

COMMENTS ON “CONFRONTING INDETERMINACY AND BIAS IN CHILD PROTECTION LAW” BY JOSH GUPTA-KAGAN

Judge Leonard Edwards (ret.)

Professor Josh Gupta-Kagan has written an important article regarding the child welfare system in the United States. The focus is on “steps needed to narrow the existing system, and when CPS agencies bring families to court, better regulate agency and family court discretion.”¹ The author writes about the indeterminacy of child welfare law, a fact that has led to the unnecessary removal of children from parental care and termination of parental rights in many cases. Throughout this long, well-researched article, the author addresses the effects of indeterminacy including bias (on race, class, sex, and other forms) on critical decisions made by child protection workers and judges.

The author makes several recommendations to reduce the amount of vagueness in the law. In addition, the author recommends legislative changes to make child protection laws more specific, to reduce the unequal application of child protection law, and to limit the unnecessary removal of children from parental care except in cases of severe child maltreatment.

There is more, but my comments will primarily address four issues that the author discusses: the vagueness of existing law, the reasonable efforts mandate, permanency, and relative placement. Professor Gupta-Kagan suggests changes in the law on these four topics, and I will outline his positions throughout this article.

I should add that my perspective starts with family preservation and favors placement with relatives and kin when parents cannot fulfill their parental responsibilities. I believe that the role of the juvenile court system is to protect children, but also to support their parents to give them a fair opportunity to regain custody of their children. Should those efforts fail, the juvenile court should take steps to place the child with extended family and kin.

1. Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 222 (2022).

VAGUENESS OF EXISTING LAWS

Professor Gupta-Kagan concludes that vague statutory language gives social workers too much latitude when making removal decisions. In particular, the impact of vague laws falls disproportionately upon African-Americans and indigenous peoples.² Vagueness leads to over-representation of minorities in the child welfare system, principally African-American and indigenous peoples. Social workers remove minority children from home more frequently, and courts terminate parental rights more often than for non-minority families.³ By rewriting statutory language, the author believes the removal process will be less likely to impact minority children unnecessarily. He turns to criminal law for examples of more precise language that can cure this problem.⁴

This change may produce results, but its impact may not be significant. First, criminal law statutes focus on specific definable acts while child welfare neglect cases focus on a collection of acts demonstrating neglect or abuse. In my experience dependency cases usually involve parental substance abuse, domestic violence, and/or parental mental health issues. Each of these issues require additional facts and analysis to demonstrate how it impacts the child. Second, it is very difficult to govern the actions of social workers by changing the law. My experience is that some social workers fear that if they do not remove a child and the child is subsequently abused, they will be held responsible.⁵

Moreover, whether a child is removed depends on the attitude of an individual social worker. As a juvenile court judge for many years, I saw how individual social workers can look at the same set of facts and take different actions depending on their personal judgment. Given the same facts, one might settle the case in the field with services to the family, while another might remove the child and take the case to court. One answer to this dilemma is stronger supervision of these decisions, but large caseloads combined with significant vacancies in child protection offices limit the time a supervisor can spend on oversight of removal decisions.

Third, some judges simply accept the social worker's petition as presented and do not make judgments about its sufficiency. I know of very few cases in which the appellate court has reversed the trial court findings on the grounds that the petition was inadequate to declare that the child needed the jurisdiction of the court.⁶

2. *Id.* at 258-61.

3. See generally DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001); LEONARD EDWARDS, REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE 25-34 (2d ed. 2022).

4. Gupta-Kagan, *supra* note 1, at 273-76.

5. One has only to think of the lawsuits that follow the death of a foster child to know how social workers can end up in protracted legal proceedings about their alleged failings. Also, data demonstrates that many children are returned to parents shortly after removal, thus confirming that the removal decision was likely mistaken.

6. See EDWARDS, *supra* note 3; see also *id.* at 155-157.

THE REASONABLE EFFORTS MANDATE

Professor Gupta-Kagan writes at some length about the lack of definition of reasonable efforts.⁷ This lack of a definition has been identified as a problem in child welfare law for decades.⁸ Many states have either statutory definitions or appellate cases that define the term.⁹ However, none of these gives more than a general definition that essentially states that what constitutes reasonable efforts depends on the circumstances of the situation the social worker discovers.

I believe that reasonable efforts is a term of art and involves judgment by the social worker. Nevertheless, I believe the author’s suggestions for clarifying existing definitions will result in somewhat more careful decision-making by social workers when they are considering removing children from parental care. Of course, a definition will not be uniform unless it is adopted by Congress. In the absence of a federal standard, we will be left with the current situation – many different definitions and some states without definitions at all.

Additionally, the author points out that the reasonable efforts mandate has been ineffective in holding the child protection agency accountable for delivering on its legal obligations. Via the reasonable efforts mandate, federal law requires that the agency provide support and services to families to prevent the removal of children from their families and to facilitate reunification of children should they be removed from parental care because of abuse or neglect.¹⁰ To receive federal funding for child welfare expenses, each state must submit a plan outlining the services the state will provide families to accomplish these goals. In those plans, states promise to provide specific services and, in return, the federal government provides funding to accomplish those goals.

I agree with the author that the reasonable efforts requirement has not been effective in many states, but the national picture is more complex. Social workers and judges in some states take the reasonable efforts mandate seriously.¹¹ One need only look at appellate case law in some states to see that the issue is tried in juvenile courts, that trial judges’ orders are appealed, and that appellate courts often reverse trial court determinations that the agency has satisfied the reasonable efforts requirement. The states of California, Connecticut, New York, and Oregon stand out, while many other state appellate courts have issued opinions that acknowledge the duty of social workers to provide support and services to parents after their child has been removed.¹²

7. Gupta-Kagan, *supra* note 1, at 282-85.

8. See EDWARDS, *supra* note 3, at 21-22.

9. *Id.* at 519-28.

10. Gupta-Kagan, *supra* note 1, at 253-57.

11. See EDWARDS, *supra* note 3, at 155-517 (surveying statutes and case law on reasonable efforts state-by-state, along with commentary).

12. The reader can learn more about appellate court activity in each jurisdiction by referring to EDWARDS, *supra* note 3, at 155-517. Appendix A provides information on all 51 jurisdictions, their dependency laws, appellate decisions dealing with reasonable efforts, as well as comments from attorneys and judges.

In other states, there is no appellate case law on the reasonable efforts issue, indicating that the issue is either not tried in juvenile court proceedings or that attorneys are not practically able to challenge trial court decisions, likely because large caseloads and inadequate financial resources limit the ability of attorneys to challenge judicial findings of reasonable efforts.¹³ Moreover, in some states the trial court does not appoint attorneys in juvenile dependency cases.¹⁴ In such jurisdictions reasonable efforts determinations will not be appealed because, absent legal assistance, parents do not understand the complexities of the reasonable efforts law and are practically unable to challenge judicial determinations.

Several strategies have proven effective for increasing attention to the reasonable efforts findings in court proceedings. First, judicial and attorney trainings have started to highlight the importance of these findings.¹⁵ Additionally, several appellate decisions have informed practitioners and trial judges that the issue should be addressed in dependency/termination cases.¹⁶ As Montana Supreme Court Justice Ingrid Gustafson wrote to me regarding her opinion discussing the reasonable efforts requirement in the case of *In re R.J.F.*¹⁷

This decision certainly brought the issue to the forefront of judges' minds – many have related to me they are considerably more focused on this issue than they have been in the past. I believe this decision has also impacted the agency's handling of cases with more emphasis on considering the specific needs of the parent and family rather than merely requiring the same laundry list of tasks for every parent.¹⁸

One related positive development has been judges' increasing use of a strategy that I refer to as The Art of the No Reasonable Efforts finding.¹⁹ If a particular service has not been provided for parents during the reunification period or if the social worker has failed to provide support for a parent, judges can suggest that they would be inclined to make a "no reasonable efforts" finding but then continue the case for a few weeks to give the agency an opportunity to provide the service or the needed support. This almost always results in compliance with the judge's suggestion.

However, I agree with the author that much more must be done to strengthen judicial oversight of agency practices. Judges must be more assertive about

13. *Id.* at 99-100.

14. *Id.* at 94-95.

15. The National Council of Juvenile and Family Court Judges holds judicial trainings on a regular basis. I personally have delivered more than 600 individual trainings on reasonable efforts over the past 40 years.

16. *See In re Care and Protection of Walt*, 84 N.E.3d 803 (Mass. 2017); *In re Ta.L.*, 149 A.3d 1060 (D.C. 2016).

17. 443 P.3d 387 (Mont. 2019).

18. Email from Ingrid Gustafson, Assoc. Just., Mont. Sup. Ct., to author (May 20, 2020) (on file with author).

19. EDWARDS, *supra* note 3, at 123-24; *see also id.* at 124 n.620 (providing a partial list of judges across the country who use this strategy).

holding agencies accountable for their failures to support the family. Too many judges are fearful of making findings that will cost an agency federal dollars.²⁰ But just as judges suppress evidence in criminal cases, juvenile court judges must be prepared to find that the agency did not provide reasonable efforts when the facts reveal their failure to do so. Such a finding will change practice throughout the agency.

Additionally, the reasonable efforts requirement should be expanded to address other critical issues in the dependency process.²¹ Agencies should be accountable for their failure to find non-custodial fathers and relatives, for supporting relative caretakers, and for failures to provide timely services. They should also be held accountable when a court finds that a critical service that should be available in the community is not being provided.²²

PERMANENCY

The overarching goals of child welfare proceedings are to keep children safe and have them reach timely permanency. The Adoption and Safe Families Act of 1997 added a third mandate to social service agencies – find a permanent home for the child.²³ There are four permanent plans recognized in the law: return to parents, adoption, guardianship, and relative placement. The legal preference is to return the child to parental care.²⁴

Professor Gupta-Kagan opines that guardianship is the preferred permanent plan for children removed from parental care.²⁵ I disagree. Guardianship is temporary, dissolves by operation of law when the youth reaches 18 years of age,²⁶ and does not provide a right of inheritance for the child. If the guardian is a stranger, the placement is only slightly better than foster care.²⁷

Data indicate that relative placement is the best option for the child and the family. Numerous studies show that placement with relatives or kin creates the best long-term results for the child.²⁸ Recent research supports these earlier

20. *Id.* at 109-11.

21. Leonard Edwards, *Reasonable Efforts: Let's Raise the Bar*, 42 *GUARDIAN* 21, 21-24 (2020).

22. Leonard Edwards, *Overcoming Barriers to Making Reasonable Efforts Findings*, A.B.A. (Jan. 29, 2019), <https://perma.cc/65LN-JB24>.

23. Adoption and Safe Families Act of 1997 § 101, 42 U.S.C. § 671; *see also* EDWARDS, *supra* note 3, at 6-9.

24. *See* EDWARDS, *supra* note 3, at 6-9.

25. Gupta-Kagan, *supra* note 1, at 249-50.

26. Legal guardians have custody of children and the authority to make decisions concerning the protection, education, care, discipline of the child. Legal guardianship is assigned by a court, such as the family or juvenile court according to state laws.

27. Leonard Edwards, *Reasonable Efforts and the Adoption and Safe Families Act: A Judicial Perspective*, 1 *FAM. INTEGRITY & JUST. WORKS Q.* 94, 101-102 (2022).

28. *See* Leonard Edwards, *The Urgency of Placing Children with Relatives*, 42 *GUARDIAN* 1, 3-4 (2020).

studies' conclusions.²⁹ In one study of over 500,000 families, some of which included children placed in out-of-home care, researchers examined the effects of health, socioeconomic circumstances, family life, and living arrangements over several decades. The study concluded that when a child must be removed from parental care, placement with relatives or kin results in the best outcomes and congregate care the poorest, with foster care outcomes somewhere in the middle.³⁰ If a child must be removed from parental care, the placement that benefits the child the most should be sought.³¹ Other commentators support these conclusions.³²

RELATIVE PLACEMENT IN OTHER CIRCUMSTANCES

As discussed above, relative placement is the preferable permanent plan if reunification is not possible. It is also the preferable temporary placement while the parents are working on the requirements of the case plan.³³ One key benefit of relative placement is that it provides increased opportunities for visitation. In my work with state judiciaries, attorneys and judges report that visitation is the most litigated issue in juvenile court proceedings, and attorneys frequently complain that they are dissatisfied with the visitation opportunities offered by social service agencies. Indeed, visitation is inadequate in most jurisdictions across the country.³⁴ Once or twice a week for an hour seems to be the national average, and visits with siblings and other relatives are even less adequate.³⁵ With relative placement, visits with parents, siblings, and other relatives can be dramatically increased and can take place in a more comfortable environment. Non-custodial fathers and their families often become the placement.³⁶

The preference for relative placement is understandable. Americans have shown that if they need help with their children, they prefer to turn to relatives without involving the state. While there are somewhere between 400,000 and 500,000 children under the jurisdiction of the child welfare system, more than

29. AMANDA SACKER WITH EMILY MURRAY, REBECCA LACEY & BARBARA MAUGHAN, *THE LIFELONG HEALTH AND WELLBEING TRAJECTORIES OF PEOPLE WHO HAVE BEEN IN CARE: FINDINGS FROM THE LOOKED-AFTER CHILDREN GROWN UP PROJECT (2021)*; *see also* NUFFIELD FOUND., *THE LIFELONG HEALTH AND WELL-BEING OF CARE LEAVERS (2021)*.

30. SACKER ET AL., *supra* note 29, at 49.

31. *See supra* text accompanying note 29.

32. *See, e.g.*, GENERATIONS UNITED, *STATE OF GRANDFAMILIES 2020: FACING A PANDEMIC: GRANDFAMILIES LIVING TOGETHER DURING COVID-19 AND THRIVING BEYOND 1 (2020)*.

33. Stranger care has a high likelihood of increasing the trauma experienced by a child removed from parental care. *See* Edwards, *supra* note 27.

34. EDWARDS, *supra* note 3, at 49-56.

35. *Id.*

36. Statistics from Los Angeles indicate that 19% of placements are with non-custodial parents, usually fathers. Email from Michael Nash, Exec. Dir., L.A. Cnty. Off. of Child Prot., to author (May 4, 2022) (on file with author).

2,500,000 children reside with relatives without state involvement.³⁷ It took Congress over 100 years to realize that relative placement was preferable to foster and congregate care when it passed the Fostering Connections Act in 2009,³⁸ but now that the law is clear, efforts should be intensified to identify, engage, and work with relatives.

Problematically, fifteen years after the Fostering Connections Act, data shows that agencies still place more children in foster care than with relatives. The national average for placing children with relatives is only 32%, while the foster care placement rate is over 40%.³⁹ But this need not be the case. Several model counties have demonstrated that they can place children with relatives in over 80% of their dependency cases, often in a day or two.⁴⁰ These stunning results provide hope for efforts to improve the lives of children caught in the child welfare system, especially because quick placement greatly benefits children. Children are traumatized by removal even from abusive and neglectful parents, and shortening the time children must live in stranger care will reduce that trauma.

CONCLUSION

I appreciate the policy recommendations that Professor Gupta-Kagan makes, but I believe that additional emphasis must be placed on the suggestions I have made. My approach to child welfare starts with strengthening the family. It includes providing services before there is a crisis as well as when a crisis arises, including affordable housing, access to food and medical services, quality education, and access to services for substance abuse, domestic violence, and mental health disorders.

Child protection and social service agencies should focus on families as the preferred choice for placement, whether temporarily or permanently. These families should receive the same support and services that foster families currently receive. Simply dropping children off with grandparents or other relatives without adequate support (as is practiced in some states) is bad social policy and should be abandoned.

Additionally, the legal system should continue to provide oversight of social service agencies, but courts should follow the law and enforce the reasonable efforts mandate as current law requires. The courts should expand the reasonable efforts concept to include the search and engagement of relatives also as required by federal law.⁴¹

37. *Children in Kinship Care in the United States*, ANNIE E. CASEY FOUND. KIDS COUNT DATA CTR., <https://perma.cc/GGV6-6CZV> (archived Oct. 9, 2022).

38. Fostering Connections to Success and Increasing Adoptions Act of 2008 § 101, 42 U.S.C. § 671.

39. Leonard Edwards, *Relative Placement: The Best Answer for Our Foster Care System*, 69 JUV. & FAM. CT. J. 55, 59 (2018).

40. *See id.* at 60.

41. Edwards, *supra* note 21.

Ultimately, federal and state governments should recognize that the children and families who come before juvenile dependency courts need substantial support. Our child welfare system is just 41 years old and its laws and practice do not adequately reflect this understanding. Instead, legislation has focused on an unproductive child saving attitude, which underlies the Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997. These initiatives were based on a belief that we could find better homes for abused and neglected children.⁴² Because of this focus, federal legislators have passed laws modifying agency and court responses to child abuse and neglect without adequately enabling communities to provide services to rehabilitate families brought into the child welfare system.

The child welfare system has grown slowly and in its present state needs to provide even more effective services in a timelier fashion. This expansion and improvement in services will only become realized with substantial financial support. To the extent that the child welfare system reflects poverty in our society, the challenges are significant.⁴³ But the goal is worthwhile, and the expansion will improve results for children and families throughout the country.

Professor Gupta-Kagan's article contains some valuable suggestions, but their impact could be strengthened by considering the comments I have made.

42. Edwards, *supra* note 27.

43. EDWARDS, *supra* note 3, at 47-49.