

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-698

ADOPTION OF SHOSHANA.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

After a trial in the Juvenile Court, the judge terminated the father's parental rights to his then two year old daughter, Shoshana.² We consider the father's consolidated appeal of (1) the termination decree and (2) the order of a single justice of this court denying the father's motion to stay the appellate proceedings to permit him to file a motion for new trial. We conclude that even assuming trial counsel's conduct fell below the standard established in Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), the father failed to demonstrate that he was prejudiced by any shortcomings in his attorney's performance. Accordingly, we reject the father's claim of ineffective assistance of counsel, see Commonwealth v. Satterfield, 373

¹ A pseudonym.

² Before trial, the mother stipulated to the entry of a decree terminating her parental rights to the child. She is not a party to this appeal.

Mass. 109, 115 (1977), and affirm the order denying the father's motion to stay the appellate proceedings. Because we are also satisfied that the judge's determinations of both the father's permanent unfitness and the best interests of the child were supported by clear and convincing evidence, we affirm the decree terminating the father's parental rights to the child.³

Background. The Department of Children and Families (department) filed this care and protection petition on the day of the child's birth and removed the child from the custody of the parents when she was approximately ten days old.⁴ After a trial over several days between October 2020 and January 2021, the judge terminated the father's parental rights, and issued detailed findings supporting her conclusion that the department had met its burden of demonstrating, by clear and convincing evidence, that the father was unfit to parent the child, and was likely to remain so. See Adoption of Nancy, 443 Mass. 512, 515-516 (2005). As we have noted, the father appealed from that

³ "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 children. The question for the judge is 'whether the parent's deficiencies 'place the child[ren] at serious risk of peril from abuse, neglect, or other activity harmful to the child[ren].'"

Adoption of Lisette, 93 Mass. App. Ct. 284, 285 n.2 (2018), quoting Adoption of Olivette, 79 Mass. App. Ct. 141, 157 (2011).

⁴ Although the department placed the infant child back with the mother, within one month the department again removed the child, returning her to the foster parents who had previously cared for her and with whom she lived through the time of trial.

decree and, when his petition for a stay of the appellate proceedings was denied, appealed from that order as well.

Discussion. 1. Ineffective assistance claim. The father's claim of ineffective assistance centers on trial counsel's treatment of the father's longstanding and debilitating mental health conditions. Specifically, the father argues that trial counsel (1) failed adequately to investigate his mental illness and how it impacted his case; (2) did not comply with certain performance standards established by the Committee for Public Counsel Services (CPCS) in her advocacy for the father before and during trial; (3) failed to argue that the department's services to the father were inadequate to further his interest in reunification with the child and to advocate for additional accommodations for the father's mental health disability; and (4) at trial, did not place appropriate emphasis on the father's disability. We review the father's claim under the two-part test set forth in Saferian, 366 Mass. at 96. Applying that analysis, we need not resolve the question whether trial counsel's performance "[fell] measurably below that which might be expected from an ordinary fallible lawyer" because, even assuming arguendo that it did so, the father has failed to show that "it . . . likely deprived [him] of an otherwise

available, substantial ground of defence."⁵ Id. See Satterfield, 373 Mass. at 115.

Trial counsel's strategy, which she pursued throughout the trial and argued to the judge in closing, was that father's mental illness was capable of being treated, and that by the time of trial, "he [was] stabilized on his medications." Although the father now faults trial counsel for, among other things, failing to check the accuracy of the father's psychiatric diagnoses, not eliciting input about the father's condition from additional treatment providers and expert witnesses, and neglecting to "probe [f]ather's mental capacity" by obtaining a neuropsychological examination, he has not explained whether or how these steps, if taken, would have rebutted the department's evidence of his permanent unfitness to parent the child. See Adoption of Valentina, 97 Mass. App. Ct. 130, 137 (2020) (no ineffective assistance where parent failed to "identif[y] any steps that would have allowed her to avoid termination of her parental rights or allege[] any way in which she was denied a substantial defense"). Cf. Adoption of Azziza, 77 Mass. App. Ct. 363, 369 (2010) (affidavits documenting existence of "[m]ultiple witnesses" who would have testified to

⁵ We decline the department's suggestion that we pass over the question of prejudice.

father's parental fitness, but whom counsel did not call to testify, sufficient to establish prejudice).

Likewise, the father has failed to identify any "appropriate services" he was unable to access due to his trial counsel's shortcomings, or any particular harm occasioned by trial counsel's failure to meet certain CPCS performance standards when she obtained many, but not all, of the father's treatment records. The department referred the father to a "parent aide" and curriculum "specific to [the father's] disabilities" and extended the aide's three-month referral for an additional month. It also referred the father to additional parenting classes and assigned other tasks intended to advance his parenting skills and provide for the child's safety.⁶ To the extent the father argues that these services did not account for his disabilities, we are not persuaded that the record reflects that they were inadequately tailored to "help[] address the [d]epartment's concerns regarding [the f]ather['s] ability to parent [the c]hild." In the same vein, we identify nothing beyond the father's own postulation to support his claim that "[his] efforts towards reunification were hindered by [the department's] failure to accommodate his disability." We discern no prejudice resulting from trial counsel's failure to

⁶ These included additional parenting classes, batterer's intervention programming, and ongoing mental health treatment.

pursue that defense. Accordingly, the father's claim for ineffective assistance of counsel fails.

2. Motion for stay. As we have noted, the father filed a petition with the single justice for a stay of appeal to allow him to file a motion for new trial. The single justice denied the motion on the grounds that the father failed to demonstrate "a sufficiently strong likelihood of success on the merits to justify the . . . delay in . . . appellate review" that would result from allowing his petition for a stay of the appellate proceedings to litigate his ineffective assistance claim in the trial court. Concluding, as we have, that the father failed to show that he was prejudiced by any of the claimed failings of his trial counsel, we discern neither error of law nor abuse of discretion in the single justice's ruling. See Adoption of Ulrich, 94 Mass. App. Ct. 668, 675 (2019). See also id. at 673 (allowance of motion to stay to allow prosecution of motion for new trial "not automatic" and takes into account motion's odds of success).

3. Unfitness. The father challenges the judge's determination that he was unfit to parent the child and contends that the evidence failed to show his unfitness would have been "likely to continue into the indefinite future" if he had been offered appropriate services to accommodate his mental illness. We review the judge's decision to terminate parental rights for

an abuse of discretion or clear error of law, according "substantial deference" to the judge's conclusions. Adoption of Hugo, 428 Mass. 219, 225 (1998), cert. denied sub nom. Hugo P. v. George P., 526 U.S. 1034 (1999).

The evidence presented at trial and credited by the judge in her thoughtful findings amply supports the conclusion that the father's unfitness was not merely temporary. See Adoption of Ilona, 459 Mass. 53, 60 (2011) ("a parent's unfitness is not temporary if it is reasonably likely to continue for a prolonged or indeterminate period"). The father's longstanding struggles with mental health, and its impact on his ability to care even for himself, were underscored by his two involuntary inpatient hospitalizations during the pendency of the case.⁷ See Adoption of Nicole, 40 Mass. App. Ct. 259, 262 (1996) ("the central judgment" concerns whether parent "has the capacity to act as a fit parent").

The judge considered the father's history of violence, including domestic violence evidenced by abuse prevention orders obtained against him by the child's mother, other of the defendant's partners, and various family members (although there was no evidence that the father ever abused the child). Despite

⁷ We note the judge's findings to the effect that each admission was occasioned by the father's failure to adhere to his medication regimen despite his participation in programming that provided medication management.

the inclusion of domestic violence treatment in the father's service plans, the judge found that the father delayed enrolling in the required treatment and then did not complete it, thus "fail[ing] to address domestic violence concerns." The judge also noted the father's criminal history, which included additional violence. See Adoption of Jacob, 99 Mass. App. Ct. 258, 262 (2021) (domestic violence relevant to parental fitness).

The father's inconsistent efforts and intermittent unwillingness to participate in visits with the child were part of the judge's calculus. See Care & Protection of Vick, 89 Mass. App. Ct. 704, 707-708 (2016) (relevance of cooperation with department). While the father gave various reasons for his failure to participate in visits with the child, including a hiatus of several months in which he did not visit her at all, the judge did not, in the main, find those reasons compelling. We discern no abuse of discretion in that assessment. See Adoption of Hugo, 428 Mass. at 225. Additionally, the judge considered the father's failure to maintain a safe home environment for the child, despite reminders from the department of the need to provide an appropriate environment for her, and the father's apparent recognition of the importance of the point to the determination of his fitness as a parent. See Care &

Protection of Vick, supra at 706 (home environment appropriate factor for consideration).

In sum, the evidence established "that there have been no changes to [the f]ather's ability to parent this child since his prior adjudication of unfitness in November of 2019," and there were "continuing concerns over his ability to parent the child and provide a safe and stable environment for her." In the absence of any evidence that a change in the father's ability was imminent, the judge was within her discretion in considering, as she did, the father's past conduct as a predictor of his future parenting ability, and in concluding that his unfitness was not merely temporary. See Adoption of Katharine, 42 Mass. App. Ct. 25, 32-33 (1997).

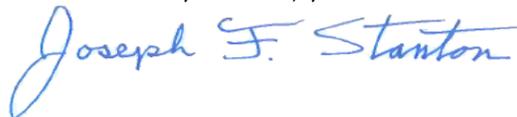
4. Reasonable efforts. Finally, the father argues that the department failed to make reasonable efforts to reunify the father and the child where it did not provide appropriate services "geared toward[] [the f]ather's parenting skills [and] that accommodated his mental health issues." Putting aside the father's failure to demonstrate that his mental health prevented him from benefiting from the services with which he was provided, or to identify any services that the department should have recommended but did not, we note that the judge made specific and well-supported findings that termination of the father's parental rights was in the child's best interests. "A

determination by the court that reasonable efforts were not made shall not preclude the court from making any appropriate order conducive to the child's best interest." Adoption of Ilona, 459 Mass. at 61, quoting G. L. c. 119, § 29C. There was no abuse of discretion in the judge's termination of the father's rights given her properly-founded conclusion that it was in the child's best interests to do so. See id.

Conclusion. The decree terminating the father's parental rights is affirmed. The order of the single justice denying the father's petition for a stay of the appellate proceedings is affirmed.

So ordered.

By the Court (Desmond, Hand & Brennan, JJ.⁸),



Clerk

Entered: May 13, 2022.

⁸ The panelists are listed in order of seniority.