

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-1001

ADOPTION OF VERNA.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Following a trial, a Juvenile Court judge concluded that Verna was in need of care and protection and that Verna's mother and father were unfit to parent her. Decrees entered terminating their parental rights and approving the adoption plan of the Department of Children and Families (department). The judge did not order posttermination or postadoption visitation, leaving the decision of postadoption visitation to the discretion of the adoptive parents. On appeal, the mother and father claim that (1) some of the judge's factual findings were clearly erroneous, (2) the department failed to make reasonable efforts to reunify them with Verna, (3) their unfitness was not established by clear and convincing evidence, and (4) the adoption plan was not in Verna's best interests.

¹ A pseudonym.

The father also argues that the judge's denial of his request for a continuance violated due process. We affirm.

Background. We summarize the judge's findings, reserving some details for our discussion. The mother has four children. This appeal relates only to Verna, who was born in January 2016, and is the youngest of the mother's children and the only child the mother and father share. The mother's three older children are from a prior relationship with Peter (a pseudonym).² That relationship spanned several years and was marked by drug use, domestic violence, and abuse and neglect of their three children, which prompted the department to take temporary custody of the three older children. After Peter's death in 2009, the mother's mental health deteriorated, and she struggled with an opiate addiction.

At the time of trial, the mother and the father had been in a relationship, on-and-off, for nearly ten years. They were together consistently for five years after the birth of Verna. The father was aggressive, controlling, and violent; he had difficulty managing his anger and lashed out at others, including the mother, the children, and employees of the

² The mother's parental rights were also terminated as to the two middle children. The eldest child reached the age of majority prior to trial and was discharged from the care and protection petition. The decrees related to the two middle children are not part of this appeal.

department. The mother and father fought often, and the three older children reported that the father chased the mother in their home. The children were frightened by the fights.

The father's involvement with the department began in 2000 when, at age fourteen, he admitted to sexually abusing his brother and sister. As a result, the father lived with his paternal grandmother and attended a sex offender program. Four years later, the father's parents obtained a restraining order against the father after he was again accused of sexually abusing his sister.

The father has a significant criminal history as an adult. He has been convicted of breaking and entering in the daytime with intent to commit a felony, carrying a dangerous weapon, assault and battery on a police officer, resisting arrest, disorderly conduct, larceny, and fraud. The father also has a history of probation violations.

The mother was taking Suboxone to treat her opiate addiction during her pregnancy with Verna. When Verna tested positive for Suboxone at birth, the department conducted an investigation and formulated a safety plan which required that the father not be left alone with the children. The father disregarded the plan and continued to live with the mother and the four children.

A second safety plan was initiated by the department based on multiple reports of violence in the home.³ Contrary to the plan, the mother allowed the father to continue living with her and the children. The department then created a third safety plan which provided that "[f]ailure to follow the . . . safety plan will result in the removal of the children." The third plan required father to remain away from the home and the children, except during supervised visits with Verna. After the father was again observed at the family home, the department filed a care and protection petition and obtained temporary custody of the children. The department permitted the children to remain in the mother's care subject to a fourth safety plan, but the mother and father again violated the plan by living together.

In March 2017, the father physically abused the mother's son, evidenced by bruises and scratches on the child's body. Following this incident, the department removed all the children from the mother's custody. Department workers observed that the home had a foul odor and was overflowing with trash. Verna wore

³ In May 2016 the mother's adult sister, while living with the family, struck the mother with a soda can in Verna's presence. In November 2016, the father disciplined the mother's son by forcing him to stand in the corner on one leg and pinching him. In December 2016, the mother reported to police that the father had strangled her.

ill-fitting clothes and had "food all over her cheeks and mucus all over her nose."

Following removal, Verna was placed in a foster home where she remained throughout the pendency of the care and protection petition. Verna has adjusted well to her foster home and has developed a strong bond with her foster family.

Over the next four years, the department created various action plans designed to help the mother and father improve their parenting skills. Key elements of the plans were mental health treatment and domestic violence counselling. While the mother and father participated in some mental health treatment, their participation was inconsistent and they did not meaningfully benefit from it. The mother refused evaluations related to her anxiety, depression, and posttraumatic stress disorder (PTSD), which were so debilitating that at times that she was unable to leave her room.

While the father discussed his anger issues in therapy, he denied the allegations of domestic violence. The father refused to take responsibility for his actions, often blaming others for his circumstances. He never completed domestic violence counselling. Initially he refused to enroll because of the cost. After enrolling, he was discharged for failure to regularly attend.

The mother and father also failed to comply with the conditions of their supervised visits with the children. They frequently missed meetings, arrived late, or engaged in inappropriate behavior. The father often attended the mother's visits with her other children even though his presence was prohibited. His conduct during these visits was demeaning to the mother. He was hostile to and threatened department workers, sometimes in Verna's presence.

Discussion. The central question in an action to terminate parental rights is whether the parent is unfit, and if so, whether termination is in the best interests of the child. See Adoption of Ilona, 459 Mass. 53, 59 (2011). Such findings must be supported "by clear and convincing evidence, based on subsidiary findings proved by at least a fair preponderance of evidence." Adoption of Jacques, 82 Mass. App. Ct. 601, 606 (2012). See Adoption of Mary, 414 Mass. 705, 710-711 (1993). "[P]arental unfitness means grievous shortcomings or handicaps that put the child's welfare much at hazard" (quotation and citation omitted). Adoption of Leland, 65 Mass. App. Ct. 580, 584 (2006). "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." Adoption of Ilona, supra.

1. Factual findings. After reviewing seventy-four exhibits and the testimony of nine witnesses, the judge made 263 detailed findings of fact. Based on those findings, the judge concluded that the mother and the father were unfit to parent Verna, that their unfitness was likely to persist for the foreseeable future, that the department made reasonable efforts to reunify Verna with the parents, and that termination of their parental rights was in Verna's best interests. The mother and the father challenge these conclusions as unsupported by the judge's subsidiary findings, several of which they claim were clearly erroneous. We have carefully reviewed the challenged factual findings and conclude that they were supported by the evidence.

a. The father's failure to cooperate. The judge found that the father failed to cooperate with the department and failed to participate in necessary services. The finding regarding the father's need for domestic violence services was supported by evidence that the father physically abused the mother and her son, and that the children feared the father. The judge had the discretion to discredit the mother's and father's denials of domestic violence. See Adoption of Helga, 97 Mass. App. Ct. 521, 526 (2020).

The judge's finding that the father did not cooperate with the department was supported by evidence of the father's hostile

and threatening conduct toward department employees. He also frequently ignored the terms of supervised visits, safety plans, and action items. To his credit, the father signed releases, participated in some services, and attended supervised visits, but he was never fully compliant with his action plans and never completed the domestic violence program.⁴

b. The father's failure to change his behavior. The judge's finding that the father failed to take responsibility for his actions and failed to meaningfully change his behavior was well supported by the evidence. The father claims that he was making steady progress with his therapist and that he "acknowledged his difficult past, struggles with anxiety and anger, and financial difficulties." He also notes that his therapist documented that the father was beginning to "understand[] . . . the role his anger played in [Verna's] removal." The judge had the discretion to weigh this evidence against the father's persistent denials and resistance to domestic violence counselling. See Adoption of Helga, 97 Mass. App. Ct. at 526. We see no abuse of discretion in the judge's

⁴ The finding that the father was able to pay for the domestic violence program, but chose not to, was supported by evidence that that the father had income from work, unemployment benefits, and stimulus checks, and made nonessential purchases. There was ample evidence that the father did not believe he needed domestic violence services.

conclusion.⁵ Even at trial the father maintained that he did not need domestic violence services and that Verna had been wrongfully taken from him. This testimony indicated that the father still did not accept the relationship between his conduct and Verna's removal from the home. See Adoption of Ulrich, 94 Mass. App. Ct. 668, 677 (2019) ("mere participation" in services does not render parent fit "without evidence of appreciable improvement" [quotation and citation omitted]).

c. Mother's ability to support Verna. The father claims error in the finding that the mother was incapable of financially supporting Verna. This finding, which the mother does not contest, had no bearing on the father's fitness to parent Verna. In any event, the evidence showed that the mother was consistently unemployed, did not have an independent source of income, and relied almost exclusively on the father for financial support.

d. The mother's Suboxone use and mental health. The mother claims error in the judge's rejection of her testimony that she informed her doctor about her Suboxone use. The judge did not find that the mother hid her Suboxone use from her physician; rather, the judge did not credit the mother's

⁵ While the father's therapist discussed information related to domestic violence, she had no particular expertise in domestic violence and never observed the father's interactions with the mother and children.

testimony that her doctor advised her it was "perfectly fine" to use Suboxone during her pregnancy. This credibility determination was within the judge's discretion. See Adoption of Helga, 97 Mass. App. Ct. at 526.

The mother also argues that the judge's findings regarding her mental health were clearly erroneous, "and there was little evidence that her mental health interfered with her ability to parent." We disagree. The evidence established that the mother was diagnosed with anxiety, depression, and PTSD, conditions which sometimes prevented her from leaving her room. The mother was not making significant progress in caring for her mental health and refused evaluations to determine whether medication might help.

2. Reasonable efforts. The mother challenges the judge's finding that the department made reasonable efforts to reunify Verna with the mother and father. See Care & Protection of Walt, 478 Mass. 212, 221 (2017). She argues that the department declined the father's requests for financial assistance to complete a sex offender risk assessment and domestic violence services. The record shows, however, that the father had sufficient income to pay for domestic violence services, and his request for funds for the risk assessment was ultimately granted.

The mother further argues that the department failed to accommodate the parents' schedules for supervised visitation with Verna. The evidence supported the judge's conclusions that the department's efforts were reasonable and that the visitation schedule promoted consistency and stability and were in Verna's best interests.⁶

3. Parental unfitness. In addition to challenging the judge's subsidiary findings of fact, the mother and father argue that evidence of their unfitness was not clear and convincing. A finding that a parent is unfit is "not a moral judgment or a determination that the [parent] . . . [does] not love the child." Adoption of Bea, 97 Mass. App. Ct. 416, 417 n.2 (2020), quoting Adoption of Bianca, 91 Mass. App. Ct. 428, 432 n.8 (2017). The evidence established that although the parents loved Verna, their inability to parent her "put [Verna's] welfare much at hazard" (quotation and citation omitted). Adoption of Leland, 65 Mass. App. Ct. at 584.

As we have discussed, the evidence showed that the father was aggressive, controlling, and violent, including with the

⁶ For the first time on appeal, the mother argues that the department failed to make reasonable efforts to reunite Verna with the mother and father because the department did not place Verna with the maternal grandmother when she was removed from the mother and father's custody. Because this argument was not raised at trial it is waived. See Adoption of Willow, 433 Mass. 636, 651 (2001); Adoption of Mary, 414 Mass. 705, 712 (1993).

mother and her children. The mother denied or minimized the father's behavior and instead blamed her son for reporting the abuse. The mother was unwilling to distance herself from the father and did not accept or understand that exposure to domestic violence was harmful to Verna. Despite the department's reasonable efforts, the mother and father failed to demonstrate material improvement in their ability to provide a stable and abuse-free environment for Verna. See Adoption of Carla, 416 Mass. 510, 518-520 (1993) (mother's unwillingness to distance herself and child from perpetrator of domestic violence bears on mother's ability to protect child from further abuse); Adoption of Garret, 92 Mass. App. Ct. 664, 671 (2018) ("a child who has been either the victim or the spectator of [domestic violence] suffers a distinctly grievous kind of harm" [quotation and citation omitted]).⁷ The judge's decision to terminate parental rights was supported by clear and convincing evidence of parental unfitness.

4. The adoption plan and posttermination and postadoption visitation. The father claims that the judge abused her

⁷ We are unpersuaded by the father's argument that the judge placed undue emphasis on Verna's bond with her preadoptive family. A judge may consider the bond that a child has established with her caregivers in determining if termination of parental rights is in the child's best interests. See G. L. c. 210, § 3 (c) (vii); Adoption of Nicole, 40 Mass. App. Ct. 259, 262-263 (1996).

discretion in concluding that the department's adoption plan was in Verna's best interests and in refusing to order posttermination and postadoption visitation with the mother and father. The judge credited expert testimony that removing Verna from her preadoptive family would be "extremely harmful [to Verna] and create an environment of psychological stress, placing her at a higher level of risk . . . for a reactive attachment disorder." Additionally, the judge credited expert testimony that Verna's preadoptive home would "assist her in developing . . . the most potential that she could realize, given the concerns of potential trauma exposure and her social and emotional needs."

In considering placement of the Verna with the maternal grandmother, the judge noted that maternal grandmother had admitted that her relationship with Verna was not as strong as her relationship with the mother's other children, and that maternal grandmother did not have a reasonable plan for keeping Verna away from the father's harmful behavior. We discern no abuse of discretion in the judge's decision to approve the adoption plan.

Nor did the judge abuse her discretion in leaving postadoption visitation to the discretion of the adoptive family. Once it is established that parents are unfit, the decision to grant such visitation is left to the discretion of

the trial judge and it is the parents' burden to establish that such visitation is in the best interests of the child. See Adoption of Ilona, 459 Mass. at 63-65; Adoption of John, 53 Mass. App. Ct. 431, 439 (2001). Here, the judge noted that the parents missed several visits, appeared late, permitted unauthorized people to be present during virtual visits, and behaved inappropriately toward each other and department staff during visits. While the judge acknowledged that parents loved Verna and were affectionate with her, the judge concluded that the bond was not so significant that posttermination or postadoption visitation was in the child's best interests. This was within the judge's discretion.

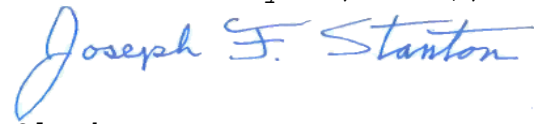
5. Due process. Finally, the father claims that he was denied due process when the judge denied his counsel's request for a continuance of the trial to review documents not previously disclosed, particularly in light of the judge's earlier ruling to exclude the father's expert's testimony for failure to timely disclose. Reviewing the record in its entirety, we conclude that the father was afforded due process. First, we discern no abuse of discretion in the judge's decision to exclude the father's expert testimony where it was not timely disclosed. See Mass. R. Civ. P. 26 (b) (4) (A) (i), 365 Mass. 772 (1974); Kace v. Laing, 472 Mass. 630, 637 (2015). Second, it appears from the record that the department met its discovery

obligations by disclosing the relevant documents to the father's prior counsel.

Even were we to conclude that the judge abused her discretion in denying the continuance, there was no prejudice. See Doucette v. Massachusetts Parole Bd., 86 Mass. App. Ct. 531, 537 (2014). Trial counsel for the father had several days to review the documents before the next trial date, and the judge allowed the father to recall witnesses if necessary. Moreover, the father has not established that a continuance to consider the documents would have made a material difference. For all of these reasons we see no abuse of discretion or other error in the denial of the motion to continue the trial.

Decrees affirmed.

By the Court (Green, C.J.,
Kinder & Neyman, JJ.⁸),



Clerk

Entered: May 27, 2022.

⁸ The panelists are listed in order of seniority.