

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-1421

ADOPTION OF OMAR.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The mother appeals from a decree issued by a Juvenile Court judge, finding the mother unfit to parent her child and terminating her parental rights.² She argues that the evidence does not clearly and convincingly support the judge's determination of unfitness and that the Department of Children and Families (department) did not make reasonable efforts at reunification. We affirm.

Background. We summarize the judge's factual findings, supplemented by undisputed facts in the record. See Adoption of Ilona, 459 Mass. 53, 55 (2011).

On June 3, 2016, a mandated reporter filed a report under G. L. c. 119, § 51A, alleging that the mother was found wandering the streets naked and was taken to a hospital

¹ A pseudonym.

² The putative father failed to establish paternity and was stricken as a party.

emergency room, where she went into labor. The report further alleged that the mother received no prenatal care and tried to escape from the hospital after giving birth.

The same day, a department investigator went to the hospital and observed the child, who appeared healthy. The investigator learned that, immediately after giving birth, the mother had assaulted a nurse, breaking her nose. The investigator then spoke to the mother, who was hospitalized in the psychiatric unit. The mother was sedated and immediately began to shake when the investigator told her that the department had taken custody of the child. The investigator perceived that the mother was not comfortable and decided to end the interview.

A few days later, a hospital social worker reported to the department that the mother had assaulted another nurse over the weekend and that she had no imminent discharge date. The department investigator returned to the hospital to interview the mother. During the interview the mother stated that she had assaulted the nurse because the nurse was laughing at her. When the investigator tried to explain that the department had custody of the child, the mother did not appear to understand, and the investigator determined that she was incapable of being interviewed. The child was placed in foster care that day.

The mother had no further contact with the department until August 30, 2016, when she appeared at a department office and expressed her willingness to work with the department. In October 2016 the mother took part in an assessment, during which she reported that she was not in treatment for her mental health diagnosis, identified by her as schizophrenia. She could not remember anything about the child's birth other than "pushing, the pain during labor, and that she had a boy." The mother became upset as she was speaking and was "flexing her hands."

The mother attended visits with the child until April 2017. During the visits the mother relied on the maternal grandfather to care for the child; she did not change the child's diapers, did not bring nutritious food for him, and was unable to comfort him when he became upset. She also had to be constantly reminded of the child's sex. The mother was unable or unwilling to attend visits or other appointments without the support of the maternal grandfather. At the time of trial, the maternal grandfather was living in Florida and was no longer a support for the mother.

By May 2017 the mother was still not engaged in mental health treatment. Although the department provided a referral, the provider reported having no record of the mother. Because the mother was not in treatment, the department had no official diagnosis of her mental health.

In July 2017 the mother informed the department that she wanted the child to be adopted. She then had no contact with the department for several months, and her social worker was unable to schedule home visits. In October 2017 the department changed its goal for the child to adoption.

In February 2018 the department learned that the mother had been involuntarily hospitalized. A department worker met with the mother at the hospital in March 2018. She reiterated at that time that she wanted the child to be adopted.

When the mother was discharged from the hospital in December 2018, the department resumed offering monthly parent-child visits. The mother cancelled the first visit, but attended a visit in January 2019. The visit scheduled for February 2019 did not occur because the mother failed to confirm it. She was then hospitalized again in March 2019, and the department offered no further visits after that point.

Trial occurred over two days in May 2019. The judge found that the mother presented as "mentally and cognitively challenged" and "giggled indiscriminately, became easily escalated, and needed to have many questions repeated or rephrased." The mother could not remember the child's birth date or age. When asked about the day the child was born, the mother remembered being in labor and being at the hospital but little else, stating "[i]t was a long day" and she "was

unconscious" during it. She could not recall how long she was hospitalized after the child's birth. She also did not believe she had any psychiatric needs and described her current diagnosis as "a little bit of . . . amnesia, something like." Although the mother testified that she recently attended an individual therapy session, she could not recall the therapist's name.

Discussion. 1. Unfitness. A judge's determination of unfitness must be supported by clear and convincing evidence based on subsidiary findings proven by a preponderance of the evidence. See Adoption of Jacques, 82 Mass. App. Ct. 601, 606 (2012). "Despite the moral overtones of the statutory term 'unfit,' the judge's decision is not a moral judgment, nor is it a determination that the parent does not love the child[]. The question for the judge is whether the parent's deficiencies place the child[] at serious risk of peril from abuse, neglect, or other activity harmful to the child[]" (quotations and citations omitted). Adoption of Lisette, 93 Mass. App. Ct. 284, 285 n.2 (2018).

Here, the evidence clearly and convincingly supports the judge's conclusion that the mother's untreated mental health issues render her unfit to care for the child. There is no dispute that the mother suffers from serious mental illness and was involuntarily hospitalized during much of this proceeding.

Yet, despite her psychiatric history and hospitalizations, the mother does not believe that she has any psychiatric needs. Consistent with that belief, the mother failed to seek and engage in mental health treatment.

Contrary to the mother's assertion, the evidence established a nexus between her mental health issues and her ability to parent. As the judge determined, visits with the child were "impracticable and not in the child's best interests" when the mother was involuntarily hospitalized. The mother's mental illness thus rendered her unavailable to parent the child for prolonged periods of time, and, given her failure to engage in treatment, the judge was on firm ground in finding that her unavailability would continue into the indeterminate future. See Adoption of Quentin, 424 Mass. 882, 889 (1997) (in assessing mother's fitness, judge could consider her "mental deficiencies," which "impaired her ability to protect and care for the children"). Moreover, the mother had no plan for how she would care for the child if they were reunified. As noted, the mother's primary support, the maternal grandfather, was living in Florida by the time of trial.

The mother contends that the judge failed to pay close attention to the evidence, as reflected by the absence of numbered findings of fact and citations to the record. We see

nothing in the rules that imposed such obligations on the judge.³ In any event, any error in this respect would be harmless, where the judge's findings clearly and convincingly establish that the mother is unfit. See Care & Protection of Olga, 57 Mass. App. Ct. 821, 825 (2003). There is no merit to the mother's claims that it is unclear how much weight the judge placed on the mother's criminal history or on the child's bond with the foster parents. The judge expressly stated that she was giving "limited weight" to the criminal history, and nowhere in the decision did the judge indicate that she was relying on the child's bond with his foster parents as a factor.⁴ Rather, the judge plainly based her determination of unfitness on the overwhelming and undisputed evidence of the mother's serious mental illness.

We also reject the mother's argument that the judge issued "no usable rulings on the motions in limine filed by [the] [m]other's counsel," making it "impossible to determine whether the judge impermissibly relied upon evidence that should have been excluded." The judge ruled on the motions in limine at the start of trial. The mother does not challenge those rulings,

³ The mother cites Mass. R. Civ. P. 52 (c), as appearing in 450 Mass. 1404 (2008), which applies to the District Court.

⁴ The judge made no express finding of a bond. Instead, she found that the child "is playful and affectionate with [the preadoptive] family, and he follows their redirection."

nor does she identify any factual finding that was based on excluded evidence. She has thus failed to show error, let alone reversible error.

Finally, while the mother is correct that the judge's factual findings appear to be internally inconsistent in two respects,⁵ these errors were minor and not central to the decision. See Adoption of Peggy, 436 Mass. 690, 702 (2002) ("Because [the two factual errors] relate only marginally, if at all, to the judge's ultimate conclusion of unfitness, we consider them harmless"). The judge ultimately concluded that, while the mother loves the child very much, her mental health issues render her unfit to parent the child, both currently and into the indeterminate future. Clear and convincing evidence supports this conclusion.

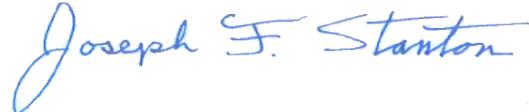
2. Reasonable efforts. The mother has waived her arguments that the department failed to make reasonable accommodations for her disabilities or reasonable efforts to reunify her with the child. "[A] parent must raise a claim of inadequate services in a timely manner so that reasonable accommodations may be made." Adoption of Gregory, 434 Mass.

⁵ Specifically, the mother notes the following inconsistencies: the judge found that the mother contacted the department in February 2018 through her clinician, but then "credit[ed]" the department for locating the mother; and the judge variously found that the mother was living at the time of trial at the "Mt. Tom Respite Program" and "the CHD group home."

117, 124 (2001). See Adoption of West, 97 Mass. App. Ct. 238, 242-243 (2020). The mother failed to do so here. At no point in the three-year proceeding did the mother bring the issue to the attention of the judge or the department. She may not raise her arguments for the first time on appeal. See id.⁶

Decree affirmed.

By the Court (Massing, Shin & Ditekoff, JJ.⁷),



Clerk

Entered: June 26, 2020.

⁶ We note that the department's focus throughout the proceeding was, justifiably, on stabilizing the mother's mental health. Despite referrals from the department, however, the mother did not engage in mental health treatment, and she failed to maintain contact with the department for prolonged periods of time. See Adoption of Mario, 43 Mass. App. Ct. 767, 774 (1997) (department's obligation to make reasonable efforts "contingent upon the mother's fulfillment of her own parental responsibilities"). Furthermore, while the mother claims that the department did not offer an adequate number of parent-child visits, the department was unable to facilitate visits during much of the case because the mother was either hospitalized or her whereabouts were unknown.

⁷ The panelists are listed in order of seniority.