

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

20-P-379

ADOPTION OF KAMEL.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The mother appeals from a decree issued by a judge of the Juvenile Court terminating her parental rights to her son pursuant to G. L. c. 119, § 26. Concluding that the trial judge properly found clear and convincing evidence of parental unfitness caused primarily by the mother's long history of substance use disorder and the resulting history of unstable housing and emotional injury to the child, and that the judge properly considered the child's preferences, we affirm.

1. Background. The child was born premature in April 2008 with cocaine and marijuana in his system. Two days later, a report pursuant to G. L. c. 119, § 51A (51A report), was filed and the Department of Children and Families (department) conducted a nonemergency investigation pursuant to G. L. c. 119, § 51B. During the investigation, the mother admitted that she

¹ A pseudonym.

had used cocaine and marijuana during her pregnancy but claimed she stopped using both substances when she learned that she was pregnant. The department supported the allegations. The case was closed in that same year.

The mother has a long history of substance use disorder and was using cocaine, opiates, and marijuana by the age of sixteen. Prior to the child's birth, the mother was prescribed painkillers for a back injury sustained in a car accident. The mother again took painkillers after reporting that she injured her back during labor and continued to use painkillers for the next seven and one-half years. She was prescribed painkillers for two of those years and then procured painkillers from the street for the remainder. The mother admitted that from 2009 to 2014 she was suffering from a "major addiction." The mother was intoxicated around the child and, when he was three years old, the child joked that it was funny when the mother sat on the floor and could not get up. The mother entered treatment at Spectrum Health Systems (Spectrum) in March 2014 but continued to use Adderall, heroin, marijuana, and Percocet. On occasion, she brought the child to the methadone clinic with her. The mother was inconsistent in her attendance in therapy, missing almost ten months of group counselling, and was ultimately discharged in 2016 for attempting to divert methadone.

The mother also has a history of unhealthy intimate relationships. The mother and the father both had issues with substance use during their three-year relationship, which ended just prior to the child's birth.² The relationship included episodes of domestic violence, including one occasion where the father served sixty days in jail for assaulting the mother. Shortly after the child's birth, the mother started a relationship with a boyfriend who had been incarcerated in Florida for seven years as a result of kidnapping and robbery convictions. The mother understood that the boyfriend was a drug dealer. In 2014, police conducted simultaneous drug raids at both the boyfriend's house and the maternal grandmother's house, where the mother and the child resided. Drugs were recovered at both homes, and the mother was charged with numerous drug offenses. The mother also has prior criminal charges for shoplifting and receiving stolen property.

The mother had other encounters with the department following the child's birth. In October 2011, a 51A report was filed alleging neglect of the child because of domestic violence. The report alleged that, while the mother was living with her boyfriend, the father came to drop the child off,

² The father agreed to a finding of parental unfitness and termination of his parental rights, and he entered into an open adoption agreement in 2019. He is not a party to this appeal.

pounded on the door, swore at the mother, threatened her, and called her names in front of the three year old child. The department supported the allegations of neglect against the father. The department then closed the case. In January 2012, a 51A report was filed alleging neglect by both parents because of their misuse of prescription medication. The department found no current concern, and the case was closed. In August 2013, a 51A report was filed alleging that the paternal great-grandfather touched the child's penis while the child was sitting on his lap. The department interviewed the child, and he was referred to therapy.

A final 51A report was filed by police in August 2016 after the paternal grandmother, who was watching the child that day, was arrested for assaulting her boyfriend. The paternal grandmother is an alcoholic and was intoxicated at the time. Department investigators tried to contact the mother for several hours but were unable to reach her. As a result, the child was taken into emergency custody and placed with the paternal aunt and uncle. The mother contacted the department the next day.

After the child was removed, the department developed a service plan for the mother, setting forth various tasks. The mother was largely unable to complete these tasks. She permitted only five home visits between 2017 and the trial in June 2019, with two of those visits occurring during the two

months leading up to trial. Although the mother initially signed releases for the department to speak with her probation officer and treatment professionals, she revoked all releases after failing a urine screen in November 2017 and did not reinstate them until March 2019, sixteen months later. The mother never obtained independent housing, instead living with the maternal grandmother, the paternal grandfather, or her boyfriend.

The mother's substance use disorder also continued. She began using heroin in 2016 or 2017 and was injecting herself with heroin three to six times per day during the summer of 2018. Her urine screens tested positive for cocaine in March 2017, positive for fentanyl in November 2017 and August 2018, and positive for amphetamines in September 2018. She did not attend any NA meetings. The mother did not provide the department with records indicating that she was engaging in substance use disorder treatment from September 2016 to March 2019. When the department did receive the records, they indicated that the mother had been engaged in treatment since July 2018 but that she did not consistently attend individual or group therapy sessions. The mother did not demonstrate an understanding of how her substance use disorder affected the child, instead blaming his removal on the paternal family. Finally, the mother showed up visibly intoxicated to a

supervised visit in December 2018. The child was understandably upset, and he refused to visit with the mother following this incident.

When the child was first placed with the paternal aunt and uncle, he arrived dirty and unkempt. He had more than ten cavities, and decaying and rotting teeth that required surgery. The child was also bedwetting and defecating in his pants. The aunt and uncle engaged a therapist to meet with the child and work on these behaviors. When the child began therapy in August 2017, the therapist observed that the child made little eye contact and "looked defeated." The therapist diagnosed the child with posttraumatic stress disorder (PTSD) stemming from physical and emotional abandonment issues involving both the mother and the father. Since being placed with the aunt and uncle, many of these issues have resolved. The therapist noted that the child is now confident and "looks really great." His accidents have stopped since he ceased visiting the mother. He reports feeling safe with the aunt and uncle, and refers to his cousins as his brothers and sisters.

2. Standard of review. "To terminate parental rights to a child and to dispense with parental consent to adoption, a judge must find by clear and convincing evidence, based on subsidiary findings proved by at least a fair preponderance of evidence, that the parent is unfit to care for the child and that

termination is in the child's best interests." Adoption of Jacques, 82 Mass. App. Ct. 601, 606 (2012). "Despite the moral overtones of the statutory term 'unfit,' the judge's decision was not a moral judgment or a determination that the mother . . . do[es] not love the child." Adoption of Bianca, 91 Mass. App. Ct. 428, 432 n.8 (2017). She manifestly does love the child. Rather, the question is "whether the parent's deficiencies 'place the child at serious risk of peril from abuse, neglect, or other activity harmful to the child.'" Adoption of Varik, 95 Mass. App. Ct. 762, 767 (2019), quoting Adoption of Olivette, 79 Mass. App. Ct. 141, 157 (2011). Clear and convincing evidence must be "sufficient to convey to 'a high degree of probability' that the proposition is true The requisite proof must be strong and positive; it must be 'full, clear and decisive.'" Adoption of Rhona, 57 Mass. App. Ct. 479, 488 (2003), quoting Adoption of Iris, 43 Mass. App. Ct. 95, 105 (1997).

On review of a judge's decision to terminate parental rights, we give substantial deference to the trial judge's decision, 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). "A finding is clearly erroneous when there is no evidence to support it, or when, 'although there is evidence to

support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Adoption of Larry, 434 Mass. 456, 462 (2001), quoting Custody of Eleanor, 414 Mass. 795, 799 (1993). An abuse of discretion exists where the reviewing court concludes that "the judge made 'a clear error of judgment' . . . such that the decision falls outside the range of reasonable alternatives." L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014), quoting Picciotto v. Continental Cas. Co., 512 F.3d 9, 15 (1st Cir. 2008).

3. Evidence of unfitness. a. Substance use disorder. "Evidence of alcohol or drug abuse is . . . relevant to a parent's willingness, competence, and availability to provide care." Adoption of Anton, 72 Mass. App. Ct. 667, 676 (2008). Here, the mother's long history of substance use disorder was amply demonstrated. The mother admitted that she suffered from a "major addiction" between 2009 and 2014. During this time, the child observed her in an intoxicated state and joked that the mother could not get up from the floor. Her substance use disorder continued after the child's removal, as shown by positive drug tests throughout 2017 and 2018. Although the mother's probation officer reported that her urine screen was negative for all substances in August 2017, the trial judge was justified in finding to the contrary because the mother

testified that she tested positive for opiates on that screen. See Adoption of Hugo, 428 Mass. 219, 225 (1998), cert. denied sub nom. Hugo P. v. George P., 526 U.S. 1034 (1999) (judge's assessment of credibility of witnesses and weight of evidence afforded substantial deference).

"[T]he parent's willingness to engage in treatment is an important consideration in an unfitness determination where the substance dependence inhibits the parent's ability to provide minimally acceptable care of the child." Adoption of Luc, 484 Mass. 139, 147 (2020). Here, the evidence demonstrated the mother's inability or unwillingness to follow through with treatment. The mother's attendance at therapy sessions at Spectrum had been spotty.³ The mother also continued to use marijuana, including marijuana purchased on the street, despite her repeated expressed belief that the marijuana she purchased was doctored with other substances.⁴

³ The judge could reasonably conclude that Spectrum encouraged the mother to attend NA/AA meetings. The therapist testified that Spectrum encourages some clients to participate in AA and NA meetings, but that it is not required. See Adoption of Daniel, 58 Mass. App. Ct. 195, 203 (2003) (judge may draw inferences from trial testimony). The judge did not find that participation was required. In any event, attending NA meetings was a task in the September 2016 department service plan.

⁴ Although the mother's use of marijuana did not appear to be a major factor in the judge's reasoning, we note that we discern no error in the judge's conclusion that the mother's therapist did not affirmatively condone the mother's marijuana use. Although abstaining from marijuana was not a goal in the mother's treatment, her therapist testified that they have an

More importantly, the mother waited until March 2019, three months before trial, to sign releases and seriously start treatment. The mother was discharged from Spectrum in May 2016 for attempting to divert methadone. During her time with Spectrum, the mother was inconsistent in her attendance, missing ten months of group meetings, and continued to use drugs. The next time she sought treatment was in February 2018 when she worked with Clean Slate. She was discharged in July 2018, and the department was never able to access her Clean Slate records. Additionally, the mother was using heroin daily from May to July 2018. She then again sought treatment at Spectrum in July 2018. The mother had positive urine screens in August and September 2018 and missed all group therapy sessions from January through April 2019.⁵ She signed a release in March 2019, allowing the department to review her treatment records from Spectrum. Given her frequent relapses and sparse attendance, we discern no clear error in the judge's finding that the mother's belated

"ongoing conversation" about the mother's marijuana use and have discussed alternative ways of managing anxiety and pain that do not involve marijuana. Furthermore, in answering a hypothetical question, the therapist expressed some disapproval of medical marijuana use in the mother's circumstances. The judge's conclusion was a reasonable inference from the evidence before him. See Adoption of Daniel, 58 Mass. App. Ct. at 203.

⁵ Because the mother missed all of her group therapy sessions through April 2019, the judge was well justified in concluding that she was not engaged in treatment until May 2019.

engagement in services contributed to her unfitness. See Adoption of Luc, 484 Mass. at 147.

A parent's substance use disorder is not sufficient to justify termination of the parent's parental rights "[w]ithout a showing that the mother's drug and alcohol use rendered her unable to provide minimally acceptable care for her child." Adoption of Zoltan, 71 Mass. App. Ct. 185, 191 (2008). Here, there was a substantial showing that the mother's drug use negatively and substantially impacted the child. First, the child was born premature and tested positive for marijuana and cocaine. Second, the child joked about the mother's being intoxicated when he was young, but seeing the mother intoxicated upset him as he grew older and began to understand what he was seeing. Third, the mother's substance use disorder caused her unstable employment history and reliance on unfit caregivers, such as her boyfriend and the paternal grandparents. Fourth, she neglected the child's health, such as his immunizations and dental care. Finally, her substance use disorder caused the child to feel emotionally abandoned, leading to his bedwetting, inability to control his bowels, and PTSD. The mother acknowledged that she could have been more emotionally present for the child.

The judge was not required to conclude that the child's emotional problems resulted from sexual abuse, rather than the

mother's consistently prioritizing her substance use over the child's welfare. First, the trial judge found that the child's PTSD centered on abandonment issues concerning both the mother and the father, and the judge's findings are entitled to deference. See Adoption of Ilona, 459 Mass. at 59. Second, the expert opined that the child's crying and difficulty controlling his bowels resulted from the anxiety of visiting with the mother. As such, the record supports the conclusion that the child's emotional issues were caused by the anxiety of his fraught relationship with the mother, which was bound up in the mother's substance use disorder.

b. Other factors of unfitness. The trial judge was also justified in finding that housing issues contributed to the mother's parental unfitness. See Adoption of Virgil, 93 Mass. App. Ct. 298, 303 (2018) (housing instability proper consideration in unfitness determination). Regardless of whether the department previously found that the mother's home was unclean, the mother did not allow consistent access to the home as required by the service plan. The mother did not permit any home visits from May 2018 to April 2019. In all, only five home visits occurred between 2017 and trial in June 2019, with two of the five occurring the two months preceding trial.

Furthermore, the mother's housing was often not suitable for the child. During the first year of the child's life, he

and the mother lived with the father and the paternal grandfather in the grandfather's home at various times. The paternal grandfather also had issues with drug and alcohol use. The mother and the child lived at times with the mother's boyfriend, who sold drugs and had been incarcerated in Florida for kidnapping and robbery. At other times, the mother and the child lived with the maternal grandmother.

It was appropriate for the trial judge to consider these factors even if they were not previously flagged as issues by the department. The department's failure to remove a child from a home is not a finding of parental fitness. The case cited by the mother, Adoption of Imelda, 72 Mass. App. Ct. 354, 361 (2008), stands for the unremarkable proposition that the department's failure to show at trial that the child's care suffered as a result of the mother's drug use is fatal to the department's claim that termination of parental rights should be premised on that drug use. Here, by contrast, there was ample evidence that the mother's drug use severely impacted the child's health, both physical and emotional.

c. Failure to mention positive evidence. Although the trial judge did not highlight every positive instance of mother's preremoval parenting, the issue before him was whether the mother was currently fit. See Adoption of Ramona, 61 Mass. App. Ct. 260, 263 (2004), quoting Custody of a Minor, 21 Mass.

App. Ct. 1, 7 (1985) ("the issue is the current fitness of the biological parents to further the welfare and the best interests of the particular child"). Evidence of the mother's positive parenting in 2011 and 2012 had little bearing on her fitness to parent at the time of trial. Regardless, the trial judge did mention positive instances of the mother's preremoval parenting, such as limiting the father's access to the child following the October 2011 51A report.⁶

4. Adoption plan. As was his duty, the judge "gave full and fair consideration to the department's adoption plan." Adoption of Helga, 97 Mass. App. Ct. 521, 529 (2020). Although the mother had been sober for nine months at the time of trial and had a job, the early stages of recovery after a protracted period of active substance use disorder are not inconsistent with the termination of parental rights. See Adoption of Elena, 446 Mass. 24, 33-34 (2006) (judge's conclusion that mother was unlikely to maintain successful recovery supported by evidence).

⁶ Moreover, some of the positive parenting highlighted by the mother exists only because the mother was not honest with department investigators. The department did not find, as the mother contends, that the 2012 allegations were "false and retaliatory," merely that "the allegation might be false" and that the mother "seems to be in control" (emphases added). Even so, the mother reported to department investigators that she was not abusing her prescription medication, whereas she admitted at trial that she was suffering from a "major addiction" at this time and abusing painkillers. As such, the trial judge properly declined to find that the allegations in the 2012 51A report were false.

Furthermore, the trial judge did not give undue weight to the child's preference. See Adoption of Nancy, 443 Mass. 512, 518 (2005). There is ample evidence of the child's postremoval improvements that demonstrate that the placement with the paternal aunt and uncle is in the child's best interests. After being placed, the child was diagnosed with PTSD stemming from physical and emotional abandonment issues concerning the mother and the father. This involved anxiety, bedwetting, loss of bowel control, and crying. Since he has stopped seeing the mother, these issues have greatly subsided. The child has been accident free since April 2019. He is comfortable, confident, and happy in his new home. He has even started spending time with the father again and reports that it does not trigger his anxiety. His physical condition has also improved. The aunt and uncle took the child to the dentist to treat his numerous cavities and bring him to routine dental cleanings. As such, the trial judge properly considered the department's adoption

plan and concluded that termination of parental rights was in the child's best interests.

Decree affirmed.

By the Court (Vuono, Milkey & Ditekoff, JJ.⁷),

Clerk

Entered: January 8, 2021.

⁷ The panelists are listed in order of seniority.