

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-220

ADOPTION OF DIMITRI.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The Department of Children and Families (department) filed this care and protection petition in August, 2012, and was granted temporary custody of the child, Dimitri, then ten months old. After a trial that started in August 2016 and ended in September 2017, a Juvenile Court judge found Dimitri's mother and father unfit, terminated their parental rights, and approved the department's plan for Dimitri to be adopted by his foster parents. On appeal, the mother and father argue that the judge erred in finding them permanently unfit, particularly insofar as the judge relied on Dimitri's attachment to the foster parents. The mother also challenges the judge's finding that the department had made reasonable efforts toward reunification of the family, and she argues that the judge should have addressed posttermination and postadoption visitation between Dimitri and

¹ A pseudonym.

his siblings. The department and Dimitri ask that we uphold the decree, although Dimitri asks that we remand for a determination on sibling visitation.

We conclude that the ultimate findings of unfitness, as well as the finding that the department made reasonable efforts, are not sufficiently supported by the judge's subsidiary findings and conclusions of law. We therefore vacate the decree and remand for further proceedings, during which any party may seek an order for sibling visitation.

Discussion. It was the department's burden to prove by clear and convincing evidence that the mother and father were currently unfit to parent. See Adoption of Gregory, 434 Mass. 117, 125-126 (2001). "We give substantial deference to a judge's decision that termination of a parent's rights is in the best interest of the child, and reverse only where the findings of fact are clearly erroneous or where there is a clear error of law or abuse of discretion." Adoption of Ilona, 459 Mass. 53, 59 (2011).

1. Unfitness. Here, the judge rested his ultimate findings of unfitness on two main considerations: (a) that the parents, if custody were returned to them, would be unable to provide Dimitri with the stability and consistency he needs (and that the foster parents are currently providing), particularly with regard to medical and other treatment appointments; and (b)

that Dimitri would suffer serious psychological harm if removed from his foster placement and that the parents would be unable to meet the additional needs resulting from such removal. We address these issues in turn, referencing the judge's numbered findings of fact and conclusions of law as necessary.

a. Stability and consistency. The judge's Finding 226 identified no concerns about Dimitri's development at the time he was removed from the parents in August 2012 at the age of ten months and placed in foster care. In early 2014, however, Dimitri was diagnosed with a communication disorder (a neurodevelopmental disorder) and an anxiety disorder.² As a result, the judge found in Finding 259 that Dimitri has special needs, which "require a continuous level of heightened care and attention"; that Dimitri is "emotionally and developmentally fragile"; that treatment "is best provided in a stable, attentive environment by stable, attentive care providers"; and that the foster mother has consistently provided that environment and level of care, leading Dimitri to experience "positive behavioral growth and progress." Notably, however, the judge made no finding that the mother or father were

² A diagnosis of developmental coordination disorder was also made at that time but removed in March 2016.

incapable of providing sufficient stability and consistency to meet Dimitri's needs.

Nevertheless, the judge's Conclusion 12 assumes that to be the case:

"[Dimitri's] substantial needs require stability, extraordinary attention to and participation in his recommended treatment, and the [m]other and [f]ather lack the ability to meet those needs consistently over time. The [m]other and [f]ather have a consistent and disturbing history of cancelling medical appointments for themselves and their other children, and missing medical and treatment appointments for themselves. [Dimitri's] treatment requires consistent attendance at medical appointments" (emphasis added).

To similar effect are Conclusions 13 and 18, which state that the parents, who have been inconsistent with their own mental health and substance abuse treatment regimens, "are unable to provide appropriate care to comply with [Dimitri's] treatment regimens," and have not benefited from services "to the extent that they could provide the necessary care" to Dimitri.³

³ Relatedly, Conclusion 14 refers to the parents' long histories of illegal drug use and recognizes that such drug use may be relevant to the extent that there is shown to be a nexus to abuse and neglect of a child. See Adoption of Katharine, 42 Mass. App. Ct. 25, 31, 33-34 (1997). Conclusion 14 does not, however, identify what that nexus might be in this case. Also, in reviewing the factors set forth in G. L. c. 210, § 3 (c), the judge concluded that factor (xii), concerning whether a condition such as drug addiction makes a parent unlikely to provide minimally acceptable care, "does not apply" to this case. We therefore understand the judge's references to substance abuse and mental health issues as embodying his concern about the parents' inconsistent participation in their own treatment.

Conclusion 16 is in the same vein: "The [m]other and [f]ather provide appropriate attention and care at visits but are unable to provide that same level of care and attention for any greater extended periods of time."

These conclusions lack support in the judge's findings. Although the parents have been at times inconsistent with regard to their own treatment, the inference that they will necessarily be inconsistent in meeting Dimitri's treatment needs is not reasonable on this record. First, as mentioned above, Dimitri was removed from the parents over a year before his developmental and anxiety disorders were diagnosed or, so far as we can tell from the record, before those disorders even manifested themselves in a way that suggested any need for medical or therapy appointments. The parents thus have no track record of failure or inconsistency in ensuring that Dimitri attends his appointments.

Second, at least for a time, the parents were denied the opportunity to establish a positive track record in this regard. The judge found that in 2015, Dimitri's therapist declined to allow the mother to attend Dimitri's appointments;⁴ that in

⁴ Although the department made some attempt to arrange for the therapist to talk to the mother by telephone, the therapist had never done so as of April 2017. Also noteworthy is the judge's Finding 115, that "there were obstacles that precluded [the parents] from attending [Dimitri's] appointments." Specifically, when the parents "presented at Children's

October 2015, a department worker learned of upcoming medical and dental appointments for Dimitri but did not take the necessary steps for the parents to be informed of the appointments; that the parents requested a list of Dimitri's medical and school appointments in November 2015 but received no information until June 2016; and that, as of the time of trial in August 2016, the parents' ongoing social worker, eleven months after being assigned to the parents' case, still had not received full information about Dimitri's various providers and appointments to share with the parents. The judge found that the mother "had not been given an opportunity to participate in any therapeutic services with [Dimitri] at the time of trial."

Third, the evidence regarding the mother's attendance at appointments for her other children was neither recent nor particularly telling. The judge found that the mother had missed one appointment for Dimitri's older half-brother in 2011, and several appointments for the half-brother and Dimitri's older sister in 2012.⁵ The judge also found that, according to a

Hospital, they were told that the appointments were cancelled. However, [Dimitri] and [the] [f]oster [m]other were seen by the doctor as scheduled." The judge found that the foster mother worked at Children's Hospital and that it appeared to the court investigator that the foster mother herself had printed out Dimitri's hospital records.

⁵ The judge's finding and the exhibit he cited to support it leave unclear whether any of the 2012 appointments involved Dimitri.

provider in early September 2015, appointments involving the mother and Dimitri's younger sister had been "inconsistent," but the finding did not specify whether the mother had actually missed any scheduled appointments or instead whether the provider believed that appointments should be scheduled more frequently.⁶

Fourth, and also relevant to the 2015 period, the judge found that as of July 2015, a department foster care reviewer concluded that the mother and father were "in full compliance with service plan tasks." The mother's tasks included attending school meetings and medical appointments for Dimitri and his older sister; continuing to have Dimitri's younger sister available for early-intervention appointments; ensuring that the younger sister was medically up to date and attended all scheduled medical appointments; and reviewing Dimitri's psychological and developmental assessments with the mother's therapist and discussing the skills needed to fulfill his needs. The judge also found that another department foster care review

⁶ The mother retained custody of Dimitri's older and younger sisters, and the judge expressly concluded that she was fit to raise them. Of course, as the judge properly acknowledged, "[p]arental fitness as to one child does not render a parent fit with respect to a different child if the other child has special needs." Adoption of Frederick, 405 Mass. 1, 9 (1989). Dimitri's half-brother turned eighteen years of age before the judge issued his findings and conclusions, and the judge made no finding as to the mother's fitness to raise the half-brother.

in July 2016 reached the same conclusion -- that both the mother and the father were "in full compliance with their service plan tasks" -- and the reviewer "recommended that the goal of adoption be re-visited because [the] [m]other and [f]ather had been in full compliance . . . for more than a year." The department nevertheless moved ahead, one month later, with the trial in which it sought termination of the parents' rights.

Accordingly, because the facts as found do not support the judge's conclusions of law regarding the parents' inability to provide consistency in Dimitri's treatment were he returned to them, those conclusions are in error.⁷ The same is true of the judge's Conclusions 7, 19, and 31(viii)⁸ regarding the parents' lack of the necessary "insight" to provide for Dimitri's needs. Although lack of insight is often a factor in these cases, there

⁷ We have considered whether the parents' record of visitation with Dimitri might support the judge's conclusions. But, in the judge's seventy-seven findings of fact regarding visitation, covering 2012 through March 2017, he notes no concerns about the parents' conduct leading to missed visits, with one possible exception in March 2013.

⁸ This conclusion addressed G. L. c. 210, § 3 (c) (viii), which requires a judge to consider whether there has been "a lack of effort by a parent . . . to remedy conditions which create a risk of harm due to abuse or neglect of the child." Although the judge concluded that this factor applies, his explanation for doing so referred not to any lack of effort by the parents, but instead to his determination that the progress they had made was "not sufficient to overcome their lack of insight of their deficits and the needs of [Dimitri]."

is no finding of fact explaining in this particular case what sort of insight into Dimitri's needs either parent lacks.⁹ The department points to various arguments in the parents' appellate briefs as evincing a lack of insight, but, needless to say, such arguments are not evidence. And, to the extent any such lack of insight might be identified from the record evidence, a question that necessarily emerges from the findings discussed above is whether such a deficit is attributable to the various barriers -- either created by the department or created by third parties and tolerated by the department -- to the parents' participation in and ability to learn about Dimitri's medical, psychological, and educational appointments and needs.

b. Harm upon removal from foster parents. The principal remaining basis for the judge's termination decision was that Dimitri would suffer serious psychological harm if removed from his foster placement and that the parents would be unable to meet the additional needs resulting from such removal. The judge's Finding 273 stated in pertinent part that "[r]emoval of [Dimitri] from the foster home would cause serious psychological harm to [Dimitri]. . . . [H]e has developed attachment with his [f]oster [m]other and [f]oster [f]ather to the extent that

⁹ In challenging the conclusions regarding insight, the father calls our attention to several findings recognizing his intuitive skills in relating to and engaging with Dimitri.

removal from that home would be harmful to [Dimitri]. The court credits [expert witness] Ms. Milde's testimony concerning attachment and bonding."¹⁰ The judge concluded as a matter of law that factor (vii) as set forth in G. L. c. 210, § 3 (c), was applicable, in that "[f]orced removal of [Dimitri] from the [f]oster [p]arents would likely cause serious psychological harm to [Dimitri] and the [m]other and [f]ather lack the capacity to meet [Dimitri's] needs upon removal."¹¹

We think it clear that factor (vii) was a "decisive factor" in the judge's decision. Adoption of Katharine, 42 Mass. App. Ct. 25, 30 (1997). We have explained supra our determination

¹⁰ Finding 273 further stated that at the time Dimitri was removed from his parents' custody, "he had not sufficiently developed attachment" to them, due to their neglect of him "in his early years of life." The parents challenge this portion of the finding, noting that Dimitri was removed at the age of ten months, whereas Ms. Milde, the department's own attachment expert, expressly credited by the judge, testified that the "critical period of time is one to one and a half years old in terms of attachment." We need not resolve whether the finding regarding the extent of the attachment, and the reason for any lack of a sufficient attachment at age ten months, has adequate support in the record. Our focus with regard to attachment is on the present and the future.

¹¹ Factor (vii) requires a judge to consider whether, "because of the lengthy absence of the parent or the parent's inability to meet the needs of the child, the child has formed a strong, positive bond with his substitute caretaker, the bond has existed for a substantial portion of the child's life, the forced removal of the child from the caretaker would likely cause serious psychological harm to the child and the parent lacks the capacity to meet the special needs of the child upon removal." G. L. c. 210, § 3 (c) (vii).

that the judge's reliance on factor (viii), see G. L. c. 210, § 3 (c) (viii), was not supported by findings of fact and was therefore erroneous. The judge also relied without explanation on factors (ii) and (iv), see G. L. c. 210, § 3 (c) (ii), (iv), which concern a parent's failure to utilize or benefit from department services to an extent sufficient to address the circumstances that previously led to abuse or neglect. As the judge did not specify the type of abuse or neglect for which the return of Dimitri to the parents would put him at continuing risk, the reliance on factors (ii) and (iv) does not add to what the other findings and conclusions show to be the basis of the judge's decision. This leaves factor (vii) as the only remaining factor in G. L. c. 210, § 3 (c), that the judge determined to be applicable. Hence we think it can fairly be termed "decisive," even though it was not the only factor relied upon. Compare Adoption of Rhona, 57 Mass. App. Ct. 479, 491-492 (2003).

The court has repeatedly emphasized that when factor (vii) is decisive, a judge is "bound in findings to describe the nature of the bonds formed, why serious psychological harm would flow from the severance of those bonds, what means to alleviate that harm had been considered, and why those means were determined to be inadequate." Adoption of Katharine, 42 Mass. App. Ct. at 30-31. See Adoption of Zoltan, 71 Mass. App. Ct.

185, 196 (2008); Adoption of Abby, 62 Mass. App. Ct. 816, 828 (2005); Adoption of Rhona, 57 Mass. App. Ct. at 492. No such findings were made here.

Not only are "specific and detailed findings" required on these issues, but the judge's "wholesale adoption of the [expert witness's] opinions and findings is entirely insufficient." Custody of a Minor (No. 2), 392 Mass. 719, 725 (1984). The judge credited the testimony of the department's expert witness Ms. Milde concerning attachment and bonding, without identifying which of her specific statements of fact or opinion he relied upon.¹² "Wholesale incorporation of the [expert's] testimony in the absence of specific and detailed findings by the judge makes it impossible for us to ascertain whether the judge has given close attention to the evidence and arrived at an independent judgment based upon that evidence, or whether the judge is simply rubberstamping the conclusion of the expert witness." Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 593 (1981).

An illustration from this case highlights these perils. Ms. Milde testified that she performed her evaluation in December 2015 and January 2016, at which time Dimitri told her

¹² Other than in Finding 273, the decision mentions Ms. Milde only one other time, noting that her reports were the basis of another expert's suggestion that dolls be incorporated into visits between Dimitri and his parents.

that he "hate[d] going" to visits with his parents and that, although he understood that the intent of the visits was to "build a relationship and help th[e] process if he is placed with his parents," "it scare[d] him to death." The judge found, however, that Dimitri's visits with his parents began to improve around this time, after the foster mother stopped attending the visits. The findings indicate that visits in the second half of 2016 generally went well; that at a December 2016 visit, Dimitri had significant, especially positive interactions with both parents (telling the mother about a "boo-boo" on his head and jumping toward the father while yelling "Daddy!"); and that visits in 2017 continued to go well.¹³ The judge ultimately found "that a significant bond exists between [the parents] and [Dimitri], such that continued contact with [them] would be in [Dimitri's] best interest," both posttermination and postadoption. In light of these specific findings (which strongly suggest that Ms. Milde's observations were stale), and in light of other significant gaps in her testimony regarding how reunification might affect Dimitri,¹⁴ a general reference to

¹³ On the last day of trial, the ongoing social worker testified that at the June 2017 visit, Dimitri referred to his parents as "Mommy and Daddy" and "said I love you to his parents and to his siblings."

¹⁴ Ms. Milde testified that she had "no comment" on the impact of reunification, could not predict whether it would be successful because that was beyond the scope of her evaluation, and could

her testimony does not support Finding 273 or the conclusion that factor (vii) applies.

2. Reasonable efforts. "Before seeking to terminate parental rights, the department must make 'reasonable efforts' aimed at restoring the child to the care of the natural parents" (citation omitted). Adoption of Ilona, 459 Mass. at 60. See G. L. c. 119, §§ 26 (b), 29C. A judge must determine whether the department has made such reasonable efforts; the determination must be "in written form, which shall include the basis for the . . . determination[]." G. L. c. 119, § 29C, fifth par.

Here, the judge determined that the department had made reasonable efforts to return Dimitri to his parents, but did not set forth the basis for his determination. No subsidiary

not say whether the services already in place could help mitigate any harm to Dimitri from such a reunification. Even on the narrower issue of what harm could befall Dimitri due to removal, her opinion appears somewhat equivocal: "Long-term, I could see [him] shutting down, being depressed, giving up, or becoming combative and not having access to his own emotions because they're so painful. It's hard to say down the road but I think for now, being so little, he desperately needs all the services he has." Strikingly, an expert called by the father, Mr. Carr, opined that reunification could likely be considerably smoother if the foster parents cooperated, and could likely be traumatic if they did not (given Dimitri's clear attachment to them), but that services could be provided to the family to facilitate reunification. We of course do not suggest that the judge was required to credit any particular expert over another. We note only that Mr. Carr, who observed ten visits, addressed attachment and reunification issues that Ms. Milde, who observed one visit, did not.

findings that support that determination are readily apparent, but there are plainly others that undercut such a determination. The lack of an explanation or reconciliation of those findings leaves us unable to say that the determination was properly supported.

Particularly concerning are the findings regarding the department's toleration of the foster mother's counterproductive involvement in and control over visits between Dimitri and his parents, the department's failure to ensure that the parents were consistently informed of Dimitri's various appointments so that they could attend, and the department's inability to arrange for Dimitri's therapist to speak with the mother by telephone to discuss Dimitri's needs.¹⁵ It is also troubling that, as the judge found, a department foster care review in

¹⁵ The adoption social worker whose testimony the judge credited on this point further testified that she frequently left messages with Dimitri's therapist in an attempt to facilitate such contact but received no return calls. She agreed that the mother "was never given the opportunity to receive advice or guidance from [Dimitri's] therapist about how to respond to his needs surrounding" visits with the parents. Although the judge made no express finding on the point, it is unclear how the department -- which as Dimitri's legal custodian could exercise some control over who served as his therapist -- could satisfy its reasonable-efforts obligation by tolerating a provider who, without explanation, refused even to discuss the department's request to assist the mother in meeting Dimitri's needs. (The court-appointed investigator's report of November 9, 2015, recommended that the department enroll Dimitri in play therapy and "arrange for the new therapist to have regular meetings with the parents . . .").

July 2016 determined that both the mother and the father had been in full compliance with their service plan tasks for more than a year and thus "recommended that the goal of adoption be re-visited," yet the department nevertheless immediately moved ahead with its attempt to terminate the parents' rights. The department's reasons for this action are not apparent from the judge's findings or the record.

We recognize that "even where the department has failed to meet [its reasonable-efforts] obligation, a trial judge must still rule in the child's best interest." Adoption of Ilona, 459 Mass. at 61. We also acknowledge the department's point "that a parent must raise a claim of inadequate services in a timely manner," and that the parents here may not have done so. Adoption of Daisy, 77 Mass. App. Ct. 768, 781 (2010), S.C., 460 Mass. 72 (2011). At the same time, however, "[a] judge may consider the department's failure to make reasonable efforts in deciding whether a parent's unfitness is merely temporary." Adoption of Ilona, supra. The judge's unexplained finding that the department used reasonable efforts here causes us to question the judge's conclusions that both parents' unfitness "is likely to continue into the indefinite future" and that the child's best interests would be served by termination. In certain respects, at least, it is fair to say that the parents here were on an upward trajectory.

Accordingly, because the case must be remanded in any event, either parent may raise the reasonable-efforts issue on remand through an appropriate motion. See Adoption of Daisy, 77 Mass. App. Ct. at 781. The judge should also consider how any deficiencies he finds in the department's efforts may bear on whether any continuing parental unfitness is merely temporary.

3. Sibling visitation. Both the mother and Dimitri argue that the judge, pursuant to G. L. c. 119, § 26B (b), should have expressly considered whether to order posttermination and postadoption visitation between Dimitri and his siblings.¹⁶ The department asserts that the issue, not having been raised below, is waived, and that in any event the judge did not abuse his discretion in not addressing the issue -- at least where, in the posttermination period, the department itself has been arranging such visitation.¹⁷ See Adoption of Garret, 92 Mass. App. Ct.

¹⁶ The statute provides in pertinent part as follows:

"The court or the department shall, whenever reasonable and practical and based upon a determination of the best interests of the child, ensure that children placed in foster care shall have access to and visitation with siblings in other foster or pre-adoptive homes or in the homes of parents or extended family members throughout the period of placement in the care and custody of the department, or after such placements, if the children or their siblings are separated through adoption or long-term or short-term placements in foster care."

G. L. c. 119, § 26B (b), first par.

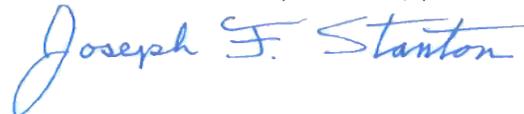
664, 680 (2018) (observing that statute gives department, as well as court, responsibility regarding posttermination visitation).

Because we are remanding the case in any event, we need not resolve whether G. L. c. 119, § 26B (b), required the judge on his own motion to address posttermination and postadoption sibling visitation. On remand, any party seeking such visitation may by appropriate motion ask the judge to determine whether to order it.

Conclusion. For the foregoing reasons, we vacate the decree terminating the parents' rights and concluding that the department's plan for adoption is in Dimitri's best interests. We remand the case for further proceedings consistent with this memorandum and order.

So ordered.

By the Court (Massing,
Sacks & Hand, JJ.¹⁸),



Clerk

Entered: November 8, 2019.

¹⁷ The mother acknowledges in her reply brief "that there are currently no issues with [the department] managing posttermination sibling visitation."

¹⁸ The panelists are listed in order of seniority.