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COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC-12295

CARE AND PROTECTION OF J.C.

ON REPORT BY A SINGLE JUSTICE OF THE APPEALS COURT

Docket No. 2016-J-0277

BRIEF OF AMICI CURIAE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....................................iii

INTEREST OF AMICUS CURIAE...............................1

ISSUES PRESENTED ON APPEAL..............................4

STATEMENT OF THE CASE...................................5

STATEMENT OF THE FACTS..................................5

SUMMARY OF ARGUMENT.....................................5

ARGUMENT..7

I. AT A 72-HOUR HEARING, WHERE THE TRIAL COURT IS CONSIDERING WHETHER A CHILD WILL REMAIN IN THE CUSTODY OF DCF PENDING A FINAL HEARING ON THE MERITS OF A CARE AND PROTECTION PROCEEDING, THE JUDGE MUST COMPLY WITH THE REASONABLE EFFORTS DETERMINATION REQUIREMENTS OF G.L. C. 119, § 29C; THESE REQUIREMENTS APPLY AT BOTH THE INITIAL EX PARTE HEARING AND THE 72-HOUR HEARING...........13

A. G.L. c. 119, § 24 unambiguously requires that the court make a determination at the 72-hour hearing as to whether DCF made reasonable efforts to prevent removal.14

B. Requiring the reasonable efforts determination at the 72-hour hearing is consistent with widespread court procedure when parties seek emergency relief, leads to better-informed determinations, and in the case of a care and protection case, promotes child welfare best practices...............15

II. WHERE G.L. C. 119 § 29C DELINEATES CERTAIN EXCEPTIONS FROM THE REASONABLE EFFORTS REQUIREMENT, NONE OF WHICH APPLIES IN THE CIRCUMSTANCES OF THE CASE, DCF MAY NOT BE EXCUSED FROM MAKING REASONABLE EFFORTS BASED ON ALLEGED “EXIGENT” CIRCUMSTANCES.........................20

A. Federal and State law do not permit any exceptions to the reasonable efforts

requirement other than those enumerated in G.L. c. 119, § 29C........................21

B. Excusing reasonable efforts in exigent circumstances would eliminate the intended oversight and feedback function of the juvenile court without improving the safety of children...............................26

III. THE JUVENILE COURT HAS THE AUTHORITY, PURSUANT TO THREE INDEPENDENT BUT RELATED POWERS BESTOWED UPON THE COURT, TO ORDER DCF TO PROVIDE SERVICES TO A CHILD AND FAMILY SUCH AS THE ONES THE SINGLE JUSTICE ORDERED IN THIS CASE, AND ISAAC AND JEREMY DO NOT HOLD OTHERWISE..........31

A. The juvenile court must act to effectuate timely permanency for children under its jurisdiction and therefore supervise DCF's efforts to achieve that permanency; fulfillment of such a mandate requires the power to issue orders to DCF regarding the provision of services to children and families......................33

B. Pursuant to McKnight, the juvenile court is authorized to define the scope of DCF's obligations and order DCF to meet those obligations..........................38

C. Where a judge determines, as occurred in this case, that DCF has failed to comply with the law to make reasonable efforts prior to removing a child, thereby causing irreparable harm to the child and family, the court has the power, pursuant to its equitable authority and G.L. c. 119, § 29C, to craft orders designed to remedy that harm......................................42

D. Isaac and Jeremy do not forbid the orders made by the single justice in this case......................................45

CONCLUSION...49

TABLE OF AUTHORITIES

Cases **Page(s)**

Adoption of Gregory,
434 Mass. 117 (2001) 3, 38

Adoption of Hugo,
428 Mass. 219 (1998) 34

Adoption of Ilona,
459 Mass. 53 (2011) 19, 35, 37, 38

Adoption of Lenore
55 Mass. App. Ct. 275 (2002) 35

Adoption of Rico,
453 Mass. 748 (2009) 41

Atty Gen v. Sheriff of Suffolk County,
394 Mass. 624 (1985) 40, 48

Care and protection of Elaine,
54 Mass. App. Ct. 266 (2002) 34

Care and Protection of Issac,
419 Mass. 602 (1995) ....*passim*

Care and Protection of Jeremy,
419 Mass. 616 (1995) ....*passim*

Care and Protection of Robert,
408 Mass. 52 (1990) 16, 17, 47

Commonwealth v. Perry,
455 Mass. 1010 (2009) 22

Commonwealth v. Ronald R.,
450 Mass. 262 (2007) 22

Dep't of Pub. Welfare v. J.K.B.,
379 Mass. 1 (1979) 10

Harborview Residents' Comm., Inc. v. Quincy
Hous. Auth.,
368 Mass. 425 (1975) 22

In the Matter of McKnight,
406 Mass. 787 (1990) ....*passim*

Independent Wireless Tel. Co. v. Radio Corp. of America,
269 U.S. 459 (1926) 44

L.B. v. Chief Justice of the Probate and Family Court Department,
474 Mass. 231 (2016) 45

Perez v. Boston Housing Authority,
379 Mass. 703 (1980) 44

Police Commissioner of Boston v. Municipal Court of Dorchester District Court,
374 Mass. 640 (1978) 37

Santosky v. Kramer,
455 U.S. 745 (1982) 38

Stanley v. Illinois,
405 U.S. 645 (1972) 9

Statutes and Court Rules

42 U.S.C. §671 (a)(15)(D) (i)........................22

42 U.S.C. § 675(5)(C)...............................34

Adoption Assistance and Child Welfare Act of
1980 97

Adoption and Safe Families Act of 1997...............23

G.L. c. 18B, § 3....................................39

G.L. c. 119, § 1........................8, 10, 26, 39

G.L. c. 119 § 21.............................47, 48

G.L. c. 119, § 23...................................49

G.L. c. 119, § 24.............................*passim*

G.L. c. 119, § 25...........................9, 10, 48

G.L. c. 119, § 26...........................9, 45, 48

G.L. c. 119, § 29B............................*passim*

G.L. c. 119, § 29C............................*passim*

G.L. c. 119 § 32................................47

G.L. c. 119, § 35...............................41

G.L. c. 119, § 51B(g)...........................39

G.L. c. 210, § 3.........................9, 34, 37

G.L. c. 218, § 59...........................36, 43

G.L. c. 221, § 34E...............................3

Mass. R. Civ. P. 9(b)...........................43

Mass. R. Civ. P. 12(b)..........................43

Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183 128 Stat 1919 (2014) 33, 36

Stat 1984 c. 197 §5.............................43

Stat 1992 c. 69 §6..............................23

Stat 1999 c. 3 § 12.............................23

Stat 2002 c. 371 §2.............................23

Stat 2008 c. 176 §87............................23

Stat 2010 c. 369 §22............................23

Trial Court Rule VI 35

Regulations

110 C.M.R. § 1.02..............................39

110 C.M.R. § 1.03..............................39

110 C.M.R. § 6.04(7)............................8

Other Authorities

Troutman, Ryan, Cardi, The Effects of Foster Care Placement on Young Children's Mental Health, 16 Protecting Children 30 (2000) 11

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INTEREST OF AMICI CURIAE

The **Children's Law Center of Massachusetts** ("CLCM") is a private, non-profit legal advocacy and resource center providing direct representation to children in Eastern Massachusetts as well as technical assistance and training to lay and professional communities throughout the Commonwealth on children's issues related to child welfare, civil rights, health, education and immigration. CLCM's mission is to promote and secure equal justice and to maximize opportunity for low-income children and youth by providing quality advocacy and legal services.

The **Massachusetts Law Reform Institute** ("MLRI") is a statewide nonprofit poverty law and policy center. Its mission is to advance economic, racial and social justice through legal action, education and advocacy that removes barriers to opportunity and creates a path to self-sufficiency for low-income individuals and families. Through its Child and Family Law Unit, MLRI advocates for judicial, administrative and legislative policies, in both the private child custody and child welfare arenas, that make the lives of low-income parents and their children safer and more physically, emotionally and financially stable.

Founded in 1977, the **National Association of Counsel for Children** ("NACC") is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well-being of America's children. The NACC works to strengthen legal advocacy for children and families by promoting well resourced, high quality legal advocacy; implementing best practices; advancing systemic improvement in child serving agencies, institutions and court systems; and promoting a safe and nurturing childhood through legal and policy advocacy. NACC programs which serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, policy advocacy, and the amicus curiae program. Through the amicus curiae program, the NACC has filed numerous briefs involving the legal interests of children and families in state and federal appellate courts and the Supreme Court of the United States.

The **Mental Health Legal Advisors Committee** ("MHLAC") was established by the General Court in 1973 under the jurisdiction of the Supreme Judicial Court. G.L. c. 221, § 34E. MHLAC provides legal services to indigent litigants in a variety of proceedings,

including matters in which the rights of parents are at stake. As an advocate for rigorous procedural protections and substantive legal standards, it has participated as amicus in many cases, including Adoption of Gregory, 434 Mass. 117 (2001) and In the Matter of McKnight, 406 Mass. 787 (1990).

The **Center for Public Representation** ("CPR") provides free legal services to people with disabilities. **Greater Boston Legal Services** ("GBLS") provides legal services to indigent litigants in a variety of civil proceedings, including matters in which the Department of Children and Families ("DCF") becomes involved and the custody of children and the rights of parents are at stake. These programs have a strong interest in ensuring access to justice for all litigants in the courts of the Commonwealth, particularly so for parents and children.

Citizens for Juvenile Justice ("CFJJ") is an independent, statewide nonprofit organization which strives to improve the Commonwealth's juvenile justice system. Its interest in this matter stems from its research into the causes of youth entering the juvenile justice system from the child welfare system, which include lack of permanency, stability, or

appropriate services being provided to children prior to and at their entry into the child welfare system.

The **Juvenile Rights Advocacy Program** ("JRAP**)** at Boston College Law School is a curricular law clinic, based at Boston College Law School since 1995. JRAP provides full civil legal representation and social work support to youth who are in the delinquency or status offender systems. Its interest stems from this work.

ISSUES PRESENTED ON APPEAL

I. When the Department of Children and Families ("DCF") removes a child from his parents, a juvenile court must determine pursuant to G.L. c. 119, §§ 24, 29C whether or not DCF made reasonable efforts to prevent or eliminate the need for that removal. Must the juvenile court judge make that determination at the *ex parte* hearing and the 72-hour hearing?

II. G. L. c. 119, § 29C enumerates certain exceptions from the reasonable efforts requirement. May DCF be excused on any other basis from making reasonable efforts to eliminate the need for removal of the child from his home?

III. The single justice in this case found that DCF failed to meet its obligation to make reasonable efforts to prevent removal of the child from his home. When a juvenile court makes such a finding, does the court have the authority to order DCF to provide services in the best interest of the child?

STATEMENT OF THE CASE

Amicus Curiae adopt the statement of the case from the Brief of Appellants Father and Child.[1] See Father's Brief at 1-5 and Child's Brief at 1-4.

STATEMENT OF THE FACTS

Amicus Curiae adopt the statement of the facts from the Brief of Appellants Father and Child. See Father's Brief at 5-9 and Child's Brief at 4-13.

SUMMARY OF ARGUMENT

When a juvenile court grants custody of a child to DCF at a 72-hour hearing, G.L. c. 119, § § 24, 29C require the juvenile court to determine at that hearing whether DCF made reasonable efforts to prevent or eliminate the need to remove the child from his parents (pp. 13-15). By making a reasonable efforts determination at the 72-hour hearing, which is the first hearing at which the parents and child have a chance to present their case and the outcome of which may have long term and profound impacts on their family, the court follows standard court practice for

[1] Throughout this brief, Father's Brief is referred to as "F. Br." and Father's Reply Brief as "F. R. Br." Child's Brief is referred to as "Ch. Br." Finally, DCF's brief is referred to as "DCF Br."

emergency orders, which leads to better-informed decisions (pp. 15-20).

DCF is not excused from making reasonable efforts to prevent or eliminate the need to remove a child from his parents when none of the statutory exceptions enumerated in G.L. c. 119, § 29C apply. The clear language of § 29C does not include an exigent circumstances exception; federal guidance does not excuse a judicial determination of reasonable efforts when exigent circumstances exist; and reading an emergency exception into DCF's obligation to make reasonable efforts would eliminate the need to make those efforts for any child removed pursuant to an emergency § 24, which is the great majority of removals (pp. 20-26). The judicial reasonable efforts determination also provides feedback and oversight on a system-wide basis to ensure that DCF fulfills its mandate to keep children safely in their home whenever possible. Excusing reasonable efforts determinations in exigent circumstances would limit this intended oversight function of the juvenile court without providing additional safety for children (pp. 26-31.)

The juvenile court has the authority to order DCF to provide services to a family, particularly when DCF

has already failed to provide reasonable efforts to prevent removal. In order for the juvenile court to fulfill its mandate to ensure permanency for children, including ensuring that DCF is making reasonable efforts to achieve that permanency, it must have the power to order DCF to provide services (pp. 31-38). Moreover, a court has the power to define the scope of an executive agency's obligations and to order the agency to meet those obligations. The single justice did just that in this case (pp. 38-42). The juvenile court is especially empowered to order DCF to provide services when the court finds that it failed to make reasonable efforts because, due to DCF's failure and pursuant to § 29C, the court may make "any appropriate order conducive to the child's best interest" (pp. 42-45). DCF's reliance on Care and Protection of Jeremy, 419 Mass. 616 (1995) and Care and Protection of Isaac, 419 Mass. 602 (1995) to minimize the role of the court is misplaced as those cases had narrow holdings regarding placement (pp. 45-49).

ARGUMENT

This Court has the opportunity in this case to affirm the juvenile court's responsibility and authority to protect children in this Commonwealth

from unnecessary state intervention into the lives of their families. Under Massachusetts law, the juvenile court performs this function, in large part, through its reasonable efforts determinations and its role in determining a permanent plan for a child. Permanency for children involved with DCF is achieved first through stabilization of the family (i.e., preventing removal of a child), then reunification with the parents, or, finally, if reunification is not possible, another permanent substitute care plan. G.L. c. 119 § 1, 29B; 110 C.M.R. 6.04(7). DCF's arguments in this case seek to minimize and effectively eliminate the oversight of the juvenile court in this realm. These arguments find no support in Massachusetts law or sound child welfare policy and ultimately would lead to unnecessary disruptions in family integrity and harm to children.

The History and Importance of Judicial Reasonable Efforts to Prevent Removal Determinations and the Harm Caused by Removal

The reasonable efforts requirement is fundamental to a care and protection case as it is the primary vehicle to prevent removal and ensure timely reunification or, if reunification is impossible, alternative permanency for children involved with DCF.

These determinations occur from the very first hearing of a care and protection case, G.L. c. 119, §§ 24, 25, must be made again as part of judicial decisions affecting parents' rights, G.L. c. 119, § 26; G.L. c. 210, § 3, and continue until the child achieves permanency, G.L. c. 119, § 29B.

The Adoption Assistance and Child Welfare Act ("AACWA") of 1980, which first introduced the concept of reasonable efforts in 1980 and which Massachusetts quickly incorporated into its own law four years later, demanded for the first time that child welfare agencies take affirmative actions to prevent the removal of children from their homes when removal could be safely avoided with the provision of services. This preference and emphasis on preserving family integrity in the first instance has dual underpinnings: recognition of the constitutionally protected family relationships for both children and parents and an understanding of the harm caused to children by removing them from their family. Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("The rights to conceive and to raise one's children" are "essential . . . basic civil rights of man . . . far more precious

. . . than property rights."); Dep’t of Pub. Welfare v. J.K.B., 379 Mass. 1, 3 (1979).

Consistent with the federal statute and in recognition of the impact of removal on children, in Massachusetts, removal of children from their parents is permissible only when all available resources are insufficient to keep them safely at home. See G.L. c. 119, § 1 (declaring it to be the policy of the Commonwealth “to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection”); G.L. c. 119, §§ 24, 29C (requiring DCF to make reasonable efforts to avoid removal).

The intent of federal and Massachusetts law is clear: the way we keep children safe from abuse or neglect from their parents is first by addressing the family issues that put children at risk and only removing them and keeping them in state custody as a last resort, *i.e.*, after the State has made reasonable efforts to avoid doing so.

The initial prevention services that DCF must provide are especially important because separating children from their parents is traumatic and disruptive of family life from which child well-being

springs. "Everyone would agree that children should not be exposed to abuse and neglect. However, the process of being removed from one's home and placed in foster care has consequences as well, and can have negative effects that last a lifetime." U. Penn. Collaborative on Community Integration, Removal from the Home: Resulting Trauma 1 (2010), available at http://tucollaborative.org/pdfs/Toolkits_Monographs_Guidebooks/parenting/Factsheet_4_Resulting_Trauma.pdf. For young children, out-of-home placements and disruptions in attachment relationships have implications for their healthy emotional development. Troutman, Ryan, Cardi, The Effects of Foster Care Placement on Young Children's Mental Health, 16 Protecting Children 30, 30-31 (2000). Even short-term removals from their family can have significant effect. J. Goldstein, A. Solnit, S. Goldstein, & A. Freud, The Best Interest of the Child: The Least Detrimental Alternative 41 (1996).

In a case such as this, it is important to note that among children on the "margin of placement," (those for whom social workers might be expected to disagree about the necessity of removal) those who remain at home have better long term outcomes than

those placed in foster care. Doyle, Child Protection and Child Outcomes: Measuring the Effects of Foster Care, 96 The American Economic Review 1583 (2007). A longitudinal study of young children in poverty found children placed in foster care had more emotional problems and higher levels of behavioral problems than children who were in similar situations of maltreatment but who remained in their homes. Lawrence, Carlson, & Egelund, The Impact of Foster Care on Development, 18 Development and Psychopathology 57, 57, 70-72 (2006).

In this case, DCF ignored these underlying principles of family preservation by failing to make reasonable efforts, and the trial court abdicated its oversight responsibility by excusing DCF from this failure. The consequences of that combination of agency and court inaction unnecessarily put a child at great risk of traumatization and tore apart a family. Without thorough vetting and oversight by the juvenile court of DCF's efforts to keep children safely at and to return them home, the pendulum swings back to where Congress found itself in 1980: too many avoidable removals, traumatized children, families unnecessarily ripped apart, and children languishing in foster care.

This case presents an opportunity for greatly needed guidance in this area.

I. AT A 72-HOUR HEARING, WHERE THE TRIAL COURT IS CONSIDERING WHETHER A CHILD WILL REMAIN IN THE CUSTODY OF DCF PENDING A FINAL HEARING ON THE MERITS OF A CARE AND PROTECTION PROCEEDING, THE JUDGE MUST COMPLY WITH THE REASONABLE EFFORTS DETERMINATION REQUIREMENTS OF G.L. C. 119, § 29C; THESE REQUIREMENTS APPLY AT BOTH THE INITIAL EX PARTE HEARING AND THE 72-HOUR HEARING.

Massachusetts law unambiguously states that at a 72-hour hearing, a trial court judge must determine[2] whether DCF has made reasonable efforts to prevent the child's removal from his or her home. DCF's arguments to the contrary conflict with the clear language of the statute.

Furthermore, DCF ignores the purposes of the reasonable efforts determination at the 72-hour hearing, the first hearing at which the parents and child have a chance to present their case, and the outcome of which may have both long term and

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[2] The Court's notice soliciting amicus briefs, refers to the "certification and determination requirements" of G.L. c. 119, §29C (regarding DCF's reasonable efforts to eliminate the need for removal of the child from the home). Our reading of § 29C is that it requires that the court "certify" that continuation of the child in his home is contrary to his best interests, and "determine" that DCF has made reasonable efforts to prevent or eliminate the need for removal from the home. Therefore, we have used the term "determination" to refer to the court's duties with respect to reasonable efforts.

profoundly disruptive impacts on their family. DCF's argument requires the belief that the child's and parents' case and input regarding their needs and capacities are irrelevant to the reasonable efforts determination. This runs counter to established law and sound child welfare practice.

A. G.L. c. 119, § 24 unambiguously requires that the court make a determination at the 72-hour hearing as to whether DCF made reasonable efforts to prevent removal.

As Appellant Father's brief lays out clearly, Massachusetts law requires that the trial court make a reasonable efforts determination at the 72-hour hearing. F.BR 13-15; F.R.Br. 3-5. The language of § 24 is straightforward: it describes the 72-hour hearing as the hearing on notice which determines whether custody shall remain with DCF beyond 72 hours and states that at that hearing "[t]he court shall . . . consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C." Section 29C in turn requires that the court determine in "written form" whether DCF "has made reasonable efforts prior to the placement of a child with [DCF] to prevent or eliminate the need for removal from the home."

DCF claims, without support, that despite the clear language of § 24, the judge at the 72-hour hearing was not required to make a reasonable efforts determination because that determination had already been made by the judge at the ex parte hearing. DCF Br. 29-32. To reach this conclusion, DCF cites the first half of the sentence describing the court's reasonable efforts obligations at the 72-hour hearing which suggests that the reasonable efforts determination may be optional. DCF Br. 29-30. However, DCF then omits the rest of the sentence which says "and shall make the written certification and determinations required by said section 29C." G.L. c. 119, § 24. This omitted portion makes § 29C clear: where a court holds both an ex parte and a 72-hour hearing, it must make a reasonable efforts determination at both.

B. Requiring the reasonable efforts determination at the 72-hour hearing is consistent with widespread court procedure when parties seek emergency relief, leads to better-informed determinations, and in the case of a care and protection case, promotes child welfare best practices.

Section 29C of G.L. c. 119 requires that "[i]f a court of competent jurisdiction commits, grants or transfers custody of a child to [DCF] or its agent" it

must make a reasonable efforts determination. DCF argues that since the transfer of custody is first made at the ex parte hearing the reasonable efforts determination need not be made again at the 72-hour hearing. DCF Br. 29-32. This argument ignores the two-part nature of the Massachusetts custody transfer decision-making process which this court described in Care and Protection of Robert, 408 Mass. 52, 57 (1990). In that case, this Court spelled out the three parts of the Commonwealth's custody decision making process required under G.L. c. 119, § 24: first the emergency hearing, second the 72-hour hearing, and third, the adjudication on the merits. *Id.;* G.L. c. 119, § 24.

In requiring a reasonable efforts determination when a court transfers custody to DCF, § 29C does not distinguish between the two parts of that removal decision, as DCF claims. Instead, just as with a temporary restraining order and a preliminary injunction-on which the ex parte and temporary custody hearing are modelled-the emergency and the 72-hour hearings are two separate adjudications about the child custody removal. The difference is not in what determinations must be made at each hearing, as the

removal and the reasonable efforts decisions are made at both, it is in the purposes and results of the two hearings as well as in which parties are present. The emergency hearing provides temporary relief that expires within 72 hours of having been entered. It is meant to prevent irreparable harm, is not a judgment on the merits, and is held ex parte due to the need for expedition. See Robert at 57 (comparing the ex parte hearing to a temporary restraining order hearing.) The 72-hour hearing, on the other hand, like a preliminary injunction, addresses the likelihood of success on the merits, the resulting order remains in place for at least a year, and the parties are present and have their first opportunity to present their case. See Robert at 61, 61 n. 5, 68 n. 7 (analogizing the 72-hour hearing to the preliminary injunction hearing).

Moreover, unlike at the ex parte hearing, the reasonable efforts determination at the 72-hour hearing is made upon consideration of the full array of facts presented by both parties at the 72-hour hearing. If the reasonable efforts determination could be dispensed with at the ex parte hearing, and did not need to be made again at the 72-hour hearing on

notice, then the parents would have no opportunity to respond and provide evidence to the court regarding DCF's failure to make reasonable efforts. This would not only deprive parents of their procedural due process rights, but it would also deprive the court of vital information and thereby weaken decision-making about whether removals of children from their parents are necessary.

The 72-hour hearing gives parents their first opportunity to correct or clarify inaccurate or overstated claims that DCF may make to the Judge at the ex parte hearing. As Appellant Father's reply brief illustrates, this case presents an excellent example of why the court should hear from the parents about reasonable efforts at the 72-hour hearing. F. R. Br. 4-5. For example, at the ex parte hearing the DCF social worker made the false statement that "reasonable efforts by the Department were attempted, however, the parents have either not participated or have only minimally participated."[3] F. R. Br. 4-5. It

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[3] The language of the social worker's affidavit appears to be boilerplate language in that it was not tailored to the facts of this case. First, it was not true, which the social worker acknowledged at the 72-hour hearing. F. R. Br. 5. Second, it says "the parents have not participated or have only minimally

was not until the 72-hour hearing, where the parents, who were present and represented by counsel, could challenge that testimony. Indeed, in this case, the social worker admitted at the 72-hour hearing that she had offered no services to the parents, and therefore that they had not refused to engage in any services that were offered. F. R. Br. 5.

In addition, the 72-hour hearing also presented the first opportunity for the parents to inform the court about what services could have been provided but were not to support their family and keep their child safely at home. See Adoption of Ilona, 459 Mass. 53, 60-61 (2011) (recognizing that with respect to reasonable efforts, "[t]he Department must 'match services with needs'"). This is especially important in the context of a care and protection case where research has shown that parents who are engaged in the decision-making process are more likely to engage in services. See Berrick, Dickens, Pösö, Skivenes, Parents' Involvement in Care Order Decisions: A Cross-Country Study of Front-Line Practice, 22 Child and Family Social Work 626, 627 (May 2017). In this case,

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participated," rather than specifically stating whether there was no parental participation or minimal participation. F. R. Br. 4-5.

for example, the parents first had the opportunity at the 72-hour hearing to inform the court that DCF might have but did not give them an opportunity to clean up by themselves, or provide them homemaker or parent aide services to help with the cleanup. C. Br. 17-19.

The parents also had their first opportunity to challenge DCF's refusal to allow the child to stay with his maternal aunt for a few days while they cleaned up the house, which the social worker refused to do even though the aunt had arrived immediately at the home while the social worker was still there and offered to take the child. C. Br. 6-11, F. Br. 7-8; See The Ties that Bind: Strengthening, and Reducing Racial Disparities in, Kinship Foster Care in Massachusetts, Massachusetts Law Reform Institute, pp. 15-16 (2014) and sources cited therein (describing the benefits of kinship care for children who must be removed from their parents.)

II. WHERE G.L. C. 119 § 29C DELINEATES CERTAIN EXCEPTIONS FROM THE REASONABLE EFFORTS REQUIREMENT, NONE OF WHICH APPLIES IN THE CIRCUMSTANCES OF THE CASE, DCF MAY NOT BE EXCUSED FROM MAKING REASONABLE EFFORTS BASED ON ALLEGED "EXIGENT" CIRCUMSTANCES

Massachusetts law requires a reasonable efforts determination at the hearings regarding removal unless

one of four circumstances enumerated in § 29C exist. Contrary to DCF's argument, a judge at the ex parte hearing may not excuse DCF from making reasonable efforts to prevent the removal of a child because an emergency existed. This claim has no support in the law and, if accepted, would disserve children and families.

A. Federal and State law do not permit any exceptions to the reasonable efforts requirement other than those enumerated in G.L. c. 119, § 29C.

As all three parties acknowledge, the juvenile court must make a reasonable efforts determination in every case in which the court grants custody to DCF, except in four specifically enumerated circumstances.[4] DCF Br. 15-16, C. Br. 16, F. Br. 15-16. DCF has

[4] The exceptions are: committing, or aiding and abetting in, murder or voluntary manslaughter of a sibling of the child, abandonment of the child, the involuntary termination of the parent's rights to another sibling of the child, or state-defined aggravated circumstances. Massachusetts defines "aggravated circumstances" as murder of another parent of the child in the presence of the child, or subjecting the child or other children in the home to sexual abuse or exploitation or severe and repetitive conduct of a physically or emotionally abusive nature. "Emotionally abusive behavior" is defined as conduct causing an impairment to or disorder of the intellectual or psychological capacity of a child as evidenced by observable and substantial reduction in the child's ability to function within a normal range of performance and behavior." G.L. c. 119, § 29C.

conceded that it made no efforts at all to prevent the child's removal, F. Br. 15, and that none of the statutory exceptions to the reasonable efforts requirement existed in this case. DCF Br. 24, C. Br. 16. Instead, DCF argues, reasonable efforts were not required because the conditions in family's home put the child at risk of immediate harm.

1. The text of G.L. c. 119, § 29C precludes DCF's interpretation

The clear text of the statute should end the inquiry. By expressly identifying certain exceptions to the reasonable efforts requirement, the legislature clearly intended to exclude all others not specifically enumerated. Commonwealth v. Perry, 455 Mass. 1010, 1011 (2009) ("[a] general tenet of statutory construction is that the 'statutory expression of one thing is an implied exclusion of other things omitted from the statute.'") (quoting Commonwealth v. Ronald R., 450 Mass. 262, 266 (2007), quoting Harborview Residents' Comm., Inc. v. Quincy Hous. Auth., 368 Mass. 425, 432 (1975)). Here, while federal law allows states to further define one of the four enumerated exceptions, the "aggravated" circumstances exception, See 42 U.S.C., §671

(a)(15)(D)(i) (2014), Massachusetts did not include "exigent circumstances" in its definition of "aggravated circumstances." See G.L. c. 119, § 29C. The legislature's exclusion of an "exigent circumstances" is decisive.

Moreover, the legislature has amended § 29C several times since first adopting it in 1984, including following the federal clarification of the reasonable efforts requirement in the Adoption and Safe Families Act ("ASFA") of 1997. See G.L. c. 119, § 29C, as amended through St. 1992, c. 69, § 6; St. 1999, c. 3, § 12; St. 2002, c. 371, § 2; St. 2008, c. 176, § 87, eff. July 8, 2008; St. 2010, c. 359, § 22, eff. Jan. 3, 2011. The Legislature has therefore had ample opportunity to include an exigent circumstances exception within the text, and has declined to do so several times.

2. Federal guidance does not evince contrary legislative intent

Despite DCF's arguments, federal guidance, to the extent that it might aid this Court in interpreting Massachusetts law, does not provide a basis for implying the existence of an exigent circumstances exception to the reasonable efforts requirement.

DCF argues that ASFA and federal guidance interpreting ASFA, which emphasized child safety, somehow demonstrates Congressional intent to create additional exceptions to the reasonable efforts determination. DCF Br. 17-20, 24-26.

While language from the child welfare manual (the most recent of the guidance DCF cites) suggests that courts may determine that under specific emergency circumstances it is reasonable for the agency to make no efforts to prevent removal, this does not mean that the court is excused from making the reasonable efforts determination once it has determined that emergency circumstances exist, as the ex parte and 72-hour hearing judges did in this case. F. Br. 3, 13-14, 16-17. Instead, when the judge has determined that an emergency exists, that judge must still make a determination as to whether the agency made the efforts that were reasonable under those particular emergency circumstances.

As the child welfare manual states clearly, in a portion that DCF omits:

> While we recognize that concerns for the child's safety may preclude efforts to prevent removal, <u>the court must make a reasonable efforts determination. Even when children are removed in emergency</u>

> situations, the court must consider whether appropriate services were or could have been provided. When the court determines that it was reasonable for the agency to make no effort to provide services to prevent removal [or return the child home] in light of exigent circumstances discovered through assessment of the family, such as the safety or protection of the child, there must be a judicial determination to that effect.

Child Welfare Policy Manual, December 31, 2007, 8.3A.9b, Answer to Question 4 (emphasis added). Accordingly, federal guidance clarifies ASFA's intent that courts must evaluate whether DCF's efforts were reasonable under the circumstances, even when those circumstances are exigent.

3. The legislature could not have intended to include an emergency exception, as it would eliminate the reasonable efforts to prevent removal requirement in virtually all cases.

Most removals of children take place under emergency circumstances.[5] Indeed, the emergency nature of the removal is why most removal hearings are held on an ex parte basis, at or immediately after, the

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[5] Due to the time constraints on filing this brief, Amici were unable to obtain statistics from the trial court on the number of care and protection cases that begin at an ex parte hearing. The information that Amici has is based on their experience representing parents and children in these matters and as reported to them. In all courts except the Boston Juvenile Court, very few care and protection cases begin with something other than an ex parte hearing.

removal. If an exception to the reasonable efforts requirement were created for exigent circumstances, DCF would be excused from making reasonable efforts to prevent removal in almost all cases. Congress and the Massachusetts legislature, which sought through the reasonable efforts requirement to limit the number of children entering foster care, could not have intended to create such a meaningless prerequisite to removal. See Crossley, Defining Reasonable Efforts: Demystifying the State's Burden under Federal Child Protection Legislation, 12 B.U. Pub. Int. L.J. 259, 272.

B. Excusing reasonable efforts in exigent circumstances would eliminate the intended oversight and feedback function of the juvenile court without improving the safety of children.

The determination of whether reasonable efforts were made, if conducted as required, ensures that children are taken from their families and placed in state custody only when mobilizing all available resources is not sufficient to keep children safely at home, as is required by Massachusetts law. See G.L. c. 119 § 1; see also Crossley at 272, Judge Leonard Edwards, Reasonable Efforts: A Judicial Perspective 8 (2014).

While it is true that a reasonable efforts determination may not change the custody outcome for the individual child (because the court may determine that despite DCF's failure to make reasonable efforts the child should still be removed), the inquiry provides the vital gatekeeping and supervisory role that federal and state law has assigned to the courts. Edwards at 8-9. The court's determination as to whether DCF made reasonable efforts to prevent the removal protects not only the individual child and family before the court, but also protects all children and families that come to DCF's attention by providing feedback and guidance as to what efforts are reasonable under the often challenging circumstances that DCF confronts.

Without such guidance, DCF is more likely to bend to public and political pressure to err in favor of removing children rather than adhering to its more challenging mission of keeping children safe by keeping them safely with their families whenever possible. In fact, since December of 2013 when a boy under DCF supervision went missing, the number of children that DCF has removed from their families has increased dramatically. Michael Levenson, <u>State</u>

Failing on Granting Quick Hearings in DCF Cases, The Boston Globe (May 6, 2016), https://www.bostonglobe.com/metro/2016/05/05/parents-must-wait-days-weeks-for-due-process-after-children-taken-away/GS349cRs8YzqAc0fQPGl0K/story.html. The number of children in foster care in Massachusetts has grown from 7,677 to 9,482 children, a 23% increase in slightly over three years.[6]

This case serves as an excellent example of the need to make a reasonable efforts determination at both the ex parte and 72-hour hearing where emergency circumstances are alleged. Had the judge at the ex parte hearing conducted an inquiry as to what reasonable efforts were made, the social worker would have likely revealed that the parents had offered a maternal aunt, whom the child already spent a good deal of time with, and with whom the child could live

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[6] Such an increase also affects placement availability and stability. In 2013, before the recent surge, over 43% of children who had been in placement between 12 and 24 months had three or more placements Children's Bureau, Child Welfare Outcomes 2010-2013: Report to Congress, 27, 173 (Feb. 1, 2016), available at https://www.acf.hhs.gov/cb/resource/cwo-10-13. The child in this case moved from hotline home to hotline home for several weeks. Ch. Br. 13. Multiple placements in the foster care system exacerbate trauma to children. Joseph J. Doyle, Child Protection and Child Outcomes: Measuring the Effects of Foster Care, 97 The Am. Econ. Rev. 1583 (2007).

temporarily to remain safe while the parents could clean up their messy living quarters. F. Br. 7-8. The judge could have questioned the social worker as to why that aunt was not a suitable emergency placement, and what steps the social worker took to ascertain whether the aunt was suitable.

Creating an exigent circumstances exception would eliminate the court's gatekeeping function in almost every removal proceeding without keeping children safer. The fact that an emergency exists may well mean that very limited efforts are reasonable under those circumstances, but it is only by making an inquiry that a judge can ascertain the nature of the risk to the child, the resources available to the family, or temporary arrangements that could be made, short of granting custody to DCF, that would ensure the child's safety and enable the parents to address the issues that have created the risk. Moreover, while the circumstances that prompted removal may have been exigent, DCF is often involved with a family prior to the emergency, and the efforts made before the situation became urgent should also be considered in the court's reasonable efforts determination.

The term “reasonable” is flexible and bends with the situation at hand. What is reasonable with a less immediate risk may not be reasonable when the risk must be eliminated immediately. Reasonable efforts are required under exigent circumstances; however, they are only expected to be reasonable with respect to the exigent circumstances. The very use of the term “reasonable” provides the flexibility that courts need in order to ensure that children are safe while also ensuring they are not unnecessarily traumatized through the removal process. Federal guidance recognizes this flexibility without suggesting an exception to the reasonable efforts requirement. See, e.g. Child Welfare Policy Manual 8.3A.9b, Answer to Question 4, available at https://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=91.

Moreover, even in a case like this, where the judge makes a determination that DCF did not make reasonable efforts, Massachusetts law allows the judge to grant custody to DCF. G.L. c. 119, § 29C (“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.”). Thus, the fact that DCF has not made reasonable efforts to keep the child safe at home, does not mean that a judge must keep the child in a situation that the judge has determined to be unsafe. The trial judge may simultaneously fulfill his or her gatekeeping role and keep children safe.

III. THE JUVENILE COURT HAS THE AUTHORITY, PURSUANT TO THREE INDEPENDENT BUT RELATED POWERS BESTOWED UPON THE COURT, TO ORDER DCF TO PROVIDE SERVICES TO A CHILD AND FAMILY SUCH AS THE ONES THE SINGLE JUSTICE ORDERED IN THIS CASE, AND ISAAC AND JEREMY DO NOT HOLD OTHERWISE.

The juvenile court has the authority to order DCF to provide services and facilitate reunification and permanency, including services to help a family locate appropriate housing, visitation, and to permit a parent to participate in special education meetings, not only when DCF fails to fulfill its legal obligation to make reasonable efforts to prevent the removal of a child, but also as part of the court’s ongoing duty to monitor the efforts of DCF in order to ensure timely permanency for children. Three independent but related powers bestowed on the juvenile court make this clear.

First, the legislature has assigned to the juvenile court the vital task of ensuring permanency

for children, including ensuring that DCF is making reasonable efforts to that end. Without the power to independently review the adequacy of those efforts and issue orders accordingly, the juvenile court cannot effectively fulfill that function. Therefore, the power to issue orders regarding services is, by text and intent of G.L. c. 119, permissible.

Second, a court may define the scope of an executive agency's obligations and order the agency to meet those obligations. In the Matter of McKnight, 406 Mass. 787, 798 (1990). DCF must make reasonable efforts, and the juvenile court, not DCF, must determine what efforts are reasonable. The court, therefore, may define the scope of DCF's obligations with respect to those efforts and order DCF to meet them.

Third, the single justice's orders flow seamlessly from equity powers bolstered by the language of G.L. c. 119, § 29C. By failing to make reasonable efforts to prevent removal of the child from his parents, DCF violated the law and caused the child and family irreparable harm. Equity permits the juvenile court to remedy that wrong, and § 29C expressly permits the juvenile court to make orders

conducive to the best interest of the child when DCF fails to make reasonable efforts. G.L. c. 119, § 29C.

Finally, this Court's holdings in Care and Protection of Isaac, 419 Mass. 602 (1995), and Care and Protection of Jeremy, 419 Mass. 616, (1995) do not compel a different result. Those cases were narrow cases addressing DCF's powers of placement. They did not address the court's powers with respect to permanency and reasonable efforts or how to remedy harm caused to a child and parent(s) by DCF's failure to comply with the law. Accordingly, they are inapposite.

A. The juvenile court must act to effectuate timely permanency for children under its jurisdiction and therefore supervise DCF's efforts to achieve that permanency; fulfillment of such a mandate requires the power to issue orders to DCF regarding the provision of services to families.

Statutes, case law, and common sense all make clear that the juvenile court must and does have the power, as part of its duty to oversee and effectuate permanency, to order DCF to provide services. Without such power, the juvenile court's oversight of permanency and reasonable efforts becomes meaningless.

Federal and state law regarding care and protection cases includes directives to the juvenile

court to determine and manage how a child under its jurisdiction will achieve permanency. See, e.g., 42 U.S.C. § 675(5)(C)(requiring that state child welfare plans establish a permanency hearing process in order for a court to determine a child's permanency plan and certain specifics related to the chosen plan); G.L. c. 119, § 29B (requiring the court to determine at least annually a child's permanency plan and certain specific aspects of that plan); G.L. c. 210, § 3(c) (requiring the court to consider the plan for the child when deciding whether to terminate parental rights). This Court and the Appeals Court have explicitly recognized the oversight role of the juvenile court in determining a child's permanent plan. Adoption of Hugo, 428 Mass. 219, 234 (1998)(holding that the juvenile court may order an adoption plan different than the one proposed by DCF); Care and Protection of Elaine, 54 Mass. App. Ct. 266, 273-274 (2002)(chastising DCF for failing to provide services to the parents where adoption had been DCF's "desired objective" but no judicial adjudication had occurred). The juvenile court also has the responsibility to stay "vigilant" to ensure that DCF makes reasonable efforts to achieve that child's

permanent plan. Adoption of Ilona, 459 Mass. at 60-61 (recognizing that with respect to reasonable efforts, "[t]he Department must 'match services with needs, and the trial judge must be vigilant to ensure that it does so.'") (quoting Adoption of Lenore, 55 Mass. App. Ct 275, 279 n. 3 (2002)).

Although DCF tries to minimize the oversight role of the juvenile court by referring to the § 29C decision as a "certification" rather than a "determination," (DCF Br. 47, 48), chapter 119 repeatedly refers to the court's need to "determine" with respect to both the permanent plan for a child and reasonable efforts. G.L. c. 119 §§ 29B, 29C. An entire trial court rule has also been devoted to the procedure and judicial determinations required at the permanency hearing, a hearing dedicated to assessing permanency for the child and the reasonable efforts of DCF. Trial Ct. R. VI (2000).[7] And federal law continues to increase the court's oversight responsibilities. See, e.g., Preventing Sex Trafficking and

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[7] The Trial Court has recently published for public comment an updated and even more detailed Trial Court Rule VI. Trial Court Rule VI available at http://www.mass.gov/courts/case-legal-res/rules-of-court/rule-changes-invitations-comment/ic-permanency.html (last visited April 24, 2017).

Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (2014) (adding specific permanency plan-related determinations that state courts must make at permanency hearings).

Although Massachusetts law does not state what specific orders the court may craft in its oversight role, Massachusetts law does grant the juvenile court broad powers to act in the best interest of the child. G.L. c. 119 § 29B ("In conducting a permanency hearing, the court may make any appropriate order as may be in the child or young adult's best interests"); § 29C (permitting the court to make "any appropriate order conducive to the child's best interest" upon a determination that reasonable efforts had not been made); G.L. c. 218, § 59 (granting the juvenile court equity jurisdiction in matters arising under G.L. c. 119, 210). Such non-specific language makes sense in the context of decision-making in these highly fact-specific cases. DCF, ignoring the broad powers bestowed on the court by the legislature to act in the best interest of the child, argues, without further citation, that "G.L. c. 119...contains no general grant of authority to a judge to make specific orders as to how the Department is to carry out its custody

powers, including what services to offer." DCF Br. 36. But the court must have the power to carry out its duty to stay "vigilant." See Police Comm'r of Boston v. Mun. Court of Dorchester Dist. Court, 374 Mass. 640, 660-61 (1978)(finding the power to order expungement "as a necessary adjunct to [the courts'] exercise of judicial power"); see also National Council of Juvenile Court Judges, Enhanced Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, 27 (2016), available at https://www.ncjfcj.org/sites/default/files/%20NCJFCJ%20Enhanced%20Resource%20Guidelines%2005-2016.pdf (noting that the juvenile court must play a "more material and directive function than in other types of cases").

The practical outcome of DCF's limited view of the court's authority to make orders becomes evident when considered in light of the rule articulated by this Court in Adoption of Ilona, 459 Mass. at 61. Under the rule in Ilona, although the court must determine whether DCF has made reasonable efforts to reunify when it seeks to terminate the rights of parents to consent to adoption pursuant to G.L. c. 210, § 3, a finding that DCF has not made those

efforts does not prevent the court from terminating parental rights as long as the termination is found to be in the best interest of the child. Id. Moreover, a parent who waits until trial to raise with the court the issue of DCF's efforts waives that argument. Adoption of Gregory, 434 Mass. 117, 119-120, 120 n. 1 (2001).

If the juvenile court did not have the authority to order DCF to provide services, the rule established in Gregory and Ilona would leave the court unable to remedy the deficiency in services prior to a termination order (without a finding that DCF had abused its discretion) but able to order a termination that may have been avoided with those services. Cf. Santosky v. Kramer, 455 U.S. 745, 763 (1982) (recognizing that when a child is in agency custody, "the State even has the power to shape the historical events that form the basis for termination"). This ability to identify the failure to comply with the law in hindsight but not enforce the law from the outset cannot be what the Massachusetts legislature intended when it gave the juvenile court oversight responsibility for permanency and the reasonable efforts required to achieve it.

B. <u>Pursuant to McKnight, the juvenile court is authorized to define the scope of DCF's obligations and order DCF to meet those obligations.</u>

Related to but independent of its duty to effectuate permanency, the juvenile court has the power to define the scope of an agency's obligations and order that agency to meet them. <u>In the Matter of McKnight</u>, 406 Mass. 787, 798, 801 (1990). DCF, in turn, has an obligation to provide services to families to minimize state intervention. G.L. c. 18B, § 3(b)(Department's enabling statute); G.L. c. 119, § 1 (principles of service to families); G.L. c. 119, § 29C (reasonable efforts requirement); G.L. c. 119, § 51B(g) (Department's obligation to provide services following an abuse report); see also 110 C.M.R. § § 1.02, 1.03. The court, therefore, has the power to define the scope of DCF's service provision and reasonable efforts obligations and to order DCF to fulfill them. <u>McKnight</u>, 406 Mass. at 798, 801.

In <u>McKnight</u>, this Court considered a probate court's authority to require an executive agency to afford a person a particular service. <u>Id.</u> The Court stated that the trial court could have defined the level of services the agency was obligated to provide,

because when a court is presented with a question about the scope of an agency's obligations, "[i]t is, of course, for [the] court to decide what those obligations are." Id. at 798 (emphasis supplied). Once a trial court defines the level of the agency's legal obligations, that court is authorized to direct the agency to fulfill them. Id. at 801.

DCF argues that the holding in McKnight does not permit the orders made by the single justice in this case because McKnight only permits the court to order an agency to fulfill an obligation where there is only one way to properly fulfill it. DCF Br. 37. DCF's understanding of McKnight, however, skips the first step of the analysis. The juvenile court, not DCF, must first determine the scope of the agency's legal obligations, and inherent in that determination, is whether there is only one way to properly fulfill it. McKnight, at 798; accord Attorney General v. Sheriff of Suffolk County, 394 Mass. 624, 630 (1985)(affirming an order of the single justice defining the duty of city officials and directing them to fulfill it in a specific way). As in McKnight, this analysis in a care and protection case requires the court to closely examine the specific facts and the clinically

appropriate way to address the safety concerns that led to removal. See id. at 799-802. The single justice lawfully conducted that analysis in this case.

Following the single justice's determination that the Appellants Father and Child had not been provided the services to which their family was entitled prior to removal, the single justice went on in his order to define, pending a hearing by the trial court, the scope of DCF's reasonable efforts and service provision obligations. F. Br. 4. He found those obligations to include in this particular case: exploring housing options for the family, permission for the father to participate in special education meetings for the child, and daily visitation between father and child. F. Br. 4.[8]

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[8] Authority outside of the holding in McKnight exists that permits the juvenile court to make parent-child visitation orders for children in the custody of DCF and which raises federal and state constitutional concerns about leaving those visits to the discretion of DCF. G.L. c. 119, § 35; Adoption of Rico, 453 Mass. 749, 755 n.14 (2009)(holding that the juvenile court has the responsibility to make orders for posttermination parent-child visitation); Care and Protection of Jeremy, 419 Mass. 616, 620 n.7 (1995)(recognizing broader judicial power with respect to visitation than with respect to placement "for reasons not related to the structure and language of the governing legislation"). Although the Child and DCF raise some of these arguments, Ch. Br. 19-24, DCF Br. 33-36; the single justice clearly linked the

Tellingly, DCF does not argue in its brief that there were alternative ways in which it could have properly met its service provision and reasonable efforts obligations to the family. Instead, it merely argues that the court lacks the power to order DCF to comply with its obligations. McKnight says otherwise.

C. Where a judge determines, as occurred in this case, that DCF has failed to comply with the law to make reasonable efforts prior to removing a child, thereby causing irreparable harm to the child and family, the court has the power, pursuant to equity and G.L. c. 119, § 29C, to craft orders designed to remedy that harm.

Independent of but related to the juvenile court's power to order DCF to fulfill its legal obligations pursuant to McKnight, the juvenile court's equitable power as well as G.L. c. 119 § 29C permit the juvenile court to act in the best interest of the child and to remedy the harm caused by DCF's failure to comply with the reasonable efforts law. In a case such as the present one, where the juvenile court found that the child was at immediate risk of serious abuse or neglect if he remained in the custody of his

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orders to DCF's obligations to make reasonable efforts, and the alternative justification for the orders has not been fully briefed by the parties. Consequently, Amici have not included these independent arguments in its brief.

parents, the judge could not return the child to his home and instead crafted an equitable remedy conducive to the best interest of the child pursuant to § 29C.

In other litigation contexts, the remedy in a situation where the petitioner does not fulfill the prerequisites to filing a petition is dismissal of the petition with or without prejudice. See, e.g., Mass. R. Civ. P. 9(b), 12(b). The juvenile court, tasked with ensuring the safety of a child, does not always have that option because to dismiss the petition would mean returning a child to an environment the court has declared to be unsafe. The legislature presumably understood that quandary when it enacted the reasonable efforts requirement in 1984; it included a provision permitting the juvenile court to make any order regarding the care and custody of the child even if the court simultaneously found that DCF had not made reasonable efforts to prevent removal. Stat. 1984, c. 197, § 5.

Without the ability to remedy the harm through dismissal, the juvenile court must turn to its equity jurisdiction, and the provision of § 29C that evokes that jurisdiction, to craft a remedy. The juvenile court has equitable jurisdiction, pursuant to G.L. c.

218, § 59, and equity will not suffer a wrong without a remedy. See Independent Wireless Tel. Co. v. Radio Corp. of America, 269 U.S. 459, 472 (1926). Moreover, G.L. c. 119 § 29C does "not preclude the court from making any appropriate order conducive to the child's best interest" when the court has determined that DCF failed to make reasonable efforts to prevent removal. The single justice did just that.

Finding that DCF had failed to comply with the law and therefore caused the child and his parents irreparable harm, the single justice crafted a remedial order requiring DCF to provide services to ameliorate the harm caused and to speed up reunification. The substance of those orders was directly responsive to the harm caused to the child by DCF's failure to make reasonable efforts to prevent removal. See Perez v. Boston Housing Authority, 379 Mass. 703, 730 (1980) (noting that an injunction "like other judicial remedies, should be no more intrusive than it ought reasonably be to ensure the accomplishment of the legally justified result"). Frequent visitation, especially in the case of a child on the autism spectrum, and which would likely have been available if DCF had allowed the parents to place

the child with his aunt, ameliorates the destruction of the parent-child bond that occurs at removal. See L.B. v. Chief Justice of the Probate and Family Court Department, 474 Mass. 231, 242 (2016). Services to help the parents find housing speed their ability to address the primary concern that led to the removal of the child and therefore ensures that reunification can happen quickly. And allowing the child's father to attend special education meetings, a task he had been doing very effectively, F.Br. 5-6, also enhances the parent-child bond and ensures the educational best interests of the child by allowing the experts on the topic, the parents, to be present for discussions and decision-making.

Although DCF states that federal financial penalties can be the only consequence of DCF failing to comply with state law, DCF Br. 47, 48, such penalties do not remedy the harm or further the best interests of the child as required by equity and § 29C. DCF in this case violated a state law, equity requires an appropriate state court remedy, and § 29C anticipates an order in the best interest of the child. The single justice lawfully crafted such a remedy in this case.

D. Isaac and Jeremy do not forbid the orders made by the single justice in this case.

Care and protection of Isaac, 419 Mass. 602 (1995), and Care and Protection of Jeremy, 419 Mass. 616, (1995), on which DCF almost exclusively relies to argue that the juvenile court does not have the power to make the orders it did in this case, are inapposite here. This Court was very clear in those cases about the narrow scope of their holdings: "We are concerned here with the extent of the authority this legislation gives to a judge reviewing a decision made by [DCF] concerning the residential placement of an individual child committed to its custody." Isaac, 419 Mass. at 609; see also Jeremy, 419 Mass. at 616-17 (identifying the question in the case as "whether a judge ... has the authority to require [DCF] ... to place a child who is in [DCF]'s temporary custody ... into a specific type of residential placement). The balance of power between the juvenile court and DCF differs significantly in the context of provision of services versus placement decisions.

First, placement, the subject matter of the Isaac and Jeremy cases, is a decision related to the normal incidents of custody, Isaac, 419 Mass. at 609, and

does not, generally, affect constitutionally protected rights to family integrity. In contrast, decisions regarding preventative and reunification services to children and parents are not "related to normal incidents of custody." And decisions with respect to the provision of these services directly impacts constitutionally-protected rights. Jeremy, at 620 n.7(recognizing broader judicial power with respect to visitation than with respect to placement "for reasons not related to the structure and language of the governing legislation"); Care and Protection of Robert, 408 Mass. 52, 61-62 (identifying the reciprocal interests of parents and children to family integrity).

Second, much of the discussion in Isaac and Jeremy focused on the fact that G.L. c. 119 § 21 specifically identifies placement as a decision within the discretion of the custodian of the child, i.e., DCF, and that G.L. c. 119 § 32 explicitly references the best interests determination of DCF regarding the appropriateness of a residential placement. Isaac, 419 Mass. at 408-09. In contrast to the statutory text examined in Jeremy and Isaac, G.L. c. 119 places the responsibility of determining the permanent plan for a

child and the reasonable efforts that must be made to achieve that plan on the juvenile court, not DCF. See discussion supra Part III.B; see also G.L. c. 119 § § 24, 25, 26, 29B, 29C.

Third, this court in Isaac and Jeremy examined the power of the court pursuant to G.L. c. 119, § 21 to "review" placement decisions as the power to ensure that DCF has not abused its discretion in this regard. Isaac, 419 Mass. at 408-09. In the context of permanency and reasonable efforts, the court must not just "review," it must "determine" the permanent plan for the child and whether DCF has provided reasonable efforts. G.L. c. 119, §§ 29B, 29C.

Finally, in the case before this Court, unlike in Jeremy and Isaac, a judge found that DCF failed to comply with a statutory obligation, an obligation that DCF concedes exists under Massachusetts law. DCF Br. 47. Ordering the fulfillment of a statutory obligation is a "purely judicial function." Atty. Gen v. Sheriff of Suffolk County, 394 Mass. 624, 631 (1985).

Separation of powers concerns run through every case where a court is asked to order an agency to act. Each request must be viewed individually in the context of the statutory framework and the order that

the litigant seeks. McKnight, 406 Mass. at 798. Summarily identifying all actions of DCF as decisions "related to normal incidents of custody," as DCF does, and then citing Jeremy and Isaac should not and cannot be sufficient to prevent the issuance of such an order.[9] There are times when a court can tell an agency what to do, and this case is one of those times. Whether this court relies on the explicit and inherent power of the juvenile court to oversee permanency and the reasonable efforts required to achieve it, the holding of McKnight, the juvenile court's equity power and the text of § 29C, or some combination of all three, the single justice had the responsibility and the authority to make the orders that he did.

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[9] Another perverse offshoot argument of DCF's argument that services are "incidents of custody" affects young adults ages 18-22. Young adults, having reached the age of majority, are no longer in the "custody" of DCF but continue under the responsibility of DCF if they meet certain criteria. G.L. c. 119, § 23(f). There is no custody, therefore, of which the services DCF provides can be incidents. Consequently, according to DCF, despite the court having jurisdiction over the young adult's case, the young adult continuing to have a lawyer, and the continued responsibility of DCF to make reasonable efforts to achieve permanency for that young adult, G.L. c. 119, § 29B(b), there is no basis, even under the abuse of discretion standard, for the court to order DCF to provide any services on behalf of young adults.

CONCLUSION

For all the reasons set forth above, this Court should uphold the orders of the Single Justice and affirm (1) that in a care and protection case a trial court judge must comply with the written determination requirements of G.L. c. 119, § 29C at both the ex parte and the 72-hour hearing; (2) that DCF is not excused from making reasonable efforts to prevent or eliminate a need to remove a child from his or her parents when none of the statutory exceptions apply; and (3) that the trial court may enter orders to DCF to provide services to meet its reasonable efforts requirements and effectuate the child's permanency plan, and the orders in this case were proper; and enter any other relief that this Court deems just and equitable.

Respectfully submitted,

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Dated: April 25, 2017

Certificate of Service

I, Evan D. Panich, hereby certify that the foregoing document was served by email and FedEx on the parties in this case.

Dated: April 25, 2017

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MASS. R. APP. P. 16(K) CERTIFICATE OF COMPLIANCE.

I, Evan Panich, hereby certify that this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs.

Dated: April 25, 2017

Evan D. Panich