

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

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

### **A. THE IMPORTANCE OF ATTORNEYS**

[T]he quality of justice in the juvenile court is in large part dependent upon the quality of the attorneys who appear on behalf of the different parties before the court.<sup>1</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 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. 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

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<sup>1</sup> Advisory Committee Comment to Section 24 of the California Standards of Judicial Administration. (now Standard of Judicial Administration 5.40, California Rules of Court).

reasonable steps have been taken by the agency to maintain family integrity.<sup>2</sup> A number of barriers, however, prevent many attorneys from fulfilling these goals.

## B. PARENTS ARE UNREPRESENTED

The United States Supreme Court ruled that parents in child welfare proceedings have no constitutional right to counsel, even when termination of their parental rights is at stake.<sup>3</sup> As a result some states and local courts have been reluctant to spend tax payer money for attorneys to represent parents in child protection proceedings. A national survey identified inadequate compensation as a barrier to effective representation of parents.<sup>4</sup> 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, some judges continue not to appoint counsel for parents in these cases.<sup>5</sup>

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.<sup>6</sup> In some states, the court appoints attorneys for indigent parents only in termination of parental

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<sup>2</sup> "Making Reasonable Efforts," *op.cit.*, footnote 319 at p. 11.

<sup>3</sup> *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.

<sup>4</sup> *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.

<sup>5</sup> *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 107 at p. 23.

<sup>6</sup> The Virginia statute, for example, provides for representation for indigent parents only at the adjudicatory or termination of parental rights hearings. VA. Code Ann. § 16.1-266 (2011); In Texas most parent attorneys are appointed after the critical Full Adversary Hearing. "Legal Representation Study *op.cit.*, footnote 99 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" *Id.*

rights hearings.<sup>7</sup> 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.<sup>8</sup> Twelve state court representatives indicated that representation (assuming appointment) is not adequate.<sup>9</sup> 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.<sup>10</sup> In Texas the court appoints most parent attorneys at or after the Full Adversary Hearing<sup>11</sup>, thus making it difficult, if not impossible, for the reasonable efforts issue to be raised at that hearing.<sup>12</sup>

Most states appoint an attorney or guardian *ad litem* (GAL) for the child.<sup>13</sup> This appointment is mandated by the Child Abuse and Prevention and Treatment Act (CAPTA) originally enacted in 1974.<sup>14</sup> This legislation requires states to have provisions that ensure the GAL receives training appropriate to the role.<sup>15</sup> CAPTA also provides federal funding to states in support of services for prevention, assessment, investigation, prosecution, and treatment in child abuse cases. A review of appellate cases indicates that attorneys and guardians *ad litem* for children rarely, if ever, appeal trial court decisions relating to reasonable efforts.

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<sup>7</sup> Colorado, Indiana, and Wisconsin. See Dobbin, S., Gatowski, S. and Springgate, M., "Child Abuse and Neglect: A National Summary of State Statutes," *Juvenile and Family Court Journal*, vol. 48, Nov, 1997, at pp. 43-54, at p. 49.

<sup>8</sup> "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.

<sup>9</sup> *Id.*, at p. 18.

<sup>10</sup> "Legal Representation Study" *op.cit.*, footnote 99 at pp 10-14.

<sup>11</sup> Tex. Fam. Code section 262.201

<sup>12</sup> "Legal Representation Study," *op.cit.*, footnote 99 at pp. 20-23.

<sup>13</sup> 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 often advocate only at the termination of the parental rights stage, if at all." Brooks, S. & Roberts, D., "Reflections," *op.cit.* footnote 162 at p. 1043.

<sup>14</sup> P.L. 93-247 section 106(b)(2)(B)(xiii). CAPTA was amended several times, most recently in 2010 (P.L. 111-320).

<sup>15</sup> *Id.*

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

Attorneys have significant responsibilities in child welfare cases. They must interview the client (parent or child) and family members, interview the social worker, investigate the facts of the case, and review reports including the social worker's file, all in an effort to determine whether the child can safely be returned to the family or relatives immediately. Additionally, the attorney must scrutinize whether the agency exercised reasonable efforts to prevent removal of the child.<sup>16</sup>

As a result of these demands, judges should appoint a separate attorney for each parent and for the child in every child welfare case.<sup>17</sup> The court should appoint these attorneys as soon as possible, preferably simultaneously with the filing of a petition and not at or after the shelter care hearing.<sup>18</sup> At the time of appointment the agency should provide the attorneys with a copy of the petition and supporting documents. Only with early appointment will the attorneys have sufficient time to be prepared for the critical shelter care hearing.

Because the attorney must complete these investigative tasks in a short time span, a few attorney offices have hired support staff to assist them in gathering information and working with the client.<sup>19</sup> This is a best practice and enables attorneys to be more effective in

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<sup>16</sup> There are still more responsibilities. These listed above are only a summary. See "*Making Reasonable Efforts*," *op.cit.*, footnote 319 at pp. 11-30.

<sup>17</sup> Edwards, L., "Improving Juvenile Dependency Courts: Twenty-Three Steps," *op.cit.*, footnote 380 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.

<sup>18</sup> 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](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 107; *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: Representation" *op.cit.*, footnote 398 at pp. 25-26.

<sup>19</sup> Ruiz, R., & Trowbridge, S., "National Survey of Child Welfare Legal Representation Models," *op.cit.*, footnote 407 at pp. 5, 17.

court. Unfortunately, the majority of jurisdictions provide no funding for support staff for either the attorneys for parents or the attorneys/GALs for children.<sup>20</sup>

Many states wait to appoint attorneys for parents at the shelter care hearing,<sup>21</sup> the first hearing after removal of the child. At this hearing or within sixty days of the physical removal, the juvenile court must make a finding whether the agency provided reasonable services to prevent removal of the child. This late appointment of an attorney effectively precludes him or her from preparing for and arguing the reasonable services issue. Appellate court decisions and comments from judges and attorneys reflect that the attorneys for the parents and children rarely raise the “reasonable efforts to prevent removal” issue in the trial courts.

Attorneys should approach the presiding juvenile court judge concerning early appointment. Alternatively, the unprepared attorney should request a continuance at the hearing.<sup>22</sup>

#### **D. ATTORNEYS LACK TRAINING AND ARE POORLY PAID**

Juvenile dependency court attorneys receive inadequate compensation and have low status in the legal system.<sup>23</sup> With a low level of remuneration, it is difficult to attract and retain talented attorneys.<sup>24</sup> Often representing parents in juvenile dependency court is the first job

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<sup>20</sup> *Id.*

<sup>21</sup> “The practice in 27 states is to appoint counsel for parents at the shelter care or emergency hearing....Of the remaining 10 states, half appoint counsel for parents at the adjudicatory hearing, and half at the termination hearing.” *Child Abuse and Neglect Cases: Representation as a Critical Component of Effective Practice*, *op.cit.*, footnote 398 at pp 25-26.

<sup>22</sup> *Smith v Edminston*, 431 F. Supp. 941 (W.E.Tenn.1977); Edwards, L., “Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment,” *op.cit.*, footnote 107. 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.

<sup>23</sup> Children’s Advocacy Institute, “A Child’s Right to Counsel: A National Report Card on Legal Representation for Abused and Neglected Children,” 3<sup>rd</sup> 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. and Roberts, D., *op.cit.*, footnote 162 at p. 1039.

<sup>24</sup> “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*

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.”<sup>25</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>26</sup>

Even if the parents are represented by counsel at the shelter care hearing, many attorneys lack training to alert them to the needs of their client, the existence of community resources, and to the reasonable efforts issue.<sup>27</sup> A national study of parents’ attorneys and guardians *ad litem* revealed that training was the area needing the most improvement.<sup>28</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.
- (2) The child welfare and family preservation services available in the community and the problems they are designed to address.
- (3) The structure and functioning of the child welfare agency and court systems, the services for which the agency will routinely pay, and the services for which the agency either refuses to pay or is prohibited by state law or regulation from paying.
- (4) Local experts who can provide attorneys with consultation on the reasonableness and appropriateness of efforts made to maintain the child in the home.<sup>29</sup>

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*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.

<sup>25</sup> Edwards, L., “Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment,” *op.cit.*, footnote 107, 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.4<sup>th</sup> 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.

<sup>26</sup> Dobbin, et.al., *op.cit.*, footnote 402 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.

<sup>27</sup> “In the majority of states, attorneys for parents currently receive only some or no additional training.” Dobbin et.al. *op.cit.*, footnote 398, at p. 33; “Child Abuse and Neglect Cases: Examining State Statutes in Everyday Practice,” *op.cit.*, footnote 402 at p. 18.

<sup>28</sup> “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.

<sup>29</sup> *Making Reasonable Efforts*, *op.cit.*, footnote 319 at pp. 12-14.

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.

#### **D. ATTORNEYS/GAL'S RARELY RAISE THE REASONABLE EFFORTS ISSUE**

An additional barrier to effective representation for parents is confusion about the role an attorney will play in the complex dependency system. Should attorneys raise the “no reasonable efforts” issue? Should the attorney be proactive and conduct research in order to understand family dynamics? Should the attorney be familiar with the availability of services in the community? The *Making Reasonable Efforts* study reported that two-thirds of the experts contacted indicated that attorneys appointed for parents are only ‘somewhat’ or ‘not at all’ proactive in their representation of their clients.<sup>30</sup>

Court decisions reflect that the attorneys and guardians *ad litem* for children rarely, if ever, raise the reasonable efforts issue.<sup>31</sup> It is likely that appointed attorneys/GAL's do not believe that their role encompasses the adequacy and timeliness of services to parents as they may perceive these issues involve the parents and the children's services agency.<sup>32</sup>

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

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

Two experienced California attorneys who represent parents in juvenile dependency cases offer several reasons why attorneys do not raise the reasonable efforts issue early in the

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<sup>30</sup> *Id.* at p. 39.

<sup>31</sup> This book contains references to several hundred appellate cases dealing with reasonable efforts. In almost all of these cases, the parent is the party appealing the trial court's decision. In the remaining few cases, the state is the appellant. There are no cases in which the attorney or guardian *ad litem* was the appellant.

<sup>32</sup> 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.

case.<sup>33</sup> They say that return of the child is not an option that the court will consider even if they prevail on the reasonable efforts issue. Thus, the reasonable efforts issue will not result in a finding their client will understand. Further they state that because the issue bears little or no relevance to the outcome of the hearing, raising it can frustrate the judicial officer by raising an additional issue. They also fear that the jurisdiction will lose federal funding when the judge makes a “no reasonable efforts” finding. Finally, they state that because no definition of reasonable efforts exists, attorneys do not participate in trainings that educate them about how they should approach the issue.

These attorneys are mistaken about the impact of a “no reasonable efforts” finding. Since the finding triggers a loss in federal funding, the agency takes these findings very seriously. If a judge determines that parental visitation is inadequate and makes a “no reasonable efforts” finding, the agency receives a clear message about the importance of visitation is important and will adjust agency policy and practice in the case before the court and in other cases they are managing. As a result the “no reasonable efforts” finding can have an important impact on agency practice and can improve services for all families, not just the one before the court. Moreover, many judges are receptive to reasonable efforts arguments.<sup>34</sup>

A well-prepared, trained attorney can make a significant difference in juvenile dependency proceedings. By insisting that the agency produce evidence of efforts to prevent removal and, if a child has been removed, to facilitate reunification the efforts, the attorney ensures that children are not unnecessarily removed from their families and that they are safely reunited, if possible. Studies demonstrate that enhanced legal representation results in more timely hearings, more family reunifications, fewer terminations of parental rights, and children reaching permanency sooner, thus accomplishing several major goals of the child welfare system.<sup>35</sup> Additionally, when children reach permanency sooner, savings accrue to the child welfare agency, the courts, and service providers.<sup>36</sup>

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<sup>33</sup> A full statement of their reasons is contained in the case law summary in Appendix A under California.

<sup>34</sup> See the comments of the judges in California, New Jersey, and New York in Appendix A.

<sup>35</sup> Courtney, M., Hook, J., & Orme, M., “Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care,” *Partners for Change: Discussion Paper*, Vol. 1, Issue 1, Seattle, WA, February 2011; “Improving Parents’ Representation in Dependency Cases: A Washington State Pilot Program Evaluated,” NCJFCJ, Permanency Planning for Children Department, Reno, August, 2003; Gemma, C. “Quality Representation of Parents Improves Outcomes for Families,” *Child Court Works*, Vol. 6, April 2003, ABA Center on Children and the Law; Bridge, B., & Moore, J. “Implementing Equal Justice for Parents in Washington,” *Juvenile and Family Court Journal*, Fall, 2002, pp. 31-41; Thornton, E., & Key, Judge Michael, “The Judge’s Role in Ensuring Quality Representation for Parents,” *Child Law Practice: Online*, Vol. 31, No. 3, ABA (2014) at p 2.

<sup>36</sup> 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)