

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-431

ADOPTION OF LANCE (and two companion cases¹).

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The father appeals from decrees issued by a judge of the Juvenile Court finding him unfit, terminating his parental rights to the three children, and declining to provide for postadoption visitation.² We affirm.

Background. We summarize the judge's findings of fact, which find ample support in the record.³ The mother and father have three children together, Lance, Peter, and Michael, who were thirteen, eleven, and ten years old respectively at the time of trial.⁴ The mother and father coparented the children

¹ Adoption of Peter and Adoption of Michael. The children's names are pseudonyms.

² The judge also terminated the parental rights of the mother, who did not appeal.

³ The judge incorporated findings from an earlier trial in this matter into her findings of fact, and we discern no error in doing so in the present case. See Adoption of Simone, 427 Mass. 34, 44 (1998) ("earlier findings" in care and protection proceeding "might, in appropriate cases, be relevant and reliable" for consideration in subsequent adoption proceeding).

⁴ The mother has one other child and the father has one other child, neither of whom is a subject of these proceedings.

from 2005 until they separated in 2010. The Department of Children and Families (DCF) first became involved with the family in 2007, following allegations of domestic violence between the parents. In 2009, the father admitted to striking Peter, who was two years old at the time, and was convicted of assault and battery and reckless endangerment of a child.

After the parents separated, the mother was the primary caretaker of the children until August 2011, when she "left the children with [the] [f]ather and went to Los Angeles to get away and become part of a church." Upon her return, she did not seek to regain custody of the children. The father later gained legal custody of the children through the Probate and Family Court.

On October 18, 2013, DCF received a G. L. c. 119, § 51A, report (51A report) alleging that the father sexually assaulted his girlfriend's son.⁵ The father was arrested.⁶ The paternal grandmother took custody of the children from November 2013

⁵ A 51A report was also filed alleging that the father had sexually abused Lance, Peter, and Michael. During the G. L. c. 119, § 51B, investigation, DCF found these allegations of sexual abuse to be unsupported and allegations of neglect to be supported.

⁶ The charges were later dismissed. On April 4, 2017, the Commonwealth reinstated the charges, which remained unresolved at the time of trial in the matter before us. A nolle prosequi was entered after the conclusion of this trial.

until DCF removed the children on March 6, 2014.⁷ On March 7, 2014, DCF filed a care and protection petition, the parents waived their temporary custody hearing, and DCF was granted temporary custody of the children.

In 2015, the goal for the children changed from reunification to adoption. The children have lived with their preadoptive family since approximately July of 2015. At a February 2, 2016 trial (2016 trial), DCF sought termination of parental rights to free the children for adoption. The father sought custody, which the mother supported. At the 2016 trial, the judge found the parents unfit and the children in need of care and protection, but declined to terminate parental rights. The judge ordered that steps be taken to reunite the children with the father. The judge later rescinded this order after finding that the father lied to a court-appointed special advocate (CASA), continued to be uncooperative with DCF,

⁷ Two 51A reports were filed against the paternal grandmother, which were screened out. In March 2014, DCF learned that the grandmother had moved the children out-of-State without permission. When she returned with the children, a judge of the Probate and Family Court "ordered the [children] into [the mother's] custody, and further ordered [the] mother to reside with the [children] at the paternal grandmother['s]" home. Within two days, the grandmother asked DCF to remove the children because the mother "was leaving to an undisclosed location." On March 6, 2014, a 51A report was filed alleging that the paternal grandmother, mother, and father neglected the children. On the same day, another 51A report was filed alleging that the paternal grandmother neglected Peter and that the father sexually abused him. Both 51A reports were screened in for nonemergency response.

violated an abuse prevention order, and faced indictment on sexual assault charges. In 2017, the father moved out of State for "personal reasons" and to "find himself."

Since 2016, the mother's housing and employment stability have improved and, since February 2017, she has consistently visited with the children. The mother has a history of trauma and has experienced domestic violence from former partners, including the father. DCF provided the mother with service plans to address parenting concerns, her history with domestic violence, trauma, and her mental health; however, the mother engaged minimally in services.

On January 30, 2018, the children requested a review and redetermination trial. At trial, the father supported the mother's request for custody. On March 20, 2019, the judge found the parents to be unfit and terminated their parental rights, freeing the children for adoption. The judge ordered postadoption visitation with the mother, but not with the father.

Discussion. 1. Parental unfitness. The father argues that the record does not support a finding by clear and convincing evidence that he is unfit.⁸

⁸ Although the mother has not appealed from the decrees terminating her parental rights, the father also asserts that the judge erred in finding the mother unfit. Both DCF and the children argue that the father does not have standing to raise

"In deciding whether to terminate a parent's rights, a judge must determine whether there is clear and convincing evidence that the parent is unfit and, if the parent is unfit, whether the child's best interests will be served by terminating the legal relation between parent and child." Adoption of Ilona, 459 Mass. 53, 59 (2011). "We give substantial deference to a 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." Id.

The father has a history of anger and volatility. At the outset of the case, the father was repeatedly aggressive towards DCF workers. Although the father received some anger management treatment, he testified at the 2018 trial that "[g]oing to anger management does not solve an anger issue." See Adoption of Ulrich, 94 Mass. App. Ct. 668, 676 (2019). There was also evidence that the father had physically abused Peter, had abused the mother, and had a criminal history involving multiple G. L. c. 209A abuse prevention orders. See Adoption of Gillian, 63 Mass. App. Ct. 398, 404 n.6 (2005).

this argument. See, e.g., Adoption of Paula, 420 Mass. 716, 723 n.8 (1995). We agree. See Guardianship of Tara, 97 Mass. App. Ct. 11, 11-12 (2020) (effective relief was unavailable where indispensable party did not appeal). Regardless, the father has failed to demonstrate that the judge erred or abused her discretion in finding the mother unfit.

Furthermore, the father inconsistently engaged with DCF services plans. He initially refused to comply with his service plans, but later reported that he was participating in certain services. By the time of the 2018 trial, however, he was neither participating in services nor accepting service plans from DCF. See Adoption of Rhona, 63 Mass. App. Ct. 117, 126 (2005) ("Evidence of parents' refusal to cooperate with [DCF], including failure to maintain service plans . . . is relevant to the determination of unfitness"). The father asserts that having "completed all of his service plan tasks in 2016," the judge erred in "holding that he failed to complete these services and tasks when he would not do them a second time." The father's testimony belies this claim. He stated, for example, that he refused to join a father's group, a task assigned in two 2016-2017 service plans, "out of spite." We also note the judge's finding that between 2016 and the time of the 2018 trial, the father was subject to additional abuse prevention orders, lied to the CASA, continued his "caustic and uncooperative behavior toward" DCF, and demonstrated an absence of material benefit from the services in which he had engaged.

In addition to the judge's detailed and thorough findings, the judge evaluated the provisions of G. L. c. 210, § 3 (c), finding factors ii, iii, iv, vi, vii, viii, and xii to be applicable. Having reviewed the entire record, we conclude that

the judge's determination of the father's unfitness is supported by clear and convincing evidence. The record further supports the judge's conclusion that termination of the father's parental rights is in the best interests of the children.

2. Postadoption visitation. The father contends that the judge erred in not making an express finding of the bond between the father and the children and in failing to order postadoption visitation.

After parental rights are terminated, it is within the judge's discretion to order postadoption visits between the parent and child. See Adoption of Ilona, 459 Mass. at 63; Adoption of John, 53 Mass. App. Ct. 431, 439 (2001). The judge must consider whether visitation is in the child's best interests, and, in cases where there is a preadoptive family for the child, whether "an order of visitation is necessary to protect the child's best interest." Adoption of Ilona, supra. To determine whether visitation is in the child's best interests, a judge should consider "whether there is 'a significant, existing bond with the biological parent' whose rights have been terminated." Id. at 63-64, quoting Adoption of Vito, 431 Mass. 550, 563 (2000).

Here, the judge did not order visitation because the father's behavior had "devolved over time, and his caustic, aggressive behavior could pose a threat to [the children's]

security and wellbeing. He has moved away from Massachusetts and has ceased all but minimal contact with his children." Although the judge did not make an express finding on the bond between the father and the children, we discern no abuse of discretion where the judge's decision, which finds support in the record, was based on the best interests of the children. See Adoption of John, 53 Mass. App. Ct. at 439 (when judge does not order visitation, she need not "make extensive findings if [she] has already made specific and detailed findings regarding the child's best interests and the determination of parental unfitness").⁹

3. Judge's findings. The father argues that the judge erred in finding that "[t]he children fervently wish to remain in [the preadoptive] home and be adopted." We will not disturb a judge's finding of fact unless it is clearly erroneous. See Adoption of Ilona, 459 Mass. at 59. "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" (citation omitted). Adoption of Posy, 94 Mass. App. Ct. 748, 751 (2019).

⁹ We note that the judge left the issue of postadoption contact with the father to the discretion of DCF and the preadoptive family, who indicated their willingness to support such contact.

Here, the record included ample evidence of the bond between the children and the preadoptive parents. Additionally, the CASA reported that the children "expressed a desire to live with their foster [parents] and have visits with their mother." The judge could consider this evidence for the children's state of mind. See Mass. G. Evid. § 1115(d)(1) (2020); Custody of Michel, 28 Mass. App. Ct. 260, 267 (1990) ("While statements of the children could not be relayed by others for their truth, those statements were admissible insofar as they reflected the mental state of the children at the time"). The judge's finding is not clearly erroneous.

4. Consideration of evidence. The father argues that the judge "failed to evenhandedly review the evidence." As an initial matter, much of the father's argument focuses on the mother's expert witness's testimony and the evidence in favor of the mother, which he does not have standing to raise. See note 8, supra. In any event, this argument is unavailing.

"[T]he judge's assessment of the weight of the evidence and the credibility of the witnesses is entitled to deference." Custody of Eleanor, 414 Mass. 795, 799 (1993). We review for an abuse of discretion or a clear error of law. Adoption of Hugo, 428 Mass. 219, 225 (1998), cert. denied sub nom. Hugo P. v. George P., 526 U.S. 1034 (1999).

In support of her case, the mother offered a parenting assessment and psychological evaluation as well as testimony from the psychologist who performed the evaluations. The judge qualified the witness as an expert in psychological evaluation, but not in parenting assessments. The judge considered the psychologist's report and testimony at length in her findings; she did not credit, however, his opinion regarding the mother's ability to parent because of his unfamiliarity with the facts of the case and lack of recollection during his testimony. The record supports this determination. Likewise, we are satisfied that the judge considered and weighed the evidence in favor of the father -- the services he did engage in, the positive nature of the visits with the children, and that he spoke "lovingly" about the children -- in her findings. We discern no abuse of discretion.

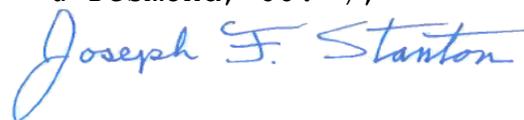
The father also argues that the findings of fact from the 2016 trial should not have been admitted in evidence over his objection. Contrary to this assertion, "recent findings from a prior care and protection decision are admissible in a later care and protection or termination proceeding when such findings are relevant and material and made during a proceeding in which the parents had a compelling incentive to litigate." Adoption of Darla, 56 Mass. App. Ct. 519, 520-521 (2002). See Adoption of Simone, 427 Mass. 34, 44 (1998). Here, the parents had a

compelling incentive to litigate, and did so, in the 2016 trial, and the uncontested findings from that trial were both relevant and material to the history of the case. Furthermore, the judge noted that the 2016 findings could be supplemented as needed. See Adoption of Darla, supra at 521-522. There was no error.

5. Child testimony. The father contends that reversal is necessary because Lance, and the other children, did not consent to their adoption, as required by G. L. c. 210, § 2. General Laws c. 210, § 2, provides that "[a] decree of adoption shall not be made . . . without the written consent of the child to be adopted, if above the age of twelve." Here, the decrees pertained to the termination of parental rights. On the record before us, no adoption decree has been issued to date for these children. As such, there has been no violation of G. L. c. 210, § 2.

Decrees affirmed.

By the Court (Neyman, Henry,
& Desmond, JJ.¹⁰),



Clerk

Entered: January 8, 2021.

¹⁰ The panelists are listed in order of seniority.