Challenges to Effective Use of the Reasonable Efforts Finding

By Judge Leonard Edwards (ret.)

Editor's Note: With passage of the Child Welfare Act of 1980, Congress selected juvenile and family courts to oversee operation of the nation's foster care system. The courts did not volunteer for this responsibility, but it is a vital one, and a duty judges take seriously. "Reasonable efforts" findings are among the most powerful tools juvenile court judges have at their disposal in abuse and neglect cases. This is the second in a two-part series by Judge Leonard Edwards, whose book "Reasonable Efforts: A Judicial Perspective 2nd Edition," published by the National Council of Juvenile and Family Court Judges, is widely considered the authority on the subject. In our Summer 2025 issue, Judge Edwards traced the legislative history and basic outlines of the court's 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. In this article, Judge Edwards addresses the challenges faced by attorneys representing parents and children and by judges presiding over these cases.

I: Attorneys Representing Parents and Children

Many state courts neglect to litigate the reasonable efforts/no reasonable findings early in the case. The majority of state courts litigate the reasonable efforts issue only 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 article discusses the role of parents' and children's attorneys and GALs in raising the reasonable efforts issue in court.

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.[1]

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. 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. No parent will understand the reasonable efforts requirement of the law, nor the legal obligations a social worker must follow. 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.[2] In addition, attorneys can develop a positive relationship with parents and help them navigate the complex juvenile dependency system. Attorneys are also critical for supporting the parent, encouraging the parent to participate in services, and reporting to the court any problems the parent encounters during the reunification process. A number of barriers, however, prevent many attorneys from fulfilling these goals.

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.[3] As a result, some states and local courts have been reluctant to spend taxpayer money for attorneys to represent parents in child protection proceedings. A national survey identified inadequate compensation as a barrier to effective representation of parents.[4] 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 ensued, and the state supreme court held the statute unconstitutional, but because appointment is discretionary in that state, some judges continue not to appoint

[1] Advisory Committee Comment to Section 24 of the California Standards of Judicial Administration (now Standards of Judicial Administration Standard 5.40, California Rules of Court (found in Edwards, *Reasonable Efforts: A Judicial Perspective 2nd Edition*, Appendix J).

[2] *Making Reasonable Efforts: A Permanent Home for Every Child*, Youth Law Center, San Francisco, 2000, at p. 11.

[3] *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.

[4] *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.

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counsel for parents in these cases.[5] To respond to this situation, in 2017 the Wisconsin legislature passed legislation (2017 Act 253) creating a five-county parent representation pilot project (for years 2018-21) through the Office of the State Public Defender and also modified statutes to clarify conformance with *Joni B.* standards for appointment of counsel for parents at the discretion of the court.[6]

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.[7] In some states, the court appoints attorneys for indigent parents only in termination of parental rights hearings.[8] 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.[9] Twelve state court representatives indicated that representation (assuming appointment) is not adequate.[10] 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.[11] In Texas, the court appoints most parent attorneys at or after the full adversary hearing,[12] thus making it difficult, if not impossible, for the reasonable efforts issue to be raised at that hearing.[13]

Judges should appoint a separate attorney for each parent and for the child in every child welfare case, and as soon as possible—preferably simultaneously with the filing of a petition and not at or after the shelter care hearing.

Most states appoint an attorney or guardian *ad litem* (GAL) for the child.[14] This appointment is mandated by the Child Abuse and Prevention and Treatment Act (CAPTA) originally enacted in 1974.[15] This legislation requires states to have provisions that ensure the GAL receives training appropriate to the role.[16] CAPTA also provides federal funding to states in support of services for prevention, assessment, investigation, prosecution, and treatment in child abuse cases. The author's review of appellate cases indicates that attorneys and guardians *ad litem* for children rarely, if ever, appeal trial court decisions relating to reasonable efforts.

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 what the facts of the case are and 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.[17]

As a result of these demands, judges should appoint a separate attorney for each parent and for the child in every child welfare case.[18] The court should appoint these attorneys as soon as possible, preferably simultaneously with the filing of a petition and not at or after

[5] *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 138 at p. 23.

[6] Wis. Stat. Ann. §48.355(2c) - A court's consideration of reasonable efforts shall include, but not be limited to: "A comprehensive assessment of the family's situation; Financial assistance to the family, if applicable; Provision of services, including in-home support and intensive treatment services, community support services, or specialized services for family members with special needs."

[7] For example, in Texas most parent attorneys are appointed after the critical Full Adversary Hearing. "Legal Representation Study, *op. cit.*, footnote 129 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., "Representation" *op. cit.*, footnote 138.

[8] Colorado, Indiana, and Wisconsin. See Dobbin, S., Gatowski, S. & 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.

[9] "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.

[10] *Id.*, at p. 18.

[11] "Legal Representation Study" *op. cit.*, footnote 129 at pp. 10-14.

[12] Tex. Fam. Code section 262.201.

[13] "Legal Representation Study," *op. cit.*, footnote 129 at pp. 20-23.

[14] 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 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 of an advocate only at the termination of the parental rights stage, if at all." Brooks, S. & Roberts, D., "Reflections," *op. cit.*, footnote 188 at p.1043.

[15] P.L. 93-247 section 106(b)(2)(B)(xiii). CAPTA was amended several times, most recently in 2018 (P.L. 115-424).

[16] *Id.*

[17] There are many more responsibilities. These listed above are only a summary. See *Making Reasonable Efforts, op. cit.*, footnote 2 at pp. 11-30.

[18] Edwards, L., "Improving Juvenile Dependency Courts: Twenty-Three Steps," *Juvenile and Family Court Journal*, Vol. 48, No. 4 (1997), 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.

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the shelter care hearing.[19] At the time of appointment, the agency should provide the attorneys with a copy of the petition and supporting documents. Only with early appointment and discovery of relevant reports 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.[20] 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, but see VIII-G *infra* for a discussion of best practices.[21]

Some state court judges wait to appoint attorneys for parents at the shelter care hearing,[22] the first hearing after removal of the child. At this hearing or within 60 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 at the shelter care hearing. 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. Moreover, if the court appoints attorneys only for a termination of rights hearing, the attorney will be ineffective at that hearing for a number of reasons. The attorney will not have a relationship with the parents, will not have been able to counsel them through the long dependency process, and will not have been able to challenge court rulings about the adequacy of services until it is too late.

Attorneys should approach the presiding juvenile court judge concerning early appointment. Several juvenile courts automatically appoint an attorney for the parents simultaneously with the filing of a petition on behalf of their child. This is a best practice as the attorney can be prepared for the shelter care hearing. (For guidance on this procedure, contact the author or the NCJFCJ.) Alternatively, the unprepared attorney should request a continuance at the hearing.[23]

Attorneys Lack Training and Are Poorly Paid

Juvenile dependency court attorneys receive inadequate compensation and have low status in the legal system.[24] With a low level of remuneration, it is difficult to attract and retain talented attorneys.[25] 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."[26]

> 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.[27]

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 the reasonable

[19] 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 138; *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, half appoint counsel for parents at the adjudicatory hearing, and half at the termination hearing." "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 at pp. 25-26.

[20] Ruiz, R., & Trowbridge, S., "National Survey of Child Welfare Legal Representation Models," National Child Welfare Resource Center on Legal and Judicial Issues, ABA Center on Children in the Law, Washington, D.C., 2009, at pp. 5, 17.

[21] *Id.*

[22] "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" *op. cit.* footnote 12, at pp. 25-26.

[23] *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," *Juvenile and Family Court Journal*, Vol. 63, Spring. 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.

[24] 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 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. & Roberts, D., "Family Court Reform: Social Justice and Family Court Reform," 40 *Fam. Ct. Rev.* 453, 454 (Oct. 2002) at p. 1039.

[25] "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.

[26] Edwards, L., "Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment," *op. cit.*, footnote 23, 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.

[27] Dobbin, S., Gatowski, S. & Springgate, M., "Child Abuse and Neglect: A National Summary of State Statutes," *Juvenile and Family Court Journal*, Vol. 48, Nov, 1997, 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.

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efforts issue.[28] A national study of parents' attorneys and guardians *ad litem* revealed that training was the area most needing improvement.[29] National experts state that before accepting representation in a juvenile dependency case, attorneys should be familiar with the following:

> The causes and available treatment for child abuse and neglect.
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> The local child welfare agency's procedures for complying with reasonable efforts requirements.
>
> The child welfare and family preservation services available in the community and the problems they are designed to address.
>
> 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. Local experts who can provide attorneys with consultation on the reasonableness and appropriateness of efforts made to maintain the child in the home.[30]

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.

Additionally, there is high turnover in the juvenile dependency attorney ranks. In my trainings around the country, I am surprised to find so many new attorneys (and judicial officers) learning about reasonable efforts for the first time. Trainings must be conducted regularly for attorneys to be initiated into the law and best practices in dependency court particularly with regards to the reasonable efforts issues.

Attorneys/GALs 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.[31] Several attorneys responded to the author that the judge they appeared before indicated that he/she was not interested in the reasonable efforts issue and discouraged the attorney from raising it. This is most disappointing; however, the attorneys should not give up and in an appropriate case, consider making a record and then taking an appeal.

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.

Appellate court decisions reflect that the attorneys and guardians *ad litem* for children rarely, if ever, raise the reasonable efforts issue.[32] It is likely that appointed attorneys/GALs do not believe that their role encompasses the adequacy and timeliness of services to parents as they may perceive these issues involve only the parents and the children's services agency.[33]

This attitude reflects a misunderstanding about the role of these attorneys/GALs and how they can promote the interests of their clients. Children do better at home or with relatives than in foster or congregate care. Most children would like to remain in parental care, especially if parental behavior improved. The attorney/GAL should be a strong advocate for preventing removal from parental care, for the agency to provide effective services for the parents, and for relative placement.

Attorney Attitudes – "What Good Will It Do?"

For a number of reasons, attorneys do not believe that raising the reasonable efforts issue will benefit their client. They recognize that the child welfare agency stands to lose federal dollars if the court either fails to make a reasonable efforts finding or makes a no reasonable efforts finding, and they 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.

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. They believe the reasonable efforts issue will not result in a finding their client will understand or appreciate. Further, they believe that because the reasonable efforts issue bears little or no relevance to the outcome of the hearing, raising it can frustrate the judicial officer by raising an additional issue.

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[28] "In the majority of states, attorneys for parents currently receive only some or no additional training." Dobbin et al. *op. cit.,* footnote 27, at p. 33; "Child Abuse and Neglect Cases: Examining State Statutes in Everyday Practice," *op. cit.*, footnote 12 at p. 18.

[29] "The number one area identified as needing the most improvement with regard to representation was training of attorneys and guardians *ad litem* (GAL's)." Dobbin, *id.*, at p. 15.

[30] *Making Reasonable Efforts, op. cit.*, footnote 2 at pp. 12-14.

[31] *Id.*, at p. 39.

[32] The book this article is adapted from, *Reasonable Efforts: A Judicial Perspective 2nd Edition*, 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.

[33] 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. However, the NACC seems to fail to acknowledge the benefits to their client should the child successfully reunite with the parent.

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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 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 more judges are receptive to reasonable efforts arguments.[34]

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 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 accomplishing several major goals of the child welfare system.[35] Additionally, when children reach permanency sooner, savings accrue to the child welfare agency, the courts, and service providers.[36]

Finally, the attorney could suggest to the judge to make a no reasonable efforts finding, but then ask the judge to continue the matter for 30 days. Perhaps the problem identified can be resolved during that period of time.

Best Practices

Attorneys for Parents and Children Should Be Appointed Simultaneously with the Filing of a Petition

The time has passed when we can accept that parents come to the juvenile dependency court with no legal representation. Dependency cases are the most serious civil matters in our court system. Children and families are separated, disrupted, and traumatized. Parents may lose permanent custody of their children in proceedings that they do not understand. They do not understand court language or legal concepts such as petition, contrary to the best interests, and reasonable efforts. They should be automatically appointed legal counsel at the outset of the case and through all legal proceedings until the case is concluded.[37]

Dependency cases are the most serious civil matters in our court system.

The State Should Pay for Attorney Representation of Parents and Children

The overwhelming majority of parents appearing in dependency proceedings are indigent and unable to afford counsel. Without state support, they will not be represented in court. Already a number of states have recognized these facts and provide counsel for parents at no cost to them.[38] Should a parent have sufficient resources to secure counsel, the state would be relieved of this responsibility, but there should be a presumption that they are indigent until after the shelter care hearing.[39]

The Impact of High Quality Legal Representation

As a result of federal funding changes, some economic support for children's and parents' counsel is now available in every state. Research indicates that this high-quality legal representation has resulted in improvements in legal services for dependency court clients. The increased funding has improved attorney recruitment and retention, multidisciplinary legal practice, caseloads, workload per case, and case delays.[40] High quality legal representation has resulted in significantly improved case outcomes including more family reunifications and a shorter time to permanency.[41]

Attorneys Should Have Support Staff to Assist Them

Attorneys are more effective and parents and children are better served when the attorney has support staff to assist in the legal representation. This has been proven in several jurisdictions. Washington State uses an interdisciplinary law office approach to parent representation in abuse and neglect cases. The law office employs social workers and parent advocates in addition to attorneys to represent and support parents, all paid for by the state.

In Santa Clara County, California, the Dependency Advocacy Center Director, AnnaLisa Chung, reports that the model has significantly raised the quality of

[34] See the comments of the judges in California, New Jersey, Oregon, and New York in Edwards, *Reasonable Efforts: A Judicial Perspective 2nd Edition*, Appendix A.

[35] 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, M., "The Judge's Role in Ensuring Quality Representation for Parents," *Child Law Practice: Online*, Vol. 31, No. 3, ABA (2014) at p. 2.

[36] Courtney, M. *et al., 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).

[37] See Judicial Council of California, *California Blue Ribbon Commission on Children in Foster Care*, San Francisco, 2012; available at https://www.courts.ca.gov/brc.htm at pp 17-18; See "Commission on Parental Legal Representation: Interim Report to Chief Judge DiFiore, State of New York, Unified Court System, February 2 019; Edwards, L., "Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment," *Juvenile and Family Court Journal*, Vol. 63, No. 2, Spring, 2012, at pp. 21-37; See also Edwards, L., "Ignoring Reasonable Efforts: How Courts Fail to Promote Prevention," *The Chronicle of Social Change*, December, 2018, and Edwards, L., "Improving Juvenile Dependency Courts: 23 Steps," *Juvenile and Family Court Journal*, Vol. 48, No. 4, 1997, at p. 7.

[38] *Id.*, at p. 16.

[39] *Id.*

[40] ABA Center on Children and the Law, *Effects of Funding Changes on Legal Representation Quality in California Dependency Cases*, Washington, D.C., 2018.

[41] *Id.*

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representation of parents. She describes the work of her office as follows:

> The role of parent's counsel in juvenile dependency proceedings is nuanced and complex. In the course of providing zealous advocacy to every client, we are often asked to interchangeably wear the hats of counselor, mediator, advisor, cheerleader, and guide. With parental rights and the irreparable harm caused by family separation at stake, trauma is universally present in all of these cases and traditional legal advocacy is a woefully inadequate response. The recent acceptance of interdisciplinary parent representation as a best practice in child welfare proceedings is both welcome and long overdue.
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> In 2008, Dependency Advocacy Center (DAC) became one of the first family defense organizations in California to successfully utilize an interdisciplinary team of attorneys, mentor parents, and social workers to represent parents in Santa Clara County. The shift from a model of traditional legal advocacy to one that embraced a more client-centered, holistic approach was immediately felt by the attorneys who had been practicing in the county without interdisciplinary support for the previous decade.
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> Social workers communicate using a different language. With compassion and clinical acumen, family defense social workers are often able to deftly navigate challenges that arise between clients and service providers, caregivers, or county social workers. While attorneys work to resolve outstanding legal issues and extend the umbrella of attorney-client privilege to the entire team, social workers offer other crucial support to parents such as independent clinical assessments, assistance with safety planning, linkages to community resources, and emotional support in the form of hope, encouragement, and an understanding ear. In Santa Clara County, attorneys are not invited to attend Child and Family Team (CFT) meetings where important decisions, such as where a child will be placed, are being made. DAC social workers have been particularly effective at helping to elevate a client's voice during these meetings and thereby improve the integrity of the joint decision-making process. In some cases, the county social worker affirmatively requests that DAC send one of its social workers to participate in a family's CFT, when they believe that it will be beneficial to one of the parents.
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> In a recent example during the COVID-19 pandemic, a county social worker was recommending removal of a young child from his mother who had a history of substance use disorder. Before trial, the DAC social worker conducted her own thorough assessment and wrote a literature review about the efficacy of integrated substance use programs (those that allow clients to have their children in their care while completing treatment). She found that they contributed to positive outcomes such as decreased parental stress, reductions in substance use behavior/ relapse, improved confidence in parenting skills, increased motivation to complete programs, and increased parent-child bonding. After the literature review was shared with opposing counsel, the county social worker changed her position and recommended that the child remain with his mother in a local residential treatment program. The matter resolved without a trial and, more importantly, without the unnecessary removal of the child from his mother.[42]

Using a similar law office model, a New York study reported that children spent 118 fewer days on average in foster care during the four years following the abuse or neglect case filing. Moreover, this model also achieved overall permanency, reunification, and guardianship more quickly. The multi-year study of child welfare cases in New York City courts evaluated whether the kind of legal representation provided to parents can make a difference in case outcomes.[43] The key findings from this study included children spending less time in foster care, returning to parental care earlier, remaining just as safe when returned, and being placed with relatives more frequently than children represented by solo practitioners working alone without such assistance. Along with some additional benefits to the children and their families, the Santa Clara and New York experiences demonstrated that the multidisciplinary model of representation is a best practice that better serves children and their families as well as saves money for the local jurisdiction in reduced foster care costs.

Whether juvenile courts will adopt the recommendations outlined here will in great part rely upon the actions of the judges hearing these cases as well as the local legal community.

II. Judges

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.[44] 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 families must wait for each service). The court also should know the experts the agency uses to make difficult decisions such as 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 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

[42] Communication to the author from AnnaLisa Chung, Director, Dependency Advocacy Center.

[43] https://www.sciencedirect.com/science/article/pii/S019074091930088X?via%3Dihub Guggenheim, M., Jacobs, S., "Providing Parents with Multi-Disciplinary Representation Significantly Reduces Children's Time in Foster Care," ABA, June 4, 2019; for a review of other jurisdictions using the support staff model see Gerber, L., Pang, Y., Ross, T., Guggenheim, M., Pecora, P., "Effects of an interdisciplinary approach to parental representation in child welfare," *Children and Youth Services Review,* 102 (2019) 42-55.

[44] *Making Reasonable Efforts, op. cit.,* footnote 2 at pp. 34-35; Edwards, L., "Improving Juvenile Dependency Courts: 23 Steps," *Juvenile and Family Court Journal*, Vol. 48, No. 4, 1997, at p. 8.

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that assignment for extended periods of time and both organize and participate in regular trainings.[45]

Judge Douglas McNish took this approach on the island of Maui, Hawai'i. He discovered a list of services the social service agency claimed to have to assist families at risk of losing custody of their children. It may well have been the services the state promised the federal government in order to receive Title IV-E funding. He was able to make meaningful reasonable efforts findings by questioning the social workers about their actions and measuring their responses against the available services on the island. It worked! When the judge made a no reasonable efforts finding because the promised service was not available, the agency was able to provide that service in the future. Because the judge knew about available services, the judge was able to ask relevant questions and make meaningful reasonable efforts findings. Judges should ask their local social services/child protection agencies for a list of services they provide to prevent removal of children from parental care and rehabilitate families. This should not be difficult as the department would simply be describing how social workers perform their daily work. Attorneys should also receive a copy of that list.

Some judges may complain that they are experts in the law but not in social services. However, the law is clear that judges must make decisions about social service conduct in their communities, and informed decisions require some judicial expertise. Judges in the criminal courts are also asked to judge police conduct in search and seizure and confession cases. Judges do not simply agree with what the prosecuting attorney requests. The role of the judge in overseeing actions by the executive branch of government is not a foreign idea. It is embedded in the Constitution and our system of laws. Judges must acknowledge their role and be prepared to monitor the actions of the social services agency.

Judicial Knowledge of Available Services

A more challenging 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 the community.[46] 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.[47] 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. It is also important that the judge remain in a juvenile court assignment for several years in order to build up a storehouse of information about local services.

Often a new social worker will not be aware of community services that 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. One resource the judge should know is the location and meeting times of AA and NA meetings in the community. The author used to pass out such a list to accompany a case plan.

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 should disclose what the court knows and provide the parties an opportunity to respond to the court's information.[48] Following that procedure, the parties and any appellate court will know the basis of the court's ruling.

Working with the Director of Social Services

The Judge-Director of Children's Services Relationship

As presiding judge of your juvenile court, it is critical to develop and maintain a working relationship with the director of children's services in your county. Both the juvenile court and the children's services agency have critical roles in the child welfare system, and their relationship will have an impact on the success of efforts to protect children and rehabilitate families.

By fostering a working relationship with the director of children's services, the juvenile court judge will be able to establish the coordination and cooperation necessary for the two branches of government to work well together.

The Department of children's services is the designated community agency for protecting children and for delivering preventive and supportive services to families in crisis. The director manages the child protection system including emergency response, dependent intake and investigation, case supervision, permanency planning, and adoptions. The juvenile court provides the legal

[45] Edwards, L., "Judicial Rotation-One Judge-One Family," *The Bench*, the official magazine of the California Judges Association, Spring, 2008; *Enhanced Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases*, National Council of Juvenile and Family Court Judges, Reno, NV, (1995) at p. 34-36.

[46] *Making Reasonable Efforts, op. cit.*, footnote 2 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.

[47] California Standard of Judicial Administration 5.40(e)(2).

[48] Edwards, L., *The Role of the Juvenile Court Judge: Practice & Ethics*, California Judges Association, The Rutter Group, (2012) at 77-81 (A copy of this book is available from the California Judges Association).

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framework for state intervention into family life. The juvenile court must review agency decisions to remove children from parental care, provide services to parents, and ensure that children reach timely permanency by finalizing a permanent plan. In order to make well-informed decisions about these issues, the judge must know how the agency operates and what resources the agency has at its disposal.[49]

> The judge must determine whether the children's services agency legally removed a child from parental care. To make that determination, the judge must decide whether the agency has presented a *prima facie* case showing that the child comes within the provisions of the state code specifying the grounds for court involvement.
>
> At different hearings throughout the case, the judge must determine whether the agency has provided reasonable efforts to prevent removal of the child, whether the agency has provided reasonable efforts to rehabilitate the parents so that the child can be safely returned to them, and whether the agency has provided reasonable efforts to provide a permanent home for the child.[50] All of these decisions must be made within a strict time frame, one that is sensitive to the needs of a young child.[51]

In order to make intelligent, informed decisions about these and related issues regarding actions by the children's services agency, the judge needs to understand how the agency operates, what services it provides to families, as well as what services are available in the local community. The California Judicial Council recognized this when it wrote Standard of Judicial Administration 5.40(e):

> Among their many responsibilities:
>
> Judges of the juvenile court...are encouraged to
>
> (3) Exercise their authority by statute or rule to review, order and enforce the delivery of specific services and treatment for at-risk children and their families.
>
> (9) Encourage the development of community services and resources to assist homeless, truant, runaway, and incorrigible children.[52]

Without knowledge of the services available in the community, the judge will have a difficult time evaluating agency efforts to prevent removal and provide rehabilitative services to parents.

Other matters involving the court and agency relationship impact court operations. These include the content and length of social reports, the timely delivery of reports to the court and all parties, court communications to the agency about problems that arise in the context of court hearings, procedures for the approval of the use of psychotropic medications on foster children, *ex parte* requests for judicial authorization for certain agency actions, the collection of data regarding children under court jurisdiction, and communications with juvenile courts in other counties and states. Coordination between the court and agency will improve the efficiency of these and other activities that impact both. The judge should also be aware of steps taken by the agency to complete an adoption. Since the court must make a finding that the agency has made reasonable efforts to finalize a permanent plan, the judge must know the details of the adoption process in order to determine whether the agency has taken reasonable and timely steps.[53]

Developing a Relationship

The judge should meet with the director at least monthly. In smaller jurisdictions this may be quarterly. There need not be an agenda and the meeting should only take as long as necessary. However, new legislation, directives from the state department of social services, comparisons of data collected by the court and agency, management of day-to-day operations, court implementation of interim hearings, new court projects (such as the development of a family drug treatment court or dependency mediation), and new agency projects (such as family finding, family group conferencing and wrap-around services) require frequent communication between the judge and director. For example, years ago I discovered that the court and the agency were counting cases differently; moreover, each calculated a different number of children currently in the system. After several meetings, the director and I developed a plan for resolving the differences.

In addition to these one-on-one meetings with the director, the juvenile court presiding judge should convene court systems meetings on a regular basis.[54] These meetings should involve representatives from all significant participants in the juvenile dependency system—attorneys, social service leaders, the CASA program, court administration, mediators, family drug treatment court staff, court security, and service providers. The topics can include improving court operations, the development of alternative dispute resolution programs, changes to the court calendar, the prompt delivery of court documents to all parties, visitation protocols, concerns about security, consideration of best practices from other jurisdictions, and much more. After all, the judge and the director are both trying to improve outcomes for children and families. While there may be some disagreements on specific issues, each should recognize their common goals.

Judicial ethics require that at any of these meetings individual cases not be discussed as such discussions would be

[49] "The relationship between the responsibility of the agency and the actions of the court makes a close working arrangement crucial to the effectiveness of the system." Ratterman, D., Dodson, D., & Hardin, M., "Reasonable Efforts to Prevent Foster Placement: A Guide to Implementation," 2nd Ed., ABA, National Legal Resource Center for Child Advocacy and Protection, Washington, D.C., 1987; Edwards, L., "Improving Juvenile Dependency Courts: 23 Steps," *Juvenile and Family Court Journal*, Vol. 48, No. 4, 1997, at p. 9.

[50] 42 U.S.C. sections 472(a)(2)(A)(ii) and 671(a)(15)(B)(ii) and 45 CFR 1356.21(c) and (b)(1) (2006).

[51] Edwards, L., "Achieving Timely Permanency in Child Protection Courts: The Importance of Frontloading the Court Process," *Juvenile and Family Court Journal*, Vol. 58, No. 2, Spring 2007, at pp. 1-37.

[52] Standard 5.40(e) is incorporated into the statutory scheme in Welfare and Institutions Code section 202(d).

[53] P.L. 105-77 (1997); 42 U.S.C. (a)(2)(A)(ii), 45 C.F.R. 11356.21(b)(2) (2006). 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, and refer to the discussion at VII-C.

[54] 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) pp. 1-28 at 18-19.

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improper *ex parte* communications.[55] The judge should remind the director and all participants in the court system's meeting about the prohibition of discussing individual cases. Of course, administrative issues can be discussed as that is the purpose of the meetings—improving the administration of justice.

Trainings

Multidisciplinary trainings provide an excellent forum for the court and its participants to learn about available services and particularly about agency operations. Trainings should take place every month or quarterly for one or two hours. All participants in the child protection system should be invited. The topics can include presentations by the agency on how the agency operates, new case law, new statutes, new programs instituted by the agency, new court procedures, and services available in the community. In many jurisdictions, the administrative office of the courts and the court improvement director can provide guest speakers on occasion. In addition, attorneys can receive continuing education credits for these trainings.

Conclusion

The juvenile court judge and the director of social services need to have a working relationship. As long-time Los Angeles Presiding Juvenile Court Judge Michael Nash (now retired) said:

> The child protection system cannot work effectively unless the court and the agency work together. This requires communication and a mutual understanding of each other's roles within the framework of the system and *vis a vis* each other. This generally can't happen unless the agency director and the juvenile court presiding judge work together to make it happen.[56]

Judges and attorneys cannot intelligently discuss reasonable efforts issues without a solid working knowledge of the child protection system starting from the agency's decision to remove a child and including the decision to decide upon a permanent placement for the child. By fostering a working relationship with the director of children's services, the juvenile court judge will be able to establish the coordination and cooperation necessary for the two branches of government to work well together. By convening regular meetings and trainings of all participants in the juvenile dependency system, the judge will be developing cooperation among these participants as well as educating them about the juvenile court and child welfare processes. These steps will lead to improvements throughout the juvenile dependency system and will improve outcomes for children and families.

Best practice is for judges to raise the reasonable efforts issue even if the attorneys neglect to mention it.

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? Apparently not.

Several studies indicate judges' reluctance to address the reasonable efforts and an inclination to rubber stamp agency requests for a reasonable efforts finding.[57] 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.[58] 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."[59] 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.[60] 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.[61] In the Summary of National Trends (section XI of *Reasonable Efforts: A Judicial Perspective 2nd Edition*, by this author), a number of national experts comment that the reasonable efforts issues are not addressed in most of our nation's juvenile courts. These and other

[55] California Code of Judicial Conduct, Canon 3B(7); Edwards, L., *The Role of the Juvenile Court Judge: Practice and Ethics*, CJA, The Rutter Group, 2012, at pp. 261-265.

[56] Email from Judge Michael Nash, September 22, 2013. A copy can be obtained from the author. This goal is supported by Judicial Council of California, *California Blue Ribbon Commission on Children in Foster Care*, San Francisco, 2012; available at https://www.courts.ca.gov/brc.htm, which states, "Because the courts share responsibility with child welfare agencies and other partners for the well-being of children in foster care, the courts, child welfare and other partnering agencies must work together to prioritize the needs of children and families in each system and remove barriers that keep stakeholders from working together effectively." At p. 20.

[57] 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," (1996) 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, A., "Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later," *Cal. W. L. Rev.*, Vol. 26, 1989-1990, at pp. 227-228.

[58] Special Child Welfare Advisory Panel, "Advisory Report on Front Line and Supervisory Practice," Annie E. Casey Foundation, March 9, 2000, pp. 47-48.

[59] *Id.*

[60] 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.

[61] 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 57 at p. 236.

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reports led one commentator to conclude that the reasonable efforts requirement simply does not work.[62]

The best practice is for judges to raise the issue even if the attorneys neglect to mention it.[63] 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 principal reason Congress passed the AACWA and the ASFA.

Some judges are reluctant to ask questions. They prefer to leave it up to the attorneys to raise issues, ask questions of witnesses, and then argue their points to the court. They believe they are "neutral" arbiters, not participants in the fact-finding process. That may be true in other types of judicial proceedings, but not in juvenile dependency court. As Judge Richard FitzGerald said, we are "enquiring magistrates" with a responsibility to find the truth about what happened and what should be done. We need to ask questions because we must make the judicial findings and record them in the record.[64] In particular, dependency judges must inquire and determine paternity, possible Indian heritage, and whether reasonable or active efforts were provided by the social service agency.

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 testimony[65] or reports, but cannot consist of allegations contained in a petition.[66] Judicial inquiry 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.[67] 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 in these jurisdictions spent additional time at the shelter care hearing and asked specific questions from a benchcard.[68] The results were stunning. This study demonstrated that an enhanced shelter care hearing, including representation for all parties and judicial questioning, resulted in more children being returned to a parent at the first hearing, more family and relative placements, and fewer children placed in non-relative foster homes.[69] It also demonstrated that judges can facilitate better results for families by asking questions.[70]

Should Judges Make a No Reasonable Efforts Finding? Yes!

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 to prevent the removal. Any party should have the right to present testimony on the issue of reasonable efforts. After the parties submit their evidence, the court may wish to ask questions as indicated above. Then 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. So too, a service that would be too costly, such as a 24-hour live-in social worker, would not be considered reasonable. The court forms developed in several states have proven useful for the parties and the court to read what the agency has done to prevent removal or facilitate reunification.

Additionally, a number of benchcards have been developed that can assist the judge's analysis of whether reasonable efforts have been provided by the agency. A benchcard provides the judge with a short series of questions and issues the judge can quickly review during a court case. The best examples include the Courts Catalyzing Change cards which

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

[63] "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, pp. 211-228, at 224.

[64] Edwards, L., "Should Judges Ask Questions? The Enquiring Magistrate," Fall 2016, *The Bench*, the official magazine of the California Judges Association; available at judgeleonardedwards.com.

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

[66] 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. 10.

[67] "Right from the Start: The CCC Preliminary Protective Hearing Benchcard Study Report: Testing a Tool for Judicial Decision Making," NCJFCJ (2011).

[68] 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 a rises. The NCJFCJ has produced benchcards for several types of hearings and issues. Examples of benchcards used regarding reasonable efforts findings are contained in Edwards, *Reasonable Efforts: A Judicial Perspective 2nd Edition*, Appendix H.

[69] Miller, N., & Maze, C., "Right From The Start: The CCC Preliminary Protective Hearing Benchcard: A Tool for Judicial Decision Making," NCJFCJ, Reno, 2011, at p. 3.

[70] Edwards, L., "Should Judges Ask Questions? The Enquiring Magistrate," Fall 2016, *The Bench*, the official magazine of the California Judges Association.

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contain questions the judge should ask at the shelter care hearing. Minnesota has also developed a benchcard to explain what questions a judge should ask at that hearing.

Should Judges Make a No Reasonable Efforts Finding?

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 legislation give 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. However, 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. (Refer to Section X-J for a full explanation of this strategy.)
+ 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.[71]

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.[72] Judges must overcome that reluctance to ensure that the agency is doing its job, and by using the techniques described in Section X-J of *Reasonable Efforts, 2nd Edition*, the court may persuade the agency to make changes without the loss of federal dollars. ■

[71] *Making Reasonable Efforts, op. cit.*, footnote 2 at p. 33.

[72] Chapter X of Edwards, *Reasonable Efforts: A Judicial Perspective 2nd Edition*, 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.