Reasonable Efforts: A Judicial Perspective

By Judge Leonard Edwards (ret.)

Introduction

The term "reasonable efforts" challenges and confounds many in our juvenile dependency and family courts across the country.[1] 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 many 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.[2] 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 (abuse and neglect) cases, and attorneys and judges should pay special attention to them to ensure that the agency is doing its job, to make positive changes in the child protection system, and, most importantly, to improve outcomes for children and families.

> ***"Reasonable efforts" findings are the most powerful tools juvenile court judges have at their disposal in abuse and neglect cases.***

Legislative History

When the United States Congress held hearings on the status of foster children and other child welfare issues 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.[3] In the years that followed, 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 to preserve the family and then failed to provide parents with adequate services in their efforts to reunify parents with their children.[4] 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.[5] 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.[6] Congress also learned from substantial research conducted in the 1960s and 1970s which indicated that with provision of effective social services, a greater number of families could be preserved, and many

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[1] 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 discussion.

[2] "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. 298; (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. However, it is encouraging to read the comments of so many attorneys in the state commentaries that they are raising the reasonable efforts issue regularly.

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[3] CAPTA was originally enacted in P.L. 93-247 and was amended and reauthorized on December 20, 2010, by the CAPTA Reauthorization Act of 2010 (P.L. 111-320). It has been amended several times including P.L. 95-266 (1978), P.L. 98-457 (1984), P.L. 99-401 (1986), P.L. 100-294 (1988), P.L. 101-126 (1989), P.L. 101-226 (1989), P.L. 102-295 (1992), P.L. 102-586 (1992), P.L. 103-171 (1993), P.L 103-352 (1994), P.L. 104-235 (1996), P.L 108-36 (2003), P.L. 111-320 (2010), P.L. 114-22 (2015), P.L. 114-198 (2016), and P.L. 115-271 (2018). Most recently it was amended in February of 2018 (P.L 115-424).

[4] "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.

[5] 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").

[6] 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, at 423 (1983); Bartholet, E., *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative*, Beacon Press, Boston (1999); Woodhouse, B., "Horton Looks at ALI Principles," *J.L.O. & Fam. Stud.*, 4: 151 (2002).

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children could be safely reunited with their biological parents.[7]

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 (the AACWA):[8]

> [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.[9]

Under AACWA, the nation's juvenile and family courts became responsible for overseeing children's services agencies at critical points in the juvenile dependency process.

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 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—the AACWA—the nation's juvenile and family courts became responsible for oversight of the children's services agencies at critical points in the juvenile dependency process.[10] First, the 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 removals.[11] 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."[12] The AACWA also required the courts to determine whether the agency provided adequate services to assist parents in their efforts to reunify with their children who had been removed from their custody.[13]

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.[14] In the resulting legislation, The Adoption and Safe Family Act (the ASFA),[15] Congress declared that the health and safety of the child are paramount.[16] 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.[17]

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7 Fanshel, David, & Shinn, Eugene, *Children in Foster Care: A Longitudinal Investigation*, New York, 1975, Child Welfare Information Services; Stein, T., Gambrill, E.D., & 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., & Casciato, J., (1978) *A Follow-up Study of the Oregon Project: A Summary*, Portland: Regional Research Institute for Human Services, Portland State University.

8 P.L. 96-272; 42 U.S.C. §670 *etseq.* 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.

9 123 *Cong. Rec.*S22684 (daily ed. August 3, 1979).

10 In different states, either the juvenile or family court has the responsibility for presiding over juvenile dependency cases. Juvenile court will be used in this discussion.

11 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).

12 42 U.S.C. §472(a)(2)(A)(ii); 45 CFR 1356.21(b)(1) (2006).

13 42 U.S.C. §671(a)(15)(B)(ii) (2006).

14 "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. 10577, 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.

15 P.L. 105-77 (1997).

16 42 U.S.C. §629.

17 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. & Renne, J., ABA Center on Children and the Law, Washington, D.C. (2002); (hereinafter "*Making It Permanent.*")

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In each of these three situations (at the time of removal, during reunification and after a permanent plan had been set), 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 to accomplish the legislative goals.

Important financial implications for the local children's services agency and for the state's Department of Social Services 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. If the no reasonable efforts finding occurs at the shelter care hearing, the agency can never receive federal funding for that case. If the no reasonable efforts finding occurs during the reunification period or during the search for a permanent placement, the agency will not receive federal funding for that case until the court makes a subsequent reasonable efforts finding. As a result of a no reasonable efforts finding, local or state governments must pay for any such services.[18]

Subsequent to the passage of the AACWA and the ASFA, the federal government has continued to enact child welfare legislation. These legislative enactments include the following:

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

Preventing Sex Trafficking and Strengthening Families Act of 2014 (P.L 113-183)

Comprehensive Addiction and Recovery Act of 2016 (CARA)—(P.L. 114-198)

Family First Prevention Services Act of 2018 (H.R. 253)—part of Division E in the Bipartisan Budget Act of 2018 (H.R. 1892 - Public Law No: 115-123)

Victims of Child Abuse Act Reauthorization Act of 2018 (P.L. 115-424)

The Federal Law and Child Welfare

The federal law (the AACWA) 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.

In the new federal statutory scheme, found in part in Titles IV-B and IV-E, the federal government grants money to each state which supports children placed in foster care.[19] Usually the funds provided require that the state match this grant, typically by 25 to 35 percent.[20] 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.[21] The plan resembles a contract—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.

The federal government uses several methods to ensure that 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 ("CFSRs") 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.[22] As of 2020, there have been three rounds of the CFSRs.

Case plans are integral to the reasonable efforts requirement.

The government conducts all three of these reviews of agency practice by reviewing agency and court records. The United States Supreme Court ruled in 1992 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."[23] 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.

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

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[18] If the reasonable efforts to prevent removal finding is not made, the agency will not ever receive federal funding for that child. 45 CFR §1356,21(b)(1); If either of the reasonable efforts findings regarding services to facilitate reunification or finalizing a permanent plan are 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).

[19] 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. The Family First Prevention Act (the FFPA) significantly modified the federal funding for families.

[20] 42 U.S.C. §674.

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

[22] http://www.acf.hhs.gov/programs/cb/monitoring; https://www.childwelfare.gov/management/reform/cfsr/.

[23] *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., & Alexander, C., "The Impact of *Suter vArtist M.*, on Foster Care Policy," *Social Work*, Vol. 40, No. 4, July, 1995 at pp 543-548.

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In its plan, a state agency specifies what services it will provide families when there has been an intervention, but ultimately, the judge in court proceedings determines whether the services offered in a particular case were appropriate and reasonable.

prevent children's removal from parental custody and to reunite the child and the parents after removal.[24] The plan must also include a provision that the social service agency will make foster care maintenance payments in accordance with §672 of the federal law.[25] The law mandates that the state fulfill numerous other conditions in order to receive federal funding.[26]

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.[27] 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 parents' home, consistent with the best interests and special needs of the child.[28] The case plan is an integral element of the reasonable efforts requirement.[29] 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.[30] 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."[31]

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.[32] 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.[33] 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 to prevent removal and to reunite the family.[34]

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.[35] These factors include:

– the dangers to the child and the family problems that precipitated those dangers;
– whether the appropriate services for the family were available and timely;
– whether the services the agency provided relate specifically to the family's problems and needs;
– whether case managers diligently arranged services for the family; and,
– the results of the services provided.[36]

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.[37] In its state plan, the

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[24] 42 U.S.C. § 671(a). Title IV-B provides a small amount of federal funding to the states for services to preserve families. Title IV-B funds are limited whereas Title IV-E funding is not limited.

[25] *Id.*

[26] *Id.*

[27] The agency decision to remove must be based on danger of immediate harm to the child. See Lund, T.R. & Renne, J., *Child Safety: A Guide for Judges and Attorneys*, ABA. 2009.

[28] 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; In the Interest of S.F., No. 00-0137, 2000 WL 961591 (Iowa Ct. App. July 12, 2000).

[29] 45 C.F.R. § 1356.21(c)(3); § 1356.21(g)(4).

[30] 45 CFR § 1356.21(b)(2).

[31] 45 C.F.R. § 1356.21 (g)(4).

[32] 45 C.F.R. §1356.21(b).

[33] 45 C.F.R. §1356(d).

[34] 42 U.S.C. sections 671(a)(15), 672(a)(1).

[35] 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.

[36] *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.

[37] 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. 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. §1357.15(e)(2); "Guide to the Adoption Assistance Act," *op. cit.*, footnote 9 at pp. 591-2.

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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 appropriate and reasonable. The judge must also decide whether the services addressed the problems that brought the child to the attention of the agency.[38]

The judge may also conclude that the child or family needs a service that is not available in the community. Indeed, the relationship between the judge and the director of social services is important when considering services that the judge believes should be available to families.[39]

In order to implement effectively the reasonable efforts requirement, the agency must document its efforts to fulfill its statutory duty.[40] Documentation enables the agency to demonstrate to federal reviewers the quality of their work as well as provide the court sufficient information for the judge to make well-informed reasonable efforts decisions.

Following passage of the AACWA and the 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.[41] 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.[42] Ultimately, the courts and federal audits determine whether a particular agency is, in fact, following these recommended policies and guidelines.

Congress selected juvenile and family courts to oversee operation of the nation's foster care system—the courts did not volunteer for this responsibility.

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.[43] 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.[44] 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.

States quickly adopted statutes requiring the courts to make the findings outlined in the federal legislation. For example, California Welfare and Institutions Code § 319(f)(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.[45]

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.[46] 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.[47] The finding may not be made after that period using the *nunc pro tunc* (now for then) procedure.

According to the federal law and conforming state legislation, the court must

[38] A few 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. Reporter 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 4 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.

[39] Edwards, L., "Working with Your Director of Children's Services," Winter 2014, *The Bench*, the official magazine of the California Judges Association, pp. 17-18. A copy is available at judgeleonard-edwards.com; Refer to section IX-C in "Reasonable Efforts: A Judicial Perspective 2nd Edition" for further discussion of the relationship between the judge and the Director of Social Services.

[40] 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").

[41] Ratterman, *id.*, at p. 3.

[42] 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; and see *In re C.K.*, 165 A.3d 935, 2017 Pa. Super. LEXIS 405, 2017 PA Super 175.

[43] "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.

[44] 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 juvenile justice (delinquency) workload. That is, the same amount of judicial time is necessary to address juvenile dependency cases as the court expends in juvenile justice cases. There are many more attorneys necessary to represent parties in a dependency case than in a juvenile justice case.

[45] California Welfare and Institutions Code §319(f)(1), West, 2020.

[46] 45 CFR § 1356.21(b) and (c).

[47] 45 CFR §§ 1356.32(d) & 1356(b)(1))(i).

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make reasonable efforts findings in at least three different stages of a juvenile dependency ease.[48] First, at the judicial hearing that leads to removal of a child (usually called a shelter care hearing),[49] 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.[50] This results in a judicial finding that the agency 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, contact law enforcement, secure a restraining order, 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 issuer.[51]

Federal law places responsibility for monitoring social service compliance when removing a child from parental care, providing services to families where a child has been removed, and finalizing a permanent plan for the child squarely on the nation's juvenile and family courts.

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.[52] 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.[53] 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.[54]

As a result of the 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.[55] 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." There are very few appellate cases addressing this issue.

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 that 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.[56] 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

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48 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), Page's Ohio Revised Code Annotated, and Cal. Welfare & Inst. Code §§306, 319, 361, 366.21(e), 366.26(f), 366.22(a), West, 2013.

49 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. I 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 in the text of the warrant.

50 42 U.S.C. §671 (a)(15)(B)(i); 45 C.F.R. §1356.21(c) & (d). The reasonable efforts to prevent removal finding can be waived when certain emergency circumstances arise. A waiver should occur only when service 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). However, an emergency removal does not end the agency's mandate to continue to provide services to prevent removal during the first 60days.

51 Edwards, L., "Domestic Violence and Reasonable Efforts at the Detention Hearing," *The Bench*, Winter, 2013. Found at Judgeleonardedwards.com in the publications blog. 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).

52 42 U.S.C. §671(a)(15)(B)(ii).

53 42 U.S.C. §671; 45 C.F.R. §1356.21(d).

54 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, WL 6016468—unpublished, a copy is available from the author).

55 42 U.S.C. §671(a)(15)(C); 45 CFP §1356.21(b)(2); and see Edwards, L., "Timely Adoptions: An Ignored Issue in Child Welfare, *The Guardian*, a publication of the National Association of Counsel for Children (NACC), Vol. 42 No. 02, Summer 2020.

56 42 U.S.C. §§671(a)(15), 672(a)(1).

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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.[57]

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.[58] Usually the parent claims that the agency has not provided reasonable efforts to reunify the parent with the child. Most appellate case law which addresses the adequacy of social service actions arises from termination of parental rights hearings.[59]

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 a preadoptive home, and the parents have not been caretakers for months or 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.[60] The case law indicates that given this situation, the pressure on the judge and the appellate courts is to affirm the termination of parental rights decision. One conclusion 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 for the court to focus on reasonable efforts.

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, a division of Health and Human Services, 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.[61] 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.[62] 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 into 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. However, a failure to provide reasonable efforts to prevent removal will result in no federal monies for the life of the case.[63] This is a logical penalty since reasonable efforts may have prevented the removal at the outset of proceedings.

> ***Reasonable efforts should be litigated early.***

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 percent 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.[64] Numerous other states have been penalized for failing to make the required federal findings.[65]

The Impact of Reasonable Efforts/ No Reasonable Efforts Finding

The reasonable efforts finding by the court often creates a ripple effect through the child protection system. Social workers in the field and social service administrators 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 provide additional or improved services 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 with obtaining a restraining order, or finding

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[57] 42 U.S.C. §§ 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.

[58] For example, N.Y. Soc. Serv. Law § 384-b(2)(f) (McKinney Sup. 1986).

[59] The vast majority of cases involving reasonable efforts reviewed by the appellate courts have arisen from termination of parental rights hearings.

[60] Watson, A., *op. cit.*, footnote 5 at p. 2.

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

[62] 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), (c)(4) (1997).

[63] 45 CFR §1356.21(b) *Reasonable efforts.*

[64] 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").

[65] 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.

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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.

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.[66] This failure has led to confusion and criticism.[67] One commentator blames the failure of reunification efforts during the first 17 years of the AACWA on the lack of a definition.[68] Several states have enacted legislation defining reasonable efforts.[69] State definitions typically restate the federal language with the addition of more general terms. 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...."[70]

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 appellate 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.[71]

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 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."[72] 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.[73] The agency provided the parents food and housing, parenting classes, referrals to community service programs and psychological counselors, and arranged visits. The mother, however, left a 6-month residential treatment program after one 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.[74]

The child welfare process might benefit from a carefully drawn statute defining reasonable efforts such as that enacted by the Minnesota legislature. However, even that definition is too general. Contrary to the claims of many critics of child welfare practice, the inadequate definition of reasonable efforts is not the principal reason for its ineffectiveness in many states. Reasonable efforts become very effective when trial judges examine the issue throughout the life of a juvenile dependency case, particularly early in the proceedings. After creation of a realistic case plan, 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. ■

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66 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).

67 Crossley, W., *op. cit.*, footnote 4 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, R., *The Book of David: How Preserving Families Can Cost Children's Lives, op. cit.*, footnote 18 at p. 94; Bufkin, M., *op. cit.*, footnote 4 at p. 370; Hannett, M.J., "Lessening the Sting of ASFA: The Rehabilitation-Relapse Dilemma Brought About by Drug Addiction and Termination of Parental Rights,"45 *Fam. Ct. Rev.* 524 (2007).

68 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 4 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.

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

70 Mo. Ann. Stat. §211.183(2), Vernon Supp. 2013.

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

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

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

74 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 did the mother fail to attend?" Was there a problem with transportation? Were the services free of charge? See Shotton, *op. cit.*, footnote 4 at p. 9.