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## The Effective Use of the Reasonable Efforts Finding: CHALLENGES FACING ATTORNEYS



Article by Judge Leonard Edwards (ret.)

A common misunderstanding about juvenile dependency cases is that the juvenile court is focusing only on child safety and parental misconduct. Those are the reasons that bring the matter before the court, but those are not the only issues the court must by law decide. The court also must determine if the social services agency has done its work assisting the family as required by federal and state statutes.<sup>1</sup> Indeed, one of the law's primary purposes is to ensure that the agency has provided services to prevent removal and, if removal is made, to facilitate reunification of the child with the parents. The law requires the agency to detail what services it has provided to these ends, and the court is required to determine whether those services

are adequate and reasonable. In statutes and case law these are referred to as "reasonable efforts" and "no reasonable efforts" findings.

According to appellate court decisions many state juvenile courts do not address the reasonable efforts/no reasonable findings on a regular basis.<sup>2</sup> Some state courts only discuss the reasonable efforts issue in termination of parental rights proceedings years after the child was removed from parental care. The reasons for this inattention include a number of policy and practice issues. This article will discuss the role of attorneys in the reasonable efforts determination and the barriers that prevent attorneys from participating effectively in juvenile courts.

### A. THE IMPORTANCE OF ATTORNEYS

*[T]he quality of justice in the juvenile court is in large part dependent upon the quality of the attorneys who appear on behalf of the different parties before the court.<sup>3</sup>*

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 particularly at the time of removal make their participation important for their clients and for the court. Judges do not work in a vacuum. The juvenile court bases its decisions on information it receives from the parties. If the only information the court reviews comes from the social services agency, it will be difficult for the judge to do anything but make orders based on the agency's recommendations. Unrepresented parents do not have the experience to address the legal issues that the court →

1. P.L. 96-272; 42 U.S.C. §§ 472(a)(2)(A) and 670 et seq.; 45 CFR 1356.21.

2. "The systems for ensuring reasonable efforts earlier in a case have never been fully effective." (Crossley, Will, "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 (2002-2003), at p. 298; and see Edwards, L., *Reasonable Efforts: A Judicial Perspective*, (2014) available on line at [judgeleonardedwards.com](http://judgeleonardedwards.com) where Appendix A reviews the appellate decisions in all states regarding reasonable efforts. Several state appellate courts have not addressed the issue while others have only a few cases.

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

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must decide. Only with well-prepared lawyers representing parents and children will the court receive information from multiple perspectives thus giving the judge alternative recommendations to consider. In addition, studies demonstrate that legal representation for all parties increases participant's perceptions of fairness, increases party engagement in case planning, services, and court hearings, increases visitation and parenting time, expedites permanency, and saves costs to the state government due to reductions of time children and youth spend in care.<sup>4</sup>

The reasonable efforts requirement provides attorneys for both children and parents a powerful tool for enforcing their clients' rights to effective and timely 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.<sup>5</sup> However, a number of barriers prevent many attorneys from fulfilling these goals.

### B. PARENTS AND CHILDREN ARE OFTEN UNREPRESENTED

The United States Supreme Court ruled that parents in child welfare proceedings do not have a constitutional right to counsel, even when termination of their parental rights is at stake.<sup>6</sup>

4. U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau, Log No: ACYF-CB-IM-17-02 (2017) at p.2.
5. NCJFCJ, Child Welfare League of America, Youth Law Center, National Center for Youth Law, "Making Reasonable Efforts: Steps for Keeping Families Together," Published by the Youth Law Center, San Francisco, 1988.
6. *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

Thus, in some states parents are unrepresented by counsel in child protection proceedings, are appointed only in some cases, or are appointed only for certain hearings in the juvenile dependency process.<sup>7</sup> In some states, the court appoints attorneys for indigent parents only in termination of parental rights hearings.<sup>8</sup> This haphazard approach to attorney participation is unfair and counter-productive. Dependency law involves the custody and possible permanent loss of one's children – matters, I would argue, that are more serious than incarceration. Unrepresented parents do not understand the legal system. They are likely intimidated appearing before a judge and are unlikely to engage the court with questions. In particular, they are unable to address complex issues such as whether the agency has provided adequate services to prevent removal of the child from parental care. The legal system anticipates that such issues will be raised by counsel. If parents are unrepresented, it is unlikely that the reasonable efforts issue and other issues will be discussed in court.

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 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).

7. In Texas, for example, most parent attorneys are appointed after the critical Full Adversary Hearing. "Legal Representation Study: Assessment of Appointed Representation in Texas Child-Protection Proceedings," Children's Commission, Supreme Court of Texas, Permanent Judicial Commission For Children, Youth & Families, Austin, 2011, at pp 10-14.
8. For example, Indiana, and Wisconsin. See Dobbin, S., Gatowski, S. and Springgate, M., "Child Abuse and Neglect: A National Summary of State Statutes," *Juvenile and Family Court Journal*, vol. 48, Nov, 1997, at pp. 43-54, at p. 49.

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In a national survey, professionals in each state were asked what the primary areas in need of improvement in their juvenile dependency courts.<sup>9</sup> Twelve state court representatives indicated that representation (assuming appointment) is not adequate.<sup>10</sup> A Texas study of legal representation concluded that in that state there were insufficient numbers of attorneys, insufficient training, parents' attorneys were appointed late in the case, attorney compensation was inadequate, and the quality of representation was uneven.<sup>11</sup> The report continued that the juvenile court appoints most parent attorneys after the Full Adversary Hearing,<sup>12</sup> thus making it difficult, if not impossible, for the reasonable efforts issue to be raised.<sup>13</sup>

Most but not all states appoint an attorney or guardian *ad litem* (GAL) for the child.<sup>14</sup> A few state →

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. Supreme Court of Texas, Permanent Judicial Commission for Children, Youth and Families, "Legal Representation Study: Assessment of Appointed Representation in Texas Child-Protection Proceedings," Austin, 2011, at pp 10-14.
12. Tex. Fam. Code section 262.201
13. "Legal Representation Study," *op.cit.*, footnote 7 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; However, in Tennessee, "[m]ost children receive the benefit often advocate only at the termination of the parental rights stage, if at all." Brooks, S. "Essay: Reflections on the

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juvenile courts appoint an attorney or guardian ad litem in some but not all cases. Appointment is mandated for all children in the dependency system by the Child Abuse Prevention and Treatment Act (CAPTA) originally enacted in 1974.<sup>45</sup> This legislation requires states to have legal provisions that ensure that the GAL receives training appropriate to the role.<sup>46</sup> CAPTA also provides federal funding to states in support of services for prevention, assessment, investigation, prosecution and treatment in child abuse cases. However, appellate case law indicates that attorneys and GALs for children rarely, if ever, appeal trial court decisions relating to reasonable efforts. Apparently, many attorneys and GALs believe that the reasonable efforts issue is only relevant for parents. Of course, if the child is unrepresented, no legal action will be taken on his or her behalf.

### C. ATTORNEYS ARE APPOINTED TOO LATE AND ARE NOT PREPARED

Attorneys should be appointed for each parent and the child in every child welfare case.<sup>47</sup> The court should appoint these attorneys as soon as possible, preferably simultaneously with the filing of a petition.<sup>48</sup> The agency should also

at the same time provide the appointed attorneys with a copy of the petition and supporting documents. Attorneys have significant responsibilities in child welfare cases. They must interview the client (parent or child) and family members, interview the social worker, investigate the facts of the case, and review reports including the social worker's file, all in an effort to determine whether the child can safely be returned to the family or relatives immediately. Additionally, the attorney must investigate to determine whether the agency exercised reasonable efforts to prevent removal of the child.<sup>19</sup> Many states appoint attorneys for parents at the shelter care hearing.<sup>20</sup> This is the first hearing after a child has been removed. At this hearing the juvenile court must make a finding whether the agency provided reasonable efforts to prevent removal of the child. If an attorney is appointed at that hearing, he or she will be unprepared to argue the reasonable services issue. Appellate court decisions reflect that the "reasonable efforts to prevent removal" issue rarely tried in the trial courts.<sup>21</sup>

In several courts around the country, attorneys are notified and appointed simultaneously with the filing of the petition on behalf of the child, usually at least a day before the shelter care hearing. They are provided the documents supporting the petition (police and social worker reports). This is a best practice as it gives the attorneys an opportunity to meet their client and prepare for the hearing.<sup>22</sup> Parent and children's attorneys should approach the presiding juvenile court judge concerning early appointment and explain that some juvenile courts around the country have instituted an early appointment procedure.<sup>23</sup> If that is not possible, another strategy for the attorney appointed at the hearing is to request an adjournment.<sup>24</sup>

### D. PARENT AND CHILDREN'S ATTORNEYS ARE POORLY PAID AND LACK TRAINING

Attorneys working in juvenile dependency court are poorly paid and have low status in the legal system.<sup>25</sup> Often representing parents in juvenile →

issue of reasonable efforts to prevent removal. See Edwards, L., *Reasonable Efforts: A Judicial Response*, Appendix A. A copy of the book is available on the website: [judgeleonardedwards.com](http://judgeleonardedwards.com).

22. Some may argue that the parent may not be indigent and thus not deserving of an attorney at state expense. Some attorneys and judges have addressed this issue effectively. First, most parents in the juvenile dependency court are indigent. Second, should the parent not be indigent, the appointed attorney would withdraw at the initial hearing and not be reimbursed.
23. Contact the author for further information about those jurisdictions and for contact information. [judgeleonardedwards@gmail.com](mailto:judgeleonardedwards@gmail.com).
24. *Smith v Edmiston*, 431 F. Supp. 941 (W.E.Tenn.1977).
25. "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 simultane-

Tennessee Court Improvement Program for Juvenile Dependency Cases," *Tennessee Law Review*, Vol. 65, 1998, pp 1031-1047, at p. 1043.

15. 42 U.S.C. 5106a (b)(2)(B)(xiii). CAPTA was amended several times. Most recently, certain provisions of the act were amended on May 29, 2015, by the Justice for Victims of Trafficking Act of 2015 (P.L. 114-22) and on July 22, 2016, by the Comprehensive Addiction and Recovery Act of 2016 (P.L. 114-198).
16. *Id.*
17. 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; Children's Bureau *op. cit.*, footnote 4 at pp. 6-7.
18. 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," *Juvenile and Family Court Journal*, Vol. 63, No. 2, Spring, 2012, at pp. 21-37; *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.

19. There are still more responsibilities. These listed above are only a summary. See "Making Reasonable Efforts," *op. cit.*, footnote 5 at pp. 11-30.
20. "The practice in 27 states is to appoint counsel for parents at the shelter care or emergency hearing... Of the remaining 10 states, half appoint counsel for parents at the adjudicatory hearing, and half at the termination hearing." *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice*, Technical Assistance Bulletin, NCFJFCJ, Reno, Vol. II, no. 2, 1998, at pp 25-26.
21. In an exhaustive study of appellate decisions involving the reasonable efforts issue, it was revealed that less than 1 percent of appeals involved the

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dependency court is the first job for a new attorney.<sup>26</sup> After a year or two many are eager to move on to another legal field where the pay is better and where they are not engaged in “social work.”<sup>27</sup>

A national study of parents’ attorneys and GALs revealed that training was the area needing the most improvement.<sup>28</sup>

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.<sup>29</sup>

Even if the parents are represented by counsel at the shelter care hearing, many attorneys lack training to alert them the needs of their client, community resources, and to the reasonable efforts issue.<sup>30</sup> National experts state that before accepting representation in a juvenile dependency case, attorneys should be familiar with the following:

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

ously lowered the cap on attorney’s fees from \$1,000 to \$500. See Brooks, S., *op. cit.*, footnote 14 at p. 1039.

26. This is bad practice. Only experienced attorneys should appear in these cases. The stakes are too high for inexperienced attorneys to represent parties in child welfare proceedings.

27. 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.

28. “The number one area identified as needing the most improvement with regard to representation was training of attorneys and guardians *ad litem* (GALs).” *Child Abuse and Neglect Cases, op. cit.*, footnote 9 at p. 15.

29. Dobbin, et.al., *op. cit.*, footnote 8 at p. 49.

30. “In the majority of states, attorneys for parents currently receive only some or no additional training.” *Id.*, at p.33.

3. The child welfare and family preservation services available in the community and the problems they are designed to address.
4. 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.
5. Local experts who can provide attorneys with consultation on the reasonableness and appropriateness of efforts made to maintain the child in the home.<sup>31</sup>

Early appointment, long-term assignments to juvenile dependency court, and adequate training are critical if attorneys are to have an impact on the court’s decisions.

### E. ATTORNEYS DO NOT UNDERSTAND THEIR ROLE

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 investigation in order to understand the dynamics of a family? The same national study indicated 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.<sup>32</sup>

31. *Making Reasonable Efforts, op. cit.*, footnote 5 at pp. 20-23.

32. *Id.*, at p. 39.

### F. CHILDREN’S ATTORNEYS AND GAL’S FOR CHILDREN DO NOT RAISE THE ISSUE

Court decisions reflect that the children’s attorneys and GALs rarely, if ever, raise the reasonable efforts issue. It is likely that appointed attorneys/ GALs do not believe that their role encompasses the adequacy and timeliness of services to parents. Very likely they perceive these issues as between the parents and the children’s services agency.

Two experienced California attorneys who represent parents and children in juvenile dependency cases offer several reasons why the reasonable efforts issue is not raised by attorneys early in the case. They say that return of the child is usually not an option so that the reasonable efforts issue will not result in something their client will understand. Further they state that the issue can upset the judicial officer as the issue has little or nothing to do with the outcome of the hearing. They also fear that the jurisdiction will lose federal funding when the judge makes a “no reasonable efforts” finding. Finally, they state that since there is no definition of reasonable efforts, attorneys do not participate in trainings that educate them about how they should approach the issue.<sup>33</sup>

Hopefully, the arguments in this article will encourage attorneys to take a more pro-active role in dependency cases and address the reasonable efforts issue early and often. →

33. A full statement of their reasons is found on page 153 of Edwards, L., *Reasonable Efforts: A Judicial Perspective, op. cit.*, footnote 2.

## G. ATTORNEY ATTITUDES — “WHAT GOOD WILL IT DO?”

Attorneys recognize that the child welfare agency will lose federal dollars should the court either fail to make a “reasonable efforts” finding or make a “no reasonable efforts” finding. However, attorneys often do not 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.

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 parent-child visitation is inadequate and makes a “no reasonable efforts” finding, the agency will receive a clear message that visitation is important and will adjust agency policy and practice in the case before the court and in other cases they are managing. As a result the “no reasonable efforts” finding will have an impact on agency practice and will improve services for all families, not just the one before the court.

Perhaps the attorney could suggest that the judge make a “no reasonable efforts” finding but suspend that finding for some time until the next hearing. If the agency complies with providing the particular service, the judge can strike the finding. This approach results in the parents or child receiving the needed service and no loss of federal

dollars for the agency. It has been called “The Art of the No Reasonable Efforts” approach.<sup>34</sup> Many judges have used this practice to spur changes in social worker practice and agency policies.

## CONCLUSION

Reasonable efforts decisions are at the heart of the federal law addressing how the state should intervene on behalf of abused and neglected children. A well-prepared and trained attorney can make a significant difference in juvenile dependency proceedings. By insisting that the agency produce evidence of efforts to prevent removal and, if a child has been removed, to facilitate reunification the attorney will ensure that children are not unnecessarily removed from their families and, if removed, that they are safely reunited, if possible. ■

34. See Edwards, L., “Improving Implementation of the Federal Adoption Assistance and Child Welfare Act of 1980,” *Juvenile and Family Court Journal*, 1994, Vol. 45, No. 3, at pp.19-20.