

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-689

ADOPTION OF VICKIE.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The father appeals from a decree of the Juvenile Court terminating his parental rights to his daughter, Vickie.² The judge also declined to order posttermination and postadoption visitation. The father contends that the Juvenile Court lacked jurisdiction because South Carolina was Vickie's "home [S]tate" at the time proceedings commenced in Massachusetts. He also claims that he was denied effective assistance of counsel, the findings did not clearly and convincingly demonstrate that he was unfit to parent Vickie, and the judge erred in declining to order posttermination and postadoption visitation. We affirm.³

Background. We summarize the procedural history and the relevant facts as found by the judge, reserving additional facts

¹ A pseudonym.

² The judge also terminated the mother's parental rights, but she is not a party to this appeal.

³ Vickie has submitted a brief and requests that we affirm the decree.

for our discussion of the issues. The father and the mother met in Massachusetts in 2015 and entered into a relationship. They had one child together, Vickie. The two moved to South Carolina, where the father had spent much of his time since childhood, shortly before Vickie's birth in Georgia in November 2016. Vickie lived with her mother in an apartment in South Carolina from her birth until April 2017, when she was approximately five months old, at which time they moved to Massachusetts and began living at a shelter in Lowell. The mother alleged that she had fled South Carolina due to the father's domestic violence; the father, however, denied all allegations of domestic violence.

The Department of Children and Families (department) became involved with Vickie about one month later after receiving a report, filed pursuant to G. L. c. 119, § 51A (51A report), alleging that the mother had twice left Vickie, who was almost six months old, in the care of a sixteen year old resident of the shelter and that Vickie had poor hygiene and had been fed potato chips. After an investigation pursuant to G. L. c. 119, § 51B (51B investigation), the department supported the 51A report for neglect by the mother and opened a case for services.

In June 2017, the father traveled to Massachusetts to visit Vickie. He decided to stay and try "to go live in [a] shelter" with the mother and Vickie and "be part of a family unit" with

them. After being denied a placement in a shelter, the family stayed in New Bedford with a friend of the father.

On July 3, 2017, a 51A report was filed alleging neglect of Vickie by her parents. It was alleged that the family was residing with a man who was known to the reporter as being a drug dealer. The reporter relayed that people were using drugs outside of the apartment while Vickie was in a car seat on the porch by herself. During the ensuing 51B investigation, the department learned that the family had no place to stay and had not eaten for over one day. As a result, on July 18, 2017, the department removed Vickie, taking emergency temporary custody of her; the next day the department filed a care and protection petition and was granted temporary custody of Vickie. The father appeared at the temporary custody hearing held on July 21, 2017, but was arrested on an open warrant. The father and the mother subsequently waived their rights to a temporary custody hearing, and the department continued to have temporary custody of Vickie. Vickie has remained in the same foster home since July 21, 2017.

The father was released from prison in October 2017, and by December he had returned to South Carolina. From that time until about two months before the trial began,⁴ the father moved

⁴ The trial took place on February 27, April 1, May 13, June 5, and July 17, 2019. The father was present for all dates.

between Massachusetts and South Carolina numerous times.⁵ He did not have stable employment or housing during this period. In addition, his visits with Vickie were sporadic even when he was in Massachusetts,⁶ and he had not completed the majority of tasks required by his action plans.⁷ At the time of trial, the father was living with his cousin and her child in a two-bedroom apartment in Brockton. The father did not permit the department to conduct a home visit at this location. The judge found, based on the father's testimony, that the father had worked one to two days per week for a period of time, but was currently living off his savings of \$600.

Vickie was two years old at the time of trial. The judge found that she was in good health, attended daycare, was

⁵ The father lived with friends in Massachusetts until the end of December 2017. He then returned to South Carolina and remained there until the beginning of June 2018, first living with the paternal grandmother and later with his girlfriend. He lived at an unidentified location in Massachusetts from about June 5, 2018, until about August 13, 2018, when he returned to South Carolina to live with the paternal grandmother. The father returned to Massachusetts on December 27, 2018.

⁶ The visits, when they occurred, were appropriate. The father was caring and attentive, and at times brought food, puzzles, and coloring books for Vickie.

⁷ The tasks included, among other things: (1) maintaining monthly contact with his social worker while living out of State; (2) completing a dual diagnosis program on substance abuse and mental health issues, and demonstrating an understanding of how these issues affect children; (3) completing a batterer's intervention program; and (4) locating appropriate housing for himself and Vickie. The father did attend a fatherhood support group in South Carolina.

receiving early intervention services for delays in fine motor skills and speech, and responded to both English and Spanish. She had a close relationship with her foster family with whom she had lived since July 21, 2017. The department proposed two potential preadoptive resources for Vickie. The first was with the father's cousin in South Carolina. In the event placement with the cousin was denied or withdrawn, the foster parents were willing to be an adoptive resource.

Discussion. 1. Jurisdiction. The father argues for the first time on appeal that the Juvenile Court lacked jurisdiction because, at the inception of the case, South Carolina, and not Massachusetts, was Vickie's "home [S]tate." Thus, according to the father, South Carolina had "home [S]tate" jurisdiction and the Juvenile Court had only "emergency" jurisdiction that limited its authority to issuing temporary orders. We conclude that neither South Carolina nor Massachusetts had "home [S]tate" jurisdiction. However, as we discuss, the case was properly adjudicated in Massachusetts because the Juvenile Court had "default" jurisdiction pursuant to G. L. c. 209B, § 2 (a) (2).

A court of the Commonwealth "may exercise jurisdiction in a custody proceeding only under the provisions of G. L. c. 209B," the Massachusetts Child Custody Jurisdiction Act. Custody of Victoria, 473 Mass. 64, 68 (2015). General Laws c. 209B, § 2 (a), sets forth four bases for jurisdiction: "home [S]tate"

jurisdiction, "default" jurisdiction, "emergency" jurisdiction, and "appropriate" jurisdiction. G. L. c. 209B, § 2 (a) (1)-(4); Custody of Victoria, supra at 68-71.

A State has "home [S]tate" jurisdiction when at the time the custody proceedings commence, the State either: "(i) is the home [S]tate of the child" or "(ii) had been the child's home [S]tate within [the preceding] six months . . . and the child is absent from [that State] because of . . . her removal or retention by a person claiming . . . her custody or for other reasons, and a parent or person acting as a parent continues to reside in [that State]." G. L. c. 209B, § 2 (a) (1).

The "home [S]tate" of a child is defined as "the [S]tate in which the child immediately preceding the date of commencement of the custody proceeding resided with [her] parents, a parent, or a person acting as parent, for at least [six] consecutive months, and in the case of a child less than [six] months old the [S]tate in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the [six]-month or other period." G. L. c. 209B, § 1.

Contrary to the father's argument, South Carolina did not have "home [S]tate" jurisdiction because Vickie was not living there when the care and protection petition was filed, and neither parent continued to reside in South Carolina when the

proceedings commenced in Massachusetts. As previously noted, after the mother and Vickie relocated to Lowell, the father followed in June 2017 "to go live in [a] shelter" with them and to "be part of a family unit."

Furthermore, Massachusetts was not Vickie's home State either because Vickie had not lived in Massachusetts for six consecutive months prior to the commencement of the proceedings. Consequently, at the time the care and protection petition was filed, Vickie had no "home [S]tate." We therefore turn to the question whether, as the department and Vickie argue, the Juvenile Court had default jurisdiction under G. L. c. 209B, § 2 (a) (2).

A court has default jurisdiction when no State has home State jurisdiction and "it is in the best interest of the child that a court of the [C]ommonwealth assume jurisdiction." G. L. c. 209B, § 2 (a) (2). The exercise of default jurisdiction is in the child's best interests if

"(i) the child and his or her parents, or the child and at least one contestant, have a significant connection with the [C]ommonwealth, and (ii) there is available in the [C]ommonwealth substantial evidence concerning the child's present or future care, protection, training, and personal relationships."

G. L. c. 209B, § 2 (a) (2).

Vickie and both of her parents had significant connections to Massachusetts. The mother lived in Massachusetts prior to

meeting the father and the couple began their relationship here. The father has moved between Massachusetts and South Carolina for much of his life. More importantly, the father returned to Massachusetts in June 2017, and intended to remain here so that he could reunite as a family with the mother and Vickie. In addition, the department, an agency of the Commonwealth, became involved in Vickie's life shortly after she began living in Massachusetts.

There was also substantial evidence concerning Vickie's present and future care and protection in Massachusetts. As noted, the department investigated allegations of neglect and placed Vickie in appropriate foster care. Thereafter, the department was responsible for Vickie's well-being and was in a position to monitor the father's ability to care for Vickie. Given these circumstances, we conclude that the Juvenile Court properly exercised default jurisdiction pursuant to G. L. c. 209B, § 2 (a) (2). See Custody of Victoria, 473 Mass. at 71.

Furthermore, we discern no basis to fault the judge for not raising the issue of jurisdiction sua sponte. It may be appropriate in cases where "the question of jurisdiction [is] readily apparent from the inception of the case," for a judge to consider whether the exercise of jurisdiction is proper, even though the parties do not raise the issue. Adoption of Yvette (No. 1), 71 Mass. App. Ct. 327, 341 n.17 (2008). Here, however,

although Vickie was not born in Massachusetts, there was nothing "readily apparent" in the record to alert the judge to a potential problem with jurisdiction. Id. While Vickie lived in South Carolina for the first five months of her life, there was nothing pending in any court of South Carolina regarding her custody. And as discussed above, Vickie had significant contacts with Massachusetts, where she had lived with the mother, and occasionally the father, and had been placed in foster care since she was five months old, and where she and both of her parents lived at the time the case was filed. The parents also had significant contacts with Massachusetts since childhood. Accordingly, we are neither surprised nor concerned that the issue of jurisdiction was not raised by the judge.

Next, the father argues that he was denied effective assistance of counsel because his attorney did not challenge the Juvenile Court's jurisdiction. Because we conclude that the court had jurisdiction, the father's argument fails, as he cannot show that he was deprived of an otherwise available, substantial ground of defense. See Care & Protection of Stephen, 401 Mass. 144, 149 (1987) (adopting standard set forth in Commonwealth v. Saferian, 366 Mass. 89 [1974], for judging ineffective assistance claims in care and protection proceedings).

2. Sufficiency of the evidence. The father argues that the findings supporting termination of his parental rights do not clearly and convincingly demonstrate that he was unfit to parent Vickie. Our review of the record leads us to conclude otherwise.

"Before a parent's rights may be terminated, the trial judge must engage in a two-step analysis." Adoption of Garret, 92 Mass. App. Ct. 664, 671 (2018). "First, the judge must determine whether the parent is fit to carry out the duties and responsibilities required of a parent." Id. "If the parent is deemed unfit, the judge must then determine whether termination of parental rights is in the child's best interests." Id. "[T]he 'parental fitness' test and the 'best interests of the child test' are not mutually exclusive, but rather 'reflect different degrees of emphasis on the same factors'" (citation omitted). Id. Factors relevant to this determination include "a parent's character, temperament, conduct, and capacity to provide for the child in the same context with the child's particular needs, affections, and age" (citation omitted). Id.

The judge's determination regarding the father's unfitness to parent Vickie was amply supported by the evidence. The judge concluded that the father "has been unavailable and unwilling to parent [Vickie] since the [d]epartment became involved with this family." This was based on evidence that the father missed a

number of scheduled visits with Vickie,⁸ failed to engage in recommended services listed on his action plan,⁹ and failed to obtain stable housing or employment. The judge made detailed findings regarding the father's lengthy absences from Vickie's life from which he properly concluded that the father was unable to make Vickie's well-being a priority. The judge also considered the father's significant criminal history, which included violent crimes and drug charges, in determining that he was currently unfit to parent Vickie. See generally Care & Protection of Frank, 409 Mass. 492, 495 (1991).

The father further argues that the judge improperly relied on evidence that he had a mental disorder (depression) in reaching the conclusion that the father was unfit, because there was no nexus between his depression and his ability to care for Vickie. However, the father acknowledged that he suffered from depression, and the judge found that the father's depression prevented him from obtaining and maintaining employment, which, in turn, constituted "a barrier to his being able to parent [Vickie]."

⁸ The father's main reason for missing visits was lack of transportation.

⁹ For example, the father failed to keep the department informed as to where he was living; did not maintain consistent communication with the department; avoided a home visit; refused to participate in a batterer's intervention program; and declined a referral to a counselor for his depression, which he acknowledged prevented him from working.

Lastly, the father claims that in the absence of evidence that he had any problems with drug use or that he had engaged in domestic violence, the "extreme step" of terminating his parental rights was not warranted. Leaving aside that the father's criminal history included possession of illegal drugs and that the father acknowledged that he often argued with the mother (prompting police response), this argument is not persuasive because it ignores the judge's specific findings that demonstrate the father's inability to parent Vickie because of his overall instability. In sum, as the judge observed, although he had the opportunity to do so, the father did not take the steps required to show he could provide Vickie with proper care.

3. Posttermination and postadoption visitation. The father argues that the judge abused his discretion in failing to order posttermination and postadoption visitation with Vickie. After a determination of unfitness, a judge may order visitation between a child and a parent whose parental rights have been terminated. Adoption of Vito, 431 Mass. 550, 557 (2000). A "necessary condition" for such an order "is a finding, supported by the evidence, that continued contact is currently in the best interests of the child." Id. at 564. The order should be "based on emotional bonding and other circumstances of the actual personal relationship of the child and the biological

parent." Id. at 562. If a judge determines that a posttermination or postadoption order is in the child's best interests, the judge then must ask, "in cases where a family is ready to adopt the child, is an order of visitation necessary to protect the child's best interest, or may decisions regarding visitation be left to the judgment of the adoptive family" (citation omitted). Adoption of Helga, 97 Mass. App. Ct. 521, 530 (2020).

We discern no abuse of discretion in the judge's decision. The judge's findings support the conclusion that continued contact with the father was not shown to be in Vickie's best interests. The father made little effort to be present in Vickie's life, frequently missing scheduled visits and being absent for long periods of time. While Vickie was affectionate with the father during the visits that he did attend, this does not equate to evidence of a significant existing bond. The judge also found that Vickie "gets along well" with her foster family and "goes to her foster parents for affection and comfort." Furthermore, it matters not, as the father contends, that when the trial concluded, there was no approved adoptive resources for Vickie. Two viable options for Vickie were under consideration at that time, and the judge acted well within his discretion to conclude that decisions regarding future

visitation with the father were best left to Vickie's future adoptive parent or custodian.

Decree affirmed.

By the Court (Vuono, Hanlon & Shin, JJ.¹⁰),



Clerk

Entered: April 6, 2021.

¹⁰ The panelists are listed in order of seniority.