

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

22-P-23

ADOPTION OF YEHUDA (and two companion cases<sup>1</sup>).

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

On appeal from decrees entered in the Juvenile Court terminating his parental rights, the father challenges the trial judge's finding that he is unfit and the termination of his parental rights. He also assigns error to the judge's failure to order posttermination visitation.<sup>2</sup> The children join with the father in challenging the failure to order posttermination visitation, but they do not otherwise challenge the decrees terminating the father's parental rights. We affirm.

Background. We summarize the trial judge's findings of fact, reserving certain details for further discussion. The father has three children: Yehuda, and twins James and Amy. The Department of Children and Families (department) filed a

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<sup>1</sup> Adoption of James and Adoption of Amy. The children's names are pseudonyms.

<sup>2</sup> The mother entered a stipulation terminating her parental rights prior to trial and is not a party to this appeal.

care and protection petition in March, 2020, based on the mother's substance misuse, and was granted temporary custody of the children. The mother was granted conditional custody of the children in May, 2020, but emergency temporary custody was again granted to the department in July, 2020, based on an occasion in which the mother appeared to a department social worker to be under the influence of substances.

The father has suffered from substance misuse for a significant period of time, including during the trial. As part of the father's action plan, the department informed him that he needed to enter a substance abuse program before the department could begin the assessment process. In July, 2020, the father reported that he was sober, but he had not engaged in treatment. One month later, the father informed the department that he wanted to enter an inpatient substance abuse program. He also reported that he had some mental health concerns that he needed to address. At the same meeting, the father fell asleep, admitted that he had "smoked a joint," and appeared to be "under the influence." The father admitted during trial that he had relapsed after learning that the mother was entering into an open adoption agreement with respect to the children.

The father was also aware that in order to reunify with the children he not only needed to address his drug use, but also to obtain a stable, suitable residence, attend all supervised video

or telephone visits with the children, and attend all case-related meetings and court dates. The department also encouraged the father to look into shelter placements while the assessment continued. In the fall of 2020, the department repeatedly attempted to contact the father by telephone and mail but he was nonresponsive. It is undisputed that during this time, from October 1, 2020 until the trial in July, 2021, the father did not visit with the children.

None of the children were medically up to date when they entered the department's care, and all three have been diagnosed with communication disability and have speech and articulation issues. When the children were removed from the mother's custody, they were placed together in a comprehensive foster care placement. The foster mother, who has recently adopted another child, lives in a home with enough bedrooms for each child to have his or her own bedroom. The children are close with their foster family and call their foster parent "mom." The department's adoption plan is for the children to be adopted by the foster mother, and a preadoptive licensing study has begun. The department does not foresee any issues with the foster mother's approval as an adoptive mother for the children.

Discussion. The central question in an action to terminate parental rights is whether a 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). Findings to support a termination of parental rights must be by "clear and convincing evidence, based on subsidiary findings proved by at least a fair preponderance of evidence." Adoption of Darlene, 99 Mass. App. Ct. 696, 702 (2021), quoting Adoption of Jacques, 82 Mass. App. Ct. 601, 606 (2012). "Parental unfitness . . . means more than ineptitude, handicap, character flaw, conviction of a crime, unusual life style, or inability to do as good a job as the child's foster parent. Rather, the idea of parental unfitness means grievous shortcomings or handicaps that put the child's welfare much at hazard." Adoption of Darlene, supra, quoting Adoption of Leland, 65 Mass. App. Ct. 580, 584 (2006).

1. The father's substance misuse. Evidence of substance misuse is "relevant to a parent's willingness, competence, and availability to provide care." Adoption of Anton, 72 Mass. App. Ct. 667, 676 (2008). Although it is true that substance misuse alone does not render a parent unfit, a judge may consider whether a parent suffers from "a condition which is reasonably likely to continue for a prolonged indeterminate period, such as alcohol or drug addiction, mental deficiency or illness . . . [that] makes the parent . . . unlikely to provide minimally acceptable care of the child." G. L. c. 210, § 3 (c) (xii). See Adoption of Katharine, 42 Mass. App. Ct. 25, 32-34 (1997).

The record supports the judge's finding that the father's substance misuse greatly hampered his ability to properly care for the children. In 2015, the father took Yehuda to a gas station bathroom, fell asleep, and the fire department had to break down the bathroom door to get to them out. The father tested positive for opiates, amphetamines, and benzodiazepines. In 2016, the father kicked down the door to the home and threatened the mother with two knives while she had Yehuda, then age two, in her arms. The other two children were in their cribs. In 2017, the father tested positive for cocaine and fentanyl.

During the department's investigation, the father informed the department that he was taking thorazine, a medication used to treat certain mood disorders, and he was attending Habit Optco for methadone treatment. However, the father missed multiple methadone doses in the fall of 2017. In July 2020, the father informed the department that he was sober and had not been engaged in any treatment or program. However, one year later, on July 28, 2021, six days after the trial had begun, the father fell asleep during a meeting with the department because he was under the influence of substances.

The father's substance misuse which, at times, placed the children at risk, and which continued until the time of trial,

contributed to a pattern of neglect and instability. See Adoption of Anton, 72 Mass. App. Ct. at 673.

2. The father's unavailability. Since 2017, the father has not lived with the children for a variety of reasons, including substance misuse, removal from a shelter, and his housing circumstances.<sup>3</sup> After the children were removed from the mother's custody in March 2020, the department attempted to contact the father during the ensuing investigation, but could not locate him. Thereafter, when the children were again in the department's custody after July, 2020, the department informed the father that an assessment was needed in order to reunite him with the children. The department encouraged him to look into shelter placements rather than living on a boat. However, the department was only able to meet with the father once before he stopped responding. Inability to secure "adequate stable housing" is a proper consideration in determining a parent's fitness. Adoption of Anton, 72 Mass. App. Ct. at 676.

Additionally, the failure to comply with services is relevant to a parent's fitness. See Adoption of Rhona, 63 Mass. App. Ct. 117, 126 (2005).

The father had no direct contact with the department or the children whatsoever for approximately ten months preceding the

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<sup>3</sup> For much of the time, the father was living on a lobster boat.

trial. This was mainly due to the father's repeated failure to respond to the department's letters and telephone calls. A judge's consideration of the willful failure to visit a child when the child is not in the parent's custody is a factor to be considered in determining a parent's fitness. See G. L. c. 210, § 3 (c) (x). See also Care & Protection of Vick, 89 Mass. App. Ct. 704, 708 (2016).

3. Reasonable efforts. Following the removal of a child, the department has an ongoing responsibility to provide services to the family geared toward reunification. See Care & Protection of Rashida, 488 Mass. 217, 218 (2021), S.C., 489 Mass. 128 (2022). The father faults the department for not creating an action plan until December 2020, five months after it obtained custody of the children. However, in July, 2020, the department social worker informed the father that she wanted to meet with him to complete an assessment and explained that the assessment would identify the areas of concerns and the best way to address those concerns. The assessment was never completed because the father stopped responding to the department after October 2020.

The father cannot now fault the department for failing to communicate the specifics of the action plan, including the requirements of obtaining adequate housing, when he ignored the department's communications for a number of months. The father

failed to provide any evidence that he attempted to obtain a shelter placement or any type of stable housing. The department's duty to provide reasonable efforts is contingent on the parent's fulfillment of his parental responsibilities. See Adoption of Mario, 43 Mass. App. Ct. 767, 774 (1997).

4. Continued unfitness. At trial, a "judge must determine both whether the parent is currently unfit and whether 'on the basis of credible evidence, there is a reasonable likelihood that the parent's unfitness at the time of trial may be only temporary.'" Adoption of Ilona, 459 Mass. at 60, quoting Adoption of Carlos, 413 Mass. 339, 350 (1992). "Because childhood is fleeting, a parent's unfitness is not temporary if it is reasonably likely to continue for a prolonged or indeterminate period." Adoption of Ilona, supra. In assessing whether a parent's unfitness is likely to continue indefinitely, a judge may consider "past conduct, medical history, and present events to predict future ability and performance as a parent." Care & Protection of Bruce, 44 Mass. App. Ct. 758, 761 (1998).

There was ample evidence in the record that the father's unfitness was likely to continue indefinitely. The father failed to engage in most of the services offered to him and was unable to obtain safe and secure housing. Given this, as well as his long history of substance misuse, it was not error for

the judge to conclude that the father's unfitness was likely to continue for a prolonged or indeterminate period.<sup>4</sup>

5. Visitation. "A judge has broad discretion to grant posttermination or postadoption visitation" where it is in the best interests of the child. Adoption of Douglas, 473 Mass. 1024, 1027 (2016). When determining whether to order visitation where a preadoptive family has been identified, as in this case, the judge must balance the benefit of such an order to the children with "the intrusion that an order imposes on the rights of the adoptive parents, who are entitled to the presumption that they will act in their child's interest." Adoption of Ilona, 459 Mass. at 64-65. The best interests of the children should be "based on emotional bonding and other circumstances of the actual personal relationship of the child and the biological parent, not in the rights of the biological parent nor the legal consequences of their natural relationship." Adoption of Vito, 431 Mass. 550, 562 (2000). The decision to grant visitation is left to the discretion of the trial judge. See Adoption of John, 53 Mass. App. Ct. 431, 439 (2001).

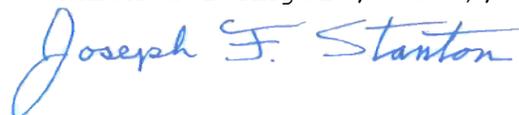
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<sup>4</sup> "We give substantial deference to a judge's decision . . . and reverse only where the findings of fact are clearly erroneous or where there is a clear error of law or abuse of discretion." Adoption of Ilona, 459 Mass. at 59. While the judge, at times, may have weighed the evidence against the father harshly, we cannot say that any of her findings were clearly erroneous as they were supported by the evidence.

Although the father and the children believe that a "significant bond" exists between them, the father had not had a visit with the children since October, 2020, and failed to respond to the department's repeated attempts to reach him over a ten month period preceding trial. The children are close with their foster family and call their foster parent "mom." They have been in the same home since July 2020, and it is a comprehensive foster care placement -- the highest level of care for children with special needs.<sup>5</sup> The foster mother can also adopt all the siblings together. "[T]he bond of a child with foster parents is 'a factor that has weight in the ultimate balance'" (citation omitted). Adoption of Daniel, 58 Mass. App. Ct. 195, 202-203 (2003). We discern no abuse of discretion in the decision by the trial judge to leave posttermination and postadoption visitation to the discretion of the department and the adoptive family, respectively.

Decrees affirmed.

By the Court (Green, C.J.,  
Walsh & D'Angelo, JJ.<sup>6</sup>),



Clerk

Entered: August 15, 2022.

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<sup>5</sup> The department has proposed a plan of adoption for all three children by the foster mother. An assessment was conducted and the department anticipated that the foster mother would be approved as an adoptive resource.

<sup>6</sup> The panelists are listed in order of seniority.