SJC-13072

CARE AND PROTECTION OF RASHIDA.[1]

Norfolk. May 5, 2021. - August 20, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

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

Petition filed in the Norfolk County Division of the Juvenile Court Department on February 3, 2020.

A motion for a reasonable efforts determination was heard by Linda G. Sable, J.

A proceeding for interlocutory review was heard in the Appeals Court by Sabita Singh, J., a motion for reconsideration was considered by her, and questions were reported by her to the Appeals Court. The Supreme Judicial Court granted an application for direct appellate review.

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

William A. Comeau for the child.

Jeremy Bayless for Department of Children and Families.

Jonathan M. Albano, Michael C. Polovich, & Emma Coffey, for Lawyers for Civil Rights, amicus curiae, submitted a brief.

[1] A pseudonym.

Jessica Berry, Claire Donohue, & Thomas J. Carey, Jr., for Jessica Berry & others, amici curiae, submitted a brief.

KAFKER, J. When a child is removed from his or her home and placed into the custody of the Department of Children and Families (department), the department is required by statute to make ongoing "reasonable efforts to make it possible for the child to return safely to his [or her] parent or guardian." G. L. c. 119, § 29C. See Care & Protection of Walt, 478 Mass. 212, 221 (2017). The primary issue presented by the reported questions is whether the statute's provision that "the court shall determine [reasonable efforts] not less than annually" permits or requires a Juvenile Court judge to make a reasonable efforts determination at other times. The department contends that such a determination shall be made not more frequently than the permanency hearings, typically held annually, and that Juvenile Court judges have no discretion to consider such motions or make such determinations at other times.

We conclude that a party may file a motion for a determination of reasonable efforts at other times. We also conclude that a Juvenile Court judge has several options when presented with such a motion. If the party filing such motion fails to meet its burden of production, the judge may simply deny the motion without making a determination of reasonable efforts. Further, where a motion challenging the department's

reasonable efforts regarding reunification is appropriately considered a challenge to a specific service or services, rather than the reasonableness of the department's efforts more generally, the judge has the option to treat such a motion as a motion for abuse of the department's discretion in providing such services. Finally, we conclude that when the judge determines that the burden of production has been satisfied to raise doubts about the reasonableness of the department's efforts towards reunification, the department bears the burden of proving that it has made reasonable efforts.[2]

Legal framework. 1. Reasonable efforts in care and protection cases. "Reasonable efforts" is generally understood to include "accessible, available, and culturally appropriate services that are designed to improve the capacity of families to provide safe and stable homes for their children" and "to ensure that parents and other family members . . . are making progress on case plan goals." United States Department of Health & Human Services, Administration for Children & Families, Children's Bureau, Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children 2 (September 2019). See Care & Protection of Walt, 478 Mass. at 227 ("What

[2] We acknowledge the amicus briefs submitted by Lawyers for Civil Rights and by Jessica Berry, Claire Donohue, Cristina Freitas, Debbie Freitas, Children's Law Center of Massachusetts, Citizens for Juvenile Justice, Massachusetts Law Reform Institute, and Mental Health Legal Advisors Committee.

constitutes reasonable efforts . . . must be evaluated in the context of each individual case . . ."). To evaluate whether the department has fulfilled its responsibility to make reasonable efforts, a brief overview of the law governing care and protection cases is in order.[3]

When the department "has reasonable cause to believe a child's health or safety is in immediate danger" and "removal is necessary to protect the child from abuse or neglect," it shall immediately take the child into temporary custody. G. L. c. 119, § 51B (c), (e). When a child is removed from his or her home in this emergency manner, the department must file a care and protection petition within twenty-four hours. Id. See G. L. c. 119, § 24. "On the day a petition is filed, a judge will conduct an emergency hearing . . . [usually] with the department's petitioner present but not the parents." Care & Protection of Walt, 478 Mass. at 220. A second hearing must be held within seventy-two hours to determine whether temporary custody of the child will continue past that seventy-two hours. Id. at 220. G. L. c. 119, § 24. This hearing is commonly known as the "seventy-two hour hearing" and is an adversarial

[3] In order to receive Federal funding, State frameworks for foster care and adoption assistance must provide that "reasonable efforts shall be made to preserve and reunify families." 42 U.S.C. § 671(a)(15)(B).

evidentiary hearing. Care & Protection of Walt, supra at 213, 220.

A judge is required by statute to determine whether the department has made reasonable efforts at the emergency hearing, the seventy-two hour hearing, and "not less than annually" thereafter.[4] G. L. c. 119, § 29C. At both the emergency hearing and the seventy-two hour hearing, the judge is required to determine that 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." Id.[5] See Care & Protection of Walt, 478 Mass. at 213. Thereafter, "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.'"[6] Id. at 221, quoting G. L. c. 119, § 29C.

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[4] A judge must also make a reasonable efforts determination before terminating parental rights. Adoption of West, 97 Mass. App. Ct. 238, 242 (2020).

[5] Section 29C lays out limited exceptions to the requirement of determining reasonable efforts that do not apply to this case.

[6] Or, "[i]f a court has determined . . . that reasonable efforts to safely return the child to his [or her] parent or guardian are inconsistent with the permanency plan for the child," the department must make "reasonable efforts to place the child in a timely manner in accordance with the permanency plan." G. L. c. 119, § 29C.

So long as the child remains in the care of the department, the court must hold an annual permanency hearing, the purpose of which is threefold: (1) to "determine the permanency plan for the child or young adult and when the plan will be implemented";[7] (2) to "aid in the timely implementation of such plan"; and (3) to determine reasonable efforts. Rule 8 of the Uniform Rules for Permanency Hearings, Trial Court Rule VI (URPH). See G. L. c. 119, §§ 29B, 29C; Rules 3(a) & 9(b) of the URPH. The annual review of the department's reasonable efforts usually coincides with the annual permanency review.

In addition to the annual permanency hearing, within twelve to fifteen months of the filing of the petition, the court adjudicates whether the child is in need of care and protection. See G. L. c. 119, § 26 (b); Juvenile Court Standing Order 2-18, § III; Rule 15(c) of the Juvenile Court Rules for the Care and Protection of Children (Care and Protection Rules).[8] At this hearing on the merits, the court must both make a reasonable efforts determination and determine whether a parent is currently unfit. G. L. c. 119, §§ 26 (b), 29C. Care &

[7] The permanency plan includes the permanency goal for the child: reunification, adoption, guardianship, permanent care with relatives, or another permanent planned living arrangement. G. L. c. 119, § 29B.

[8] The permanency hearing may be held simultaneously with the full adjudication of the care and protection petition. Rule 8(c)(5) of the URPH.

Protection of Erin, 443 Mass. 567, 570 (2005) ("In a proceeding to commit a child to the custody of the department under G. L. c. 119, § 26, the department bears the burden of proving, by clear and convincing evidence, that a parent is currently unfit to further the best interests of a child and, therefore, the child is in need of care and protection"). The court may determine that the department has failed to meet its reasonable efforts obligation, but nonetheless determine a parent is currently unfit and commit a child to the department's custody, if the court concludes that doing so is in the child's best interests. G. L. c. 119, § 29C. Adoption of Ilona, 459 Mass. 53, 61-62 (2011).

2. Abuse of discretion motions. Parents have "many avenues available to raise a claim of inadequate services," particularly a motion for a finding that the department abused its discretion by failing to adequately provide a particular service or services. Adoption of West, 97 Mass. App. Ct. 238, 242 (2020). The Appeals Court has stated, and we agree, that a "claim of inadequate services can be raised by a so-called 'abuse of discretion' motion." Id. at 243, citing Adoption of Daisy, 77 Mass. App. Ct. 768, 781 (2010), S.C., 460 Mass. 72 (2011) (mother filed motion claiming that department abused its discretion by failing to secure specific services). Because this court has never directly addressed whether an abuse of

discretion motion is a proper vehicle for contesting specific inadequate services by the department, or how it differs from a reasonable efforts determination, we briefly summarize the history and framework of such motions.

Addressing a Probate and Family Court judge's order mandating specific placement and treatment for an individual under guardianship, this court stated in Matter of McKnight, 406 Mass. 787, 798 (1990), "[t]he placement of individuals and the coordination of the provision of services financed by [a social services agency] are executive functions" that should not be "imping[ed] on" by the judiciary. Drawing on this reasoning, in Care & Protection of Isaac, 419 Mass. 602, 611 (1995), the court determined that the department's decisions regarding custodial placements are reviewable "for legal error or abuse of discretion." Specifically, the court concluded that a judicial order mandating a certain residential placement for a child was inappropriate because "decisions related to normal incidents of custody, by the terms of [G. L. c. 119,] §§ 21, 26 and 32, are committed to the discretion of the department." Id. at 609. We extended this decision to children in temporary custody in Care & Protection of Jeremy, 419 Mass. 616, 622 (1995). However, these decisions were rooted in statutory language addressing custodial placements and did not address the provision of

services. The court referenced this language, but did not expand on it, in Care & Protection of Walt, 478 Mass. at 230.

Like the "individual placement decision" addressed in Care & Protection of Isaac, 419 Mass. at 611, an individual service decision is committed to the discretion of the department. See id. (Legislature charged department "with administering a highly complex social services program within the constraints of a finite annual appropriation"). The department "is authorized to promulgate rules and policies 'necessary for the full and efficient implementation of programs . . . in the area of social services.'" Id. at 607, quoting G. L. c. 18B, § 3 (B) (1), as in effect prior to St. 2008, c. 176, § 26. The department offers specific services to parents and families in order to fulfill that obligation. See 110 Code Mass. Regs. §§ 7.000 (2011). Although the department is statutorily obliged to make reasonable efforts towards reunification, "the means of fulfilling that obligation [are] within the department's discretion." Care & Protection of Isaac, supra at 606, citing Attorney Gen. v. Sheriff of Suffolk County, 394 Mass. 624, 630 (1985). Therefore, an abuse of discretion motion is an appropriate vehicle for challenging a specific service or specific services, though it is not, as discussed at length infra, an appropriate vehicle for challenging the department's over-all reasonable efforts to reunify a family. See Rule 14(B)

of the Care and Protection Rules (court may hear motions regarding service issues at any time "in the interests of justice").

Facts and procedural history.[9] The mother gave birth to a child, whom we shall call Rashida, on or about January 29, 2020. The mother has severe cognitive impairments, lives with her parents and siblings, and speaks Somali Mai Mai as her primary language. Shortly after the birth, the department received a report pursuant to G. L. c. 119, § 51A, that alleged the mother was unable to care for Rashida. After an investigation, the department found the allegations were supported, and filed a care and protection petition. On February 3, 2020, the department was awarded temporary custody of Rashida in an ex parte hearing.

The department initially provided the mother with weekly supervised in-person visitation, which was disrupted by the Statewide shutdown in response to the COVID-19 pandemic in March 2020. Following the shutdown, the department sent video recordings and pictures of Rashida to the mother, through her brother, twice a week. On April 29, 2020, the mother began weekly supervised remote video visits, and weekly supervised in-person visits recommenced on July 15, 2020. Four visits were

[9] We summarize the facts of the case up to the time of the mother's motion for a determination of reasonable efforts on September 15, 2020, the subject of this appeal.

canceled or took place remotely due to weather, transportation problems, or the mother being ill. Two visits were canceled because the mother failed to confirm them ahead of time.

The department completed a family assessment regarding Rashida and her parents[10] on June 22, 2020, and reviewed the resulting action plan with the mother on July 15, 2020.[11] In addition to visitation, the action plan included participating in a neuropsychological and parenting evaluation, continuing to engage in a program for pregnant and new mothers from which the mother received services during her pregnancy, enrolling with the Department of Developmental Services (DDS), and participating in parent aide services. The mother did not enroll with DDS, so she did not receive a referral for a neuropsychological evaluation. The department sent the release for parent aide services to the mother on August 25, 2020, but was unable to find a provider who spoke Mai Mai.

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[10] The father did not respond to the department or otherwise participate in the assessment.

[11] By statute and regulation, the assessment and action plan should have been completed by April 6, 2020, forty-five working days after the initial petition. See 110 Code Mass. Regs. § 5.03 (2008) (full assessment "must be completed within [forty-five] working days" of department's initial petition); G. L. c. 119, § 29 (parent entitled to receive service or case plan within forty-five days of department's initial petition). However, on March 10, 2020, the Governor declared a state of emergency in response to the COVID-19 pandemic, which disrupted visitation and the functioning of State agencies including the department. Desrosiers v. Governor, 486 Mass. 369, 370, 373-374 (2020).

On September 15, 2020, the mother filed a motion for a determination that the department committed a breach of its legal duty to make "reasonable efforts to make it possible for the child to return safely to [her] parent." G. L. c. 119, § 29C. The mother alleged that the department did not provide her with any services or accommodations to assist her with parenting time. The department responded that any delay in providing services beyond visitation was because of "difficulties and delay presented by Mother and Mother's counsel throughout the proceedings."

A Juvenile Court judge denied the motion on October 14, 2020.[12] The mother filed a petition for interlocutory review pursuant to G. L. c. 231, § 118, which was denied by a single justice of the Appeals Court. The mother then filed a motion for reconsideration and requested that the single justice report a question regarding a Juvenile Court judge's discretion to determine reasonable efforts more than once a year. On January 15, 2021, the single justice reported the following questions to the Appeals Court:

> 1. "After judicial certification of reasonable efforts at the emergency custody hearing pursuant [to] G. L. c. 119, § 24, and the so-called '[seventy-two] hour hearing' pursuant to G. L. c. 119, § 24, is the trial court judge

[12] The judge first stated in court that she had no authority to determine reasonable efforts until a permanency hearing. Later, in written findings, she stated that she declined to make a determination because reasonable efforts were previously litigated at the seventy-two hour hearing.

> required to determine whether the department has continued to engage in reasonable efforts at any time prior [to] the statutorily mandated annual review pursuant to G. L. c. 119, § 29C, upon the motion of a parent or child?"
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> 2. "If the answer to question one is in the negative, does the trial court judge have the discretion to make such a determination upon the motion of a parent or child? If so, what is the burden of the parent or child in raising the issue and how is a judge's discretion to be guided in determining whether to make such a determination?"
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> 3. "If the answer to either question one or question two is in the affirmative, does the department bear the burden of proving that it continues to engage in reasonable efforts in response to the motion of the parent or child?"
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> 4. "If the answers to questions one and two are in the negative, may the parent or child raise the issue of the department's failure to engage in reasonable efforts at reunification in the context of a so-called 'motion for abuse of discretion'? Adoption of West, 97 Mass. App. Ct. 238, 243 (2020). If so, what is the allocation of burdens?"

We accepted the mother's application for direct appellate review.

Discussion. 1. Mootness. Rashida's annual permanency review was scheduled to take place on January 29, 2021. The single justice noted in her report that the permanency hearing was likely to render the mother's motion for a reasonable efforts determination moot, as a reasonable efforts determination must be made at a permanency hearing, thus fulfilling the mother's request for a reasonable efforts determination. See G. L. c. 119, § 29B (d). However, as the mother notes, the requirements of § 29C -- and therefore our resolution of its interpretation -- apply for the entirety of

the department's custody, even if a permanency hearing has been held. Even assuming the mother's instant petition for a reasonable efforts determination was satisfied by a determination made at the permanency hearing, she still has an ongoing stake in the ability to request a reasonable efforts determination so long as Rashida remains in the department's custody. See Commonwealth v. Pena, 462 Mass. 183, 186 (2012) (case moot when issues are no longer "live" or parties lack legally cognizable interest). Thus, the mother's motion for a reasonable efforts determination is not moot.

Further, the reported questions are of public importance and capable of repetition while evading review, and so we address them regardless of the satisfaction of the mother's petition at the permanency hearing. Care & Protection of Isaac, 419 Mass. at 605 n.2, quoting Norwood Hosp. v. Munoz, 409 Mass. 116, 121 (1991). See Care & Protection of Walt, 478 Mass. at 219 (deciding moot case because judicial determination of compliance with reasonable efforts is "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").

2. Statutory interpretation. "[I]n interpreting a statute, we begin with the language of the statute, and when a statute is plain and unambiguous, we interpret it according to

its ordinary meaning" (quotations, citations, and alterations omitted). Commonwealth v. Hanson H., 464 Mass. 807, 810 (2013). "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." Care & Protection of Walt, 478 Mass. at 223-224, quoting Adoption of Daisy, 460 Mass. 72, 76 (2011). The statutory provision at issue in this case states in relevant part:

> "the court 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 [or her] parent or guardian."

G. L. c. 119, § 29C.[13]

The plain meaning of this statutory provision is clear. The court shall make at least one determination not less than annually that the department or its agent has made reasonable efforts towards reunification. The court is not precluded from making additional determinations. The phrase "not less than annually" creates a minimum frequency at which there must be a reasonable efforts determination. It does not limit the determination to those times specifically enumerated in the

[13] The statute also provides that when a court initially grants temporary custody to the department, it "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.

statute. To set such a limit or maximum frequency, the Legislature uses the phrase "not more than." See, e.g., G. L. c. 119, § 26 (c) (review and redetermination hearing may be held "not more than once every [six] months"). See Commonwealth v. Williamson, 462 Mass. 676, 682 (2012) ("use of different language strongly suggests the legislative intent to convey a different meaning"). Simply put, "not less than" means "not less than;" it does not, as the department argues, mean "only" or "not more than." See Hanson H., 464 Mass. at 810 (plain and unambiguous language is given ordinary meaning).

The result of a plain language construction of § 29C is that a Juvenile Court judge has the discretion to make a reasonable efforts determination at other times. The department argues that this reading is contrary to the purpose of the statutory scheme, and that the correct reading of the phrase "not less than annually" in § 29C refers to the practical possibility of an annual permanency hearing occurring sooner than statutorily required. We disagree.

By statute, permanency hearings must be held "not less than every [twelve] months," and must include reasonable efforts determinations. G. L. c. 119, § 29B (a), (d) (permanency hearings must include "determinations required by . . . section 29C"). The parties may request, or the court may schedule, a permanency hearing to be held more frequently than required.

Rule 3(a) of the URPH. The department contends that if a party wishes for the court to make a reasonable efforts determination, the proper vehicle is to request an early permanency hearing.

The department's proposed interpretation is not only contrary to the plain meaning of § 29C, but also changes the purposes of permanency hearings. Section 29C makes no reference to permanency hearings or § 29B when laying out the reasonable efforts requirements at issue.[14] Although reasonable efforts determinations are part of permanency hearings, G. L. c. 119, § 29B (d), permanency hearings are more comprehensive than reasonable efforts determinations and require significantly more preparation and scheduling coordination than what would be necessary even for an evidentiary hearing on a motion to determine reasonable efforts.[15] To require a party seeking a reasonable efforts determination to do so by requesting a

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[14] Section 29C's only reference to § 29B is to note that if the permanency goal is not reunification, the department's obligation is to make reasonable efforts "to place the child in a timely manner in accordance with the permanency plan."

[15] See G. L. c. 119, § 29B (a) (detailing requirements of permanency report); Rule 4 of the URPH (same); Rule 6(a) of the URPH (permanency report must be filed no less than thirty days prior to permanency hearing); Rule 8(c)(2) of the URPH (author of permanency report shall be available at hearing for cross-examination). See also G. L. c. 119, § 29B (a) ("court shall consult with the child in an age-appropriate manner about the permanency plan"); Rule 8(b) of the URPH (child, foster parents, preadoptive parents, or relatives have right to attend permanency hearing and be heard, and there is presumption child age fourteen or older will attend).

permanency hearing would be significantly more burdensome than to allow the party to move for a reasonable efforts determination, thus causing unnecessary delay of the resolution of the contested issue, and risking transformation of the over-all purpose of a permanency hearing.

By contrast, interpreting the statute to allow the judge discretion to determine reasonable efforts at other appropriate times is in keeping with the stated Legislative purpose of the statutory scheme:

> "[T]he 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 . . . .'"

Care & Protection of Walt, 478 Mass. at 219, quoting St. 1954, c. 646, § 1. Ongoing court oversight of the department's requirement to make reasonable efforts to reunite the family serves this legislative purpose by "protect[ing] children and families against . . . unnecessarily prolonged foster care placement." Care & Protection of Walt, supra at 222, quoting H. Rep. 96-136, 96th Cong., 1st. Sess. (1979).[16]

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[16] See, e.g., Care & Protection of Walt, 478 Mass. at 223 ("removal of a child from his or her parents is a last resort"); Petition of the Dep't of Pub. Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 587-588 (1981) (parents have

The department also argues that "[a] parent has many avenues available to raise a claim of inadequate services," including an abuse of discretion motion directed at the services provided by the department and administrative remedies. Adoption of West, 97 Mass. App. Ct. at 242-243 ("A claim of inadequate services can be raised by a so-called 'abuse of discretion' motion"), citing Adoption of Daisy, 77 Mass. App. Ct. at 781 ("It is well-established that a parent must raise a claim of inadequate services in a timely manner"). However, the existence of these alternative remedies does not contradict the statutory requirements regarding reasonable efforts determinations. Further, none of the alternative "avenues" put forward by the department is the legal equivalent of a reasonable efforts determination. See Adoption of West, supra. They serve different purposes and meet different legal requirements. The department has a statutory requirement to

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fundamental right to custody of their children, and child's best interest is best served in custody of parent as "a stable, continuous family environment"); National Council of Juvenile and Family Court Judges, Enhanced Resource Guidelines 27 (2016) ("More frequent and timely court oversight can effectively move children to safe permanency sooner"); L. Edwards, Reasonable Efforts: A Judicial Perspective 98 (2014) ("Early attention to reasonable efforts means that critical issues will be addressed quickly and efficiently. . . . Children and families are in trauma as the result of social services and court intervention. The longer the process takes, the more extensive the trauma. . . . Early inquiry into these issues will result in earlier determinations regarding reunification. It will serve the best interest of children and their families").

make reasonable efforts, but discretionary authority regarding particular services. Compare G. L. c. 119, §§ 24, 26, 29B, 29C (mandating judicial determination of reasonable efforts), and Care & Protection of Walt, 478 Mass. at 221 (department has "obligation to make reasonable efforts . . . making it possible for the child to return safely to his [or her] parent or guardian" [citation omitted]), with Matter of McKnight, 406 Mass. at 792 (means of fulfilling obligation is within discretion of public agency).

Importantly, contesting a specific service or services through an abuse of discretion motion differs significantly from a reasonable efforts determination. An abuse of discretion motion is a narrower claim that a service has been provided inadequately or that the department's refusal or requirement of a particular service falls "outside the range of reasonable alternatives," L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014), from which the department has discretion to choose to "fulfil its legal obligation" to make reasonable efforts in the context of the case at issue, Care & Protection of Isaac, 419 Mass. at 606-607. A reasonable efforts determination necessarily requires a judge to consider the contested service or services, but it is a more comprehensive review of the entirety of the department's actions in the context of a particular case. See, e.g., Care & Protection of Walt, 478

Mass. at 227 ("What constitutes reasonable efforts . . . must be evaluated in the context of each individual case, considering any exigent circumstances that might exist"); Adoption of Ilona, 459 Mass. at 61-62 (reviewing multiple facets of case as part of review of reasonable efforts determination). As discussed infra, the department bears the burden of showing that it has made reasonable efforts. In contrast, the department has discretionary authority regarding which particular services to recommend, and how those services shall be provided. The adequacy of such services must be evaluated in the context of the department's discretionary authority.[17]

Similarly, other administrative remedies that the department raises as alternatives to reasonable efforts determinations are not functional or legal equivalents. Internal administrative review is not equivalent to independent judicial oversight; it is a lengthy administrative process, governed by different standards, and subject to the direction

[17] As we discuss infra, a judge may determine that a motion titled as a motion for a determination of reasonable efforts would be more appropriately treated as a motion for discretion. Such a conclusion should not be confused with the notion that an abuse of discretion motion and a reasonable efforts determination are equivalent. On the contrary, a judge has the discretion to conclude that the motion has been mislabeled: that in substance the motion for a reasonable efforts determination is more properly considered a challenge to the provision of a particular discretionary service, not the reasonable efforts towards reunification as a whole.

and control of the department.[18] Even when not delayed, the regulatory timeline for a fair hearing process can extend to over six months, excluding judicial review. See 110 Code Mass. Regs. §§ 10.08, 10.10, 10.29 (2014). The department's suggestions that utilizing administrative processes other than the department's formal review process, such as rejecting the action plan or "raising their concern with the department," are adequate solutions are similarly unavailing. Independent judicial oversight through a reasonable efforts determination is different from administrative resolution processes in kind, not degree.

Thus, none of the "avenues available to raise a claim of inadequate services" is the legal equivalent of a reasonable efforts determination. Adoption of West, 97 Mass. App. Ct. at 242. Nor could they displace a reasonable efforts requirement, given the express statutory requirement in § 29C governing reasonable efforts determinations.

Giving meaning to the plain language of § 29C, which aligns with express legislative intent, we conclude that a Juvenile Court judge has discretion to make a reasonable efforts

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[18] A recent independent audit, although recognizing progress, identified serious concerns with the timeliness, procedural obstacles, and independence of the department's administrative review process. See Ripples Group, Report to the Office of the Child Advocate and the Legislature Regarding the Department of Children and Families (DCF) Fair Hearing System 5-6, 9-10, 19 (June 29, 2015).

determination more frequently than once a year. It naturally follows from this interpretation and the Juvenile Court rules governing motions that a party may file a motion for a determination of reasonable efforts before the passage of a year.[19] See Rule 7 of the Care and Protection Rules (governing motion practice); Rule 14(B) of the Care and Protection Rules (court may hear motions regarding the department's plan to achieve permanence and service issues at any time "in the interests of justice"). Concluding that a party may properly file such a motion also aligns with the established requirement that claims regarding services must be raised "in a timely manner so that reasonable accommodations may be made." Adoption of Gregory, 434 Mass. 117, 124 (2001). See Adoption of West, 97 Mass. App. Ct. at 242 ("Raising the issue at an early stage in the proceedings allows the department to remedy the inadequate services, which in turn fosters a greater chance of family reunification").

3. Deciding the motion. Once a party has made a motion for a determination of reasonable efforts, the Juvenile Court judge has multiple options based on the merits of the filing. As explained infra, the judge may simply deny the motion for a

[19] A Juvenile Court judge may also make a reasonable efforts determination sua sponte, consistent with the permissive language of § 29C and the importance of judicial oversight in care and protection cases.

reasonable efforts determination if the burden of production is not met. If the burden of production is met and the motion is properly framed as a challenge to the department's reasonable efforts towards reunification, the judge may proceed to conduct a reasonable efforts determination.[20] The judge may also determine that the motion is more appropriately considered an abuse of discretion motion directed at a particular service or services provided by the department, rather than the department's reasonable efforts to reunify the family more generally.

In evaluating a motion for a reasonable efforts determination, as in all matters and decisions by the department, "[t]he health and safety of the child shall be of paramount concern and shall include the long-term well-being of the child." G. L. c. 119, § 1. Thus, time is also of the essence. In making its decision, the court must consider not only the need for a timely resolution of the contested issues regarding reasonable efforts, but also timely resolution of the

[20] In deciding the motion, the judge may consider whether a permanency hearing is imminent. If so, the judge may use his or her discretion to conduct a single reasonable efforts determination at the permanency hearing, rather than conduct two reasonable efforts determinations so close in time that they are nearly identical. In considering whether to combine the two proceedings, the judge must weigh the effect of any delay in addressing and remedying inadequacies in the department's reasonable efforts towards reunification.

entire care and protection case itself.[21] In most circumstances, resolving the underlying issue regarding reasonable efforts expeditiously will promote a timely resolution of the entire case by establishing either that the services are reasonable or that they require correction. At the same time, prolonged or protracted proceedings regarding the reasonable efforts determination must nonetheless be avoided to avoid unnecessary and harmful delays. See National Council of Juvenile and Family Court Judges, Enhanced Resource Guidelines 29-30 (2016) (noting both negative effects of "[c]ourt delays caused by prolonged litigation" and importance of judicial oversight in holding agency accountable to provide services in timely manner). See also Care & Protection of Walt, 478 Mass. at 222 (foster care should not be "unnecessarily prolonged"); Adoption of West, 97 Mass. App. Ct. at 242 (stressing need to address inadequate services early in proceedings to "foster[] a greater chance of family reunification); Adoption of Emily, 25 Mass. App. Ct. 579, 581 (1988), citing Custody of a Minor, 389 Mass. 755, 764 & n. 2, (1983) (emphasizing that "[s]peedy resolution of cases involving issues of custody or adoption is desirable"); Connor B. ex rel. Vigurs v. Patrick, 985 F. Supp. 2d 129, 138-156 (D.

[21] Of course, the judge's consideration should not be limited to the factors discussed here. It is impossible to create an exhaustive list of all the relevant considerations in a care and protection case.

Mass. 2013) (extensive findings of fact regarding negative effects of extended foster care in Massachusetts); G. L. c. 119, § 1 (prioritizing reunification and providing resources to families); 110 Code Mass. Regs. §§ 1.01-1.02 (2008) (department's policy prioritizes reunification and "swift action," and "substitute care is a temporary solution").

The party seeking a reasonable efforts determination bears the burden of production -- that is, the "obligation to come forward with evidence to support its claim." Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 681 n.7 (2016), quoting Director, Office of Workers' Compensation Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 272 (1994). Cf. Care & Protection of Erin, 443 Mass. at 568 (moving party seeking review and redetermination of care and protection adjudication "bears an initial burden to produce some credible evidence"). Thus, to satisfy the burden of production, the moving party must submit evidence that, if found credible at an evidentiary hearing, would support the claim that the department has not made reasonable efforts to reunify the family.[22] In many cases, the burden of production may be satisfied by the affidavit that must accompany all motions in Juvenile Court. See Rule 7(B) of the Care and Protection Rules (motion must be accompanied by

[22] The moving party's burden of production should not be confused with the department's burden of proof, discussed infra.

"affidavit signed by the person with personal knowledge of the factual basis of the motion" that "shall state with particularity the grounds therefor"). Where the judge determines that the burden of production has not been satisfied, the judge may simply deny the motion for a determination of reasonable efforts.

4. Further judicial discretion regarding motions for a reasonable efforts determination. A motion titled as a motion for a determination of reasonable efforts may, in some instances, be more appropriately considered a challenge to a specific service or services or lack thereof. In those instances, where a parent has not satisfied the burden of production regarding the department's reasonable efforts as a whole, but only raised questions regarding a particular service or services, a judge has multiple options. The judge can deny the motion for a reasonable efforts determination, explaining that the department's reasonable efforts as a whole have not been adequately challenged. It is also within a judge's discretion to treat the motion as an abuse of discretion motion contesting a particular service and address the merits of the motion. See Munshani v. Signal Lake Venture Fund II, LP, 60 Mass. App. Ct. 714, 721 (2004), quoting Link v. Wabash R.R., 370 U.S. 626, 630-631 (1962) (courts have control "to manage their own affairs so as to achieve the orderly and expeditious

disposition of cases").[23] This conclusion reflects the long-standing principle that judges have the flexibility to decide a motion based on its substance, rather than its title. See, e.g., Care & Protection of Manuel, 428 Mass. 527, 532 (1998), quoting Lambley v. Kameny, 43 Mass. App. Ct. 277, 280 (1997) ("the label attached to a pleading or motion is far less important than its substance"); Colorio v. Marx, 72 Mass. App. Ct. 382, 385 (2008), quoting Honer v. Wisniewski, 48 Mass. App. Ct. 291, 294 (1999) ("Courts may determine whether and under what section relief might be granted; the label attached to the motion is not dispositive"); Watros v. Greater Lynn Mental Health & Retardation Ass'n, 37 Mass. App. Ct. 657, 662 n.7 (1994), S.C., 421 Mass. 106 (1995) (citing multiple practice guides for principle that "[i]t is, of course, the substance of a motion and not its technical name or label that determines its nature and legal effect").

Most importantly, the exercise of discretion here requires a careful review of the substance of the motion, particularly the affidavit in support thereof, and the distinctions discussed above regarding whether the motion is properly raising questions about the department's reasonable efforts towards reunification or is challenging the provision of a particular discretionary

[23] At a hearing on the motion, a judge may also, of course, attempt to resolve the issue expeditiously and informally through agreement by the parties.

service or services.[24] Finally, this decision should not be based on judicial efficiency. Rather, it should be based on the scope and substance of the motion, "the health and safety . . . [and] the long-term well-being of the child," and "the strengthening and encouragement of family life." G. L. c. 119, § 1.

5. Burden of proof. The ultimate burden of proof of reasonable efforts determinations is not in dispute here, and is only briefly addressed by the parties. When a properly framed request for a reasonable efforts determination is made and the burden of production is met, the department retains the burden of proving that it has made reasonable efforts to reunify the family. See Care & Protection of Erin, 443 Mass. at 571 (upholding department's burden of proof for both initial care and protection proceedings and review and redetermination because of parental liberty interests). Where, as with reasonable efforts, the State "has the power to shape the historical events that form the basis for" future requests for termination of parental rights, it is appropriate for the burden

[24] We note that there may be unusual circumstances where a motion may only address a single service and still be an appropriate motion for reasonable efforts determination. For example, if the department determines that the only necessary service is a particular type of counseling, but only refers the parent to one counseling resource with a six-month waiting list, the movant could credibly claim that the department's over-all efforts towards reunification do not meet the reasonable efforts standard.

of proof to remain with the department. Id., quoting Santosky v. Kramer, 455 U.S. 745, 763 (1982). This is consistent with other instances when a reasonable efforts determination is made, at which the department also bears the burden of proof. See Care & Protection of Walt, 478 Mass. at 220, quoting Care & Protection of Robert, 408 Mass. 52, 68 (1990) (department bears burden of proof at seventy-two hour hearing); Adoption of Ilona, 459 Mass. at 60-61 (department must show parent unfit and reasonable efforts determination must be made before terminating parental rights); Care & Protection of Erin, supra ("where a parent is deprived of the right to raise his or her child . . . it is never permissible . . . to shift the burden of proof to the respondent parent," in reference to "care and protection proceeding" and "cases that involve severing parental rights"); G. L. c. 119, §§ 29B (d), 29C (mandating judicial determination of reasonable efforts at permanency hearings and removals).[25]

[25] For the same reasons outlined in Care & Protection of Walt, 478 Mass. at 228, where a judge finds that the department "failed to fulfil its duty to make reasonable efforts . . . [the judge] ha[s] the equitable authority to order the department to take reasonable remedial steps to diminish the adverse consequences of its breach of duty." Id., citing G. L. c. 218, § 59 (Juvenile Court has equity jurisdiction in all cases and matters arising under G. L. c. 119). Nonetheless, "[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." Care & Protection of Walt, supra at 230, quoting Smith v. Commissioner of Transitional Assistance, 431 Mass. 638, 651

Conclusion. We answer the first three reported questions as follows:

There is no requirement, following judicial certification of reasonable efforts at the emergency custody hearing and the seventy-two hour hearing pursuant to G. L. c. 119, § 24, that a trial court judge, upon the motion of a parent or child, determine that the department has continued to engage in reasonable efforts at any time prior to the statutorily mandated annual review prescribed in G. L. c. 119, § 29C; however, the trial court judge has the discretion to make such a determination upon the motion of a parent or child. The moving party bears the burden of producing evidence that, if found credible at an evidentiary hearing, would support the claim that the department has not made reasonable efforts to reunify the family. If the burden of production is not met, the judge may simply deny the motion. The judge also has the discretion to conclude that the motion, albeit inadequate as a challenge to the reasonableness of the department's over-all efforts to reunify the family, is nonetheless sufficient to challenge the adequacy of a specific discretionary service or services and address the merits of the motion as an abuse of discretion motion. In response to such a motion by a parent or child, the

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(2000). Of course, at all times the physical and psychological health and safety of the child is paramount. G. L. c. 119, § 1.

department bears the burden of proving that it continues to engage in reasonable efforts.

We decline to answer the fourth reported question. For clarity, we respond that an abuse of discretion motion is not the legal equivalent of a motion for a reasonable efforts determination; they serve different purposes and must meet different legal requirements. A reasonable efforts determination necessarily requires a judge to consider the contested service or services, but it is a more comprehensive review of the entirety of the department's actions in the context of a particular case. The department also bears the statutory burden of showing that it has made reasonable efforts. In contrast, the department has discretionary authority regarding which particular services to recommend, and how those services shall be provided. Therefore, a party may not properly raise the issue of the department's failure to engage in reasonable efforts through a motion for abuse of discretion. A more complicated question is presented when a party's motion for a reasonable efforts determination is in substance a challenge only to a particular service or service. As discussed in detail supra, a party's labeling of a motion does not control the judge's decision-making, as a judge reviews the substance of the motion -- not just its form or title. The judge therefore has the discretion, if he or she so chooses, to convert such a

motion for a reasonable efforts determination into an abuse of discretion motion and address its merits as a challenge to a discretionary decision by the department.

So ordered.