The Bench

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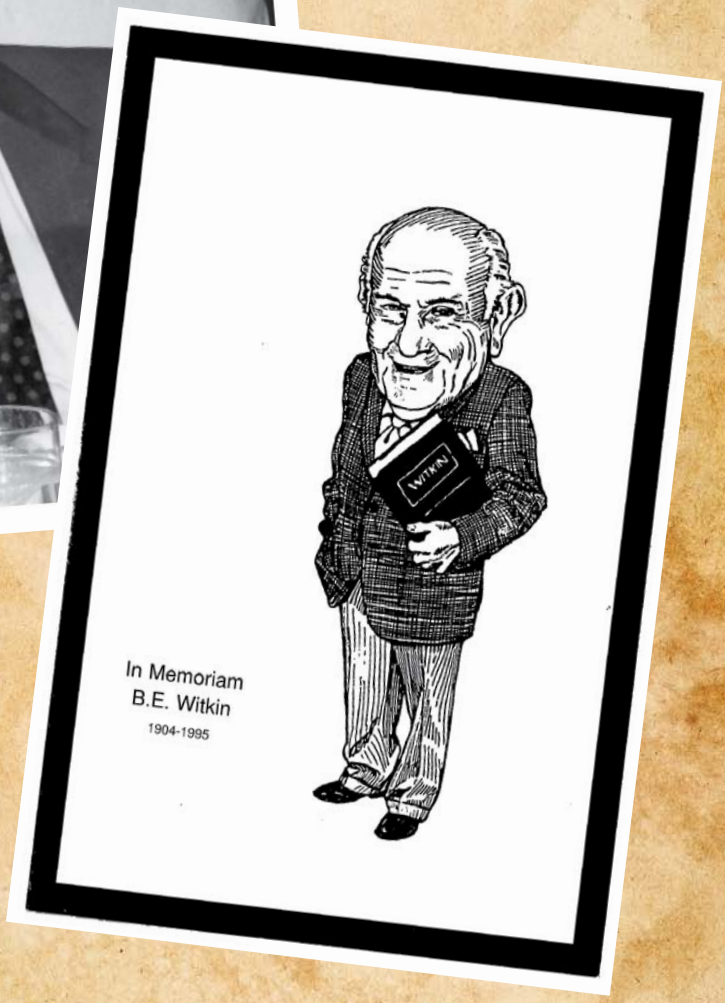

The Traynor/Witkin Legacy

Reflections by Justice Ming Chin

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Judge Leonard Edwards (Ret.)
Santa Clara Superior Court

Mental Health Issues in Dependency Court

All child welfare service providers have to work with mentally challenged parents struggling to rear their children, and all juvenile court judges must make decisions about the ability of these parents safely to parent their children.[1] Some parents have mental health problems so severe that the state will intervene and remove the child from their care. States vary widely in their response to parents with these problems. California has created an exception permitting reunification services to be bypassed in cases of chronic mental illness.[2] If two experts with specified qualifications conclude that the parent has a mental incapacity or disorder that renders the parent unable to care for and control the child adequately and is likely to remain so in the foreseeable future, family reunification services need not be offered.[3]

Some California courts have resisted the trend to bypass services and have ordered reunification services where the parent has mental illness.[4] Their decisions to provide services start from the proposition that just because a parent has mental health problems, it does not mean that he or she is unfit to parent or that the child should be removed permanently. As several appellate decisions have held, there must be a nexus between the parent's mental illness and child endangerment before the children can be removed.[5]

California's appellate courts have also required that the social services agency provide reasonable efforts to prevent removal and to facilitate reunification in these cases. For example, one appellate court held that a failure to provide a case plan for a mentally ill mother did not meet the reasonable efforts requirement and reversed the trial court's termination of parental rights decision.[6] Another found the agency did not provide reasonable efforts when it failed to arrange for counseling for a child, thus preventing the father and child to participate in conjoint counseling.[7] In another case the appellate court reversed a termination of parental rights decision, because the agency failed to give the developmentally disabled parents an opportunity to demonstrate that they were able to parent their child.[8] However, frequently the state court will determine that the agency has provided reasonable efforts when the parent is uncooperative[9] or when the time for reunification has run out.[10]

On several occasions the appellate courts have demanded that appropriate services be provided to mentally ill parents and have reversed termination of parental rights decisions because the state failed to provide reasonable efforts. One appellate court found that the agency had not provided tailored services to meet the needs of a developmentally disabled parent.[11] In this case the agency removed the children from a developmentally delayed adult living in filthy surroundings. The court ordered her to find housing and demonstrate suitable parenting skills. The appellate court reversed the termination of parental rights holding that clear and convincing evidence must show that services specially designed to meet the needs of the parent were explored, and, despite the availability of such services, it is in the best interest of the children to be declared free for adoption. The court pointed out the mother was given no assistance to find housing and was not referred to a regional center which could have assisted her. The court noted that the agency had failed to help the mother deal

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with the health and cleanliness issues plaguing her children. The only "help" the agency provided the mother to find housing was to tell her to keep her eyes open for a house. The court stated the record was "clear that no accommodation was made for [the mother's] special needs in providing reunification services."[12] One can conclude from this ruling that mental illness, standing alone, is not a sufficient basis to justify legal proceedings removing a child.[13]

The reasoning in *In re Victoria M.* resembles that in *In re Venita L.*,[14] where the child had been removed and dependency proceedings commenced when the mother was confined to a psychiatric hospital. When services were terminated, the parents appealed the decision, and the appellate court reversed the trial court finding of reasonable efforts. The appellate court noted that the agency had amended the service plan five times in a little over a year and that the mother had been successful in her rehabilitation from mental illness. The father was told to be involved with Alcoholics Anonymous, but the court of appeals pointed out that that was not the reason for the dependency and that the mother had completed her case plan. Changing the focus from the conduct that brought the child to the attention of the court to new problems occurs somewhat frequently in child protection cases.[15]

When the appellate court concludes that the agency has not provided reasonable efforts or when the evidence reveals that a parent is recovering from mental illness, the court has frequently ordered additional family reunification services. In one case, the appellate court reversed a termination of parental rights decision by the trial court, holding that the mentally ill parent was hospitalized most of the reunification period, presently she was making great improvements, and that the trial court had discretion to extend the time for reunification given the unique circumstance of the case.[16] In the case of *In re David D.*[17] the mother voluntarily placed her children in foster care to escape an abusive environment with her husband. Her accompanying depression resulted in a suicide attempt during the reunification period, prompting the system to cease all efforts to help her reunify. The appellate court found the system reacted with "appalling lack of compassion" and ordered six more months of services, during which the mother was to receive a chance to reestablish regular visits with her children.

While the court may order reunification in these cases, the parent must demonstrate some interest in reunification. In one case it was discovered during the reunification period that mother was developmentally disabled and that it was difficult for her to comply with the case plan. Services were terminated and the court terminated parental rights.[18] On appeal the termination was affirmed. The court found that there was substantial evidence to support the trial court's finding that it was unlikely that the mother would develop an adequate parental relationship with her daughter. Reasonable efforts were offered, but mother had no motivation and no participation in the case plan. A similar result occurred in the case of *In re Walter P.* where the court noted that the mother's problem was less a function of lack of mental ability than a poor attitude and a lack of motivation to parent a fragile child with special health needs.[19] As the court noted, reunification services are voluntary, and an unwilling or indifferent parent cannot be forced to comply with them.[20]

Some critics assert that welfare agencies do not tailor reunification services to the needs of disabled parents. They point out that without individualized services that address the special needs of these parents, a termination of parental rights will occur.[21] Moreover, the Americans with Disabilities Act (ADA) does not provide any support for disabled parents facing termination of parental rights proceedings. State appellate decisions including those in California have concluded that termination of parental rights proceedings do not constitute 'services, programs, or activities' within the meaning of 42 U.S.C. 12132 [the ADA].[22] Whether the ADA applies to the family reunification period remains an open question, and at least one out-of-state appellate decision found that it did.[23]

Our juvenile and family courts will always have to face difficult issues regarding mentally ill and developmentally delayed parents and their children. Judges should insist that they receive high quality information about each parent's capabilities. The information may come from psychological or psychiatric evaluations or from sources such as California's Regional Centers. Judges should also consider what supports the parent has including relatives and close friends. Often the parent can remain a part of the child's life if others are present in the daily family life.[24] Most importantly, the courts should not give up on these parents without making an effort to see if the parent is capable of parenting.

As one critic concluded:

> *It is not that Mary Ann (and others like her) is reasonably likely to become a fit parent; rather, it is that she ought to be provided the opportunity to achieve fitness, and that her children should be provided the opportunity to remain with their biological mother. The state cannot be held liable for failing to perform miracles, but the state can be expected to make the minimum 'reasonable effort' that might afford some chance of change for these parents.*[25]

The research collected in preparing this paper included hundreds of appellate cases across the country involving reasonable efforts in child protection cases.[26] A review of those cases reveals that most appellate decisions involving mentally ill parents affirm trial court orders terminating parental rights. If the reasonable efforts mandate is to be meaningful in cases involving mentally ill parents, the court should take the following steps:

(1) Determine whether the mental illness or disability has a negative impact on the care of the child such that state intervention is necessary.

(2) If so, determine the nature of the mental illness.

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(3) Determine whether it is treatable.

(4) Determine how the agency's proposed case plan will address the parent's rehabilitation and whether the proposed services are specially designed to address the parent's disability. In this regard determine whether there was consultation with an agency that has expertise in working with parents with mental health challenges/ disabilities.

(5) Determine what the court should expect from the agency in order to prevent removal of the child or assist in rehabilitating the parent.

(6) Determine whether the parent can be rehabilitated in the foreseeable future such that she or he can safely care for the child. Rehabilitation does not mean that the disability has disappeared – only that the parent's behavior no longer creates harm to the child.

(7) Find out whether there are support persons such as a spouse, relatives, or good friends who will enable the parent safely to care for the child.

By addressing these questions and making appropriate orders, the court will be offering the parent a fair opportunity to parent their child.

Endnotes:

1 See generally "Zimmerman, S., "Parents' Mental Illness or Mental Deficiency as Ground for Termination of Parental Rights – Issues Concerning Rehabilitative and Reunification Services," 12 A.L.R.6th 417; Spreng, J., "The Private World of Juvenile Court: Mothers, Mental Illness and the Relentless Machinery of the State," *Duke J. Gender L. & Pol'y*, Vol. 117 (2010) at pp. 189-218.

2 California (Welfare and Institutions Code section 361.5(b)(2). Refer also to Family Code §§ 7826 and 7827.

3 *Id.*

4 For a comprehensive review of cases involving mentally ill parents involved in the child protections system see Zimmerman, S., "Parents' Mental Illness or Mental Deficiency as Ground for Termination of Parental Rights," op.cit., footnote 1.

5 *In re Jamie M.*, 134 Cal.App.3d 530 (1982). See also *In re Kimberly F.*, 56 Cal.App.4th 519 (1997) where the appellate court held that a "narcissistic personality" is an insufficient basis for removal of children. A similar result occurred in the case of *In re Elizabeth R.*, 42 Cal. Rptr.2d 200 (1995).

6 *In re T.M.*, 175 Cal. App. 4th 1166 (2009).

7 *In re Alvin R.*, 108 Cal. App. 4th 962 (2003).

8 *Tracy J. v. Superior Court*, 202 Cal. App. 4th 1415 (2012)

9 *In re Misako R.*, 1 Cal. App. 4th 538 (1991).

10 *In re Daniel G.*, 25 Cal. App. 4th 1205, 31 Cal. Rptr. 2d 75 (1994)

11 *In re Victoria M.*, 207 Cal.App. 3d 1317, 255 Cal.Rptr.498 (1989).

12 *Id*. at 504.

13 *In re Victoria M.*, 207 Cal.App.3d 1317 (1989). *In re Jamie M.*, 134 Cal.App.3d 530 (1982) held that there must be some nexus between the mother's mental illness and child endangerment before her children could be removed. Also see the cases cited in footnote 5.

14 191 Cal. App. 3d 1229, 236 Cal. Rptr. 859 (1987)

15 Although the juvenile court can consider "new" problems, such "new" problems cannot be the basis for findings continuing the dependency unless those problems would sustain a jurisdictional finding. (*In re Venita L.*, 191 Cal.App.3d 1229, 1242-1243.) "Dependency proceedings should not be allowed to drift from major problem-solving circumstances to prolonged attempts to resolve shortcomings in the parental home which would not cause dependency in the first place." *In re Kristin W.* 222 Cal. App. 3d 234. "A review of the literature concerning reunification services for such parents reveals that the efforts typically made by state child welfare agencies are frequently both unsuitable and ineffective." Kaiser, J., "Victimized Twice: The Reasonable Efforts Requirement in Child Protection Cases When Parents Have a Mental Illness," *Western New England University School of Law Legal Studies Research Paper Series,* No. 12-8, available at *http://ssrn.com/abstract=2056387* at pp 25.

16 *In re Elizabeth R.*, 35 Cal. App. 4th 1774; 42 Cal. Rptr. 2d 200 (1995)

17 28 Cal. App. 4th 941, 952, 956 (1994)

18 *In re Christina L.*, 3 Cal. App. 4th 404 (1990).

19 228 C.A.3d 113 (1991). *Accord In re Misako R.*, 1 Cal.App. 4th 538 (1991), *Katie V. Superior Court*, 130 Cal. App. 4th 586 (2005), *In re Mario C.*, 226 Cal. App. 3d 599 (1990), and *In re Christina L.*, 3 Cal.App. 4th 404 (1992).

20 *In re Jonathan R.* (1989) 211 Cal. App.3d 1214, 1220 [259 Cal. Rptr. 863]; *In re Lynna B.* (1979) 92 Cal.App.3d 682, 702 [155 Cal. Rptr. 256].)

21 Kaiser, J., "Victimized Twice: The Reasonable Efforts Requirement in Child Protection Cases When Parent Have a Mental Illness," *Western New England University School of Law, Legal Studies Research Paper Series*, No. 12-8; *Whittier Journal of Child and Family Advocacy*, Vol. 11-1; Kaiser, J. "Finding a Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases," *op.cit.*, footnote 16.

22 *In re Anthony P.,* 84 Cal.App.4th 1112, 101 Cal. Rptr. 2d 423 (4th Dist. 2000); *In re Terry*, 240 Mich. App. 14, 610 N.W.2d 563 (2000); Zimmerman, S., "Parents' Mental Illness or Mental Deficiency as Ground for Termination of Parental Rights – Applicability of the Americans With Disabilities Act," 119 A.L.R. 5th 35; Margolin, D., "No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law," *Va. J. Soc. Pol'y & L.*, Vol. 15, (2007) at p. 112.

23 "Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children, National Council on Disability, *www.ncd.org* at pp. 107-113.

24 The author has noted that some psychological reports focus exclusively on the parent and make no mention of the parent's support system or those persons who might live with the parent and assist in parenting duties.

25 DeVault, E., "Reasonable Efforts Not So Reasonable: The Termination of the Parental Rights of a Developmentally Disabled Mother," *Roger Williams U. L. Rev.*, Vol.10, Spring, 2005, 763 at p. 787.

26 These cases are collected in Appendix A of a forthcoming book, *Reasonable Efforts: A Judge's Perspective.* Check with my website (*judgeleonardedwards.com*) to see when it appears and how to obtain a copy.