REASONABLE EFFORTS TO PREVENT FOSTER PLACEMENT

A GUIDE TO IMPLEMENTATION

SECOND EDITION

BY DEBRA RATTERMAN
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American Bar Association
National Legal Resource Center
for Child Advocacy and Protection

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FOREWORD TO SECOND EDITION

This monograph was written to provide information and guidance on the legal aspects of implementation of the reasonable efforts requirement of Public Law 96-272, the Adoption Assistance and Child Welfare Act of 1980. This provision is one of the most important features of Congressional efforts, through Public Law 96-272, to emphasize services to children and their families to enable children to remain in their own homes in safety rather than being placed in foster care. This monograph should provide valuable information on these requirements to judges, lawyers, policymakers, child welfare agency officials, and child advocates.

Since the American Bar Association's *Reasonable Efforts to Prevent Foster Placement* was published in June 1985, several states have adopted new statutes and policies on the reasonable efforts requirement. As of 1986, twenty-one states have legislation addressing the judicial determination of reasonable efforts. The ABA has also received new and revised policy manuals, memoranda, and forms on reasonable efforts from thirty states. In addition, materials and commentary on reasonable efforts was obtained during the American Bar Association's seventeen-month nationwide study of the implementation of reasonable efforts, funded by the U.S. Department of Health and Human Services. This monograph is an update of our prior publication and highlights current trends in reasonable efforts policy.

Dozens of state child welfare agency administrators took the time to respond to our requests for information on state statutes, regulations, policy guidance, court rules and forms related to implementation of the reasonable efforts requirements. Beth Wanger assisted the project and Tom Devine followed up my research and compiled the bibliography. Sally Small Inada of the ABA Resource Center provided production and marketing assistance. I would like to thank Joyce Sinclair for her help on word processing, formatting, and editing on the monograph and her assistance throughout this project.

Debra Ratterman
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CHAPTER 1

INTRODUCTION TO "REASONABLE EFFORTS"

A. The Federal Reasonable Efforts Requirement

The reasonable efforts requirement of the Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, is actually two requirements. First, states must include in their Title IV-E state plan a commitment that reasonable efforts will be made to prevent unnecessary placement and to return foster children to their homes. The relevant State plan requirement provides:

> Sec. 671(a) In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . .
>
> (15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of a child from his home, and (B) to make it possible for the child to return to his home. . . .[1]

Second, for each child entering placement after October 1, 1983, there must be a *judicial determination* that reasonable efforts to prevent removal were made in order for the state to be eligible for federal foster care funds under Title IV-E. The child will be eligible only if:

> The removal of the child from the home was the result of a judicial determination to the effect that . . . reasonable efforts of the type described in section 671(a)(15) have been made.[2]

B. Purpose of the Requirement

Prior to enacting the Adoption Assistance and Child Welfare Act of 1980, Congress heard extensive testimony about the unnecessary placement of children into foster care who could have been protected at home had services been available to help their families. Prior to the passage of this legislation, substantial federal funding had been available to help pay for the costs of foster care for these children, while relatively little federal aid was provided for services to enable these same children to remain with their families.

In adopting this legislation in 1980, Congress decided to shift the emphasis of federal programs toward providing preventive services to allow abused or neglected children to remain at home safely rather than being placed in foster care.[3] The reasonable efforts requirements represent an effort to insure that before federal dollars are spent to pay for foster care for a child, reasonable efforts will be made to prevent the need to place the child and, after placement, reasonable efforts will be made to reunify the family. The judicial determination of reasonable efforts is a means of insuring that there is a close examination, in each individual child's case, whether reasonable efforts were made to leave the family intact. It serves to protect the individual rights of each child and family. In addition, it provides a fiscal incentive for states to establish an adequate program of preventive and reunification services in order not to lose federal funding for foster care costs.

The reasonable efforts requirement is only one of the P.L. 96-272 provisions designed to emphasize preventive and reunification services to families. Congress also required that a state must establish programs of preventive and reunification services for all children in foster care in order to obtain maximum funding under the IV-B Child Welfare Service Program. Both programs must also be established for states to be able to claim federal funding for foster care costs for children voluntarily placed in foster care.

Finally, states are permitted to transfer unused federal foster care funds to the child welfare services program to pay for preventive, reunification and adoption services. For a full discussion of these points see Allen and Golubock, "A Guide to the Adoption Assistance and Child Welfare Act of 1980," *Foster Children in the Courts* (M. Hardin ed. 1983).

Congress delayed the effective date of the reasonable efforts requirement until October 1, 1983, almost three years after the other portions of the Act went into effect. It was thought that this would give states ample time to develop preventive services programs.

C. Federal Guidelines and Monitoring of Reasonable Efforts

The Department of Health and Human Services have promulgated regulations concerning the reasonable efforts requirement. *See* Appendix A. The federal regulations add to the statutory provisions by requiring that documentation of reasonable efforts be included in each child's federally-mandated case plan.[4] In addition, the Department of Health and Human Services (HHS) issued a Policy Announcement on the subject of reasonable efforts to prevent placement on January 13, 1984. *See* Appendix B.

HHS has implemented a system to review state compliance with Title IV-E eligibility requirements, including the judicial determination of reasonable efforts. The states with the largest foster care populations (New York, Pennsylvania, Michigan and California), are reviewed annually and other states are reviewed once every three years. Federal auditors review a random sample of fifty case records for documentation showing that the judicial determination of reasonable efforts was made and other eligibility criteria are met. If the error rate is less than ten percent, disallowance is made only for the cases found to be ineligible. If the error rate is greater than 10%, another 150 cases are reviewed and a proportional amount of federal funding for the state is disallowed.[5]

The federal government has already audited thirty-one states for Title IV-E compliance. Reasonable efforts has been audited in sixteen states. Twenty states have passed the audit, while eleven states have gone on to second stage reviews. Given the amount of federal foster care funding that could be lost in these reviews, it is critical that states successfully implement the reasonable efforts requirement.

HHS has recommended that each state should include in its program manual a provision that services will be provided to prevent removal of a child from the home and to reunify families.[6] HHS has also suggested that states review their statutes to determine whether changes in laws or court rules may be helpful or necessary in securing the court's cooperation in relation to the judicial determination of reasonable efforts.[7]

D. State Implementation of Reasonable Efforts

As of 1986, twenty-one states have statutes addressing the judicial determination of reasonable efforts: Arkansas (1985), California (1984), Florida (1984), Georgia (1984), Illinois (1985), Indiana (1984), Iowa (1984), Kansas (1986), Louisiana (1985), Maine (1985), Massachusetts (1984), Mississippi (1985), Missouri (1985), Nevada (1985), New Mexico (1984), New York (1984), Oklahoma (1984), Oregon (1985), Virginia (1984), Washington (1984), and Wisconsin (1983). *See* Appendix C. Most states have adopted new policy on the reasonable efforts requirement including new and revised policy manuals, memoranda and forms on reasonable efforts, and instructional materials.

The following chapters examine current trends in reasonable efforts policy. Chapter 2 describes reasonable efforts to prevent placement as it affects agency practice in providing services to families. Chapter 3 focuses on the judge's role in making the judicial determination of reasonable efforts. Chapter 4 describes in more detail the various types of documentation necessary to reasonable efforts. Finally, Chapter 5 discusses various strategies for the successful implementation of the reasonable efforts requirement.

CHAPTER 2

REASONABLE EFFORTS TO PREVENT PLACEMENT

A. Reasonable Efforts Defined

1. Federal Guidance

The federal regulations do not attempt to define the term "reasonable efforts." The definition of reasonable efforts is up to the states and their court systems.[8]

2. State Statutes

Three states have defined "reasonable efforts" in their state statutes. Florida defines reasonable efforts as "the exercise of reasonable diligence and care by the department. . . . "[9] Missouri defines it as "the exercise of *ordinary* diligence and care by the division. . . . " (emphasis added).[10] The statutes also differ on the issue of availability of services. Arkansas states that "[r]reasonable efforts means the exercise of reasonable diligence and care by the responsible State agency to utilize all *available* services related to meeting the needs of the juvenile and the family." (emphasis added).[11] However, in Missouri, the definition of reasonable efforts "assumes the availability of a reasonable program of services to children and their families."[12] The latter is more consistent with the legislative purpose behind the federal requirement to provide states with an incentive to increase their preventive services programs. In Louisiana, reasonable efforts is defined in the juvenile court rules.[13]

3. Agency Policy

Agency policies have also clarified the concept of "reasonable efforts" to provide guidance for caseworkers. One aspect of reasonable efforts is a prompt investigation of reported abuse or neglect.[14] Reasonable efforts includes the caseworker's best efforts to assess the individual child and family situation regarding service needs.[15] This involves the development of a service plan for the family.[16]

The key element of reasonable efforts is provision of preventive services to the family. In choosing services, the caseworkers should consider the relevance of the service, i.e., the specific harm that the resource is to alleviate.[17] They also need to consider the availability of the service and the acceptability of the service to the family.[18] While availability needs to be considered by the caseworker in providing services, the lack of services can be deemed unreasonable by the court.

To meet the reasonable efforts requirement, caseworkers need to go beyond merely offering services to the family. They should encourage and assist the family in gaining access to and utilizing these services.[19] Specifically, this means making referrals, setting up appointments, giving necessary assistance to enable parents to keep appointments, and doing follow-up.[20] Providing transportation and scheduling around parents' work hours are often critical elements in making these services accessible.[21] Because some of the families move frequently or do not have a phone, additional efforts may be necessary to keep track of them and to maintain their involvement in service delivery.[22]

Finally, reasonable efforts means keeping children in their current living situation when no imminent danger to their health and safety exists.[23] Removal should only occur when the provision of preventive services fails or when no services would insure the safety of the child.

4. Termination of Parental Rights Definitions

Many state statutes make reasonable efforts an additional requirement for termination of parental rights.[24] Others make a factor that may be considered by the court.[25] In such states, the documentation of reasonable efforts at removal and all subsequent hearings is particularly important if the case ultimately goes to termination. Judicial findings that the agency has been making reasonable efforts will be persuasive to the judge at termination. For example, a California statute directs the judge to review and consider the contents of the juvenile court file in termination of parental rights cases to determine whether the services offered were reasonable under the circumstances.[26]

The definition of necessary agency efforts prior to termination of parental rights can offer some guidance to defining reasonable efforts at earlier stages. For example, the New York termination of parental rights statutes defines "diligent efforts" as:

> reasonable attempts by an authorized agency to assist, develop, and encourage a meaningful relationship between the parent and the child, including but not limited to:
> (1) consultation and cooperation with the parents in developing a plan for appropriate services to the child and his family;
> (2) making suitable arrangements for the parents to visit the child except with respect to incarcerated parent, arrangements for the incarcerated parent to visit the child only outside the correctional facility shall not be required unless reasonably feasible and in the best interests of the child;
> (3) provision of services and other assistance to the parents, except incarcerated parents, so that problems preventing discharge of the child from care may be resolved or alleviated;
> (4) informing the parents at appropriate intervals of the child's progress, development and health; and
> (5) making suitable arrangements with a correctional facility and other appropriate persons for an incarcerated parent to visit the child within the correctional facility, if such visiting is in the best interests of the child. . . . Such arrangements shall include, but shall not be limited to, the transportation of the child to the correctional, and providing or suggesting social and rehabilitative services to resolve or correct the problems other than

incarceration itself which impair the incarcerated parent's ability to maintain contact with the child. . . .[27]

Many of these factors are applicable to the consideration of reasonable efforts to prevent placement and to reunite families.

B. Funding Consequences

If there is no judicial determination of reasonable efforts, the state cannot legally claim federal matching funds for the individual child pursuant to Title IV-E since a condition of eligibility would not be met.[28] The possibility of loss of funding has been stressed to agency personnel and to the courts through policy announcements.[29] Since a substantial portion of state foster care budgets is derived from federal funds, the failure to comply with the federal requirement can seriously jeopardize state foster care programs.[30] Ultimately, the Secretary of Health and Human Services has the right to cut off federal funds if the state's IV-E plan or its administration of the IV-E program substantially fails to meet federal requirements, including those related to reasonable efforts.

C. The Duty to Make Reasonable Efforts

1. The Child Protective Services Agency

The state agency has a duty to make reasonable efforts to prevent or eliminate the need for removal before a child is placed in foster care. It must provide services to resolve family problems and insure the safety of the child. Indiana has codified the duty of its child protective services to make reasonable efforts to prevent removal.[31] Once the child is removed from the home, the agency has a duty to make reasonable efforts to make it possible for the child to return home. Iowa statutes impose this duty upon transfer of custody to the Department of Human Services.[32]

2. The Caseworker and Supervisor

The duty to make reasonable efforts in practice falls upon the caseworker. Caseworkers are charged with evaluating the family situation and then making informed judgments about the appropriateness of services. The caseworker plays a key role in locating, linking and monitoring services and assessing their effectiveness in protecting the child. If services are contracted, the caseworker is responsible for coordinating and monitoring activities of other providers and intervening on the family's behalf to resolve any problems that arise in the family's work with collateral providers. The supervisor also shares the obligation of monitoring the provision or preplacement services to at-risk families.[33]

3. Law Enforcement

Federal requirements are not excused if a state chooses to make law enforcement officials primarily responsible for responding to protective service calls. Preventive service efforts still must be made prior to removing a child from home when it is reasonable to do so. Because law enforcement personnel may not be trained in service delivery or service evaluation, some states which have been using law enforcement response may be required to change their practice to involve social service personnel in quick response to protective services calls.

States may choose to reassign responsibility for initial protective service response to the state child welfare agency or may provide that a trained social worker, able to evaluate preventive services alternatives, accompany law enforcement officials. Alternatively, law enforcement officials may be allowed or required to call on social workers to evaluate services when a question of removal arises.

D. Preventive and Reunification Services

Child protective service agencies have developed specialized services for abused and neglected children. Preventive services are offered to families in order to prevent the unnecessary removal of a child from the parents and are directed toward insuring the child's development, safety and well-being in the parent's home.[34] Reunification services are services directed toward the helping the child's parents achieve adequate parenting standards and insuring the child's safety upon return home.[35] The passage of the "reasonable efforts" requirement was intended to create a strong fiscal incentive for states to establish an adequate program of preventive and reunification services.

Congress required that preventive service efforts be made prior to removing a child from home in every case in which it was reasonable to do so. In addition, reasonable efforts to reunite the family are required in all cases in which the child has been removed from home—whatever the reason—even if preventive efforts were made previously. Reunification efforts are an additional responsibility, not an alternative responsibility.

1. Federal Regulations

Each state must designate in their state plan which preventive and reunification services are available to children and families in need.[36] The federal government has not required that every state provide a specific set of services.[37] However, the regulations do provide a list of suggested services.[38] These services are:

(1) twenty-four hour emergency caretakers and homemaker services;
(2) day care;
(3) crisis counseling;
(4) individual and family counseling;
(5) emergency shelters;
(6) procedures and arrangements for access to available emergency financial assistance;
(7) arrangements for the provision of temporary child care to provide respite to the family for a brief period, as part of a plan for preventing removal from home.

The regulations also give examples of other services that the agency may identify as necessary and appropriate:

(1) home-based family services;
(2) self-help groups;
(3) services to unmarried parents;
(4) provision of or arrangements for mental health, drug and alcohol abuse counseling, vocational counseling or vocational rehabilitation;
(5) post-adoption services.[39]

2. Basic Services

There are an enormous variety of services which are used to maintain children in their homes and to reunite them with

their families. *See* Appendix D. There are four preventive and reunification services that are most commonly used by child welfare agencies: counseling, day care, homemakers, and parent education. Counseling includes all supportive and therapeutic activities provided to a child or a child's family directed at preventing or alleviating conditions which present a risk to the safety or well-being of the child by improving problem-solving and coping skills, interpersonal functioning, the stability of the family, or the capacity of the family to function independently.[40] Trained homemakers provide home help, home care skills instruction and child care and supervision in the child's home.[41] Day care is used as part of a family service plan to provide care and supervision for a child outside of the home for part of a day.[42] Parent education is practical education and training for parents in child care, child development, parent-child relationships, and the experiences and responsibilities of parenthood.[43]

3. Family-Based Services

Social service practitioners have also developed new preventive services approaches, such as "family-based" or "home-based" services, which focus on extensive and highly intense interactions between social work or para-professional staff and the family. These interactions, which usually occur in the family home, may be as extensive or intensive as family needs indicate. Staff assist the family to obtain any additional services they may require. The focus is on strengthening family skills and supports and allowing a thorough assessment of family functioning while the child is at home. In such systems, while a variety of services may be used, they are all coordinated by the in-home professional and para-professional staff.

This type of preventive service program can be effective with difficult families who are too disorganized or have too many problems to be able to progress adequately with weekly parenting classes or other limited services. Intensive home-based services have had some success with families where removal of a child had already been directed by a court or an agency placement committee. Intensive home-based programs can also give judges a much more sophisticated assessment of a family's parenting abilities. If it then becomes necessary to remove a child, the case for removal is much clearer and documentation is stronger for possible subsequent proceeding.

In addition to a number of demonstration projects around the country in which such intensive service programs are purchased from private providers, several state agencies have begun to apply this approach using their own staff.[44] Some public agencies have created special in-house intensive service units to deal with the most problematic families. Other public agencies have also redesigned their service delivery systems to make the major advantages of the family-centered approach available to all client families.[45]

4. Hard Services

While the focus of many child welfare service programs is specialized counseling and instruction, often families in the child welfare system need "hard services" like financial assistance, housing, food, and clothing. Agencies should provide or arrange access to these services for families in need. In addition, providing transportation is often critical to the utilization of services by families.[46]

5. Mandated Services

Some states have established lists of services that must be available throughout the state. California, by statute, has established a set of minimum services which must be available in all parts of the state. For example, under California law, services in emergency situations should include counseling, emergency shelter care, initial intake, crisis intervention and transportation.[47] New York has established a description of services to be available throughout the state[48] and Ohio is in the process of doing so.[49] Lists are most helpful when they not only designate required services but also describe when a specific service is appropriate.

Reports from the states which have statutory lists of required services indicate that agencies will have these services available more often although not in sufficient quantity. As a result of the statutory changes, judges are much more willing to order that listed services be provided to a family when there is evidence that this would allow the child to remain home safely than was the case before the lists of mandated services were developed. However, judges are likely to be more cautious before ordering non-mandated services be provided.

In addition, if the lists include a reasonable array of services, they can serve as a starting point for a determination of whether reasonable efforts were made to prevent removal or facilitate reunification. The court is justified in assuming that it is appropriate for the agency to provide the services on the list when there is evidence that such services might enable the child to stay or return home. If the agency has failed to provide mandated services, the court may find that reasonable efforts were *not* made to prevent removal or to facilitate reunification. Obviously, this does not require that all listed services be provided in every case.

6. Exemplary State Programs

Some states already have a broad array of preventive and reunification services. Both Washington and Indiana have an impressive list of services available to families in need. *See* Appendix E. In evaluating whether reasonable efforts are being made in particular case, it is important that judges and advocates be knowledgable about the service resources available in their area. They also should be aware of the service needs of their community.

E. Cases Requiring Reasonable Efforts

The reasonable efforts requirement is most commonly applied to abused or neglected children placed out of their homes. However, federal foster care reimbursement is not limited to abuse and neglect cases. Title IV-E of the Social Security Act allows federal matching funds for children placed in a licensed foster family home or a licensed child care institution which accommodates no more than twenty-five children, regardless of the reason for placement, when all other eligibility criteria (including reasonable efforts) are met.[50]

1. Delinquents

Federal law does provide federal funding for the placement of delinquents in foster care.[51] However, the federal statute specifically excludes funding reimbursement for children placed in detention facilities, forestry camps, training schools, or any other facility operated primarily for the detention of

children who are determined to be delinquent.[52] When delinquents are placed in eligible facilities like non-secure group homes or family foster care, reasonable efforts must be made to prevent placement. The Act does not prescribe which agency must make these efforts, so they could be made by the state agency that handles delinquency rather than the child protection agency, if these agencies are separate.[53] The case record must also show that these efforts were made.[54]

Federal funding can also be obtained for delinquents released from a correctional facility and placed in foster care.[55] Again, reasonable efforts must be made to return the child home before placement in foster care.[56] If the permanency planning goal is emancipation rather than reunification, the court must find that the lack of efforts to reunify is reasonable under the circumstances.[57]

There must be a judicial determination of reasonable efforts at the time of the court-ordered placement of a delinquent in foster care for the state to be eligible for federal matching funds. For example, an Idaho Youth Rehabilitation program was found *not* to be eligible because the court ordered the delinquents to the custody of the State Department of Health and Welfare but did not order out-of-home placement, allowing the agency to decide whether the child could be supervised at home or should be placed in foster care.[58]

California, Iowa, New York, and Virginia have statutory provisions requiring that a judicial determination of reasonable efforts be made when delinquents are placed in foster care.[59] Policy in Michigan, Oregon, and Pennsylvania also applies the reasonable efforts requirement to juvenile delinquents.[60]

Defining "reasonable efforts" in delinquency cases requires different considerations from abuse and neglect cases. In delinquency cases, the court also has an obligation to protect the public.[61] The New York statute states:

> the court shall determine . . . where appropriate, and *where consistent with the need for protection of the community,* reasonable efforts were made prior to the date of the dispositional hearing to prevent or eliminate the need for removal of the respondent from his home. (emphasis added).[62]

The determination as to whether reasonable efforts were made to reunify the delinquent with her/his family may also be different in these types of cases, *e.g.*, if the parents had been contributing to the child's delinquency. Reunification may be inappropriate and preparing the adolescent for independent living may be a preferable alternative.

2. Status Offenders

Some states have a special designation for incorrigible children who are not delinquent nor abused and neglected. These children are sometimes called "children in need of services" (CHINS), "persons in need of supervision" (PINS), "minors in need of authoritative intervention," or "status offenders." If these children are placed in foster care, the state is potentially eligible for federal matching funds. As in the case of delinquents, the court must find that reasonable efforts were made to prevent the placement. California, Illinois, New York, and Virginia have statutory requirements for reasonable efforts determinations in these types of cases.[63] Again, special considerations such as the need to prevent the child from running away may affect the judicial determination of reasonable efforts.

3. Voluntary Placements

Under Title IV-E of the Social Security Act, children voluntarily placed in foster care by their parents are eligible for federal matching funds if specific requirements are met.[64] Voluntary placements do not require a judicial determination of reasonable efforts. However, in order for a state to be eligible for federal financial participation for voluntary placements, its state plan must certify that in each case, including those involving voluntary placements, reasonable efforts will be made prior to the placement of a child in foster care and to make it possible for the child to return home.[65] The state must also have implemented a preplacement preventive services program designed to help children remain with their families.[66] The case plan for voluntary placements must include a description of services offered or provided to prevent removal, a discussion of the reasons it was necessary to place the child, and a description of the services underway to reunite the family, just as in court-ordered placements.[67]

Both Nevada and New York statutes require that reasonable efforts be made prior to court approval of the voluntary placement agreement.[68] Several state agencies have adopted policy requiring caseworkers to document efforts to prevent placement in cases where the parent voluntarily agrees to foster care.[69] In New Jersey, caseworkers must document efforts to prevent placement in the court notice of a voluntary placement.[70] Appendix F contains examples of forms used by agencies to document efforts in voluntary cases.

4. Protective Supervision

Services provided pursuant to court-ordered protective supervision that allows children to remain with their family may be evaluated as efforts to prevent placement should the child later be removed from the home. However, federal law does not require a reasonable efforts determination be made at the time the child is placed under protective supervision. Some state courts monitor the agency's service provision in these cases. For example, at a review hearing for protective supervision in South Carolina, the court must determine:

(1) What services have been offered to or provided to the parents;
(2) Whether the parents are satisfied with the delivery of services;
(3) Whether the agency is satisfied with the cooperation given to it by the parents;
(4) Whether additional services should be ordered and when termination of supervision by the agency can be expected.[71]

F. The Decision to Remove a Child from the Home

1. Legal Standard for Removal

One of the major purposes of the reasonable efforts requirement is to encourage agencies and courts to consider service alternatives to placement. Some states have incorporated the consideration of service alternatives into their standard for removal of children. For example, the Florida shelter placement statute states:

> No child shall be removed from home or continued out of home pending disposition if, with the provision of

appropriate and available services, including services provided in the family home, the child could remain safely at home.[72]

The legal standard for removal in Illinois requires that "appropriate services aimed at family preservation and family reunification have been unsuccessful in rectifying the conditions which have led to such a finding of unfitness. . . ."[73]

The standard for emergency removal has also been defined in some states by the lack of service alternatives. For example, Indiana law allows emergency removals only when "consideration for the safety of the child precludes the immediate use of family services to prevent removal of the child."[74]

A good legal standard for removal of a child from home should focus both on the degree of danger to the child and on whether there are practical alternatives to placement that can allow the child to remain at home safely. For example, the California statute provides that a child must be released by the court unless the court finds that:

> [t]here is a substantial danger to the physical health of the minor or the minor is suffering severe emotional damage, and . . . there are no reasonable means by which the minor's physical or emotional health may be protected without removing the minor from the parents' or the guardians' physical custody. . . .[75]

2. Agency Removal Guidelines

Some state agencies require caseworkers to provide all the agency's services to a family prior to considering placement.[76] Others require that a service assessment be made prior to removal.[77] Services must be considered prior to placement in foster care in several states.[78] The services considered must be both appropriate and available to prevent removal.[79]

Some agencies consistently review caseworker's decisions to place children to insure that service alternatives are fully considered. In North Carolina, the agency uses a team approach to decision-making, including a preplacement screening system that reviews cases prior to placement to ensure that services have been provided to prevent or eliminate the need for placement.[80]

Many programs require that services be documented in the case record prior to placement.[81] In New York, the reason that offered services did not avert placement must also be documented.[82] Colorado requires that documentation include a description of services considered and rejected and the reasons for rejection.[83] If an emergency precluded service delivery, this should also be documented prior to placement.[84] Florida uses a "Placement Decision Form" to document service alternatives prior to the decision to remove a child from home. *See* Appendix G.

CHAPTER 3

JUDICIAL DETERMINATION OF REASONABLE EFFORTS

A. The Role of the Court

Eligibility of a child for federal foster care funds is dependent on a judicial determination that continuation in the home would be contrary to the child's welfare and that reasonable efforts were made to prevent the need for placement and to make it possible for the child to return home.[85] The court, after a hearing on the evidence, must explicitly conclude that the agency's efforts were reasonable.[86] The court must make a *determination* that reasonable efforts were made—the fact that the agency actually made reasonable efforts is not sufficient without this determination. Review and approval of the agency's report and recommendation by the court alone does not satisfy the requirement.[87]

Twenty-one states have passed state statutes requiring this determination be made. For example, the Arkansas statute states:

> Prior to the placement of a child in other than the home of the parent, guardian, or custodian, the juvenile court must make specific findings that reasonable efforts were made to keep the family together and avoid foster care and reasonable efforts to eliminate the need for removal of the child from the home were made by the State.[88]

In determining whether the reasonable efforts requirement is met, federal auditors check case records for court orders containing the appropriate language.[89] Only a signed court order or a transcript of court proceedings may be used to evidence that the necessary determination was made.[90] Inclusion in the court order is sufficient even if the case record does not support the finding—the auditor relies on the judge's decision.[91] A reference to reasonable efforts in the petition does not meet the requirement unless the court order expressly adopts the specific relevant wording in the petition.[92] HHS has also stated that a court order citing a state law allowing removal only for the "best interests" of the child is *not* adequate to meet the reasonable efforts requirement. If, however, the state law allows removal under no other circumstances except those required under the Act and the court order is expressly based on that law, then the order is sufficient evidence that the determinations have been made.[93] However, making reasonable efforts a legal prerequisite for removal may be unwise because, as discussed in the next section, there are situations where the child should be removed even though reasonable efforts have not been made.

Most state policy incorporates the requirement that the reasonable efforts determination be included in a written court order.[94] For example, Missouri judges are advised to include a determination of reasonable efforts in the written court order or enter the finding into the written record of the proceedings.[95] Minnesota policy does not consider the official court transcript to be sufficient documentation and requires a written finding in the court order.[96] Agency reports to the court that document reasonable efforts are not sufficient evidence of compliance, but Florida, Louisiana, and Minnesota have interpreted the requirement as being met if the court specifically determines that this portion of the report is true.[97] The agency should keep a copy of the court order in the case record.[98]

B. Removal When Reasonable Efforts Have Not Been Made

There is a distinction between the reasonable efforts determination and the decision to remove a child from the home. While the question of whether more could have been done to prevent placement is pivotal in deciding whether to remove a child, removal may sometimes be necessary even though timely and appropriate services were not provided. For example, the agency may have failed to provide an emergency intervention service that would have prevented a family situation from deteriorating to the point that the child is seriously endangered in the home. The child should not be left in an unsafe situation because the agency has not met its responsibility to make efforts to prevent placement. If the child must be removed, the agency will be penalized by not receiving federal matching funds for that child's placement.

Unfortunately, several state statutes have made the reasonable efforts requirement a prerequisite for removal of a child.[99] It is preferable that the state statute only require the courts to make a finding of reasonable efforts, as other statutes do,[100] instead of requiring a positive determination for removal. Some states have specific statutory provisions that allow removal even if reasonable efforts were not met.[101] For example, the Missouri statute states:

> The juvenile court may authorize the removal of the child even if the preventive and reunification efforts of the division have not been reasonable, but further efforts could not permit the child to remain at home.[102]

Many states have policy emphasizing that the reasonable efforts determination is *not* a new substantive requirement for removal.[103]

C. Burden of Proof

The agency must affirmatively show that it has made reasonable efforts at the hearing. Some states have established special burden of proof rules for the reasonable efforts determination. For example, Missouri places the burden of demonstrating that reasonable efforts were made on the agency.[104] Louisiana's statute also place the burden of proof on the agency.[105] Florida also gives the agency the burden of demonstrating that reunification efforts would be inappropriate where that is alleged.[106] Placing the legal burden of proof on the agency is consistent with the legislative intent

of creating an affirmative duty on the agency to make reasonable efforts to prevent foster care placement.

D. Evidence

A judge cannot make a finding that the agency made reasonable efforts to prevent placement unless that allegation is supported by evidence produced at the hearing.[107] Allegations made in petitions do not constitute evidence. Neither do court reports or other written documentation submitted to the court unless they are admitted into evidence at the hearing. It is the responsibility of the agency's attorney to prepare and present evidence at the hearing with the cooperation of the caseworker.[108]

When insufficient evidence is provided on the issue of reasonable efforts, the court can ask the agency to provide further information on the case or to consider other service alternatives and report back to the court. The court can also ask the parents' or child's attorney to specifically address the question of whether further services might make it possible for the child to remain at home safely. Any of the parties may be directed or ordered to consider specific alternatives the judge believes should be considered. Occasionally, a court might even appoint another social work expert to provide an evaluation of service alternatives or call representatives of possible service providers to talk about the availability and appropriateness of their services. For example, a social work professor or a social worker from a community social services agency might be asked to prepare an alternative social plan. A representative of a daytime facility for the care of a severely handicapped children could be called to testify about whether their services might make it possible for the handicapped child to remain at home.

1. Testimony

The most common evidence on reasonable efforts at the hearing is the testimony of the caseworker.[109] The caseworker should be prepared to testify on all efforts made to prevent placement of the child.[110] The worker should outline the services provided to the parents prior to removal and the efforts made to make those services accessible to the parent. If no services were provided, the caseworker should explain the emergency circumstances that made service provision impossible. The attorney for the agency should elicit reasonable efforts testimony from the caseworker at the hearing.[111] When indicated, the agency attorney should also call service providers who worked with the family to testify on the efforts to prevent placement.

2. Cross-Examination

The parents' attorney should cross-examine the caseworker and try to show that reasonable efforts were not made. Although the reasonable efforts determination affects federal funding and does not determine whether the child is actually removed, a negative finding can be beneficial to the parents at later hearings, can be used to advocate for increased services for the family, and may persuade the agency to delay removal in marginal cases. Parents should also testify about their service needs and problems of accessibility to services that have not been addressed by the agency. Children's attorneys, guardians *ad litem*, and court-appointed special advocates (CASA's) should prepare for and raise the issue of reasonable efforts at the hearing.

E. The Standard for Reasonable Efforts Determination

There has been very little guidance for judges in terms of establishing a standard for the judicial determination of reasonable efforts. The requirement leaves a great deal of discretion to the court.[112] Reasonable efforts is a difficult standard to define and will, of course, vary with the facts of a particular case.[113]

Each judge must make the determination using state law guidelines where they are available. Clearly, the court should be informed on the service efforts that were made and why. The court must also clearly identify the nature of the problem in the family which the service efforts are intended to resolve. Having identified the specific problems, consideration of the following factors will be helpful in reaching a decision.

1. Factors to Be Considered

a. Relevance of Services

The first criteria is the relevance of the services: there should be a match between the family problem and the services offered. For example, a child was found to be sexually abused by the mother's boyfriend and the mother had thrown the abuser out of the home. Services were directed at the mother's alcoholism, even though there was no demonstrated relation between her drinking problem and any abuse and neglect, and no sex abuse counseling was offered to either mother or child. This would not constitute reasonable efforts because the services were not relevant to the substantiated abuse. Agency efforts should be focused on services most likely to alleviate danger to the child.

b. Adequacy of Services

The second consideration, adequacy of services, involves two important elements: quality of effort and quantity of effort. In the process of developing a service plan to meet the needs of a family, the agency should ensure that the family receives quality services. For example, if services are contracted for outside the public agency, the agency should determine whether the selected service provider is well-qualified to meet the family's needs. Quality also related to the caseworker's skills, which are developed through education and experience, compassion and commitment.

Second, the agency case plan should ensure that sufficient services are identified and allocated to meet the needs of the family. The family situation may require a variety of services in order to meet varied needs. The services must also be at an intensity level that will enhance the family's potential for achieving success. For example, a family that is in a crisis situation is unlikely to be helped by a counseling program that sees the family once a month. On the other hand, a parent should not be overwhelmed by the service plan. Reasonable efforts also means the least intrusive level of services to help alleviate the danger to the child.

In evaluating adequacy of services, the judge should examine the number of contacts with the family, the duration and frequency of services, and the quality of the caseworker's involvement. It is also helpful to inquire into the reasons why the services offered were unsuccessful. Would an increased level of services or the addition of new services be sufficient to allow the child to remain at home safely?