

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

21-P-405

CARE & PROTECTION OF DARRELL.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a trial, a Juvenile Court judge found the father currently unfit to parent his son Darrell.² The judge adjudicated Darrell in need of care and protection and committed him to the custody of the Department of Children and Families (department). See G. L. c. 119, § 26. The father appeals. Although the father concedes that he is currently unfit, he argues that the judge erred in granting permanent custody to the department and denying the petition for appointment of the paternal grandparents as guardians of Darrell. We affirm.

Background. We summarize the relevant facts found by the judge, reserving some details for our discussion. The department filed this care and protection petition in September

¹ A pseudonym.

² The mother was also found unfit. She did not file a notice of appeal from the adjudication that Darrell was in need of care and protection.

2017, alleging that almost two year old Darrell was at risk for neglect. The allegations stemmed from a G. L. c. 119, § 51A, report (51A report) and the subsequent investigation: a caller to the department's "hotline" reported that Darrell had been "pushed . . . into a neighboring Chinese restaurant" during a fight between the mother and an "unknown acquaintance." The father was also present and reportedly "broke [up]" the fight.³ During the G. L. c. 119, § 51B, investigation, the department struggled to contact the parents and, therefore, to adequately assess their ability to maintain a safe and stable environment for Darrell. The mother did not appear for the first scheduled meeting with a department social worker, and the social worker was unable to reach her by telephone. The next day, when the social worker called again, the father answered and told the social worker that the mother and Darrell were staying with the paternal grandparents (grandparents). After a week of no further communication, the social worker conducted an unannounced visit to the grandparents' apartment. Both

³ Darrell had previously been the subject of two 51A reports filed in November 2016 and June 2017. The first stemmed from an allegation that the mother had brought Darrell to the emergency room with a respiratory virus, and then "refus[ed] treatment." After a G. L. c. 119, § 51B, investigation determined that the incident "was just a misunderstanding and [due to a] lack of communication" and that staff at the shelter where the mother and Darrell were staying had "no concerns," the allegation of neglect was "unsupported." The second 51A report was screened out.

grandparents were home; they reported that Darrell had been staying with them, as his parents were "house hopping." Put together, the parents' homelessness, their failure to respond to outreach by the department, and the report of fighting in the presence of Darrell was sufficiently concerning that the department sought and was granted temporary custody of Darrell.⁴ Darrell was placed in a foster home in September 2017, where he has lived since that time.⁵

In June 2018, the grandparents expressed to the department their interest in becoming a foster placement for Darrell. The department denied their application, however, based on the size of their apartment and the paternal grandfather's criminal record. Then, in March 2019, the father filed a guardianship petition in the Juvenile Court seeking appointment of the grandparents as guardians of Darrell. The guardianship petition was heard concurrently with the hearing on the merits of the

⁴ A social worker spoke with the mother and explained that the department intended to seek custody of Darrell two days before the petition was filed. The mother told the social worker that she believed that she had given custody of Darrell to the paternal grandmother; at trial she testified that she gave the paternal grandmother a "notarized paper . . . to say that [the paternal grandmother had] temporary custody of [Darrell] until [the mother was] able to go back to a shelter."

⁵ In June 2018, the department filed a care and protection petition seeking temporary custody of Sarah (a pseudonym), the mother's second child and Darrell's half-sister. The petition was granted and Sarah was placed in the same foster home where Darrell had been placed. She is not involved in this appeal.

care and protection petition. The trial began in August 2019 and, after eleven days of testimony spanning sixteen months, the judge issued a decision in November 2020.⁶ The judge found that the father was currently unfit to parent Darrell, denied Darrell's oral request to terminate the father's parental rights, and committed Darrell to the custody of the department. The judge also found that it was not in Darrell's best interests that the grandparents be appointed guardians and denied the guardianship petition.

Discussion. The father asserts that the judge evaluated his guardianship petition under an incorrect legal standard. He argues that the judge treated the guardianship petition as a "competing plan" to the department's petition to gain permanent custody of Darrell. The father further asserts that, regardless of the standard employed, it was error to deny the guardianship petition.

The plain language of the controlling statute forecloses the father's first argument. General Laws c. 119, § 26 (b), authorizes a judge, after determining that a parent is currently unfit, to commit the child to the custody of the department. See Care & Protection of Rashida, 488 Mass. 217, 220-221 (2021).

⁶ In the spring of 2020, in light of the public health concerns arising from the coronavirus pandemic, the trial was continued until July 2020 and thereafter conducted via Zoom.

The judge "also may make any other appropriate order . . . about the care and custody of the child as may be in the child's best interest." G. L. c. 119, § 26 (b). Such "appropriate orders" may include transferring custody of the child to a person who is presented to the court pursuant to a G. L. c. 190B, § 5-206, petition, as a proposed guardian, where the petitioner establishes that the appointment will serve the child's best interests. See G. L. c. 119, § 26 (b) (2); G. L. c. 190B, § 5-206. See also Guardianship of Kelvin, 94 Mass. App. Ct. 448, 456 (2018). "In making a custody determination, the 'driving factor' is the best interests of the child" (citation omitted). Adoption of Garret, 92 Mass. App. Ct. 664, 676 (2018).

Moreover, there was no error in treating the guardianship petition as a competing plan. Indeed, the very reason that the two petitions are heard together is because a guardianship is frequently proposed as an alternative disposition to an order committing the child to the department's custody under G. L. c. 119, § 26. See Guardianship of Phelan, 76 Mass. App. Ct. 742, 749 (2010) ("Although each case must be decided on its own peculiar facts, where competing plans for the placement of a child are presented to the judge through care and protection and guardianship proceedings . . ., the matters generally should be

heard together"). The judge's reference,⁷ in her conclusions of law, to G. L. c. 210, § 3, is nothing more than a recognition that "the tests 'best interests of the child' in the adoption statute and 'unfitness of the parent' in the guardianship statute reflect different degrees of emphasis on the same factors[;] . . . the tests are not separate and distinct but cognate and connected." Guardianship of Estelle, 70 Mass. App. Ct. 575, 580 (2007), quoting Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption, 367 Mass. 631, 641 (1975).

Whether a permanent guardianship with the grandparents "was in [Darrell's] best interests presents 'a classic example of a discretionary decision' to which we accord substantial deference." Adoption of Jacob, 99 Mass. App. Ct. 258, 272 (2021), quoting Adoption of Peggy, 436 Mass. 690, 705, cert. denied sub nom. S.T. v. Massachusetts Dep't of Social Servs., 537 U.S. 1020 (2002). In this regard, we discern no abuse of discretion in the judge's determination that the grandparents were unprepared to meet Darrell's needs. The judge had "significant concerns" as to the paternal grandmother's ability to parent Darrell, and this concern is well-supported by evidence of her difficulties managing the behavior of her own

⁷ There is no indication that the judge applied any of the fourteen factors enumerated in G. L. c. 210, § 3 (c).

children when they were in her care.⁸ The record also reveals a pattern of domestic violence between the mother and the father. The judge was entitled to consider the previous occasions when the mother and the father stayed at the grandparents' home and to conclude that placing Darrell in that home risked "inappropriate contact with his parents and the possibility of further exposure to domestic violence."

On the whole, the father's insistence that the judge "disregarded" certain evidence "amount[s] to no more than a disagreement with the judge's weighing of the evidence." Adoption of Don, 435 Mass. 158, 166 (2001). Here, the judge's detailed findings reflect a close and careful attention to all the evidence, including evidence (favorable to the father's position) that Darrell "appeared well cared for" while in the grandparents' care. To the extent that the father faults the judge for discrediting the expert's assessment of the grandparents' home, "[i]t is undisputed that a judge may accord the weight [s]he chooses to expert testimony." Guardianship of Brandon, 424 Mass. 482, 499 (1997).

⁸ Although the father argues that the judge should have considered the department's failure to offer services to better equip the grandparents as guardians, he cites no legal authority holding the department to such an obligation. Rather, as the petitioner, the father bore the burden of proving that appointing the grandparents as Darrell's guardians would serve the child's best interests. See Guardianship of Kelvin, 94 Mass. App. Ct. at 456.

Nor do we discern error in the judge's brief consideration of the environment at Darrell's foster placement; the child's current "safety and stability" was relevant to a custody determination. However, because "[p]lacement decisions, as opposed to custody decisions [under G. L. c. 119, § 26], fall within the discretionary powers of the legal custodian," the judge was not required to find that Darrell's particular foster placement served his best interests. See Care & Protection of Manuel, 428 Mass. 527, 534 (1998). Concerns over Darrell's care at the specific placement chosen by the department are, like "'decisions related to normal incidents of custody' generally . . . committed to the discretion of the department, reviewable only for abuse of discretion" (citation omitted). Care & Protection of Walt, 478 Mass. 212, 230 (2017).

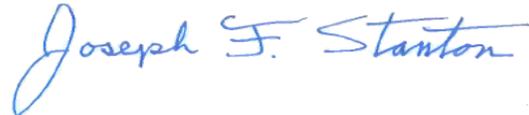
The disposition of the guardianship and care and protection petitions does not foreclose the father from seeking a review and redetermination based on changed circumstances, or the grandparents from reapplying to become a foster resource. See Care & Protection of Erin, 443 Mass. 567, 571-572 (2005); 110 Code Mass. Regs. § 10.06(7) (2014). But as to the merits of the father's guardianship petition, the judge did not abuse her

discretion in concluding that the proposed guardianship was contrary to Darrell's best interests.

Judgment affirmed.

Order denying guardianship
petition affirmed.

By the Court (Meade, Henry &
Singh, JJ.⁹),



Clerk

Entered: January 11, 2022.

⁹ The panelists are listed in order of seniority.