SJC-12295

# CARE AND PROTECTION OF WALT.[1]

Worcester. May 1, 2017. - October 20, 2017.

Present: Gants, C.J., Lenk, Hines, Gaziano, Lowy, & Budd, JJ.[2]

Department of Children & Families. Minor, Custody, Temporary custody. Parent and Child, Custody of minor. Appeals Court, Appeal from order of single justice. Jurisdiction, Equitable.

Petition filed in the Worcester County Division of the Juvenile Court Department on June 2, 2016.

A hearing on continuation of an ex parte emergency order granting temporary custody was had before Anthony J. Marotta, J.

A petition for interlocutory review was heard in the Appeals Court by Judd J. Carhart, J.; motions for reconsideration and for a stay were also heard by him, and his order was reported by him to a panel of the Appeals Court. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Ann Balmelli O'Connor, Committee for Public Counsel Services, for the father.

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[1] A pseudonym.

[2] Justice Hines participated in the deliberation on this case prior to her retirement.

Bryan K. Clauson (Marianne W.B. MacDougall also present) for the child.

Richard A. Salcedo for Department of Children and Families.

Evan D. Panich, Katrina C. Rogachevsky, Jessica Berry, Susan R. Elsen, & Jamie Ann Sabino, for Children's Law Center of Massachusetts & others, amici curiae, submitted a brief.

GANTS, C.J. Under G. L. c. 119, § 29C, if a Juvenile Court judge grants temporary custody of a child to the Department of Children and Families (department), the judge "shall certify that the continuation of the child in his home is contrary to his best interests and shall determine whether the department . . . has made reasonable efforts prior to the placement of a child with the department to prevent or eliminate the need for removal from the home." In this opinion, we resolve three legal issues regarding the reasonable efforts determination.

First, we hold that a judge must make a reasonable efforts determination when issuing an order transferring custody of the child to the department for up to seventy-two hours at the emergency hearing, and must revisit that determination at the temporary custody hearing that must follow, commonly known as the "seventy-two hour hearing," if the judge continues the department's temporary custody of the child.

Second, § 29C provides that reasonable efforts by the department prior to removal of a child from the home are not required if the judge finds that one of four exceptions applies. We hold that, where none of the four exceptions in § 29C apply,

exigent circumstances do not excuse the department from making reasonable efforts, but we recognize that a judge must determine what is reasonable in light of the particular circumstances in each case, that the health and safety of the child must be the paramount concern, and that no child should remain in the custody of his or her parents if immediate removal is necessary to protect the child from serious abuse or neglect.

Finally, we hold that, where a judge or single justice finds that the department failed to make reasonable efforts before removing a child from his or her home, the judge or single justice has the equitable authority to order the department to take reasonable remedial steps to diminish the adverse consequences of the department's failure to do so.[3]

Background. According to the evidence admitted at the seventy-two hour hearing, in June, 2016, the department received a report alleging that Walt, then three years old, was being neglected by his mother and father at the home of Walt's

[3] We acknowledge the amicus brief submitted jointly by the Children's Law Center of Massachusetts; Massachusetts Law Reform Institute, Inc.; National Association of Children's Counsel, Citizens for Juvenile Justice; Mental Health Legal Advisors Committee; Center for Public Representation; Greater Boston Legal Services; Juvenile Rights Advocacy Clinic; and Center for Public Representation. We also acknowledge the letter submitted by the Chief Justice of the Juvenile Court Department "to provide procedural context for the Juvenile Court making a reasonable efforts determination upon initial removal of the child from the home by the Department of Children and Families (department) in a care and protection matter and the timing of such a determination."

paternal grandmother in Worcester, where they were then living. On June 1, at approximately 4:30 P.M., a department investigator made an unannounced visit to the home, and subsequently prepared a written report as required by G. L. c. 119, § 51B (§ 51B report). As she went upstairs, where Walt and his parents were residing, she smelled the strong odor of marijuana and saw that the upstairs hallway was littered with trash. She went to the parents' bedroom and saw a curtain hanging as a door. After she knocked on the door jamb, the mother opened the curtain and the investigator reported the allegations to her; the father was lying in bed.[4] The investigator asked where Walt was, and the mother said he was in his room, which was next to the parents' bedroom. When the investigator visited Walt's bedroom, she observed that the floor was so covered with boxes, clothing, trash, and debris that there was no room to walk. She saw items piled taller than the dresser and various safety hazards. The investigator returned to the parents' bedroom and asked the parents about smoking marijuana in their bedroom with Walt in the next bedroom. The mother insisted she did not smoke in front of Walt. The investigator observed trash and debris littering the floor of the parents' bedroom, including dirty plates, cups, cigarette butts, and a chicken bone.

[4] The Department of Children and Families (department) investigator later learned that the father was not feeling well.

The investigator informed the parents that she was going to call her supervisor, and that she was taking custody of Walt "as I was not leaving him in this mess." The investigator telephoned her supervisor, who agreed that emergency removal of the child was necessary at that time. The investigator then telephoned the Worcester police department and asked for assistance in removing the child from the home.

After the investigator informed both parents that the department was taking custody of their son, the mother asked if she could call her aunt to take Walt rather than have him go to a foster home. The investigator told her that that could not happen, because the department office was closed and she therefore could not complete the process required to determine whether a family member qualified as a caregiver. The investigator offered to take down the name of the aunt and other household members to see if they would qualify.

The father was upset that the department was taking custody of his son and grabbed Walt and walked downstairs. The investigator told him that he could not leave with Walt because the department now had custody and, if he did, he could be arrested for parental kidnapping. He remained with Walt downstairs.

The maternal aunt then arrived and attempted to take Walt with her. The investigator told her she could not take him

because the department had custody. The investigator wrote down her identifying information and explained that, if there were no issues, a home study would have to be done. The investigator said that Walt was going to a foster home that day and that the department would begin the process of evaluating the maternal aunt as a "resource" the next day.

The investigator then spoke with the mother and father. The mother said that she worked at a supermarket and that the father worked at an automobile body shop down the street. She did not have a set work schedule; the father watched Walt when she was working. As to the condition of the upstairs portion of the house, she said it was in that condition when they moved to the paternal grandmother's home in October, 2015. When the investigator asked why they had not cleaned the rooms, the mother said that the paternal grandmother would not allow it. The mother said that they had attempted to obtain public housing, but had been denied. The mother admitted to smoking marijuana a few times per week, but said she usually did not smoke upstairs; she explained that she did that day because she was "stressed out." The father said he smoked marijuana a "couple of times a day," but generally only at his workplace. The father denied having any adult criminal record, and both denied using any other controlled substance. The mother provided the name of Walt's pediatrician, and the parents

reported that Walt had no health issues, except that he had a cold with fever, for which they were giving him Tylenol.

On June 2, a care and protection petition was filed in Worcester Juvenile Court for emergency custody of Walt pursuant to G. L. c. 119, § 24, as well as a sworn affidavit in support of the application. The affidavit signed by the investigator and her supervisor briefly summarized the investigator's observations regarding the condition of the two rooms and hallway on the second floor of the parental grandmother's home and noted that the mother appeared to be "high" on marijuana. The affiants declared that the department "believes that the child is at risk for neglect by his parents and requests custody of" Walt pending a hearing on the merits, adding that it would be contrary to Walt's welfare "at this time" to return home. The affiants also stated, "In light of the emergency circumstances and risk to the child's health and safety, reasonable efforts by the [d]epartment were attempted. However, the parents have either not participated or have only minimally participated."

That same day, a judge, as authorized under § 24, issued an ex parte emergency order transferring custody of Walt to the department for up to seventy-two hours pending a hearing as to whether temporary custody should continue, and ordered that counsel be appointed for the mother, father, and child. Based

on the affidavit, the judge signed a Trial Court form entitled, "Reasonable efforts -- initial custody," certifying that "the continuation of the child in his[] home is contrary to the child's best interests." The judge also checked two of the three boxes, reflecting her determination both that the department "has made reasonable efforts prior to the placement of the child with the [department] to prevent or eliminate the need for removal from the child's home," and that "the existing circumstances indicate that there is an immediate risk of harm or neglect which precludes the provision of preventive services as an alternative to removal; consequently, the [department's] efforts were reasonable under the circumstances."[5]

During the early evening of June 2, Walt was placed in the home of the maternal aunt, but the department retained custody of the child.

The seventy-two hour hearing was held on June 3 before another judge to determine whether the department's temporary custody of Walt would continue beyond seventy-two hours. The mother stipulated to continued custody of Walt by the department, and waived her right to a hearing. The father exercised his right to a hearing, which was rescheduled to June

[5] The judge did not check the box that would reflect a determination that the department "has not made reasonable efforts prior to the placement of the child with the [department] to prevent or eliminate the need for removal of the child from the child's home."

7 and concluded on June 9. At the hearing, the judge heard the testimony of the investigator, the father, the mother, the maternal grandmother, and the maternal aunt, and considered the exhibits offered in evidence, which included the investigator's redacted § 51B report and photographs of the home taken by the investigator on June 2.

The investigator admitted at the hearing that she did not know whether the department was able to provide families with homemaking or babysitting services, whether the family support services the department provides included "chore services," or whether counselling and management services were available to prevent the removal of children from their parents by the department.[6] She also testified that, as an investigator, it was not her job to make reasonable efforts to prevent or eliminate the need for removal before removing a child to the custody of the department. As to Walt, she admitted that she decided to remove Walt within ten minutes of being in the home, before she spoke with the father. She also admitted that, before she placed Walt in the custody of the department, she did not explore with the family possible alternatives to avoid the need

[6] Each of these services are available to the department to support struggling parents in need of such services. See 110 Code Mass. Regs. §§ 7.020-7.025 (2008) (homemaker services); 110 Code Mass. Regs. §§ 7.030-7.035 (2008) (family support services); 110 Code Mass. Regs. §§ 7.040-7.046 (2008) (babysitting services); 110 Code Mass. Regs. §§ 7.060-7.064 (2008) (parent aide services).

for foster care. She explained that her "job is to make sure children are safe," and she "did not feel the child was safe in the place that he was living." She later clarified that she meant "physically safe"; she said she did not remove Walt from the home simply because it was dirty and messy.

On June 9, the judge ruled that custody would remain with the department pending a final hearing on the merits, finding that the department had met its burden of proving by a preponderance of the evidence that, if Walt were returned to the home, he would be in immediate risk of serious abuse or neglect.[7] The judge made no determination as to whether the department made reasonable efforts to prevent or eliminate the need for removal from the home before taking custody. Instead, he found that the department had no obligation "to do anything other than remove the child."

The father petitioned for interlocutory relief under G. L. c. 231, § 118, challenging both the judge's order that allowed the department's temporary custody of Walt to continue and his finding that the department was not obligated to make reasonable efforts to prevent or eliminate the need to remove Walt from his parents' custody. On August 1, 2016, a single justice of the Appeals Court determined that the judge erred in his June 9

[7] The judge found that the child had been "kept and housed in conditions that aren't safe for an animal," and characterized the home as a "filthy, disgusting sewer."

ruling when he concluded that the department had no obligation to make reasonable efforts before removing the child from the parents' custody. The single justice declared that the department had an obligation to adhere to the mandates of G. L. c. 119, § 29C, including the obligation to make reasonable efforts to eliminate the need for removal from the home where none of the exceptions to that obligation set forth in § 29C applied in this case. The single justice further found that "[t]he [d]epartment did not make reasonable efforts to eliminate the need for removal prior to removing [Walt]; rather, it summarily removed the child from the premises."

The single justice remanded the case to the Worcester Juvenile Court Department "for a further hearing as to what reasonable efforts will be made by the [d]epartment to eliminate the need to remove [Walt] from the home." The single justice also ordered that (1) daily supervised visitation between the father and Walt, that is, parenting time, shall be permitted by the department; (2) the father shall be permitted to participate in Walt's special education meetings; (3) the department shall explore alternative housing options for Walt and his parents to facilitate their reunification; and (4) Walt shall remain in the custody of the department until the father has found alternative housing for the family and, once he has found such housing, the

Juvenile Court shall determine whether Walt should be reunified with his parents.

The department moved for reconsideration of the single justice's order and for a stay. The single justice denied both motions but, at the request of the child's attorney, modified his order regarding visitation, reducing visits to four per week. The single justice also reported his order to a panel of the Appeals Court to determine the legal issues. We transferred the case to this court on our own motion. After oral argument in this court, the Juvenile Court entered a guardianship decree with the parents' consent; the department no longer has custody of Walt. Although the decree renders the case moot, we nonetheless decide the legal issues presented because these issues are of public importance, fully argued and briefed on all sides, very likely to arise again in similar factual circumstances, and might otherwise evade appellate review. See Commonwealth v. Humberto H., 466 Mass. 562, 574 (2013).

Statutory framework. To understand the legal issues presented on appeal, we need first to set forth the statutory framework governing care and protection proceedings.
In 1954, the Legislature, through its enactment of G. L. c. 119, § 1, declared it "to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the care and protection of

children; to assist and encourage the use by any family of all available resources to this end; and 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 to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development." St. 1954, c. 646, § 1. In 1999, the Legislature made clear that, where the interests of parents and children are in conflict, "[t]he health and safety of the child shall be of paramount concern and shall include the long-term well-being of the child." St. 1999, c. 3, § 4. The legislative policy that removal of a child from the family is a last resort is implemented through three provisions: G. L. c. 119, §§ 24, 29C, and 51B. Where the department has reasonable cause to believe both that "a child's health or safety is in immediate danger from abuse or neglect," and that "removal is necessary to protect the child from abuse or neglect," the department "shall take a child into immediate temporary custody" and "shall file a care and protection petition under section 24 on the next court day." G. L. c. 119, § 51B (c), (e).

On the day a petition is filed, a judge will conduct an emergency hearing which, like a hearing for a temporary restraining order, is usually ex parte, with the department's petitioner present but not the parents. See Care & Protection

of Robert, 408 Mass. 52, 57 (1990). "If the court is satisfied after the petitioner testifies under oath that there is reasonable cause to believe that: (i) the child is suffering from serious abuse or neglect or is in immediate danger of serious abuse or neglect; and (ii) that immediate removal of the child is necessary to protect the child from serious abuse or neglect, the court may issue an emergency order transferring custody of the child for up to [seventy-two] hours to the department . . . ." G. L. c. 119, § 24. Upon entry of this emergency order, notice of the seventy-two hour hearing is given to the parents and, where they are indigent, counsel is appointed to represent the parents and the child. See G. L. c. 119, §§ 24, 29.

The seventy-two hour hearing, like a hearing for a preliminary injunction, is an adversarial evidentiary hearing where the department and the parents have an opportunity to present evidence and to be heard. See Care & Protection of Zita, 455 Mass. 272, 279–280 (2009) (normal rules of evidence apply in temporary custody hearings); Care & Protection of Sophie, 449 Mass. 100, 105–107 (2007) (nature of custody hearings adversarial). At this hearing, the judge "shall determine whether temporary custody shall continue beyond [seventy-two] hours until a hearing on the merits of the petition for care and protection is concluded . . . ." G. L.

c. 119, § 24. Because temporary custody is generally substantially longer than emergency custody, the department's burden of proof to continue temporary custody is a "fair preponderance of the evidence," not reasonable cause. Care & Protection of Robert, 408 Mass at 68.

At the emergency hearing, if the judge grants custody of the child to the department, the judge must make both a written certification and a determination: the judge "shall certify that the continuation of the child in his home is contrary to his best interests and shall determine whether the department or its agent, as appropriate, has made reasonable efforts prior to the placement of a child with the department to prevent or eliminate the need for removal from the home." G. L. c. 119, § 29C. Under § 29C, the determination regarding reasonable efforts is separate and distinct from the certification regarding the child's best interests. Id. ("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").

Section 29C identifies four specific circumstances where reasonable efforts before removal are not required: (1) the child has been abandoned; (2) the parent's rights were involuntarily terminated or parental consent to adoption was dispensed with in a case involving the child's sibling; (3) the

parent was convicted of murder or voluntary manslaughter of another child of the parent, or of a felony assault resulting in serious bodily injury to the child or another child of the parent; or (4) "a parent has subjected the child to aggravated circumstances consisting of murder of another parent of the child in the presence of the child or by subjecting the child or other children in the home to sexual abuse or exploitation or severe or repetitive conduct of a physically or emotionally abusive nature." Id.[8]

The department's obligation to make reasonable efforts does not end once the department takes temporary custody of a child, but the purpose of those efforts shifts from preventing or eliminating the need for removal from the home to making it "possible for the child to return safely to his parent or guardian." Id. (if judge has previously granted custody of child to department, judge "shall determine not less than annually whether the department or its agent has made reasonable efforts to make it possible for the child to return safely to his parent or guardian"). See Adoption of Ilona, 459 Mass. 53, 60 (2011) ("Before seeking to terminate parental rights, the

[8] Under G. L. c. 119, § 29C, "conduct of an 'emotionally abusive nature' shall mean any 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."

department must make 'reasonable efforts' aimed at restoring the child to the care of the natural parents"). See also G. L. c. 119, § 26 (b) (department need not petition to dispense with parental consent to adoption if family has not yet been provided "such services as the department deems necessary for the safe return of the child to the child's home if reasonable efforts as set forth in [§] 29C are required to be made with respect to the child").

These State statutes must be understood in the context of Federal legislation, first enacted in 1980, that, among other things, expanded Federal foster care assistance payments and conditioned such funding on the State's development of a plan for the provision of foster care in accordance with the requirements in the Federal statute. See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (June 17, 1980) (1980 act). The bill established "a comprehensive set of child welfare services procedures and safeguards . . . [to] protect children and families against unwarranted removal of children from their homes and inappropriate and unnecessarily prolonged foster care payments." H. Rep. 96-136, 96th Cong., 1st. Sess. (1979).

Relevant for purposes of this case, Congress provided that "[e]ach State with a plan approved under this part shall make foster care maintenance payments" on behalf of each child who

has been removed from the home into foster care where, among other requirements, there is "a judicial determination to the effect that continuation therein would be contrary to the welfare of such child and . . . that reasonable efforts of the type described in [42 U.S.C. § 671(a)(15)] have been made." See 42 U.S.C. § 672(a)(1) (1982). See also Pub. L. No. 96-272, § 472(a)(1) (1980). Section 671(a)(15) provided that "reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home."

In 1997, Congress amended the reasonable efforts requirement with the passage of the Adoption and Safe Families Act, Pub. L. No. 105-89, 105th Cong., 1st Sess. (Nov. 19, 1997) (1997 act). The 1997 act identified various specific exceptions where reasonable efforts to preserve the family were not required: where the parent committed murder, voluntary manslaughter, or a felony that resulted in serious bodily injury to the child or another child of the parent; where "the parental rights of the parent to a sibling have been terminated involuntarily"; or "where the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, or sexual abuse)." See 42 U.S.C.

§ 671(a)(15)(D) (2012). By allowing States to define the meaning of "aggravated circumstances," Congress gave States the authority to determine when reasonable efforts were not required to prevent removal or to make it possible to return the child to the parental home. See H.R. Rep. No. 77, 105th Cong., 1st Sess., pt. I, at 7 (1997) (requiring "States to define 'aggravated circumstances' in State law . . . would permit the State to bypass the Federal reasonable efforts criterion and move expeditiously to terminate parental rights to make a child available for adoption").

In addition, the 1997 act made clear that, "in determining reasonable efforts to be made with respect to a child . . . and in making such reasonable efforts, the child's health and safety shall be the paramount concern." See Pub. L. No. 105-89, 105th Cong., 1st Sess. (1997); 42 U.S.C. § 671(a)(15)(A).

Although the State policy announced in G. L. c. 119, § 1, that essentially declared that removal of a child from his or her parents is a last resort, predates the enactment of both the Federal 1980 and 1997 acts, the enactment of G. L. c. 119, § 29C, in 1984, see St. 1984, c. 197, § 5, and the amendments to §§ 1 and 24 that followed those two acts, see St. 1999, c. 3, §§ 4, 6; St. 2008, c. 176, §§ 82, 84; St. 2008, c. 215, § 64C, ensured that Massachusetts remains eligible to receive Federal financial assistance for foster care maintenance payments. See

Adoption of Ilona, 459 Mass. at 60 n.10. The department's obligation to make reasonable efforts, therefore, is both a duty owed by statute consistent with a State policy that dates back to 1954, and a duty with substantial financial consequences for Federal reimbursement of foster care maintenance payments.

Discussion. 1. Must the judge make a reasonable efforts determination at the seventy-two hour hearing? The department contends that, where the determination that the department made reasonable efforts prior to removal of the child from the home was made by the judge at the emergency hearing, the judge at the seventy-two hour hearing was not required to make such a determination, and the single justice erred in ruling otherwise. We disagree.

Section 24 plainly states that, where a judge determines at a seventy-two hour hearing that temporary custody of a child shall continue beyond seventy-two hours, the judge "shall also consider the provisions of [§] 29C and shall make the written certification and determinations required by said [§] 29C."[9]

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[9] The relevant paragraph in G. L. c. 119, § 24, provides:

> "Upon entry of the [emergency] order, notice to appear before the court shall be given to either parent, both parents, a guardian with care and custody or another custodian. At that time, the court shall determine whether temporary custody shall continue beyond [seventy-two] hours until a hearing on the merits of the petition for care and protection is concluded before the court. The court shall also consider the provisions of [§] 29C and shall make the

Where the meaning of the statutory language is plain and unambiguous, and where a literal construction would not "yield an absurd or unworkable result," we need not look to extrinsic evidence to discern legislative intent. Adoption of Daisy, 460 Mass. 72, 76 (2011), quoting Boston Hous. Auth. v. National Conference of Firemen & Oilers, Local 3, 458 Mass. 155, 162 (2010).

It is equally plain that the Legislature's imposition of this obligation on the judge at the seventy-two hour hearing is consistent with the State policy that removal of a child from his or her parents is a last resort, albeit one that sometimes is necessary because "[t]he health and safety of the child shall be of paramount concern." See G. L. c. 119, § 1. The judge at the emergency hearing generally receives information only from the department petitioner; the parents are usually neither present nor at that time represented by counsel. See, e.g., Care & Protection of Zita, 455 Mass. at 274-275; Care & Protection of Robert, 408 Mass. at 57. The emergency nature of the hearing means that the hearing, "in the interest of expediency, most likely cannot be exhaustive." Care & Protection of Lillian, 445 Mass. 333, 341 (2005), quoting Custody of Lori, 444 Mass. 316, 321 (2005). The judge's

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written certification and determinations required by said [§] 29C."

determination at that emergency hearing regarding the department's reasonable efforts therefore is generally based on information obtained solely from the department, whose efforts are the subject of the judge's evaluation, regarding a removal that occurred the previous day.

Much as a judge deciding a preliminary injunction must revisit his or her findings issued upon the grant of an ex parte temporary restraining order, so, too, must a judge at the seventy-two hour hearing revisit the determination of reasonable efforts made earlier at the ex parte emergency hearing. "[A] primary function of the seventy-two hour hearing is to discover and correct any errors that may have occurred during the initial hearing . . ." (emphasis omitted). Care & Protection of Lillian, supra, quoting Custody of Lori.

The circumstances of this case illustrate the Legislature's wisdom in requiring that the determination of reasonable efforts also be made by the judge who conducts the seventy-two hour hearing. The judge who made the reasonable efforts determination at the emergency hearing wrote that she based her determination on the affidavit submitted by the investigator and her supervisor, which attested that "reasonable efforts by the [d]epartment were attempted; however, the parents have either not participated or have only minimally participated." See § 29C (reasonable efforts determination "shall include the

basis" for determination). In fact, as emerged at the seventy-two hour hearing, the investigator admitted that she had removed Walt from his parents' custody within ten minutes of entering the home, after only a brief conversation with the mother and before even speaking with the father. She also admitted that she did not explore possible alternatives to avoid the need for foster care with either the mother or the father. Therefore, it was simply not true that the investigator attempted to make reasonable efforts but was thwarted by the failure of the parents to participate with her in those efforts. The emergency judge's determination of reasonable efforts rested on materially inaccurate information. The judge at the seventy-two hour hearing was in a far better position, as a result of the adversarial evidentiary hearing, to make an informed determination of reasonable efforts.

2. Where none of the four exceptions in § 29C apply, may exigent circumstances excuse the department from making reasonable efforts to prevent or eliminate the need for a child's removal from his or her parents' custody? The department concedes that none of the four statutory exceptions to the department's reasonable efforts obligation set forth in § 29 applies to the circumstances of this case. But the department claims that, where there are exigent circumstances, such as those it contends were present in this case, the

department is excused from making reasonable efforts to prevent or eliminate the need for removal of the child from parental custody. We disagree, but we recognize that a judge must determine what is reasonable in light of the particular circumstances in each case, that the health and safety of the child must be the paramount concern, and that no child should remain in the custody of the parents if his or her immediate removal is necessary to protect the child from serious abuse or neglect.

As noted earlier, the Federal 1997 act specifically authorized each State to define the "aggravated circumstances" committed by a parent against his or her child that would relieve the department from its obligation to make reasonable efforts. When it enacted § 29C, the Legislature defined "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 or repetitive conduct of a physically or emotionally abusive nature." St. 1999, c. 3, § 12. The department essentially asks us to add to this definition "subjecting a child to serious abuse or neglect or an immediate danger of serious abuse or neglect," because, under § 24, a child's immediate removal from parental custody is required where there is reasonable cause to believe such removal "is necessary to

protect the child from serious abuse or neglect." Where the Legislature did not add this to its definition of "aggravated circumstances" or include it as a separate exception, we decline to add it ourselves.[10]

This does not mean that the department should allow a child to remain with his or her parents when there is reasonable cause to believe that doing so would subject the child's health or safety to immediate danger from abuse or neglect. See G. L. c. 119, § 51B (c). See also § 24. The Legislature has made it crystal clear in various statutes that "[t]he health and safety of the child shall be of paramount concern." See §§ 1, 26, 29B, 29C. We have made it equally clear in various opinions. See, e.g., Adoption of Ilona, 459 Mass. at 61, quoting Adoption of

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[10] We note that the Child Welfare Policy Manual, issued by the Children's Bureau of the Administration for Children and Families within the United States Department of Health and Human Services, includes answers to frequently asked questions, one of which is:

> "The regulations, at 45 C.F.R. 1356.21, list the circumstances under which the court may determine that reasonable efforts are not required to prevent removal or to reunify the child and family. Are there other circumstances under which the court may determine that reasonable efforts are not required?"

The Children's Bureau answer to this question states, in relevant part, "Unless one of the circumstances at [42 U.S.C. § 671(a)(15)] exists, the statute requires the State to make reasonable efforts." Child Welfare Policy Manual, 8.3C.4, Answer to Question 4, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=59.

Inez, 428 Mass. 717, 720 (1999) ("While parents have a constitutionally recognized interest in maintaining the family unit, a 'child's interest in freedom from neglect or abuse is absolute'"); Care & Protection of Robert, 408 Mass. at 62 ("The child's interest in freedom from abusive or neglectful behavior . . . is absolute. In no situation may a child be legitimately subjected to abusive or neglectful conditions").

What constitutes reasonable efforts, therefore, must be evaluated in the context of each individual case, considering any exigent circumstances that might exist.[11] See Adoption of Ilona, 459 Mass. at 61 (reasonable efforts analyzed in light of particular needs of parent). Where the department had prior involvement with the family before the exigency arose, those efforts may be considered in determining whether reasonable efforts were made. See, e.g., Care & Protection of Isabelle, 459 Mass. 1006, 1007 (2011) (unreasonable to continue efforts to develop mother's parenting skills where previous efforts failed). Where there was little or no prior involvement prior to the exigency, reasonable efforts are still required but they

[11] "The statute requires that reasonable efforts determinations be made on a case-by-case basis . . . . In each individual case, the court and the State must determine the level of effort that is reasonable, based on safety considerations and the circumstance of the family." Child Welfare Policy Manual, 8.3C.4, Answer to Questions 1 & 4, https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=59.

need only be reasonable in light of the exigency. We recognize that there might be exigent circumstances where there is nothing the department reasonably could have done to prevent or eliminate the need for removal from the home, but these do not excuse the department from its obligation reasonably to explore the possibility of reasonable alternatives to removal of the child; it simply means that in those circumstances, after such alternatives were considered, no reasonable alternatives were possible.

This case illustrates how reasonable efforts were possible in a situation that the department deemed exigent. The department's investigator here was so concerned about the sanitary conditions in the home and the mother's use of marijuana that she immediately took custody of the child after a brief conversation with the mother and before she had spoken with the father, who was ill but present. As a result, apart from what she had seen within ten minutes of her arrival at the home, when she took custody on behalf of the department, she knew almost nothing about the relationship between the parents and the child, about whether the parents had obtained appropriate medical care for the child and acted appropriately to address his speech issues, about why they were living with the paternal grandmother, about whether there were other housing arrangements that could be made that day for the child, and

about whether there were other trusted members of the family who might care for Walt while the home was cleaned. The investigator had already taken custody of Walt before the maternal aunt arrived at the home and offered to take Walt to her home. As the single justice essentially found, reasonable efforts would have required the investigator at least to speak with the parents and obtain more information before making the decision to take custody of the child and put him in foster care.

As we have noted, and as § 29C makes clear, the judge's determination regarding reasonable efforts is separate and distinct from the judge's certification regarding the child's best interests that decides whether the child should remain in the custody of the department. "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." § 29C. See Adoption of Ilona, 459 Mass. at 61 (even where department failed to meet obligation to make reasonable efforts, "a trial judge must still rule in the child's best interest"). We reiterate what we stated earlier in this opinion: regardless of whether the department made reasonable efforts to prevent or eliminate the need for removal from the home, no child should remain in the custody of the

parents if his or her immediate removal is necessary to protect the child from serious abuse or neglect.

3. Did the single justice exceed his authority by ordering the department to permit the father to visit with Walt four times each week, to permit his participation in Walt's special education meetings, and to explore alternative housing for the family? The department contends that the single justice's order regarding visitation, participation in special education meetings, and exploration of alternative housing exceeded his authority and that of any Juvenile Court judge. We disagree. Where, as here, the single justice found that the department failed to fulfil its duty to make reasonable efforts before taking custody of Walt, he had the equitable authority to order the department to take reasonable remedial steps to diminish the adverse consequences of its breach of duty. See G. L. c. 218, § 59 (Juvenile Court has equity jurisdiction in all cases and matters arising under G. L. c. 119); Commonwealth v. Adams, 416 Mass. 558, 566 (1993) (law leaves issuance and scope of equitable relief to sound discretion of judge).

As noted earlier, the single justice found that "[t]he department did not make reasonable efforts to eliminate the need for removal prior to removing Walt; rather, it summarily removed the child from the premises." The department contends that the only adverse consequence of its failure to obtain a reasonable

efforts determination is the potential loss of Federal reimbursement for the foster care maintenance payments in this case.[12] But the single justice was entitled to conclude from the evidence in the record that the department's failure to make reasonable efforts also adversely affected Walt and his family and that reasonable equitable relief was needed to diminish that adverse impact. When the matter reached the single justice, it was too late to order the department to fulfil its duty to make reasonable efforts to eliminate the need for removal, but it was not too late to ensure that the department fulfilled its duty to make it possible for the child to return safely to his father or to attempt to hasten the time when that reunification would become practicable. See generally Smith v. Commissioner of Transitional Assistance, 431 Mass. 638, 653 (2000), quoting Correia v. Department of Pub. Welfare, 414 Mass. 157, 170 n.14 (1993) (judge did not abuse discretion "in ordering steps she could have found were necessitated by the department's 'fail[ure] to rectify the problems with its policies and procedures, [such that] a more specific order, detailing particular steps to be taken, [was] appropriate'").

[12] Where a judge grants the department temporary custody but determines that reasonable efforts were not made by the department prior to removal, the department is ineligible for Federal reimbursement for the child's foster care maintenance payments for the duration of the child's stay in foster care. See 42 U.S.C. § 672(a)(2)(A)(ii) (2012); 45 C.F.R. § 1356.21(b)(1)(ii) (2016).

When the single justice entered his initial order, the department was allowing the father to visit his son only twice each month, for one hour per visit. We have recognized the critical importance of parenting time to the parent-child relationship:

> "Visitation, like custody, is at the core of a parent's relationship with a child; being physically present in a child's life, sharing time and experiences, and providing personal support are among the most intimate aspects of a parent-child relationship. For a parent who has lost (or willingly yielded) custody of a child temporarily to a guardian, visitation can be especially critical because it provides an opportunity to maintain a physical, emotional, and psychological bond with the child during the guardianship period, if that is in the child's best interest; and in cases where the parent aspires to regain custody at some point, it provides an opportunity to demonstrate the ability to properly care for the child."

L.B. v. Chief Justice of the Probate & Family Court Dep't, 474 Mass. 231, 242 (2016). Where the department had so limited the father's opportunity to visit with his three-year old son as to imperil the father-child bond that was essential if custody were to be restored, the single justice did not exceed his authority or abuse his discretion by ordering a visitation schedule that would enable that bond to remain intact. See G. L. c. 119, § 35 (where parent is not informed where child is, court may order that parent be so informed and may permit parent to visit child "at such times and under such conditions as the court orders"); Adoption of Rico, 453 Mass. 749, 757 (2009) (even after termination of parental rights and adoption of child, judge may

order visitation with biological parent where child's best interests will be advanced by honoring child's bond with parent); Youmans v. Ramos, 429 Mass. 774, 779-783 (1999) (although father had legal custody of child, "broad equitable powers" permit judge to order visitation with prior permanent guardian over objection of father where such visitation is in child's best interest). Nor did the single justice exceed his authority or abuse his discretion in ordering the department to permit the father to participate in Walt's special education meetings so that he could remain involved in his son's education.

Another adverse consequence of the department's failure to make reasonable efforts prior to removal was that, with Walt in the department's custody, the family would potentially face greater difficulties in securing public housing benefits, which might have made it harder for the family to obtain the alternative housing that was likely a prerequisite to family reunification. The single justice did not exceed his authority or abuse his discretion in ordering the department to explore alternative housing options to facilitate that reunification.

We recognize that "[w]here a court contemplates an injunctive order to compel an executive agency to take specific steps, it must tread cautiously in order to safeguard the separation of powers mandated by art. 30 of the Declaration of

Rights of the Massachusetts Constitution." Smith, 431 Mass. at 651. We also recognize that, where the department has been awarded temporary custody of a child in a care and protection proceeding, "decisions related to normal incidents of custody" generally are committed to the discretion of the department, reviewable only for abuse of discretion. See Commonwealth v. Adkinson, 442 Mass. 410, 418 (2004); Care & Protection of Isaac, 419 Mass. 602, 606 (1995). We need not here determine the full scope of judicial authority to issue injunctive orders where the department has been awarded temporary custody of a child, or the limitations on that authority. It suffices here that we conclude that, where the department has been awarded temporary custody of a child after failing to fulfil its duty to make reasonable efforts to prevent or eliminate the need for the child's removal from parental custody, a judge has the equitable authority to take reasonable steps to attempt to remedy the adverse consequences on the child and the parents arising from the department's breach of that duty.

Conclusion. The father's appeal must be dismissed as moot because the department's temporary custody of the child has been vacated and a guardianship decree has been entered with the parents' consent. We hold, however, that:

> (1) Under G. L. c. 119, § 29C, a judge must make a reasonable efforts determination when issuing an order transferring custody of the child to the department for up

to seventy-two hours at the emergency hearing, and must revisit that determination at the seventy-two hour hearing if the judge continues the department's temporary custody of the child.

(2) Where none of the four exceptions to § 29C applies, exigent circumstances do not excuse the department from making reasonable efforts, but a judge must determine what is reasonable in light of the particular circumstances in each case; the health and safety of the child must be the paramount concern; and no child should remain in the custody of his or her parents if immediate removal is necessary to protect the child from serious abuse or neglect. As made clear in § 29C, "A determination by the [judge] that reasonable efforts were not made shall not preclude the [judge] from making any appropriate order conducive to the child's best interest."

(3) Where a judge or single justice finds that the department failed to make reasonable efforts before removing a child from his or her home, the judge or single justice has the equitable authority to order the department to take reasonable remedial steps to diminish the adverse consequences of the department's failure to do so.

So ordered.