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From: Mark Hardin <mhardin913@gmail.com> <cip-grantees@lists.childwelfare.gov>
Sent: Monday, November 12, 2018 2:10 PM
To: Court Improvement Project Grantees
Subject: [cip-grantees] Overcoming Barriers to Effective Judicial Oversight of Reasonable Efforts

This is a Court Improvement Program listserv message

Thank you Jerry Milner and David Kelly for your great article on reasonable efforts, which I learned about through the CIP listserv group and the ABA listserv group for child welfare attorneys. I appreciate your ideas about what judges, lawyers, and court staff can do to address reasonable efforts.

To complement your ideas, I would like to add my two cents regarding judicial oversight of reasonable efforts. There are persistent barriers that make it more difficult than necessary to ensure proper reasonable efforts findings, and I hope readers will will think about ways to overcome them. Below I briefly outline the barriers and offer some further suggestions.

Objective Standards for Reasonable Efforts

A key barrier to getting judges and attorneys to focus on reasonable efforts is the the lack (in many states) of a clear and objective standard for determining whether efforts to preserve families and secure permanent placement are reasonable. In the absence of a workable definition or reasonable efforts it is more difficult for attorneys to argue effectively whether or not the state's efforts have been reasonable; and, of course it can be difficult for judges to decide. Deciding what is "reasonable" is particularly difficult in regard to the availability and sufficiency of child welfare agency services.

Nevertheless, there was a judicial district I once observed, in which the state child welfare agency had clearly enunciated its list of services to families. There the judge could and did routinely make both positive and negative reasonable efforts determinations, basing his reasonable efforts determination on whether the state had provided those listed services in cases where they would be helpful. By doing so, the judge ensured the availability of those services when needed and benefited the children and families who came before him.

I have two basic suggestions for defining reasonable efforts. First, state child welfare agencies should briefly list and describe the services they frequently provide to preserve families and to achieve other permanent placements. Federal statutes, regulations, or policies could require this; state statutes, regulations, or policies could also do so; and state agencies, like the one I described, could do this on their own initiative.

Second, the federal government and states could define reasonable efforts to mean that (a) the listed services be actually provided when relevant and appropriate to each case and (b) caseworkers' work diligently with families and arrange for the services when needed, to the extent practical, taking into account their caseloads. A lack of availability of listed services, when needed, would not be a defense.

This definition might be supplemented by a provision that reasonable efforts will not be found if there is clear evidence that caseloads are grossly excessive or essential affordable services are not being provided. But for the same reason some attorneys and judges currently don't seriously address reasonable efforts — the lack of clear definitions — this provision might not be applied often.

Enhance the Tactical Reasons for Addressing Reasonable Efforts

A second key barrier to seriously addressing reasonable efforts in court is that many attorneys don't see an advantage in it for their clients, and judges don't see a benefit from it either. In many states a negative finding does not make it more difficult to later terminate parental rights (TPR) nor does it result in a judicial order that services be improved. Likewise, a positive finding also does not affect later outcomes.

Prior to TPR, the reasonable efforts determination may also not be integral to (i.e., not a part of) the more immediate key decisions before the court, namely removal of the child from home (typically at shelter care and disposition stages), court jurisdiction (at adjudication), return home (various stages following removal), or other permanent placements. Reasonable efforts findings are not dispositive of decisions to remove, return, find jurisdiction, or otherwise permanently place. Judges are disinclined to seriously address an issue they regard as extraneous to their essential decision-making responsibilities.

To address this in relation to TPR, state law can require that reasonable efforts findings be considered in determining whether to terminate parental rights. (Some state laws already do this.) But of course, negative reasonable efforts findings should not dispositively block TPR in all cases. (This is complex; I once co-wrote a book on this topic.)

To make reasonable efforts determinations more integral to early judicial decisions, the law can direct judges to explicitly consider and address reasonable efforts as part of its decisions to remove, reunify, order services, and order alternative permanent placements. Further, the law can empower courts to order services when it has made a negative finding of reasonable efforts based on the failure to provide them. Finally, states can review and improve their required forms and findings to make sure that reasonable efforts are integral to decisions at all stages of the judicial process and specific factual findings are required. If anyone is interested, I can provide more details on the ideas expressed in this paragraph.

Encourage Judges to Engage With Agencies More Assertively

Many of us have been working for years to help judges better address reasonable efforts, and we can take pleasure in how many more judges are engaged than in the past, thanks to better advocacy and court improvement efforts throughout the country. But there is still room for progress as indicated by the article by Jerry Milner and David Kelly.

There are many ways to address this, of course, many related to improving the legal process generally. I would like to add one small suggestion. Based largely on the experience of leading selected judges and court staff around the country, develop a guide on how they can more effectively work with child welfare agencies." The book would be (a) to help judges and court administrators better understand how child welfare agencies operate and think; (b) describe specific constructive and effective approaches for judges to engage with agencies; (c) suggest ways to to communicate with agencies more effectively generally (including their jargon); and (d) briefly explain some of the key kinds of child welfare services courts should understand.

Encourage and Assist Attorneys to Address Reasonable Efforts

It is self evident that attorneys play an essential role in the implementation of reasonable efforts findings. As with judges, while many attorneys now do a far better job addressing reasonable efforts than in the past, there is substantial room for improvement in too many jurisdictions.

Attorneys should not only be effective advocates of reasonable efforts in court; they can also advocate for the policy changes outlined above as well as for other system improvements. They can support systemic improvements in legal representation.

Finally, making Title IV-E matching funds available for parents' and children's attorneys could provide a big boost for legal representation and hence for the effective implementation of the Title IV-E reasonable efforts provisions.
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