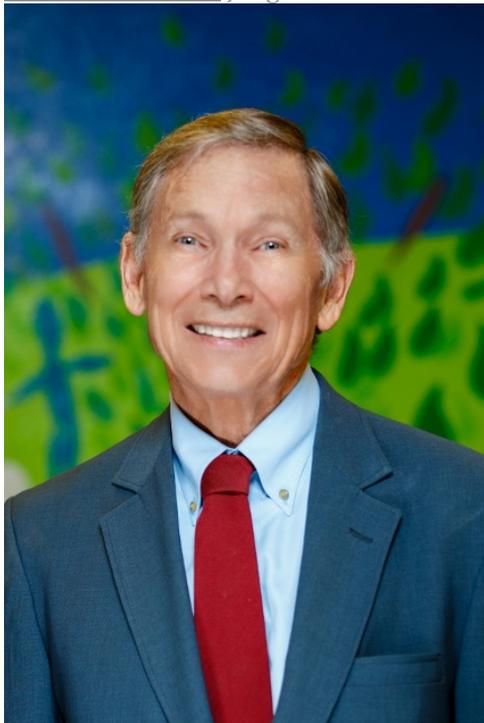


Ignoring Reasonable Efforts: How Courts Fail to Promote Prevention

December 5, 2018 Judge Leonard Edwards



Judge Leonard Edwards

The [Family First Prevention Services Act](#), signed into law earlier this year, strives to prevent some children from entering foster care as a result of contact with the child welfare system. Shifting federal money so that more can be used by local agencies to prevent children from entering the court system is a good idea. However, the court system is not prepared to use its powers to promote prevention.

The federal legislation that started with the [Adoption Assistance and Child Welfare Act of 1980](#) created tools that courts could use to address prevention. Specifically, the legislation mandated that courts oversee the delivery of services by agencies to prevent removal of children from their parents. If the agency provided adequate services, the court would make a finding on the record that “reasonable efforts” had been provided, but if the agency did not provide adequate services to prevent removal, the court would make a negative finding – “no reasonable efforts” – and the agency would be penalized and lose federal dollars for that case. Later in the case the court would decide whether the agency provided reasonable services to reunite a separated family, and finally, whether the agency provided reasonable efforts to achieve permanency for the child.

The reasonable efforts/no reasonable efforts findings are the most powerful tools given to the courts by the federal legislation. These findings enable the court to determine whether the agency has done its job to prevent removal, assist in reunifying families, and achieve timely permanency for the child. The trial judge has a difficult task since there is no definition of “reasonable efforts” and the services available in each community are different and may change over time. Nevertheless, the courts are obliged to make several “reasonable efforts” findings throughout the pendency of each child welfare case in which a child has been removed from parental care.

Unfortunately, the reasonable efforts tool to prevent removal has not been litigated by our courts. [Less than 1 percent of appellate case law](#) deals with the reasonable efforts to prevent removal issue. That means that attorneys are not challenging the “reasonable efforts” findings judges are making at the initial hearing. The issue is not being litigated. On the other hand, over 98 percent of appellate case law deals with the reasonable efforts issue after a court has terminated parental rights. In those appeals, the parents’ attorney argues that the agency did not provide reasonable services to promote reunification of the family. The issue of reasonable efforts to prevent removal is not litigated in these appeals. It is obvious that “reasonable efforts” litigation occurs at the conclusion of the case, not at the beginning.

The structure and procedures within the court system make it next to impossible for the “reasonable efforts to prevent removal” issue to be litigated at the initial hearing. Parents who appear at the initial hearing without an attorney do not understand the legal issues. They certainly do not understand that the agency has a duty to provide services (reasonable efforts) to prevent removal. They have often not been appointed or obtained counsel before that hearing.

Attorneys must be present to represent parents at the initial hearing because parents are not able to raise the complex issue of reasonable efforts to prevent removal. That is a sophisticated legal issue that only a trained attorney can address. And yet attorneys are often appointed at or just before the initial hearing. That is when they receive the petition and supporting papers that have been filed on behalf of the child. As a result of the timing of the appointment, they have insufficient time to prepare for the hearing and thus are unable to test the “reasonable efforts” issue.

Another problem is that most judges [do not carefully address the reasonable efforts issue](#). They do not question the social worker who made the removal and do not make a record of the facts they rely upon when making a “reasonable efforts” finding. In some jurisdictions, judges simply check a box indicating reasonable efforts were made by the social worker. Many judges do not believe they should be telling the social service agency what they should be doing.

Moreover, many judges do not want to make a “no reasonable efforts” finding. They do not want to take money away from an already financially strapped agency. Ironically, judges do not seem to resist making findings in criminal cases that police officers did not follow the law. These rulings can result in release of the defendant when judges grant motions to suppress evidence or confessions by the defendant, but making similar findings in child welfare cases indicating that the social worker did not do her job correctly in providing adequate services to prevent removal does not appear in the appellate case law.

There is more. When judges make reasonable efforts findings and the attorney disagrees and wants an appellate court to review the court order, attorneys are challenged with the reality that appellate relief is expensive and time consuming. Appellate review requires an extraordinary legal procedure, a writ, and both time and money discourage such action. The attorneys are usually over-burdened with many cases and do not have the time to prepare an extraordinary writ. And unless a private

attorney was hired by the parents, appointed attorneys are unlikely to be reimbursed for the additional work of filing, briefing and arguing the writ.

As these comments reveal dependency law does not fit well within the legal system. Dealing with young children requires the court system to be prepared to move more quickly than in other types of cases. For the court system effectively to address prevention issues, there must be several structural changes.

First, attorneys should be appointed simultaneously with the filing of the petition. That means the state must send a copy of the petition and supportive documents to the attorney simultaneously with filing of the petition. To address the objections raised by some in the legal system, [several courts have accomplished this challenge](#).

Second, the attorneys must have the ability to ask for a short continuance if there are delays so that there can be sufficient time to prepare for the hearing.

Third, attorneys must be prepared to ask the social worker detailed questions about the services she provided to prevent removal of the child from parental custody. This questioning creates a record that an appellate court can review.

Fourth, attorneys must be prepared to seek appellate review in appropriate cases where the social worker failed to take steps to support the family without removing the child. Appellate review must be accessed by using an extraordinary writ, since time is of the essence.

Finally, the appellate courts must be ready to respond quickly to these extraordinary writs.

Some of these changes have challenged court systems across the country. Nevertheless, in a few jurisdictions all of these changes have been instituted. Technical assistance to implement some of these changes can be sought from the National Council of Juvenile and Family Court Judges. The author is also willing to discuss these changes with court systems. [\[2\]](#)

If we are going to serve children and families experiencing child welfare problems and prevent unnecessary removal of children from parental care, the legal system must be prepared to make changes. It can be done.

Leonard Edwards is a retired judge from Santa Clara County, California. Read more of his work [here](#).
