**IMPOUNDED**

**COMMONWEALTH OF MASSACHUSETTS**

**APPEALS COURT**

**\_\_\_\_\_\_\_, ss DOCKET NO. 2018-J-\_\_\_\_**

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**)**

**Jennifer L. and Sarah K., )**

**Petitioners )**

**v. )**

**Department of Children )**

**and Families, )**

**Respondent )**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)**

**In re: )**

**)**

**Care and Protection of )**

**Jennifer L. and Sarah K. )**

**Docket No. 18CP\_\_\_\_\_\_\_ )**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_)**

**CHILDREN’S MOTION FOR A REPORT OR FOR LEAVE TO APPEAL**

**FROM DENIAL OF PETITION FOR INTERLOCUTORY RELIEF**

**UNDER G.L. c. 231, § 118 (FIRST PARAGRAPH)**

Introduction

Jennifer L. and Sarah K. (the Children), the Children in the underlying care and protection and single justice proceedings, request that this Court either (a) report the legal questions raised by their petition for interlocutory relief to a full panel or (b) grant them leave to appeal from the denial of that petition to a full panel.

Prior Procedure

The Department of Children and Families (“DCF”) filed the underlying G.L. c. 119, § 24 petition in the \_\_\_\_\_\_\_\_ Juvenile Court (“trial court”) on \_\_\_\_\_\_, 2018. RA 1,6,11,16,21.[[1]](#footnote-1) *[Add other relevant trial court procedural history. This model is based on the denial of a motion at the trial level for extra visitation/parenting time. The Argument below addresses that issue, but your petition and motion to report may address other issues.]*

The Children filed their petition in this Court on \_\_\_\_\_\_, 2018. This Court (\_\_\_\_\_\_\_\_, J.) denied the petition on \_\_\_\_\_\_, 2018, ruling that it showed no clear error of law or abuse of judicial discretion.

Argument

**Resolution of the unsettled legal issues raised in the Children’s petition is vital for the protection of their fundamental constitutional rights and those of all children and parents in care and protection cases.**

**A. No court has yet resolved the question of whether a juvenile court judge has authority to make orders for parenting time for a child in DCF’s temporary custody under G.L. c. 119, § 24.**

The trial court denied the Children’s motion for additional parenting time. It did not do so on the merits; rather, it denied the motion because it believed that it lacked the authority to enter such an order. RA 37. The court is mistaken.

In the case the trial court relied upon, Care and Protection of Jeremy, 419 Mass. 616 (1995), the SJC held only that a juvenile court lacks authority to require DCF to place a child in its temporary custody in a specific residential placement. Id. at 618. And in the Court’s most recent examination of a juvenile court’s authority to require DCF to take particular actions regarding a child in its temporary custody under § 24, the SJC expressed that neither the “full scope of judicial authority” nor “the limitations on that authority” has been decided. Care and Protection of Walt, 478 Mass. 212, 230-31 (2017).

The question is not merely academic. If DCF could determine parent-child visits for a child in its temporary custody under § 24,[[2]](#footnote-2) subject to judicial review only for abuse of discretion, children and parents would be deprived of the “fundamentally fair procedures” they are entitled to as a matter of due process. Santosky v. Kramer, 455 U.S. 745, 754 (1982). Parents and children who are temporarily separated by state intervention

retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

Id. at 753-754.

The U.S. Supreme Court also recognized that where “the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.” Id. at 763. That principle is particularly apt in the context of DCF’s severely limiting parenting time.[[3]](#footnote-3) It is settled that a lack of regular and meaningful parenting time decreases the parent-child bond and imperils reunification. Care and Protection of Walt, 478 Mass. at 229-230. And a trial court must consider any lack of meaningful parent-child contact in determining whether to terminate the parent-child relationship. G.L. c. 210, § 3(c)(iii), (vii),(x).

If DCF had sole authority to decide the frequency and conditions of parent-child contact, the procedural protections afforded to parents and children -- judicial review for abuse of discretion -- would not meet the requirements of due process and fundamental fairness. See Santosky, 455 U.S. at 753-754; see also Custody of a Minor, 377 Mass. 876, 884 (1979) (extra protection for personal rights required “when the breakup of a family is threatened”).

The question whether a juvenile court has authority to enter orders for parenting time for a child in DCF’s temporary custody under § 24 is unresolved (save for cases in which DCF failed to make reasonable efforts to avoid removing the child from the parent)[[4]](#footnote-4) and juvenile court judges currently view the matter differently. A1, ¶4.[[5]](#footnote-5) Because resolution of the question is vital for the consistent protection of the fundamental rights of children and parents in the integrity of their relationship, this Court should report the question or grant the Children leave to appeal to a panel.

**B. The question whether a juvenile court has equitable authority to make remedial orders where DCF breaches its legal duty to make reasonable efforts towards parent-child reunification is unsettled and should be resolved.**

In Care and Protection of Walt, the SJC held that, where DCF violates its legal duty to make reasonable efforts to avoid removing a child from his or her parent, a Juvenile Court judge and a Single Justice of this Court have equitable authority to enter orders -- including orders for parenting time -- that are designed to remediate the harm caused by DCF’s breach. 478 Mass. at 228-231. The holding of Walt is limited to cases in which DCF violated its legal duty to make reasonable efforts to avoid separating parent and child. See id. at 230–231 (full scope of courts’ authority to enter injunctive orders to DCF not settled).

The Court explained, though, that after DCF has removed children from their parent, “the purpose of [DCF’s] obligation to make reasonable 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. at 221 (quoting from G.L. c. 119, § 29C). The Court further explained that the Single Justice had entered orders “to ensure that [DCF] fulfilled its duty to make it possible for [Walt] to return safely to his father or to attempt to hasten the time when that reunification would become practicable.” Id. at 229 (citations omitted). It was those remedial orders -- designed to ensure that DCF made reasonable efforts to facilitate reunification­ -- that the SJC affirmed. Id. at 228-230.

The SJC’s dicta and reasoning in Walt thus suggest that a court well may have equitable authority to enter orders to remedy the harm DCF causes when, as in this case, it fails to make reasonable efforts towards reunification by ensuring parenting time sufficient to safeguard the parent-child bond. But the question remains unsettled, and different juvenile court judges have ruled on it differently. A1, ¶4. Because, as more fully explained supra at pages \_\_, maintenance of the parent-child bond through adequate parenting time is essential to safeguard children’s and parents’ fundamental rights to familial integrity, this Court should report the question or grant the Children leave to appeal.

Bound up in that question is another unresolved legal issue raised by the Children’s petition: whether a trial court may consider and determine the issue of DCF’s fulfillment of its reasonable efforts obligation between a hearing under G. L. c. 119, § 24 (“72-hour hearing”) and a hearing under G.L. c. 119,

§ 29B (“permanency hearing”). In this case, the trial court ruled that it could not consider DCF’s efforts towards reunification at any time prior to a permanency hearing under G.L. c. 119, § 29B. The court was mistaken.

It is settled that a trial court must consider whether DCF made reasonable efforts to avoid removal both when the court transfers emergency custody to DCF and at a 72-hour hearing. Walt, 478 Mass. at 231. Afterwards, the court “shall determine not less than annually whether [DCF] has made reasonable efforts to make it possible for the child to return safely to his parent[.]” G.L. c. 119, § 29C (emphasis supplied). Section 29C sets once annually as the minimum frequency with which a court must determine whether DCF is fulfilling its duty to make reasonable efforts towards reunification. Id. Accordingly, a trial court may consider and determine the reasonable efforts issue more than once a year. See id.[[6]](#footnote-6)

The statute that the trial court relied upon, G.L. c. 119, § 29B, did not govern the Children’s motion. Section 29B provides that “within twelve months of the original [grant of custody] of a child to [DCF] by a court of competent jurisdiction and not less than every 12 months thereafter while the child remains in the care of [DCF], the committing court shall conduct a permanency hearing . . . to determine and periodically review thereafter the permanency plan for the child.” G.L. c. 119, § 29B(a). If at that hearing the trial court exercises its statutory authority to make orders in the child’s best interests, the court must make a determination of reasonable efforts in accordance with § 29C. G.L.

c. 119, § 29B(d).

Because the Children did not present their motion at a permanency hearing, § 29B did not pertain and the court clearly erred in relying on it. In any case, like a reasonable efforts redetermination under § 29C, a permanency hearing under § 29B must be held “not less than every 12 months[.]” G.L. c. 119, § 29B(a).

Whether a trial court may make a determination of reasonable efforts toward reunification prior to the expiration of twelve months from the court’s determination of DCF’s efforts to avoid removing the child is an open question and different juvenile court judges are answering it differently. A1, ¶4. The question should be resolved by a panel of this Court.

Conclusion

The Children’s petition raises at least three unsettled questions of law that impact the constitutional rights of the Children, their mother, and other parents and children who are parties to care and protection cases filed by DCF throughout the Commonwealth. This Court should report those questions or permit the Children to appeal from the denial of their petition.

\_\_\_\_\_\_\_\_, 2018

Respectfully submitted,

Jennifer L. and Sarah K. (Children)

By their attorney,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[Signature Block]

1. References are to the Record Appendix filed with the Children's petition. [↑](#footnote-ref-1)
2. At that point in a case, a trial court will have determined, by a mere preponderance of the evidence, that the child would be at risk of harm in the parent's custody. Care and Protection of Robert, 408 Mass. 52, 68 (1990). [↑](#footnote-ref-2)
3. In this case, DCF permits each child to see the mother for one hour weekly. None has one-on-one time with her; the two older children (ages 14 and 7) visit their mother together, as do the three youngest (ages 5, 3, and 1). RA 40,47. [↑](#footnote-ref-3)
4. In those cases, it is settled that a court, in the exercise of its equitable authority, may enter those orders – and others - to protect the parent-child bond. Care and Protection of Walt, 478 Mass. at 228-231. [↑](#footnote-ref-4)
5. The undersigned has appended to this motion an Affidavit of Counsel, references to which are denoted “A” followed by the page and paragraph numbers. [↑](#footnote-ref-5)
6. This interpretation effectuates the plain language of the statute and makes sense. A trial court generally is required to “enter a final order of adjudication and permanent disposition” within fifteen months of the date on which a § 24 petition is filed. G.L. c. 119, § 26(c). If, as the trial court ruled, a parent or child could not be heard for a full year on a claim that DCF was failing to make reasonable efforts to reunify the family, then that party would be forced to raise the issue for the first time at or on the eve of trial -- at which time it would be too late to remedy DCF’s failure and the resulting harm to the family. See Adoption of Gregory, 434 Mass. 117, 127 (2001) (“parent must raise a claim of inadequate services in a timely manner” so situation may be remedied). [↑](#footnote-ref-6)