IMPOUNDED

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

NO. 2014-P-8888

ADOPTION OF LONNIE D.

ON APPEAL FROM A JUDGMENT OF THE
_____ COUNTY JUVENILE COURT

BRIEF OF APPELLANT-MOTHER

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[Please note that all names and dates have been redacted or changed)

ISSUES PRESENTED

I. Due process requires that the Department of Children and Families ("DCF") notify parents of alleged parenting deficiencies and give parents a reasonable opportunity to address them before proceeding to termination. Here, DCF's own foster care reviewers found Mother fully compliant with services for a year prior to trial, but DCF, on the eve of trial, surprised Mother by telling her that it would not return the child because she was not and had never been compliant with services, and the judge agreed. Was Mother deprived of due process?

II. Federal and state law requires that DCF make "reasonable efforts" to reunify families before moving to terminate parental rights. DCF unequivocally informed the trial court that it *never* intended to help reunify this family and refused to provide reunification services. Should this Court vacate the termination decree and order DCF on remand to provide required reunification services before proceeding to a termination trial?

III. The trial court cannot terminate Mother's parental rights unless its findings show by clear and convincing evidence that she was unfit. Here, the trial judge's pivotal findings regarding Mother's noncompliance with DCF and her relationship with Lonnie are clearly erroneous, the judge improperly ignored "troublesome" facts showing Mother's fitness, and other findings are fatally tainted because the judge failed to conduct the trial as a neutral fact-finder. Should this Court remand for a new trial?

IV. An order for post-termination and post-adoption contact is warranted where such contact serves the child's best interests, and an order is necessary to protect those interests. Here, the trial judge found that continued contact with Mother served the child's best interests, but the pre-adoptive parents offered no evidence that they would, absent an order, permit such contact. Did the court err in failing to protect the child's interests by not ordering contact?

STATEMENT OF THE CASE

Nature of the Case

This is an appeal from a judgment of the _____ County Juvenile Court, _____ Division, finding Appellant-Mother, Helen D. ("Mother"), unfit to parent her son, Lonnie D. ("Lonnie" or "Child"), and terminating her parental rights. (RA. 7, 283).[1]

Prior Proceedings

On September 14, 200_, the Department of Children and Families ("DCF" or "department") filed a petition in the _____ County Juvenile Court, _____ Division, alleging that Lonnie (d.o.b. 11/19/20__) and his older sister, Krista T.[2] (d.o.b. 10/31/19__), were in need of care and protection. (RA. 1, 46). The case proceeded to trial in October 200_. (RA. 2, 47). On January 3, 200_, the court (____, J.) found Mother

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[1] References to the record appendix will take the form "RA.[page number]"; references to the transcripts will take the form "T.[volume number]:[page number]"; references to the trial court's findings will take the form "F.[para. number]"; references to the trial court's conclusions of law will take the form "CL.[para. number]."

[2] Krista is not a subject of the current proceeding.

unfit and committed both children to the permanent custody of DCF. (RA. 3, 47).[3]

The children's foster parents were granted guardianship of the children on August 14, 200_. (RA.4). Mother was allowed four visits per year with the children in a supervised setting. (RA. 60).

On February 23, 20__, the guardianship as to Lonnie was vacated at the request of Lonnie's guardian. (RA. 4). The court returned custody of Lonnie to DCF pursuant to the January 3, 20__ decree. (RA. 4, 264). On March 25, 20__, Mother petitioned the court for review and redetermination. (RA. 4). Following a hearing on April 27, 20__, the petition was denied and visits between Mother and Lonnie were suspended. (RA. 4; T.I: 130).

On December 17, 20__, the judge *sua sponte* scheduled the matter for a termination trial.[4] (T.I:

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[3] Mother appealed. (RA. 3). This Court affirmed the decree. See Care and Protection of Thomasina, 75 Mass. App. Ct. 563 (2009).

[4] Although the docket reflects that trial dates were not scheduled until the following hearing on February 4, 20__, the discussion on that date suggests that the judge had already scheduled the case for trial. (T.I: 188, 193, 194). A "Motion for Clarification" filed by DCF on May 10, 20__, further suggests that the trial judge *sua sponte* scheduled the case for a trial in December 20__. (RA. 27).

177). On March 11, 20__, Mother's trial counsel moved to continue the trial because she was newly appointed and had not received the entire DCF record. (RA. 5; T.I: 199). The motion was denied. (RA. 5).

On March 18, 20__, Mother filed a motion for the trial judge to recuse herself. (RA. 5, 9). She also filed a motion for reconsideration of the court's prior denial of her motion to continue the trial. (RA. 5, 17). Both motions were denied on March 25, 20__. (T.I: 222-229).[5]

Trial in this matter took place on May 16, 17, 18, 19, 25, 31, and June 1, 20__. (RA. 6-7). Mother was present for every day of trial. (RA. 6-7). On July 7, 20__, the court found Mother unfit and terminated her parental rights as to Lonnie. (RA. 7). Mother filed a timely notice of appeal. (RA. 7, 285).

STATEMENT OF THE FACTS

Mother's Status Just Before Trial

A week before trial, Mother was feeling optimistic, and with good reason. For the past year, she had done everything DCF asked of her to work

[5] The March 25, 20__ hearing date is not reflected on the docket sheet. However, a transcript of that hearing was ordered by the Juvenile Court and is reproduced in Transcripts Volume I at pages 210-233.

toward reunification with her ten-year-old son, Lonnie. (T.III: 324-325). DCF's foster care reviewers found her in "full compliance" with her service plan for the entire year leading up to trial.[6] (RA. 101, 119, 146, 215; T.II: 397-398; T.III: 280, 324-325, 441-442).

DCF had given Mother two service plans in the year before trial. (RA. 122, 136). The tasks on the first included:

- Meet with DCF social worker monthly or more;
- Sign releases of information so that DCF could confirm her progress in treatment;
- Continue with therapy and follow the therapist's recommendations;
- Work with her psychiatrist and follow his recommendations;
- Meet with Dr. Garson and follow his recommendations;
- Take all medications as prescribed, provide a written list of current medications, and inform DCF of any medication changes;

[6] The foster care reviews were held on October 5, 20__ and April 11, 20__. (RA. 99, 215).

- Once Lonnie's therapist approves, visit with Lonnie;
- Attend foster care reviews, court dates, etc.

(RA. 123). The second service plan contained largely the same tasks. (RA. 137). DCF deleted the task involving Dr. Garson and added two more tasks (RA. 137):

- Work with her therapist before visiting with Lonnie to develop a plan for positive interaction with Lonnie;
- Agree not to discuss long term planning with Lonnie other than expressing an interest in maintaining a connection with him.

(RA. 137). DCF determined that Mother fully complied with *all* of her tasks. (RA. 101, 119, 146, 215; T.II: 397-398; T.III: 280, 324-325, 441-442).

Mother's Recent Visits with Lonnie

DCF did not give Mother many visits with Lonnie, but the two visits she had were successful. (RA. 87; T.II: 308-309, 322-323). The visits occurred on January 31, 20__, and on April 20, 20__. (RA. 86; T.II: 312).

Lonnie met with his therapist to prepare for the January 20__ visit. (RA. 88, 178). He told her that

he was most looking forward to "seeing my mother" and "my mother's scent." (RA. 88, 178; T.II: 348). Mother had given Lonnie some pillows. (T.II: 348). He liked to smell them because they reminded him of her. (T.II: 348).

The January visit took place at the _____ DCF office. (T.II: 307). Mother was excited and arrived early. (T.II: 307, 349). She brought a snack, some of Lonnie's belongings from home, and a Lego toy. (T.II: 307, 349). Throughout the visit, Mother expressed an interest in Lonnie's life and asked appropriate questions about school and his activities. (T.II: 308-309). Mother asked the social worker if she could take some pictures. (T.II: 309). At the end of the visit, Lonnie willingly hugged her. (T.II: 309). Lonnie then excitedly introduced her to his foster father. (T.III: 50).

On the car ride home, Lonnie said, "Didn't my mom look pretty?" (RA. 89, 195; T.III: 364). He had some minor behavioral issues following the visit, but he was fine after a short time. (T.III: 51). Lonnie asked when he would be able to see Mother again. (RA. 87). In fact, a week after the visit, Lonnie was still talking about it. (RA. 195). He told his

therapist that he would like to continue working on his relationship with Mother. (RA. 199).

Everyone reported that it was a good visit. (T.I: 188-189, 192). Lonnie's GAL thought that Lonnie would be able to include Mother in his future permanent plan. (T.I: 193). Mother requested additional visits and support for her around future visits. (T.I: 191).

Lonnie required no preparation for the second visit in April. He was not told about the visit until the day before and simply said, "okay." (T.III: 53). His body language was fine, and he had no trouble sleeping that night. (T.III: 55). On the way to meet Mother the following day, his mood was fine; he was looking forward to the visit. (T.III: 56).

While the visit started off with Lonnie being a bit "snappy" (T.II: 313), his mood improved when Mother showed him pictures of his family. (T.II: 315-316). Mother told Lonnie that he looked like his biological father, which made Lonnie happy. (T.II: 316). During lunch, Lonnie blurted, "I can't wait for the next visit." (T.II: 323). Afterwards, he asked for another visit, but one was never scheduled. (T.III: 58).

Mother Had Come a Long Way

Mother's year of full compliance with services and her good visits with Lonnie were all the more impressive because of her difficult history. At the time of the first care and protection trial in 20__, Mother struggled with drug and alcohol use. (RA. 51). Devastated by Lonnie's father's disappearance, she was depressed and was unable to sleep or supervise the children appropriately. (RA. 51).

But since that time, Mother made significant improvements in her life. Mother no longer has substance abuse or alcohol problems. (T.II: 388; T.III: 126). She secured stable housing and would be able to move into a two bedroom apartment if Lonnie was returned to her care. (T.II: 157, 161). She developed long-term, positive relationships with her therapist and psychiatrist. (RA. 96; T.III: 124, 222). In the past year, she cooperated with DCF and fully complied with her service plan. (RA. 101, 119, 146, 215; T.II: 397-398; T.III: 280, 324-325, 441-442).

Prior to January 20__, Mother had not seen Lonnie in a year and a half. (RA. 70; T.II: 331). Earlier visits with Lonnie had been difficult, as Mother and

the former visitation supervisor, Esther Cohen, did not get along. (T.II: 176-190; T.III: 259). Despite their conflict, Ms. Cohen never stopped Mother's visits early. (T.III: 255, 257-258). When Ms. Cohen informed Mother that Lonnie's guardian was terminating visits, Mother became angry and made inappropriate comments. (T.II: 190). She later apologized for her behavior. (T.II: 50; T.III: 89).

Mother knew that Lonnie did not want to talk about her when he entered DCF care in February 20__. (T.II: 134). He was angry and sad. (T.II: 249, 253, 304). His guardian-father died in March 20__ after a lengthy battle with cancer. (T.II: 330). He and Lonnie were very close and Lonnie had a hard time dealing with his death. (T.II: 330). Lonnie also lost his home, school, friends, community and sister when his guardian-mother informed DCF that she could no longer care for him. (T.II: 338-340; T.III: 97).

Although Mother was eager to see Lonnie, she knew that he needed time. When she heard that he had begun to ask about her, she felt very encouraged. (RA. 179; T.II: 134, 267). Lonnie had positive discussions with his foster parents about Mother. (T.III: 45-46). The more Lonnie talked about Mother, the more comfortable

he became. (T.III: 46). He even told his foster parents that his mother and father had "a really cool love story." (T.III: 46).

Mother took full responsibility for Lonnie's removal from her care in 20__ and acknowledged her mistakes. (T.II: 97, 100; T.III: 397). Because Mother was not invited to attend any meetings involving Lonnie's treatment providers, her knowledge of his needs is limited. (T.III: 280). But she recognizes that reunification would be a gradual process (T.II: 162), and that she and Lonnie would need support following reunification. (T.II: 72, 90, 93). She is open to any services in order to meet Lonnie's needs. (T.III: 398).

DCF "Surprised" Mother

On May 13, 20__, three days before trial, Mother met with the DCF social worker and supervisor. (T.III: 386). What they said left her in complete shock. (T.III: 387). After being told less than a month earlier that she was in "full compliance" with her service plan, DCF informed her that she had not actually complied. (RA. 234; T.III: 386-388). The social worker told her that the releases she signed were "too limited" to allow the department to assess

her needs. (T.III: 386-388). The DCF supervisor, Darren Porkpie, made it a point to say that DCF did not want Mother to be "surprised" by this at trial. (T.III: 386). But Mother was surprised. (T.III: 387-388).

Mother did not understand what DCF meant by "open releases." (T.III: 406). She had signed releases. (T.II: 56, 213; T.III: 391). Her service plan required her to sign them so DCF could verify her progress in treatment. (RA. 122, 136). And DCF did, in fact, use them to contact her treatment providers. (RA. 100; T.III: 387, 391).

DCF *never* explained to Mother that it needed broader releases. (T.III: 322, 384). The worker never explained this to DCF's foster care reviewers, because otherwise, the reviewers would not have found Mother "fully compliant" with services. This was all new. And it confirms what Mother later found out: DCF did not plan on reunifying Mother and Lonnie. (RA. 43; T.III: 481-483). In fact, unbeknownst to Mother, DCF only opened a case to "assess visitation." (T.II: 243, 247, 389).

Mother would have given DCF "open releases" had she been asked. (T.III: 388). She had been clear

from the moment Lonnie's guardian returned him to DCF's custody that she wanted to reunify with him. (T.II: 298; T.III: 389-390). She had done *everything* asked of her. (RA. 101, 119, 146, 215; T.II: 397-398; T.III: 280, 324-325, 441-442). The only task she did not accomplish was the one sprung on her on the eve of trial.

The Judge's Push to Termination

On December 17, 20__, DCF requested that the trial court lift the order suspending visits between Lonnie and Mother. (T.I: 182). The judge expressed reluctance over lifting the order, as she believed that Lonnie was being "forced" to visit with Mother. (T.I:183). The judge also expressed concern about Lonnie's need for permanency and suggested that a trial "on the issue of termination" be scheduled. (T.I:177). None of the parties asked for a termination trial. (T.I: 174-185).

The GAL recommended that visits between Lonnie and his mother "be assessed now that Lonnie is settled into his placement and engaged in a therapeutic relationship...." (RA. 84). Lonnie's attorney also stated that Lonnie would "like to see his mother." (T.I:183). Nevertheless, the judge continued to

express concern. In an email from Lonnie's attorney to the DCF adoption worker in early January 20__, Lonnie's attorney wrote, "the judge is worried that Lonnie is being forced into [visiting with Mother]." (RA. 185).

At the March 11, 20__ hearing, the judge refused to allow Mother's motion to continue the trial. (T.I: 199-200). She also agreed with Lonnie's attorney that Lonnie was a "legal risk child" and DCF would not be able to easily locate a pre-adoptive home for him. (T.I: 204). She asked the parties to consider settlement, stating, "[t]his poor young child has been through a whole lot and to force him to go through more is something that needs to be reconsidered by everybody." (T.I: 204, 209).

SUMMARY OF THE ARGUMENT

Mother was surprised on the eve of trial when DCF informed her that she had not done everything she needed to do to be reunited with her son, Lonnie. She was surprised because just weeks earlier, and for a full year prior to that, DCF's own foster care reviewers found her to be in "full compliance" with her service plan. Due process requires that DCF inform parents of their parenting deficiencies and

provide them with a reasonable opportunity to address those deficiencies prior to termination. When DCF informed Mother on the eve of trial that the releases she signed for her providers were "too limited," Mother was deprived of a meaningful opportunity to address that concern. Moreover, the judge's reliance on Mother's alleged refusal to comply with DCF to find her unfit and terminate her parental rights was improper. Mother was never given a chance. (pp. 17-23).

DCF informed the judge throughout the proceedings that it did not need to provide reunification services to Mother and Lonnie because Lonnie was in its care due a disrupted guardianship. But that is not the law. Federal and state law requires that DCF make "reasonable efforts" to reunify the family prior to initiating an action designed to sever family ties. Here, Mother is not complaining that DCF provided inadequate services. DCF provided *no* reunification services at all. Moreover, the judge allowed DCF to get away with this by failing in her obligation to ensure that DCF had provided services before she terminated Mother's parental rights. (pp. 23-29).

Additionally, many of the judge's findings are clearly erroneous. The judge did not consider current evidence of Mother's ability to cooperate with DCF and other professionals in order to provide minimally adequate care of Lonnie. She also erroneously found that Lonnie did not want to visit with Mother. (pp. 29-36).

The judge's failure to ensure that DCF offered any reunification services did not come as a surprise to Mother. The judge had made statements prior to trial suggesting that she was predisposed to terminating Mother's parental rights. Indeed, the judge's findings support Mother's pre-trial concerns that the judge had pre-determined the outcome. It is clear that the judge did not even-handedly weigh the evidence, and thus, her findings are not entitled to the usual deference. (pp. 37-42).

Even if none of the judge's findings are clearly erroneous, the findings, taken together, do not prove Mother's unfitness by clear and convincing evidence. The department cannot shift the burden onto Mother to identify her parental deficiencies, and the judge cannot blame Mother for the department's failure to identify such deficiencies. (pp. 42-44).

The judge further erred in failing to order post-termination and post-adoption contact between Lonnie and Mother after finding that such contact would be in Lonnie's best interests. There was no evidence to suggest that Lonnie's newly identified pre-adoptive parents would ensure that such contact occurred. An order was therefore necessary to protect Lonnie's interests, and this Court should remand for one. (pp. 45-46).

ARGUMENT

I. Mother was deprived of her due process rights when she was not given reasonable notice of her parenting deficiencies or a meaningful opportunity to address those deficiencies prior to termination of her parental rights.

Three days before trial, Mother thought she had done everything DCF asked of her. And she had good reason. Just four weeks before trial, and for a full year before that, DCF's foster care reviewers pronounced her "fully compliant" with all services on her service plan. (RA. 101, 119, 146, 215; T.II: 397-398; T.III: 280, 324-325, 441-442). But Mother received a rude awakening when DCF surprised her on the eve of trial by saying that, despite what its own reviewers determined, there was another task that Mother had not completed. (T.III: 387-388). And

because she had not done it, she could not have her son back. The judge agreed and terminated Mother's parental rights. (RA. 7, 283; F. 8, 67, 75; CL. 9, 20)

"'The rights to conceive and to raise one's children' are 'essential . . . basic civil rights of man . . . far more precious . . . than property rights.'" Department of Pub. Welfare v. J.K.B., 379 Mass. 1, 3 (1979) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)). "[The] loss of a child may be as onerous a penalty [to the parents] as the deprivation of the parents' freedom." Id. (quoting Custody of a Minor (No. 1), 377 Mass. 876, 884 (1979)). Accordingly, before the State may deprive a parent of the custody of a child, "the requirements of due process must be met." Id.; see also Care and Protection of Robert, 408 Mass. 52, 58 (1990).

Due process means the right to be heard at a meaningful time and in a meaningful manner. See Armstrong v. Manzo, 380 U.S. 545, 550 (1965). In the context of termination proceedings, the right to be heard at a meaningful time and in a meaningful manner means that parents must have a reasonable opportunity to "effectively rebut adverse allegations concerning

his or her child-rearing capabilities." Duro v. Duro, 392 Mass. 574, 580 (1984).

A parent cannot effectively rebut the State's allegations of parenting concerns when she is surprised by them at the last minute. That is not a meaningful opportunity to address those concerns. See Custody of Two Minors, 19 Mass. App. Ct. 552, 555 (1985) (mother not provided with doctor's letter and reports, which trial court relied on to terminate mother's parental rights); Custody of Michel, 28 Mass. App. Ct. 260, 266 (1990) (due process requires opportunity to cross examine court investigator and investigator's sources to rebut adverse allegations); Brantley v. Hampden Div. of Probate and Family Court Dept., 457 Mass. 172, 187 (2010) (finding unconstitutional the court's protocol of providing judge with probation department reports summarizing parties' DCF involvement, where parties were not entitled to obtain copies of such reports).

In the ordinary course of care and protection proceedings, DCF gives parents ample notice of their alleged parenting deficiencies. The agency does this by giving parents a service plan. Parents have a statutory right to a service plan whenever DCF is a

party to a child custody proceeding. G.L. c. 119, § 29. The service plan "describes the tasks to be undertaken and the services to be provided to meet the department's goal." [7] 110 C.M.R. § 6.01(a). Parenting deficiencies, and the "fixes" for those deficiencies, are clearly laid out. There are no surprises, nor should there be.

But this case is different. DCF gave Mother two service plans. (RA. 122, 136). Mother was asked to: meet with DCF monthly; meet regularly with her therapist and psychiatrist and follow their recommendations; sign releases for her providers; provide DCF with a list of her medications; attend meetings and court; and visit with Lonnie as instructed. (RA. 123, 137). DCF's own foster care reviewers found Mother in "full compliance" at every review leading up to trial. [8] (RA. 101, 119, 146, 215;

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[7] If the parent does not agree with the department's goal, the service plan still includes the "tasks which the parent needs to achieve during the timeframe of the service plan to address the problems that led to [DCF] involvement, placement of the child and the [department's] goal [for the child]." Service Planning and Referral Policy #97-003, p. 247.

[8] Foster care reviews are held every six months. 110 C.M.R. § 6.07. They include, in part, consideration of the necessity and appropriateness of services, the parent's fulfillment of tasks and progress made toward

T.II: 397-398; T.III: 280, 324-325, 441-442). Yet, just *three days* before trial, DCF surprised Mother by informing her for the first time that she had not complied with her service plan. (RA. 234; T.III: 386-388). DCF suddenly was not satisfied with Mother's releases, alleging that they were "too limited" to allow DCF to assess her needs. (T.III: 386-388).

The department argued that it informed Mother of its need for open releases well in advance of trial. (RA. 260; T.II: 280-285). But the fact that DCF's own foster care reviewers found Mother to be in full compliance with her service plan just weeks earlier indicates otherwise. Additionally, Mother testified that the DCF supervisor, Dennis Porkpie, informed Mother and Mother's attorney that the issue of "limited releases" would be raised at trial, and he did not want Mother to be "surprised" by this. (T.III: 386). If the issue had been raised previously, why would Mother be surprised?

DCF and Lonnie's attorney suggest that Mother was aware, or should have been aware, that her service plan tasks were inadequate to ameliorate her parenting

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alleviating the causes necessitating the child's placement. 110 C.M.R. § 6.10(2).

deficiencies. (T.III: 408, 457). DCF argued that because Mother was involved with the department previously, she should have known of other problems that needed to be corrected. (T.II: 212-213; T.III: 408). But if those problems existed, the department would have known of them, too.

Moreover, Mother had no reason to suspect that she was not doing everything possible to work toward reunification with Lonnie. She had corrected the issues that initially led to DCF involvement. She no longer had substance abuse or alcohol problems. (T.II: 388; T.III: 126). She had secured stable housing. (T.II: 157). And she had developed long-term, positive relationships with her therapist and psychiatrist. (RA. 96; T.III: 124, 222).

DCF found Mother in "full compliance" with her service plan tasks, but then surprised her on the eve of trial by alleging her noncompliance. This left Mother with no ability to meaningfully address the department's concerns regarding her parenting deficiencies. Cf. A.O. v. State, 201 P.3d 985, 997 (Utah 2009) ("Where a service plan is not communicated to the parent...the State cannot rely on any alleged failure by the parent to comply with such a plan in

considering later actions."). The trial judge's reliance on this "parenting deficiency" - Mother's signing of "limited releases" as opposed to "open releases" - to find Mother unfit and terminate her parental rights (F. 8, 67, 75; CL. 9, 20) deprived Mother of due process. See Duro v. Duro, 392 Mass. at 580; Custody of Two Minors, 19 Mass. App. Ct. at 555. Thus, this Court should vacate the termination decree.

II. The trial court erred in terminating Mother's parental rights when DCF failed to make reasonable efforts to reunify Mother with Lonnie.

A. DCF is obligated to provide reunification services to families before seeking to terminate parental rights.

DCF believed that it was not obligated to provide reunification services to Mother and Lonnie because Lonnie had returned to its care following a disrupted guardianship. (RA. 43, 228, 259; T.III: 334-338, 483). But that is not the law.

Under the Adoption and Safe Families Act of 1997 ("ASFA"), states must implement a federally-approved plan for delivering child welfare services. This plan must provide that the agency will make "reasonable efforts" to prevent a child's removal from the home and to make it possible for the child to safely return home. See 42 U.S.C. § 671(a)(15)(B); 45 C.F.R. §

1356.21(b). For each child in foster care, the state's service plan must include "services . . . to the parents, child, and foster parents in order to improve the conditions of the parent's home, facilitate return of the child to his own home or the permanent placement of the child . . . ." 42 U.S.C. § 675(1)(B); see also 42 U.S.C. § 671(a)(16).

Massachusetts likewise requires that DCF provide services tailored to ameliorate the problems that led to placement. For DCF to provide "reasonable efforts to make it possible for the child to return safely to his parent" G.L. c. 119, § 29C, its services must help the parent overcome the problem that led to removal of the child. See Adoption of Lenore, 55 Mass. App. Ct. 275, 279 n. 3 (2002) (agency must "match services with needs, and the trial judge must be vigilant to ensure that it does so.").

DCF must do more than merely tell parents what to do or give them a list of services and send them on their way. See Care and Protection of Elaine, 54 Mass. App. Ct. 266, 273-74 (2002) (reversing permanent custody decree to DCF where all agency did for father with housing problem was give him list of places to call). The agency must actively help the parent

obtain services. Cf. In the Matter of Sheila G., 61 N.Y.2d 368, 385, 462 N.E.2d 1139, 1148 (Ct. App. 1984) (agency must "make affirmative, repeated, and meaningful efforts to assist the parent"). Services "must go beyond mere matters of form, such as the scheduling of appointments, so as to include real, genuine help." Matter of Welfare of J.A., 377 N.W.2d 69, 73 (Minn. Ct. App. 1985).

B. DCF refused to provide services designed to assist Mother in reunifying with Lonnie.

Massachusetts appellate decisions have long recognized the principle that the agency must make "reasonable efforts" before moving to terminate parental rights. As the Supreme Judicial Court noted in Petition of Dept. of Pub. Welfare to Dispense with Consent to Adoption, "the State is required to make every effort to strengthen and encourage family life before it may proceed with plans to sever family ties permanently." 376 Mass. 252, 266 (1978) (citing G.L. c. 119, § 1); see also Adoption of Ilona, 459 Mass. 53, 60 (2011). Such efforts are required because parents have a fundamental liberty interest in the care and custody of their children. See Dept. of Public Welfare v. J.K.B., 379 Mass. 1, 3 (1979).

Accordingly, requiring the State to help troubled families before seeking to break them apart is a matter of fundamental fairness.

Mother does not allege that DCF provided her with inadequate services. Here, DCF provided *no* services to Mother at all. Moreover, DCF misled Mother into believing that she was doing everything possible to work toward reunification with her son. DCF knew Mother's belief and encouraged it. The foster care review report from October 20__ notes that Mother "continues to work with the department in an effort to visit with Lonnie with a goal of reunifying in the future." (RA. 101). Certainly, Mother was entitled to believe that she was doing everything possible to attain that goal when she was found in "full compliance" with her service plan tasks.

But DCF had no intention of reunifying Mother and Lonnie. Its position throughout these proceedings was that it was not obligated to provide services to Mother because Mother had been found "unfit" two years earlier. (RA. 43, 228, 259; T.II: 430; T.III: 334-338, 481-483). But that is not the law. See Adoption of Ilona, 459 Mass. at 59. Even after a finding of unfitness is made, the department "has the obligation

under G.L. c. 119, § 1, to 'encourage the use by [Mother] of all available resources' to promote the 'strengthening and encouragement of family life....'" Care and Protection of Elaine, 54 Mass. App. Ct. at 274.

Reasonable reunification efforts must be provided except in certain circumstances of egregious parental misconduct. See G.L. c. 119, § 29C.[9] None of these circumstances applies to this case. The statute contains no exception for when a child is returned to DCF's care following a disrupted guardianship.

Moreover, the unfitness factors in G.L. c. 210, § 3(c) demonstrate that DCF must provide appropriate

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[9] Such efforts are not required if:

- the child has been abandoned
- the parent's rights were involuntarily terminated as to a sibling of the child;
- the parent has been convicted of murder or voluntary manslaughter of a sibling of the child, or aiding, abetting, attempting, conspiring or soliciting to commit such a murder or voluntary manslaughter
- the parent has been convicted of a felony assault on the child or the child's sibling resulting in serious bodily injury
- the parent has subjected the child or a sibling to "aggravated circumstances" (which include murdering the child's other parent in the child's presence, sexually abusing or exploiting the child or his sibling, or subjecting the child to "severe or repetitive conduct of a physically or emotionally abusive nature"). G.L. c. 119, § 29C.

services to the family as a condition precedent to termination of parental rights. See Adoption of Gregory, 434 Mass. 117, 126 (2001). Section 3(c) sets forth fourteen non-exclusive factors the court must consider in determining parental unfitness. Six of those factors require the court to evaluate whether DCF has provided services tailored to the parent's needs and whether the parent has participated in and learned from those services. See G.L. c. 210, § 3(c)(ii), (iii), (iv), (v), (vi) and (viii).

Courts can only terminate rights under G.L. c. 210, § 3 if they find "current" parental unfitness, that is, unfitness at the time of trial. See Adoption of Paula, 420 Mass. 716, 730-31 (1995); Adoption of Ramona, 61 Mass. App. Ct. 260, 264 (2004). Thus, factors that look to parents' service plan compliance must refer to DCF's "current" provision of, and parents' "current" compliance with, services. The court cannot find a parent "currently" unfit for failing to engage in services if DCF has not offered any services.

DCF unequivocally informed the court throughout these proceedings that it had no intention of providing reunification services to Mother and Lonnie.

(RA. 43, 228, 259; T.II: 384, 430; T.III: 334-338, 481-483). It was the court's obligation to determine the sufficiency of DCF's efforts at every stage of the proceedings. See G.L. c. 119, §§ 23, 24, 25, 26, 29B and 29C; Adoption of Ilona, 459 Mass. at 61. It failed to do so. Because the trial court did not fulfill its mandate in this case, this Court should vacate the termination decree and order DCF on remand to provide required reunification services before proceeding to termination.

III. The trial judge's decision to terminate Mother's parental rights was not based upon findings that proved Mother's unfitness by clear and convincing evidence because many of the judge's key findings are clearly erroneous, and the judge ignored material evidence that was favorable to Mother.

A. The trial judge erroneously found that Mother refused to cooperate with DCF.

The trial judge made several findings that Mother refused to cooperate with DCF. (F. 8, 67, 75). In her Conclusions of Law, the judge also found that DCF made efforts to help Mother, but Mother failed to cooperate. (CL. 9, 18, 20, 22, 23, 24). These findings are the foundation for the judge's ultimate conclusion that Mother is unfit to parent Lonnie. But these findings are clearly erroneous.

A finding is "clearly erroneous" when there is no evidence to support it or when the reviewing court, after a review of the entire evidence, is "left with the definite and firm conviction that a mistake has been committed." Custody of Eleanor, 414 Mass. 795, 799 (1993). Here, the judge relied on Mother's "failure" to sign "open releases" for her service providers - a "failure" that Mother knew nothing about until three days before trial - to find that Mother refused to cooperate with DCF. (F. 8, 67, 75; CL. 9, 20). The judge's reliance on this factor is a mistake. Mother did not "refuse" or "resist" DCF's requests to speak with her providers. In fact, she willingly signed releases so that DCF could do so. (T.II: 56, 213; T.III: 391). Indeed, all along DCF acted as if it had "open releases": the social worker stated at the October 20__ foster care review that she had spoken with Mother's psychiatrist about Mother's behaviors (not just about her treatment progress). (RA. 100; T.III: 387, 391). DCF was not limited to merely verifying "attendance and participation." (F. 8).

Moreover, Mother received "full compliance" reports at DCF's own foster care reviews. (RA. 101,

119, 146, 215; T.II: 397-398; T.III: 280, 324-325, 441-442). This would not have been possible if she had failed to cooperate with DCF or satisfy its service plan requirements. DCF never explained to Mother that it needed broader releases or that it could not assess her parenting without more information from her providers. (T.III: 322, 325-326, 384). That is until three days before trial. (T.III: 386-388).

The judge also found that Mother failed to cooperate with the department by not providing the results of a psychological evaluation from August 20__. (F. 75). But this task was never included in Mother's service plan. In fact, the DCF social worker testified that she did not specifically asked Mother for a copy of the evaluation. (T.II: 284).

Mother *never* refused to cooperate with DCF. On the contrary, she did everything asked of her. Thus, Findings 8, 67, and 75 and Conclusions of Law 9, 18, 20, 22, 23, and 24, to the extent that they indicate Mother's refusal to cooperate with DCF, are clearly erroneous.

B. The judge erred in finding that Mother cannot work with most professionals such that she would be unable to provide minimally acceptable care of Lonnie.

The judge found that Mother is "extremely volatile and impulsive" and "cannot work cooperatively with service providers," such that she would not be able to provide "minimally adequate parenting" for Lonnie. (F. 25, 30; CL. 12, 15, 16, 25). While there is evidence to suggest that Mother was unable to work with some professionals in the past, current evidence does not support these findings. See Adoption of Carla, 416 Mass. 510, 517 (1993) (stale information cannot be the basis of a finding of current parental unfitness).

The judge points to Mother's relationship with the former visitation supervisor, Ms. Cohen, to bolster her conclusion. (F. 14). Yet, at the time of trial, Mother had not seen or interacted with Ms. Cohen in a year and a half. (RA. 70; T.II: 331).

Current evidence reveals Mother's cooperation with professionals and lack of "volatility." In the year prior to trial, Mother worked with DCF and other professionals toward her goal of reunifying with Lonnie. The DCF social worker testified that Mother

was never threatening, although she could be argumentative. (T.II: 298). The GAL testified that Mother was able to speak with her about difficult subjects in a "calm" manner. (T.III: 110). Mother "work[ed] with the department in an effort to visit with Lonnie with a goal of reunifying in the future." (RA. 101). If she was so "volatile," she would not have been deemed "fully compliant."

There was no evidence that Mother could not meet Lonnie's needs. Admittedly, her knowledge of his needs is limited, but that is because she was not invited to attend any meetings involving his treatment providers. (T.III: 280). She recognizes that reunification would be a gradual process (T.II: 162), and that she and Lonnie would need support following reunification. (T.II: 72, 90, 93). She is open to any services in order to meet Lonnie's needs. (T.III: 398).

The current evidence does not show that Mother is so "impulsive and volatile" as to render her unable to provide minimally acceptable care of Lonnie. Accordingly, Findings 25 and 30 and Conclusions of Law 12, 15, 16, and 25, to the extent that they indicate

that Mother is unable to work with professionals in order to meet Lonnie's needs, are clearly erroneous.

C. Findings indicating Lonnie's resistance to visiting Mother are clearly erroneous.

In her Conclusion of Law 15, the judge found that Lonnie "does not want to see his mother and expresses to all a desperate need to be adopted and to cut ties with Mother for the foreseeable future." (CL. 15). The judge also found that Lonnie had to be "convinced" to visit Mother and that each visit required "meticulous preparation." (F. 51, 63). She went on to find that DCF did what it could to foster a relationship between Mother and Lonnie despite "fierce resistance" on Lonnie's part. (F. 75). But these findings were only made possible by the judge's failure to acknowledge positive evidence of Lonnie's wishes. See Adoption of Jerrold, 74 Mass. App. Ct. 1121 (2009) (Memorandum and Order Pursuant to Rule 1:28) (vacating termination decree because judge's conclusions of law were based on findings that were only made possible by judge discrediting positive testimony of every professional involved with the parents).

Lonnie *never* had to be "convinced" to visit with Mother, nor was there ever "fierce resistance" on his part. On the contrary, he began expressing an interest in seeing Mother months before the January 20__ visit was scheduled and became more and more comfortable discussing Mother over time. (RA. 87, 179; T.I: 183; T.II; 134; T.III: 46, 58). He also requested additional visits. (RA. 87; T.II: 58).

In preparation for the January 20__ visit, Lonnie told his therapist that he was most looking forward to "seeing my mother" and "my mother's scent." (RA. 88, 178; T.II: 348). He stated that he liked to smell the pillows Mother gave him because they reminded him of her. (T.II: 348). On the car ride home following the visit, Lonnie commented, "Didn't my mom look pretty?" (RA. 89, 195; T.III: 364). He asked when he would be able to see Mother again. (RA. 87). In fact, a week after the visit, Lonnie was still talking about it. (RA. 195). He told his therapist that he would like to continue working on his relationship with Mother. (RA. 199). The judge made no findings at all about this, as if she ignored the evidence entirely.

Lonnie also had positive discussions with his foster parents about Mother. (T.III: 45-46). The

more Lonnie talked about Mother, the more comfortable he became. (T.III: 46). He even told his foster parents that his mother and father had "a really cool love story." (T.III: 46).

While Lonnie did require preparation for the January 20__ visit, as he had not seen Mother in a year and a half, he required *no* preparation for the April 20__ visit. Lonnie was informed one day before the visit that he would be seeing Mother, and he said, "okay." (T.III: 53). He had no trouble sleeping that night. (T.III: 55). On the way to meet Mother the following day, his mood was fine, and his foster father commented that Lonnie was looking forward to the visit. (T.III: 56). He did not require "meticulous preparation" as the judge found. (F. 75).

Additionally, DCF did not do what it could to foster a relationship between Mother and Lonnie. Indeed, the department made no efforts at all. [See Arguments I and II.] Thus, findings 51, 63 and 75 and Conclusion of Law 15 are not supported by the evidence and are clearly erroneous.

D. Even the findings that appear to be supported by the evidence are fatally flawed because the judge failed to even-handedly consider the evidence.

1. The judge showed a predisposition to terminate parental rights early in the proceedings.

A trial judge must keep an open mind until all evidence is presented and both sides have rested. Adoption of Tia, 73 Mass. App. Ct. 115, 121-122 (2008). The "appearance of fairness" is particularly important in a case involving difficult and emotional issues, such as the termination of parental rights. Id. at 123. Here, the judge's actions and comments prior to trial suggested unfairness early on.

On December 17, 20__, approximately ten months after Lonnie's guardian returned him to the department's care, the judge *sua sponte* scheduled a trial "on the issue of termination." (T.I: 177). But "termination" is only one of the possible dispositions that a judge can order following a trial. See G.L. c. 119, § 26. The judge can also order reunification or permanent custody to DCF or a third party. Id. That the judge would view the trial as an opportunity to terminate Mother's rights rather than reunify Mother and Lonnie is itself telling. Moreover, no party had

even asked for a trial. (T.I: 174-185). It was the judge who was pushing toward termination.

At that hearing, the judge also expressed concern, without any evidentiary support, that Lonnie was being "forced" to visit with Mother. (T.I: 177, 183). The judge cited the GAL report to support her concerns, but the report said just the opposite. It recommended that visits between Lonnie and his mother be considered "now that Lonnie is settled into his placement and engaged in a therapeutic relationship...." (RA. 84). The report *nowhere* suggests that Lonnie is being made to visit with Mother against his will. Lonnie's attorney also informed the judge that Lonnie would "like to see his mother." (T.I:183). The judge's misreading of the report and failure to credit the child's statements does not suggest an open mind.

Two months before trial, the judge again made statements that called into question her impartiality. With no evidence before her as to Mother's current fitness, the judge suggested settlement, stating, "[t]his poor young child has been through a whole lot and to force him to go through more is something that needs to be reconsidered by everybody." (T.I:209).

The judge made this "suggestion" without reviewing any evidence.

The judge clearly blamed Mother for Lonnie having been "through a whole lot." But Mother had nothing to do with most of that "lot." Much of the trauma that Lonnie experienced during the preceding year was caused by his former guardians. Lonnie lost one guardian to a terrible illness (RA. 95; T.III: 274); then he lost his other guardian because she no longer wished to care for him (RA. 95, T.III: 274); he effectively lost his sister because his guardian chose to continue caring for her while returning Lonnie to DCF's custody (RA. 95; T.III: 275); and he lost his home, school, friends, community and family because DCF placed him in a distant part of the state. (T.III: 275, 291-292).

Not only did the judge *sua sponte* schedule a termination trial, she also insisted on keeping the trial dates when DCF did not. DCF represented to her that the matter was not urgent and could be continued to allow Mother's counsel an opportunity to review the agency's late-produced file. (T.I: 199, 201-202, 209). The judge's desire to hold the trial seemed to go beyond scheduling difficulties, as she agreed with

Lonnie's attorney that Lonnie was a "legal risk child" and finding a permanent home for him would not be easy. (T.I:204). But the judge could not possibly know that without hearing the evidence. Surely there would be no such "risk" had she decided to return him to Mother.

These pretrial comments suggest that the judge had no intention of considering reunifying Lonnie with Mother. She was not "keeping an open mind," thus casting all of her findings into doubt.

2. The trial judge ignored undisputed evidence that Mother was found to be in "full compliance" with her service plan.

A critical factor in the judge's determination of Mother's unfitness was Mother's alleged noncompliance with her service plan. (F. 8, 67, 75; CL. 9, 20). Somehow, the judge failed to mention in her findings that Mother was *twice* found by DCF to be in "full compliance" with her service plans, covering the whole year leading up to trial. (RA. 101, 119, 146, 215; T.II: 397-398; T.III: 280, 324-325, 441-442). Certainly, a diligent judge paying close attention to the evidence would not miss such a crucial fact. See Custody of Eleanor, 414 Mass. 795, 799 (1993) (judge's

findings must "demonstrate that close attention has been given the evidence").

There was no way for the judge to miss it; Mother's service plan compliance was noted throughout the record. (RA. 101, 119, 146, 215; T.II: 397-398; T.III: 280, 324-325, 441-442). Indeed, it was undisputed by the parties. Surely this is an inconvenient fact if the judge was set on terminating Mother's rights from the outset. But "[t]roublesome facts, pointing to a conclusion contrary to that reached by the department or the judge, are to be faced rather than ignored.... Only then is the judge's conclusion entitled to the great respect traditionally given to discretionary decisions." Petition of the Dept. of Public Welfare to Dispense with Consent to Adoption, 376 Mass. 252, 260 (1978).

The judge could not have missed this important, albeit "troublesome," fact. The only logical explanation for it to be missing from the judge's findings is that she chose to ignore it. And then she relied on its absence to find Mother unfit.

The judge's pre-trial inclination and her failure to acknowledge evidence favorable to Mother show that

she did not approach this case in an even-handed manner at any stage of the proceedings.

> It is difficult to reach a clear conclusion of parental unfitness such that termination would be in the child[]'s best interests... The evidence does not appear to have been treated fairly and difficult facts do not appear to have been fairly considered. It is clear that close attention has not been paid to the evidence.

Adoption of Jerrold, 74 Mass. App. Ct. 1121 (2009) (Memorandum and Order Pursuant to Rule 1:28). Accordingly, the judge's findings are not entitled to deference by this Court.

E. Even if none of the judge's findings are clearly erroneous, the findings, taken together, do not prove Mother's parental unfitness by clear and convincing evidence.

In order to be clear and convincing, the requisite proof must be strong, positive, full, clear and decisive. See Adoption of Zoltan, 71 Mass. App. Ct. 185, 188 (2008). It is exactly this "full, clear and decisive" proof that is missing in this case.

In finding Mother unfit, the trial court relied heavily on Mother's failure to sign "open releases" for the department. Lacking in the judge's findings, however, is how that issue impacted Lonnie. See id. at 192 (a parent's failure to follow service plan tasks "is less important where the tasks in the plan

are not closely related to any identified parental deficiencies.").

Here, the department asserted that it was unable to identify Mother's deficiencies and needed more substantive access to Mother's treatment providers in order to identify and develop appropriate services. (T.II: 280-285). No problems were apparent, so the department wanted to fish for them. Surely a provider might reveal a "hidden" problem that the State could then use against Mother. But that is burden-shifting, which is constitutionally unsound. See Care and Protection of Erin, 443 Mass. 567, 571-572 (2005). It was the department's obligation to identify Mother's parental shortcomings. The judge cannot blame Mother for the department's failure to discover something. Either Mother's conduct is problematic or it is not. Mother is not unfit because of something she says in therapy that is not manifested in negative behaviors.

"Given the lack of any clearly established parental shortcomings which needed to be rectified in order for Mother to be able to provide minimally acceptable care, [lack of service plan compliance] adds little to the issue of Mother's fitness." Adoption of Zoltan, 71 Mass. App. Ct. at 192-193.

Thus, this Court should be "hard pressed to place great significance, much less dispositive weight," on Mother's failure to sign open releases since it is unclear how this task reflected on Mother's care of Lonnie. See Adoption of Yale, 65 Mass. App. Ct. 236, 242 (2005).

Furthermore, the judge acknowledged that Mother had made gains since 20__. (F. 7). The judge's findings in 20__, which focus on several issues that Mother has since rectified, did not support termination of parental rights. (RA. 60, 64). It does not follow that improved findings in 20__ would support such a conclusion.

While Lonnie's welfare was undoubtedly the judge's focus in this case, "good intentions and genuine concern are not a satisfactory substitute for clear and convincing evidence." Adoption of Zoltan, 71 Mass. App. Ct. at 196. Without such clear and convincing evidence, the judge's decision to terminate Mother's parental rights must be reversed.

IV. It was error for the judge not to order post-termination and post-adoption contact after concluding that such contact would be in Lonnie's best interests, and the pre-adoptive parents offered no evidence that they would, absent an order, ensure that contact occurred.

The trial judge correctly found that it would be in Lonnie's best interests to have continued contact with Mother post-adoption. (F. 81). But the trial judge did not make any specific orders in this regard, leaving it up to the decision-making of Lonnie's adoptive parents, in consultation with Lonnie and his therapist. (F. 79, 81; CL. 27). See Adoption of Ilona, 459 Mass. 53 (2011).

In Ilona, the pre-adoptive parent was committed to ensuring continued contact between Ilona and her mother. Id. at 66. Thus, a specific order was unnecessary. Here, the facts are quite different. No evidence suggests that Lonnie's identified pre-adoptive parents, with whom Lonnie had not begun living at the time of trial, were similarly committed. Lonnie's only lasting parent-child relationship had been with Mother. See Adoption of Rico, 453 Mass. 749, 754-755 (2009).

By not making a specific order for post-adoption contact, the judge effectively terminated all contact

between Lonnie and Mother. Without the assurance of a pre-adoptive family's word that they will encourage such contact between Lonnie and his Mother, see Adoption of Ilona, 459 Mass. at 66, it is likely that it will never occur. This must be rectified on remand.

CONCLUSION

For the foregoing reasons, the trial court's judgment finding Lonnie in need of care and protection and dispensing with Mother's consent to Lonnie's adoption must be reversed. In the alternative, the matter should be remanded for entry of a specific post-termination and post-adoption contact order.

Respectfully submitted,
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Dated: December __, 20__

CERTIFICATION PURSUANT TO MASS. R. A. P. 16(k)

I, Jaime L. Prince, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to: Mass. R. A. P. 16(a)(6); Mass. R. A. P. 16(e); Mass. R. A. P. 16(f); Mass. R. A. P. 16(h); Mass. R. A. P. 18 and Mass. R. A. P. 20.

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