

REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE

By Judge Leonard Edwards (ret.)¹

INTRODUCTION

The term “reasonable efforts” challenges and confounds many in our juvenile dependency and family courts across the country.² Judges hear about it in their judicial trainings, read about it now and then in publications, sign their names to court orders finding that the children’s services agency (“agency”) made “reasonable efforts” on a daily basis, and on occasion make “no reasonable efforts” findings. Yet attorneys rarely refer to reasonable efforts in court, and most judges approve of what the agency has done with little or no thought about it.³ The law requires judges to make these findings, and good reasons exist to do so. By making the reasonable efforts/no reasonable efforts findings the court informs the parties, the children’s services agency, and the federal government that the agency is or is not meeting its legal responsibilities. By monitoring the agency’s actions the court ensures that the agency has complied with its legal obligation to provide services to prevent the child’s removal from parental care, assist the family safely to reunify with its child, and make certain to finalize a permanent plan for the child. The reasonable efforts/no reasonable efforts findings are the most powerful tools juvenile court judges have at their disposal in dependency cases, and attorneys and judges should pay special attention to them to ensure that the

¹ Judge Edwards is a retired judge now working as a consultant to juvenile courts in California and other states. The author is indebted to many people for the research and information contained in this booklet. In particular, I thank Sidney Hollar, Esq. for her assistance with the text, Corby Sturges, Christopher Wu, Mary Michael Miatovich, and Judge Arnold Rosenfield (ret.) for their suggestions, Jackie Ruffin for her work on the footnotes, and Anna Bokides for her assistance on research. Additionally, I thank all of the judges, attorneys, and CIP directors who commented on how the reasonable efforts issue is tried in their jurisdictions.

² The trial court that hears child abuse and neglect cases is called by different names in different states. Some refer to it as the Abuse and Neglect Court, the Child Protection Court, the Family Court, CHINS (Children in Need of Supervision), CHIPS (Children in need of Protection), CINC (Children in Need of Care), the Juvenile Dependency Court, and other names. The term juvenile dependency or dependency court will be used throughout this paper.

³ “The systems for ensuring reasonable efforts earlier in a case have never been fully effective.” (Crossley, Will L.

“Defining Reasonable Efforts: Demystifying the State’s Burden Under Federal Child Protection Legislation,” *Public Interest Law Journal*, 12 B.U. Pub. Int. L.J. 259, (2002-3), at p. 299; (hereinafter Crossley); Shotton, A., “Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later,” *Cal. W. L. Rev.*, Vol. 26, 1989-1990, 223-256, at 227 & 236. (hereinafter “Shotton”); “Because it was difficult to enforce, the federal reasonable efforts requirement never became an effective provision.” Bufkin, M., “Note: The ‘Reasonable Efforts’ Requirement: Does It Place Children at Increased Risk of Abuse or Neglect?”, *University of Louisville Journal of Family Law*, Vol. 35, Spring 1996/1997, at pp 355-380, at pp 370-1.

agency is doing its job, to make positive changes in the child protection system, and, most importantly to improve outcomes for children and families. Two goals of this book are to encourage judges and attorneys to be more assertive in their oversight of social service agencies and to examine the “reasonable efforts” issue earlier in the case.⁴

This book considers the reasonable efforts finding from a number of perspectives. First, it reviews the history of the reasonable efforts concept, including the congressional actions that resulted in legislation mandating court oversight of children’s services agency actions in child abuse and neglect cases. Second, it explains the legal requirements imposed on children’s services agencies and the responsibilities placed upon the courts by the legislation – when must the reasonable efforts findings be made, and what the consequences are if the court fails to make the finding? Third, it discusses the failure of the federal legislation to define reasonable efforts and the significance of that failure. Fourth, it reviews “aggravated circumstances”- situations when the court need not make reasonable efforts findings. Fifth, it examines the Indian Child Welfare Act (ICWA) and the federal requirement that the state provide “active efforts” before removing an Indian Child from parental care and “active efforts” to help parents reunify with their child. Sixth, it discusses state legislative responses to the federal law, trial court practice, and state appellate law rulings on the reasonable efforts issue. Seventh, it reviews state court practice addressing the reasonable efforts issue in the context of problems frequently encountered by families, including inadequate housing, poverty, domestic violence, substance abuse and similar issues. Eighth, the book outlines the problems and barriers that limit an attorney’s ability to address the reasonable efforts issue effectively. Ninth, it discusses the problems and barriers that limit judges’ ability to address the reasonable efforts issue effectively. Tenth, it suggests some strategies and recommended best practices judges can use to address the reasonable efforts issue. All of these come from a judicial perspective, from a judge who served in the juvenile court for more than 20 years, a judge who has spent his career attempting to improve outcomes for children and families who appear in the juvenile court.

Additionally, the book includes ten appendices. Appendix A includes each state’s statutes regarding reasonable efforts and some of each state’s appellate case law discussing the reasonable efforts requirements. Comments from participants in the court process and scholars accompany the statutes and case law. Appendix B reviews state definitions of reasonable efforts from statutes and case law. Appendix C sets out several useful court forms regarding social service efforts to document reasonable efforts created in Troup County Georgia, Mecklenberg County, North Carolina, Jefferson County, Kentucky, Santa Clara County, California, and the state of Washington. Appendix D contains a letter to the Santa Clara County Director of Children’s Services from the

⁴ Watson, A., “A New Focus on Reasonable Efforts to Reunify,” *Child Law Practice Online*, American Bar Association, *Child Law Practice*, Vol. 32, available at http://www.americanbar.org/publications/child_law_practice/vol.32/sample_issue/a_new at pp. 2-3.

juvenile court presiding judge concerning reasonable efforts. Appendix E contains a psychological report concerning the inadequacy of visitation along with several letters regarding efforts to improve visitation for children and parents, while Appendix F sets out the Code of Federal Regulations 45: §1356.21. Appendix G contains a copy of 45 CFR §1355.25 - Principles of child and family services. Appendix H contains several preliminary hearing benchcards developed by the Courts Catalyzing Change project at the National Council of Juvenile and Family Court Judges (NCJFCJ). Appendix I contains several forms developed for use at interim reviews, and Appendix J reproduces California Standard of Judicial Administration 5.40 (c) and (d) regarding the judge's responsibility to attract and retain competent lawyers to represent children and parents. A bibliography follows.

The book includes a discussion regarding the widely disparate responses to the federal law among the states. Many commentators have concluded that the nation's juvenile courts have not effectively addressed the reasonable efforts issue thus thwarting the intent of Congress.⁵ This book attempts to demonstrate that while juvenile courts in many states infrequently try the reasonable efforts issue, trial and appellate courts in a number of states have been aggressive in their treatment of reasonable efforts and have effectively monitored agency actions. Appellate cases and commentary from trial court participants reveal that almost always the reasonable efforts issues are tried at a termination of parental rights hearing when it is too late to serve the interests of the child and family. The book urges all parties in the juvenile court, and particularly judges, to pay careful attention to the reasonable efforts issue and to do so early in the case. Reasonable efforts decisions are legal requirements and compliance with the law better serves children and families.

SOURCES

One can only approximate trial court activity regarding reasonable efforts litigation. Appellate case law reflects only those cases in which the attorneys had the time and resources to appeal a trial court decision. Even if the case is appealed, some appellate decisions are not reported in the official reporters. This book includes some unreported cases, but only where the case was of interest. It also includes interviews with and comments from a variety of practitioners and experts including judges, attorneys, writers, and court improvement directors.

⁵ Marcia Lowry of the ACLU testified to Congress that children "are supposed to be protected by the very fine legislation that Congress passed in 1980 which requires the states to make reasonable efforts to avoid the need for foster care placement whenever possible," but "reasonable efforts are not made in hundreds and hundreds of thousands of cases across the country." *Foster Care, Child Welfare, and Adoption Reforms, Joint Hearings Before the Subcommittee On Public Assistance and Unemployment Compensation of the Committee On Ways and Means and Select Committee On Child, Youth and Families, 100th Congress 20-21 (1988)* (Statement of Marcia Lowry, Director Children's Rights Project, ACLU); cited in "Crossley," *op.cit.*, footnote 3 at pp. 280 & p. 312;

There are cautions about reading appellate decisions. The law in every jurisdiction differs; thus, a case in one state may not be the law in another. Moreover, cases must be read carefully as they are fact driven and each case is different. Nevertheless, each case identifies issues that may be considered in other contexts. Many of the issues identified in case law have been litigated in only a few states. Attorneys and judges are encouraged to raise these issues in their own jurisdictions.

I. LEGISLATIVE HISTORY

When the United States Congress held hearings on the status of foster children and other child welfare issues in hearings from 1975 to 1980, the legislators were dissatisfied with what they heard from welfare directors and policy experts around the country. Congress had already passed the Child Abuse Prevention and Treatment Act (CAPTA) in 1974. That legislation provides federal funding to states in support of prevention, assessment, investigation, prosecution and treatment.⁶ But Congress continued its attention on the foster care system, finding that the state and local child welfare agencies removed children from their parents without attempting first to preserve the family and then failed to provide parents with adequate services in their efforts to reunify parents with their children.⁷ The congressional hearings revealed that child welfare agencies failed to create case plans for foster children, which unnecessarily prolonged their time in out-of-home care.⁸ Congress further found that foster children experienced “foster care drift”, the movement from one foster home to another, and that this continual upheaval damaged these children.⁹ Congress also learned from

⁶ CAPTA was originally enacted in P.L. 93-247 and was most recently amended and reauthorized on December 20, 2010, by the CAPTA Reauthorization Act of 2010 (P.L. 111-320).

⁷ “A major reason for the enactment of legislation dealing with these programs is the evidence that many foster care placements may be inappropriate, that this situation may exist at least in part because federal law is structured to provide stronger incentives for the use of foster care than for attempts to provide permanent placements.” Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, *Legislative History* (U.S. Congress, Washington, D.C.) 1980, at p. 1464.

⁸ Allen, M., Golubock, C., & Olson, L., “A Guide to the Adoption Assistance and Child Welfare Act of 1980,” Chapter 23, *Foster Children*, Edited by Hardin, M., American Bar Association, Butterworth Legal Publishers, Boston, 1983. (hereinafter “Guide to the Adoption Assistance Act”).

⁹ Foster care drift “...refers to children who, once placed in foster care, become lost in the foster care system,” drifting from home to home thereafter, never achieving permanency. See Garrison, M., “Why Terminate Parental Rights?,” 35 *Stanford Law Review*, 423 (1983); Bartholet, E., *Nobody’s Children: Abuse and Neglect, Foster Drift, and the Adoption*

substantial research conducted in the 1960's and 1970's which indicated that with provision of effective social services, a greater number of families could be preserved, and many children could be safely reunited with their biological parents.¹⁰

Congress concluded that a significant overhaul was needed to address the complex problems facing abused and neglected children and their families. Congress conceived of a system that emphasized removal of children only when necessary for the child's safety, provision of services to the family that make it possible for family reunification, and careful monitoring of agency actions to ensure that the agency acted consistently with these goals. Senator Cranston summarized one of the principles underlying this new law, the Adoption Assistance and Child Welfare Act of 1980 (AACWA):¹¹

[T]hese sections are aimed at making it clear that States must make reasonable efforts to prevent the removal of children from their homes. In the past, foster care has often been the first option selected when a family has been in trouble; the new provisions will require States to examine alternatives and provide, whenever feasible, home-based services that will help keep families together, or help reunite families. Of course, State child protective agencies will continue to have authority to remove immediately children from dangerous situations, but where removal can be prevented through the provision of home-based services, these agencies will be required to provide such services before removing the child and turning to foster care. These provisions, I believe, are among the most important aspects of this legislation. Far too many children and families have been broken apart when they could have been preserved with a little effort. Foster care ought to be a last resort rather than the first.¹²

Congress concluded that the legislative initiatives were necessary to avoid the major problems they identified: social services agencies removed too many children from homes, children lived in foster

Alternative, Beacon Press, Boston (1999); Woodhouse, B., "Horton Looks at ALI Principles," *J.L.O. & Fam. Stud.*,4: 151 (2002).

¹⁰ Fanshel, David, and Shinn, Eugene, *Children in Foster Care: A Longitudinal Investigation*, New York, 1975, Child Welfare Information Services; Stein, T., Gambrell, E.D., and Wiltse, K.T., *Children in Foster Homes: Achieving Continuity of Care*, (1978) New York, Praeger; Lahti, J., Green, J., Emlen, A., Zadny, J., Clarkson, Q., Kuehnel, M., and Casciato, J., (1978) *A Follow-up Study of the Oregon Project: A Summary*, Portland: Regional Research Institute for Human Services, Portland State University.

¹¹ P.L. 96-272; 42 U.S.C. §670 *et seq.* Many of the policies contained in the AACWA were suggested by Professor Michael S. Wald in his article, "State Intervention on Behalf of 'Neglected' Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights," *Stanford Law Review*, Vol. 28, No. 4, April, 1976, at pp 623-706.

¹² 123 *Cong. Rec.*S22684 (daily ed. August 3, 1979).

care for too long, and social services agencies failed to take affirmative action to prevent the removal of children from their homes when that could be safely avoided with the provision of services.

Under the new legislation – AACWA - the nation’s juvenile and family courts¹³ became responsible for oversight of the children’s services agency at critical points in the juvenile dependency process. First, AACWA instructed juvenile courts to review the facts which surrounded the removal of a child from parental care and to determine whether the children’s services agency used sufficient services and resources to prevent the removal.¹⁴ Related to that finding, before the removal could be approved, the AACWA required that the courts make a finding that “...continuation in the home from which the child was removed would be contrary to the welfare of the child.”¹⁵ AACWA also required the courts to determine whether the agency provided adequate services to assist parents re-unify with children who had been removed from their custody.¹⁶

In 1997, some seventeen years later, Congress held additional hearings on the status of foster children and found that children continued to languish in foster care, were not receiving timely permanency, and that family preservation policies placed some children at risk of re-abuse.¹⁷ In the resulting legislation, The Adoption and Safe Family Act (“ASFA”),¹⁸ Congress declared that the health and safety of the child are paramount.¹⁹ Implementation of this goal involved provisions which shortened the time that family reunification services could be provided to families, identified types of serious abuse that would eliminate the need for reunification services, created a “case review system” that provides for periodic review of the case, and instituted adoption incentives. This new legislation also added a third issue for the courts to review – whether the agency was making reasonable efforts to make and finalize alternate permanency plans for each foster child in a timely fashion.²⁰ In each of these three situations (at the time of removal, reunification, and timely

¹³ In different states the juvenile or family court has the responsibility for presiding over juvenile dependency cases. Juvenile court will be used in this paper.

¹⁴ 42 U.S.C. §472(a)(2)(A)(ii) and 45 CFR 1356.21(c) (2006); “No child will be placed in foster care, except in emergency situations, either voluntarily or involuntarily, unless services aimed at preventing the need for placement have been provided or refused by the family.” House Committee on Ways and Means, Social Services and Child Welfare Amendments of 1979: Report to Accompany H.R. Rep. No 96-136, 96th Congress, 1st Session, at 6 (1979).

¹⁵ 42 U.S.C. §472(a)(2)(A)(ii); 45 CFR 1356.21(b)(1) (2006).

¹⁶ 42 U.S.C. §671(a)(15)(B)(ii) (2006).

¹⁷ “Children are experiencing increasingly longer stays in foster care...The emerging statistical picture shows that young children are spending substantial portions of their childhood in a system that is designed to be temporary.” H.R. Rep. 105-77, H.R. Rep. No. 77, 105th Cong. 1st Session, 1997 U.S.C.C.A.N. 2739, 1997 WL 225672 (Leg. Hist.) at p. 11; Gelles, R., *The Book Of David: How Preserving Families Can Cost Children’s Lives*, Basic Books, 1996.

¹⁸ P.L. 105-77 (1997).

¹⁹ 42 U.S.C. §629

²⁰ 42 U.S.C. §§672 (a)(2)(A)(ii), 673(b), & 675; 45 CFR 1356.21(b)(2) (2006); for a guide regarding finalizing a permanent plan see *Making It Permanent: Reasonable Efforts to Finalize Permanency Plans for Foster Children* by Fiermonte, C. and Renne, J., ABA Center on Children and the Law, Washington, D.C. (2002); (hereinafter “*Making It Permanent.*”)

permanency) the legislation required that the courts make specific findings addressing whether the agency provided reasonable efforts or whether the agency failed to provide reasonable efforts.

Important financial implications for the local children’s services agency follow the required reasonable efforts finding. If the court makes a “no reasonable efforts” finding on the record, the agency receives no federal funding for the support of that child while in foster care. Local government must pay for any such services.²¹

II. THE FEDERAL LAW AND CHILD WELFARE

The federal law significantly changed the relationships between the federal government and state child welfare agencies and between state child welfare agencies and the courts. Suddenly the nation’s juvenile dependency courts had new responsibilities involving the oversight of agency actions regarding abused and neglected children and their families.

A. FEDERAL OVERSIGHT OF STATE CHILD WELFARE ACTIONS

In the new federal statutory scheme, found in part in Title IV-B and IV-E, the federal government grants money to each state which supports children placed in foster care.²² Usually the funds provided require that the state match this grant, typically by 25 to 50 percent.²³ Each state creates a state plan which indicates how the state plans to use this funding to provide services to prevent removal, to reunify families that are separated, and to finalize a permanency plan for children under state control.²⁴ The plan resembles a contract – in that the federal government provides money to the state which funds the placement of children in out-of-home care, and the state guarantees that it will use the money as promised in the state plan.

²¹ If the reasonable efforts to prevent removal finding is not made, the agency will not ever receive federal funding for that child. *Id.* If the reasonable efforts finding regarding finalizing a permanent plan is not made, the agency will not receive federal funding for the month when that finding was made and will not receive funding until such time as a reasonable efforts finding is made. 45 CFR §1356.21(b)(2)(ii).

²² 42 U.S.C. §671. The federal government, under Title IV-B of the Social Security Act, also provides funds to states, tribes, and territories for the provision of child welfare-related services to children and their families. These services may be made available to any child, and his or her family, and without regard to whether the child is living in his or her own home, living in foster care, or was previously living in foster care. The majority of these funds are intended to support families and prevent entry into foster care. See 42 U.S.C. §§ 620-622. Some states have successfully applied to the federal government such that children found to be delinquent can be eligible for Title IV-E funding. This means that local probation officers must follow the Title IV-E guidelines and provide reasonable efforts to prevent a child’s placement in foster care.

²³ 42 U.S.C. §674.

²⁴ The requirements of a state plan are described in 42 U.S.C. §§621, 622(b), 629(b), and 671(a).

The federal government utilizes several methods to ensure that the states comply with their state plan. First, the federal government relies on judicial findings such as “contrary to the best interests” and “reasonable efforts” to determine on a case-by-case basis whether the agency complies with its plan. Second, the federal government conducts Title IV-E audits of each state. Third, in 2000 the federal government started to conduct Child and Family Service Reviews (“CFSR”) of state child welfare agencies to determine whether each has complied with a number of practices and provides promised services, many of which are a part of the state plan.²⁵

The government conducts all three of these reviews of agency practice by reviewing agency and court records. The United States Supreme Court has ruled that private parties cannot sue under Titles IV-B and IV-E to enforce the federal reasonable efforts requirement, in part because of the statute’s silence as to the meaning of “reasonable efforts.”²⁶ Federal audits and judicial oversight through the “contrary to the welfare of the child” and “reasonable efforts” findings remain the exclusive means for ensuring that the agency fulfills its legal responsibilities.

B. AGENCY REQUIREMENTS

In order to qualify for federal funding for foster care, the AACWA requires that a state prepare a state plan which describes the services it will provide to prevent children’s removal from parental custody and to reunite the child and the parents after removal.²⁷ The plan must also include a provision that the social service agency will make foster care maintenance payments in accordance with section 672 of the federal law.²⁸ The law mandates that the state fulfill numerous other conditions in order to receive federal funding.²⁹

Federal law requires that state child welfare agencies handle child welfare cases in several particular ways. First, the agency must take action to protect the child and provide services that will prevent removal, place the child, if necessary, and ensure the child is cared for.³⁰ Second, if the agency removes the child from the home, the agency must develop a case plan to ensure the child’s placement is in the least restrictive, most family-like setting available in close proximity to the

²⁵<http://www.acf.hhs.gov/programs/cb/monitoring>; <https://www.childwelfare.gov/management/reform/cfsr/>;

²⁶*Suter v Artist M.*, 503 U.S. 347, 112 S.Ct. 1360, 118 L.Ed.2d 1 (1992); see also *Washington State Coalition for the Homeless v Department of Social & Health Services*, 949 P.2d 1291 (Wash. 1997) and Alexander, R., Jr., and Alexander, C., “The Impact of *Suter v Artist M.*, on Foster Care Policy,” *Social Work*, Vol. 40, No. 4, July, 1995 at pp 543-548.

²⁷ 42 U.S.C. § 671(a). Title IV-B provides a small amount of federal funding to the states for services to preserve families.

²⁸ *Id.*

²⁹ *Id.*

³⁰ 42 U.S.C. §1356.21 (c). (Refer to Appendix F for the complete text of §1356.21). “Cared for” means that the child has a home with parental figures ensuring the child is safe and healthy.

parents' home, consistent with the best interests and special needs of the child.³¹ The case plan is an integral element of the reasonable efforts requirement.³² The case plan must identify the problem which caused the removal as well as the goals and services which will enable the parent to remedy those problems and assist the parents as they seek to correct the problems. The agency must develop a case plan jointly with the parent or guardian.³³ Each case plan must specifically "[i]nclude a description of the services offered and provided to prevent removal of the child from the home and to reunify the family."³⁴

Third, the agency must also provide substantial information and assistance to the parents before parental rights are altered or lost. The agency must inform the parents of the reasons for state intervention, identify what the parents must do in order to remedy the situation, and provide assistance in locating and referring parents to service providers who can help the parents address the problems that brought their child to the attention of the agency.³⁵ Then, during court proceedings, the agency must provide evidence to the court at several court hearings that it is fulfilling its duty to make reasonable efforts, and this evidence must be documented by the court.³⁶ Court documents such as petitions, court reports, and forms may contain information about reasonable efforts, and court orders including findings of fact must reflect a judicial finding whether or not the agency made reasonable efforts prevent removal and to reunite the family.³⁷

The federal government through the Children's Bureau, a division of the Department of Health and Human Services, issued guidelines for state legislatures to consider when implementing laws which require that courts consider a variety of factors in making "reasonable efforts" findings.³⁸ These factors include:

- (1) the dangers to the child and the family problems that precipitate those dangers;
- (2) whether the services the agency provided relate specifically to the family's problems and needs;
- (3) whether case managers diligently arranged services for the family;
- (4) whether the appropriate services for the family were available and timely,

³¹ 42 U.S.C. §§675 (1) & 675(5)(A), §1356.21(g); If the child is 16 years of age or older, the plan must include services aimed at helping the youth prepare for independence. 42 U.S.C. §§ 671, 677, 1369a.

³² 45 C.F.R. § 1356.21(d)(4); § 1356.21(g)(4) – both are found in Appendix F.

³³ 45 CFR § 1356.21(b)(2)

³⁴ 45 C.F.R. § 1356.21 (g)(4)

³⁵ 45 C.F.R. §1356.21(b)

³⁶ 45 C.F.R. §1356(d)

³⁷ 42 U.S.C. sections 671(a)(15), 672(a)(1)

³⁸ Duquette, D., & Hardin, M., *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, Department of Health and Human Services, ACF, Children's Bureau, Washington, D.C. 1999.

(5) and, the results of the services provided.³⁹

The federal government does not require that a state offer a specific set of services to families whose children have been abused or neglected. Instead, federal guidelines provide a list of suggested services and principles underlying child and family services.⁴⁰ In its state plan, the agency specifies what services it will make available to families where there has been state intervention, but ultimately, the judge in court proceedings determines whether the services offered in a particular case were reasonable. The judge must also decide whether the services addressed the problems that brought the child to the attention of the agency.⁴¹

In order to implement effectively the reasonable efforts requirement, the agency must document their efforts to fulfill its statutory duty.⁴² Documentation enables the agency to demonstrate to federal reviewers the quality of their work as well as provide the court sufficient

³⁹ *Id.*, at III-5; Minnesota is one state that has specific statutory language making it clear that the state agency bears the burden of establishing it has made reasonable efforts. The statute lists factors the courts must consider in analyzing whether the state has met its burden; (refer to the Minnesota statutes in Appendix A).

⁴⁰ The litany of services includes: “24 hour emergency caretaker; the homemaker’s services; daycare; crisis counseling, individual and family counseling; emergency shelters; procedures and arrangements for access to available emergency financial assistance; arrangements for the provision of temporary child care to provide respite to the family for a brief period, as part of a plan for preventing the children’s removal from the home; other services which the agency identifies as necessary and appropriate such as home-based family services, self-help groups, services to unmarried parents, provisions, or arrangements for mental health, drug and alcohol abuse counseling, vocational counseling or vocational rehabilitation; and post adoption services.” C.F.R. § 1357.15(e)(2)(1990). A commentator suggests that the following services be available: Drug treatment, housing assistance, homemaker services, counseling, transportation, parenting education, anger management classes, mental health care, child-development classes, home visits by nurses, day care referrals to medical care, domestic violence counseling, financial management services, alcohol recovery support, stress management services, nutritional guidance, and arrangements for visitation to which the author adds, wrap-around services, and facilitated meetings with family/support persons. See Bean, K. “Reasonable Efforts: What State Courts Think,” *University of Toledo Law Review*, Vol.36, 321 (2004-5) (hereinafter, “What State Courts Think”); 45 C.F.R. section 1357.15(e)(2); “Guide to the Adoption Assistance Act,” *op.cit.*, footnote 7 at pp. 591-2 See also Appendix G, “45 CFR 1355.25, Principles of Child and Family Services.

⁴¹ Some appellate courts have addressed this issue. See *In re Kristin W.*, (1990) 222 Cal.App.3d 234 and *In re Venita L.*, 191 Cal. App. 2d 1229, 236 Cal. Rptr. 859 (1987). Several commentators have also noted that the services offered are sometimes unrelated to the presenting problems in the case. Crossley, W., *op.cit.*, footnote 3 at p. 305. At least one judge asked for a copy of the state plan and then ordered services that the state had included in its state plan. The judge learned that the state had no such services. See the comments of Judge Douglas McNish (ret.) in Appendix A under the State of Hawai’i.

⁴² 35 C.F.R. §1356.21(d); Ratterman, D., Dodson, D., & Hardin, M. “Reasonable Efforts to Prevent Foster Placement: A Guide to Implementation,” Second Edition, American Bar Association, National Legal Resource Center for Child Advocacy and Protection, Washington, D.C., 1987 at p. 17. (hereinafter “Reasonable Efforts to Prevent Foster Placement”).

information for the judge to make well-informed reasonable efforts decisions. Appendix C provides examples of forms used by several agencies' to document the services it has provided to parents.

Following passage of the AACWA and ASFA most state legislation paralleled the federal law. State child welfare agencies responded to the new reasonable efforts requirements by developing policies and suggested guidelines for social workers who investigate and handle cases involving abused or neglected children. Agency policies stress prompt investigation of reported abuse or neglect, an assessment of family needs, and the development of a service plan for the family.⁴³ Agency policies often highlight the importance of preventing removal of the child from the home. One agency memorandum stated that a simple referral to services was insufficient to meet the demands of reasonable efforts, and that the agency should encourage and assist the family in gaining access to and utilizing the services.⁴⁴ Ultimately the courts and federal audits determine whether a particular agency is, in fact, following these recommended policies and guidelines.

C. THE COURT'S INVOLVEMENT: "CONTRARY TO THE WELFARE OF THE CHILD" AND "REASONABLE EFFORTS" FINDINGS

To ensure the viability of this new system, Congress selected juvenile and family courts to oversee operation of the nation's foster care system. When Congress chose the nation's juvenile courts to oversee the actions of children's services agencies, it anticipated that these courts would seriously undertake the responsibilities placed on them by federal legislation.⁴⁵ It is important to note, however, that the courts did not volunteer for this responsibility and Congress failed to provide the necessary financial assistance for the increased workload.⁴⁶ Moreover the children's services agencies certainly did not want the courts looking over their shoulders, but this legislation forced the courts and the child welfare agencies into a new relationship.

⁴³*Id.* at p. 3.

⁴⁴ See Ariz. Div. of Economic Security, *DES Manual*, Revision No. 241, section 5-53-08(c)(4)(Nov. 1984) cited in Ratterman et.al. *Id.*, at p. 3.

⁴⁵ "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, Public Law. No. 96-272, *Legislative History* (U. S. Congress, Washington, D.C.) 1980, at p. 1465.

⁴⁶ Based on the author's experience visiting courts across the country and a review of the literature, the court's juvenile dependency workload is comparable to the delinquency workload. That is, the same amount of judicial time is necessary to address juvenile dependency as the court expends in juvenile delinquency cases.

States quickly adopted statutes requiring the courts to make the findings outlined in the federal legislation.⁴⁷ For example, California Welfare and Institutions Code § 319(d)(1) requires the court to

make a determination on the record, referencing the social worker’s report or other evidence relied upon, as to whether reasonable efforts were made to prevent or eliminate the need for removal of the child from his or her home, pursuant to subdivision (b) of Section 306, and whether there are available services that would prevent the need for further detention.⁴⁸

Under the federal law, in order for a state to recover federal foster care funds, a judicial finding must be made that “continuation in the home would be contrary to the child’s welfare” and that the child welfare agency made “reasonable efforts” to prevent the need for placement and to make it possible for the child to return home.⁴⁹ The “reasonable efforts” finding must be contained in a written court order, and the court must make this finding within 60 days from the physical removal of the child from parental custody.⁵⁰

According to the federal law and conforming state legislation the court must make reasonable efforts findings at least in three different stages of a juvenile dependency case.⁵¹ First, at the first judicial hearing that leads to removal of a child (usually a shelter care hearing),⁵² if the court removes the child from parental custody, the court must make a finding that continuance in the home of the parents would be contrary to the welfare of the child. The court must also determine what the agency could have done to prevent removal.⁵³ This results in a judicial finding that the agency

⁴⁷ Appendix A provides the references to the state statutes concerning reasonable efforts.

⁴⁸ California Welfare and Institutions Code §319(d)(1), West, 2013.

⁴⁹ 45 CFR § 1356.21(b) and (c); (the full text of this regulation is reprinted in Appendix F).

⁵⁰ 45CFR §§ 1356.32(d) & 1356(b)(1)(i).

⁵¹ 42 U.S.C. §671(15)(B)(i) & (ii). In some states, the court must make reasonable efforts findings at more hearings. For example, see Ohio Rev. Code Ann. §2151.419(A), Anderson, 1989, and Cal. Welfare. & Inst. Code §§306, 319, 361, 366.21(e), 366.26(f), 366.22(a), West, 2013.

⁵² The shelter care hearing is the first judicial hearing after a child has been removed from parental care. It usually occurs a few days after the physical removal. The hearing has different names in different states including initial hearing, detention hearing, temporary custody hearing, and emergency protection hearing. This paper will refer to it as the shelter care hearing. State statutes set the time for shelter care hearings, usually within a few days of the physical removal of the child. For a list of each state’s statutes, see *Matrix of State Statutes Pertaining to Child Abuse, Neglect and Dependency*, NCJFCJ, Reno, 1998. If the child is removed based upon a protective custody warrant, the “contrary to the welfare” finding must be made on the warrant.

⁵³ 42 U.S.C. §671 (a)(15)(B)(i); 45 C.F.R. §1356.21(c) & (d) (reprinted in Appendix G). The reasonable efforts to prevent removal finding can be waived when certain emergency circumstances arise. A waiver should occur only when services would fail or would not be adequate to protect the child in the home. The trial court can make this determination up to 60 days from the time of removal of the child. 45 C.F.R. 1356.21(b)(1)(i).

either did or did not exercise reasonable efforts to prevent removal of the child. For example, in a petition which alleges that the child needs the protection because the child has been exposed to domestic violence in the home, the court must determine what steps the child protection agency (“CPS”) took to remove the harm (the abuser) before removing the child. Did CPS explore in-home protection for the abused person and the child, or did the agency try to find a safe home for the victim-parent and child such as in a domestic violence shelter? This is a reasonable efforts issue.⁵⁴

Second, during the pendency of the case, the court must determine whether the agency has provided appropriate services to assist the parents in their efforts to reunify with their child.⁵⁵ This determination necessarily assumes that the agency has conducted an appropriate assessment of the family and that the family was involved in that assessment. Depending on state statutes this determination may occur at review hearings, status hearings, permanency planning hearings, and/or termination of parental rights hearings. If the agency provided appropriate services, the court makes a “reasonable efforts” finding; if the agency did not provide adequate services, the court makes a “no reasonable efforts” finding. For example, if the parents lost custody of their child because of their substance abuse issues, the agency arguably should have assessed their needs and provided them with access to appropriate substance abuse services. If the agency failed to do so, the court could make a “no reasonable efforts” finding.⁵⁶ If, on the other hand, the parent did not cooperate with the social worker, left the area, or continued to abuse drugs and alcohol in spite of social worker efforts, the court would likely make a reasonable efforts finding.⁵⁷

As a result of ASFA courts must also make a third reasonable efforts finding. If a child’s return home is no longer the appropriate plan, the agency must make reasonable efforts to finalize alternate permanency plans.⁵⁸ For example, if the court terminates parental rights and establishes adoption as the permanent plan for the child, the court must monitor agency efforts to complete the adoption. Failure to complete the adoption in a timely manner could result in a judicial finding of “no reasonable efforts.”

⁵⁴ Edwards, L., “Domestic Violence and Reasonable Efforts at the Detention Hearing,” *The Bench*, Winter, 2013. Found at Judgeleonardwards.com in the Publication’s blog. See also the cases and discussion *infra* at Section VII B. 5. If the agency offers reasonable services, but the parents refuse to accept or participate in those services, the agency will have fulfilled its statutory duty. (See for example, Wash. Dept. of Soc. & Health Serv. *Manual G* section 32.32 (Apr. 1984 at p. 19).

⁵⁵ 42 U.S.C. §671(a)(15)(B)(ii).

⁵⁶ 42 U.S.C. § 671; 45 C.F.R. §1356.21(d) (reprinted in Appendix F). Also see the cases and discussion *infra* at Section VII B 5(Substance Abuse).

⁵⁷ For example, in one case involving a mother’s substance abuse, the appellate court held that the agency should have made an immediate assessment of mother’s substance abuse needs and provided services. The agency did not and the court held that was a failure of reasonable efforts. *Jennifer R. v Superior Court of San Diego* (2012 Cal. App. LEXIS 5 unpublished)

⁵⁸ 42 U.S.C. §671(a)(15)(C); 45 CFP §1356.21(b)(2).

In short, the federal legislation and regulations place the responsibility of monitoring social service compliance with federal law regarding the necessity of removing a child from parental care, the provision of services to families where a child has been removed from home, and actions to finalize a permanent plan for the child squarely on the nation's juvenile and family courts. Congress designed the law to ensure child welfare agencies provide families with services to prevent disruption of the family unit, and to respond to the problems of unnecessary removals and foster care drift.⁵⁹ The reasonable efforts requirement is an enforcement mechanism to guarantee that each state provides adequate preventive and reunification services.

The agency must make these three reasonable efforts (prevent placement, reunify families, and achieve timely permanency) for children and families in each case where a child has been removed by the agency. This is both a requirement of each state's Title IV-E state plan and a condition of federal funding for individual foster care placements.⁶⁰

Many states require a judicial determination of reasonable efforts at a termination of parental rights hearing, while other states view it as a factor for the judge to consider.⁶¹ Usually the parent claims that the agency has not provided reasonable efforts to reunify the parent with the child. As this book demonstrates, most appellate case law which addresses the adequacy of social service actions arises from termination of parental rights hearings.⁶² A parent who raises a reasonable efforts issue at a termination hearing presents the judge with a difficult decision. Usually the case has been in the system for years, the child is placed in an adoptive home, and the parents have not been caretakers for years. Given these circumstances it is likely that removal from the current adoptive home will cause trauma for the child. Moreover, if the court gives the parents some additional time to reunify, the child's permanent plan will not be finalized and the parents may or may not be successful.⁶³ The case law indicates that given this situation, the pressure on the judge and the appellate courts is to terminate parental rights. One conclusion this book reaches is that reasonable efforts should be litigated early, and that neither the child nor the parents are well served when they wait until the termination hearing to focus on reasonable efforts.

⁵⁹ 42 U.S.C. §§671(a)(15), 672(a)(1).

⁶⁰ 42 U.S.C. sections 671(a)(15) and 672(a)(1). Each state develops its own state plan and presents it to the federal government. What a state might consider in developing a state plan is suggested in 45 C.F.R. § 1357.15(e)(2). Apparently, most states have not adopted these suggestions.

⁶¹ For example, N.Y. Soc. Serv. Law section 384-b(2)(f) (McKinney Sup. 1986)

⁶² Appendix A reviews the statutes and selected cases involving reasonable efforts from all 50 states and the District of Columbia. The vast majority of cases reviewed by the appellate courts have arisen from termination of parental rights hearings.

⁶³ Watson, A., "*op.cit.*", footnote 4 at p. 2.

D. THE CONSEQUENCES OF REASONABLE EFFORTS FINDINGS

The federal government bears a significant interest in how each state uses its portion of the billions of federal dollars for foster care funding through Title IV-E. The Children's Bureau, Administration for Children and Families, conducts Title IV-E Foster Care Eligibility Reviews every few years in each state. The review is a collaborative process between each state agency and its stakeholders.⁶⁴ The purposes of the review are (1) to determine if the state is in compliance with the child eligibility requirements as outlined in 45 CFR §1356.71 and §§671 and 672 of the Social Security Act and (2) to validate the basis of the financial claims of the state to ensure that the state made appropriate payments on behalf of eligible children and to qualified homes and institutions.⁶⁵ As a part of that audit the investigators examine court records in individual cases. The auditors review the court file to ascertain whether the court entered the "contrary to the best interests" finding in the court records when a child is removed from the home and whether the court made a reasonable efforts finding at specified hearings during the dependency case. The penalty for failure to include the proper findings or a "no reasonable efforts" finding by the court, is a loss of federal funds expended on behalf of the particular child for the period of time when the juvenile court found reasonable efforts to be lacking.⁶⁶

Each state derives a substantial portion of its foster care budgets from federal funds, thus the failure to comply with federal requirements seriously jeopardizes state foster care programs. For example, in 1995 the eligibility audit of foster care cases in California by the U.S. Department of Health and Human Services' Office of the Inspector General found that 39% of the cases were not eligible for Title IV-E funding. California's programs consequently faced a potential loss of \$51.7 million. Most of those errors were traced to court failures to make the required reasonable efforts findings.⁶⁷ Numerous other states have been penalized for failing to make the required federal findings.⁶⁸

E. THE IMPACT OF REASONABLE EFFORTS/NO REASONABLE EFFORTS FINDINGS

⁶⁴ The stakeholders include service providers foster parents, the courts and others involved in the child welfare system.

⁶⁵ For example, HHS regulations also mandate that the case plan include a description of the services offered and provided to prevent removal and to reunify the family. 42 U.S.C §671; 45 C.F.R. § 1356.21(b), (d)(4) (1997)

⁶⁶ 45 CFR § 1356.21(b) *Reasonable efforts*. A copy of this regulation is contained in Appendix F; HHS, Human Services Development Serv., Policy Announcement, ACYF-PA-84-1 (Jan. 13, 1984), p. 4.

⁶⁷ See generally, Edwards, L., "Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980," *Juvenile and Family Court Journal*, Vol. 45, No. 3, 1994, at pp. 1-28. (hereinafter "Improving Implementation,")

⁶⁸ Edwards, L., "Improving Implementation," *id.* at p. 10. If a state does not participate in the Title IV-E program, it would not receive federal money for foster care placements and a "no reasonable efforts" finding would have no fiscal impact on the state. Most states, however, participate in the Title IV-E program.

The reasonable efforts finding by the court often creates a ripple effect through the child protection system. Social workers in the field pay careful attention to the reasonable efforts findings by the judge, just as law enforcement officers heed a judicial criminal court ruling in search and seizure and confession cases. The reasonable efforts finding indicates court approval of the actions by the social worker in that particular case. The finding often builds confidence among social workers that their actions can be repeated.

On the other hand when the court makes a “no reasonable efforts” finding, it sends a message to child protection and social workers that they should not repeat that action or that they should do more than they did in the case before the court. For example, if the social worker unnecessarily removes a child from a victim of domestic violence and the court makes a “no reasonable efforts” finding, the next time a similar case arises, social workers will consider alternatives to removal such as removing the abuser, providing in-home protection for the abused person and child, assisting the victim obtain a restraining order, or finding a safe home for the child and the victim of abuse.

A “no reasonable efforts” finding by the court can result in a modification of agency practices. The agency may create new services or expand existing services. See Appendix D which provides an example of one judge’s finding in which the agency responded to the judge’s letter by making those services available.

III. WHAT IS THE DEFINITION OF REASONABLE EFFORTS?

The federal statutes which created the reasonable efforts concept failed to define the term. The Child Welfare Policy Manual states that judicial determinations of reasonable efforts be made on a case-by-case basis so that the individual circumstances of each child before the court are properly considered.⁶⁹ This failure has led to confusion and criticism.⁷⁰ One commentator blames

⁶⁹ The federal government has stated that a federal definition of reasonable efforts would be contrary to the intent that reasonable efforts be considered case-by-case or would be too broad to be effective. Administration for Children and Families, Child Welfare Policy Manual, Section 8.3C.4 Title IV-E; Foster Care Maintenance Payments Program, State Plan/Procedural Requirements, Reasonable Efforts. Available at www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=59; However, the Child Welfare Information Gateway refers to reasonable efforts as “accessible, available and culturally appropriate services that are designed to improve the capacity of families to provide safe and stable homes for their children. These services may include family therapy, parenting classes, drug and alcohol abuse treatment, respite care, parent support groups, transportation expenses and home visiting programs.” Child Welfare Information Gateway, Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children: Summary of State Laws (2009)

⁷⁰ Crossley, W., *op.cit.*, footnote 3 at p. 260; Kaiser, J. “Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases,” *Rutgers Journal of Law & Public Policy*, Vol. 7:1, Fall 2009, 100-144, 101; Gelles,

the failure of reunification efforts during the first 17 years of AACWA on the lack of a definition.⁷¹ Several states enacted legislation defining reasonable efforts.⁷² State definitions typically restate the federal language with the addition of more general terms. Refer to Appendix B which includes both the statutes and definitions written by appellate courts. Because of the general nature of the state definitions, they give the trial and appellate courts little guidance. As such, trial courts must compare agency efforts, the available resources, and parental compliance.

A typical definition from one of these statutes reads as follows:

the exercise of ordinary diligence and care by the division....”⁷³

As noted in this definition, reasonable efforts cannot be defined with precision. The reasonableness of services or other social worker actions depends on the local community and its resources. What is reasonable in one community may not be in another. Trying to impose a standard for services across a state or the nation will work only through the use of very general terms. As written in one court opinion:

The question of what constitutes “reasonable services” is one which cannot be answered by a definitive statement. Instead, it must be answered on the basis of any given factual situation, for it is clear that services which might be reasonable in one set of circumstances would not be reasonable in a different set of circumstances.⁷⁴

Facts and circumstances of each case inform the definition of “reasonable efforts.” As a result of this subjective standard, judges retain a great deal of discretion in their reasonable efforts decisions. Parental participation in services plays a critical part in this decision. A lack of parental

R., *The Book of David: How Preserving Families Can Cost Children’s Lives*, *op.cit.*, footnote 16 at p. 94; Bufkin, M., *op.cit.*, footnote 3 at p. 370.

⁷¹ Kim, C., “Putting Reason Back Into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases,” *University of Illinois Law Review*, 1999, pp. 287-332, at p.296; other commentators also lament the lack of a definition. See Crossley, *op.cit.* footnote 3 at pp. 280-281; Gelles, R., “Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Committee on Labor and Human Resources, 104th Congress 16 (1996) at p. 13; Braveman, D., & Ramsey, S., “When Welfare Ends: Removing Children From the Home for Poverty Alone,” *Temple Law Review*, Vol. 70, Summer, 1997, at pp. 447-470, at 453-454.

⁷² Those states include Arkansas, Colorado, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Missouri, Nebraska, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, and Virginia.

⁷³ Mo. Ann. Stat section 211.183(2), Vernon Supp. 2013

⁷⁴ *In the Matter of Myers*, 417 N.E.2d 926, 931 (Ind. App. 1981)

cooperation with the service plan may result in a finding of reasonable efforts even when the agency failed to provide adequate services. The Rhode Island appellate court stated that it “would not burden the state agency with the additional responsibility of holding the hand of a recalcitrant parent.”⁷⁵ In a Missouri case the appellate court reviewed agency and parental actions during the reunification period and affirmed the termination of parental rights decision and the reasonable efforts finding.⁷⁶ The agency provided the parents food and housing, parenting classes, referrals to community service programs and psychological counselors, and arranging visits. The mother, however, left a 6 month residential treatment program after 1 week, missed meetings, rarely attended her therapy sessions, did not complete her financial assistance applications, and cancelled visits with her children, thus not seeing them regularly.⁷⁷

The child welfare process would benefit from a carefully drawn statute defining reasonable efforts such as that enacted by the Minnesota legislature.⁷⁸ However, contrary to the claims of many critics of child welfare practice, the inadequate definition of reasonable efforts is not the principle reason for its ineffectiveness in many states. As this book attempts to demonstrate, reasonable efforts become very effective when trial judges examine the issue throughout the life of a juvenile dependency case, particularly early in the proceedings. The careful examination of social worker actions by the judge and parental participation in services determine whether the agency has met its duty to provide reasonable efforts.

IV. AGGRAVATED CIRCUMSTANCES: WHEN ARE REASONABLE EFFORTS UNNECESSARY?

In the years following passage of the AACWA in 1980, a number of critics argued that some parents should not receive services from the agency in order to reunify with their children. They asserted that in some states the agencies expended services over too long a period of time without the child reaching permanency.⁷⁹ Additional congressional hearings in 1996 and 1997 resulted in

⁷⁵ *In re Kristen B.*, 558 A.2d 200, 204 (R.I. 1989)

⁷⁶ *In the Interest of A.M.K.*, 723 S.W. 2d 50 (Mo. Ct. App. 1986)

⁷⁷ A commentator points out that the appellate court did not make the connection between the mother’s “failures” and the agency’s efforts. She asks “why the mother failed to attend?” Was there a problem with transportation? Were the services free of charge? See Shotton, *op.cit.*, footnote 3 at. p. 9.

⁷⁸ Refer to Appendix B.

⁷⁹ See, for example, the testimony of Gelles, R., “Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Committee on Labor and Human Resources, *op.cit.*, footnote 70.

passage of the Adoption and Safe Families Act (ASFA).⁸⁰ In this legislation Congress shifted the emphasis away from efforts to reunify the family and towards permanency and child safety.⁸¹

ASFA “excuses” states from providing reasonable efforts if a court of competent jurisdiction determines that the parent subjected the child to aggravated circumstances (as defined by state law) such as abandonment, torture, chronic abuse, and sexual abuse.⁸² ASFA specifies examples of parental conduct which would permit the state to bypass reunification services, including murder or voluntary manslaughter of a sibling, aided or abetted, attempted, conspired, or solicited to commit such a murder or voluntary manslaughter; or committed a felony assault that results in serious bodily injury to the child or another child of the parent.⁸³

ASFA permits the states to expand the list of findings that excuse the agency from making reasonable efforts.⁸⁴ While some states adopted the federal list of the types of parental behavior which, if proven, excuses the state from providing reunification services to the parent, other states have expanded the list.⁸⁵ For example, Georgia law follows the federal statute closely,⁸⁶ while California law expanded the federal list substantially.⁸⁷

Whether proof that a parent’s conduct falls within the statutory language means that the parent automatically does not receive reunification services remains unanswered in some states. Two authors suggest that the agency examine the parent’s current situation to determine if the proven conduct clearly indicates that the parent will place the child at risk should the child be returned, rather than automatically bypass services.⁸⁸ On the other hand, another author recommends circumventing the reasonable efforts requirement entirely. If the agency concludes that a history of abuse exists in the family or in cases where an agency has already removed one child

⁸⁰ Pub. L. No. 105-89, 111 Stat. 2115, (codified as amended in scattered sections of 42 U.S.C.)

⁸¹ Roberts, Dorothy, “Is There Justice in Children’s Rights?: The Critique of Federal Family Preservation Policy,” 2 *U. PA. J. Const. Law*, 112 (1999).

⁸² 42 U.S.C. §671 (a)(15)(D)(i) – (iii).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ For a summary of state laws regarding aggravated circumstances see:

https://www.childwelfare.gov/systemwide/laws_policies/statutes/reunify.pdf

⁸⁶ Ga. Code Ann section 15-11-58(a)(4)(A) (2013)

⁸⁷ Calif. Welfare & Institutions Code § 361.5. Interestingly, it has been the added sections which have resulted in the highest number of bypass cases. Refer to § 361.5 subsections (10), (11), and (13).

⁸⁸ That is the position taken by Professor Kathleen Bean. “Aggravated Circumstances, Reasonable Efforts, and ASFA,” *Boston College Third World Law Journal*, Volume 29, Issue 2, Article 1 (2009); and see the discussion in Rollin, M., Vandervort, F., & Haralambie, A., “Federal Child Welfare Law and Policy: Understanding the Federal Law and Funding Process,” found in *Child Welfare Law and Practice*, ed. By Ventrell, M., & Duquette, D., Bradford, Denver, 2005, at p. 154. The appellate court in the case of *In re G.L.*, (No. D064521, January 10, 2014) agrees with this position where despite the loss of 4 children and a long-standing drug addiction, mother’s recent rehabilitation persuaded the trial judge to offer her reunification services.

from the home. Under these circumstances the commentator suggests that a permanent placement should be sought and parental rights terminated.⁸⁹

Based upon 20 years presiding in the juvenile court, the author recommends following the first commentators. Some parents do change. They overcome their addiction, they leave a dangerous relationship, or they mature and become safe parents even after their parental rights have been terminated in a previous case. Judges should always examine the current situation and the parent's ability to parent safely.

V. STATE RESPONSES TO THE REASONABLE EFFORTS ISSUE

A. LEGISLATION:

All states participate in the legislative scheme established by the AACWA and ASFA and passed statutes in conformity with the federal law.⁹⁰ These statutes mandate that the judge make "contrary to the best interests" and "reasonable efforts" findings. The Arkansas statute typifies many state statutory schemes:

ARKANSAS

What Are Reasonable Efforts?

Citation: Ann. Code § 9-27-303

'Reasonable efforts' are measures taken to preserve the family and can include reasonable care and diligence on the part of the department or agency to utilize all available services related to meeting the needs of the juvenile and the family.

Reasonable efforts may include the provision of 'family services,' which are relevant services provided to a juvenile or his or her family, including, but not limited to:

- Child care

Homemaker services

- Crisis counseling

- Cash assistance

- Transportation

- Family therapy

⁸⁹ Graf, J., "Can Courts and Welfare Agencies Save the Family: An Examination of Permanency Planning, Family Preservation, and the Reasonable Efforts Requirement," *Suffolk U. Law Review*, Vol. 30, 1996, 91 at pp. 112-113.

⁹⁰ Christian, S., "1998 State Legislative Responses to the Adoption and Safe Families Act of 1997," National Conference of State Legislatures, State Legislative Report, March, 1999, available at <http://www.ncls.org/Default.aspx?TabId=4248>

- Physical, psychiatric, or psychological evaluation
- Counseling or treatment

Family services are provided in order to:

- Prevent a juvenile from being removed from a parent, guardian, or custodian
- Reunite the juvenile with the parent, guardian, or custodian from whom the juvenile has been removed
- Implement a permanent plan of adoption, guardianship, or rehabilitation of the juvenile

When Reasonable Efforts Are Required

Citation: Ann. Code § 9-27-303

Reasonable efforts shall be made:

- Prior to the placement of a child in foster care to prevent the need for removing the child from the child’s home
- To reunify a family after a child has been placed out of the home to make it possible for the child to return home safely
- To obtain permanency for a child who has been in placement more than 12 months, or 15 of the previous 22 months.

A list of the statutes regarding reasonable efforts findings from each state is contained in Appendix A.

Some state Judicial Councils or Supreme Courts emphasize the importance of the federal law by passage of court rules and/or standards of judicial administration regarding the reasonable efforts findings. For example standard 5.40 of the California Standards of Judicial Administration states:

Judges of the juvenile court...are encouraged to

(8) [e]valuate the criteria established by child protection agencies for initial removal and reunification decisions and communicate the court’s expectations of what constitutes “reasonable efforts” to prevent removal or hasten return of the child.⁹¹

⁹¹ Standard of Judicial Administration 5.40(e)(8), California Rules of Court, West, 2011. Standard 5.45 encourages juvenile court judges to follow the Resource Guidelines written by the National Council of Juvenile and Family Court Judges in order to achieve a number of goals including (5) “Timely and thorough reports and services to ensure informed judicial decisions, including reasonable efforts findings...”

B. WHEN MUST THE TRIAL COURT ADDRESS THE REASONABLE EFFORTS ISSUE AND MAKE REASONABLE EFFORTS/NO REASONABLE EFFORTS FINDINGS?

The federal law requires that the court must make a determination within 60 days of the physical removal of the child that the agency made reasonable efforts to prevent removal or the state will lose federal funding for that child.⁹² The court must review the status of each child in foster care every six months to determine the progress made in the case towards a return home or an alternate permanent plan.⁹³ The court must make a reasonable efforts finding within twelve months of the date the child entered foster care and at least once every twelve months thereafter.⁹⁴ The court must also hold a review every six months to determine the appropriateness of the placement, the extent of case progress, and compliance with the case plan.⁹⁵

State statutes vary, some require that the court address the issue several times as in the Arkansas statute above. Most states require that the issue be addressed early in the case, within the first 60 days. Securement of an early judicial determination of reasonable efforts allows the state to commence collecting federal funding. The Texas statutes, for example, require frequent trial court findings at the shelter care hearing,⁹⁶ the 14-day hearing,⁹⁷ and at all status hearings.⁹⁸ See Appendix A for state statutes which provide an indication of the frequency that trial judges are required to make reasonable efforts findings. Whether the juvenile court tries these issues is difficult to determine.⁹⁹ State appellate decisions and comments from participants in many state court systems indicate that they are rarely litigated.¹⁰⁰

Several commentators argue that the courts should be required to make a “reasonable efforts” determination before a termination of parental rights.¹⁰¹ This is a reasonable requirement, but for the child and family this determination comes too late in the case. As the discussion throughout this

⁹² 42 C.F.R. §1365.21(b)(1)

⁹³ 42 U.S.C. §675(5)(B)

⁹⁴ 42 C.F.R. §1356.21(b)(2)

⁹⁵ 42 U.S.C. §§6671(a) & 675(5)(B).

⁹⁶ Tex. Fam. Code Ann. Section 262.001

⁹⁷ Tex. Fam. Code Ann. Section 262.201

⁹⁸ Tex. Fam. Code Ann. Section 262.202

⁹⁹ Studies of practice and appellate case law in Texas indicate that the reasonable efforts issue is rarely litigated. “Legal Representation Study: Assessment of Appointed Representation in Texas Child-Protection Proceedings,” Children’s Commission, Supreme Court of Texas, Permanent Judicial Commission For Children, Youth & Families, Austin, 2011, at pp. 20-23. (Hereinafter “Legal Representation Study”)

¹⁰⁰ Refer to Appendix A for this information.

¹⁰¹ Crossley, W., *op.cit.* footnote 3 at p. 298; Hand, J.A. “Notes: Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground For Termination of Parental Rights,” 71 N.Y.U.L.Rev. 1251 (1996) at p. 1264, 1286.

book indicates, the reasonable efforts determination should begin early and continue throughout the case.

C. TRIAL COURT PRACTICE

State courts vary in their approach to the reasonable efforts issue. In some states attorneys and judges regularly try the issue, as reflected in numerous appellate decisions in those states. In other states the issue seldom appears in appellate decisions, and interviews with judges and attorneys indicate that the issue rarely is litigated in the trial courts.¹⁰²

Some critics assert that trial court judges simply do not make “no reasonable efforts” findings.¹⁰³ They offer several reasons. First, judges do not receive sufficient information to make an informed decision regarding reasonable efforts. Usually, the only information comes from the agency. Second, when the judge realizes that a negative finding will impact the resources for the local agency, it becomes difficult to make such a finding. Third, auditing procedures do not require judges to explain the basis for their decisions to approve of state removal of children.¹⁰⁴ Fourth, under the ASFA timelines and its emphasis on timely permanency, judges may find the state exercised reasonable efforts in order to move the case along and ensure a permanent and stable home.¹⁰⁵ Fifth, some judges do not believe it is their role to ask questions of the agency. Instead, they see themselves as passive observers of a court process in which “the contestants develop the facts and the judge makes a decision.”¹⁰⁶

Many state judges make informed reasonable efforts finding in spite of these reasons. As the review of case law and commentary reveals, in some states the trial and appellate courts pay careful attention to reasonable efforts findings, and judges and attorneys examine the issue carefully in court proceedings. These judges recognize that they have been designated by the legislature as monitors

¹⁰² For example, an Alaska report indicate that “[p]ractitioners interviewed for this study agreed that a judicial finding of ‘no reasonable efforts’ was uncommon.” *Improving the Court Process for Alaska’s Children in Need of Care*, Alaska Judicial Council, Anchorage, 1996, at p. 100. The author has had numerous email and personal discussions with judges, attorneys, and court improvement directors in many states regarding the frequency that reasonable efforts issues are tried in their court and in their state. Copies of emails from those persons are available from the author.

¹⁰³ Shotton, A., *op.cit.*, footnote 3 at p. 27, reporting that a 1989 survey of juvenile court judges revealed that only 44 judges had made one or more negative reasonable efforts rulings during his or her tenure. *cf.* Smith, L, “Children’s Aid System Gets Mixed Marks from Clients,” *L.A. Times*, Feb. 27, 1996, at A1, reporting on a 1992 study documenting that 54.8% of the case files involving foster care children in Kansas did not include documentation regarding reasonable efforts.

¹⁰⁴ Raymond, S., “Notes: Where Are the Reasonable Efforts to Enforce the Reasonable Efforts Requirement?: Monitoring State Compliance Under the Adoption Assistance and Child Welfare ACT OF 1980,” *TEXAS LAW REVIEW*, VOL. 77, 1235, 1255 (1999).

¹⁰⁵ Bean, K., “What State Courts Think,” *op.cit.* footnote 39 at 332.

¹⁰⁶ *Improving the Court Process for Alaska’s Children in Need of Care*, *op.cit.*, footnote 100, at p. 98.

of social work practice. Just as judges play a critical role in overseeing police officer conduct in criminal cases involving searches and seizures, they play a similar role checking to see that social workers are fulfilling their legal responsibilities towards children and families.

D. STATE APPELLATE LAW

State appellate courts provide an indication of how often parties try the reasonable efforts issue in the state juvenile and family courts. Appellate decisions also provide an idea of the degree to which the appellate courts actively examine and rule upon reasonable efforts issues. It is important to note that cases reported in the appellate courts do not reflect the frequency of litigation in the trial courts on the issue of reasonable efforts. Several barriers prevent these issues from reaching the appellate courts. The parents may not have legal representation or the court may appoint an attorney too late to be prepared to raise the issue.¹⁰⁷ Even with representation, the attorneys may not appeal the court rulings regarding reasonable efforts,¹⁰⁸ due to the cost of the appeal, an unwillingness to use the appellate process, or heavy caseloads. In states where little or no state appellate law exists, the author contacted judges, attorneys, guardians *ad litem*, and court improvement directors to determine the extent of court activity regarding the reasonable efforts determinations.¹⁰⁹

A great disparity exists in trial court attention to the three reasonable efforts issues, reasonable efforts to prevent removal, to reunify, or to finalize a permanent plan. Very few trial and appellate courts address the reasonable efforts to prevent removal,¹¹⁰ and only some address reasonable efforts to reunify. Very few cases examine the reasonable efforts to achieve timely permanency. The vast majority of appellate cases discussing the reasonable efforts issue occur at termination of parental rights hearings.¹¹¹ (Refer to section VIII and Appendix A for a state-by state analysis).

VI. THE INDIAN CHILD WELFARE ACT AND ACTIVE EFFORTS

¹⁰⁷ Edwards, L., "Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment," *Juvenile and Family Court Journal*, Vol. 63, Spring, 2010, at pp. 21-37.

¹⁰⁸ In at least one state (Georgia), one trial court judge indicated that the reasonable efforts issue is regularly heard in his court, but that the court rulings are not appealed. Georgia has very few appellate court decisions discussing reasonable efforts. (Interview with Judge Michael Key, Troup County Court, 2012).

¹⁰⁹ Those comments appear in Appendix A after the appellate case law summary for each state.

¹¹⁰ New York is a significant exception to this statement. As the cases listed under New York in Appendix A indicate, the issue is regularly tried and reviewed in appellate decisions.

¹¹¹ Kim, *op.cit.*, footnote 70 at p. 305.

The Indian Child Welfare Act (“ICWA”), federal legislation passed in 1978, establishes a different standard for the child protection agency when Indian children are the subject of child protection proceedings and seeks to keep Indian children with Indian families, if possible.¹¹² Because of unique historical issues which impacted Indian families, Congress concluded that removal of Indian children required additional efforts by the state to prevent removal.¹¹³ During the federal legislative hearings which led to passage of the ICWA, Congress heard overwhelming testimony that state social workers often removed Indian children from their homes without applying any legal standards for removal.¹¹⁴ Congress stated the policy of the ICWA as follows:

[I]t is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families.¹¹⁵

The ICWA requires that before removal or termination of parental rights of an Indian child, the state must prove to the court that “active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.”¹¹⁶ Active efforts has a “distinctly Indian character” and involves a greater expenditure of resources by the state than those required by the reasonable efforts standard.¹¹⁷ These efforts must demonstrate proactive casework and active engagement with the family including more frequent contact with the family and tribe.¹¹⁸ Moreover, active efforts must

¹¹² P.L. 95-608; 25 U.S.C. §§1901 et seq. West, 2013.

¹¹³ *Id.* Congressional Findings at §1901; Hazeltine, S., “Speedy Termination of Alaska Native Parental Rights: The 1998 Changes to Alaska’s Child in Need of Aid Statutes and Their Inherent Conflict with the Mandates of the Federal Indian Child Welfare Act, 19 Alaska L. Rev. 57 (2002)

¹¹⁴ One report described it as the “wholesale separation of Indian children from their families....” *Establishing Standards for the Placement of Indian Children in Foster or Adoptive Homes, to Prevent the Breakup of Indian Families, and for other Purposes*, H R Rep. 95-1368, at 9 (July 24, 1978); See also *Mississippi Band of Choctaw Indians v Holyfield*, 490 U.S. 30, 32; 109 S. Ct. 1597; 104 L. Ed. 2d 29 (1989); See also H.R. Report No. 1386, 95th Cong., 2d Sess. 23 (1978), reprinted in *U.S. Code Cong. & Admin. News* 7530.

¹¹⁵ 25 U.S.C. § 1902.

¹¹⁶ *Id.* At §1911(d) and §1912(d). In California the state must prove it as provided active efforts by clear and convincing evidence. *In re Michael G.*, 63 Cal. App. 4th 700 (Cal. App. 1998)

¹¹⁷ Andrews, “The ‘active efforts’ standard requires more effort than a ‘reasonable efforts’ standard does.” “‘Active’ Versus ‘Reasonable’ Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes,” 19 *Alaska L. Rev.* 85 (2002); *In re Nicole B.*, 927 A.2d 1194 (Md. Ct. Spec. App. 2007). “The term active efforts by definition, implies heightened responsibility compared to passive efforts.” *In the Matter of A.N. and M.N.*, 325 Mont. 379, 384, 106 P.3d 556, 560 (Montana Supreme Court, 2005); *C.J. v State Dep’t of Health & Social Services*, 18 P.3d 1214 (Alaska 2001); *M.W.*, 20 P.3d 1146 (note 18); 44 Fed. Reg. 67,584 at D. 2 (Nov. 26, 1979); DHS Social Services Manual XIII-3559:

(http://www.dhs.state.mn.us/main/groups/county_access/documents/public/dhs_id_018765-pdf).

¹¹⁸ Judge April Attebury of the Karuk Tribal Court in Siskiyou and Humboldt Counties, California, tells social workers they should hold the client’s hand from start to finish of the case; (author’s conversation with Judge Attebury). Justice William Thorne (ret.) told the author that the social worker should treat the client as you would your own child.

be culturally appropriate. This should be accomplished by involving and using the available resources of the extended family, the tribe, Indian social service agencies, and individual Indian caregivers.¹¹⁹ The active efforts standard must be applied by the court regardless of whether the child's tribe has intervened in the proceedings.¹²⁰

A. THE STATUTE

The ICWA does not define active efforts, thus a judge makes a determination on a case-by-case basis.¹²¹ Nevertheless, agreement exists throughout the country that active efforts require a higher level of services than reasonable efforts.¹²² Moreover, the Bureau of Indian Affairs, as well as several states require that "active efforts" include input and assistance from tribal resources.¹²³ The federal law specifies that child welfare must provide "active efforts" prior to foster care placement and prior to termination of parental rights.¹²⁴ Most state courts address the issue at the same hearings as they would address the reasonable efforts issue, at the shelter care hearing, the dispositional hearing, the permanency planning hearing, and the termination of parental rights hearing.

(author's conversation with Justice Thorn). "Active Efforts Principles and Expectations," Oregon Judicial Department, Citizens Review Board, Salem; Wisconsin statutes state that it is the agency's responsibility to meet the standard defined as "an ongoing, vigorous, and concerted level of case work...made in a manner that takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe and that utilizes the available resources of the Indian child's tribe, tribal and other Indian child welfare agencies, extended family members of the Indian child, other individual Indian caregivers, and other culturally appropriate service providers. Wis. Stat. §48.028(4)(g)(2).

¹¹⁹ 25 U.S.C. § 1912(d)

¹²⁰ *In re Jonathon S.*, 28 Cal. Rptr. 3d 495 (Cal. Ct. App. 2005)

¹²¹ *Wilson W. v. State*, 184 P.3d 94, 101 (Alaska 2008).

¹²² Goldsmith, D. "Preserving the Indian Child's Family: Active vs. Reasonable Efforts," *The Judge's Page*, National CASA, October 2007, p. 11. *A.M. v State*, 945 P.2d 296 (Alaska 1997); However, commentator Mark Andrews disagrees, writing that, at least in Alaska, the state Supreme Court has used the same standard for both reasonable efforts and active efforts. Andrews, M., "'Active' Versus 'Reasonable' Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes," *op.cit.*, footnote 116; Fletcher, M. "The Origins of the Indian Child Welfare Act: A Survey of the Legislative History," *Legal Studies Research Paper Series*, Research Paper No. 07-06, Michigan State University College of Law, <http://ssrn.com/abstract=xxxxxx>.

¹²³ For example, the Bureau of Indian Affairs wrote that the meaning of "active efforts" included a search for help from within the Indian culture; "Guidelines for State Courts; Indian Child Custody Proceedings," 44 *Fed. Reg.* 67,584 (Nov. 26, 1979). Oregon has developed a common understanding and consensus around the active efforts definition. Convening tribal representatives with Citizen Review Boards resulted in the development of Oregon's *Active Efforts Principles and Expectations*. (nationalcasa.org/download/Judges_Page/0710_active_efforts_0119.pdf). The California legislature defines "active efforts" as efforts that "takes into account the prevailing social and cultural values, conditions, and way of life of the Indian child's tribe. Active efforts shall utilize the available resources of the Indian child's extended family, tribe, tribal and other Indian social service agencies, and individual Indian caregiver service providers." Cal. Welfare & Institutions Code § 361.7, and California Rule of Court 5.484(c). Michigan requires caseworkers to "take a proactive approach with clients and actively support them in complying with the service plan rather than requiring the service plan to be completed by the client alone." "Indian Child Welfare Case Management," State of Michigan Department of Human Services, Native American Affairs 205 (3/1/2010)

¹²⁴ 25 U.S.C. §1912(d)

B. CASE LAW

Numerous appellate decisions address “active efforts” pursuant to the ICWA. Most of these decisions are listed in Appendix A under each state’s appellate decisions. The general themes involve (1) whether the agency exercised “active efforts” to prevent removal of an Indian child or to prevent the need for termination of parental rights; (2) whether lack of parental cooperation excused failures by the agency to provide “active efforts;” (3) the definition of “active efforts,” and (4) whether the trial court used the correct standard of proof in determining if “active efforts” have been provided.¹²⁵ In one case the court noted that “active efforts” implies heightened responsibility compared to passive efforts. These same cases agree with the distinction between active and reasonable efforts as follows: “Passive efforts are where a plan is drawn up and the client must develop his or her own resources towards bringing it to fruition. Active efforts, the intent of the drafters of the Act, is where the state caseworker takes the client through the steps of the plan rather than requiring the plan be performed on its own.”¹²⁶ Another set of cases focused on the difference between “reasonable efforts” and “active efforts.”¹²⁷ Several cases affirmed agency “active efforts” based upon a lack of parental cooperation with the service providers.¹²⁸ Some appellate decisions reverse trial court findings because the trial court terminated parental rights illegally by its failure to follow the ICWA.¹²⁹

Judges must become conversant in the requirements of the ICWA. The judge should enquire of all parents and relatives appearing in juvenile dependency proceedings whether they have any Indian heritage, regardless of whether any party raises the issue. If there is a possibility that the child could be Indian, the judge should order the social worker to provide legal notice to any possible tribes and to the Bureau of Indian Affairs as to the legal proceedings and thereby give the tribe an opportunity to participate in the proceedings. Failure to do so may result in a reversal of all of the court orders and a return to the beginning of the proceedings.¹³⁰ Once it has been determined

¹²⁵ For example, in the case of *In re Michael G.*, 63 Cal.App.4th 700, 74 Cal. Rptr. 2d 642 (Cal. App. 1998) involving interpretation of the ICWA, the appellate court reversed a termination of parental rights finding that clear and convincing evidence is the standard of proof in California for a determination under ICWA that active efforts have been made to prevent breakup of an Indian family and have been unsuccessful.

¹²⁶ *A. A. v. State, Dept. of Family & Youth Services*, 982 P. d 256 (Alaska 1999); *In re A.N.*, 325 Mont. 379, 106 P.3d 556 (Montana, 2005). The appellate court does not explain how the term “passive efforts” appears in the case law. “Passive efforts” is certainly not synonymous with “reasonable efforts.” Social workers in whatever context should not be permitted to provide only “passive efforts.”

¹²⁷ *A.M. v. State*, 945 P.2d 296 (Alaska 1995); *appeal after remand*, 945 P.2d 296 (Alaska 1997); *N.A. v State*, 19 P.3d 94, 101 (Alaska, 2008)

¹²⁸ *In re William G.*, 89 Cal. App. 4th 423 (Cal. Ct. App. 2001); *T.F. v State Dep’t of Health and Social Services*, 26 P.2d 1089 (Alaska 2001).

¹²⁹ *In re Nicole B. and Max B.*, 175 Md. App. 450, 927 A.2d 1194 (Court of Special Appeals of Maryland, 2006)

¹³⁰ See *In re Nicole B.*, 175 Md. App. 450, 927 A.2d 1194 (Md. App. 2007)

that the case involves an Indian child, judges must be prepared to hold the agency to the “active efforts” standard, one that is higher and more demanding than “reasonable efforts.”

VII. RECURRING FACTUAL SITUATIONS IN THE TRIAL COURTS

A. THE SHELTER CARE HEARING

Juvenile court experts assert that the most important hearing in the juvenile court process is the shelter care hearing.¹³¹ Both the *Resource Guidelines* and commentators conclude that after the child has been placed in foster care, family reunification becomes more difficult to achieve than prevention of placement in the first instance.¹³² Thus the shelter care hearing in the court process and the court’s attention to the “reasonable efforts to prevent removal” issue is a very critical point in the juvenile court process.

At the shelter care hearing or within 60 days of the child’s removal from parental custody, the judge must decide whether the agency has provided reasonable efforts to prevent removal of the child.¹³³ Few appellate cases address the reasonable efforts to prevent removal, and almost all of the judges, attorneys, and court improvement leaders confirmed that attorneys and judges do not discuss this reasonable efforts issue early in the case. The court may find that reasonable efforts to prevent removal were not possible because of exigent circumstances. However, the court must review this finding at subsequent hearings to determine whether continued removal is still necessary.

¹³¹ “Once a child is removed it becomes logistically and practically more difficult to help a family resolve its problems.” *Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases*, National Council of Juvenile and Family Court Judges, Reno, NV, (1995) at p. 30 (hereinafter *Resource Guidelines*); “The emergency hearing is often critical. Once a child is removed, it is easier for a judge to continue the placement.” Rauber, D., Granik, L., “Representing Parents: The Role and Duties of Respondents’ Counsel,” Chapter 20 in *Child Welfare Law and Practice*, ed. By Ventrell, M. & Duquette, D., Bradford, Denver, 2005, at p.453. In addition to determining whether reasonable efforts to prevent removal have been provided by the agency, the judge must accomplish a great deal at the shelter care hearing. The judge must determine if all parties have been properly noticed for the hearing, explain the nature of the legal proceedings and advise the parties of their legal rights, determine where the child will live and, if the child is removed, what access the parents will have to the child, what services or examinations should be offered to the parents immediately, whether relatives or other responsible adults have been identified, and determine when the next hearing should take place.

¹³² *Id.*, and Frankel, H. “Family-centered, home-based services in child protection: A review of the research,” *Social Service Review*, Vol. 62, (1988) at pp. 132-57.

¹³³ 42 U.S.C. §671 (a)(15)(B)(i); *Resource Guidelines*, *op.cit.*, footnote 127 at p. 37.

Most reported cases arise in New York. Pursuant to New York law, a party can request that the juvenile court hold a hearing within a few days of the agency's removal of a child.¹³⁴ The court has appointed counsel by the time of this hearing, and at the hearing the court frequently hears evidence on the reasonable efforts to prevent removal issue. For example, in the case of *In the Matter of Jamie C.*¹³⁵ the trial court found the agency did not provide reasonable efforts to prevent removal, a finding affirmed on appeal. The agency (ACS) removed the children on neglect allegations. The petition alleged that the mother's mental illness rendered her neglectful of her children and that she was not taking her prescribed medication. One of her children had Down's syndrome. The appellate court stated "[h]ere, ACS did not provide this mother with sufficient services or referrals in response to her significant psychiatric needs." While the ACS frequently contacted with the family, no services addressed the family's unique needs. The court concluded that "[t]he condition that a judicial determination that reasonable efforts to prevent a child from entering into foster care were made before the State can be eligible for foster care maintenance reimbursement was enacted to punish the State and hold it accountable when its social services agencies fail to do what the federal law mandates."¹³⁶

In the cases of *Nicholson v Scopetta* and *David G.* case the appellate courts set out the process a trial court should follow in analyzing the agency's responsibilities:

The court *must do more* than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal... Additionally, the court must specifically consider whether the imminent risk to the child might be eliminated by other means, such as issuing a temporary order of protection or providing services to the victim.¹³⁷ (emphasis in the original)

This recommended analysis requires that the judge examine the social worker, particularly in cases where the worker claimed that no services were provided because of exigent (emergency) circumstances.

¹³⁴ McKinney's Family Court Act, section 1028 (section 1027 is of similar import.)

¹³⁵ 26 Misc. 3d 580, 889 N.Y.S.2d 437 (N.Y Slip Op. 229458, 2009)

¹³⁶ *Id.*, at p. 446. Other examples of New York appellate decisions reviewing the reasonable efforts to prevent removal are collected in Appendix A under New York and in Section VII B 6 (Domestic Violence).

¹³⁷ *Nicholson v Scopetta*, 820 N.E.2d 840 (N.Y. 2004) at p. 852; . *In re David G.*, 29 Misc.3d 1178, at 1183-4.

Upon delivery to the social worker of a child who has been taken into temporary custody..., the social worker shall immediately investigate the circumstances of the child and the facts surrounding the child's being taken into custody and attempt to maintain the child with the child's family through the provision of services.¹³⁸

A California appellate case highlights the meaning of this statute. The mother seriously beat one of her children using an extension cord. Social work investigation revealed other incidents of physical abuse. The trial court removed the children at the detention hearing. The trial court found that "reasonable efforts have been made to prevent or eliminate need for [the children's] removal from home." The trial court did not identify or describe what those "reasonable efforts" were, nor did the court inquire into the availability of services "that would prevent or eliminate the need to detain the child or that would permit the child to return home" as required by California Rules of Court, rule 5.678(c)(2).¹³⁹ The appellate court pointed out that California Welfare and Institutions Code §361(d) requires the trial court to make a determination whether reasonable efforts were made to prevent or eliminate the need for removal of the minor from his or her home and that the court "shall state the facts on which the decision to remove is based." The trial court did not do this, thus making the finding "merely a hollow formula designed to achieve the result the agency seeks." The appellate court concluded that "[a] finding of parental abuse is not sufficient by itself to justify removing the child from the home, reversed the trial court order removing the children, and returned the case to the trial court for further proceedings."¹⁴⁰

In the Connecticut case of *In re Lindsey P.*,¹⁴¹ the appellate court held that the state department failed to provide reasonable efforts to prevent the removal of an allegedly neglected child from her home. The *ex parte* affidavit filed by the state contained misleading and inaccurate information and omitted exculpatory information. In the case of *Interest of S.A.D.*¹⁴² the Pennsylvania appellate court found that the agency had not offered reasonable efforts to an eighteen-year-old mother and her 14 month-old daughter. The mother sought help from the agency for

¹³⁸ California Welfare & Institutions Code section 309(a), West, 2013 and see *In re Venita*, 191 Cal. App. 3d 1229, 236 Cal. Rptr. 859 (1987).

¹³⁹ California Rule of Court, rule 6.678(c)(2) reads as follows: "The court must not order the child detained unless the court, after inquiry regarding available services, finds that there are no reasonable services that would prevent or eliminate the need to detain the child or that would permit the child to return home. Rule 6.678(c)(3) reads in part: "If the court orders the child detained, the court must: (A) Determine if there are services that would permit the child to return home pending the next hearing and state the factual basis for the decision to detain the child."

¹⁴⁰ *In re Ashley F.*, (CA, Ct. App., B250742, 4/22/14)

¹⁴¹ 864 A.2d 888, 49 Conn. Supp. 132 (Super.Ct. 2004)

¹⁴² 382 Pa. Super 166, 555 A.2d 123 (Pa. Super. Ct. 1989).

housing. The agency informed the mother she would have to “voluntarily” place her child with the agency and then find housing. The mother procured housing with a family and returned to the agency for her daughter only to be told she had to find her own housing. No one from the agency visited the family home she had located. The appellate court reversed the finding of reasonable efforts by the trial court based on their determination that the mother acted responsibly towards her child throughout the proceedings. The court concluded:

It is well-settled that the Juvenile Act was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take children of the illiterate and crude and give them to the educated and cultured, nor to take the children of the weak and sickly and give them to the strong and healthy.¹⁴³

In a Missouri case, the appellate court reversed a trial court removal order and remanded the case to the trial court for further proceedings. The appellate court found that the dispositional order removing the children lacked any showing of reasonable efforts by the agency to prevent the removal. The agency claimed that the removal was based upon an “emergency hot line” call regarding the children. The appellate court rejected that reasoning, pointing out that a hot line call does not preempt the role of evidence and adjudication.¹⁴⁴ An Iowa Court of Appeals reversed a juvenile court finding of reasonable efforts after the court had placed a 12-year-old child who had committed an aggravated assault into a group home.¹⁴⁵ The appellate court found no evidence that the agency had made any attempt to “prevent or eliminate the need for removal of the child from the child’s home.”¹⁴⁶

B. REVIEWS, PERMANENCY HEARINGS, AND TERMINATION OF PARENTAL RIGHTS HEARINGS

The federal law requires the court to determine whether the agency provided reasonable efforts to make it possible for a child to safely return home.¹⁴⁷ This finding relates to the efforts made by the agency to assist the parents in their rehabilitation. Few appellate cases address this issue early in the case. Virtually all appellate decisions addressing reasonable efforts do so in the

¹⁴³ *Id.*, at p. 176.

¹⁴⁴ *Interest of A.L.W., L.R.W., A.M.W. and H.A.K.*, 773 S.W.2d 120 (Mo. Ct. App. 1989)

¹⁴⁵ *In the Interest of M.D.S.*, 488 N.W. 2d 715 (Iowa App. 1992)

¹⁴⁶ *Id.*

¹⁴⁷ 42 U.S.C. §671(a)(15)(B)(ii). *Resource Guidelines*, *op.cit.*, footnote 130 at pp. 59 & 71; 42 C.F.R. §1356.21(b)(1).

context of a termination of parental rights hearing. The cases listed in this section are organized according to the problems presented by the parents when the agency removed their child or children from parental care.

Many of these issues have been litigated in only a few states. They represent issues that judges and attorneys should carefully consider in determining whether reasonable efforts have been offered to the parents. After all, one of the purposes of the federal law is to offer parents a fair opportunity to change their circumstances and reunite with their children.

1. HOUSING

Homelessness can be the primary reason for state intervention on behalf of a child. In fact, since 1995 several separate studies show that 30 percent of America's foster children could be safely returned to their own homes now, if their birth parents had safe, affordable housing.¹⁴⁸ Should the state be required to provide housing services for the parent in order to prevent removal of a child from his or her parents? Several appellate courts have addressed whether the agency owes a duty to assist homeless parents with housing resources in the context of juvenile dependency proceedings. One of the first courts which addressed this issue was the Delaware Supreme Court in the case of *In the Matter of Derek W. Burns*.¹⁴⁹ The young mother approached the agency for temporary assistance while she sought housing. She asked the agency to return her child, but the agency refused and ordered services unrelated to her needs. The trial court terminated her parental rights when she was unable to find stable housing. The Supreme Court reversed stating that the agency failed to provide assistance to her in finding stable housing.¹⁵⁰

The Rhode Island Supreme Court faced a similar situation in two cases in which parents claimed that the agency should have provided housing assistance to homeless families which would allow parents to reunite with their children.¹⁵¹ The agency resisted claiming that the court had no authority to order housing assistance in juvenile dependency cases and asserting that such expenditures would unduly tax the agency's limited resources. The Rhode Island Supreme Court

¹⁴⁸ Harburger, D., and White, R., "Reunifying Families, Cutting Costs: Housing – Child Welfare is Slow to Improve Despite Court Order," *Child Welfare*, Vol. LXXXIII, #5 Sept./Oct. 2004, p.501; Poe, J. and Kendall, P., "Cases of Neglect May Be Only Poverty in Disguise," *Chicago Tribune*, Dec. 24, 1995, p. 6;

¹⁴⁹ 519 A. 2d 638 (Del. 1986). A similar case arose in the Pennsylvania courts; *In Interest of S.A.D.*, 555 A.2d 123 (Pa. Super. Ct. 1989).

¹⁵⁰ A New York appellate court rendered a similar decision regarding a grandmother's request for housing assistance, stating that the assistance should include writing letters, making phone calls, and taking legal action on the grandmother's behalf to secure a preference in tenant selection for public housing. *In re Enrique R.*, 129 Misc. 2d 956, 494 N.Y.S.2d 800 (N.Y. Fam. Ct. 1985). In another similar ruling the New York appellate court held that the agency should actively aided the mother in her search for suitable housing so that her child could be returned. *In the Matter of Jason S.*, 117 A.D.2d 605, 498 N.Y.S.2d 71 (N.Y. App. Div. 1986)

¹⁵¹ *In re Nicole G.*, 577 A.2d 248 (R.I. 1990).

affirmed the trial court holding that temporary housing relief was consistent with the intent of the state statute, stating “the Legislature intended for the court to provide a check on DCF’s powers, to protect families from hasty and routine terminations by ensuring that adequate services have been provided prior to termination.”¹⁵²

In *Martin A. v Gross*¹⁵³ a class action brought by homeless parents, the New York appellate court found that the agency offered virtually no services to homeless families whose children had been placed in protective custody by the agency. In the case of *In re S.A.D.*¹⁵⁴ the mother turned to the agency for help with housing only to have her child removed. The Pennsylvania court held that this was a denial of reasonable efforts.

A Washington appellate court ruled that a trial judge could not order the agency to pay for housing for a homeless mother and her children, concluding that the trial court had overstepped its authority and must defer to the doctrine of separation of powers.¹⁵⁵ However, in a subsequent decision the Washington Supreme Court held that the State had an enforceable statutory duty to provide housing assistance to homeless children and their families, that the juvenile dependency statute could be interpreted outside of a dependency proceeding, and that a juvenile court in dependency proceedings may order the State to provide some form of housing assistance to children and their families when homelessness is a primary factor in the decision to place or to keep a child in foster care.¹⁵⁶

Nothing in the federal law prohibits welfare agencies from providing housing for homeless parents. At the congressional hearings Senators stated “The bill...allows federal child welfare funds to be spent on specific services intended to make it possible for children to remain in their own homes...”¹⁵⁷ As one commentator noted “the judge may fashion innovative remedies, such as housing assistance, to meet the specific needs of homeless families.”¹⁵⁸

As indicated in these cases only a few states have addressed housing in the context of juvenile dependency cases. No appellate decisions on this issue exist in the majority of states.

2. POVERTY

¹⁵² *Id.*, at p. 250.

¹⁵³ 524 N.Y.S.2d 121 (N.Y. Sup. Ct. 1989)

¹⁵⁴ 555 A.2d 123 (Pa. Super. Ct. 1989)

¹⁵⁵ *In re Welfare of J.H., B.H., J.C., K.C.*, 75 Wash. App. 887, 880 P.2d 1030 (1994).

¹⁵⁶ *Washington State Coalition of the Homeless, et al. v Department of Social and Health Services, et al.*, 133 Wn. 2d 894; 949 P.2d 1291 (1997).

¹⁵⁷ 125 Cong. Rec. s29943 (1979) (statement of Sens. Cranston, Ribicoff, Moynihan, and Dole).

¹⁵⁸ Patel, “Homeless Children and the Welfare System: Forging a New Relationship,” *Family Law Quarterly*, Vol. 28, 521, at p. 524 (1994).

Poverty is endemic in our society, and its impact on children is particularly harsh. The most recent study estimates that 21.6 percent of children in the United States live in poverty.¹⁵⁹ A strong correlation exists between poverty and foster care. As one author concluded, “children *in* foster care, by and large, come from families living in poverty.”¹⁶⁰ (emphasis in the original) However, the law is clear: poverty must not be the basis for removing a child from parental care.¹⁶¹

Studies show the inextricable link between poverty and the child welfare system.¹⁶² Courts have struggle with this issue. For example, in a Pennsylvania case the court wrote

It is well-settled that the Juvenile Act was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take children of the illiterate and crude and give them to the educated and cultured, nor to take the children of the weak and sickly and give them to the strong and healthy. Neither will this court tolerate the separation of a young child from a parent to protect agency funding.¹⁶³

In an Alabama case, the agency removed the children basically due to the parents’ poverty. The allegations stated that the parents could not support the children financially or emotionally and the children were not receiving adequate medical treatment, food, clothing or shelter.¹⁶⁴ The father worked full time, but was unable to financially support the family. The appellate court reversed a

¹⁵⁹ U.S. Child Poverty Rate, 2010, U.S. Census Bureau, American Community Surveys; this figure is the highest since the ACS started collecting data in 2001.

¹⁶⁰ Pelton, L., *For Reasons of Poverty: A Critical Analysis of the Public Child Welfare System in the United States*, Praeger, N.Y., 1989, at p. 108; “[T]here has always been a considerable number of children in the United States living in foster care....By and large they have continued to be poor children from impoverished families.” At p. 5.

¹⁶¹ “It is more than half a century since the tenet was first enunciated that ‘no child should be separated from his family for reasons of poverty alone.’ It is unforgivable that in more than half a century this basic principle, to which there is such strong commitment, has not been implemented. It may be true that in many instances, we do not place for poverty alone, because poverty seldom comes ‘alone.’” Boehm, B., “The Child in Foster Care,” in Stone, H.D. (Ed.) *Foster Care in Question: A National Reassessment by Twenty-One Experts*, Child Welfare League of America, New York, 1970, at p. 222; Braveman, D., & Ramsey, S., “When Welfare Ends: Removing Children From the Home for Poverty Alone,” *op.cit.* footnote 70 at 447-470, at 450-452.

¹⁶² “Poverty is the ‘single most important predictor of placement in foster care and the amount of time spent there.’” Brooks, S. & Roberts, D., “Family Court Reform: Social Justice and Family Court Reform,” 40 *Fam. Ct. Rev.* 453, 454 (Oct. 2002); Mabry, C., “Second Chances: Insuring that Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty,” *West Virginia Law Review*, Vol. 102, Spring, 2000, 607, at 612-614.

¹⁶³ *In Interest of S.A.D.*, 382 Pa. Super 166, 555 A.2d 123 (Pa.Super.Ct. 1989), at p. 176; See also *In re B.C.*, 582 A.2d 786 (D.C. App. 1990); *In re T.G.*, 684 A.2d 786 (D.C. 1996); *In re Ardoin Children*, 667 So. 2d 1144 (La. 1996), *In re T.S.*, 464 So. 2d 677 (Fla. 1985).

¹⁶⁴ *In re Hickman*, 489 So. 2d 601 (Ala. 1986)

termination of parental rights finding that the social service agency failed to provide any aid to the family. The court wrote that "...poverty in the absence of abuse or lack of caring should not be the criteria for taking away a wanted child from the parents. Such should particularly be the case when there has been no apparent aid given toward keeping the family together by the agency seeking its termination."¹⁶⁵ Similarly a New York appellate court stated:

An agency assuredly need not guarantee that parents will no longer be poor or unemployed, but neither can it, without more, simply impose on impoverished parents the usual plan, including the requirement, for return of their child, that they have a means of support and suitable home.¹⁶⁶

The California legislature passed a law statute which reflects a similar state policy, stating "[no] child shall be found to be a person described by this subdivision solely due to the lack of an emergency shelter for the family."¹⁶⁷

While the child welfare system cannot be charged with bringing children and families out of poverty, the system can and should be prepared to provide particularized services for poor parents.¹⁶⁸ These services at the very least include child care, homemaking, babysitting, financial assistance, and housing assistance.¹⁶⁹ In addition, parenting education, employment assistance, nutrition programs, counseling, temporary kinship placements, and health care often can be of critical importance.¹⁷⁰ Whatever services offered must be available in a timely fashion, low cost or free, effective, and transportation must be provided.

3. VISITATION

Visitation between parents and children is an essential service in the reunification process. Some experts argue that visitation or access is the most important part of any reunification plan.¹⁷¹

¹⁶⁵ *Id.* at pp. 602—603; and see similar cases cited in *Mabry*, *op.cit.* footnote 155 at p. 630.

¹⁶⁶ *In re Jamie M.*, 472 N.E. 2d 311 (N.Y. 1984) at p. 314.

¹⁶⁷ California Welfare & Institutions Code, §300(b), West, 2013.

¹⁶⁸ "The more accurate reason for placement is very often that the family, frequently due to poverty, does not have the resources to offset the impact of situational or personal problems, which themselves are often caused by poverty, *and the agencies have failed to provide the needed supports.*" Pelton, *op.cit.* footnote 156 at p. 52.

¹⁶⁹ *Id.* at p. 114.

¹⁷⁰ *Mabry*, C., *op.cit.*, footnote 158 at pp. 635-646.

¹⁷¹ Fanshel, D., *On the Road to Permanency*, CWLA, New York, 1982, and see the sources cited in Edwards, L., "Judicial Oversight of Parental Visitation in Family Reunification Cases," *Juvenile and Family Court Journal*, Vol. 53, No. 3, 2003, at pp. 1-24 pp 2-5; Hess, P. & Proch, K.O., *Family Visiting in Out-of-Home Care: A Guide to Practice*, Child Welfare

Frequent visiting maintains family relationships, helps families cope with changing relationships, empowers and informs parents, and enhances children's well-being. In addition, it helps families confront reality (the situation in which they find themselves), and it provides a time and place to practice new behaviors.¹⁷² Ongoing contact with the child enhances a parent's motivation to change.¹⁷³ Visitation also permits others to assess the parent-child relationship and assist parents learn safe and effective parenting behaviors.¹⁷⁴

Studies of children in out-of-home care repeatedly find that children who visit frequently are more likely to be reunited with their parents.¹⁷⁵ Studies also show the association between frequent visitation and the emotional well-being of both children and parents.¹⁷⁶ Regardless of the outcome of the legal case before the court, both the child and parents are best served by frequent visitation.¹⁷⁷

Child development experts agree that no standard visitation schedule exists for all children. Creation of a visitation order must focus on the child's developmental needs.¹⁷⁸ For example, infants need frequent and consistent contact with their parents. Separation evokes strong and painful reactions.¹⁷⁹ According to the American Academy of Pediatrics:

League of America, Washington, D.C., 1988; Hess, P. "Case and Context: Determinants of Planned Visit Frequency in Foster Family Care". CWLA, N.Y. Vol. LXVII, No. 4, July/August 1988.

¹⁷² New developments in dealing with maltreating parent-child relationships have demonstrated significant improvements in those relationships. See Timmer, S., Urquiza, A., Zebell, N., & McGrath, J., "Parent-Child Interaction Therapy: Application to maltreating parent-child dyads," *Child Abuse & Neglect*, Vol. 29 (2005) at pp. 825-840.

¹⁷³ Millham, S., Bullock, R., Hosie, K., & Haak, M., *Lost in Care: The Problems of Maintaining Links Between Children in Care and Their Families*, Hants, UK: Gower (1986).

¹⁷⁴ *Id.* "Visitation between parents and their children in foster care is generally considered to be the most important factor contributing toward timely family reunification, a major feature of permanency planning for children in foster care." Roemer, L., "Information Packet: Visiting with Family in Foster Care," April, 2008.

¹⁷⁵ Fanshel, D. "On The Road to Permanency," *op.cit.*, footnote 167; Beckerman, A., "Charting a Course: Meeting the Challenge of Permanency for Children with Incarcerated Mothers," *Child Welfare*, Vol. 77, No. 5, (Sept./Oct. 1998) at pp 513-529; Fanshel, D., & Shinn, E., *Children in Foster Care: A Longitudinal Investigation*, *op.cit.* footnote 9 pp. 85-111 & 486-495..

¹⁷⁶ Weinstein, E., *The Self-Image of the Foster Child*, Russell Sage Foundation, N.Y. 1960; "Final Report," Michigan Parent-Child Visitation Task Force, March 2013 at pp 14-15; McWey, L., & Mullis, A. "Improving the Lives of Children in Foster Care: The Impact of Supervised Visitation," *Family Relations*, Vol. 53, No. 3, April, 2004, at pp. 293-300.

¹⁷⁷ Cantos, A., Cries, L., & Slis, V., "Behavioral Correlates of Parental Visiting During Family Foster Care," *Child Welfare*, Vol. 76, No. 2, (1997) at pp. 309-329.

¹⁷⁸ See the chart explaining appropriate visitation for different age groups written by Dr. David Arredondo, "Guidelines to the Developmental Needs of Children According to Age," found in Arredondo, D., & Edwards, L., Arredondo, D., & Edwards, L., "Bonding, Attachment, and Reciprocal Connectedness: Limitations of Attachment Theory in the Juvenile and Family Court," *Journal of the Center for Families, Children & the Courts*, California Administrative Office of the Courts, 2000 at pp 109-127, Appendix A of that article.

¹⁷⁹ Goldsmith, D.F., Oppenheim, D., and Wanlass, J., "Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placement of Children in Foster Care," *Juvenile and Family Court Journal*, Vol. 55, No. 2, 2004, at pp. 1-13, at p. 6.

Weekly or other sporadic “visits” stretch the bounds of a young child’s sense of time and do not allow for a psychologically meaningful relationship with estranged biological parents....For parent-child visits to be beneficial, they should be frequent and long enough to enhance the parent-child relationship.¹⁸⁰

Some juvenile court judges recognize this principle. For example, Judge Douglas Johnson wrote in an article that

the standard supervised biweekly, one-or-two hour visitation is inadequate, inappropriate and unacceptable. Reasonable efforts in this context means meaningful daily or near daily parenting time to build the infant/parent relationship and achieve permanency. A judge can rule earlier on whether a parent is making progress toward becoming a proper parent when the parent is given a fair opportunity to learn skills and apply them. If Health and Human Services is unwilling to provide such services, the judge could rule that a negative reasonable efforts finding will be issued in 30 days. If so ruled, Health and Human Services will not receive its foster care matching dollars under Federal Title IV-E Foster Care and Adoption Assistance Program. But Health and Human Services must still provide the services as ordered.”¹⁸¹

A NCJFCJ publication stressed the importance of “continued and regular contact between family members,” recommending daily visits between a mother and her baby.¹⁸² A San Francisco Superior Court Standing Order mandates infants from birth to five years of age receive “at least six hours of visitation with their parent(s) or guardian(s) each week.”¹⁸³

¹⁸⁰ American Academy of Pediatrics Committee on Early Childhood, “Adoption and Dependent Care,” 2000 at p. 1148. “For very young children, infrequent visits are not enough to establish and maintain a healthy parent-child relationship.” Cohen, J., & Youcha, V., “Zero to Three: Critical Issues for the Juvenile and Family Court,” *Juvenile and Family Court Journal*, Vol. 55, No. 2 (Spring, 2004) at pp. 15-27, 22.

¹⁸¹ Johnson, Hon. Douglas, “Babies Cry for Judicial Leadership: Reasonable Efforts for Infants and Toddlers in Foster Care,” *The Judge’s Page*, Online publication of National CASA, October, 2007.

¹⁸² NCJFCJ, *Protocol for Making Reasonable Efforts to Preserve Families in Drug-Related Dependency Cases*, Reno, (1992) at pp. 4, 20-22.

¹⁸³ Superior Court of San Francisco, Juvenile Division, Standing Order No. 201, found in Appendix D, Edwards, L. “Judicial Oversight of Parental Visitation in Family Reunification Cases,” *op.cit.*, footnote 167 at p. 17.

Ensuring early and adequate visitation presents significant challenges for social workers. After the agency removes a child from parental care, the immediate concerns of the social worker include finding a temporary placement for the child and preparing documents for a court hearing that will take place almost immediately. After completion of these tasks the social worker then decides the location of the visits, the necessary transportation for the parents and child in order to meet at the designated visitation location, the length and frequency of the visits, whether the visits must be supervised, and who will provide that supervision, and whether the social worker will evaluate the child's reactions after the visit. For some of these issues, the social worker makes recommendations to the court. The frequency, duration, and supervision involve legal issues that the judge in many states must determine after hearing recommendations from the social worker.¹⁸⁴ Judges should also determine whether transportation issues exist, particularly where public transportation is limited.

Some state social service agencies developed standards and procedures regarding visitation. One survey indicated that about half of the states specify a minimum of biweekly visits as the standard; the remaining states had no standards regarding visitation frequency.¹⁸⁵ In state court litigation parents argued that the failure of the agency to adequately facilitate visitation prevented them from maintaining a connection with their children because the agency did not adequately facilitate visitation.¹⁸⁶ However, many jurisdictions find visitation problematical due to the lack of agency resources which often makes frequent parent-child contact difficult.¹⁸⁷

Many state child welfare agencies instituted policies and procedures on parent-child visitation.¹⁸⁸ Ms. Peg Hess, a recognized expert in parent-child visitation, concludes that agency policies grant too much discretion to the agency and that her study warrants a concerted effort to define visitation standards and frequency.¹⁸⁹ She points out that children-in care whose parents frequently visit are more likely to have high well-being ratings and to adjust well to placement than those children whose parents visit less frequently or not at all. Children whose parents visit

¹⁸⁴ "There is no question but that the power to regulate visitation between minors determined to be dependent children and their parents rests in the judiciary." *In re Jennifer G.*, 270 Cal.Rptr. 548, 327 (Cal. Ct. App. 1990); *In re Shawna M.*, 24 Cal.Rptr. 2d 126 (Cal.Ct.App. 1993).

¹⁸⁵ Hess, P.M. & Proch, K., "How the States Regulate Parent-Child Visiting, *Public Welfare*, Vol. 64 (1986) at p. 12

¹⁸⁶ As one appellate court noted, denying visitation when visitation is possible is incompatible with encouraging and strengthening the parent-child relationship. *In re Guardianship of D.M.H.*, 736 A.2d 1261, 1274 (N.J. 1999) "Consistent efforts to maintain and support the parent-child bond are central to [a] court's determination" of whether the agency made reasonable reunification efforts." (at 1276). But some courts seem to blame the parents for poor visits. *Matter of V.M.S.*, 446 N.E.2d 632 (Ind. Ct. App. 1983) and *Matter of Christine Tate*, 312 S.E.2d 535 (N.C. Ct. App. 1986)

¹⁸⁷ Edwards, L., "Judicial Oversight of Parental Visitation in Family Reunification Cases," *op. oit.* footnote 167 at pp. 1-24

¹⁸⁸ Hess, P., "Visiting Between Children in Care and Their Families: A Look at Current Policy," available at http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/visiting_report-10-29-03.pdf.

¹⁸⁹ *Id.*

frequently are also more likely to be discharged from placement.¹⁹⁰ She concludes that the frequency of visitation is the result of agency policy and resources, the location of the placement, the cooperation of foster parents, and caseworker attitudes and assessment of the case.¹⁹¹

Reasonable efforts rulings in both federal and state courts have focused on the adequacy of the visitation between parents and their children. In one federal case the court ordered the state to provide fair hearings for denials of visitation to parents with children placed in foster care.¹⁹² The court held that the agency must provide visits within the first week of a child's placement in foster care, and service plans must include provisions for visits at least every two weeks and take into account the time commitments of the parent.¹⁹³ In another federal case, the consent decree declared that visits should occur in the home of the biological parents or the foster family whenever possible, or otherwise in a dignified setting that is natural and homelike.¹⁹⁴ Several federal courts resisted making orders regarding visits for parents and children in care.¹⁹⁵

Several state appellate courts discuss visitation in the context of reasonable efforts requirements. Some of these decisions emphasize the importance of visitation in maintaining the parent-child relationship. The Rhode Island appellate court in the case of *In re Nathan F.* stated "[t]he state must demonstrate that the department has ... 'made suitable arrangements for visitation....'"¹⁹⁶ In *In re Kristina L.*,¹⁹⁷ the agency arranged for the mother to see her daughter one hour every 2 weeks. When a termination hearing was held, the child was "bonded" to the foster parents. The mother appealed the termination decision, and the Rhode Island Supreme Court reversed the trial court ruling because the agency failed to provide reasonable efforts to the family. The Supreme Court noted that it was no surprise that the child bonded to the foster parents in light of the "totally inadequate" visitation schedule arranged by the agency.

¹⁹⁰ Hess, P., "Visiting Between Children in Care and Their Families: A Look at Current Policy," The National Resource Center for Foster Care & Permanency Planning, Hunter College School of Social Work, A service of the Children's Bureau, October 2003 at p. 2.

¹⁹¹ Hess, P., "Case and Context: Determinants of Planned Visit Frequency in Foster Family Care," *op.cit.* footnote 167.

¹⁹² *J.J. v Ledbetter*, No. CV 180-84 (S.D. Ga. Slip ops. filed Aug. 27, 1984, Sept. 21, 1984, and Jan. 21, 1985).

¹⁹³ *Id.*

¹⁹⁴ *G.L. v Zumwalt*, No. 77-0242-CV-W-4 (W.D. Mo. Consent decree filed Mar. 21, 1983).

¹⁹⁵ See *Scrivner v Andrews*, 816 F.2d 261 (6th Circuit. 1987) and *State of Vermont Dep't of Soc. & Rehab. Serv. v U.S. Dep't of Health & Human Services*, 798 F.2d 261 (2nd Cir. 1986); *Winston v Children and Youth Services of Delaware County*, 948 F.2d 1380 (3^d Cir. 1991) –This was an action by parents whose children had been removed to establish specific rights to visitation. The federal court concluded that because of the vague language in the federal statute, the agency need not provide any particular amount of visitation or even no visitation at all if other services were provided. (at 1389-1390).

¹⁹⁶ 762 A.2d 1193, 1195 (R.I. 2000). The benefits of frequent visitation are listed in "Smariga, M, "Visitation with Infants and Toddlers in Foster Care: What Judges and Attorneys Need to Know," *Practice & Policy Brief*, ABA Center on Children and the Law, July 2007, at p. 6.

¹⁹⁷ 520 A.2d (R.I. 1987)

Increased judicial oversight of parent-child visitation is vitally necessary to ensure adequate contact.¹⁹⁸ In a California case, *In re Alvin R.*, the agency recommended delaying visitation until the initiation of counseling sessions for the father and son. Counseling was delayed, and as a result no father-son visitation occurred. On appeal the appellate court reversed the trial court finding that the agency had provided reasonable efforts stating “[t]he longer parent and child live with no visitation, the less likely there will ever be any meaningful relationship.”¹⁹⁹ In another California case, *Tracy J. v Superior Court*²⁰⁰ the appellate court held that the agency failed to make reasonable efforts, and that visitation was inadequate given the safety concerns present in the case. Although the parents had limited intellectual functioning, they fully cooperated with services offered, and visits had been reported as positive. Nevertheless the agency permitted only one supervised visit a week. The appellate court held that this was a denial of reasonable efforts and that the agency should have increased the visitation. A New Mexico Appellate Court reached a different result in a case where agency delays prevented meaningful visitation between the father and his child. The court concluded that the more immediate needs of the child for permanency should prevail.²⁰¹

Providing adequate visitation with an incarcerated parent presents a challenge. Some state courts have ruled that limited visitation while parents are incarcerated violates the reasonable efforts requirement.²⁰² These cases hold that incarceration should not mean the end of a parent-child relationship.²⁰³ In an Ohio case the agency’s case plan provided only general goals. The agency scheduled to regular visits and required the parents to call and arrange visits for no more than once a week and for no longer than one hour. The appellate court reversed the termination of parental rights,²⁰⁴ stating its opinion that when the agency provides visitation to an incarcerated parent, the appellate court will be ready to affirm reasonable efforts.²⁰⁵ If a parent fails to take advantage of visitation, the court will likely affirm the efforts of the agency even if those efforts were minimal.²⁰⁶

¹⁹⁸ Edwards, L., *op.cit.*, footnote 167 at pp. 9-12.

¹⁹⁹ *In re Alvin R.*, 134 Cal.Rptr.2d 210, 217; the appellate court further noted that the department submitted no evidence of having made a good faith effort to arrange counseling sessions. Because the child needed therapy before being returned to his father, the trial court did not err in finding that such a return would have been detrimental..

²⁰⁰ 202 Cal.App.4th 1415 (Cal. Ct. App. 2012)

²⁰¹ *State ex rel. Children, Youth & Families Dep’t*, 47 P.3d 859 (N.M. Ct. App. 2002)

²⁰² *In re Brittany S.*, 17 Cal. App.4th 1399; 22 Cal. Rptr.2d 50 (1993)(agency did not provide visitation while mother was incarcerated); See also *In re David D.*, 28 Cal.App.4th 941 (agency and court placed an unreasonable burden on mother thus preventing her from visiting –TPR reversed); *Mark N. v Superior Court*, 60 Cal.App.4th 1158 (agency did not follow court order to provide an incarcerated mother with visitation); *In the Interest of T.A. and O.A.* (2003 WL 21459553 Iowa App., 2003)

²⁰³ Or as the court put it, “Go to prison, lose your child” is an unacceptable maxim. *Id.* at p. 1402.

²⁰⁴ *In re Brown*, 648 N.E.2d 576 (Ohio, Ct. App. 1994)

²⁰⁵ *In re Hector L.*, 730 A.2d 106 (Conn. App. Ct. 1999); *In re Ebony H.*, 789 .2d 1158, 1163.

²⁰⁶ *In re Guardianship of D.M.H.*, 736 A.2d 1261 (N.J. 1999); *Div. of Family & Youth Serv. v V.S.*, No. S-10350, 2002 WL 1004097 (Alaska May 15, 2002); *In re Nicole J.*, 2002 WL 1610216 (Conn. Super. Ct. June 25, 2002)

The author while sitting as Presiding Judge of the Santa Clara County Juvenile Court became concerned about the quality and quantity of parent-child visitation during the family reunification period. At the time the agency scheduled visitation for once a week for two hours at a large converted gymnasium. The author asked two well-known psychologists to review the visitation location and to prepare a report addressing the question: is the current parent visitation program supportive of family reunification? Their report indicated that the visitation failed to support family reunification, the environment was too impersonal, and the visits occurred too infrequently. The author met with the agency director who responded with significant changes in the county's entire visitation scheme. The author's letter to the psychologists, their report, the author's letter to the Director of Children's Service, his response, and the author's letter to the local newspaper are contained in Appendix E.

The juvenile court judge must take an active leadership role to ensure improvements occur in local visitation practice. The following steps outline the measures a judge should take to provide children in foster care appropriate visitation:

- + Recognize that visitation is a critical element of the family reunification process and be prepared to address visitation at each hearing.
- + Ensure that a visit take place soon after the removal as both the parent and child will be experiencing grief over the separation.²⁰⁷
- + Oversee the child's initial placement decision to ensure that it supports frequent, meaningful visitation.
- + Develop clear, enforceable, written visitation orders for each case.
- + Develop local rules that address visitation issues.
- + Determine the frequency and duration of visitation by measuring the needs of the child and family rather than the capacity of the agency.
- + Encourage cross-systems training for all participants in the juvenile dependency court system to address child development principles and strategies to improve the quality and quantity of visitation.

²⁰⁷ Fahlberg, V., *A Child's Journey Through Placement*, Jessica Kingsley, London, 2012, at pp. 141-175. Bowlby, J. *Attachment and Loss. Vol. 2 Separation*, New York, Basic Books, (1973)

- + Examine best practices and draw from model programs from around the country to improve visitation practices.
- + Facilitate collaborative community efforts to improve visitation practices and overcome barriers to successful visitation.²⁰⁸
- + Work with the agency and community members to make transportation available so that frequent visitation is possible.
- + Discuss visitation at court system’s meetings so that attorneys and service providers can contribute their ideas.²⁰⁹

Children and their parents benefit from visitation, yet policies and practice in most states reveal the inadequacy of visitation both in quantity and quality. Moreover, very few appellate decisions address visitation, which indicates that attorneys fail to litigate issues surrounding the quality and quantity of visitation. Visitation plays a critical part in the family reunification process. Judges and attorneys must pay particular attention to this issue.²¹⁰

4. CASE PLAN AND PROVISION OF APPROPRIATE SERVICES

Federal law requires the agency to provide a case plan which identifies the problems presented in the case and the services offered to alleviate the problems.²¹¹ As a Minnesota appellate court stated: “[T]he record should show that the supervising agency identified the problems leading to the loss of custody [and] offered services designed to remedy those problems...”²¹² In order to offer reasonable efforts, the plan must address the problems that brought the child to the attention of the agency,²¹³ and must not “consist of a litany of required services that [are] not related to the conditions that eventually gave rise to the dependency adjudication.”²¹⁴

Some courts recognized the failure of the agency to provide the needed services to parents trying to reunify with their children. In a Connecticut case, the trial court terminated reunification

²⁰⁸ Edwards, L., *op.cit.* footnote 167 at pp. 11-12.

²⁰⁹ Both Polk County, Iowa, and the state of Maine have developed visitation guidelines that are comprehensive and sensitive to the developmental needs of children. The Iowa guidelines were developed by both the agency and the courts. Tabor, Nancy, “State of Iowa Court Improvement Project, Resource Manual: Visitation Issues in Juvenile Court,” 22 *et.seq* (2001); Maine Department of Human Services, Child and Family Services Manual (2002).

²¹⁰ *Id.*

²¹¹ 42 U.S.C. §§671(16) & 675(B) and 45 C.F.R. §1356.21(d)(4) & (g)(4)

²¹² *In re Riva M.*, 235 Cal. App.3d 403; 286 Cal. Rptr. 592, 599 (1991); See also *In re Doe*, 60 P.3d 285 (HI. 2002) (the plan must include those steps “necessary to facilitate the return of the child to a safe family home.” At 289).

²¹³ *In re Ty M.*, 655 N.W.2d 672, 688 (Neb. 2003).

²¹⁴ *In re Child of E.V.*, 634 N.W.2d 443, 447 (Minn. Ct. App. 2001)

services and found the agency had provided reasonable efforts. The trial court found the primary obstacle to reunification was the mother’s “longstanding lack of insight or sense of responsibility for [her daughter’s] past,”²¹⁵ which passed the burden of obtaining services to the mother. The appellate court reversed the trial court, finding that the agency had not provided reasonable efforts.²¹⁶

In a Delaware case the agency’s drug treatment professionals made clear that the substance abusing mother needed more than referrals to out-patient services. When the agency failed to provide those services, the Family Court denied a petition to terminate parental rights holding that the agency failed to develop and implement an adequate case plan.²¹⁷ In a California case the case plan included counseling for the child as the key component to reunification.²¹⁸ Yet the agency referred the child to a therapist where there was a long waiting list for services. The agency did not explore other therapists or transportation that would make it possible for the child to attend another therapist. In its reversal of the trial court the appellate court stated “*Some* effort must be made to overcome obstacles to the provision of reunification services.”²¹⁹ (emphasis in the original) Other cases have criticized the agency’s lack of efforts towards removing particular obstacles to reunification such as a parent’s lack of financial resources,²²⁰ a lack of stable housing,²²¹ and substance abuse.²²²

However, state appellate courts acknowledge that “reasonable efforts” does not mean every conceivable effort or service. In *In re Alvin R.* the California appellate court noted “[w]e recognize that the mere fact that more services could have been provided does not render the Department’s efforts unreasonable.”²²³ The New Hampshire appellate court in *In re Jonathan T.* stated that the agency need not make “every effort,” only “reasonable efforts,”²²⁴ and the Connecticut appellate court noted that the agency is required to “everything reasonable, not everything possible.”²²⁵ Nevertheless, the trial court should always examine the case plan to determine whether the offered services addressed the problems that brought the child to the attention of the agency.

5. SUBSTANCE ABUSE

²¹⁵ *In re Nicole J.*, 2002 WL 1610216 at 15 (Conn. Super. Ct. June 25, 2002).

²¹⁶ *Id.* An alternative ground permitted the court to affirm the trial court and affirm the termination of parental rights (at 10 & 15).

²¹⁷ *Division of Family Services v N.X.*, 802 A.2d 325 (Del. Fam. Ct. 2002).

²¹⁸ *In re Alvin R.*, 134 Cal. Rptr. 2d. 210 (Cal. Ct. App. 2003).

²¹⁹ *Id.*

²²⁰ *In re Edward B.*, 558 S.E. 2d 620 (W. Va. 2001)

²²¹ *In re D.D.V.*, No.M2001-02282-COA-R3-JV, 2002 WL 225891 (Tenn. Ct. App. Feb. 14, 2002)

²²² *In re Rogers II.*, No. 246085, 2003 WL 21752814 (Mich. Ct. App. July 29, 2003)

²²³ 134 Cal. Rptr.2d 210, 218 (Cal. Ct. App. 2003)

²²⁴ 808 A.2d 80, 87-88 (N.H. 2002)

²²⁵ *In re Dorrell R.*, 780 A.2d 944, 950 (Conn. App. Ct. 1999)

Many parents lose custody of their children because of their substance abuse problems. Between 50 to 90 percent of all child welfare cases involve issues of parental substance abuse,²²⁶ and nationally over 700,000 women abuse drugs while pregnant.²²⁷ Many appellate court decisions reflect the widespread use of intoxicating substances by pregnant and parenting mothers and their partners.²²⁸ These cases focus on prenatal drug abuse, the danger to children resulting from parental substance abuse, drug testing, the confidentiality of medical records, and the criminalization of fetal abuse.²²⁹

There are different types of cases involving substance abusing parents, and these should be analyzed separately. For the drug-exposed infant, the social worker should make an evaluation whether state intervention is necessary.²³⁰ The questions that the social worker and later the judge should ask include the status of the infant, the status of the mother and father, the home environment, and previous contact with the social services agency.²³¹ Persuasive research indicates that if the mother has a support person in her life, the baby can safely remain with her, possibly with some services.²³² If the mother has a serious substance abuse problem and little or no support system, the social worker should consider placing the mother and baby together directly from the hospital in an in-patient program. All of these strategies are consistent with the legal mandate that the social worker provide services to prevent removal.

For cases involving substance abuse and older children, the social worker must determine the impact of the abuse on the children. The social worker may decide to refer the parents to out-patient substance abuse treatment programs. Parenting programs that focus on substance-abusing parents

²²⁶ *Linking Child Welfare and Substance Abuse Treatment: A Guide for Legislators*, National Conference of State Legislatures, 2000; Feig, L., "Drug Exposed Infants and Children: Service Needs and Policy Questions," U.S. Department of Health and Human Services, 1990; Kelleher, K., et.al. "Alcohol and Drug Disorders Among Physically Abusive and Neglectful Parents in a Community Based Sample," *American Journal of Public Health*, Vol. 84, at 1586, (1999);

²²⁷ Center for the Future of Children, *The Future of Children*, David and Lucille Packard Foundation, Spring, 1991, Vol. 1, No. 1, at p. 22.

²²⁸ *In re Michelle M.*, 4 Cal. App. 4th 1024 (1992); *In re Michael R.*, 5 Cal. App. 4th 687 (1992); *Angela S. v. Mendocino County*, 36 Cal. App. 4th 758 (1995). Also refer to the cases in Section V of *Protocol for Making Reasonable Efforts to Preserve Families in Drug-Related Dependency Cases*, *op.cit.* footnote 178 at pp. 39-44.

²²⁹ *Id.*

²³⁰ Many states require hospital staff to report the birth of a drug-exposed infant. See Sagatun-Edwards, I., Saylor, C., & Shifflett, B., "Drug Exposed Infants in the Social Welfare System and Juvenile Court," *Child Abuse & Neglect*, Vol. 19, No. 1, pp. 83-91 (1995) at p. 83.

²³¹ *Protocol for Making Reasonable Efforts to Preserve Families in Drug-Related Dependency Cases*, *op.cit.* footnote 178 at pp. 39-44.

²³² Sagatun-Edwards, I., Saylor, C., & Shifflett, B., "Drug Exposed Infants in the Social Welfare System and Juvenile Court," *Child Abuse & Neglect*, Vol. 19, No. 1, pp. 83-91 (1995) *op.cit.* footnote 226.

can also be effective, preferably ones that focus upon mother-child relationships.²³³ Some state courts have ruled that substance abuse by itself is not a sufficient basis for juvenile court intervention - connection between the abuse and child well-being must exist.²³⁴

In all types of cases where the child has been removed the court must determine whether the agency has provided adequate services for the substance abusing parents.²³⁵ Appellate case law has addressed this issue. In one case the child was removed from the parents because of domestic violence and substance abuse. The social worker insisted that the mother participate in domestic violence counseling, but the mother asked for substance abuse services. The case plan did not include substance abuse services. The appellate court found that no reasonable efforts were provided stating “[T]he record does not support the finding that the Agency identified the problems leading to the loss of custody of the child, offered and provided services designed to remedy those problems, and made every reasonable effort to assist the parent in the areas where compliance proved difficult.”²³⁶

Some communities do not have adequate substance abuse services, particularly in the rural areas of our country. Community leaders must recognize the high cost of foster care and other out-of-home placements. For example, the author along with others persuaded the local Board of Supervisors to prioritize substance abuse services for mothers and their infants. The local Department of Family and Children’s Services responded by opening a residential treatment center for substance-abusing mothers and their infants.

If a parent is unwilling to participate in substance abuse services, however, the parent runs the risk of losing custody permanently. In one case the mother was ordered to enter a residential treatment program as a part of the case plan.²³⁷ She refused and continued to abuse alcohol and drugs. The appellate court affirmed the trial court’s decision to terminate reunification services finding that the agency had offered reasonable services to the mother.

Commentators note that recovery from substance abuse can take a long time and that services have been inadequate;²³⁸ however, recent developments have made many re-think that observation. The family drug treatment court (FDTC) is the most important development in

²³³ The Celebrating Families parenting class is notable for its structure and its success in the reunification process. See www.celebratingfamilies.net.

²³⁴ *In re Randall*, 96 Or. App. 672, 773 P.2d 1348 (1989); *In the Matter of Milland*, 548 N.Y.S.2d 995 (Fam. Ct. 1989); *In re Destiny S.*, 210 Cal. App. 4th 999 (Cal. Ct. App. 2012).

²³⁵ *In re Ebony H.*, 789 A.2d 1158, 1162 (Conn. App. Ct. 2002)

²³⁶ *Jennifer R., v. Superior Court of San Diego*, (2012 Cal. App. LEXIS 5 – unpublished)

²³⁷ *Robert L. v. The Superior Court of San Benito County*, 45 Cal. App. 4th 619; 53 Cal. Rptr. 2d 41 (1996)

²³⁸ Bean, *op.cit.*, footnote 38 at p. 332.

substance abuse treatment for parents whose children are the subject of child welfare proceedings.²³⁹ First created in 1993 in a Florida juvenile court and based on the criminal drug court model, these courts have expanded rapidly across the United States and now number more than 340.²⁴⁰ Perhaps no other rehabilitative program produces more successful outcomes in the treatment of substance abusing parents. FDTCs demonstrate that substance abusing parents can change – they can become safe, sober parents in much greater numbers than thought possible. That change can occur within a reasonable time, a time consistent with ASFA timelines. The juvenile court judge can facilitate this rehabilitative process by working with substance abuse treatment providers, the social services agency, and other service providers. Numerous studies confirm FDTCs success in rehabilitating parents and permitting safe reunification.²⁴¹ Comparisons between juvenile dependency courts that offer a FDTC and those that do not clearly indicate that reunification is more likely when a parent participates in a FDTC.²⁴²

FDTC's successes can be partially attributed to the presence of a substance abuse expert in the court process. The judge needs an accurate assessment of the parent's substance abuse problem and the proper treatment plan for him or her. Social workers usually have insufficient training to provide the court with that assessment or to create an appropriate treatment plan. The development of FDTCs shows that juvenile court judges need substance abuse expertise to help make the important decisions about the treatment and rehabilitation of substance abusing parents.²⁴³

6. DOMESTIC VIOLENCE

²³⁹ This court has many different names including Family Wellness Court, Dependency Drug Treatment Court, and more. In this article the term Family Drug Treatment Court will be used. Edwards, L., & Ray, J., "Judicial Perspectives on Family Drug Treatment Courts," *Juvenile and Family Court Journal*, Vol. 56, Summer, 2005, at pp. 1-27.

²⁴⁰ The dating of the early FDTCs comes from Caroline Cooper at the BJA Drug Court Clearinghouse, American University, Washington, D.C., cited in Edwards, L., "Sanctions in Family Drug Treatment Courts," *Juvenile and Family Court Journal*, Vol. 61, No. 1 (2010) at pp. 55-62.

²⁴¹ Marlowe, D., & Carey, S., "Research Update on Family Drug Courts," *NADCP: Need to Know*, May, 2012; Worcel, S.D., Green, B.L., Furrer, C.J., Burrus, S.W.M., & Finigan, M.A., *Family Treatment Drug Court Evaluation: Final Report*, NPC Research, Portland, OR, March, 2007.

²⁴² *Id.*, Worcel, *et.al.*

²⁴³ "It should also be acknowledged that substance-abusing parents and their children are a relatively new population and a specialized field of endeavor for substance abuse professionals." "Protocol for Making Reasonable Efforts to Preserve Families in Drug-Related Dependency Cases," *op.cit.* footnote ____ at p.32.

A child's exposure to domestic violence in the home can result in state intervention on behalf of that child.²⁴⁴ In fact, a substantial portion of CPS caseloads involve domestic violence.²⁴⁵ Domestic violence cases typically involve one parent inflicting violence upon the other, and are often accompanied by parental substance abuse, a dirty home, parental mental health problems, poverty, and homelessness.²⁴⁶ Commentators note that while social workers may identify substance abuse or mental health issues as a justification for removing a child, the issue of domestic violence should not be overlooked, whether it is identified at the outset or during the pendency of a case.²⁴⁷ The legal issues that the court must decide include whether the agency provided reasonable services to prevent removal of the children and then, at subsequent hearings, whether the agency provided adequate services to keep the child and the victim-parent safe and permit the parent or parents to reunify with their child.

The most important case regarding domestic violence, child protection, and reasonable efforts is *Nicholson v Scopetta*, where a federal court judge in New York City held that the state violated a mother's constitutional rights by removing her children after she was victimized by domestic violence.²⁴⁸ The court made clear that social workers have a responsibility to the victim of

²⁴⁴ *In re Heather A.*, 52 Cal. App. 4th 183, 60 Cal. Rptr. 2d 315 (1996); *In re Amoda D.*, 2013 WL 6824917 (N.Y. Appellate Division); *In re T.V.*, 217 C.A.4th 126 (Cal App. 2013).

²⁴⁵ Stark, E., "The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response," *Women's Rights Law Reporter*, Vol. 23, No. 2, Spring 2002 at pp. 107-131, at pp. 109-110. When clients are screened for domestic violence, the percentage of cases involving domestic violence rises significantly.

²⁴⁶ "A significant percentage of cases that appear before the dependency court screen positive for domestic violence." O'Riley C., and Lederman, Judge Cindy, "Co-occurring Child Maltreatment and Domestic Violence: The Judicial Imperative to Ensure Reasonable Efforts," *The Florida Bar Journal*, November 2001, Volume LXXV, No. 10 at p. 1; Fitzgerald, Judge R., Bailey, C., & Litton, L., "Using Reasonable Efforts Determinations to Improve Systems and Case Practice in Cases Involving Family Violence and Child Maltreatment," *Juvenile and Family Court Journal*, vol. 54, No. 4, Fall, 2003, pp. 97-107, at pp. 97-98; The California case of *In re Heather A.*, 52 Cal.App.4th 183, 60 Cal.Rptr.2d 315 (1996) is an example of a reported case dealing with domestic violence. Estimates are that from 30 to 60% of abuse and neglect cases involve domestic violence; Osofsky, J.D. "Prevalence of Children's Exposure to Domestic Violence and Child Maltreatment: Implications for Intervention and Prevention," *Clinical Child and Family Psychology Review*, (2003) Vol. 6 at pp 161-170.

²⁴⁷ "Judges should not permit agencies to use mental health or substance abuse issues as excuses for failing to recognize and treat domestic violence," and "Making reasonable efforts requires addressing all of the problems that compromise the child's safety, and addressing those problems in a way that keeps adult victims of violence safe while they work on their other issues." Goodmark, L. JD "Reasonable Efforts Checklist for Dependency Cases Involving Domestic Violence," NCJFCJ, Reno, 2008, at p. 16;²⁴⁷ *In re Charles A.*, 738 A.2d 222 (Conn. App. Ct. 1999); See also *Bridget A. v. Superior Court*, 148 Cal. App. 4th 285, 312(2007) – "There is no statutory [time] limit on the provision of family maintenance services if the court believes the objectives of the service plan are being met."

²⁴⁸ 181 F. Supp. 2d182 (E.D. NY 2002); the court held that when a trial court is considering an application to remove an abused or neglected child, the court must consider whether (1) continuation in the child's home would be contrary to the best interests of the child; (2) reasonable efforts were made prior to application to prevent or eliminate the need for removal; and (3) imminent risk to the child would be eliminated by issuance of a temporary restraining order of protection directing removal of a person from the child's residence. See also *Nicholson v Williams*, 203 F. Supp. 2d 153; The Second Circuit affirmed but requested guidance from the N.Y. Court of Appeals, 344 F.3d 154 (2nd Cir. 2003); The

violence as well as to the child in order to prevent removal of the child. To satisfy the reasonable efforts requirement the court suggested that the social worker explore options such as removal of the abuser, assist the victim to secure a restraining order, or placement of the victim and child in a safe environment.²⁴⁹ The fact that a parent is the victim of domestic violence is insufficient reason to remove a child.

After the *Nicholson* case, social service practice in New York changed significantly.²⁵⁰ The New York courts recognize the obligation upon the child welfare agency to provide services to prevent removal and the court's obligation to review agency actions to determine whether the agency fulfilled its legal obligations.²⁵¹ Further, subsequent New York case law clarified the agency's responsibility to provide services to enable a parent to reunify with the child.²⁵² One appellate case noted that agency efforts should help the parent "so as to render the parent capable of caring for the child."²⁵³ These services may include "assistance with housing, employment, counseling, medical care and psychiatric treatment."²⁵⁴

In several New York cases involving domestic violence the trial court addressed the reasonable efforts issue which resulted in a return of the child to the non-offending parent including the case of *In re David G.*, cited above.²⁵⁵

One of the reasons that New York trial judges review removals so quickly relates to the state statutory structure, which requires that the reasonable efforts issue must be addressed by the court at the shelter care hearing.

(iii) In determining whether temporary removal of the child is necessary to avoid imminent risk to the child's life or health, the court shall consider and determine in its order whether continuation in the child's home would be contrary to the best interests of the child and where appropriate, whether

New York Court of Appeals ruled that the district court accurately reflected New York law (820 N.E.2d 840 (N.Y. 2004) and the parties reached a settlement.

²⁴⁹ *Id.*, and FitzGerald, R., et. al. *op.cit.*, footnote 238 at pp. 102-103,

²⁵⁰ Capps, K., "Comment: The Good, The Bad, and The Future of *Nicholson v. Scoppetta*: An Analysis of the Effects and Suggestions for Further Improvements," 72 *Albany Law Review* 497 (2009).

²⁵¹ Bonagura, R., "Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York," 18 *Columbia Journal of Gender & Law*, 175, 218-219 (2008)..

²⁵² *In re Donna K K.*, 819 N.Y.S.2d 582 (App. Div. 3rd Dep't 2006)

²⁵³ *In re Mariano S., Jr.*, 795 N.E.2d 21 (N.Y. 2003)

²⁵⁴ *Id.* at p. 25.

²⁵⁵ *Matter of Raymond A.*, 26 Misc. 3d 394 (N.Y. Fam. Ct. 2009); *In re David G.*, 29 Misc.3d 1178, 909 N.Y.S.2d 891 (N.Y. Fam. Ct. 2010); *Matter of Naomi R.*, 296 AD 2d 503, 745 NYS 2d 485 (2d Dept 2002); *In re Kayla B.*, 262 A.D.2d 137 (1st Dept. 1999), 29 Misc.3d 1178 (N.Y. Fam. Ct. 2010).

reasonable efforts were made prior to the date of application for the order directing such temporary removal to prevent or eliminate the need for removal of the child from the home. If the court determines that reasonable efforts to prevent or eliminate the need for removal of the child from the home were not made but that the lack of such efforts was appropriate under the circumstances, the court order shall include such a finding.²⁵⁶

Additionally, New York law requires a hearing shortly after the shelter care hearing.²⁵⁷ A parent or other person legally responsible for the care of a child temporarily removed or the child's attorney can apply for a hearing at which the court must determine whether the child should be returned to the parent. The hearing must be held within three court days of the application. At the hearing the court must determine, among other issues,

whether reasonable efforts were made prior to the date of the hearing to prevent or eliminate the need for removal of the child from the home and where appropriate, whether reasonable efforts were made after removal of the child to make it possible for the child to safely return home.²⁵⁸

This statute permits the parties to raise the reasonable efforts issue early in the case, and particularly the reasonable efforts to prevent removal issue. Christine Kiesel, the Court Improvement Program Director in New York, reports that New York judges and attorneys receive significant training on reasonable efforts. The issue is contested frequently at Family Court §§1022 & 1027 hearings shortly after the child is taken into emergency protective custody (§1022) or when the agency requests to take the child into emergency protective custody before the filing of a petition (§1027). This hearing provides an opportunity to prevent removal from the parent at the outset of the case.²⁵⁹ The attorneys litigate the reasonable efforts to prevent removal issue at this hearing realizing that it is often difficult to secure the return of a child once the child is removed.²⁶⁰ The New York experience along with the later sections of this book entitled "Early is Better" and "Interim Hearings" support the scheduling of hearings early in the case to examine reasonable efforts issues.

²⁵⁶ McKinney's Family Court Act, §1022 (a)(iii)

²⁵⁷ McKinney's Family Court Act, §1028 (section 1027 is of similar import.)

²⁵⁸ *Id.*, section 1028(b).

²⁵⁹ Telephone conversation and emails with Christine Kiesel on December 10, 2013.

²⁶⁰ "This observation is consistent with the *Resource Guidelines*, *op.cit.*, footnote 130. "Once a child is removed, it becomes logistically and practically more difficult to help a family resolve its problems." At p. 30.

A few other state appellate court opinions have addressed domestic violence in the context of child welfare litigation. In a Minnesota case, the agency removed the children from their mother's care because of their exposure to violence inflicted on her and the children. The mother participated in services, but failed to end the abusive relationship. The trial court terminated parental rights and the court of appeals affirmed the judgment.²⁶¹ The appellate court failed to address why the mother remained in the abusive relationship. Was she threatened or did she stay because of her love for the abuser? A careful examination of this issue would have been helpful.

Mothers who are victims of domestic violence face difficult choices. Threats from the abuser, loss of economic support, and love for the abuser may inhibit her desire to leave and care for her child.²⁶² In a Connecticut case the agency failed to recognize that the mother was a victim of domestic violence. The appellate court, in reviewing a termination of parental rights, noted that the agency was mistaken about the mother's victimization, but that the parents "actively sought to deceive the service providers by failing to disclose the dysfunction, abuse and violence within the household."²⁶³ The appellate court affirmed the termination of parental rights and the reasonable efforts finding by the trial.

National policy experts focus on the need for judicial use of the reasonable efforts finding in domestic violence cases. As one policy book stated: "[t]he judge should utilize the reasonable efforts provisions of state and federal law to hold the social service or child protection service agency accountable for the timely provision of appropriate services to family members."²⁶⁴ Another publication states:

The court should review the actions the agency has taken to protect the children, and to provide necessary services in a timely manner, particularly those addressing the domestic violence, to the children and to each of the parents to enable the children to remain in the home."²⁶⁵

²⁶¹ *In re Welfare of P.R.L.* 622 N.W.2d 538, 544-45 (Minn. 2001). "Respondent's relationship with [her abuser] is, and has been for years, the primary basis of her unfitness to be a parent." At p. 545.

²⁶² McGee, S. "20 Reasons Why She Stays: A Guide for Those Who Want to Help Battered Women," <http://stopviolence.com/domviol/whytheystay.htm>; LaViolette, AI, & Barnett, O., *Why Battered Women Stay: It Could Happen to Anyone*, 3rd Ed., Sage Publications, 2013; See *In re E.B.*, (2010) 184 Cal. App. 4th 568 for an example of a case where the mother continued to return to her abusive partner.

²⁶³ *In re Charles A.*, 738 A.2d 222 (Conn. App. Ct. 1999). A different result was reached in a similar Minnesota case. *In re Child of E.V.*, 634 N.W.2d 443 (Minn. Ct. App. 2001) where the mother was also a victim of domestic violence.

²⁶⁴ *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy and Practice*, Family Violence Department, NCJFCJ, Reno, NV, 1999, at p. 100. (hereinafter, *Effective Intervention*)

²⁶⁵ *Judges Guide to Domestic Violence in Dependency Cases*, Center for Families, Children & the Courts, California Administrative Office of the Courts, San Francisco, 2012, at p. 30.

A Florida publication co-authored by Judge Cindy Lederman concludes that “[r]easonable efforts require immediate provision of domestic violence services to families in dependency court.”²⁶⁶

A California publication delineates the following efforts by the agency to address safety in domestic violence cases and they include:

- assisting in the creation of a safety plan for the abused parent and the children;
- consulting with a local domestic violence agency about providing advocacy and services, and linking the abused parent and the children with that agency;
- assisting the abused parent in seeking a restraining order for her/himself and the children;
- assisting the abused parent and the children in securing temporary, confidential shelter or other housing assistance; and
- requiring supervised visitation or other restricted visitation for the abusive parent, and providing access to visitation center services.²⁶⁷

The California legislature has gone further by requiring the court to “examine the child’s parents, guardians, or other persons having relevant knowledge and hear relevant evidence as the child, the child’s parents or guardians, the petitioner, or their counsel to present,”²⁶⁸ and

...make a determination on the record, referencing the social worker’s report or other evidence relied upon, as to whether reasonable efforts were made to prevent or eliminate the need for removal of the child from his or her home, pursuant to subdivision (b) or Section 306, and whether there are available services that would prevent the need for further detention.²⁶⁹

Questions the judge or attorneys should ask the social worker include: (1) Did you screen for domestic violence at the outset of the case? (2) Does the petition allege the specific facts about the abuse?²⁷⁰ (3) What steps did you take to remove the abuser from the family home? (4) Did you consider placing the mother and child in a battered woman’s shelter? (5) Did you assess the possibility of the mother and child reside with a relative? (6) Did you consider in-home services to

²⁶⁶O’Riley C. & Lederman Judge Cindy, “Co-Occurring Child Maltreatment and Domestic Violence: The Judicial Imperative to Ensure Reasonable Efforts,” *op.cit.* footnote 238.

²⁶⁷ *Domestic Violence in Dependency Cases: A Judge’s Guide*, Revised 2012, California Administrative Office of the Courts, San Francisco, 2012, at p. 26.

²⁶⁸ California Welfare and Institutions Code §319(a)

²⁶⁹ California Welfare and Institutions Code §319(d)(1).

²⁷⁰ General language such as “the child was exposed to domestic violence” and “the parents engaged in domestic violence” does not explain who the primary aggressor was and what happened. The petition should be specific about the actions that took place.

support and protect the mother? (7) Did you secure a restraining order for the mother or assist her secure a temporary restraining order? (8) Since the time of removal what steps have you taken to obtain safe housing for the mother? (9) Is it safe to return the child to the mother today? (10) What would be necessary in order to make it safe to return the child to the mother? (11) Are you prepared to provide the mother support temporarily for housing and food? (12) Have you referred the mother to a domestic violence advocacy organization?²⁷¹ Of course, if the abuser is the mother and the victim is the father, the same questions should be asked to identify a safe environment for the father and child to reside.

The judge or attorneys should ask these questions early in the case, preferably at the shelter care hearing. They address whether the agency has provided reasonable efforts to prevent removal or to facilitate a speedy return of the child to the abused parent. They also identify issues that the case plan should address.

7. MENTAL HEALTH

All child welfare service providers have to deal with mentally challenged parents struggling to rear their children.²⁷² Some parents have mental health problems so severe that the state will intervene and remove the child from their care. States vary widely in their response to parents with severe mental health problems. A few states created an exception permitting reunification services to be bypassed in cases of chronic mental illness.²⁷³ In Nebraska the state appellate court held that reunification services need not be provided in spite of a statute because, in one case, “the mother was destined by virtue of the mental condition never to be able to comply with any order of rehabilitation.”²⁷⁴ Under South Carolina law mental illness, drug or alcohol addiction, mental

²⁷¹ Edwards, L., “Domestic Violence & Reasonable Efforts at the Detention Hearing,” *op.cit.*, footnote 53 at p. 8.

²⁷²See generally “Zimmerman, S., “Parents’ Mental Illness or Mental Deficiency as Ground for Termination of Parental Rights – Issues Concerning Rehabilitative and Reunification Services,” 12 A.L.R.6th 417; Spreng, J., “The Private World of Juvenile Court: Mothers, Mental Illness and the Relentless Machinery of the State,” Duke J. Gender L. & Pol’y, Vol. 117 (2010) at pp. 189-218. It should also be pointed out that many of these parents’ children also suffer from mental health problems, thus making child safety and parental neglect issues even more challenging.

²⁷³ N.Y. Soc. Serv. Law §384(b)(4)(c) McKinney, 2010. Courts have followed this statute and not ordered reunification services. *In re Harris AA*, 727 N. Y. S. 2d 769, 771 (App. Div. 2001); *In re Jammie CC.*, 540 N. Y. S. 2d 27, 28 (App. Div. 1989). Other states that permit the bypass of family reunification services based upon a parent’s mental illness include South Carolina (S. C. Code Ann. Section 63-7-2570(6), 2010), Utah (Utah Code Ann. Section 78A-6-312(3)(d)(i)(B), (1996), California (Welfare and Institutions Code section 361.5(b)(2), Deering, 2008), and Colorado (Colo. Rev. Stat. section 19-3-604(1)(b)(I), 2010.

²⁷⁴ *In the Interest of C.W.*, 414 N.W. 2d 277, 279 (Neb. 1987). The argument that services would be futile was repeated in *In the Matter of Appeal in Pinal County*, 729 P.2d 918 (Ariz. Ct. App. 1986) where the mother was diagnosed as a chronic paranoid schizophrenic. A similar result occurred in the New Jersey case of *N.J. Div. of Youth & Family Servs. v A.G.*, 782 A.2d 458 (N.J. Super. Ct., App. Div. 2001) where the court concluded that “no treatment would assist [the parents] in becoming better parents because they lack the necessary insight and skill.” (at 472). Accord, *In re Christopher B.*, 823 A.2d 301 (R.I. 2003)

retardation and extreme physical capacity can serve as grounds for termination of parental rights.²⁷⁵ If the evidence shows that the parent could benefit from services, however, the state must provide services.²⁷⁶

Some state courts resist the trend to bypass services and order reunification services where the parent suffers from mental health difficulties.²⁷⁷ These court decisions recognize that the parent's mental health issues should not automatically result in the permanent removal of the child.²⁷⁸ Some appellate decisions demonstrate that child welfare agencies offer extraordinary reunification services,²⁷⁹ while others indicate that such services are not required by law.²⁸⁰ In Florida, an appellate court held that a simple referral to a mental health agency failed to meet the reasonable efforts requirement and reversed a termination of parental rights decision.²⁸¹ A New York court found that the agency did not provide reasonable efforts including intensive case management services to a parent suffering from mental illness.²⁸² However, on occasion the state

²⁷⁵ S. C. Code Ann. §63-7-2570(6). If the state chooses to proceed under this section of the code, it need not prove reasonable efforts. See *Orangeburg Cnty. Dept. of Soc. Serv. v. Harley*, 393 S.E.2d 597, 598 (S.C. Ct. App. 1990).

²⁷⁶ *S.C. Dep't of Soc. Servs. v. Smith*, 429 S.E.2d 807,809 (S.C. 1993).

²⁷⁷ *In re Natalya C.*, 946 A. 2d 198, 203, (R.I. 2008) and *Mary Ellen C. v Arizona Dep't of Econ. Sec.*, 971 P.2d 1046, 1053 (Ariz. Ct. App. 1999); *In re Eden F.*, 710 A.2d 771 (Conn. App. Ct. 1998); *Matter of Chapman*, 53 Or. App. 268, 631 P.2d 831 (1981); *In re W.W. Children*, 190 Misc. 2d 258, 735 N.Y.S.2d 567 (Fam. Ct. 2001). For a comprehensive review of cases involving mentally ill parents involved in the child protections system see Zimmerman, S., "Parents' Mental Illness or Mental Deficiency as Ground for Termination of Parental Rights – Issues Concerning Rehabilitative and Reunification Services," *op.cit.* footnote 265.

²⁷⁸ *In the Interest of N.B.*, 64 S.W.3d 907, 915 (Mo. App. 2002); the mother's mental illness resulted in removal of the child. The appellate court in reversing stated: "the mental illness of a parent is not *per se* harmful to a child." The decision to terminate parental rights should be based upon an inability to provide a safe and healthy environment for the child rather than the illness of the parent. (at 915); *In the Interest of A.M.*, 702 Ga. App. 686 (Ga. App. 2010) – The mother's mental deficiency was not shown to have any impact on her parenting abilities. *Accord, Interest of T.O.*, 470 N.W.3d 8 (Iowa 1991), *Care and Protection of Bruce*, 44 Mass. App. Ct. 758, 694 N.E.2d 27 (Mass. App. Ct. 1998) and *In the Matter of C.R.T.*, 66 P.3d 1004 (Okla. Ct. App. 2003). See generally, Benjet, C., Azar, S. T., & Kuersten-Hogan, R. (2003) "Evaluating the parental fitness of psychiatrically diagnosed individuals: Advocating a functional-contextual analysis of parenting," *Journal of Family Psychology*, Vol. 17, at pp. 238-251; as the Minnesota appellate court stated: "Mental impairment is not sufficient grounds to terminate a father's parental rights to his child where there is not evidence that the impairment interfered with his ability to be a party to the parent-child relationship." *In the Matter of B.M., J.M. and C.G., Parents*, MN Court of Appeals, A13-2025 (2014).

²⁷⁹ *In re Amanda A.*, 755 A.2d 243, 247, (Conn. App. Ct. 2000); *In re Welfare of H.S.*, 973 P.2d 474, 481 (Wash. Ct. App, 1999); *In re Welfare of S.Z.*, 547 N.W. 2d at 886 at 889 (Minn. 1996); *In re Joseph S.*, 788 A.2d 475 (R.I. 2002).

²⁸⁰ *In the Interest of C.S.M.*, 805 P.2d at 1131; *In re Adoption of Lenore*, 770 N.E.2d 498, 503, (Mass. App. Ct., 2002); *In re Hanks*, 553 A.2d, 1171 (Del., 1989). In the case of *Adoption of Gregory*, 747 N.E.2d 120 (Mass. 2001) the Massachusetts Supreme Court held that the department was required to accommodate a parent's disabilities, but held that the American Disabilities Act cannot be used as a defense in termination of parental rights proceedings. See also Margolin, D., "No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law," *Va. J. Soc. Pol'y & L.*, Vol. 15, (2007) at p. 112.

²⁸¹ *P.A. v Dep't of Health & Rehabilitative Services*, 685 So. 2d 92,93 (Fla. Dist. Ct. App., 1997)

²⁸² *In the Matter of Jamie C.*, 26 Misc.3d 580, 889 N.Y.S.2d 437 (2009);

court will hold that the agency is not required to provide a service that is not readily available,²⁸³ when the parent is uncooperative,²⁸⁴ or when the services would be duplicative of services a parent is receiving on his or her own.²⁸⁵ Even when the court orders reunification services, those services often do not meet the needs of the parent.²⁸⁶

In several states the courts have demanded that the agency provide appropriate services to mentally ill parents and have reversed termination of parental rights decisions because the state failed to provide reasonable efforts.²⁸⁷ A California court found that the agency had not provided tailored services to meet the needs of a developmentally disabled parent.²⁸⁸ The court noted that the agency failed to help the mother deal with the health and cleanliness issues plaguing her children. The agency “helped” the mother find housing by telling her to keep her eyes open for a house. The court stated the record was “clear that no accommodation was made for [the mother’s] special needs in providing reunification services.”²⁸⁹ One can conclude from this ruling that, at least in this state, mental illness, standing alone, is not a sufficient basis to justify legal proceedings removing a child. A nexus between the illness and risk to the child must exist.²⁹⁰ The reasoning in this case resembles that in *In re Venita L.*,²⁹¹ where the agency removed the child and commenced dependency proceedings because the mother was confined to a psychiatric hospital. The agency amended the

²⁸³ In the case of *In re Interest of C.S.M.*, 805 P.2d at 1131 the appellate court ruled that the state was not required to provide inpatient treatment recommended by the mother’s doctors.

²⁸⁴ *In re Anthony B.*, 735 A.2d 893 (Conn. App. Ct. 1999) – The court found the mother’s failure or refusal to take advantage of the services offered rendered the agency’s efforts futile.

²⁸⁵ *In re Gabrielle D.*, 39 A.3d 655 (R.I. 2012)

²⁸⁶ “A review of the literature concerning reunification services for such parents reveals that the efforts typically made by state child welfare agencies are frequently both unsuitable and ineffective.” Kaiser, J., “Victimized Twice: The Reasonable Efforts Requirement in Child Protection Cases When Parents Have a Mental Illness,” *Western New England University School of Law Legal Studies Research Paper Series*, No. 12-8, available at <http://ssrn.com/abstract=2056387> at pp 25.

²⁸⁷ For example, in *In re Adoption/Guardianship Nos. J9610436 & J9711031*, 368 Md. 666, 796 A.2d 778 (2002), in reversing a termination of parental rights regarding a cognitively limited father the Maryland appellate court noted that “[the Department] never offered any specialized services designed to be particularly helpful to a parent with the intellectual and cognitive skill levels [the Department] alleges are possessed by petitioner.”

²⁸⁸ *In re Victoria M.*, 207 Cal.App. 3d 1317, 255 Cal. Rptr.498 (1989).

²⁸⁹ *Id.* at 504.

²⁹⁰ *In re Victoria M.*, 207 Cal.App.3d 1317 (1989). In this case children were removed from a developmentally delayed adult living in filthy surroundings. The court ordered her to find housing and demonstrate suitable parenting skills. The appellate court reversed holding that clear and convincing evidence must show that services specially designed to meet the needs of the parent were explored, and, despite the availability of such services, it is in the best interest of the children to be declared free for adoption. The court pointed out the mother was given no assistance to find housing and was not referred to a regional center which could have assisted her. *In re Jamie M.*, 134 Cal.App.3d 530 (1982) held that there must be some nexus between the mother’s mental illness and child endangerment before her children could be removed. In *In re Kimberly F.*, 56 Cal.App.4th 519 (1997) the appellate court held that a “narcissistic personality” is an insufficient basis for removal of children. A similar result occurred in the case of *In re Elizabeth R.*, 42 Cal. Rptr.2d 200 (1995).

²⁹¹ 191 Cal. App. 3d 1229, 236 Cal. Rptr. 859 (1987)

service plan five times in a little over a year. The agency also told the father to attend Alcoholics Anonymous meetings. When services were terminated the parents appealed the decision, the appellate court reversed the trial court finding of reasonable efforts. The court of appeals pointed out that father's substance abuse was not the reason for the dependency proceedings and that the mother had completed her case plan.

In another California case, the appellate court reversed a termination of parental rights decision by the trial court, holding that the mentally ill parent was hospitalized most of the reunification period and the trial court had the discretion to extend the time for reunification given the unique circumstance of the case.²⁹² In the case of *In re David D.*²⁹³ the mother voluntarily placed her children in foster care to escape an abusive environment with her husband. Her accompanying depression resulted in a suicide attempt during the reunification period, which prompted the system to cease all efforts to help her reunify. The appellate court found the system reacted with "appalling lack of compassion" and ordered six more months of services, during which the mother was to receive a chance to reestablish regular visits with her children.

Numerous New York cases address the provision of reasonable efforts to parents with mental health problems. In one case a mother, classified as mildly mentally retarded, appealed the trial court decision which terminated her parental rights.²⁹⁴ The appellate court reversed the termination holding that the agency failed to make diligent efforts and that the evidence did not establish that the mother's retardation precluded her from caring for the children in the future. The appellate court also pointed out that the agency had not provided the mother general psychiatric or psychological services or specialized services for mental retardation.²⁹⁵ In another New York case the trial court found the agency had not provided reasonable efforts to prevent removal of the children from a mother with psychiatric needs.²⁹⁶ Similarly, in the Oregon case of *State ex rel. Juv. Dept. v. Habas*,²⁹⁷ the children were placed in state custody because of their mother's periodic bouts of manic depression. The agency returned the children to their mother and provided services including a homemaker and a day nurse. Sixteen days later and before any services were in place, the mother suffered another bout of depression. The agency removed the children and parental rights were terminated. Ultimately the Oregon Supreme Court overturned the termination decision, finding that reasonable services were never provided to the mother due apparently to bureaucratic confusion. In another appeal from a termination of parental rights, a Florida court found that the evidence did not

²⁹² *In re Elizabeth R.*, 35 Cal. App. 4th 1774; 42 Cal. Rptr. 2d 200 (1995)

²⁹³ 28 Cal. App. 4th 941, 952, 956 (1994)

²⁹⁴ *Matter of Catholic Guardian Society*, 131 Misc. 2d 81, 499 N.Y.S.2d 587 (N.Y. Fam. Ct.1986)

²⁹⁵ New York appellate courts reached similar results in the cases of *In the Matter of Shantelle W.*, 587 N.Y.S. 935 (N.Y. 1992) and *In Matter of Star A.*, 55 N.Y.2d 560, 450 N.Y.S.2d 465, 435 N.E.2d 1080, (N.Y. 1982).

²⁹⁶ "Here, ACS did not provide this mother with sufficient services or referrals in response to her significant psychiatric needs." *In re Jamie C.*, 26 Misc 3d 580, 889 N.Y.S. 2d 437 (N.Y. Slip Op. 229458, 2009), at 443.

²⁹⁷ 299 Or. 177, 700 P.2d 225 (Or. 1985)

support the trial court's finding that the mother was a paranoid schizophrenic and that there was evidence that with proper psychotherapy the mother would have the tools to manage her disorder. The court found the agency had not made reasonable efforts to reunify mother and her child or provide her with appropriate services. The appellate court reversed the termination and remanded the case.²⁹⁸

Even with mental health problems, the parent must demonstrate some interest in reunification. In one California case the agency discovered during the reunification period that mother was developmentally disabled and that it was difficult for her to comply with the case plan. Nevertheless, services were terminated and the court terminated parental rights. On appeal the court affirmed the termination. The court found that there was substantial evidence to support the trial court's finding that it was unlikely that the mother would develop an adequate parental relationship with her daughter. The agency offered reasonable efforts, but the mother had no motivation and failed to participate.²⁹⁹

Some critics assert that welfare agencies do not tailor reunification services to the needs of disabled parents. They point out that without individualized services that address the special needs of these parents, a termination of parental rights will occur.³⁰⁰ Moreover, the Americans with Disabilities Act does not seem to provide any support for disabled parents facing termination of parental rights proceedings.³⁰¹ A Michigan appellate court concluded that "termination of parental

²⁹⁸ ²⁹⁸ *I.R. v Department of Children and Family Services*, 904 So.2d 583 (Fl. 2005); whether trial courts are receiving accurate information from mental health professionals is an open question. See Alexander, G., "Big Mother: The State's Use of Mental Health Experts in Dependency Cases," *Pacific Law Journal*, Vol. 24, 1993, at pp. 1465-1496.

²⁹⁸ *V.M. v. State Dept. of Human Resources*, 710 So. 2d. 915 (Ala. Civ. App.1998); *Hroncich v Department of Health and Rehabilitative Services*, 667 So. 2d 804 (Fla. Dist. Ct. App. 5th Dist. 1995); *In re T.O.*, 470 N.W.2d 8 (Iowa, 1991).

²⁹⁹ *In re Christina L.*, 3 Cal. App. 4th 404 (1990); A similar result occurred in the case of *In re Walter P.* where the appellate court noted that the mother's problem was less a function of her lack of mental ability than a poor attitude and a lack of motivation to parent a fragile child with special health needs. 228 Cal. App. 3d 113 (1991); See also *In re Antony B.*, 7335 A.2d 893, 902 (Conn. App. 1999) where the mother refused to participate in the services offered by the agency.

³⁰⁰ Kaiser, J., "Victimized Twice: *op.cit.*, footnote 279; Kaiser, J. "Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases," *op.cit.*, footnote 69.

³⁰¹ DeVault, E., "Reasonable Efforts Not So Reasonable: The Termination of the Parental Rights of a Developmentally Disabled Mother," *Roger Williams U. L. Rev.*, Vol. 10, Spring, 2005, at 763; Zimmerman, S., "Parents' Mental Illness or Mental Deficiency as Ground for Termination of Parental Rights – Applicability of the Americans With Disabilities Act," 119 *A.L.R.* 5th351; Kerr, S. "The Application of the Americans with Disabilities Act to Termination of the Parental Rights of Individuals with Mental Disabilities," 16 *Contemp. Health L. & Policy* 387 (2000); Dillion, D., "Comment: Child Custody and the Developmentally Disabled Parent," 2000 *Wis. Law. Review* 127 (2000); Watkins, C., Comment, "Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded," 83 *California Law Review* 1415 (1995).

rights proceedings do not constitute ‘services, programs, or activities’ within the meaning of [the ADA] 42 U.S.C. 12132.’³⁰²

Juvenile and family courts will always have to face difficult issues regarding mentally ill and developmentally delayed parents and their children. Judges should insist that they receive high quality information about each parent’s capabilities. The information may come from psychological or psychiatric evaluations, and judges should insist that the evaluator follow the guidelines from the American Psychological Association.³⁰³ Judges should also consider what supports the parent has including relatives and close friends. Often the parent can remain a part of the child’s life if others are present in the daily family life. Mentally ill parents deserve an opportunity to demonstrate they can be safe parents. As one critic concluded:

It is not that Mary Ann (and others like her) is reasonably likely to become a fit parent; rather, it is that she ought to be provided the opportunity to achieve fitness, and that her children should be provided the opportunity to remain with their biological mother. The state cannot be held liable for failing to perform miracles, but the state can be expected to make the minimum ‘reasonable effort’ that might afford some chance of change for these parents.³⁰⁴

A review of the appellate cases involving mental health issues (refer to Appendix A) reveals that most appellate decisions affirm trial court termination of parental rights judgments. In order to make the reasonable efforts mandate meaningful in cases involving mentally ill parents, the agency must offer services specially designed to address the parent’s disability, and judges must be prepared to examine the quality of services provided to these parents.

8. CULTURALLY COMPETENT SERVICES

³⁰² *In re Terry*, 610 N. W. 2d 563, at 570. (Mich. Ct. App. 2000. Other state courts have followed the holding in this case. See *In re Anthony P.*, 84 Cal.App.4th 1112, 101 Cal. Rptr. 2d 423 (4th Dist. 2000); Zimmerman, S., “Parents’ Mental Illness or Mental Deficiency as Ground for Termination of Parental Rights – Applicability of the Americans With Disabilities Act,” *op.cit.* footnote 294. Whether the ADA applies to the family reunification period is an open question. See Glennon, Theresa, “Symposium: Lawyering for the Mentally Ill: Walking With Them: Advocating For Parents With Mental Illnesses in the Child Welfare System,” 12 *Temp. Pol. & Civ. Rts. L. Rev.* 273 (Spring, 2003) and *Arkansas Dep’t of Human Services v Clark*, 802 S.W.2d 461 (Ark. 1991) where the appellate court affirmed the mandate for special reunification services based upon the ADA.

³⁰³ American Psychological Association, “Guidelines for Assessment of and Intervention With Persons With Disabilities,” *American Psychologist*, Vol. 67, No. 1, 42-62 (January, 2012).

³⁰⁴ DeVault, E., *op.cit.*, footnote 294 at p. 787.

Children of color represent 41 percent of children within the United States, yet 59 percent of children involved in the child welfare system are children of color.³⁰⁵ Children from all over the world reside in the counties and states in the United States. These children speak scores of different languages.³⁰⁶ Moreover, significant numbers of gay and lesbian relationships parent children as well.³⁰⁷ Yet the federal and state statutes make no mention of whether reasonable efforts should encompass culturally competent services.

In some respects the agency and the courts have made significant changes in order to accommodate different cultures. Most courts use interpreters so that non-English speakers can understand the proceedings. Many courts have interpreters as a part of court staff, some have interpreters for multiple languages, and many courts have contractual arrangements with interpreters who are on call when a non-English speaking family comes before the court. The paucity of appellate case law indicates that agencies, courts, and attorneys rarely discuss culturally competent services. A small number of cases raise the issue that the services offered were not reasonable because of a lack of cultural competence.³⁰⁸

Some appellate courts make strong statements about the necessity of tailoring services to meet the specific cultural needs of each particular family. For example, several California appellate cases hold that the service plan must be specifically tailored to fit the circumstances of each family and designed to eliminate those conditions which led to the juvenile court's jurisdictional finding.³⁰⁹ One California court ruled that the agency must make a good faith effort to develop and implement a family reunification plan.³¹⁰ The court stated:

This statutory scheme contemplates immediate
and intensive support services to reunify a family

³⁰⁵ According to the 2000 national census, one out of every four Americans is a race other than white, as opposed to one in eight as recorded in the 1990 national census. Hobbs, F., & Stoops, N, *Demographic Trends: Race and Hispanic Origin*, Bureau of Census (2002).

³⁰⁶ See generally Hughes, T., "The Neglect of Children and Culture: Responding to Child Maltreatment with Cultural Competence and a Review of Child Abuse and Culture: Working with Diverse Families," 44 *Fam. Ct. Rev.*, 501, 503 (2006).

³⁰⁷ *Working With Lesbian, Gay, Bisexual, and Transgender (LGBT) Families in Adoption*, Series: Bulletins for Professionals, Author: Child Welfare Information Gateway, 2011; *Gay and Lesbian Parenting*, American Psychological Association, Washington, D.C. 2005.

³⁰⁸ See generally, Clement, N., "Do 'Reasonable Efforts' Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System," 5 *Hastings Race & Poverty L.J.* 397 (2008).

³⁰⁹ *In re Dino E.*, 8 Cal. Rptr.2d 416; 6 Cal.App.4th 1768, 1777; *In re Michael S.*, 234 Cal. Reporter, 84, 97 (1997); *In re Edward C.*, 178 Cal. Rptr. 694, 701 (1981)

³¹⁰ *In re Kristin W.*, (1990) 222 Cal.App.3d 234, 254.

where a dependency disposition removes a child from parental custody.(citations omitted.) A good faith effort to develop and implement a family reunification plan is required. A reunification plan must be appropriate for each family and be based on the unique facts relating to that family. This reunification plan is a crucial part of the dispositional order. In light of the mandatory language of the statutes and the rule, 'failure to formulate an adequate reunification plan [has] been held to be reversible error under rule 1376(b).'³¹¹

Yet other courts fail to understand the cultural barriers facing some families. For example, a Minnesota appellate court found services were 'culturally appropriate' when the state provided an interpreter for Vietnamese parents even though the real problem concerned the parents' conduct rather than a language barrier.³¹² In a California case the Filipino mother was removed from a support group because she could not understand English adequately.³¹³ The counselor wrote that the mother

“...seems to have difficulty with understanding the group material....The facilitators are concerned that the language barrier may be too great for Maria to benefit from the group at all...it is felt that she would benefit more from a culturally competent provider of services. (in Tagalog).”³¹⁴

The court of appeals affirmed the termination of reunification services stating that reunification services need not be the best services available, merely what is reasonable. A similar result occurred in the case of *M.V. v Super. Ct. Orange County*,³¹⁵ In contrast, the appellate court in *Nahid v Superior Court of Sacramento County*³¹⁶ granted the mother's extraordinary writ and ordered the trial court to “make a fresh start,” noting “[j]uvenile dependency law does not codify the dominant culture or the reigning political system.”³¹⁷ There the trial court had not ordered reunification services because the children believed that their Irani mother was involved with the Mujahedin.

³¹¹ *Id.*

³¹² *Welfare of T.N.L.*, C4-00-1947, 2001 WL 379114 (Minn. Ct. App., 2001)

³¹³ *Maria L. v. Super. Court San Diego County* 2004 Cal. App. Unpub. LEXIS 2311, at 3 (Cal. Ct. App. March 12, 2004).

³¹⁴ *Id.* at p. 6.

³¹⁵ 2004 WL 605200 at 1 (Cal. Ct. App. March 26, 2004) – A Vietnamese mother refused to participate in a parenting class because of her fear of being talked about in the Vietnamese community.

³¹⁶ 62 Cal. Rptr. 2d 281 (1997)

³¹⁷ *Id.* at 294.

When making reasonable efforts decisions, judges must be sensitive to the family's cultural context and should expect social workers and attorneys to inform the court about the family's special needs.

9. MEANINGFUL EFFORTS – THE DEPARTMENT'S GOOD FAITH

On occasion the agency provides services that do not address the actual problems that brought the child to the attention of the juvenile court. This situation presents another reasonable efforts issue – did the agency provide services that met the parent's needs? The agency has an obligation to check to see that the reunification services are in place and that they address the problems that brought the child to the attention of the state. Simply providing the parent with a written plan without monitoring the effectiveness of the plan should be a failure of reasonable efforts. Put another way, did the agency make good faith efforts to prevent removal or to reunify the family?³¹⁸

A few appellate courts affirmed this monitoring duty. In one case the court held that as a part of its responsibilities, the agency must make certain that the service plan is working, that the parent has found the correct services and is participating in them. In this case, *Amanda H. v Superior Court*, the social worker failed to tell mother she was in the wrong counseling program until the reunification period had run.³¹⁹ The appellate court reversed the trial court's decision to end reunification services finding that the social worker failed to demonstrate good faith efforts and made representations that may have thwarted mother's ability to adequately address the plan within the statutory time frame.

Parallel to the monitoring duty is the social worker's duty to engage the family so that they would take advantage of the services. For example, in a California case the social worker only provided stamped envelopes and ignored the father's request for visits. The appellate court reversed the trial court's finding of reasonable efforts.³²⁰

An Indiana appellate court examined the agency's role in assisting an itinerant family in a case where the trial court had terminated parental rights.³²¹ The appellate court found that the agency did not provide adequate services in spite of the fact that the parents frequently moved and changed employment. The court held that the agency should have helped the family find a stable residence. Moreover, the agency should have ensured that the court-ordered homemaker actually visited the parents' home.

³¹⁸ *Making Reasonable Efforts: A Permanent Home for Every Child*, Youth Law Center, San Francisco, 2000, at pp. 66-67 (hereinafter "Making Reasonable Efforts.")

³¹⁹ 166 Cal.App.4th 1340

³²⁰ *Robin V. v Superior Court*, 33 Cal.App.4th 1158

³²¹ *In Matter of Jones*, 436 N.E. 2d 849 (Ind. Ct. App. 1982)

Some appellate courts analyze the effectiveness of services and whether the agency acted in good faith to provide services to the parents.³²² In a Delaware case experts informed the court and agency that the mother needed inpatient substance abuse treatment, but the agency did nothing but offer the mother referrals for out-patient treatment.³²³ The appellate court held that the agency's efforts were not meaningful.

Some appellate cases hold that the services must be individualized to the child and family. For example, in the California case of *In re Dino E.*³²⁴ the appellate court held that a mechanical approach to a reunification plan is not what the legislature intended. Moreover, some appellate cases hold that the services must address the problems that brought the child and family to the attention of the child protection agency and the court system. In a California case the appellate court held that the agency should have crafted a plan to help the father obtain housing,³²⁵ In a Connecticut case the appellate court held that the state had not put into place adequate services to meet the needs of the mother and her children. The missing services included schooling for one child, respite care for the mother, an effective crisis telephone line, and therapy for one child.³²⁶

Judges should be prepared to determine whether the agency acted in good faith towards the parents and whether the agency carefully monitored the parent's efforts to participate in services.

10. STRENGTHENING THE PARENT-CHILD RELATIONSHIP

Removing a child from parental care presents significant problems for the parent-child relationship. The child may not understand why the removal took place. The parent may feel guilty about the behavior that resulted in the removal, and the parent-child relationship may suffer. As a part of any reunification plan the agency should exercise diligent efforts to encourage or strengthen the parental-child relationship. The court held in the New York case of *In re Sheila G.* addressed this issue, finding that the agency failed in its duty to assist the mother and, in fact, had interfered with reunification.³²⁷ The court explained that the agency must prove to the court by clear and convincing evidence "that it fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family."³²⁸

The Rhode Island appellate court reached a similar conclusion in the case of *In re William.*³²⁹ In this case two developmentally disabled parents lost their children to the agency. Because they were not successful during the reunification period, their rights were terminated. On appeal the Supreme Court stated that "an evaluation of [the agency's] efforts to strengthen the bond between

³²² *Div. of Family Serv. v. N.X.*, 802 A. 2d 325 (Del. Fam. Ct. 2002); *In re Kayla S.*, 772 A.2d 858, 862 (Me. 2001).

³²³ *Div. of Family Serv. v N.X.*, 802 A.2d 325, 337 (Del. Fam. Ct. 2002)

³²⁴ 6 Cal.App.4th 1768

³²⁵ *In re G.S.R.*, 159 Cal.App.4th 1202

³²⁶ *In re Eden F.*, 710 A.2d 771; (Conn. App. Ct. 1998), *reversed on other grounds*, 741 A.2d 873 (1998).

³²⁷ 462 N.E. 2d 1139 (N.Y. 1984)

³²⁸ *Id.*, at p. 1148.

³²⁹ 448 A.2d 1250 (R.I. 1982)

the parents and the child is best achieved through a ‘totality of circumstances’ approach.” The court held that the agency must take every conceivable step to insure that reasonable services have been provided. Efforts to strengthen the relationship between the parents and the child may be adequate for average parents, but should be specialized for an intellectually limited parent. The “particular needs” of cognitively impaired parents must be considered and that “efforts to encourage and strengthen the parental relationship with respect to an average parent are not necessarily reasonable to an intellectually limited one.”³³⁰ In another similar case, the New York appellate court affirmed the trial court dismissal of a petition to terminate the mother’s parental rights. Although the mother showed little interest in maintaining regular contact with the child during the reunification period, the court noted that the agency had not provided services to strengthen and encourage the mother’s relationship with her child.³³¹

Judges should be sensitive to the parent-child relationship and the agency’s efforts (if any) to strengthen that relationship. Successful family reunification depends in great part on the connection between parent and child as well as the parent’s incentive to reunify.³³²

11. TIMELINESS OF SERVICES

ASFA sets strict time limits on the goal for a permanent placement – a year, possibly 18 months. Congress fashioned this legislation based in large part on the recognition that children cannot wait, and that they are developing beings who need stability as soon as possible.³³³ Federal law defines “time-limited family reunification services” to include services and activities that facilitate the safe and timely return of the child home that are offered within the first 15 months of the child entering foster care.³³⁴ State plans include the requirement that states assure they are providing time-limited family reunification services.³³⁵ Yet, rehabilitation and reunification efforts by parents can be difficult if they must wait for months to receive court-ordered services. Unfortunately, many jurisdictions offer limited services, and parents are placed on waiting lists before engaging in services. A few appellate cases discuss this problem, yet it presents a fundamental issue in child protection law: which policy should take preference, the child’s sense of urgency to reach a permanent plan or the parents’ need to have a fair opportunity to rehabilitate when services are not available in a timely fashion?

³³⁰ *Id.*, at p. 1256

³³¹ *In the Matter of Jason S.*, 117 A.D.2d 605, 498 N.Y.S.2d 71 (N.Y. App. Div. 1986)

³³² Arredondo, D., & Edwards, L., “Attachment, Bonding and Reciprocal Connectedness,” *op.cit.*, footnote 174 at pp. 109-127.

³³³ Edwards, L., “Achieving Timely Permanency in Child Protection Courts: The Importance of Front Loading the Court Process,” *Juvenile and Family Court Journal*, Vol. 58, No. 2, Spring 2007, at pp. 1-37, 5;(hereinafter “Achieving Timely Permanency”); Goldstein, J., Freud, A., & Solnit, A. *Beyond the Best Interests of the Child*, The Free Press, N.Y. 1973, Chapter 3. *In re Micah S.*, 198 Cal.App.3d 557, 243 Cal.Rptr.756 (Cal. App. 1988), Brauer, J. concurring.

³³⁴ 42 U.S.C. section 629(a)

³³⁵ 42 U.S.C. section 629(b)

After the passage of ASFA many state courts understood the need for timely permanency and made efforts to limit the reunification period.³³⁶ Moreover, these courts recognize that ASFA has shortened the time for reunification.³³⁷ As a result a number of appellate decisions uphold the termination of reunification services in shorter periods of time than the ASFA's twelve months.³³⁸ Some appellate cases hold that parents must engage in services as soon as possible as parental delay can lead to a termination of services.³³⁹ In each case the judge must decide whether the agency offered timely services, whether the parents promptly engaged in services, and whether the child's need for timely permanency should be the over-riding concern.

12. INCARCERATED PARENTS

The United States incarcerates an inordinate number of people. According to the Census Bureau, over two million persons resided in prisons and jails in 2009, including over 113,000 women.³⁴⁰ Over 70% of these women are mothers, 90% of their children are under 18, and 60% had more than one child.³⁴¹ As a result, many child welfare cases involve incarcerated parents.

An incarcerated parent faces additional hurdles during the reunification period. Difficulties arise for attending court proceedings, participation in services, visitation, and contact with an attorney. The law in most jurisdictions confirms that incarceration does not automatically mean that a parent loses his or her children,³⁴² yet social worker responses to these parents have often been ineffective and, on occasion, unhelpful to the parent.³⁴³ ASFA includes abandonment as an

³³⁶ *In re Interest of Demarcus E.*, No. A-02-1092, 2003 WL 2196495 (Neb. Ct. App. July 1, 2003). "Children cannot, and should not, be suspended in foster care, or be made to await uncertain parental maturity." (at 4); *In re K.C.*, 660 N.W.2d 2d 29 (Iowa 2003); *In re S.Z.*, 547 N.W.2d 886 (Minn. 1996); *G.C. v State Dep't of Health & Human Services*, 67 P.3d 648 (Alaska, 2003)

³³⁷ *State ex rel. Children, Youth & Families Dep't*, 47 P.3d 859, 863 (N.M. Ct. App. 2002) "[T]he duration of what constitutes reasonable efforts has changed considerably over the past several years."

³³⁸ *Id.*, *In re J.J.*, 28 P.3d 1076 (Mont. 2001)(Mother offered 5 months, but did not begin to participate in services); *In re B.D.G.*, 586 S.E.2d 736 (Ga. Ct. App. 2003)(three months provided – mother failed to clean house).

³³⁹ *In re C.B.*, 611 N.W.2d 489, 495 (Iowa 2000) Parents must "actively and promptly respond to [the agency's] services." "[T]he problem ...was with [the mother's] response to those services. She waited too long to respond, and the underlying problems which adversely affected her ability to effectively parent were too serious to be overcome in the short period of time prior to the termination hearing." (at 494); *In re Lilley*, 719 A.2d 327, 332 (Pa. Super. Ct. 1998) "[I]f a parent fails to cooperate [with] ...reasonable efforts supplied over a realistic period of time, the agency has fulfilled its mandate."

³⁴⁰ U. S. Census Bureau, Statistical Abstract of the United States: 2012; "Prisoners in 2009", Bureau of Justice Studies,

³⁴¹ Bloom, B., & Steinhart, D., *Why Punish the Children*, National Council on Crime and Delinquency, January 1993, at p. 14.

³⁴² *In re Doe*, 60 P.3d 285, 287 (Haw. 2002) "[I]ncarceration does not per se result in the forfeiture of parental rights." *Matter of S.A.*, 912 P.2d 1235, 1239 (Alaska 1996) "[I]ncarceration ...[will not] relieve the State of its duty under ICWA to make active remedial efforts." *In re A.M.I.*, 891 P.2d 815 (Alaska, 1995).

³⁴³ Bloom, B., & Steinhart, E., *op.cit.*, footnote 333 at pp. 41-43.

aggravating circumstance,³⁴⁴ although state courts generally find incarceration is only a factor in determining whether a parent has abandoned a child.³⁴⁵

The judge must ensure that an incarcerated parent receives notice of the proceedings and that the parent is included in the case plan. The judge must also determine what services, if any, are available to the incarcerated parent. Is visitation possible, and if not, is phone or mail access possible? Can the parent be transported to court for hearings about the child? For example, under California law a prisoner/parent must be transported to the court if dependency proceedings have been instituted regarding the parent's child and the parent desires to attend the hearings.³⁴⁶

An Iowa court held that the father's misdeeds resulted in his incarceration, and blame should not be shifted to the agency for failing to provide all possible services to him.³⁴⁷ The Hawai'i Supreme Court agreed stating it is "not reasonable to expect [the agency] to provide services beyond what [is] available within the corrections system."³⁴⁸ For example, courts may not demand the agency provide visitation when the logistics are difficult and instead shift blame to the incarcerated parent.³⁴⁹ However, some cases hold the agency responsible for failures to facilitate visitation for an incarcerated parent and have reversed the trial court's reasonable efforts findings. In a California case the father was incarcerated for 16 out of the 17 months of the reunification period. The agency offered him no services and did not contact the prison to determine what services might be available. The court of appeals reversed the termination of parental rights decision.³⁵⁰ In another California case the trial court ordered visitation and the department agreed, but failed to facilitate even one visit during the many months the mother was incarcerated. The appellate court reversed a termination of parental rights stating that the agency failed to provide reasonable efforts to the mother.³⁵¹

³⁴⁴ 42 U.S.C. section 671(a)(15)(D)(i); See *In re Children of Vasquez*, 658 N.W.2d 249, 254 (Minn. Ct. App.) where the appellate court stated: "Under Minnesota case law, imprisonment alone is not sufficient to constitute abandonment. But imprisonment combined with other factors, such as parental neglect and withholding parental affection, can support a finding that a parent has abandoned his child."

³⁴⁵ *In re S.J.*, 620 N. W. 2d 522, 525 (Iowa Ct. App. 2000); *In re Shaylon J.*, 782 A.2d 1140, 1143 (R.I. 2001); *Michael J. v Arizona Dep't of Economic Security*, 995 P.2d 682 (Ariz. 2000); *In re B.C. v Deborah*, 15 P.3d 8 (Okla. Civ. App. 2000).

³⁴⁶ California Penal Code §2625, West, 2013.

³⁴⁷ *In re J.K.*, No. 03-1413, 2003 WL 22346526 (Iowa Ct. App. April 10, 2002) "[the father's] own actions brought about his incarceration," and "[his] incarceration limited the availability of services." Accord, *In re M.T.*, 613 N.W.2d 690 (Iowa Ct. App. 2000) and *In re Shanna W.* 799 N.E.2d 843 (Ill. App. Ct. 2003); *Johnson v Ark. Dep't of Human Servs.*, 82 S.W.3d 183, (Ark. Ct. App. 2000).

³⁴⁸ *In re Doe*, 60 P.3d 285, 295 (Haw. 2002).

³⁴⁹ *In re Shaylon J.*, 782 A. 2d 1140 (R.I.2001); *In re N.H.*, 632 N.W.2d 451 (N.D. 2001)

³⁵⁰ *In re Sabrina N.*, 70 Cal. Rptr. 2d 603 (Cal. Ct. App. 1998)

³⁵¹ *In re Precious J.* (1996) 42 Cal. App. 4th 1463; See also *In re Brittany S.*, 17 Cal. App. 4th 1399 (1993) – visitation with an incarcerated mother was not provided even though the prison was near the child's foster home.

In the case of *In re Maria S.*³⁵² the mother gave birth while incarcerated and the agency filed a dependency action. The agency offered her no services until her release, but upon her release she was deported and not permitted to return to the dependency hearings. At the 12 month hearing the court found reasonable efforts had been provided and terminated services. The mother appealed the subsequent termination of parental rights determination. The appellate court reversed the trial court's finding of reasonable efforts holding that there was no good faith effort by the agency to provide services. The agency provided no evidence that it looked to see what services might be available while mother was incarcerated, nor offered any evidence that mother failed to cooperate. The court concluded that the mother was not given any reasonable opportunity to reunify with her daughter.³⁵³ Reaching an opposite conclusion, the court in a Connecticut case upheld the finding of the trial court regarding reasonable efforts to reunify a child with an incarcerated father. The father claimed he received inadequate services while in jail, but the court pointed out that the father had specific steps to complete when he was released and he did not even maintain visitation.³⁵⁴

Perhaps the most difficult problem facing an incarcerated parent is the statutory requirement of timely permanency. ASFA requires a permanent home within year or 18 months. Given a criminal court sentence of many years, juvenile dependency courts may not order reunification services finding that long-term incarceration is similar to abandonment.³⁵⁵ The California legislature addressed this problem by passing a statute that permits the juvenile court to extend services beyond 18 months to an incarcerated or parent participating in a court-ordered substance abuse treatment facility.³⁵⁶

Courts must not ignore incarcerated parents. Each parent represents approximately one-half of a child's relatives. The judge should take steps to include these parents and their relatives in the judicial proceedings and to ensure that they have safe contact with their children.

13. ARE THE SERVICES NECESSARY?

In addition to the considerations above, the court must also address an additional issue: are the services in the service plan necessary for the parent to rehabilitate and provide a safe home for the child? It is well known that many service plans contain "cookie cutter" services that all parents

³⁵² 82 Cal. App. 4th 1032 (2000)

³⁵³ *Id.*

³⁵⁴ *In re Kamal R.*, 2013 WL 1338809 (Conn. App. Ct. 2013)

³⁵⁵ *In re S.J.*, 620 N.W. 2d 522 (Iowa Ct. App. 2000); *In re Children of Vasquez*, 658 N.W.2d 249, 251, "[A] case plan aimed at returning the children to [the father's] day-to-day care would be futile because of his lengthy incarceration...."

³⁵⁶ California Welfare and Institutions Code §361.5(a)(3).

are presumed to need.³⁵⁷ The service plan typically includes parenting classes, drug testing, and counseling even though they may have little or no connection to the presenting problem. Some cases hold that a parent's failure to complete a service unrelated to the issues that brought the child to the attention of the court should not be held against him or her.³⁵⁸ For example, in *In re Child of E.V.* the Minnesota appellate court reversed a termination of parental rights stating that the mother did enough to address the problems that brought the child to the attention of the court. The trial court must explain "why certain case plan components were necessary to correct the conditions that first prompted public intervention." The case plan must not "consist of a litany of required services that [are] not related to the conditions that eventually gave rise to the dependency adjudication."³⁵⁹ Trial courts should resist the temptation to add "helpful" but unnecessary and unrelated services to a case plan.

14. ACCESS TO SERVICES: ARE THE SERVICES AVAILABLE?

When the court approves of a case plan to assist parents to reunify with their children, it should determine if the plan is realistic. Were the services accessible to the child/family? Was transportation available? What time of day were services offered? Were the services offered in the parents' native language? Was child care needed and, if so, was it provided? Few appellate cases address these issues.

On the other hand, can the agency be held responsible for not providing services if the agency does not have adequate resources? Is it reasonable to require an agency to provide expensive resources? These issues arise in litigation around the country. Several appellate cases refer to resource limitations. The New Hampshire Supreme Court noted that a state witness testified the agency provided every available service.³⁶⁰ A New Jersey Superior Court concluded that the state does not have an obligation "to expend its limited resources on attempting to reunify children with abusive parents where aggravated circumstances...exist..."³⁶¹ One witness from Illinois testified at Joint Hearings held in the House of Representatives that "judges are finding the reasonable efforts requirement satisfied simply because services are unavailable."³⁶²

³⁵⁷ "There are a number of boilerplate services commonly added to case plans across the country (e.g. parenting classes/counseling) without consideration of whether such services are specifically tailored to address the deficiency that prompted state intervention." Crossley, *op.cit.*, footnote 3 at p. 305.

³⁵⁸ For example, in the case of *In re Matter of M.A.*, 408 N.W.2d 227, 236 (Minn. Ct. App. 1987)

³⁵⁹ *Id.* at p. 447.

³⁶⁰ *In re Jonathan T.*, 808 A.2d 82,88 (N.H. 2002).

³⁶¹ *N.J. Div. of Youth & Family Servs. v. A.R.G.*, 824 A.2d 213, 233 (N.J. Super. App. Div. 2003)

³⁶² "Foster Care, Child Welfare, and Adoption Reforms, 1988"; Joint Hearings Before the Subcommittee on Public Assistance and Unemployment Compensation of the House of Representatives Committee on Ways and Means and the Select Committee on Children, Youth, and Families, 100th Congress, 2nd Session 231 (1988)/

One commentator concluded that courts are likely to find reasonableness “so long as the agency has done what it can.”³⁶³ This book takes the position that judges should base any conclusion on what is reasonable, not what the agency currently has at its disposal. On occasion an agency will neglect to include a necessary service in its service array. The trial court should encourage the creation of new services if resources are available and make a “no reasonable efforts” finding in some circumstances.³⁶⁴

15. OTHER ISSUES

Several other potential reasonable efforts issues do not seem to have been litigated in the trial and appellate courts. These include whether the agency collaborated with the parents in creating the service plan,³⁶⁵ whether the agency used reasonable efforts to locate and engage the father, and whether the agency used reasonable efforts to locate the child’s relatives.³⁶⁶ Each of these responsibilities is legally required of the agency, is important for the child and family, and should be carefully monitored by judges and attorneys.

16. PARENTAL BEHAVIOR

The preceding discussion in this section focuses upon the agency’s obligation to provide services throughout the life of a child protection case. Some cases stress that the agency’s obligation to provide services must be balanced against the parent’s obligation to participate meaningfully in services. Parental failures often result in the appellate court affirming a finding of reasonable efforts, even if the agency has not provided adequate services. For example, in *Armando L. v Superior Court* the father waited 13 months to agree to paternity testing and only then began to engage in services.³⁶⁷ In the case of *In re T.G.*³⁶⁸ the appellate court affirmed the termination of reunification services when the father did not keep the social worker advised of his whereabouts and failed to inform the social worker of his later incarceration or change of address.

Courts often balance the agencies failures to provide reasonable efforts with the parents’ participation or lack of participation in the case plan.³⁶⁹ In one case the mother did not comply in good faith with the case plan,³⁷⁰ and in another the court criticized the mother for a lack of

³⁶³ *Bean, op.cit.* footnote 39 at p. 366.

³⁶⁴ Refer to the discussion on “The Art of The No Reasonable Efforts Finding,” *infra* at Section XJ and the letter in Appendix D.

³⁶⁵ 45 CFR §1356.21(g)(1)

³⁶⁶ Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351 (2008) §103

³⁶⁷ 36 Cal. App. 4th 549

³⁶⁸ 188 Cal. App. 4th 871 (2010)

³⁶⁹ *Bean, K., op.cit.*, footnote 39 at p. 362.

³⁷⁰ *In re Kayla S.*, 772 A.2d at 863 (Me. 2001).

cooperation.³⁷¹ The New Jersey Supreme Court noted that it will consider a parent’s active participation in determining whether the agency has fulfilled its duty to assist in the reunification process,³⁷² while the Rhode Island Supreme Court said it would consider “the conduct and cooperation of the parents.”³⁷³ Massachusetts appellate courts have affirmed a reasonable efforts finding in a number of cases in which the trial courts focused on parental behavior and not on the reasonableness of the agency’s actions.³⁷⁴ Likewise an Iowa appellate court upheld a “reasonable efforts” finding based upon the father’s resistance to participation in services.³⁷⁵

The case law makes clear that a parent must demonstrate an interest in the reunification process and engage in services or face the risk of termination of parental rights. One of the tasks of both the court and the agency is to encourage the parent to focus on the needs of the child by engaging actively in the offered services.

C. REASONABLE EFFORTS TO FINALIZE AN ALTERNATE PERMANENCY PLAN

1. THE LAW

A dependency case is not over after parental rights have been terminated. The child must be placed in a permanent home and the case dismissed. Federal law requires that the court hold a permanency hearing to select a permanent plan no later than 12 months from the date the child is considered to have entered foster care, and if the child remains in foster care, the state must obtain such a determination every 12 months thereafter.³⁷⁶ Waiting 12 months between reviews for an infant’s placement can inflict additional trauma upon a child who has already been in placement for months if not years.³⁷⁷

In order to fulfill ASFA’s mandate and to serve the best interests of the child, a judge must monitor agency efforts to achieve timely permanency, even after parental rights have been

³⁷¹ *SD v. Carbon County Dep’t of Family Services*, 57 P.3d 1235, 1241 (Wyo. 2002).

³⁷² *In re Guardianship of D.M.H.*, 735 A.2d 1261, 1274 (N.J. 1999)

³⁷³ *In re Jason L.*, 810 A.2d 765, 767 (R.I. 2002); *Accord In re Natasha M.*, 800 A.2d 430 (R.I. 2002); *In re Natalia G.*, 737 A.2d 506, 508 (Conn. App. Ct. 1999); *In re Kayla S.*, 772 A.2d 858 (Me. 2001); *S.H. v State*, 42 P.3d 1119, 1127 (Alaska 2002);

³⁷⁴ *Adoption of Mario*, 686 N.E.2d 1061 (Mass. App. Ct. 1997); *Adoption of Serge*, 750 N.E.2d 498 (Mass. App. Ct. 2001); *Adoption of Eduardo*, 782 N.E.2d 551 (Mass. App. Ct. 2003).

³⁷⁵ *In re M.B.*, 595 N.W.2d 815 (Iowa Ct. App. 1999)

³⁷⁶ 45 C.F.R. §1356.21(b)(2)(i); 42 U.S.C. § 675(5)(C) and (F); 45 C.F.R. §1355.20.

³⁷⁷ “Heldman, J., “Court Delay and the Waiting Child,” *San Diego Law Review*, Vol. 40, 2003, at pp. 1001-1038, and see *In re Micah S.*, 198 Cal.App.3d 557, 243 Cal.Rptr.756 (Cal. App. 1988), Brauer, J. Concurring.

terminated.³⁷⁸ The same judge or judicial officer who has supervised the case from the outset provides the best oversight. Designating one judge to supervise a child's case from beginning to completion is a recognized best practice.³⁷⁹ At these post-permanency hearings the judge should determine (1) whether the agency has identified an appropriate strategy to make and finalize a new permanent placement for the child, (2) whether the agency has made a diligent arrangement for the provision of those services, and (3) whether those services have been available on a timely basis.³⁸⁰

Few appellate cases address this issue. In *In Interest of L.W.*, the Florida appellate court held that the purpose of judicial review is to assure that the Department complies with reasonable efforts to assure the protection of the child. In this case the trial court determined that the agency was making no progress towards adoption as the agency refused to place the child in a therapeutic setting. The agency resisted the placement ordered by the trial court. The appellate court affirmed the trial court order and noted that the trial court has an obligation to review the efforts provided by the department to protect and find a permanent home (in this case adoption) for a child. The appellate court also held that after a termination of parental rights, the trial court maintains jurisdiction to review the status of the child.³⁸¹

2. DELAYS IN FINALIZING A PERMANENT PLAN

In some jurisdictions, once the court terminates parental rights and the child placed in a pre-adoptive home, the legal process slows down. As one social worker told the author: "What's the hurry? Parental rights have been terminated and the child is safe in a new home."³⁸² What may seem stable and permanent to social workers and judges is not so for families who still have a social worker visiting their home and court hearings every six or twelve months. Permanency means ending state involvement with the family so that children and their families can live normal lives.

Because the parties rarely litigate post-permanency issues in the trial court, these issues rarely appear in appellate decisions. New York appears to be an exception. Several cases reveal

³⁷⁸ *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*, NCJFCJ, Reno, 2000, at p. 7. (hereinafter *Adoption and Permanency Guidelines*). *In re N.A.C.*, 2013 WL 6383024 (Kansas Ct. App, 2013).

³⁷⁹ *Id.* at p. 5; Edwards, L., "Improving Juvenile Dependency Courts: 23 Steps," *Juvenile and Family Court Journal*, Vol. 48, No. 4 (1997), pp 1-23, at pp. 5-6; McCully, Judge S., & Barnes, E.W., "Forever Families: Improving Outcomes by Achieving Permanency for Legal Orphans," *Technical Assistance Bulletin*, NCJFCJ, Reno, 2013, at pp. 9-10. (hereinafter "Forever Families.")

³⁸⁰ *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, *op.cit.* footnote 37 at pp III-6 & III-7.

³⁸¹ 615 So.2d 834, 838 (Fl. 1993)

³⁸² After hearing this statement, the author discovered that hundreds of cases existed where a permanent plan had been established, but the agency had not taken steps to complete the legal process of adoption or guardianship. The agency saw no urgency in completing the process and having the case dismissed.

that New York’s trial courts actively review this issue. In the case of *In re Taylor EE*,³⁸³ the permanent plan for a disabled child was residential care and developing a connection with a supporting adult. The trial court ruled that the agency failed to make reasonable efforts to finalize the child’s permanency placement plan. The agency efforts consisted of one unsuccessful suggestion that the child’s placement facility find an adult resource and a discussion on the day of the hearing that one of the relatives who had adopted a sibling assume that responsibility. The agency conducted no investigation to find adults with a prior relationship with the child. Furthermore, the agency social report contained the social worker’s negative comments about the child, thus underlying the agency’s lack of reasonable efforts. The appellate court affirmed the finding of the trial court.³⁸⁴ A few other New York appellate cases address this issue, in each case reversing a trial court finding of no reasonable efforts to finalize a permanent plan for a child.³⁸⁵

In spite of the lack of appellate cases, the law is clear: in order to determine whether the agency is taking timely effective steps to complete the adoption process and thereby finalize a permanent plan, the court must regularly review cases in which parental rights have been terminated and the child is awaiting permanency.³⁸⁶ This is another area closely examined by the federal government during the CFSR process. Failures to reach timely permanency can result in penalties levied by the federal government.³⁸⁷

Delays in finalizing placement should be of great concern not only to judges but to attorneys and guardians *ad litem* who represent children. After the termination of parental rights, the agency attorney and the child’s representative are the only attorneys remaining on the case. Speaking on behalf of the child, the attorney or guardian *ad litem* should advise the court of the child’s need for permanency and should ask the court to hold the agency accountable for providing timely permanency.³⁸⁸

Local practice in some jurisdictions has recognized the importance of monitoring agency actions after the termination of parental rights. In Utah the legislature passed a statute mandating court reviews after termination.³⁸⁹ In 2005, the Essex Vicinage, New Jersey, Family Court established a Post-Termination Project to ensure that children reached permanency in a timely

³⁸³ 80 A.D.3d 822, 914 N.Y.S.2d 404 (N.Y. Supreme Court, 2011).

³⁸⁴ *Id.*

³⁸⁵ *In the Matter of Blanca QQ*, 80 A.D.3d 809, 914 N.Y.S.2d 402 (N.Y. Supreme Court, 2011); *In the Matter of Michael WW*, 45 A.D.3d 1227, 846 N.Y.S. 739 (N.Y. Supreme Court, 2007).

³⁸⁶ 42 U.S.C. §472 (a)(2)(A)(ii); 45 CFR 1356.21(b)(2) (2006); *Adoption Permanency Guidelines*, *op.cit.*, footnote 368 at p. 7. And see the discussion at Section VII C.

³⁸⁷ Refer to the discussion *supra* in Section II D entitled “The Consequences of Reasonable Efforts Findings”

³⁸⁸ McCully, Judge S., & Barnes, E.W., *op.cit.*, footnote 369 at p. 13.

³⁸⁹ Refer to the discussion *infra* at section XH (The Value of Interim Reviews).

fashion.³⁹⁰ A judge assigned to all post-termination cases reviews the status of each child, usually every two months. A team consisting of a Deputy Attorney General, a representative from the Division, the assigned caseworker, and the Law Guardian for the child attend each hearing. Over 3,030 children have been adopted over the past ten years through this highly successful project.³⁹¹ The Executive Judge of Children in Court concludes that rigorous judicial oversight and collaboration ensure the successful implementation of the law.³⁹² New Jersey now requires this project statewide.³⁹³

VIII. CHALLENGES TO EFFECTIVE USE OF THE REASONABLE EFFORTS FINDING – ATTORNEYS REPRESENTING PARENTS AND CHILDREN

Many state courts neglect to litigate the reasonable efforts/no reasonable findings early in the case. Some state courts only litigate the reasonable efforts issue in termination of parental rights proceedings many months or years after removal of the child. The reasons for this inattention include a number of policy and practice issues. This section discusses the role of parent’s and children’s attorneys in raising the reasonable efforts issue in court.

A. THE IMPORTANCE OF ATTORNEYS

[T]he quality of justice in the juvenile court is in large part dependent upon the quality of the attorneys who appear on behalf of the different parties before the court.³⁹⁴

Attorneys for children and parents provide critical support for their clients in child welfare cases. The complexity of these cases combined with the short time frame in juvenile dependency proceedings make their participation crucial for their clients and for the court. Judges do not work in a vacuum. The juvenile court bases its decisions on information received from the parties.

³⁹⁰ Floria, Judge S. “More Good Than Harm: Legal Orphans and the New Jersey Post-Termination Project,” *Juvenile and Family Court Journal*, Vol. 59, No. 2, Spring, 2008, pp. 1-13.

³⁹¹ *The Model Court Effect*, NCJFCJ, Reno, 2008, p. 3.

³⁹² Floria, S., *op.cit.* footnote 380 at pp. 13-14. The adoption statistics come from Judge Sallyanne Floria and her staff. A copy of their communication is available from the author.

³⁹³ “Forever Families,” *op.cit.*, footnote 369, at p. 27.

³⁹⁴ Advisory Committee Comment to Section 24 of the California Standards of Judicial Administration. (now Standard of Judicial Administration 5.40, California Rules of Court).

Attorneys for the children and parents must provide the court with pertinent information. If the only information the court reviews comes from the agency, the judge will most likely make orders based on the agency's recommendations. Unrepresented parents and children cannot match the expertise and sophistication of government lawyers and trained child welfare workers in complex child abuse and neglect proceedings. Parents certainly do not have the experience to address the legal issues that the court must decide. Only with well-prepared lawyers present will the court receive information from multiple sources thereby providing the judge with alternative perspectives and recommendations to consider.

The reasonable efforts requirement provides attorneys for both children and parents with a powerful tool for enforcing their clients' rights to services. By advocating for services that make removal unnecessary and reunification possible, attorneys can ensure that all reasonable steps have been taken by the agency to maintain family integrity.³⁹⁵ A number of barriers, however, prevent many attorneys from fulfilling these goals.

B. PARENTS ARE UNREPRESENTED

The United States Supreme Court ruled that parents in child welfare proceedings have no constitutional right to counsel, even when termination of their parental rights is at stake.³⁹⁶ As a result some states and local courts have been reluctant to spend tax payer money for attorneys to represent parents in child protection proceedings. A national survey identified inadequate compensation as a barrier to effective representation of parents.³⁹⁷ Some state government officials are reluctant to authorize money for parents' attorneys. In Wisconsin, for example, the legislature passed a law which forbids judges from appointing counsel for parents in these cases. A legal battle

³⁹⁵ "Making Reasonable Efforts," *op.cit.*, footnote 310 at p. 11.

³⁹⁶ *Lassiter v State Department of Social Services*, 452 U.S. 18 (1981). The majority opinion held that the Fourteenth Amendment does not require courts to appoint counsel for indigents in every parental status termination proceeding. The court noted that there was no loss of liberty at stake. In order for counsel to be appointed in a civil case the trial court must weigh several factors including the private interest at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions. The dissenting justices pointed out the seriousness of a termination of parental rights case and the necessity of counsel to "require that higher standards be adopted than those minimally tolerable under the Constitution." The dissenting justices also stated that "[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but in dependency and neglect proceedings as well." (at pp. 33-34); the Supreme Court of Mississippi in *K.D.G.L.B.P. v. Hinds County Department of Human Services*, 771 So.2d 907, 92 A.L.R.5th 735 (Miss. 2000), reh'g denied, (Dec. 7, 2000), held that the mother was not deprived of the right to due process of law as guaranteed by the Fourteenth Amendment when the chancery court failed to appoint an attorney to represent her in the termination of parental rights proceeding.

³⁹⁷ *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice*, Technical Assistance Bulletin, NCJFCJ, Reno, Vol. II, no. 2, 1998, at p. 89.

ensued, and the state supreme court held the statute unconstitutional, but because appointment is discretionary, some judges continue not to appoint counsel for parents in these cases.³⁹⁸

Appointment of counsel for parents varies from state to state. In some states the court does not appoint counsel for parents in child protection proceedings, appoints counsel in some cases, or appoints counsel only for certain hearings in the juvenile dependency process.³⁹⁹ In some states, the court appoints attorneys for indigent parents only in termination of parental rights hearings.⁴⁰⁰ Unrepresented parents do not understand the legal system, and, in particular, are not even aware of complex issues such as whether the agency has provided adequate services to prevent removal of their child from their care. The adversarial process anticipates that counsel will raise these issues, yet if parents are unrepresented, it is likely that no one will discuss these issues, much less challenge the actions by the agency.

In a national survey, professionals in each state were asked which areas most needed improvement in their juvenile dependency courts.⁴⁰¹ Twelve state court representatives indicated that representation (assuming appointment) is not adequate.⁴⁰² A Texas study of legal representation concluded that an insufficient number of attorneys represented parents, these attorneys received little training, the court appointed parents' attorneys late in the case, attorney compensation was inadequate, and the quality of representation was uneven.⁴⁰³ In Texas the court appoints most parent attorneys at or after the Full Adversary Hearing⁴⁰⁴, thus making it difficult, if not impossible, for the reasonable efforts issue to be raised at that hearing.⁴⁰⁵

Most states appoint an attorney or guardian *ad litem* (GAL) for the child.⁴⁰⁶ This appointment is mandated by the Child Abuse and Prevention and Treatment Act (CAPTA) originally

³⁹⁸ *Joni B. v Wisconsin*, 549 N.W.2d 411 (1996); this conclusion is based on conversations between the author and several judges in Wisconsin. See Edwards, L., "Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment," *op.cit.*, footnote 106 at p. 23.

³⁹⁹ The Virginia statute, for example, provides for representation for indigent parents only at the adjudicatory or termination of parental rights hearings. VA. Code Ann. § 16.1-266 (2011); In Texas most parent attorneys are appointed after the critical Full Adversary Hearing. "Legal Representation Study" *op.cit.*, footnote 98 at pp 10-14; as one judge stated "Parents are generally unaware of their ability to have an attorney appointed." at p. 24; Edwards, L., *Id.*

⁴⁰⁰ Colorado, Indiana, and Wisconsin. See Dobbin, S., Gatowski, S. and Springgate, M., "Child Abuse and Neglect: A National Summary of State Statutes," *Juvenile and Family Court Journal*, vol. 48, Nov, 1997, at pp. 43-54, at p. 49.

⁴⁰¹ "Child Abuse and Neglect Cases: Examining State Statutes in Everyday Practice," Technical Assistance Bulletin, Permanency Planning for Children Project, National Council of Juvenile and Family Court Judges, Reno, 1997.

⁴⁰² *Id.*, at p. 18.

⁴⁰³ "Legal Representation Study" *op.cit.*, footnote 98 at pp 10-14.

⁴⁰⁴ Tex. Fam. Code section 262.201

⁴⁰⁵ "Legal Representation Study," *op.cit.*, footnote 98 at pp. 20-23.

⁴⁰⁶ States give much more attention to child representation than to either parent or agency representation. "National Survey of Child Welfare Legal Representation Models," Ruiz, R., & Trowbridge, S., National Child Welfare Resource

enacted in 1974.⁴⁰⁷ This legislation requires states to have provisions that ensure the GAL receives training appropriate to the role.⁴⁰⁸ CAPTA also provides federal funding to states in support of services for prevention, assessment, investigation, prosecution, and treatment in child abuse cases. A review of appellate cases indicates that attorneys and guardians *ad litem* for children rarely, if ever, appeal trial court decisions relating to reasonable efforts.

C. COURTS APPOINT ATTORNEYS TOO LATE WHICH GIVES THEM INSUFFICIENT TIME TO ADEQUATELY PREPARE THE CASE

Attorneys have significant responsibilities in child welfare cases. They must interview the client (parent or child) and family members, interview the social worker, investigate the facts of the case, and review reports including the social worker's file, all in an effort to determine whether the child can safely be returned to the family or relatives immediately. Additionally, the attorney must scrutinize whether the agency exercised reasonable efforts to prevent removal of the child.⁴⁰⁹

As a result of these demands, judges should appoint a separate attorney for each parent and for the child in every child welfare case.⁴¹⁰ The court should appoint these attorneys as soon as possible, preferably simultaneously with the filing of a petition and not at or after the shelter care hearing.⁴¹¹ At the time of appointment the agency should provide the attorneys with a copy of the

Center on Legal and Judicial Issues, ABA Center on Children in the Law, Washington, D.C., 2009, at p. 7; Child Abuse Prevention and Treatment Act of 1974 (CAPTA), 42 U.S.C. § 5103(b)(2)(G) & §5106a. In some states the appellate courts have mandated representation for parents in abuse and neglect cases. See *Danforth v. State Department of Health and Welfare*, 303 A.2d 794, (Me., 1973). However, in Tennessee, “[m]ost children receive the benefit often advocate only at the termination of the parental rights stage, if at all.” Brooks, S. “Reflections,” *op.cit.* footnote 158 at p. 1043.

⁴⁰⁷ P.L. 93-247 section 106(b)(2)(B)(xiii). CAPTA was amended several times, most recently in 2010 (P.L. 111-320).

⁴⁰⁸ *Id.*

⁴⁰⁹ There are still more responsibilities. These listed above are only a summary. See “*Making Reasonable Efforts*,” *op.cit.*, footnote 310 at pp. 11-30.

⁴¹⁰ Edwards, L., “Improving Juvenile Dependency Courts: Twenty-Three Steps,” *op.cit.*, footnote 369 at pp. 1-24, at p. 7. There is almost always a legal or factual conflict between parents in child protection cases. One attorney cannot ethically represent both parents in these cases.

⁴¹¹ ABA/NACC Standards of Practice for Representation of Children,

<http://www.naccchildlaw.org/?page=PracticeStandards>, ABA Standards of Practice for Representation of Parents,

http://www.americanbar.org/groups/child_law/tools_to_use.htm, Peters, J.K., J.P. *Representing Children in Child*

Protection Proceedings: Ethical and Practical Dimensions, LexisNexis, 2d. edition, Mathew Bender, Newark, 2001, at p.

905; Edwards, L., “Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early

Appointment,” *op.cit.*, footnote 106; *In re Hannah YY*, (3 Dept. 2008) 50 A.D. 3d 1201, 854 N.Y.S.2d 797 – Mother’s

fundamental rights were violated when she was not advised of her right to counsel until after the removal hearing was

over, at which point the Public Defender’s office was assigned to represent her in subsequent proceedings. “The

practice in 27 states is to appoint counsel for parents at the initial or shelter care hearing. In 11 states appointment

occurs at the filing of the petition, and two states appoint counsel upon removal of the child. Of the remaining states,

petition and supporting documents. Only with early appointment will the attorneys have sufficient time to be prepared for the critical shelter care hearing.

Because the attorney must complete these investigative tasks in a short time span, a few attorney offices have hired support staff to assist them in gathering information and working with the client.⁴¹² This is a best practice and enables attorneys to be more effective in court. Unfortunately, the majority of jurisdictions provide no funding for support staff for either the attorneys for parents or the attorneys/GALs for children.⁴¹³

Many states wait to appoint attorneys for parents at the shelter care hearing,⁴¹⁴ the first hearing after removal of the child. At this hearing or within sixty days of the physical removal, the juvenile court must make a finding whether the agency provided reasonable services to prevent removal of the child. This late appointment of an attorney effectively precludes him or her from preparing for and arguing the reasonable services issue. Appellate court decisions and comments from judges and attorneys reflect that the attorneys for the parents and children rarely raise the “reasonable efforts to prevent removal” issue in the trial courts.

Attorneys should approach the presiding juvenile court judge concerning early appointment. Alternatively, the unprepared attorney should request a continuance the hearing.⁴¹⁵

D. ATTORNEYS LACK TRAINING AND ARE POORLY PAID

Juvenile dependency court attorneys receive inadequate compensation and have low status in the legal system.⁴¹⁶ With a low level of remuneration, it is difficult to attract and retain talented

half appoint counsel for parents at the adjudicatory hearing, and half at the termination hearing.” “Child Abuse and Neglect Cases: Representation” *op.cit.*, footnote 390 at pp. 25-26.

⁴¹² Ruiz, R., & Trowbridge, S., “National Survey of Child Welfare Legal Representation Models,” *op.cit.*, footnote 396 at pp. 5, 17.

⁴¹³ *Id.*

⁴¹⁴ “The practice in 27 states is to appoint counsel for parents at the shelter care or emergency hearing....Of the remaining 10 states, half appoint counsel for parents at the adjudicatory hearing, and half at the termination hearing.” *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice*, *op.cit.*, footnote 387 at pp 25-26.

⁴¹⁵ *Smith v Edminston*, 431 F. Supp. 941 (W.E.Tenn.1977); Edwards, L., “Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment,” *op.cit.*, footnote 106. In the alternative, the court could set a second shelter care hearing similar to what occurs in Multnomah County (Portland), Oregon. “The Portland Model Court Expanded Second Shelter Hearing Process: Evaluating Best Practice Components of Front-Loading,” *Technical Assistance Bulletin*, NCJFCJ, Vol. VI, No. 3, July, 2002.

⁴¹⁶ Children’s Advocacy Institute, “A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children,” 3rd Ed., San Diego, 2013, at pp. 13-14. “Attorneys representing all parties in juvenile court are hampered by high caseloads, low status and pay, lack of specific training and experience, and rapid turnover.” Hardin, M., “Responsibilities and Effectiveness of the Juvenile Court in Handling Dependency Cases,” *The*

attorneys.⁴¹⁷ Often representing parents in juvenile dependency court is the first job for a new attorney. After a year or two many are eager to move on to another legal field which offers significantly higher pay, and requires no “social work.”⁴¹⁸

More interesting perhaps, is how very few state statutes articulate the training and qualifications required of attorneys as counsel in child abuse and neglect proceedings.⁴¹⁹

Even if the parents are represented by counsel at the shelter care hearing, many attorneys lack training to alert them to the needs of their client, the existence of community resources, and to the reasonable efforts issue.⁴²⁰ A national study of parents’ attorneys and guardians *ad litem* revealed that training was the area needing the most improvement.⁴²¹ National experts state that before accepting representation in a juvenile dependency case attorneys should be familiar with the following:

- (1) The causes and available treatment for child abuse and neglect.
- (2) The local child welfare agency’s procedures for complying with reasonable efforts requirements.

Future of Children: The Juvenile Court, Center for the Future of Children, The David and Lucile Packard Foundation, Vol. 6, No.3, Winter, 1996, at pp. 111-125, 118; In Tennessee when the Supreme Court mandated that attorneys be appointed for indigent parents in dependency cases, the court simultaneously lowered the cap on attorneys fees from \$1,000 to \$500. See Brooks, S., *op.cit.*, footnote 158 at p. 1039.

⁴¹⁷ “Primary causes of inadequate legal representation of the parties in child welfare cases are low compensation and excessive caseloads. Reasonable compensation of attorneys for the important work is essential. Rather than a flat per case fee, compensate lawyers for time spent. This will help to increase their level of involvement in the case and should help improve the image of attorneys who are engaged in this type of work....The need for improved compensation is not for the purpose of benefitting the attorney, but rather to ensure that the child receives the intense and expert legal services required.” *Adoption 2002: The President’s Initiative on Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children*, U.S. Dept. of HHS ACF ACYF Children’s Bureau (1999) at VII-4.

⁴¹⁸ Edwards, L., “Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment,” *op.cit.*, footnote 106, at p. 24. “Edwards, L. “The Juvenile Court and The Role of the Juvenile Court Judge,” *Juvenile and Family Court Journal*, Vol. 43, No. 2, 1992, at p.35; *Chen v County of Orange*, 96 Cal.App.4th 426; California Standard of Judicial Administration 5.40(c)(4) Advisory Committee Comment; Sankaran, V. “Protecting a Parent’s Right to Counsel in Child Welfare Cases,” *ABA Child Law Practice*, No.7 (2009) at p. 101.

⁴¹⁹ Dobbin, et.al., *op.cit.*, footnote 390 at p. 49; See also Bailie, K., “Note: The Other ‘Neglected’ Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers who Represent Them,” *Fordham Law Review*. Vol. 66, 1998, at pp. 2285-2331.

⁴²⁰ “In the majority of states, attorneys for parents currently receive only some or no additional training.” *Id.*, at p. 33; “Child Abuse and Neglect Cases: Examining State Statutes in Everyday Practice,” *op.cit.*, footnote 391 at p. 18.

⁴²¹ “The number one area identified as needing the most improvement with regard to representation was training of attorneys and guardians *ad litem* (GAL’s).” *Id.*, at p. 15.

- (2) The child welfare and family preservation services available in the community and the problems they are designed to address.
- (3) The structure and functioning of the child welfare agency and court systems, the services for which the agency will routinely pay, and the services for which the agency either refuses to pay or is prohibited by state law or regulation from paying.
- (4) Local experts who can provide attorneys with consultation on the reasonableness and appropriateness of efforts made to maintain the child in the home.⁴²²

Early appointment, long-term assignments to the juvenile dependency docket, reasonable caseloads, and adequate training are critical if attorneys are to be effective in their representation of parents and children.

E. ATTORNEYS/GAL'S RARELY RAISE THE REASONABLE EFFORTS ISSUE

An additional barrier to effective representation for parents is confusion about the role an attorney will play in the complex dependency system. Should attorneys raise the “no reasonable efforts” issue? Should the attorney be proactive and conduct research in order to understand family dynamics? Should the attorney be familiar with the availability of services in the community? The *Making Reasonable Efforts* study reported that two-thirds of the experts contacted indicated that attorneys appointed for parents are only ‘somewhat’ or ‘not at all’ proactive in their representation of their clients.⁴²³

Court decisions reflect that the attorneys and guardians *ad litem* for children rarely, if ever, raise the reasonable efforts issue.⁴²⁴ It is likely that appointed attorneys/GAL's do not believe that their role encompasses the adequacy and timeliness of services to parents as they may perceive these issues involve the parents and the children's services agency.⁴²⁵

F. ATTORNEY ATTITUDES – “WHAT GOOD WILL IT DO?”

⁴²² *Making Reasonable Efforts*, *op.cit.*, footnote 310 at pp. 12-14.

⁴²³ *Id.*, at p. 39.

⁴²⁴ This book contains references to several hundred appellate cases dealing with reasonable efforts. In almost all of these cases, the parent is the party appealing the trial court's decision. In the remaining few cases, the state is the appellant. There are no cases in which the attorney or guardian *ad litem* was the appellant.

⁴²⁵ The National Association of Counsel for Children (NACC) recommends that attorneys for children be prepared to appeal trial court decisions that unfairly impact their clients. . “The system of representation must provide an opportunity to appeal an adverse ruling.” “NACC Recommendations for Representation of Children in Abuse and Neglect Cases,” NACC, Denver, 2001, at p. 8.

Attorneys may recognize that the child welfare agency stands to lose federal dollars if the court either fails to make a reasonable efforts finding or make a “no reasonable efforts” finding, yet these attorneys often fail to see any benefit to their clients should the court make a “no reasonable efforts” finding. The state may lose money, but they believe the finding will not greatly benefit their client in the case before the court. They also believe that the judge will not be receptive to a finding that will reduce the money coming to the agency from the federal government.

Two experienced California attorneys who represent parents in juvenile dependency cases offer several reasons why attorneys do not raise the reasonable efforts issue early in the case.⁴²⁶ They say that return of the child is not an option that the court will consider even if they prevail on the reasonable efforts issue. Thus, the reasonable efforts issue will not result in a finding their client will understand. Further they state that because the issue bears little or no relevance to the outcome of the hearing, raising it can frustrate the judicial officer by raising an additional issue. They also fear that the jurisdiction will lose federal funding when the judge makes a “no reasonable efforts” finding. Finally, they state that because no definition of reasonable efforts exists, attorneys do not participate in trainings that educate them about how they should approach the issue.

These attorneys are mistaken about the impact of a “no reasonable efforts” finding. Since the finding triggers a loss in federal funding, the agency takes these findings very seriously. If a judge determines that parental visitation is inadequate and makes a “no reasonable efforts” finding, the agency receives a clear message about the importance of visitation is important and will adjust agency policy and practice in the case before the court and in other cases they are managing. As a result the “no reasonable efforts” finding can have an important impact on agency practice and can improve services for all families, not just the one before the court. Moreover, many judges are receptive to reasonable efforts arguments.⁴²⁷

A well-prepared, trained attorney can make a significant difference in juvenile dependency proceedings. By insisting that the agency produce evidence of efforts to prevent removal and, if a child has been removed, to facilitate reunification the efforts, the attorney ensures that children are not unnecessarily removed from their families and that they are safely reunited, if possible. Studies demonstrate that enhanced legal representation results in more timely hearings, more family reunifications, fewer terminations of parental rights, and children reaching permanency sooner, thus

⁴²⁶ A full statement of their reasons is contained in the case law summary in Appendix A under California.

⁴²⁷ See the comments of the judges in California, New Jersey, and New York in Appendix A.

accomplishing several major goals of the child welfare system.⁴²⁸ Additionally, when children reach permanency sooner, savings accrue to the child welfare agency, the courts, and service providers.⁴²⁹

IX. CHALLENGES TO EFFECTIVE USE OF THE REASONABLE EFFORTS FINDINGS--JUDGES

A. WHAT JUDGES SHOULD KNOW

In order to make effective and proper orders in juvenile dependency cases judges should have some background in child development, service availability and delivery, as well as issues relating to the operations of the local child welfare agency.⁴³⁰ The judge should be familiar with the agency's policies regarding the removal of children, how the agency provides services to prevent removal, the services the agency uses to help reunify families, and the availability of services (including how long must families wait for services). The court also should know the experts the agency uses to make difficult decisions (*ie.* the mental health of family members), whether the agency has wrap-around services available, what alternative dispute resolution procedures the agency uses, if any, and what the agency policies and procedures the agency uses to locate fathers and relatives. Because this information cannot be learned in a short period of time, juvenile court judges should remain in that assignment for extended periods of time and both organize and participate in regular trainings.⁴³¹

B. JUDICIAL KNOWLEDGE OF AVAILABLE SERVICES

A more complex issue involves the judge's knowledge of community resources. In order for judges to make informed decisions about reasonable efforts, the judge should have comprehensive knowledge of the needs of the family as well as the child welfare and family preservation services in

⁴²⁸ Courtney, M., Hook, J., & Orme, M., "Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care," *Partners for Change: Discussion Paper*, Vol. 1, Issue 1, Seattle, WA, February 2011; "Improving Parents' Representation in Dependency Cases: A Washington State Pilot Program Evaluated," NCJFCJ, Permanency Planning for Children Department, Reno, August, 2003; Gemma, C. "Quality Representation of Parents Improves Outcomes for Families," *Child Court Works*, Vol. 6, April 2003, ABA Center on Children and the Law; Bridge, B., & Moore, J. "Implementing Equal Justice for Parents in Washington," *Juvenile and Family Court Journal*, Fall, 2002, pp. 31-41; Thornton, E., & Key, Judge Michael, "The Judge's Role in Ensuring Quality Representation for Parents," *Child Law Practice: Online*, Vol. 31, No. 3, ABA (2014) at p 2.

⁴²⁹ *Id.*; Thornton, E. & Gwin, B. "Improved Outcomes for Families and Potential Cost-Savings Associated with Providing Parents with High Quality Legal Representation (2012) (unpublished manuscript, available from the author at Elizabeth.thornton@americanbar.org)

⁴³⁰ *Making Reasonable Efforts*, *op.cit.* footnote 310 at pp. 34-35.

⁴³¹ Edwards, L., "Judicial Rotation—One Judge-One Family," *The Bench*, the official magazine of the California Judges Association, Spring, 2008.

the community.⁴³² As a California Standard of Judicial Administration states: “Judges of the juvenile court...are encouraged to (2) Investigate and determine the availability of specific prevention, intervention, and treatment services in the community for at-risk children and their families.”⁴³³ This knowledge can best be gained by holding regular trainings for judges, attorneys, and others who participate in the juvenile dependency system. The trainings should feature agency practices, service providers in the community, and experts in mental health, substance abuse treatment, and domestic violence programs.

Often a new social worker will not be aware community services of which the judge knows. Since the judge reviews case plans regularly, he or she will naturally build up a storehouse of information about available community services. For example, the judge may know of domestic violence shelters that provide housing for a victim of violence and the child before the court. The judge may know of homeless shelter resources available for parents or specialized parenting classes.

Should the court make reference to these services when the social worker and attorneys do not? This issue has ethical overtones if the parties are litigating the reasonableness of services, and the judge knows of services that none of the parties has mentioned. In this situation, the judge must disclose what the court knows and provide the parties an opportunity to respond to the court’s information.⁴³⁴ Following that procedure, the parties and any appellate court will know the basis of the court’s ruling.

C. SHOULD JUDGES RAISE THE REASONABLE EFFORTS ISSUE?

Trial judges face a number of unique challenges regarding the reasonable efforts issue. They understand that they have a legal responsibility to address the reasonable efforts issue several times during the life of a dependency case. After all, federal and state statutes require these findings, which are necessary for the state agency to receive monies for foster care. Yet, if the attorneys fail to raise the issue, do judges have a responsibility to discuss it with agency representatives in court? Many judges are understandably reluctant to take such action *sua sponte*. They are more comfortable in a “neutral role,” one in which they hear counsel present evidence, and then make a decision based upon the evidence and argument. Of course, unrepresented parents and unprepared or untrained attorneys are unlikely to raise the issue.

⁴³²“*Making Reasonable Efforts*,” *op.cit.*, footnote 310 at pp. 31-33; *Making Reasonable Efforts: Steps for Keeping Families Together*, NCJFCJ, Child Welfare League of America, Youth Law Center, National Center for Youth Law, San Francisco, 1999, at pp. 9-10;

⁴³³ California Standard of Judicial Administration 5.40(e)(2).

⁴³⁴ Edwards, L., *The Role Of the Juvenile Court Judge: Practice & Ethics*, California Judges Association, The Rutter Group, (2012) at 77-81.

Several studies indicate judges' reluctance to address the reasonable efforts or "rubber stamp" agency requests for a reasonable efforts finding.⁴³⁵ In a New York report the authors concluded that the reasonable efforts issue is "very rarely addressed," and that judges admit they often routinely approve requests to take away children even when they don't really believe the agency has made an adequate case.⁴³⁶ The report concluded that [s]uch practice...comes frighteningly close to abdicating the Court's basic responsibility to protect the rights of children and families."⁴³⁷ A Michigan survey reported that 20 percent of the judges always found that reasonable efforts had been made, and another 70 percent said they rarely concluded otherwise. Moreover, 40 percent admitted that they lied about reasonable efforts being made because the state would otherwise lose federal aid.⁴³⁸ In another survey of over 1,200 juvenile court judges around the country, only 44 judges responded that they had made at least one negative reasonable efforts finding during their tenure on the bench.⁴³⁹ These and other reports led one commentator to conclude that the reasonable efforts requirement simply does not work.⁴⁴⁰

The better practice is for judges to raise the issue even if the attorneys neglect to mention it.⁴⁴¹ In fact, the judge should make it clear from the outset that the reasonable efforts issue will be discussed, and if not by the attorneys, the court will inquire. This approach puts the attorneys and agency on notice of the importance of the issue to the court. It also informs the agency that the court is monitoring their actions. After all, trial court monitoring of agency actions is a principle reason Congress passed the AACWA and ASFA.

⁴³⁵ Hardin, M., *Ten Years Later: Implementation of Public Law 96-272 by the Courts*, American Bar Association Center on Children and the Law, Washington, D.C., 1990 at p. 54; Carns *et.al.*, Alaska Judicial Council, "Improving The Court Process for Alaska's Children in Need of Aid," *op.cit.*, footnote 101 at pp 98-100, reporting that judicial officers rarely touched upon the reasonable efforts issue and usually checked a box on a form rather than writing out separate findings; Shotton, *op.cit.*, footnote 3, at pp.227-228.

⁴³⁶ "Special Child Welfare Advisory Panel, Advisory Report on Front Line and Supervisory Practice," March 9, 2000, pp. 47-48.

⁴³⁷ *Id.*

⁴³⁸ Muskie School of Public Service Cutler Institute For Child and Family Policy, University of Maine and The American Bar Association Center for Children and the Law, *Michigan Court Improvement Program Reassessment*, August 2005, available online at http://muskie.usm.maine.edu/Publications/cf/MI_Court_Improvement_Program_Reassessment.pdf.

⁴³⁹ This study was conducted by staff at the Youth Law Center in the summer of 1989. The judges were sent a two-page survey which contained questions such as: Have you ever made a negative finding of reasonable efforts and, if so, how many times, in what types of case, and at what kind of hearing? This survey was reported in Shotton, *op.cit.*, footnote 3 at p. 236.

⁴⁴⁰ National Coalition for Child Protection Reform, "The Unreasonable Assault on 'Reasonable Efforts,'" Issue Paper 9.

⁴⁴¹ "The second is to indoctrinate them with a commitment to monitor the dependency adjudication and dispositional process and to apply the inherent powers they possess to assure that the service providers do in fact make the reasonable efforts in a timely fashion. Judicial pressure can do wonders in moving cases and assuring compliance with the legislative mandate." Tamilia, Hon. P, Symposium: A Response to Elimination of the Reasonable Efforts Required Prior to Termination of Parental Rights Status," *U. Pitt. Law Review*, Vol. 54, Fall, 1992, at pp., 211-228, at 224.

The law requires that the court base a reasonable efforts finding upon evidence produced at the hearing. The evidence may be in the form of testimony⁴⁴² or reports, but cannot consist of allegations contained in a petition.⁴⁴³ Judicial enquiry into the evidence presented can be critical to a resolution of the reasonableness of the services provided. For example, the court may learn from the parties that services unknown to the social worker could make possible a safe return of the child.

A recent study highlights the importance of judicial questioning at the shelter care hearing.⁴⁴⁴ The National Council of Juvenile and Family Court Judges (NCJFCJ) conducted an experiment in three juvenile courts in different states – Omaha, Nebraska, Portland, Oregon, and Los Angeles, California. The judicial officers spent additional time at the shelter care hearing and asked specific questions from a bench card.⁴⁴⁵ The results were stunning. This study demonstrated that an enhanced shelter care hearing, including representation for all parties and judicial questioning, resulted in the removal of fewer children from parental care, more family and relative placements, and fewer children placed in non-relative foster homes.⁴⁴⁶

D. JUDICIAL DETERMINATION OF REASONABLE EFFORTS

What should a judge consider when determining whether reasonable efforts have been provided by the agency? At the outset the judge should understand the problem that brought the child to the attention of the agency. This should be reflected in the petition. The judge's understanding determines the relevance of any services provided. In order to ensure a full and fair hearing on the merits, the court should permit all parties to review the child welfare agency's records concerning the decision to remove the child. Then the court should require the agency to prove that it made reasonable efforts. Any party should have the right to present testimony on the issue of reasonable efforts. After the parties submit their evidence, the court should determine whether the services offered were adequate, available, accessible, and realistic. The existence of a service that is not immediately available, or a service that is inaccessible to a parent without transportation arguably would not qualify as reasonable. On the other hand, a service that would be too costly, such as a 24 hour live-in social worker, would not be considered reasonable. The court forms

⁴⁴² See *In re Armand*, 433 A.2d 957, 962 (R.I. 1981)

⁴⁴³ Ratterman, *et.al.*, *op.cit.* footnote 41 at p.10.

⁴⁴⁴ "Right From the Start: The CCC Preliminary Protective Hearing Benchcard Study Report: Testing a Tool for Judicial Decision Making," NCJFCJ (2011). Copies of the Benchcards are reproduced in Appendix H.

⁴⁴⁵ A benchcard is a one or two page sheet of questions that a judge should ask at a particular hearing or when a particular issue arises. The NCJFCJ has produced bench cards for several types of hearings and issues. They are contained in Appendix H.

⁴⁴⁶ "Right From the Start: The CCC Preliminary Protective Hearing Benchcard Study Report: Testing a Tool for Judicial Decision Making," NCJFCJ (2011), at p. 3. Copies of the benchcards are reproduced in Appendix H.

developed in several states and contained in Appendix C have proven useful for the parties and the court to read what the agency has done to prevent removal or facilitate reunification.

E. SHOULD JUDGES MAKE “NO REASONABLE EFFORTS” FINDINGS?

Yes! When the facts reveal that the agency has not provided adequate services to prevent removal of the child, to assist the parents reunify with their child, or to finalize permanency, the court has a legal and ethical obligation to make that finding. Federal and state legislations gives trial courts the duty to monitor the actions of the agency. Judges should acknowledge that responsibility and follow the law.

The court owes a duty to the child and family to hold the agency accountable for its performance. A number of options exist for the court to consider when making a reasonable efforts determination.

- + subpoena agency witnesses to testify about the agency’s failure to make reasonable efforts.
- + allow the agency a brief continuance to show why a negative finding should not be made.
- + order the agency not to seek reimbursement for the cost of the child’s care.
- + order the agency to develop specific services and file appropriate documents where necessary.
- + issue orders to show cause or contempt orders.
- + submit reports on noncompliance to state or federal agencies.⁴⁴⁷

Many judges are reluctant to make “no reasonable efforts” findings because the child welfare agency loses money, often the local agency is under-resourced, and a loss of money would further weaken the agency.⁴⁴⁸ Judges must overcome that reluctance to ensure that the agency is doing its job.

X. RECOMMENDED JUDICIAL STRATEGIES

How should judges approach the reasonable efforts issue? This section details a number of strategies designed to offer a comprehensive approach to the role of the judge when presiding in child welfare proceedings.

⁴⁴⁷ “*Making Reasonable Efforts*,” *op.cit.*, footnote 310 at p. 33.

⁴⁴⁸ The next section of this paper (IX E) offers a suggestion entitled The Art of The No Reasonable Efforts Finding. It presents a strategy that may accomplish the legislative goal without the agency suffering financial consequences.

A. EARLY APPOINTMENT OF COUNSEL FOR PARENTS AND CHILDREN

Judges should take active steps to ensure that the parties in child abuse and neglect cases have access to competent representation. Judges should be prepared to appoint counsel for indigent parents and guardians *ad litem* for all children who are the subject of child welfare proceedings.⁴⁴⁹ The appointment should take place as early as possible so that counsel can be prepared for the shelter care hearing.⁴⁵⁰ The court should order the agency to provide copies of the petition and supporting documents immediately after filing the legal action.⁴⁵¹ Attorneys appointed at the time of the shelter care hearing cannot be prepared for the hearing.⁴⁵²

Unfortunately, judges often resist appointing counsel for parents in juvenile dependency cases or do so late in the case. Their reluctance often is based upon concern with the cost of counsel and pressure from the other branches of government not to spend money on attorneys for parents.⁴⁵³ Yet as indicated in the previous discussion, early appointment can save money for the state by returning more children safely to family members and doing so in a timely manner.

B. ENSURING HIGH QUALITY LEGAL COUNSEL

Since well-trained attorneys serve both their clients and the court process well, judges must take a leadership role in attorney training.⁴⁵⁴ First, judges should require that any attorney seeking appointment to represent a parent or child in child welfare proceedings participate in continuing education regarding issues related to these cases.⁴⁵⁵ Second, judges should encourage monthly or quarterly training sessions available to attorneys, judges, social workers, CASA volunteers, and service providers.⁴⁵⁶ Such trainings should include social worker practice and services available in

⁴⁴⁹ *Resource Guidelines*: *op.cit.*, footnote 130 at pp. 22 & 43-44; “Legal Representation Study,” *op.cit.*, footnote 98; Edwards, L., “Early Appointment,” *op.cit.*, footnote 106; at pp. 23-25.

⁴⁵⁰ *Id.* An evaluation of practice in the Utah juvenile courts found that in almost all cases, parents and children were represented at the shelter care hearing (held within 72 hours of removal). “An Evaluation of Utah Court Improvement Project Reforms and Best Practices: Results and Recommendations,” *Technical Assistance Bulletin*, NCJFCJ, Reno, 2003 at §§ 3.4 & 3.5.

⁴⁵¹ Edwards, L., “Representation of Parents,” *op.cit.*, footnote 106.

⁴⁵² The author has discussed this issue with several attorneys around the country. They uniformly state that if they are appointed at the shelter care hearing, they do not have sufficient time to prepare for all of the issues that arise at the hearing.

⁴⁵³ Edwards, L., “Representation of Parents,” *op.cit.*, footnote 106.

⁴⁵⁴ “*Making Reasonable Efforts*,” *op.cit.*, footnote 310, at p. 38; California Standard of Judicial Administration recommends active judicial support of attorney training. Refer to Appendix K; see also Thornton, E., *op.cit.*, footnote 418 at pp 1-13.

⁴⁵⁵ See Appendix K and Thornton, E. *op.cit.*, footnote 418.

⁴⁵⁶ *Id.*

the local community. Third, judges should encourage attorneys to practice in juvenile dependency court for substantial periods of time. Fourth, judges should work with court administrators and local bar associations in an effort to persuade law firms or small groups of lawyers to apply to the court for a contract to provide legal representation for parents and/or children. This legal services model for clients appearing before the juvenile court has proven effective in a number of jurisdictions across the country.

E. EARLY ATTENTION TO REASONABLE EFFORTS

1. WHY EARLY IS BETTER

Early attention to reasonable efforts means that critical issues will be addressed quickly and efficiently.⁴⁵⁷ Delay is built into the legal process. It takes time to arrange for legal counsel, to read investigative reports, to interview clients, to find a time when all parties can be present, and to have witnesses available. The complexity of juvenile dependency cases with several parties, social workers, attorneys, and relatives means that a deliberative process can take months to resolve.

Yet as one commentator has stressed, everyone, and particularly the judge should “treat each case as though it were an emergency.”⁴⁵⁸ “It is difficult for participants in the juvenile court to remember that every case before the court is an emergency for the families involved. 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.”⁴⁵⁹

The best approach for the legal system involves spending significant time as soon as possible to address all possible issues.⁴⁶⁰ An examination of appellate case law reveals that many critical issues do not arise until a hearing to terminate parental rights, the last legal hearing in a juvenile dependency case. When an appellate court hears arguments that the agency failed to provide adequate and timely services to the parents, the court also knows that the child has been waiting for years, often residing in a possible adoptive home. A reversal will necessarily cause additional trauma to the child.⁴⁶¹ It will delay permanency, and it may result in another change of custody.⁴⁶²

⁴⁵⁷ “[I]t is preferable for the state agencies to show reasonable efforts early on in each case...;” Crossley, *op.cit.* footnote 3, at p. 314.

⁴⁵⁸ Edwards, L., “Improving Juvenile Courts,” *op.cit.*, footnote 369, at p. 1; and see *In re Micah S.*, 198 Cal.App.3d 557, 243 Cal.Rptr.756 (Cal. App. 1988), Brauer, J., Concurring.

⁴⁵⁹ *Id.* at p. 10.

⁴⁶⁰ “Parent’s counsel should focus on and encourage other participants in a family’s case to think about reasonable efforts at the start of the case and continue the focus as the case progresses.” Watson, A., “A New Focus on Reasonable Efforts to Reunify,” *op.cit.*, footnote 4 at p. 3;

http://www.americanbar.org/publications/child_law_practice/vol.32/sample_issue/a_new

⁴⁶¹ “However, taking this option (reversal) could wreak disaster of the life of a young child.” Kaiser, J., *op.cit.*, footnote 69 at p. 112.

⁴⁶² One author points out that the pressure on appellate courts has resulted in rubber stamping the trial court’s determination that reasonable efforts have been made in order to avoid the trauma of extended legal proceedings. Kaiser, *Id.* at 100-101, 103.

As a result of this reality, many appellate courts prefer to find that any efforts by the agency are sufficient to satisfy the reasonable efforts requirement.⁴⁶³ As one commentator wrote:

Only when TPR procedures roll around do the courts take the reasonable efforts requirement seriously.... At this point, rehabilitation is usually hopeless and requiring the agency to make reasonable efforts at this late date merely punishes the child for the agency's failure.⁴⁶⁴

As the Iowa Supreme Court has pointed out, the parent should address a lack of services early in the case.⁴⁶⁵ The trial judge and the attorneys should also create opportunities to examine whether the correct services are in place and whether the parents have access to those services. Early inquiry into these issues will result in earlier determinations regarding reunification. It will serve the best interest of children and their families.⁴⁶⁶

2. AT THE SHELTER CARE HEARING

The judge should discuss the reasonable efforts issue at the shelter care hearing.⁴⁶⁷ If the attorneys fail to address the issue, the judge should review the actions taken by the agency to prevent removal of the child including issues such as whether there have been changes that would permit the child safely to return home, whether another parent is available for custody, whether a relative is willing and able to care for the child, and whether the addition of services would make any of these alternatives possible.⁴⁶⁸

D. EARLY RESOLUTION OF PETITION THROUGH ADJUDICATION

⁴⁶³ *Adoption of Gregory*, 501 N.E.2d 1179 (Mass. App. Ct. 1986); *State ex rel. Children, Youth & Families Dept.*, 47 P.3d 859 (N.M. Ct. App. 2002); *Adoption of Nicole*, 662 N.E.2d 1058 (Mass. App. Ct. 1996).

⁴⁶⁴ Herring, D., "Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System," *U. Pitt. L. Rev.*, Vol. 54 (1992) 139 at p. 204. Another commentator (Crossley, *op.cit.* footnote 3 at p. 314) argues that the court should make a 'reasonable efforts' finding at a termination hearing. Many states require such a finding, but as pointed out throughout the text, it is difficult for a judge to delay permanency at this late stage of the proceedings. Delays traumatize the children involved.

⁴⁶⁵ The Iowa Supreme Court stressed the "critical role of reasonable efforts from the very beginning of intervention" and "the critical need for services to be implemented by the [agency] early in the intervention process." *In re C.B.*, 611 N.W.2d 489, 493, 495 (Iowa 2000); other Iowa appellate cases have repeated this statement. Refer to the Iowa case law in Appendix A.

⁴⁶⁶ One commentator concluded that the systems for ensuring reasonable efforts early in a case have never been fully effective. Crossley, W. *op.cit.*, footnote 3 at p. 299. Based on the evidence presented in this book this commentator appears to be accurate in some states. However, several courts have demonstrated that early review of reasonable efforts is possible if courts make specified structural and case processing modifications.

⁴⁶⁷ *Resource Guidelines*, *op.cit.*, footnote 130 at pp. 37-38.

⁴⁶⁸ The questions contained in the bench cards in Appendix I can be useful in this regard.

After the shelter care hearing the court should schedule an adjudication hearing in a reasonable time and in no case later than 60 days.⁴⁶⁹ Most states comply with this recommendation, but three states have no statute governing the time to adjudication.⁴⁷⁰ Early adjudication establishes judicial authority over the child, gives the parents an opportunity to challenge the allegations in the petition, clarifies what services best serve the parents, and moves the case from an adversarial to a rehabilitative posture.⁴⁷¹

F. REASONABLE EFFORTS TO REUNIFY

The court must also review the services that the agency has provided to assist the parents address the issues that brought their child to the attention of the court.⁴⁷² At hearings throughout the remainder of the case, including at any hearing to terminate parental rights, the court should review what services the agency has provided to assist the parents reunify with their child. In other words, has the agency provided timely, relevant, and effective services to the parents? Failure to do so can and often should result in a judicial “no reasonable efforts” finding.

G. REASONABLE EFFORTS TO FINALIZE A PERMANENT PLAN

ASFA added another duty for the court – to monitor the agency’s efforts to finalize a permanent plan for the child.⁴⁷³ In other words, if reunification has failed and a permanent plan has been established, the agency must take steps to complete that plan. Once again the court must monitor the agency’s efforts, and the failure of the agency to finalize a permanent plan can result in a “no reasonable efforts” finding. Attorneys and guardians *ad litem* for children, in particular, should also monitor whether the agency is providing reasonable efforts to finalize a permanent plan. They may be the only representative for the child after parental rights have been terminated. They should insist that the court finalize a permanent plan for the child at every hearing.

Several state courts conduct rigorous post-termination reviews to prevent children from lingering in foster care. New Jersey’s Orphans Project resulted in thousands of children finding permanent homes.⁴⁷⁴ Georgia juvenile courts developed a Cold Case Project that focuses upon children in lingering in long-term foster care with a goal of securing them a permanent home. A

⁴⁶⁹ Edwards, L., “Achieving Timely Permanency” *op.cit.*, footnote 325 at pp. 1-37.

⁴⁷⁰ Connecticut, New Jersey and New York have no statutory provision addressing when adjudication must be completed. New Jersey created a court rule specifying the time for adjudication, and the Connecticut practice is to adjudicate before 60 days. Adjudication in New York often takes a year to complete.

⁴⁷¹ Edwards, L., “Achieving Timely Permanency,” *op.cit.*, footnote 325.

⁴⁷² [R]easonable efforts shall be made to preserve and reunify families – (ii) to make it possible for a child to safely return to the child’s home.” 42 U.S.C. §671(a)(15)(B)(ii).

⁴⁷³ 42 U.S.C. §671(a)(15)(C); 42 CFR §1356.21(b)(2).

⁴⁷⁴ “Promising Court Practices: Strategies to Achieve Timely Permanency,” Casey Family Programs, November, 2009, at p. 10.

Texas report urges juvenile court judges to make significant changes in practice so that permanency hearings (called PMCs) become more effective in finding permanent homes for children.⁴⁷⁵

H. JUDICIAL TRAINING

Judges at both the trial and appellate level must be trained and educated on the importance of judicial oversight of agency actions through “reasonable efforts” findings.⁴⁷⁶ Many judges simply do not understand the critical importance of these findings in juvenile dependency cases. They also do not understand or are reluctant to question the social worker about efforts expended on behalf of parents to prevent removal or provide services to assist parents reunify with their children. As two commentators put it,

Judges are not trained in matters over which the juvenile court has jurisdiction, and because of rotation schedules, remain in the assignment for a short period of time. Consequently, they do not acquire the experience needed to handle these sensitive cases. While judges in some localities make a good faith effort to determine whether adequate services have been offered to the family, in many localities a positive finding is merely a matter of checking a box on a preprinted form,⁴⁷⁷

The National Council of Juvenile and Family Court Judges issued a comprehensive benchcard which outlines questions that judges should ask social workers at the shelter care hearing.⁴⁷⁸ It is a useful guide for the questions that should be addressed at this hearing.⁴⁷⁹

I. THE VALUE OF INTERIM REVIEWS

An interim review is a non-statutory hearing usually set by the judge to address one or more specific issues that require special attention.⁴⁸⁰ Judges schedule interim hearings for a number of reasons including: to complete paternity determinations, review whether a child is an Indian child pursuant to the ICWA, and determine whether mental health evaluations and reports have been completed. Judge also hold interim review hearings to learn whether visitation is occurring as

⁴⁷⁵ *Improving the Lives of Children in Long-Term Foster Care: The Role of Texas' Courts & Legal System*, Texas Appleseed, November, 2010, at pp. 5-22

⁴⁷⁶ Tamilya, Hon. P., *op.cit.*, footnote 431 at p. 224.

⁴⁷⁷ Goodman, S., & Hurley, J., *Reasonable Efforts: Who Decides What's Reasonable*, U.S. Department of Health and Human Services, Washington, D.C., 1993 at p. 8.

⁴⁷⁸ See Miller, N. & Maze, C., “Right From The Start,” *op.cit.*, footnote 434 A copy of several benchcards is contained in Appendix I.

⁴⁷⁹ A copy is reproduced in Appendix I.

⁴⁸⁰ Edwards, L., *Interim Hearings*, THE BENCH, California Judges Association, August, 2009, at pp. 9-10. Available at judgeleonardedwards.com in the publications blog.

ordered by the court, whether the child’s relatives have received notice of the proceedings pursuant to federal law, to make certain that pre-adoption home studies have been completed, and other issues that require special attention, and cannot wait for the next six or twelve month hearing.⁴⁸¹ In particular, interim reviews can determine whether the agency is providing the services ordered by the court and determine the effectiveness of these services in addressing the problems that brought the child to the attention of the court.⁴⁸² The Iowa appellate courts pay particular attention to the importance of identifying service problems early in the case and not at a termination of parental rights hearing. A frequently repeated phrase in their appellate decisions is “[w]e have repeatedly emphasized the importance for a parent to object to services early in the process so appropriate changes can be made.”⁴⁸³

Interim hearings take very little court time, but provide useful information about case progress and remind the parents of the critical nature of the proceedings. Perhaps most importantly, an interim review scheduled shortly after the court establishes a service plan identifies and solves problems early in the case rather than at the termination of parental rights hearing when it may be too late to do so. The AACWA, national policy experts, and appellate case law support the use of interim reviews.⁴⁸⁴ For example in Hamilton County, Ohio, a Model Court,⁴⁸⁵ the court frequently holds post-dispositional review hearings in all open cases. These oversight hearings make certain that the case is moving toward a final decision and that the parties are working to achieve consistent goals.⁴⁸⁶ A typical review in Hamilton County would include inquiries into the following issues:

- + Where is the child and is the child having any problems in the foster home or at school?
- + What has been done to provide services to parents?
- + Do parents feel that services are helpful and do parents think that they are making progress as a result of the services?
- + What, exactly, is the level of parental participation in services and what progress are the parents making?

⁴⁸¹ 42 U.S.C. §671(a)(29).

⁴⁸² “Review is vital to cases involving each child within the court’s jurisdiction.” At an interim review the judge can address whether the agency is making reasonable efforts to rehabilitate the family and eliminate the need for placement of the child. *Resource Guidelines, op.cit.* footnote 130 at pp. 66-71.

⁴⁸³ *In re C.B.*, 611 N.W.2d 489 (Iowa Supreme Court, 2000), at pp 493-494; *In re C.H.*, 652 N.W.2d 144, 147 (Iowa, 2002); *In re B.J. & W.J.*, (WL 2420006, Iowa App., 2011); *Washington State Dependency Best Practices Report*, Fall, 2012 at p. 16.

⁴⁸⁴ *Effective Intervention, op.cit.*, footnote 257 at p. 100; No. 88178 (Circuit Court for the State of Oregon for Multnomah County, Juvenile Dept.)(Nov. 26, 1986). *Improving the Lives of Children in Long-Term Foster Care: The Role of Texas’ Courts & Legal System, op.cit.* footnote 465 at pp 96-96. “*Resource Guidelines, op.cit.*, footnote 130 at pp. 66-71. Some examples of interim review forms are contained in Appendix K.

⁴⁸⁵ A Model Court is one identified by the National Council of Juvenile and Family Court Judges as exemplifying best practices. See NCJFCJ.ORG, Model Courts.

⁴⁸⁶ Hardin, M., *Judicial Implementation of Permanency Planning Reform: One Court That Works*, American Bar Association, Chicago, 1992, at p. 41.

- + Is the Agency satisfied with the progress of the parents?
- + What visitation has occurred and how has it gone?
- + Does return home seem likely, and what needs to be done to achieve it? How will the parents know whether the child is ready to be returned home?⁴⁸⁷

Even after a termination of parental rights, an interim review of a child's progress towards permanency proves very useful.⁴⁸⁸ If the court orders an adoption, the judge should take an aggressive approach to achieve that plan. Through interim reviews the court can put pressure on the agency to take prompt action to finalize the permanent plan. Knowing that the judge is concerned about the child's future serves as a powerful incentive to take timely action.⁴⁸⁹

The Utah legislature passed a statute which requires post-termination reviews every 90 days.⁴⁹⁰ The statute reflected practice that Judge Sharon McCully, the former presiding judge of the Salt Lake City Model Juvenile Court, and other Utah juvenile court judges previously implemented. Judge McCully reviewed every case monthly, usually together with other post-termination cases. All parties were expected to appear. Judge McCully reports that the most frequently discussed issues involved potential adoptive parents "not being ready," problems procuring the adoption subsidy, and hesitancy by a child whose consent was necessary.⁴⁹¹

The National Council of Juvenile and Family Court Judges strongly supports interim reviews. In its "Key Principles for Permanency Planning for Children" it declares:

Judges must provide fair, equal, effective and timely justice for children and their families throughout the life of the case, continually measuring the progress toward permanency for children. The same judge should oversee all cases impacting the care, placement, and custody of a child. Through frequent and thorough review, without needless delay, judges must regularly exercise their authority to set and monitor the timelines, quantity, quality, and cultural responsiveness of the services for children and families. Judge should ensure that there is communication, collaboration and cooperation

⁴⁸⁷ *Id.* at p. 67.

⁴⁸⁸ "Frequent post-TPR review hearings provide opportunities for trouble-shooting and problem-solving that could go unnoticed and unattended if the court waited six months or a year for the ASFA-mandated minimum time frames for hearings." McCully, S., & Barnes, E.W., "Forever Families: *op.cit.* footnote 369 at p. 14.

⁴⁸⁹ Judge Sharon McCully, retired presiding judge of the Salt Lake City, Utah, juvenile court, scheduled interim reviews after a termination of parental rights every 30 days until the adoption was completed. (author's conversation with Judge McCully).

⁴⁹⁰ Utah Code Annotated Title 78A-6-512.

⁴⁹¹ Email from Judge Sharon McCully (ret.) sent December 2, 2013. A copy is available from the author.

among all courts handling cases involving any given family.⁴⁹²

Social workers may object to interim reviews believing that they require more report writing and take time away from their other duties. The forms displayed in Appendix J were created by the author and the Director of Children's Services in Santa Clara County so that they would take very little time to complete, but would contain critical information for the judge and attorneys.

J. ENGAGING FATHERS AND RELATIVES

One strategy to avoid placement and facilitate reunification involves the identification and engagement of fathers and relatives. For a variety of reasons fathers are often not involved in the juvenile dependency process.⁴⁹³ Yet fathers may provide a placement for the child and have resources that benefit the child. By identification and engagement the father also dramatically increases the number of the child's relatives.

The federal government recognized the importance of relatives in child welfare cases when it passed the Fostering Connection to Success and Increasing Adoptions Act in 2008.⁴⁹⁴ This Act emphasizes the importance of identifying and engaging family members and mandates that local social service agencies actively and diligently identify, locate, and give notice to a child's relatives within thirty days of the child's removal from the home.⁴⁹⁵ The Act indicates that relatives are preferred placements for children who must be removed from their biological parents.⁴⁹⁶ The Act identifies several best practices including family finding,⁴⁹⁷ family group conferencing,⁴⁹⁸ and guardian kinship navigators,⁴⁹⁹ all processes which help engage and assist families participate in child welfare proceedings. The legislation encouraged adoption of all three of these best practices by offering grant monies to help initiate these practices locally.⁵⁰⁰

⁴⁹² "Key Principles for Permanency Planning for Children," *Technical Assistance Bulletin*, NCJFCJ, Reno, 2011

⁴⁹³ Edwards, L., "Engaging Fathers in the Child Protection Process: The Judicial Role," *Juvenile and Family Court Journal*, Vol. 60, No. 2, Spring 2009, at pp. 1-29, at p.1.

⁴⁹⁴ H.R. 6893/P.L. 110-351 (2008).

⁴⁹⁵ Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351 (2008) §103

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*; Family Finding uses search engines to locate family members of children involved in child welfare proceedings. See Campbell, K., "Lighting the Fire of Urgency: Families Lost and Found in American Child Welfare System," *Permanency Planning Today*, Fall, 2003, at p. 12. Beck, K.L. "Finding Family Connections for Foster Youth," with co-authors, *ABA Child Law Practice*, Vol. 27, No. 8, October, 2008, at p. 113.

⁴⁹⁸ Family Group Conferencing brings extended families together to address the needs of children in the child welfare system. See Sagatun, I., and Edwards, L., "The Transition to Group Decision Making in Child Protection Cases: Obtaining Better Results for Children and Families," *Juvenile and Family Court Journal*, Vol. 58, Winter, 2007, at pp. 1-16.

⁴⁹⁹ Fostering Connections Act, §102.

⁵⁰⁰ *Id.*

While some commentators believe that families often do not have the capacity to provide safe care for abused and neglected children, the federal government and other commentators conclude that relatives offer the best placement for children removed from parental care.⁵⁰¹ Judges should enforce this new law by using the “reasonable efforts” finding in relation to agency efforts to identify and locate fathers and relatives in a timely fashion. The engagement of fathers and relatives reduces the number of children placed in foster care with strangers.⁵⁰²

K. THE ART OF THE NO REASONABLE EFFORTS FINDING

Judges are often reluctant to make “no reasonable efforts” findings. The parties rarely try the issue and the court does not want to see the local children’s services agency lose money, particularly when services are difficult to fund.⁵⁰³ It is not necessary, however, to make “no reasonable efforts” findings and have the state lose federal funding. Judges can use the finding strategically through an approach called “The Art of the No Reasonable Efforts Finding.” The judge states that the court is prepared to make a no reasonable efforts finding, but that it will continue the matter for one week for a progress report. In most cases the agency understands what they need to do and takes that action. Most likely, the agency will respond and the court will not have to make a “no reasonable efforts” finding at the subsequent hearing.

The “no reasonable efforts” finding also increases the pool of available services in the community. The court may conclude that there are services that should be in place within the judge’s community. Using the possibility of a “no reasonable efforts” finding, judges have persuaded the agency to establish a visitation center, housing for teens with babies, parenting classes, and other services that once created became available to all families in the child protection system. As Judge Richard FitzGerald wrote:

Judges can use “reasonable efforts” determinations to set court expectations as to appropriate responses by the child welfare system to families experiencing both domestic violence and child abuse or neglect.⁵⁰⁴

The court can also use the “no reasonable efforts” finding in creative ways that do not penalize the agency for its inaction. The court can make a “no reasonable efforts” finding and suspend that finding for a week in order for the agency to comply with court orders. A number of

⁵⁰¹ Edwards, L., “Relative Placement in Child Protection Cases: A Judicial Perspective,” *Juvenile and Family Court Journal*, Vol. 61, No. 2, Spring 2010, pp. 1-44, at

⁵⁰² Wentz, R.M. & Beck, K.L., “Unlocking ‘Reasonable Efforts’: Kinship is Key,” *Clearinghouse Rev.* Vol. 46, July/August, 2012, at p. 99

⁵⁰³ “The result is that many judges simply ignore the reasonable efforts requirement or else make positive findings based on inaccurate or incomplete information. For many judges, determining whether reasonable efforts have been made involves little more than checking a box on a court form, with no discussion of the issue.” Shotton, A., *op.cit.*, footnote 3 at pp. 2-3.

⁵⁰⁴ FitzGerald, R., *op.cit.*, footnote 238 at p. 105.

judges found that the agency responds to this type of order.⁵⁰⁵ For example, the agency may not have completed a background check on a relative who wants the child placed with him or her. The court could make a “no reasonable efforts” finding, but continue the case for a week for completion of the investigation. When the case returns to court, the check has been completed and the court sets aside the finding of “no reasonable efforts.”

This strategy offers the judge the opportunity to pressure the child welfare agency to do the work that the judge finds they are obliged to do. Such a strategy can also create services previously unavailable to parents in the community.⁵⁰⁶ Finally, one commentator argues that safely preventing placing a child in foster care saves money.⁵⁰⁷

L. AN ALTERNATIVE APPROACH

Some judges resist making “no reasonable efforts” findings. Judge John Steketee formally a juvenile court judge in Kent County (Grand Rapids), Michigan, stated that he and his colleagues do not make negative reasonable efforts findings.⁵⁰⁸ Although Michigan law requires the court to make findings whether reasonable efforts have been made to prevent the child’s removal from home and whether reasonable efforts were made to rectify the conditions that caused the child’s removal from home, the Kent County judges question the agency at each hearing and sometimes direct the agency to perform certain tasks.⁵⁰⁹ On occasion the judge contacts a supervisor or director and asks that a particular problem be addressed.⁵¹⁰

Judge Steketee informed the author that Kent County had such excellent preventive services that

[b]y the time a petition is filed, the family has been given a wide array of social services. Those are well documented. Filing a petition clearly becomes a last resort. The result is that Kent County more than 50% of the petitions which are filed result in a termination of parental rights and an adoption.

⁵⁰⁵ See the examples set out in Edwards, L., “Improving Implementation,” *op.cit.*, footnote 66, *Resource Guidelines*, *op.cit.*, footnote 130, Appendix C. at pp. 155-156; also found at *Juvenile and Family Court Journal*, Vol. 45, No. 3, 1994 at pp. 22-23.

⁵⁰⁶ *Id.*, at pp. 167-168. (these pages are reproduced in Appendix C)

⁵⁰⁷ Shotton, A., *op.cit.*, footnote 3 at pp. 13-14.

⁵⁰⁸ Hardin, M., Rubin, H.T., & Baker, D.R., *A Second Court That Works: Judicial Implementation of Permanency Planning Reforms*, Edna McConnell Clark Foundation and the ABA Center on Children and the Law, 1995, at p. 87.

⁵⁰⁹ Mich. Comp. Law §712A.18f(4).

⁵¹⁰ “A Second Court That Works,” *op.cit.*, footnote 498 at p. 87.

All parties agree that social services has offered whatever services were appropriate, but the family was not in a position to take advantage of them.⁵¹¹

Judge Steketee stressed that holding the agency accountable can be done in other ways. For example, meetings with the court, attorneys, and agency representatives examine system problems.⁵¹² Through more frequent hearings, the court can monitor the efforts of the agency to resolve individual problems. He reported that the court addresses the reasonable efforts issue at all hearings. Attorneys for the parents cross-examine the social worker on specific tasks they performed and whether the treatment plan is appropriate for the client.⁵¹³

The judicial officers in Hamilton County, Ohio, take a similar approach and rarely make negative comments concerning the reasonableness of agency efforts.⁵¹⁴ They suggest or order additional steps to be taken by the agency and “focus closely on the sufficiency of Agency efforts to assist the family.”⁵¹⁵ The court scrutinizes the adequacy of agency services to the family throughout the time the child remains in agency custody.

Several attorneys who practice in the Allegheny County, Pennsylvania juvenile court, report that the reasonable efforts issue is not often tried in that court.⁵¹⁶ Their reasons resemble those reported by Judge Steketee’s – the agency does such a remarkable job of providing services that everyone in the court understands that filing a petition in court was a last resort.

Even in the most progressive jurisdictions, the court must be assured that the agency performs its job thoroughly. That can be accomplished by addressing the issue at each hearing, particularly early in the case. In that way the appropriate services can be identified as soon as practical and any failures to connect parents to these services can be addressed. Of course, if the agency failed to provide the appropriate services in a timely fashion, the court should hold the agency accountable.

M. CAN AGENCIES FULFILL THE REASONABLE EFFORTS REQUIREMENT?

⁵¹¹ Phone calls between Judge John Skeketee and the author (February to April, 1994), cited in “Improving Implementation,” *op.cit.*, footnote 64 at p. 18.

⁵¹² “A Second Court That Works,” *op.cit.*, footnote 498 at p. 87.

⁵¹³ *Id.* at p. 88.

⁵¹⁴ *One Court That Works*, *Op.Cit.*, footnote 476 at pp. 74-75.

⁵¹⁵ *Id.*

⁵¹⁶ The author discussed these issues with Scott Hollander and Cathy Volponi both of whom practice in the Allegheny County juvenile court.

At least one commentator believes that the reasonable efforts concept may be “too ambitious in the context of resource starved public child welfare systems.”⁵¹⁷ His criticisms of the reasonable efforts failures include many of the arguments detailed in this paper. He believes that if agencies and courts paid greater attention to state of the art research in guiding placement decisions, there would be better results for foster children.

The research results documented in this book indicate that some states use the reasonable efforts concept effectively while others do not. Through emphasis on early attention to the case plan and the services designed to rehabilitate parents, appointment of attorneys early in the process, ensurance that the attorneys are well-trained, and by strong judicial oversight of agency decisions, the concept can realize even more positive results.

Judges can make a significant difference in the development of services. As one national publication indicated:

- + Judges must exercise leadership in (a) analyzing the needs of deprived children and (b) encouraging the development of adequate resources to meet their needs.

- + In order to improve children’s services, each community, under leadership of the juvenile and family court, should analyze the needs of children and encourage legislative, executive and taxpayer support for adequate resources for:

- Preventative programs and treatment facilities and services, such as day care, early childhood education, homemaker services, crisis nurseries, aftercare, mental health, foster care, school-located services, self-help groups and parenting training; and
- Cost-effective programs to limit excessive or lengthy out-of-home placements of children.⁵¹⁸

⁵¹⁷ Herring, D., “The Reasonable Efforts Requirement – A Critique and A Proposal,” *The Judge’s Page*, National CASA, October, 2007, at p. 20; and see the comments of Chief Judge Patricia Fitzgerald, Jefferson County Family Court, Louisville, Kentucky, in Appendix A.

⁵¹⁸ Recommendation 6, *Deprived Children: A Judicial Response: 73 Recommendations*, NCJFCJ, Reno, 1985-1986.

Another commentator agreed, stating that judges can use the possible “no reasonable efforts” finding to persuade elected officials to provide additional services.

That’s the beauty of this damned system. If he’s really serious about it, a judge can say, “This is the service I want, and county, you provide it.” This then gives the county the leverage to go to the Board of Supervisors and say, “This is mandated; it’s on the books, you have to fund it.” Either way, the judges are going to do that, or someone’s going to bring a class action suit.⁵¹⁹

Both Appendices D and E offer examples of how a judge can oversee the expansion of social services in the community.

N. BEST PRACTICES AND REASONABLE EFFORTS

The field of child welfare has developed significant best practices over the past decade. These include family finding, dependency mediation, wrap-around services, family group conferencing, parent-child interaction therapy (PCIT)⁵²⁰ and multi-systemic therapy, to name a few.⁵²¹ The federal Fostering Connections to Success and Increasing Adoptions Act of 2008 identified family finding, family group conferencing and kinship guardian navigators as best practices and provided grant funding to jurisdictions in order to implement these practices.⁵²²

Agency directors and juvenile court judges should know and understand these best practices. Cross-trainings in every court system should describe new best practices, and judges and attorneys should inquire of agency representatives whether these innovations have been implemented. A failure to use some of these best practices may be sufficient to question whether the agency is providing reasonable efforts for a particular family.⁵²³

⁵¹⁹ This was a statement by Elsa ten Broeck, then a social services administrator in San Mateo County, California, as quoted by Claudia Morain in “Making Foster Care Work,” *California Lawyer*, January 1984, at p. 27.

⁵²⁰ Timmer, S., Urquiza, A., Zebell, N., & McGrath, J., “Parent-Child Interaction *op.cit.*, footnote 168 at pp. 825-840.

⁵²¹ Edwards, L., “The Future of the Juvenile Court: Promising New Directions,” *The Future of Children: The Juvenile Court*, “Family Connections Hawai’i: Final Report, Department of Human Services, State of Hawai’i, 12/31/2012; Wice, P., “Court Reform and Judicial Leadership: A Theoretical Discussion,” *The Justice System Journal*, Vol. 17, No. 3, (1995) at pp. 309-321 – “[R]egardless of how sound the new concept and how plentiful the resources, without strong judicial leadership, meaningful reform is nearly impossible.” At p. 319.

⁵²² P.L. 110-351, §§ 101-103

⁵²³ For example, when searching for relatives, the use of family finding tools may identify and locate relatives that even the parents do not know of.

O. JUDICIAL LEADERSHIP

In order for reasonable efforts findings to be a meaningful part of juvenile dependency cases, judges must take the lead and make it happen.⁵²⁴ If judges do not accept the responsibility for holding the agency accountable for providing services to families, no one else will. As stated in a NCJFCJ publication:

Judicial commitment and leadership is the key factor in any effort to improve systems response to child health and safety needs, and to provide stable and permanent homes for children. A judge sets the tone for the entire system by expressing a commitment to timely permanency, setting clear expectations of all parties, and demonstrating congruent behaviors from the bench. Through persistent pursuit of good practice and by initiating improvement efforts, a judge can create a culture of excellence that involves the court staff and other system participants.⁵²⁵

No judge can fulfill these leadership responsibilities unless the judge remains in juvenile court for a significant period of time. The rotation of judges or the movement of a case among several judges is detrimental for the children and families appearing in court, and for implementation of the law. Judicial leadership requires long-term assignments to the juvenile court.⁵²⁶

XI. CONCLUSION

One may ask why do we give all this attention to what may seem to be a technical legal issue? Why urge judges and attorneys to spend extra time in court when the result may be that the

⁵²⁴ "Judicial Leadership and Judicial Practice in Child Abuse and Neglect Cases," National Council of Juvenile and Family Court Judges, Technical Assistance Bulletin, Volume II, No. 5, July, 1998; "Juvenile Courts: Reforms Aim to Better Serve Maltreated Children," *Report to the Chairman, Subcommittee on Human Resources, Committee on Ways and Means, House of Representatives*, U.S. GAO, January, 1999, at pp. 21-22; Miller, N., "Judicial Leadership and Citizen Involvement: Improving Child Welfare Systems," *Capital University Law Review*, Vol. 28, 1999, at pp. 111-119.

⁵²⁵ *Judge's Guidebook on Adoption and Other Permanent Homes for Children*, Technical Assistance Bulletin, Volume II, No. 1, February, 1999, Permanency Planning Department, NCJFCJ; "Building a Better Collaboration: Facilitating Change in the Court and Child Welfare System," Technical Assistance Bulletin, NCJFCJ, Volume VIII, No. 2, April, 2004, at pp. 24-30.

⁵²⁶ "Juvenile Courts: Reforms Aim to Better Serve Maltreated Children," *op.cit.*, footnote 514 at p. 12; Edwards, L., "Improving Implementation," *op.cit.*, footnote 66 at p. 13; *Washington State Dependency Best Practices Report*, Fall 2012, at p. 14. <http://www.uwcita.org/>, *California Blue Ribbon Commission on Children In Foster Care*, Recommendation 2A, California Judicial Council, August, 2008; *California Standard of Judicial Administration*, Standard 5.40(a), California Judicial Council, West, 2007.

local agency loses money and is less able of providing services? The answer is simple. We are a society that believes that children belong with their own family. When that family abuses or neglects their child, we intervene to protect the child, and in the great majority of cases, we support and successfully maintain the family unit. The services that social agencies and service providers offer will usually make the difference between maintaining the family and permanent removal.

Critics argue that the reasonable efforts requirement does not accomplish what Congress intended because judges do not carefully examine the issue and hold the agency accountable.⁵²⁷ In some states these critics are correct, but in others they are not. In some states judges take the “reasonable efforts” and “contrary to the best interest” requirements seriously by monitoring the agency early and often, and providing effective judicial oversight of agency practice.⁵²⁸ The judicial oversight process established by the federal law can and does work. Judges have demonstrated they can thoughtfully and effectively monitor child welfare agency actions. Following the suggestions contained in this book will result in improvements resulting in a fairer, faster, more effective child welfare system.

In order to fulfill the expectations of both federal and state legislatures, judges must devote more time and attention to the children and families appearing in their dependency courts. Judges must appoint attorneys for parents and children immediately when legal proceedings have been initiated. These attorneys must be prepared to address the “reasonable efforts” issue at every hearing. Judges must determine (1) what was the danger that brought the child to the attention of the court? A well-drafted petition and supporting documents should provide that information. (2) What family problems are causing the danger? (3) Has the agency identified the services that will best alleviate or reduce the danger to the child and permit the child safely to return home? (4) Have caseworkers diligently arranged for those services? (5) Are these services available to the family in a timely basis? At each hearing the judge should ask whether circumstances have changed such that the child can return home, have additional and higher quality time with his or her parents, or can move to a relative home. These issues must be addressed throughout the life of a juvenile dependency case, but, in particular, at the shelter care hearing and early in the case.

Equally important is the role of the judge in making critical decisions early in the case.⁵²⁹ The court must address reasonable efforts and often. The court must also determine at the outset of the case whether the agency actions can return a child home safely or can result in a relative placement. If reasonable efforts cannot prevent removal, the court must make certain that the

⁵²⁷ Crossley, *op.cit.*, footnote 3 at 312; Kaiser, *op.cit.*, footnote 69 at 104; Graf, J., *op.cit.*, footnote 88 at p. 112-114;

⁵²⁸ For example, in Appendix A see the comments of Judge Lewis (Virginia), Judge McCully (Utah), Judge Lucero (California), Judge Clark (Pennsylvania), Judge Steketee (Michigan), and Judge Turbow (New York). Also refer to “One Court That Works,” *op.cit.*, footnote 476 and “A Second Court That Works,” *op.cit.*, footnote 498.

⁵²⁹ Edwards, L., “Achieving Timely Permanency,” *op.cit.*, footnote 325.

agency offered the correct services to the parents in order to reunify with their child. Most of the appellate cases in each state examine the reasonable efforts issue at the termination of parental rights hearing. That is simply too late to have a positive outcome for the child and family. Early attention to reasonable efforts enables the judge to ensure that the correct services are in place in time to give the parents a fair opportunity to rehabilitate and regain custody of their child.

We do not have better alternatives for children than to be reared in a family. Many infants are successfully adopted, but foster care and group home care often do not produce successful outcomes for children removed from their homes.⁵³⁰ The best answer, the solution identified by our legislatures, is to provide services to the family so that they can make the changes necessary to become safe parents. The reasonable efforts enquiry is about making certain that even the most destitute family has a fair opportunity to make the necessary changes so that their child can be maintained in their custody. That is why judges and attorneys should take this enquiry very seriously.

Tension will always exist between what the agency believes is reasonable and affordable and what advocates for parents and children argue is necessary and therefore reasonable. The judge will find that each decision reflects that tension. The judge will ask: Shall I hold the agency accountable and make a “no reasonable efforts” finding, or shall I just let it go since they are doing the best they can with limited resources, and I do not want to risk having the state lose federal dollars? The best practice is to set fair (reasonable) standards and hold the agency to those standards. Let the agency know what is appropriate and reasonable in each case. Once the court sets the standard, the judge should expect compliance by the agency in subsequent cases. A finding in one case will have an impact on the entire child protection system. In some cases the judge should issue a warning to the agency that a “no reasonable efforts” finding may be possible and also note that the court can give the agency an opportunity to provide those efforts immediately. When the agency complains that it does not have sufficient resources, the judge should be willing to work with agency leadership to obtain additional resources.

It goes without saying that judges should never simply rubber stamp the actions of the agency to prevent removal, to assist in family reunification, or to provide timely permanency. Case and statutory law require that the judge examine these issues carefully and make judgments about the reasonableness of the agency’s efforts. That finding depends on the resources available in each particular community and in the agency, meaning that in order to make the reasonableness finding, the judge must have an understanding of service availability in the community. This fact supports

⁵³⁰ Brown, W.&, Seita, J., *Growing Up in the Care of Strangers*, William Gladden Foundation Press, Tallahassee, 2009.

the notion that juvenile court judges should remain in the assignment for several years as it takes time to understand the service delivery system in one's community.⁵³¹

Removal of children from parental care is not about punishing the child or the parent for abusive or neglectful behaviors. The criminal law is written to address punishment for bad actions. Rather the child protection system concern protecting children, supporting parents' growth, if possible, safely reunifying children with their parents, and ensuring that children reach a permanent home in a timely fashion. Additionally, the child protection system is designed to serve the best interests of children. The child welfare agency is responsible for working with families to accomplish these goals, and the court must make certain that the agency does its job.

"Reasonable efforts" deserves careful judicial attention. Making reasonable efforts findings based on an examination of the local community's capacity means that the judge is following the law. The judge determines whether the agency is doing what the law requires and what the agency has promised to provide to parents. Used properly the judge can effectively and fairly oversee the child protection system. The judge will also be able to improve outcomes for children and families who appear before the juvenile dependency court.

⁵³¹ *Adoption and Permanency Guidelines*, *op.cit.*, footnote 367 at p. 7; Edwards, L., "The Juvenile Court and the Role of the Juvenile Court Judge," *op.cit.*, footnote 407, pp. at 36-37; Edwards, L., "Juvenile Judge's Corner: Rotation", *The Bench* *op.cit.* footnote 420, also found at Judgeleonardedwards.com, publications blog under Running the Juvenile Court; "Improving the Lives of Children," *op.cit.*, footnote 464 at pp. 75-76; "The policy of one year assignments practiced in many jurisdictions, however, precludes the judges from becoming committed or the court from having consistent and evolving progress." Tamilia, Hon. P., *op.cit.*, footnote 430 at p. 228; "Policy Alternatives and Current Court Practice in the Special Problem Areas of Jurisdiction Over the Family," National Center for Juvenile Justice, Pittsburgh, 1993, at pp 21-25.