

Overcoming Barriers to Making Meaningful Reasonable Efforts Findings

Judge Leonard Edwards (ret.)*

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Certain changes in juvenile court practice can lead to more meaningful reasonable efforts findings. Granted, there are many barriers that prevent judges from making these findings. This article explains what reasonable efforts findings the judge must make, some of the most challenging barriers that prevent the judge from making these findings, and a solution that could make reasonable efforts findings more meaningful.

Understanding Reasonable Efforts

“Reasonable efforts” findings are judicial rulings that the child welfare agency (the agency) has or has not provided appropriate services at different times during a child welfare case. According to federal and state laws judges must make reasonable efforts findings at least three distinct times during the case.[1]

The judge must make:

- 1 a finding that the social worker provided reasonable efforts (services/interventions) to prevent removal of the child from parental care;
- 2 findings that during the reunification period, the social worker provided reasonable efforts (meaningful services) to promote reunification between the parents and their child; and
- 3 reasonable efforts findings that the social worker has taken steps to make and finalize alternate

permanency plans for each foster child in a timely fashion.[2] The permanent plan could be with parents, a legal guardian, a relative, or an adoptive home.

The legislative history makes clear why the reasonable efforts provisions were added to the law.

As Senator Cranston stated:

[T]hese sections are aimed at making it clear that States must make reasonable efforts to prevent removal of children from their homes. In the past, foster care has often been the first option selected when a family is in trouble; the new provisions will require States to examine alternatives and provide, wherever feasible, home-based services that will help keep families together or help reunite families.[3]

In other words, Congress's method for holding social service agencies accountable for promises made in the State Plan was to require judicial oversight of social service efforts to assist families.[4] Under the federal law each state would describe to the federal government the services it would offer at-risk families to prevent removal and rehabilitate families where removal had occurred. In return the federal government would reimburse the state for some foster care costs.[5] Under the federal law the juvenile courts were tasked with holding each state agency accountable to ensure promised services were offered at various times during a child dependency case.

- If the court concluded the state had offered appropriate services, the court would make a “reasonable efforts” finding.
- If, however, the court determined the state did not offer adequate services, the court would make a “no reasonable efforts” finding. Such a finding would mean the state would not receive federal funding for that child.
- A third finding authorized by federal law was no reasonable efforts were offered because of an emergency. But even with this finding, the court could determine when the emergency would be over and when an alternative plan could be implemented.

In all these situations federal law required the court to record the reasonable efforts/no reasonable efforts findings in the written orders because federal authorities would audit court records as part of their oversight of the implementation of the law.

Barriers to Making Reasonable Efforts Findings

The federal reasonable efforts mandate has not worked well in many jurisdictions. Common barriers include:

- **Many judges are not in a position to make an intelligent finding about available services in the community.** After all, social workers are the experts in their knowledge of services, while judges are trained in the law and do not study service availability in their community. Judges realize that to make a “no reasonable efforts” finding, the judge would be second guessing an expert.
- **State plans are not easily available to the public and are not broken down into a single document** so judges and attorneys can know what services the state has promised the federal government they will provide families.[6] To make intelligent reasonable efforts findings, the judge needs to know what services are available in the local community and whether they are effective or not. Judges are usually not experts in community services. In courts where judges rotate from one assignment to another, the judge will not have a basis of knowledge to make such a finding.
- **Other than a report from the social worker, judges get little information in court.**
- **Attorneys rarely make reasonable efforts arguments in court, and almost never at the initial hearing** partly because attorneys may not be appointed early enough to prepare for that hearing. [7]
- **Judges are reluctant to make a “no reasonable efforts” finding** since the financially strapped agency would be losing federal money for that case.
- **Federal law does not define reasonable efforts.** This may be because services in one community would differ from services in other communities. Several states have legislated definitions of reasonable efforts, but they are very general. The lack of a definition has also made it difficult for a judge to decide if the agency provided reasonable efforts in individual cases.

Because of these barriers, many judges do not make reasonable efforts findings, and some merely approve the social worker’s efforts without much thought. This is contrary to the law and contrary to congressional intent.[8]

Making Effective Reasonable Efforts Findings

Judges could make more meaningful reasonable efforts with better knowledge about services available in the community. What if the agency created a list of services social workers are aware of? If the judge had a copy of that list, the judge could ask intelligent questions about why one service was used and not another. This type of reasonable efforts questioning should begin at the first hearing where the judge is already responsible for actively asking questions of the social worker regarding several other critical issues such as paternity and the application of the Indian Child Welfare Act.[9]

Judge Douglas McNish took this approach on the island of Maui, Hawai'i. He discovered a list of services the social service agency claimed to have to assist families at risk of losing custody of their children. He was able to make meaningful reasonable efforts findings by questioning the social workers about their actions and measuring their responses against the available services on the island. It worked! When the judge made a "no reasonable efforts" finding because the promised service was not available, the agency was able to provide that service in the future. Because the judge knew about available services, the judge was able to make meaningful reasonable efforts findings.

Judges should ask their local social services/child protection agencies for a list of services they provide to prevent removal of children from parental care and rehabilitate families. This should not be difficult as the department would simply be describing how social workers perform their daily work. Attorneys should also receive a copy of that list.

Some caveats accompany this approach:

- 1** In creating the list of services, the agency should include the capacity of the service provider. How many families can the service accommodate? A service would not be considered available if there were long waiting lists of clients. Some jurisdictions have addressed this problem by giving priority access to families attempting to reunify with their children.
- 2** The agency should indicate to the court whether the service has proven to be effective. The federal Family First Prevention Services Act emphasizes using evidence-based services.[10] A list of evidence-based services is available online.[11] Many services are not on the evidence-based list. That does not mean, however, that they have not been evaluated for effectiveness. The agency should be able to explain to the court how it has evaluated the effectiveness of a particular service. Social service agencies across county and state borders could work together to create lists of services that have proven effectiveness. The goal is to refer families to effective services so that families will benefit from participation.

Child welfare system leaders should be actively engaged in the reasonable efforts process.

After the agency has provided the court and attorneys with a list of available services and the effectiveness of those services, child welfare professionals can take several steps:

- 1 Frontline social workers should accurately assess family needs and report those needs to the court. Those needs should form the foundation of the case plan.
- 2 Judges should discuss the availability and effectiveness of services provided by service providers contracted by the agency.
- 3 Judges should review service effectiveness early in the case rather than waiting until the termination of parental rights hearing. Using interim reviews is an effective way to accomplish this goal.[12]
- 4 Attorneys should actively participate in the reasonable efforts determinations at every stage of the case, particularly the initial hearing.
- 5 The judge, attorneys, and the social worker should urge clients to participate in services. Many parents do not follow through, enroll in services, and complete the program. The number of clients who complete services can be increased if there is an active family drug treatment court (FDTC). Because the client sees the judge regularly in a FDTC, follow-through is much more likely. [13]
- 6 The judge must take the reasonable efforts determination seriously. Reasonable efforts is not litigated in many state courts. Several states have few or no appellate law decisions discussing the reasonable efforts issue. Of the thousands of cases that go through the nation's juvenile courts, less than 1% address whether reasonable efforts were provided to prevent removal of the child.[14] There are good reasons for this failure to address the "prevent removal" issue, most of them having to do with late appointment of attorneys.[15]

Conclusion

Federal child welfare leaders have recently emphasized the importance of the reasonable efforts law to prevent removal.[16] Jerry Milner and David Kelly state that attorneys should be "[a]dvocating vigorously for reasonable efforts to be made to prevent removal or for a finding that reasonable efforts have not been made to prevent removal when that is the situation." [17] Their goal will only be

achieved if attorneys and judges receive information about available services and the quality of those services. If the agency will provide the court and attorneys a list of available services, judges will be able to make meaningful judgments about whether the agency applied reasonable efforts to prevent removal, and attorneys will be in a better position to argue the reasonable efforts issue.

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Endnotes

[1] Social Security Act §§471(a)(15), 472(a)(1), 42 U.S.C.A. §§671(a)(15), 672(a)(1)(West Supp. 1981).

[2] 42 U.S.C. §§672(a)(2)(A)(ii); 45 C.F.R. §1356.21(b)(2)(2006).

[3] 126 Cong. Rec. S6942 (daily ed. June 13, 1980) (Statement of Sen. Cranston).

[4] Social Security Act §470, 42 U.S.C.A. §670 (West Supp. 1981).

[5] *Id.*

[6] Judge Richard FitzGerald used to quip that the State Plan was a work of fiction, unavailable to anyone interested in reading it.

[7] See Edwards, Leonard. “Ignoring Reasonable Efforts: How Courts Fail to Promote Prevention.” *The Chronicle for Social Change*, December 5, 2018. Also available at judgeleonardedwards.com – publications blog.

[8] “The committee is aware of allegations that the judicial determination requirement can become a mere *pro forma* exercise in paper shuffling to obtain federal funding. While this could occur in some instances, the committee is unwilling to accept as a general proposition that the judiciaries of the states would so lightly treat a responsibility placed upon them by federal statute for the protection of

children.” Child Welfare Act of 1980, Pub. L. No. 96-272, *Legislative History*, U.S. Congress, Washington D.C., 1980, 1465.

[9] Edwards, Leonard. “Should Judges Ask Questions: The Enquiring Magistrate.” *The Bench*, Winter 2016, 6, 36. Also available at judgeleonardedwards.com

[10] Family First Prevention Services Act of 2018, Pub. Law No. 115-123; *And see* Bellamy, J., S.E. Bledsoe, D. Traube, [“The Current State of Evidence-Based Practice in Social Work: A Review of the literature and Qualitative Analysis of Expert Interviews.”](#) *Journal of Evidence Based Social Work* 3(1), March 1, 2006, 23-48.

[11] <<http://www.cebc4cw.org/>>

[12] Edwards, Leonard. “Juvenile Court Corner: Interim Reviews.” *The Bench*, Autumn 2009, 9-10. Also available at judgeleonardedwards.com.

[13] Children and Family Futures. *Family Drug Court Literature Review* through August 2015.

[14] Edwards, Leonard. *Reasonable Efforts: A Judicial Perspective*, Appendix A. Accessible online at judgeleonardedwards.com.

[15] *See* Edwards, Leonard. “Ignoring Reasonable Efforts: How Courts Fail to Promote Prevention.” *The Chronicle for Social Change*, December 5, 2018. Also available at judgeleonardedwards.com.

[16] Milner, Jerry & David Kelly. [“Reasonable Efforts as Prevention.”](#) *ABA Child Practice Today*, November 6, 2018.

[17] *Id.*