

1990

Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later

Alice C. Shotton

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Shotton, Alice C. (1990) "Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later," *California Western Law Review*: Vol. 26 : No. 2 , Article 2.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol26/iss2/2>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

CALIFORNIA WESTERN LAW REVIEW

VOLUME 26

1989-1990

NUMBER 2

Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later

ALICE C. SHOTTON*

INTRODUCTION

In 1980, Congress enacted the Adoption Assistance and Child Welfare Act, commonly referred to as Public Law 96-272. The Act was heralded by child advocates across the country as a major step in reforming our languishing child welfare systems. The law required child welfare agencies to implement several reforms in their systems in exchange for federal funds.¹ A key provision of the law, but perhaps the least understood, requires child welfare agencies to make "reasonable efforts" to maintain children with their families or, if this is not possible, to make reasonable efforts to reunify the child with the family. The law also mandates that a juvenile court scrutinize the agency's "efforts" in every case to determine whether they were "reasonable." The statute, however, and accompanying regulations, did not define reasonable efforts.²

A major objective of Congress in requiring states to make reasonable efforts was "preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and

* B.A., UCLA, 1970; Elementary Teaching Credential, California State University at Northridge, 1972; J.D., Southwestern University School of Law, 1979. Staff Attorney, Youth Law Center, San Francisco. Research assistance by: Kadijah R. Muhammad, Legal Intern, Youth Law Center, Fall 1989; student at U.C.L.A. Law School (J.D. expected 1990).

1. Pub. L. No. 96-272, June 17, 1980, 94 Stat. 500 (see generally 42 U.S.C. 620 *et seq.*). See also Allen, *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in *FOSTER CHILDREN IN THE COURTS* (M. Hardin, ed.) American Bar Association, 1983, for a detailed discussion of the requirements of P.L. 96-272.

2. See § IIA, *infra*, for a further discussion of a definition of "reasonable efforts."

possible. . . ."³

This article will summarize the statutory, regulatory, judicial and programmatic steps that have been taken in the last decade to implement reasonable efforts in our child welfare systems. The article will also present a definition of "reasonable efforts" for use in individual cases and will analyze model legislation from various states as guidance for other states considering incorporating reasonable efforts language into their juvenile codes. Finally, the article will suggest trends and goals for the the 1990s.

I. LEGISLATIVE HISTORY OF THE REASONABLE EFFORTS REQUIREMENT

Before passing P.L. 96-272, Congress heard testimony over a five-year period about our country's treatment of abused and neglected children and their families. The most striking fact presented was the astonishing number of children who were being removed from their families and placed in foster care, many for the entire duration of their childhoods. By 1977, the foster care population was estimated to be as high as 502,000.⁴ While lost in a system that could neither return them to their families nor place them with adoptive parents, these children often moved from foster home to foster home, becoming more and more disturbed with each move.

At the same time as Congress was listening to testimony about our dysfunctional child welfare systems, a handful of programs around the country were experimenting with new ways to work with families in crisis. The most notable of these groups was Homebuilders, located in the state of Washington. Homebuilders' model is a short-term program which provides intensive services to families in their homes, and is considered by many as state-of-the-art child welfare practice.⁵

These intensive family service programs were experiencing substantial success in keeping crisis-ridden families intact. They responded to these families almost immediately upon referral and had staff available on a 24-hour basis who could go to the family's home, rather than requiring the family to come to a program office. These programs demonstrated that by utilizing the appropriate tools, many families previously thought "hopeless" could actually provide adequate homes for their children. This new faith in working with troubled families, coupled with the demonstrated

3. 42 U.S.C. § 625.

4. *Keeping Families Together: The Case for Family Preservation*, The Edna McConnell Clark Foundation I (1985).

5. *Id.* at 8-13.

harms of children growing up in foster care, helped inspire the reasonable efforts requirement.

II. PROBLEMS WITH IMPLEMENTATION OF THE REASONABLE EFFORTS REQUIREMENT

A. *Lack of a Definition*

Unfortunately, neither Congress nor the Department of Health and Human Services (HHS), the federal agency charged with overseeing the implementation of P.L. 96-272, defined the term "reasonable efforts". HHS has, however, issued a regulation listing suggested preventive and reunification services states should consider when developing their state plans.⁶ Nevertheless, it is up to the states and their court systems to define the term. Many advocates of child welfare reform believe that the lack of a definition has been a significant obstacle to implementation even several years after the reasonable effort requirement became law. Only a few states have attempted to define "reasonable efforts" in their statutes. These states include Florida, Minnesota, and Missouri. Each of these statutes, however, uses the same general wording. They define "reasonable efforts" as "reasonable diligence and care" by the agency (Florida⁷), "due diligence" by the agency (Minnesota⁸), and "reasonable diligence and care" by the division (Missouri⁹). Missouri's statute has additional language requiring that the agency's diligence and care be made to "utilize all available services related to meeting the needs of the juvenile and the family." Minnesota's additional language is similar—the agency must exercise due diligence "to use appropriate and available services to meet the needs of the child and the child's family. . . ."¹⁰ Florida's statute, in contrast, "assumes the availability of a reasonable program of services to children and their families."¹¹

While these definitions are a helpful first step in defining reasonable efforts, it is proposed that the following three-step defining process will improve reasonable efforts determinations in individ-

6. 45 C.F.R. § 1357.15(e)(2) (1986) (These services include: (1) twenty-four hour emergency caretakers and homemaker services; (2) day care; (3) crisis counseling; (4) individual and family counseling; (5) emergency shelters; (6) emergency financial assistance; (7) temporary child care to provide respite to the family; (8) home-based family services; (9) self-help groups; (10) services to unmarried parents; (11) mental health, drug and alcohol abuse counseling, vocational counseling or vocational rehabilitation; and (12) post-adoption services).

7. FLA. STAT. ANN. § 39.41(4)(b) (West Supp. 1988).

8. MINN. STAT. ANN. § 260.012(b) (Supp. 1990).

9. MO. ANN. STAT. § 211.183(2) (Vernon Supp. 1990).

10. See *supra* note 8.

11. See *supra* note 7.

ual cases. The steps include: (1) identifying the exact danger that puts the child at risk of placement and that justifies state intervention; (2) determining how the family problems are causing or contributing to this danger to the child; and (3) designing and providing services for the family that alleviate or diminish the danger to the child. If any one of these steps is missing, it is unlikely that the efforts made on behalf of the family will be reasonable.

For example, suppose the child is severely malnourished and that this is the primary reason the child is at risk of placement and the agency is involved with the family. The agency, in order to make reasonable efforts to prevent that placement, must try to determine how the family situation is contributing to, or causing, the malnutrition. It may be because the parent is ignorant of nutrition, because the parent is depressed and unable to prepare meals, or because the parent is addicted to drugs and is too preoccupied with fulfilling the drug craving to prepare meals. In order to take the third step, however (that of designing and providing services to this child's family), it is clear that the relationship between the parent and the child's condition must be explored. If the parent is not preparing meals because he or she is depressed, sending in a homemaker to work with the mother on meal preparation may be futile. Instead, arranging counseling would be a much more reasonable effort.

B. Lack of Guidelines for When Judicial Findings of Reasonable Efforts Must Be Made

The federal statute and regulations also fail to clarify when, during the court process, judges should make reasonable efforts determinations. States are again required to decide when and how often the judicial determination should be made. Only California has added reasonable efforts language to every section of its juvenile code which deals with juvenile court hearings, from detention hearings to termination hearings.¹² Ohio has recently added language requiring courts to make "reasonable efforts" determinations at every court hearing where the court is either removing a child from his home or continuing that child's placement in foster care.¹³

While the majority of state statutes that deal with the timing of judicial findings do specify more than one stage of the court process at which the determination should be made, none are as all-

12. CAL. WELF. & INST. CODE §§ 306, 319, 361, 366.21(e), 366.21(f), 366.22(a) (West Supp. 1990), and CAL. CIV. CODE § 232(a)(7) (West Supp. 1990).

13. OHIO REV. CODE ANN. § 2151.419(A) (Anderson 1989).

encompassing as California's or Ohio's.¹⁴ Both California's and Ohio's statutes recognize the importance of the agency making reasonable efforts throughout the time a child is in placement, acknowledging that such vigilance is necessary to prevent the foster care limbo Congress was so concerned about when passing P.L. 96-272.

C. Consequences of Failing to Make Reasonable Efforts

Substantial misunderstanding exists regarding the consequences under P.L. 96-272 of an agency's failure to make reasonable efforts in a particular case. The only ramification that Congress intended was that the child welfare agency could not legally claim federal matching funds for the child's stay in foster care pursuant to Title IV-E for that period of time when a court found reasonable efforts to be lacking.¹⁵ Many have incorrectly believed that a failure to make such efforts under the federal law prevents the agency from removing the child from a dangerous home situation, or else, requires the agency to return the child to an unsafe home if the child is already in placement. Unfortunately, the confusion also has led several states to pass statutes requiring reasonable efforts to be shown before removing a child.¹⁶

The result of this confusion is that many judges simply ignore the reasonable efforts requirement or else make positive findings based on inaccurate or incomplete information. For many judges, determining whether reasonable efforts have been made involves little more than checking a box on a court form, with no discussion of the issue. It is important to stress that P.L. 96-272 has never tied the state's ability to remove children from their parent's home to the reasonable efforts requirement. The child's safety is always paramount. Only federal funding for the child's placement is in jeopardy when reasonable efforts are lacking.

14. See, e.g., FLA. STAT. ANN. §§ 39.402(2), (9), (10), 39.41(2)(a) (West 1988); IND. CODE ANN. §§ 31-6-4-6(e), 15.3 (West 1986)); IOWA CODE ANN. §§ 232.52(6), .95(2)(a) (West 1985), § 232.102(3)(b) (West Supp. 1989); MINN. STAT. § 260.012(b) (Supp. 1990); MISS. CODE ANN. §§ 43-21-301(4)(c), -309(4)(c), -405(6), -603(7) (Supp. 1989); OR. REV. STAT. §§ 419.577(3)(b)(B) (1989); VA. CODE §§ 16.1-252(A), (E)(2), -279(A)(3)(c), (C)(5)(c), (E)(9)(c) (Supp. 1988); WASH. REV. CODE ANN. §§ 13.32A.170(1)(d), .34.060(6)(a), .130(1)(b) (Supp. 1989); WIS. STAT. ANN. § 48.21(5)(b) (West 1987), § 48.355(2)(a) (West Supp. 1989).

15. HHS, Human Development Serv., Policy Announcement, ACYF-PA-84-1 (Jan. 13, 1984), p. 4.

16. See *infra* note 37.

D. Emergency Situations

Another area of confusion concerns whether or not a child can be removed in an emergency situation if no reasonable efforts have been made. Here again, HHS has left it to the states to define an emergency situation and its relationship to the reasonable efforts determination. Several states have passed statutes and developed court rules that contain special language regarding the agency's role in making reasonable efforts in an emergency situation.¹⁷ California's statute is again illustrative:

Where the first contact with the family has occurred during an emergency situation in which the child could not safely remain at home, even with reasonable services being provided, the court shall make a finding that the lack of preplacement preventive efforts were reasonable.¹⁸

This statute makes two things clear in emergency situations: (1) no child should ever be left in a dangerous situation, and (2) reasonable efforts must always be considered, even in an emergency.

Faced with a removal where the agency is claiming an emergency existed and wants the judge to excuse the lack of preventive efforts, the judge should scrutinize the following:

(1) Is this truly an emergency? Even in a legitimate emergency, there is the question of degree. The fact that the agency labels the case an "emergency" does not eliminate the need for judicial scrutiny. At a minimum, the agency should do whatever time allows. Some examples of efforts that can be made even in an emergency include: removal of a perpetrator, rather than the child; locating relatives who can care for the child; and use of homemaker, respite care, emergency funds and intensive in-home services based on the Homebuilders model.

(2) Has the agency been involved with the family on prior occasions? Judges and attorneys may need to press for accurate information on any prior contacts the agency has had with the family. This should include asking the family whether they had requested help on prior occasions, and if so, what was the agency's response. If there were prior contacts, is the emergency the result of the

17. See ARK. CODE ANN. § 9-27-335(c)(3) (Supp. 1986); CAL. WELF. & INST. CODE § 319 (West Supp. 1990); CAL. JUV. CT. R. 1446 (a) (1990); FLA. STAT. ANN. §§ 39.402 (B)(a), 39.41(4)(B) (West Supp. 1988); ILL. ANN. STAT. ch. 37, para. 803-12(3) (Smith-Hurd 1989); LA. CODE JUV. PROC. ANN. art. 87(F) (West 1988); MISS. CODE ANN. §§ 43-21-301(4)(c)(ii), -309(4)(c)(ii), -603(7)(b)(1989); MO. ANN. STAT. § 211.183(1) (Vernon Supp. 1990); OKLA. STAT. ANN. tit. 10, § 1104.1(d)(2)(1987); VA. CODE §§ 16.1-252(E)(2)(1988).

18. CAL. WELF. & INST. CODE § 319 (West Supp. 1990); *see also*, MINN. STAT. § 260.172 (Supp. 1990). (If court finds agency's efforts have not been reasonable, but further efforts could not permit child to safely remain at home, court may still authorize or continue removal.)

agency's failure to make reasonable efforts on those prior occasions?¹⁹

E. Interplay With Other State Statutes

Confusion as to how the requirement interplays with other state statutes also has hampered implementation. These other statutes include mandatory reporting statutes, removal statutes, and termination of parental rights statutes. They are discussed in detail below.

1. Mandatory Reporting Statute

Since 1964, every state has enacted a statute requiring the reporting of suspected child abuse and neglect.²⁰ The range of persons who must report the abuse/neglect has expanded over the years and now includes a variety of individuals involved with children.²¹ Likewise, the types of abuse and neglect which must be reported have increased in most states to include physical abuse, physical neglect, sexual abuse, and emotional maltreatment.²² Obviously, these statutes have greatly increased the number of children who come to the attention of child welfare agencies and who, consequently, may be at risk of being removed from their homes. Nevertheless, just as the report itself does not justify removal, neither does it negate the need to make reasonable efforts.

This is true regardless of who the reporting person is. It is not uncommon for agency workers to feel pressured to accommodate the opinion of the reporter. For example, a physician may be concerned about a child's injuries and the parent's role in the child receiving those injuries. While the physician may feel strongly

19. For a further discussion of reasonable efforts and emergencies, see Ratterman, *Reasonable Efforts to Prevent Foster Placement: A Guide to Implementation* (2nd ed., 1987), American Bar Association, at 13-14.

20. See, e.g., CAL. PENAL CODE §§ 11164 to 11174.3 (West Supp. 1990); MASS. GEN. LAWS ANN. ch. 119, §§ 51A *et seq.* (West Supp. 1989); FLA. STAT. ANN. §§ 415 *et seq.* (West Supp. 1988); OHIO REV. CODE ANN. tit. 21, § 2151.421 (Anderson 1989).

21. See, e.g., CAL. PENAL CODE § 11166 (West Supp. 1990) (following persons covered: any child care custodian, health practitioner, or employee of a child protective agency who knows or reasonably suspects child is abused shall report to child protective agency; any commercial film and photographic print processor who has knowledge of, or observes in professional capacity, child engaged in sexual act shall report; any other person who has reasonable suspicion child has been abused may report); FLA. STAT. ANN. § 415.504 (West Supp. 1988) (any person, including, but not limited to, health or mental health professionals; school, childcare, or social workers; or law enforcement officers, who knows or has reasonable cause to suspect that a child is abused or neglected, must report by calling a statewide toll-free number).

22. See, e.g., CAL. PENAL CODE §§ 11165.1 to 11165.4 (West Supp. 1990) (statutes cover sexual abuse, assault and exploitation; neglect; willful cruelty or unjustifiable punishment of a child; and unlawful corporal punishment or injury).

that the child should not be removed from the parents' custody, the worker has a legal obligation to make an independent investigation of the case and also to make reasonable efforts to prevent the child's removal.

2. Child Removal Statutes

Every state has statutory guidelines outlining when a governmental agency can remove children from their parents custody. These statutes cover a range of removal situations, including emergency law enforcement removals, social worker removals, and removals initiated or authorized by court order. While the reasons justifying removal differ somewhat from state to state, they generally require that the child be in imminent danger of substantial harm and that the parents are unable to protect the child from that harm.²³

As with the mandatory reporting statute, the crucial point to stress is that even though the statutory grounds for removal exist in a case, this does not generally excuse an agency from its obligation under federal law to make reasonable efforts to prevent that removal. At the same time, the failure to make reasonable efforts does not prevent a state from removing a child from a dangerous situation. Rather, if the failure to provide services is found to be unreasonable, it will only result in a lack of federal funding for the child's placement until reasonable efforts are made. Unfortunately, at least ten states' statutes make removal conditional upon a finding that reasonable efforts have been made.²⁴ It would appear that judges in these states may be hard-pressed to make a negative reasonable efforts determination in cases where the child is clearly at risk but no services exist or none have been sought out to keep the child safely in the home.

3. Statutory Grounds Justifying No Reunification Services

At least one state, California, has passed a statute outlining grounds that can justify not providing a family with reunification services.²⁵ If these grounds are proven at the dispositional hearing

23. See, e.g., CAL. WELF. & INST. CODE § 319 (West Supp. 1990.)

24. See FLA. STAT. ANN. §§ 39.402 (2), (8)(a) (West 1988); GA. CODE ANN. § 24A-2701 (Supp. 1988); ILL. ANN. STAT. sch. 37, para. 803-12, (Smith-Hurd 1989); IOWA CODE ANN. §§ 232.52(6), .95 (2)(a) (West 1985); ME. REV. STAT. ANN. tit. 15, § 3314 (1)(C-1) (Supp. 1989); MISS. CODE ANN. §§ 43-21-301 (4)(c), - 309(4)(c), -603(7)(a) (Supp. 1989); N.Y. SOC. SERV. LAW §358-a(3) (McKinney Supp. 1990); VA. CODE §§ 16.1-251(A)(2), -252(e)(2) (Supp. 1988); WASH. REV. CODE ANN. §§13.32A.170(1)(d), 13.34.060(6)(a)(Supp. 1989); WIS. STAT. ANN. §§ 48.355(2)(a)(West Supp. 1989).

25. CAL. WELF. & INST. CODE § 361.5 (West Supp. 1990).

by clear and convincing evidence, the court may choose not to order reunification services but rather to proceed to a permanency planning hearing within 120 days.²⁶ By California court rule, the dispositional hearing for children already detained generally must take place no later than 15 days from the date of the detention order.²⁷ This means that in specified cases within a very short time, generally a matter of a few months from the time a child is removed, the agency may be relieved from working to reunify the family.

The grounds in California's statute that can justify no reunification services include: (1) parent's whereabouts unknown; (2) mental disability of parent as defined in the termination statute; (3) child previously made a dependent for physical/sexual abuse and being removed again for additional physical/sexual abuse; (4) parent convicted of causing the death of another child through abuse or neglect; and (5) child under five and a victim of severe physical abuse.²⁸

The intent behind the passage of this statute was to lend some guidance to child welfare agencies in deciding which families should be reunified.²⁹ It was also a recognition that, given the scarcity of resources, some families would probably never be able to be reunified within California's short statutory time periods. Nevertheless, even these families have the right to have the agency make reasonable efforts to prevent removal and to reunify up to the time of the dispositional hearing. From the time the agency first became involved with the family, the need to make reasonable efforts existed. At the very least, these families have the right to have the worker make every effort to place the child with a relative. More than anything, this type of statute allows the court to decide much sooner than in most cases when the worker no longer needs to make reasonable efforts.

In 1986, an appellate court decision, *In Re Clarence I.*,³⁰ appears to have encouraged the legislature to pass this statute. In that case, the mother appealed the termination of her parental rights as to her son. The trial court had ruled that attempting to reunify this family was inappropriate because of the severity of the child's injuries, the felony convictions of the parents, the par-

26. California uses the term "permanency planning hearing" instead of the term "18 month dispositional hearing" found in P.L. 96-272 § 475(5)(c).

27. CAL. JUV. CT. RULES 1447, 1451 (1990).

28. CAL. WELF. & INST. CODE § 361.5 (b)(West Supp. 1990).

29. The author bases this assertion on her extensive contact with judges, child welfare workers, and others involved in California's dependency systems over the past several years.

30. 180 Cal. App. 3d 279, 225 Cal. Rptr. 466 (Ct. App. 1986).

ents' psychological evaluations, and another agency's written report.

The mother's sole challenge on appeal was that the trial court had failed to order family reunification services, as required under both case law and court rules, prior to terminating her parental rights. The appeals court held the court rule applied only to juvenile court proceedings and thus was inapplicable to this superior court challenge.³¹ It stated that a decision to order reunification services was within the sound discretion of the trial court, and that the court was not required to order them prior to terminating the parental relationship.³²

The court of appeal affirmed the trial court's determination that it would have been inappropriate to attempt to reunite this family and return the child to his parents, with whom he would have likely suffered additional serious bodily injury or perhaps death.

It is unclear whether other states will follow California's example in statutorily defining which families need not be provided reunification services. Many judges in California report hesitance in applying the statutory guidelines, unsure whether the statute provides the necessary due process to families.³³ As of this date, there is no reported case law challenging the application of the statute.

4. Termination of Parental Rights Statutes

Many state termination statutes contain a requirement that a family be provided or at least offered reasonable services before their parental rights can be terminated. Generally, this requirement is coupled with the condition that the child has been in out-of-home placement for a certain period of time and other conditions that may differ from state to state.³⁴

The reasonable services required by these statutes are arguably the same as the reasonable efforts required by federal law. A termination case generally involves a history of family problems,

31. 180 Cal. App. 3d at 281, 225 Cal. Rptr. at 467.

32. *Id.* at 283, 225 Cal. Rptr. at 468.

33. *See supra* note 29.

34. *See, e.g.*, CAL. CIV. CODE § 232(2)(a)(7) (West Supp. 1990); LA. REV. STAT. ANN. § 13:1601(D)(4), (F)(4) (West 1989); MINN. STAT. ANN. § 260.221(b)(5) (Supp. 1990); N.Y. SOC. SERV. LAW § 384-b (McKinney 1983 & Supp. 1986); N.C. GEN. STAT. § 7A-289.32(3) (1989); R.I. GEN. LAWS § 15-7-7 (1985); S.D. CODIFIED LAWS ANN. § 26-8-35.2 (1989); WIS. STAT. ANN. § 48.415 (West Supp. 1989). The following are state statutes where reasonable efforts *may* be considered at termination. ALA. CODE § 26-18-7(a)(6) (1986); KAN. STAT. ANN. § 38-1583(b)(7) (1986); MONT. CODE ANN. § 41-3-609(2)(g) (1989); NEB. REV. STAT. § 43-292(6) (1988); NEV. REV. STAT. § 128.106(7) (Supp. 1989); N.H. REV. STAT. ANN. § 170-C:5(V)(b) (Supp. 1989); OR. REV. STAT. § 419.523(2)(1989); TENN. CODE ANN. § 37-1-147(e)(2) (Supp. 1989).

agency work to assist the family, and the parent's response to this assistance. A number of thorough and objective reasonable efforts findings made by a judge throughout the life of a case establishes a meaningful judicial record which can streamline the court process at termination and move the child more quickly into a permanent living situation. On the other hand, the lack of meaningful reasonable efforts determinations during the case's progress or negative determinations can delay or defeat a termination proceeding and cause the child to remain in foster care limbo.

F. The Role of Law Enforcement

Another major obstacle to implementation in many jurisdictions is the interplay between law enforcement and child welfare agencies. Far too often, there is little or no coordination or established protocols between the two agencies when a report of child abuse or neglect is made. Often, law enforcement responds alone to the initial report. Many law enforcement officials are not trained in the reasonable efforts requirement and have little access to current information on available services to keep the family intact. As a result, police often remove a child rather than look for alternatives that might allow a child to remain safely at home.

It is important to stress that no matter who responds to a child abuse report, the federal reasonable efforts requirement still applies. Therefore, it is incumbent on state and local child welfare agencies to develop a means of working with law enforcement to insure that reasonable efforts are made before removal.

III. APPLICATION TO DELINQUENT CHILDREN

Depending on the type of placement, the reasonable efforts requirement may apply to cases involving delinquent children. When children are placed in eligible facilities such as family foster care homes or non-secure group homes, reasonable efforts to prevent placement must be made as a condition to receive federal funding for the placement. Children placed in secure, correctional-type facilities are not covered by the reasonable efforts requirement.³⁵ A handful of states—Iowa, New York, and Virginia—have passed statutes mandating that reasonable efforts be made before a delinquent child is placed in foster care.³⁶

35. For a further discussion of delinquents, as well as status offenders and the reasonable efforts requirement, see Ratterman, *supra* note 19, at 5-6.

36. IOWA CODE ANN. § 232.52.6 (West 1985); N.Y. FAM. CT. ACT § 352.2(2)(b) (McKinney Supp. 1986); VA. CODE § 16.1-279(e)(9)(c) (Supp. 1988).

IV. STATE REASONABLE EFFORTS STATUTES

While P.L. 96-272 required states to implement a number of changes in their child welfare and juvenile court systems, the federal law does not require states to incorporate these changes into their juvenile codes. By 1986, however, at least twenty-one states had passed legislation addressing the court's determination of reasonable efforts.³⁷ Since 1986, only a few states have passed similar legislation.³⁸

At least four states—California, Minnesota, Missouri and Ohio—have adopted comprehensive statutory reasonable efforts schemes that go beyond the technical requirements of the federal law.³⁹ All are examples of model legislation. Under California's statutory scheme, judicial findings of "reasonable efforts" are tantamount to due process. If seeking to terminate parental rights, the agency in many cases must prove to the court that it made "reasonable efforts" throughout the case. The court is required by statute to make a reasonable efforts determination at virtually every court hearing in the case, beginning at detention, and again at disposition, six and twelve month reviews, the eighteen month permanency planning hearing, and culminating at the termination hearing.⁴⁰

Minnesota's recently-enacted statute offers perhaps the greatest guidance in statutorily defining "reasonable efforts." It defines the

37. ARK. CODE ANN. § 9- (Supp. 1985); CAL. WELF. & INST. CODE §§ 319, 361(c), 11404 (West Supp. 1989); FLA. STAT. ANN. § 39.402, -408, -41 (West 1988); GA. CODE ANN. § 24A-2701(c) (Supp. 1988); ILL. ANN. STAT. ch. 37, para. 803-12 (Smith-Hurd 1989); IND. CODE ANN. §§ 31-6-4-6, -10, -15.3, 31-6-11-10 (West 1989); IOWA CODE ANN. § 232.52, -.95, -.102 (West 1986); KAN. STAT. ANN. §§ 38-1542(f), -1543(i), -1563(h) (1986); LA. STAT. ANN. CODE JUV. PRO. (Supp. 1988) art. 87 (West 1988); ME. REV. STAT. ANN. tit. 15, §§ 3314-1, 3317 (Supp. 1989); MASS. GEN. LAWS ANN. ch. 119, § 29C (West Supp. 1989); MISS. CODE ANN. § 43-21-301, -309, -405, -603 (Supp. 1989); MO. ANN. STAT. § 211.183 (Vernon Supp. 1990); NEV. REV. STAT. § 432B-360 (1986) §, -550 (Supp. 1989); N.M. STAT. ANN. § 32-1-34 (1989); N.Y. SOC. SERV. LAW § 358-a, N.Y. FAM. CT. ACT §§ 352.2, 754 (McKinney Supp. 1990); OKLA. STAT. ANN. tit. 10 § 1104.1 (1987); OR. REV. STAT. §§ 419-576 -577 (1989); VA. CODE § 16.1-251, -252, -279(A)(3)(c), (C)(5)(c), (E)(a)(c) (Supp. 1988); WASH. REV. CODE ANN. § 13.32A.170, -.34.060, -.34.130 (Supp. 1989); WIS. STAT. ANN. § 48.21 (West 1987), §§ 48-355, -.38 (West Supp. 1989).

38. See, e.g., MINN. STAT. § 260.012 (Supp. 1990); NEB. REV. STAT. § 43-1315 (1987); and OHIO REV. CODE ANN. § 2151.419 (Anderson 1989).

39. CAL. WELF. & INST. CODE §§ 306, 319, 361(c), 366.21(e), 366.21(f), 366.22(a), (West Supp. 1990) and CAL. CIV. CODE § 232(a)(7) (West Supp. 1990); MINN. STAT. §§ 260.012(b), -.155, -.172, -.191 (Supp. 1990); MO. ANN. STAT. § 211.183 (Vernon Supp. 1990); and OHIO REV. CODE ANN. § 2151.49 (Page 1988) (provides for the suspension of sentence).

40. CAL. WELF. & INST. CODE §§ 319 (detention), 361(c) (disposition), 366.21(e) (six-month reviews), 366.21(f) (12-month reviews), 366.22(a) (West Supp. 1990) (18-month permanency planning), and CIV. CODE § 232(a)(7) (West Supp. 1990) (termination of parental rights).

term as "the exercise of due diligence by the responsible social service agency to use appropriate and available services to meet the needs of the child and the child's family" to prevent removal, or reunify if removal is necessary.⁴¹ The statute states that the "agency has the burden of demonstrating that it has made reasonable efforts."⁴² The juvenile court, on the other hand, must make findings and conclusions as to the provision of "reasonable efforts." The statute gives courts the following guidelines in scrutinizing the services offered or provided to a particular child and family: Were the services relevant to the child's safety and protection, adequate to meet the child's and family's needs, culturally appropriate, available and accessible, consistent and timely, and realistic under the circumstances?⁴³

Ohio amended its juvenile code in 1988 to require the court to make written findings of fact regarding reasonable efforts at court hearings where the court is either removing a child from his home or continuing that child's placement in foster care.⁴⁴ These hearings include detention, adjudication, and disposition. In its written findings of fact, the court must "briefly describe the relevant services provided by the agency to the family of the child and why those services did not prevent the removal of the child from his home or enable the child to return home."⁴⁵

Some state reasonable efforts statutes use the term "available" when describing the services which the agency must use in making reasonable efforts. California's statute, for example, requires the judge at the detention hearing to determine on the record whether reasonable services were provided to prevent or eliminate removal and whether services are "available" which would prevent the need for further detention.⁴⁶ Arguably, the term "available" limits the agency's duty to make reasonable efforts. However, P.L. 96-272 requires close scrutiny of such terms. If an agency claims a particular service is unavailable, the judge should inquire as to whether the lack of the service is reasonable. The legislative purpose behind the reasonable efforts requirement is to encourage states to increase their preventive and reunification services to families in need. Attorneys and other child advocates should push courts and legislatures to see that these services are developed.

41. MINN. STAT. § 260.012(b) (Supp. 1990).

42. *Id.*

43. MINN. STAT. § 260.012(c) (Supp. 1990).

44. OHIO REV. CODE ANN. § 2151.419 (Anderson 1989).

45. *Id.*

46. CAL. WELF. & INST. CODE § 319 (West Supp. 1990).

V. REASONABLE EFFORTS' RELATION TO THE INDIAN CHILD WELFARE ACT

In 1978, shortly before the passage of P.L. 96-272, Congress passed the Indian Child Welfare Act, P.L. 95-608 (ICWA). Like P.L. 96-272, the ICWA was passed because of Congress' concern over the excessive number of Indian children removed from their homes. As part of its statutory scheme, the ICWA requires child welfare agencies to make "active efforts" to provide services "designed to prevent the breakup of the Indian family" before they could place a child in foster care or terminate parental rights.

Defining "active efforts" is perhaps as problematic as defining reasonable efforts. However, clearly both requirements apply to Indian children removed from their homes. One source has concluded that "for an effort to be a reasonable one, it must be active. It is possible that an effort could be active without being reasonable, such as in a situation of inappropriate or ineffective case planning and referrals. Active efforts, therefore, must also be reasonable."⁴⁷

While both statutes require close scrutiny into service delivery, the ICWA has an added purpose—to preserve and maintain Indian tribes and cultures—as well as to protect individual families. In addition, unlike the reasonable efforts requirement, in ICWA cases the agency must prove to the court that active efforts have been made before it can remove an Indian child from its family. In contrast, an agency's failure to demonstrate reasonable efforts under P.L. 96-272 only results in the state and Indian tribes being unable to claim federal funding for the child's placement.⁴⁸ A final important distinction between the two statutes is that P.L. 96-272 is enforced through federal monitoring, not by the stipulation that a child may not be removed.

At least one state—Minnesota—has attempted to incorporate both reasonable efforts and active efforts into their juvenile codes.⁴⁹ Its language reads as follows:

In a proceeding regarding a child in need of protection or services, the court, before determining whether a child should continue in custody shall also make a determination, consistent with section 260.012 as to whether reasonable efforts, or in the case of an Indian child, active efforts, according to the Indian Child

47. Active and Reasonable Efforts to Preserve Families: A Guide for Delivering Services in Compliance with The Indian Child Welfare Act of 1978 (P.L. 95-608) and The Adoption Assistance and Child Welfare Act of 1980 (P.L. 96-272), Northwest Resource Associates, Seattle, Washington (1986).

48. See *supra* § IIIC for a further discussion on the ramifications for failing to make reasonable efforts under P.L. 96-272.

49. MINN. STAT. § 260.172 (Supp. 1990) (subdivision 1(c)).

Welfare Act of 1978, United States Code, title 25, section 1912(d), were made to prevent placement or to reunite the child with the child's family, or that reasonable efforts were not possible. The court shall also determine whether there are available services that would prevent the need for further detention.

VI. CASE LAW

The appellate courts are more and more becoming a source of direction for defining reasonable efforts in individual cases. This is not surprising, given the lack of legislative guidance, both federal and state, in defining the term. Further, given the inherent discretion in the word "reasonable" — what is reasonable for one person may not be reasonable for another — court decisions in individual cases are vital.

In a recent survey of over 1,200 juvenile court judges from around the country, 44 judges responded that they had made at least one negative reasonable efforts finding during their tenure on the bench.⁵⁰ Several of these judges reported that they had made numerous negative findings, with one noting that he had probably made over 100 such findings. The judges reported a variety of reasons for their findings. The reasons most often cited included lack of counseling or parenting classes, no case plan or failure to provide clear directions to parents in the case plan, and lack of agency contact with the family. Other services judges found lacking included mediation, in-home family preservation services, medical evaluations, substance abuse treatment, transportation, homemakers, respite, and failure to comply with visitation arrangements.

In one case, the judge based his negative finding on the fact that the agency failed to develop the case based on the child's individual situation but, rather, relied on the fact that the child's siblings had been properly removed to justify this child's removal.

Those judges making negative findings reported making such findings at all stages of the proceedings, including detention, disposition, 6-12-18 month reviews, and termination of parental rights.

Only a handful of cases now exist that address the issue of reasonable efforts in juvenile dependency cases prior to the termination of parental rights stage. In *Interest of S.A.D.*,⁵¹ the appellate

50. This survey was conducted by staff at the Youth Law Center in the summer of 1989. The judges were sent a two-page survey form which contained questions such as: Have you ever made a negative finding of reasonable efforts and, if so, how many times, in what type of case, and at what kind of hearing?

51. 382 Pa. Super 166, 555 A.2d 123 (Pa. Super. Ct. 1989).

court expressed great concern over the agency's failure to make reasonable efforts to keep an eighteen-year-old mother together with her fourteen-month-old daughter. The mother had herself sought help from the agency because she had no money and no housing. Rather than getting help with either, she was told that her only alternative was to "voluntarily" place her baby with the agency while she looked for housing. She did so and, a few weeks later, after finding a job at \$3.60 per hour and a place to stay with the family of a friend, she asked the agency to give her child back. The agency refused, saying that she needed "her own place to live,"⁵² even though no one from the agency had visited the home where mother was staying.

The agency's evidence of reasonable efforts consisted of the following worker testimony:

Q. What assistance has been provided?

A. Well, housing of her child, getting [Mother] hooked up with Community Services, providing her bus pass and things so she can come visit with her child, getting her hooked up with the Salvation Army, which in turn put her up in a motel for a short time.

We have been working with her and encouraging her to get out to D.P.A., get on assistance, seek employment, and encouraging her to find her own place to live.⁵³

After a lengthy discussion of the background and purpose behind the federal reasonable efforts requirement, the court concluded:

Our review of the record reveals a very young, unwed mother, lacking financial resources and housing who was unemployed. The mother, in a responsible fashion, turned to CYD to obtain assistance to provide and care for her child. There is no evidence that this young mother in any way neglected or abused her child. CYD has failed to present clear and convincing evidence to establish dependency and has failed to make reasonable efforts to prevent the separation of the mother and child.

A fundamental purpose of the Juvenile Act is to preserve family unity whenever possible. The Act limits the Commonwealth's course of interference with the family unit to those cases where the parents have not provided a minimum standard of care for the child's physical, intellectual and moral well-being. *In Interest of Pernishek*, 268 Pa. Super. 447, 408 A.2d 872 (1979). It is well-settled that the Juvenile Act was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take children of the illiterate and crude and give them to the educated and cultured, nor to take the children of the weak and sickly and give them to the strong and healthy.

52. *Id.* at 170, 555 A.2d at 125.

53. *Id.* at 173, 555 A.2d at 127.

Neither will this court tolerate the separation of a young child from a parent to protect agency funding.⁵⁴

The court then reversed the order of dependency and remanded the case with instructions that the child be returned to her mother.

In another pre-termination decision, a Missouri appellate court reversed and remanded a case because the dispositional order removing four children from their mother's custody lacked the determination that the agency had made reasonable efforts to prevent the removal. In *Interest of A.L.W., -L.R.W., A.M.W. and H.A.K.*,⁵⁵ the court carefully reviewed Missouri's reasonable efforts statutory scheme, including its emergency removal provision which deems reasonable efforts to have been made "if the first contact with the family occurred during an emergency in which the child could not safely remain at home even with reasonable in-home services."⁵⁶ The court strongly rejected the agency's contention that because a child abuse hot line call coded as "emergency" sent the worker to the family's home, the agency was deemed to have made reasonable efforts under the statute. The court held:

It is compromise to the safety of the child even with reasonable in-home services that determines the emergency, and not any pseudo-emergency of the hot line. The statute does not mean for the hot line to preempt the role of evidence and adjudication. The contention of such emergency made by the juvenile officer . . . is made all the more tenuous by lack of any allegation of emergency to the court.⁵⁷

Perhaps the most extensive discussion of reasonable efforts is by a juvenile court in an unreported decision. In *Matter of A Child*,⁵⁸ upon the mother's motion, the Juvenile Department of the Circuit Court of Multnomah County reviewed the foster care placement of a six and a half-year-old disabled child, and the services rendered to her family. At the time of the hearing, the child had been in out-of-home care for approximately nine months. The court's order addressed only whether the child welfare agency had made reasonable efforts to eliminate the need for removal of the child from her home and to make it possible for the child to return home.

The state's first contention was that neither Oregon nor federal law compelled a reasonable efforts finding at a review hearing re-

54. *Id.* at 176, 555 A.2d at 128-29. (citations omitted.).

55. 773 S.W. 2d 129 (Mo. Ct. App. 1989).

56. *Id.* at 133.

57. *Id.* at 134.

58. No. 88178 (Circuit Court for the State of Oregon for Multnomah County, Juvenile Dept.) (Nov. 26, 1986).

quested by a parent. Specifically, the state argued that the hearing was gratuitous, since it was not in response to the agency's report, or a statutorily required six, twelve, or eighteen month review. The court rejected this claim on both federal and state grounds. It held that P.L. 96-272 intended frequent and thorough review of children in foster care, and that state law, while not requiring more hearings, encouraged them.⁵⁹

The state also argued that a reasonable efforts finding is not necessarily in the best interests of the child because it only directly impacts the federal matching funds to the child welfare agency. The court rejected the argument, holding that close scrutiny of the services offered to reunite a family could only be in the child's best interest.⁶⁰

The state also asserted that the reasonable efforts required by the referee at the shelter hearing in this case (medical exam of the child and interview of child's grandmother as possible placement for child) were all that were required in the case. The court, however, found these services to be few and incomplete for a reasonable efforts finding for a child who already had been in agency care for nine months. The court held that the state's contention flew in the face of both the language and legislative history of P.L. 96-272.

Finally, the court, after closely scrutinizing all agency efforts, held that it had not made reasonable efforts to provide either preventive or reunification services to the family. The court based this holding on the following:

(1) The family was not formally referred to parenting classes, a critical service identified for this family, until nine months after the child was removed from the home;⁶¹

(2) The agency was too slow in providing family and marital counseling and offered no adequate explanation for why it had not offered its intensive family counseling from the outset;⁶²

(3) The agency's efforts to arrange a medical appointment for the mother to determine if she needed medication superseded and interfered with the provision of necessary individual counseling for the mother;⁶³

(4) The agency failed to provide frequent and appropriate visitation, because it did not attempt unsupervised, extended, overnight and weekend visits which the court deemed entirely appro-

59. *Id.* at 2-4.

60. *Id.* at 4-5.

61. *Id.* at 8-10.

62. *Id.* at 10.

63. *Id.* at 10-11.

priate;⁶⁴ and

(5) The child's medical exam was not to be considered a reunification service, as it was not given for other than routine purposes.⁶⁵

Virtually all other reported appellate cases to date that define "reasonable efforts" or "reasonable services" do so in the context of a termination of parental rights proceeding. In these cases, the courts explain the efforts/services that an agency must have made before the courts will grant the permanent severance of parents' right to the care and custody of their children. In spite of the fact that these cases involve reasonable efforts or services mandated by state termination statutes, they are still extremely relevant in defining reasonable efforts under P.L. 96-272. The remaining cases in this article are termination cases.

As set out in P.L. 96-272's legislative history, Congress passed the reasonable efforts requirement because such efforts were considered to be good social work practice and because of the importance of the constitutional right to family integrity. Certainly these are the same reasons states pass statutes requiring agencies to make reasonable efforts before courts can terminate parental rights. Particularly in light of the lack of an adequate definition of reasonable efforts in either the federal act or accompanying regulations, how courts define the concept at termination is helpful to anyone assessing the requirement in individual cases.

A. Engaging Families In Accepting Services

Courts have recently begun to scrutinize more closely the role of child welfare agencies in engaging families to accept and participate in services in individual cases. Many child welfare workers want to know what their duty under the reasonable efforts requirement is in engaging families to accept services. A question often asked by workers is whether just handing a client a telephone number of a service provider is sufficient. The answer, of course, depends on the facts of the individual case. In some cases, handing a client a phone number is sufficient if the client is actually able to follow up and make the call. In others, the worker may need to call for the client and arrange an appointment, and, in still others, the worker may need to actually take the client to the appointment.

As one court has noted:

The question of what constitutes "reasonable efforts" is one

64. *Id.* at 12.

65. *Id.* at 12.

which cannot be answered by a definitive statement. Instead, it must be answered on the basis of any given factual situation, for it is clear that services which might be reasonable in one set of circumstances would not be reasonable in a different set of circumstances.⁶⁶

Even though courts need to assess reasonable efforts on a case by case basis, they differ greatly in how intensively they delve into the efforts actually made in a case. Some courts list the problems of the family, enumerate the family's failings in addressing their problems, and tally what the agency did to help the family, with little integration among the three.

A 1986 Missouri case, *In the Interest of AMK*,⁶⁷ demonstrates this approach. In that case, the mother appealed the termination of her parental rights to her four children. The basis of the termination was the mother's inability to properly support her children. She argued, among other things, that the child welfare agency had failed to use reasonable, diligent and continuing efforts to help her rectify those conditions which led to the removal of her children.

The court of appeal rejected the mother's argument based on the evidence before it. When the agency intervened, the family had inadequate food, clothing, and electricity, and eviction was imminent. The mother's employment was sporadic and at best her monthly earnings were \$180, insufficient to cover food, housing, utilities, and clothing costs. The court found the evidence sufficiently clear, cogent and convincing of the mother's inability to rectify the conditions for termination.

In reaching this result, the court first enumerated the agency's reasonable efforts on behalf of the family: providing food and housing, obtaining a placement for the family at a residential home which taught parenting skills and self-sufficiency, referring the mother to community service programs and psychological counselors, and arranging visits with the mother and her children. The agency also offered to help the mother apply for public food and housing benefits such as AFDC and food stamps.

The court then cited the following actions of the mother as evidence of her further failure to rectify her problems: (1) leaving a 6-month residential treatment program after 1 week; (2) missing community service meetings; (3) having only minimal attendance at her therapy sessions; (4) not completing financial assistance applications; and (5) cancelling visits with her children and not see-

66. *In the Matter of Myers*, 417 N.E.2d 926, 931 (Ind. App. 1981).

67. 723 S.W.2d 50 (Mo. Ct. App. 1986).

ing them regularly.⁶⁸

While the court in this case goes into some detail about the family's problems/failures and the agency's efforts to help, it fails to make the vital connection between the problems/failures and the agency's efforts. For example, the court notes that the mother had only minimal attendance at therapy sessions. The court did not, however, discuss *why* the mother failed to attend. Was it because the service was not accessible in terms of transportation, cultural appropriateness, and acceptance?⁶⁹ Was appropriate childcare provided? The mother clearly was poverty-stricken. Were the services free of charge or was she required to pay all or a portion of the cost?⁷⁰

Likewise, in *In re Kathleen*,⁷¹ the mother placed her child in voluntary foster care, and the local child welfare agency devised a reunification plan. The mother complied with that part of the plan requiring her to find gainful employment and an apartment, and to maintain weekly visits with her daughter, but failed to seek counseling.

Approximately two years later, the mother admitted to dependency, and a new reunification plan was developed. The plan involved increased visitation and required the mother to participate in counseling. She again failed to attend counseling sessions, despite problems that surfaced during visitation.⁷²

The mother's parental rights were terminated under a state statute which permits termination when a child has been in state care for at least six months, and when the agency has made "reasonable efforts . . . to encourage and strengthen the parental relationship."⁷³ The court found that the agency had made reasonable efforts by urging the mother to participate in counseling, and that her failure to do so indicated the impossibility of reunification, thus justifying the termination of her parental rights.

This case again demonstrates a court's failure to take the agency to task about just what efforts it made to help the mother

68. *Id.* at 52.

69. *See, e.g.,* Matter of Jose F., 178 Cal. App. 3d 1141, 224 Cal. Rptr. 239, 245 (1986) (case ordered not published) (Court discusses in detail how the agency did not make services accessible for the mother, including excuses offered by the social worker at trial that counseling "could not 'realistically' be considered due to Mrs. V's work hours, the number of children she had and the limited availability of counseling programs for Spanish-speaking persons.")

70. Several other cases take this same approach, without integrating the needs/failures of the family with the efforts made by the agency. *See, e.g.,* Matter of V.M.S., 446 N.E.2d 632 (Ind. Ct. App. 1983) and In the Matter of the Welfare of CD, CT, MT, and ST, 393 N.W.2d 697 (Minn. Ct. App. 1986).

71. 460 A.2d 12 (R.I. 1983).

72. *Id.*

73. *Id.*

participate in counseling. The lower court should have inquired of the mother as to why she refused to engage in counseling—in what way did the agency “urge” her to participate? Was the counseling actually designed to overcome the mother’s problems? Just what were the mother’s problems? If “problems” did “surface during visitations”, did the agency attempt to have a trained family counselor supervise and work with the mother during the actual visits?

In contrast to these cases, the court in *In Matter of Jones*,⁷⁴ took a much more critical look at the agency’s role in assisting the family. In that case, the parents appealed the termination of their parental rights to their child. Subsequent to the child’s removal from the home, the parents had minimal visitation and contact with the child. The father was frequently unemployed, and the parents maintained a substandard living arrangement. The lower court found that the parents had moved frequently and failed to maintain contact with the child welfare agency. The lower court further found that the agency had assisted the parents in paying their medical bills, and had referred them to a consulting center for parenting training and homemaking skills.

In reversing the termination order, the court of appeal found that the agency had merely informed the parents of what actions should be taken in order to facilitate the return of the child. Despite the fact that the parents had changed residences and employment, the court held that the agency was not excused from providing services and, in fact, should have assisted the family in obtaining a stable residence. In addition, the agency’s failure to ensure that the homemaker actually made visits and that the parents received parenting training indicated that the agency did not make reasonable efforts to assist the family in reunification.⁷⁵

Other appellate courts have overturned termination decisions because the agency only evaluated the parent’s shortcomings, without considering what the agency did to remedy these shortcomings. One New York court held that a parent’s failure to maintain contact with the child or plan for its future cannot be

74. 436 N.E.2d 849 (Ind. Ct. App. 1982).

75. See also *Matter of Loretta*, 114 A.D.2d 648, 494 N.Y.S.2d 232 (N.Y. App. Div. 1985). (Three siblings had been in foster care most of their lives; agency’s original case plan provided for weekly visitations and individual and family counseling; at termination, court determined mother’s participation in plan insufficient because she attended only twenty of the sixty-six counseling sessions over an eighteen-month period, and did not regularly visit the children. Court terminated parental rights, and mother appealed. On appeal, while remanding case for other reasons, court held agency’s arrangements for counseling and visits, and providing transportation to and from these meetings, were “not only extensive but consistent with the statute” requiring “diligent efforts to encourage and strengthen the parental relationship.”) 474 N.Y.S. 2d 421, 61 N.Y.2d 368.

judged without considering the agency's statutory duty to make diligent efforts to encourage or strengthen the parental relationship. The court further found that many New York agencies failed to provide adequate services and in fact interfered with reunification.⁷⁶ The court also held that the child welfare agency "must affirmatively plead in detail and prove by clear and convincing evidence that it has fulfilled its statutory duty to exercise diligent efforts to strengthen the parent-child relationship and to reunite the family."⁷⁷

Relying on this language, another New York court, in scrutinizing a reunification plan, held that the agency "should be sensitive to the particular needs and capabilities of the parents . . . and should not be unrealistic in light of the financial circumstances of the parents." These "responsibilities are not one-sided, for the parents are obligated to cooperate with the [agency] . . ."⁷⁸

B. Reasonable Efforts and the Mentally Disabled Parent

Several cases have addressed the issue of reasonable efforts and the mentally disabled parent. A California appellate court recently handed down perhaps the most detailed decision as to what services must be explored in the case of a developmentally disabled parent. In *In re Victoria M.*,⁷⁹ the appellate court scrutinized the reunification services offered to a mother who had tested as mildly mentally retarded in 1980 with an I.Q. of 58. Her I.Q. was again measured in 1987 at 72, in the borderline range of intelligence. The mother appealed the termination of her parental rights as to three of her children.

The children had originally been removed for lack of adequate housing. However, the dependency petition was sustained on the grounds of parental neglect because the children, when removed, were found to have lice and scabies, and one child had a burn wound which became infected due to lack of proper attention.

The appellate court reversed the termination order because of the agency's failure to make reasonable efforts. In elaborating, the court noted that the agency failed to tailor services to the mother's intellectual limitations. It also failed to help the mother with the very problems that were the basis of the dependency petition—the children's lice, scabies, and infected wound. Further, while the mother lacked housing, the agency made almost no effort to assist

76. In the Matter of Sheila G., 462 N.E.2d 1139 (N.Y. 1984).

77. *Id.* at 474 N.Y.S.2d at 430, 61 N.Y.2d at 385, 462 N.E.2d at 1148.

78. In the Matter of Lisa L., 117 A.D.2d 931, 499 N.Y.S.2d 237 (N.Y. App. Div. 1986).

79. 207 Cal. App. 3d 1317, 255 Cal. Rptr. 498 (1989).

her in finding a place to live. One worker explained his failure in this regard was based on his understanding that the children's grandmother was helping the mother find housing. Another worker reported he had discussed the housing authority with mother and told her to read the newspaper and "keep her eyes open" as she drove about town. The court also faulted the agency for never referring the mother to the appropriate regional center which provides specialized services to developmentally disabled persons.

In another California case, *In re Venita L.*,⁸⁰ the parents of a three-year-old child appealed from the court's decision terminating reunification services and ordering a petition freeing the child from her parents' custody to be filed. The court of appeal reversed.

The child had originally been placed in foster care when her mother had been hospitalized in a psychiatric unit. The father lived in a motel at the time and said he could not provide a home. As a result of these circumstances, the agency devised a reunification plan requiring therapy, suitable residence, and regular visitation. In a little more than a year, the parents' reunification plans had been amended five times. The father's plan required participation in Alcoholics Anonymous, due to repeated episodes of violent drunken behavior.

In reversing and remanding the case, the court, while not making light of the father's alcohol abuse, determined that this was not the basis for the initial dependency. It further found that mother had substantially complied with reunification efforts, but that the lower court ignored those efforts and instead focused on the father's alcohol problems.

In *Matter of Catholic Guardian Society*,⁸¹ a mother classified as mildly retarded appealed the termination of her parental rights to her four children. In denying the termination petition, the appellate court held that (1) the agency had not made the diligent efforts required by statute;⁸² and (2) the evidence did not establish that the mother's mental retardation precluded her from caring for the children for the foreseeable future.

The court noted that diligent efforts did not exist where the agency had not provided general psychiatric or psychological services or specialized services for mental retardation. The court also found that the mother's passive behavior during visits did not establish a substantial and continuous failure to maintain contact

80. 191 Cal. App. 3d 1229, 236 Cal. Rptr. 859 (1987).

81. 131 Misc. 2d 81, 499 N.Y.S.2d 587 (N.Y. Fam. Ct. 1986).

82. 499 N.Y.S.2d at 592.

with the children, and that present incapacity to care for children because of mental retardation does not, ipso facto, demonstrate a future incapacity.

In *State ex rel. Juv. Dept. v. Habas*,⁸³ the child had been placed in state custody at birth because of the mother's periodic bouts of manic depression requiring medication and hospitalization. After the mother completed parenting classes, the child was returned to her, contingent upon the agency immediately supplying her with homemaker services and a day nurse. When the child had been home sixteen days, but before any services had been provided, the mother suffered a depressive episode and left the child alone for several hours. When found, the child was in good health except for a severe diaper rash. The agency determined the mother to be a good parent when not in the midst of a depressive bout, but unfit during such episodes.

The trial court had granted termination based on (1) the mother's mental illness which rendered her incapable of caring for her child; and (2) the mother's failure to effect a lasting adjustment after reasonable efforts by the agency. This decision was affirmed by the court of appeals, and mother appealed to the supreme court.

The supreme court reversed the termination order, holding that the agency had failed to show that the mental illness made it impossible for the parent to care for the child in the future and that the agency had failed to make reasonable efforts to provide services. The court noted that the failure to provide services appeared to have been due to "some administrative confusion as to which of two counties was to provide the services."⁸⁴

In *Matter of Star A.*,⁸⁵ the child welfare agency appealed the trial court's dismissal of proceedings it instituted to terminate a mother's parental rights as to her two children, who were removed while the mother was hospitalized for mental illness. She was subsequently rehospitalized on several occasions. The agency attempted to arrange psychiatric counseling for the mother on at least two occasions, but made no further efforts to do so, feeling such efforts would be futile since the mother had been receiving services from other agencies and had not been cooperative with them.

The court on appeal found that the agency had not made "diligent efforts to encourage and strengthen the parental relationship" as required by state law, and held that the agency could not

83. 299 Or. 177, 700 P.2d 225 (Or. 1985).

84. *Id.* at 186, 700 P.2d at 230.

85. 55 N.Y.2d 560, 450 N.Y.S.2d 465, 435 N.E.2d 1080 (N.Y. 1982).

simply predetermine that efforts would be futile.

The dissent, however, found that the intent of the statute was to ensure permanency for children, that there was no possibility of the children being reunited, that efforts would in fact have been futile, and that therefore the court should have ruled for the agency and terminated parental rights.⁸⁶

C. Reasonable Efforts and Housing

For many families, the lack of adequate housing is the primary reason for state intervention and removal of their children. Many court decisions have addressed this situation and have been fairly sympathetic to the families' situation. For example, in *In the Matter of Derek W. Burns*,⁸⁷ a nineteen-year-old mother, who had been in foster care since one month of age, appealed a family court's decision terminating her parental rights to her two-year-old son on the grounds of inadequate planning for the child's physical needs. When her child was born, the mother had turned to the child welfare agency for help in finding housing. As a condition of agency assistance, she was required to place her child in "voluntary" foster care for ninety days.

The mother, upon turning eighteen and relying on the terms of the voluntary placement agreement, notified the agency that she was terminating the arrangement and taking her child with her to live elsewhere. The agency refused and the child was eventually forcibly taken from the mother and placed in foster care.

An agency case worker then established a case plan calling for the mother to attend counseling and parenting classes, to attend weekly visits with her son, and to secure adequate housing and day care. Because the mother was not able to maintain a stable living arrangement for at least six months, the agency initiated, and the court granted, a termination of parental rights petition. The supreme court reversed, holding that the agency had neither provided the mother with meaningful case plans outlining reunification guidelines, nor made reasonable efforts to provide preven-

86. See also *In the Matter of Appeal in Pinal County*, 729 P.2d 918 (Ariz. Ct. App. 1986), where the appellate court held that any reunification efforts for the mother, diagnosed as a chronic paranoid schizophrenic, would be futile based on expert testimony that the child would be at risk with the mother in unsupervised settings. See also *In the Matter of Christine Tate*, 67 N.C. Ct. App. 89, 312 S.E.2d 535 (N.C. App. 1984) (Court upheld termination of mother's parental rights where mother suffered from drug and alcohol abuse and mental problems. Court held that agency had made significant efforts to assist mother by referring her to mental health centers, helping her with housing and employment, and monitoring her case. The court further found that mother had not made "substantial progress." Although she had made some efforts to work with her child, "substantial progress" requires a positive result from these efforts.)

87. 519 A.2d 638 (Del. 1986).

tive and/or reunification services. Even though the sole reason for the child's transfer to agency custody was lack of housing, the case plan did not indicate any housing assistance services.

In *In the Matter of Enrique R.*,⁸⁸ the child was not released from foster care to live with his grandmother solely because she could not obtain adequate housing. (She had applied for public housing in 1980 and, because her application was lost, was forced to file again in 1984.) All parties agreed that the maternal grandmother was a fit person to provide the child a permanent home and could provide access to both the child's parents while they underwent drug therapy.

The court recognized the negative effects of prolonged foster care upon children, and the duty of the agency to take all steps necessary to implement the state's goal of permanency for foster children. The court found that return of the child to his maternal grandmother satisfied that goal, with the exception of inadequate housing. Relying on state law and agency regulations, the court ordered the agency to assist the grandmother in obtaining adequate housing. Such assistance was to include writing letters, making phone calls, and taking legal action on the grandmother's behalf to secure a preference in tenant selection for public housing.

In another New York case, *In the Matter of Jason S.*,⁸⁹ the agency appealed the court's dismissal of a petition to terminate the mother's parental rights. The appellate court affirmed, holding that the agency failed to establish that it had actively aided the mother in her search for suitable housing—the primary obstacle preventing the return of the child. Additionally, the court found that the agency failed to work with the mother to strengthen and encourage her relationship with her child, even though she often showed little interest in having regular contact with her child.

D. Parent-Child Visitation and Reasonable Efforts

Visitation between parent and child has been shown in numerous studies to be one of the most important, if not *the* most important, reunification service.⁹⁰ No foster care case is complete without a complete discussion of the visitation arrangements existing for the family. One commentator, after in-depth interviews with

88. 129 Misc. 2d 956, 494 N.Y.S.2d 800 (N.Y. Fam. Ct. 1985).

89. 117 A.D.2d 605, 498 N.Y.S.2d 71 (N.Y. App. Div. 1986).

90. See, e.g., Fansel, D., *On the Road to Permanency*, CWLA, New York, 1982 (Children visited frequently are more likely to be released from foster care); WEINSTEIN, E., *THE SELF-IMAGE OF THE FOSTER CHILD*, Russell Sage Foundation, New York (1960) (Frequent visiting is associated with emotional well-being of children and parents).

selected caseworkers in several states, found that to a great extent planned visit frequency is beyond the parents' control. Rather, frequency is much more the result of such things as agency policy and resources, where the child is placed, the cooperation of the foster parents, and caseworker attitudes and assessment of the case.⁹¹

In spite of these findings, only a few courts clearly enunciate and evaluate an agency's reasonable efforts in the area of visitation.⁹² Far more common is the situation where visitation is only briefly alluded to, often by holding the parent responsible for problematic visits.⁹³

One case, however, that has closely scrutinized an agency's efforts in the visitation area is *In re Kristina L.*⁹⁴ This case was an appeal by parents of the termination of their parental rights to their middle child. The child had spent all but her first six months in foster care, where she had been placed for failure to thrive. The mother had no visits with her child for three months after the child entered foster care and visits began only because the mother requested them. For several months, the mother had only hour-long visits with her infant daughter every other week. The trial court terminated parental rights based on the fact that the child had bonded to her foster parents, and that future bonding with her biological parents was impossible.

The Rhode Island Supreme Court reversed for the following reasons: (1) the state's failure to prove that the parents were unfit; (2) the trial court's failure to find that the child was likely to suffer physical or emotional harm if she were returned to her family; (3) the parents cooperated with the child welfare agency; and (4) the agency failed to make reasonable efforts to reunify the family.

The supreme court, in its decision, noted that it was not surprising that the child had bonded with her foster family in light of the "totally inadequate" visitation schedule arranged by the agency.

The court went into a detailed discussion of the visitation sched-

91. Hess, P., Case and Context: Determinants of Planned Visit Frequency in Foster Family Care. CWLA, New York, Vol. LXVII, No. 4, July/August, 1988.

92. See, e.g., *In Re Kristina L.*, 520 A.2d 574 (R.I. 1987); *In the Matter of a Child*, No. 88178, (Circuit Court for the State of Oregon For Multnomah County, Juvenile Dept.) (Nov. 26, 1986).

93. See, e.g., *Matter of V.M.S.*, 446 N.E.2d 632 (Ind. Ct. App. 1983) (Termination upheld in case where agency asserted in termination petition, among other things, that parents' behavior while visiting their children did not demonstrate adequate parental relationship); *Matter of Christine Tate*, 312 S.E.2d 535 (N.C. Ct. App. 1984) (Court upheld termination based on following: (1) child did not cry when visits ended; (2) parent did not complete entire visits; (3) parent had completed only seven visits in the past year; and (4) mother showed an inability to provide a stable environment.)

94. 520 A.2d 574 (R.I. 1987).

ule the agency arranged for the family over a four year period. It described this schedule as "insufficient at best and sometimes non-existent."⁹⁵ The agency had to cancel many visits because there was no worker to transport the child or because of car troubles. The child's first overnight visit was canceled because the mother was unable to get a crib for her daughter. Finally, after the child had been in foster care for four years, the family entered a reunification program with another agency that took over the visitation schedule. The program worked intensively with the family and greatly increased the length and number of visits. With the new schedule, the child adjusted well to the increased visits and no longer became upset and vomited before the visits took place, as was the case when the social service agency arranged them.

The court also was concerned that, in spite of the parents cooperating with the agency and showing their care and concern for the child, their rights were terminated. The court noted that the mother had taken the child to three different hospitals when she was an infant in an attempt to determine why the baby was not gaining weight, and had also participated in counseling sessions, visited the child, attended a parenting program, and at times "went beyond what was required" for reunification.

The supreme court determined that the agency's keeping the child from her family for six years for reasons as insignificant as dirty dishes and laundry and an awkwardness between mother and child was unacceptable, and ordered the family court to oversee the reunification of the family. In its decision, however, the court encouraged the foster family to continue to play a part in the child's life.

In scrutinizing a visitation schedule in a particular case, there are a number of questions that judges, lawyers, social workers, and others can ask. First and most important, how soon did visits begin after a child's removal? The time between removal and the first visit is a crucial one. Both children and parents can experience a great deal of fear not knowing what has happened to each other. If several weeks elapse before the first visit, a judge should question whether the agency's efforts in this regard were reasonable.

One should also ask how often do visits take place and how long do they last. Often parents must travel a great distance to visit. Short visits may not seem worth the effort. Also, are the visits supervised? Is this justified by the facts of the situation? Where do the visits take place? Is the setting in as home-like a setting as

95. 520 A.2d at 581.

possible or in the agency offices?

E. Impact Litigation and Reasonable Efforts

A few class actions have been brought challenging a child welfare system's failure as a whole to make reasonable efforts to preserve or reunify families. In *Grant v. Cuomo*,⁹⁶ four named plaintiffs and three non-profit corporations sued New York state and municipal officials, seeking class certification, declaratory relief and a mandatory injunction requiring defendants to perform duties imposed upon them by New York's child welfare laws. Specifically, plaintiffs alleged that defendants failed to make preventive services available for families with children being considered for foster care, and failed to provide protective services to children in danger of child abuse.

The New York Supreme Court held that since defendants availed themselves of federal funding for child welfare programs, they were bound by federal mandates. Specifically, defendants were required to (1) make *reasonable efforts* to keep children with their families prior to placing them in foster care; and (2) implement a service plan for children being considered for foster care, including short and long term goals, services required by the child, the manner in which they will be provided, alternative plans, and preventive services.

The following year another New York court took on New York City's child welfare agency. In *Martin A. v. Gross*,⁹⁷ several families sued the agency, arguing that it had failed to provide them with preventive services sufficient to avoid foster care placement for their children. To support their argument, plaintiffs cited state law which required the agency to provide day care, homemaker services, parent training, and aid in transportation, clinic services, and 24-hour access to emergency shelter, cash and goods. They also challenged the 90-day limit on emergency shelter services.

The New York Supreme Court granted the families' motions for preliminary injunction, holding that defendants had a mandatory duty to conduct thorough evaluations, develop meaningful service plans and identify the services to be provided. The court also ordered the agency to implement a plan that was consistent with its legal obligations, and enjoined the state from imposing the 90-day limitation on emergency shelter since it conflicted with the purpose of preventive services law. The court

96. 130 A.D.2d 154, 518 N.Y.S.2d 105 (N.Y. App. Div. 1987) *aff'd* 73 N.Y.2d 820 (1988).

97. 138 Misc. 2d 212 (N.Y. Sup. Ct. 1987), *aff'd* N.Y.L.J. Sept. 29, 1989, at 21, col. 1 (App. Div. 1st Dept.), motion for leave to appeal dismissed, 72 N.Y.2d 1041.

noted that providing emergency shelter for longer than 90 days may, for example, wipe out the need for foster care placement altogether or reduce it substantially.

VII. THE ROLE OF ATTORNEYS IN IMPLEMENTING REASONABLE EFFORTS

All attorneys in a dependency action, regardless of whether they represent the child welfare agency, the parents, or the child, play a key role in the implementation of reasonable efforts. While the agency has the duty to make the reasonable efforts and the court has the duty to determine whether the agency does this, it is the attorneys who must investigate the agency's assertions of reasonable efforts and challenge these assertions where appropriate. Judges rely on attorneys to flesh out the services offered and/or provided to the families and to present the evidence that will provide a basis for the reasonable efforts determination.

All attorneys, regardless of who their client is, should investigate the removal of a child from the family or, if already removed, investigate the reunification efforts of the agency.⁹⁸ In investigating a child's removal, attorneys must find out the circumstances under which the child was taken from the family. They should inquire about the family's prior contacts with the agency, who made the removal decision, the basis for the removal, and particularly the specific harm the removal was designed to prevent; and what alternatives, including in-home services and placement with relatives, were considered prior to removal.⁹⁹ They must then present appropriate evidence to the juvenile court.

VIII. SOCIAL POLICY CONSIDERATIONS

A. Funding Issues

As mentioned previously, the intent of P.L. 96-272 and the reasonable efforts requirement in particular was to combat the foster care limbo to which far too many of our abused and neglected children were being subjected. It was hoped that by putting some of the monies being spent for foster care placement into preventive services for the families of these children, the problem of foster

98. See, e.g., CAL. WELF. & INST. CODE § 317(e) (West Supp. 1990). Many jurisdictions are also drafting standards and practice guidelines for attorneys in dependency actions. See, e.g., Faye Kimiera, ed., *Attorney's Manual For Handling Child Abuse and Neglect Cases in Hawaii*, Hawaii State Bar Association, 1989.

99. For a more detailed discussion of the attorney role, see *Making Reasonable Efforts: Steps for Keeping Families Together*, The Edna McConnell Clark Foundation, at 11-40 (1987).

care drift could be addressed. The rationale from a funding standpoint was that it would be more cost-effective to pay for preventive services than for years of a child's substitute care in a state-paid placement.¹⁰⁰

While the intent of P.L. 96-272 has not been realized for all children in the child welfare system, it is still considered both good social work practice and cost-effective. Studies of intensive in-home service programs throughout the country bear this out. For example, a study done for the Maryland Department of Human Resources sifts through financial data on out-of-home placements, staff salaries, and in-home services to demonstrate the cost-effectiveness of intensive in-home services for Maryland families.¹⁰¹ The Adoption Assistance and Child Welfare Act of 1980 permits states to transfer unused federal foster care funds into preventive services programs.¹⁰² This is a direct financial incentive to states to shift their resources away from placement and toward services enabling families to stay together.¹⁰³

California is currently experimenting with providing financial incentives to counties to increase their efforts in providing services to prevent removal or enhance reunification. In 1988, Under A.B. 558, three pilot counties were permitted to shift 10% of their projected AFDC-FC foster care funds into family maintenance and reunification services. As of this writing, those agencies implementing A.B. 558 report being very optimistic about the legislation's success in keeping troubled families intact.¹⁰⁴

B. Conflict Between Child Rescue Philosophy and Family Preservation Philosophy

Child welfare practice in the United States prior to the passage of P.L. 96-272 was largely based on a child rescue philosophy, with little focused effort made by agencies to prevent the breakup

100. See, Allen, *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in *FOSTER CHILDREN IN THE COURTS* (M. Hardin, ed.) American Bar Association, 1983, p.2.

101. "Measuring the Cost-Effectiveness of Family-Based Services and Out-of-Home Care", Institute of Urban and Regional Research and National Resource Center on Family-Based Services, School of Social Work, University of Iowa (June 1983); see also, "Evaluation of Nebraska's Intensive Services Project", the National Resource Center on Family-Based Services, School of Social Work, University of Iowa (March 1984).

102. Social Security Act §§ 474(c)(2), (4), 42 U.S.C. §§ 674(c)(2), (4).

103. Ratterman, et al., *Reasonable Efforts To Prevent Foster Placement: A Guide To Implementation*, (2d ed., 1987) American Bar Association, 1; and Allen, et al., *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in *FOSTER CHILDREN IN THE COURTS* (Mark Hardin, ed.) American Bar Association, 585, 605 n.68 (1983).

104. Telephone interview with Jeanne Newton, Family Preservation Specialist, Department of Public Welfare, Solano County, California (January 28, 1990).

of families and a child's subsequent placement into foster care. The intent of the child rescue philosophy was to insure that no child was left in an unsafe situation. While well-intentioned, this philosophy often doomed children to years of drift in foster care, with little or no hope of being placed in a permanent home. It also neglected or failed to recognize the harm that separation can cause to both children and their parents.¹⁰⁵

Public Law 96-272, in contrast, is primarily based on a family preservation philosophy. This philosophy has as its starting point the belief that a child's biological family is the placement of first preference and that "reasonable efforts" must be made to preserve this family as long as the child is safe. Where these efforts fail and the child must be removed, the family preservation philosophy holds that reasonable efforts must still be made to reunify the child with the family.

Clearly, these two philosophies place very different emphases on the value the biological family has to a particular child. For many who have worked in the child welfare field prior to the passage of P.L. 96-272, switching to a radically different view of the value of working with the biological family has not been easy. For still others who generally believe in family preservation, implementing it in their day-to-day practice has been a challenge. The lack of adequate federal and state funding hinders implementation. Further, many times inflexible agency policies and funding streams help keep family preservation practice from becoming a reality in many jurisdictions.

CONCLUSION

Ten years ago, Congress passed the reasonable efforts requirement as a key part of a comprehensive statutory scheme to reform our child welfare systems. To date, no system has completely implemented the reforms necessary to make reasonable efforts a reality and only a handful have made substantial progress in adequately serving our families in crisis. Nevertheless, P.L. 96-272, including its reasonable efforts requirement, will surely remain the law for at least the next decade. By the year 2000, the federal statute will be amended and its provisions made stronger. State legislatures will continue to pass and strengthen their statutory schemes requiring compliance with reasonable efforts and other reforms of P.L. 96-272. However, it is predicted that the greatest change and progress will be focused on the courtrooms across the country. Both trial and appellate judges will be faced with an

105. See *supra* note 4.

ever-greater number of challenges to child welfare practices on behalf of our nation's at-risk children. One hopes the courts will respond to and meet that challenge.