base unfitness finding on failure to comply with service that parent does not need. *Adoption of Yale; Adoption of Leland.*

Failure to Maintain Consistent and Meaningful Visits

- Parent-child visits are relevant factor in determining visits.
- Two aspects
 - Ability to comply with visitation schedule
 - Quality of visits
- Must address barriers to visitation before trial

Child's Bond with Substitute Caretaker

- Bonding with a substitute caregiver, by itself, is never enough.
- To establish unfitness because of child's bond with caretaker, need to prove four elements



BONDING ELEMENTS

G.L. C. 210 S. 3 (C)(VII)

1. The child has a strong, positive bond with the substitute caretaker;
2. The bond has existed for a substantial portion of the child's life;
3. Removal will cause serious psychological harm
4. The parent cannot meet the child's specialized needs resulting from the harm of removal

Bonding

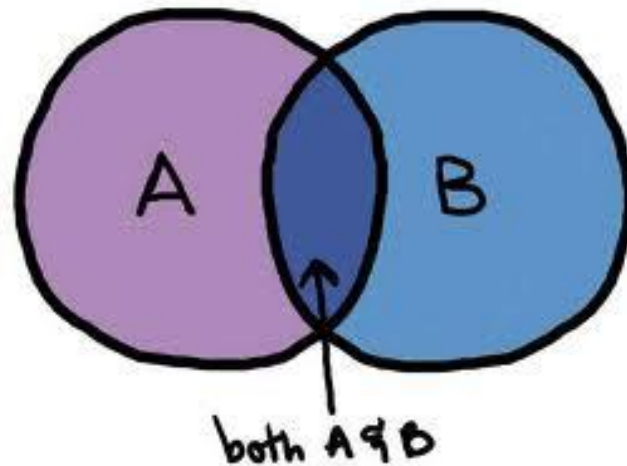
- If bonding determinative:
 - Must issue specific factual findings
 - Need expert
- If bonding not determinative, no findings or expert
- Pseudoscience? See *Adoption of Abby*

BEST INTERESTS



TWO PRONGS: UNFITNESS & BEST INTERESTS

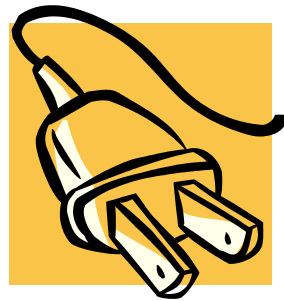
- While the same facts and evidence may be offered in support of both Unfitness and Best Interests, the judge must not “conflate” the two.



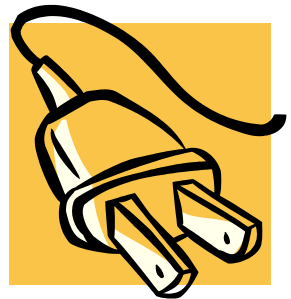
SECOND PRONG: DETERMINING BEST INTERESTS

Court may consider

- Whether the parents might be fit in the future
- Whether DCF's plan for the child necessitates termination (i.e., adoption)
- Whether the child has a close attachment to the parent



- Whether the child bonded to other caretakers
- Whether termination would advance child's need for stability and
- The child's wishes
- Sibling contact and/or placement



PLAN REQUIREMENT

- DCF must give evidence of its plan
- A fully developed plan at trial is not essential—recruitment okay
- DCF must provide sufficient information about plan to enable judge to meaningfully evaluate and make a determination about the plan
- You can attack sufficiency of the plan.

COMPETING PLANS

- Judge determines whether DCF's or parents' plan best serves the child's best interests.
- No party's plan is given artificial weight.
- Judge has considerable discretion.

Ask how does
this plan meet this
child's best interests?



Post-Termination and Post-Adoption Contact

- Termination extinguishes parent's right to visit. *Adoption of Helen.*
- Burden on party seeking contact to show that it is in child's best interests. *Adoption of Helen; Adoption of Vito.*
- If child in preadoptive placement, party seeking contact must also show that an order is necessary to protect the child's best interests. *Adoption of Ilona.*

Factors in determining best interests as to visitation:

- Significant bond between child and birth parent
- Child living in preadoptive placement
- Age of child
- Child's wishes
- Child's racial and cultural development
- Child's sense of identity

Sibling Visitation

- Siblings have a statutory right to visit with each other. G.L. c. 119, sec. 26B(b)
- Party requesting visitation has the burden to show visits are in the best interests of all the siblings. *Jamison*
- Applies any time siblings are separated by state intervention. *Jamison*

Questions?