*Adoption of Varik*, 95 Mass. App. Ct. 762 (2019)

Summary by Katy Krywonis, CAFL Training Unit

In this appeal from a decree terminating parental rights, the father and Varik argued that DCF’s adoption plan was deficient and, because judicial approval of an adequate plan is a precondition to a decision to terminate parental rights, the decree terminating the father’s parental rights should be vacated. The Appeals Court agreed that the adoption plan was inadequate but vacated only *that part* of the decree; it affirmed the termination of the father’s rights.

*Facts*: DCF filed a care and protection petition for Varik because his father physically abused him. The father participated in some of his service plan (now “action plan”) tasks over the next year, and he and Varik were reunified. Two months later, the father and his girlfriend brought Varik to the DCF office, stating that they could no longer care for him because of his “troublesome behaviors,” including harming his baby half-sister. Varik was again placed in foster care. Over the next year, the father visited Varik seven times but did not otherwise participate in services. He blamed Varik for the care and protection case and maintained that physical discipline was the best way to address Varik’s behaviors. DCF changed its goal for Varik to adoption.

At trial, DCF presented a vague adoption plan. An ICPC request for a home study of Varik’s paternal step-grandmother in South Carolina was pending. DCF was also gathering information about a paternal aunt. If necessary, DCF would try to recruit. The trial judge found the father unfit and terminated his parental rights. She approved DCF’s adoption plan and ordered postadoption visits between the father and Varik. The father and Varik appealed.

*Discussion*: Termination of parental rights requires a two-part analysis. First, the judge must decide whether the parent is currently unfit. If, and only if, the judge finds that the parent is currently unfit, they must then determine whether termination is in the child’s best interests. In making this best interests determination, the judge is required by statute to consider the parent’s fitness and readiness to assume parental responsibility *and* DCF’s plan for the child. *See* G.L. c. 210, §§ 3(b), (c). The plan must be “sufficiently detailed to permit the judge to evaluate the type of adoptive parents and home environment proposed and consider whether the proposal is best suited to meet the specific needs of the child.” *Varik* at 16.

Here, DCF’s adoption plan did not convey enough information for the judge to assess the different options that it was considering. It contained some details of Varik’s medical history, placement history, and behavioral issues, but it did not describe Varik’s specific needs or the family makeup or home environment that would best meet his needs. The Appeals Court therefore remanded for consideration of an adequate plan. It nevertheless affirmed the termination of the father’s rights.

*Practice Tip*: The Appeals Court’s decision here seems to contradict the plain language of G.L. c 210, § 3. It is also inconsistent with several decisions in which the termination decree was vacated because the plan was inadequate.  *See* *Adoption of Stuart*, 39 Mass. App. Ct. 380 (1995); *Adoption of Dora*, 52 Mass. App. Ct. 472 (2001). That said, trial counsel should continue to argue that a judge cannot determine whether termination is in a child’s best interests without having enough information to meaningfully assess DCF’s ultimate plan for the child. Best interests is a child-specific inquiry; what serves the best interests of a toddler in a pre-adoptive home may not serve the best interests of that toddler’s sibling, a teenager in a residential program. *Varik* doesn’t change that. What *Varik* does change, however, is the relief the Appeals Court may grant if it determines that an adoption plan (or other permanent plan) is inadequate. Before *Varik*, the likely result was vacatur of the termination decree. Now, after *Varik*, the Appeals Court may affirm the termination and remand solely for a new hearing on the plan.

If a case is remanded for a hearing on the plan, counsel should also consider filing a Rule 60(b) motion to vacate the judgment on the grounds that, without an adequate plan, termination is no longer in the child’s best interests. This will be a case-specific inquiry. In some cases termination may still be in the child’s best interests, but in others it may not, especially if there is a recruitment plan which seems unlikely to be successful.