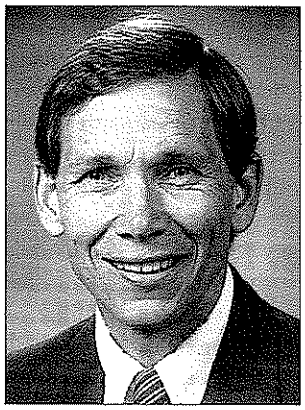
REASONABLE EFFORTS: *Judge Leonard Edwards, Santa Clara Superior Court (Ret.)*

The term "reasonable efforts" challenges and confounds many of us. We hear about it in our judicial trainings, we read about it now and then in publications, on a daily basis we sign our names to court orders finding that the agency made "reasonable efforts", and once in a while some of us make "no reasonable efforts" findings. Yet attorneys rarely refer to reasonable efforts in court, and most of us approve of what the agency has done without much thought. I believe that the reasonable efforts/no reasonable efforts findings are the most powerful tools juvenile court judges have at their disposal in dependency cases. We must use them to follow the law, to ensure that the agency is doing its job, and in order to make positive changes in the child protection system.

Some history will give us a little perspective. In 1979 and 1980 when Congress held hearings on the status of foster children and other child welfare issues, they were dissatisfied with what they heard from welfare directors around the country. Congress found foster children experienced "foster care drift", the movement from one foster home to another, a practice condemned as damaging to children by mental health experts. They also found that the child welfare leaders did not know how many children were in foster care, where they were, or how long they had been there. Congress concluded that there needed to be oversight of the child protection system, and they selected America's juvenile and family courts to perform that function. The courts did not ask for this responsibility and the children's services agencies certainly did not want the courts looking over their shoulders, but each was forced into a relationship called by some a "shotgun marriage."

Under the new legislation (The Adoption Assistance and Child Welfare Act of 1980) the courts were responsible for oversight of the children's services agency at critical points in the child protection system. First, the courts were instructed to review each removal of a child from parental care and to determine whether the children's services agency used sufficient services and resources to prevent the removal. Related to that finding, the courts had to determine that there was "a substantial danger to the physical health of the child" before the removal could be approved by the court. Second, the courts had the responsibility of determining whether the agency provided adequate services to assist parents reunify with children who had been removed from their custody. Seventeen years later in the 1997 Adoption and Safe Family Act (ASFA), Congress added a third issue for the courts to review - whether the agency was achieving permanency for each child in a timely fashion. In each of these situations (removal, reunification, and timely permanency) the legislation required the courts to make specific findings: The agency provided reasonable efforts or did the agency failed to provide reasonable efforts. That finding had to appear in the court records. The penalty for failing to include the finding or to make a "no reasonable efforts" finding was a loss of Federal Title IV-E funds for that child. The California Legislature has passed legislation conforming to the federal requirements. [W & I 306(b), 309(a), 319(b)(1), 319(d)(1), 361(d)].



Congress provided no definition of reasonable efforts. While many commentators have criticized this omission, it makes sense. What is reasonable in one community may not be in another. The capacity of each community will depend on the services available, the wealth of the community, as well as community priorities.

Juvenile court judges have been reluctant to make "no reasonable efforts" findings. Many judges believe that for the state to lose federal dollars would result in fewer resources for the state and for the community. Moreover, most attorneys do not raise the issue believing that it does not really affect their client. I believe that the reasonable efforts/no reasonable efforts findings must be taken seriously by the court even if the attorneys do not raise the issue. It is perhaps the most important finding the court makes in juvenile dependency cases. Furthermore, I believe that the "no reasonable efforts" finding can result in positive changes in the delivery of services to families.

Removal

At the initial hearing the court must determine what the agency could have done to prevent removal. For example, in a case where the allegations are that the child needs the protection of the court because the child has been exposed to domestic violence in the home, the court should inquire what steps CPS took to remove the harm (the abuser) before removing the child. Could CPS provide in-home protection for the abused person and the child, or could they find a safe home such as in a domestic violence shelter? This is a reasonable efforts issue. Moreover, the court's finding will have a ripple effect through the child protection system. When the court makes a "no reasonable efforts" finding, it sends a message to CPS that they should not necessarily remove the child (and re-abuse the adult victim) if they can safely remove the abuser, provide in-home protection for the abused person and child, or find a safe home for the child and the victim of abuse (usually the mother).

This judicial enquiry comes directly from California law. W & I section 319(d)(1) requires the court tomake a determination on the record, referencing the social worker's report or other evidence relied upon, as to whether reasonable efforts were made to prevent or eliminate the need for removal of the child from his or her home, pursuant to subdivision (b) of Section 306, and whether there are available services that would prevent the need for further detention.

There are many other examples. When CPS removes a child from a homeless parent, the first question the court needs to ask is whether CPS could have provided emergency housing for the parent. When there is no food in the house and the electricity is turned off, CPS should offer help to the family before removal is

considered. In some substance abuse cases, CPS should place the mother and child in a drug rehabilitation facility before separating them by removing the child. This last strategy has become more and more popular as family drug treatment courts expand around the state.

Reunification

The court must also address reasonable efforts during the reunification period. Has the children's services agency been providing adequate services to assist the parents address the problems that brought them before the juvenile court? Even if the attorneys do not raise the issue, the court should examine a number of issues concerning the adequacy of services. Consider the following:

1. Provision of services: did the agency, in fact, provide the services specified in the service plan? (In re Precious J. 42 Cal.App.4th 1463 and *Mark N v Superior Court*, 60 Cal.App.4th 1158 - agency did not follow court order to provide incarcerated mother with visitation).

2. Quality of services provided: were they individualized to the child and family? (*In re Dino E.*, 6 Cal.App.4th 1768 - a mechanical approach to a reunification plan is not what the legislature intended).

3. Parent Involvement: were the parents involved in the creation of the service plan? [W& I section 16501.1(d)(1) and a federal requirement in the Child and Family Service Review (CFSR) process].

4. Timeliness of services: were they delivered in a timely fashion? Were there waiting lists for some/all of the services?

5. Access to services: were the services accessible to the child/family? Consider transportation and the time of day/week they were offered. Consider also in which language the services were offered. Was childcare needed and, if so, was it provided?

6. Effectiveness of services: did they address the problems that brought the child and family to the attention of the child protection agency and the court system? (*In re G.S.R.*, 159 Cal.App.4th 1202 - agency should have crafted a plan to help the father obtain housing).

7. Engagement: did the agency engage the family so that they would take advantage of the services? (*Robin V. v Superior Court,* 33 Cal.App.4th 1158 - social worker only provided stamped envelopes and failed to respond to father's request for visits).

8. Oversight: did the agency monitor the service delivery process so that problems were addressed when they occurred? (*Amanda H v Superior Court,* 166 Cal.App.4th 1340 - social worker failed to tell mother she was in the wrong counseling program until the 11th hour).

9. Reasonableness of services: did the agency provide reasonable visitation services? (In re David D., 28 Cal.App.4th 941 - agency and court placed unreasonable burden on mother thus preventing her from visiting - TPR reversed) (*In re Brittany* S., 17 Cal.App.4th 1399 - agency did not provide visitation while mother was incarcerated).

But of course the court must also consider the parents' behavior during the reunification period. For example, in *Armando L. v Superior Court* (36 Cal. App. 4th 549) the father waited 13 months to agree to paternity testing and only then began to engage in services.

Timely Permanency

In order to determine whether the agency is taking timely effective steps to complete the adoption process and thereby achieve timely permanency (the third type of reasonable efforts finding), the court must regularly review cases in which parental rights have been terminated and the child is awaiting permanency. This is another area closely examined by the federal government during the CFSR process. Failures to reach timely permanency can result in penalties levied by the federal government.

While judges have been reluctant to make "no reasonable efforts" findings, creative alternatives exist. It is not necessary to make "no reasonable efforts" findings and have the state lose federal funding. We can use the finding strategically - I call this approach "The Art of the No Reasonable Efforts Finding." The judge can state that the court is prepared to make a no reasonable efforts finding, but that the matter will be continued for one week for a progress report. In most cases the agency will understand what has to be done and take that action. Assuming that the agency has responded appropriately, the court will not have to make a "no reasonable efforts" finding at the subsequent hearing.

The "no reasonable efforts" finding can also increase the service array available in the community. The court may conclude that there are services that should be in place within the community. Using the possibility of a "no reasonable efforts" finding, judges have been able to persuade the agency to establish a visitation center, identify beds for teens with babies, develop parenting classes, and other services that once created were available to all families in the child protection system.

Judges should pay close attention to all situations where the law requires a reasonable efforts finding. We should not simply rubber stamp what the agency has done to prevent removal, to assist in family reunification, or to provide timely permanency. Our legal duty is to examine these issues carefully and make judgments about the reasonableness of the agency's efforts. That finding will depend on the resources available in each particular community and in the agency. This means that in order to make the reasonableness finding, the judge must have an understanding of service availability in the community. This fact supports the notion that juvenile court judges should remain in the assignment for several years as it takes time to understand the service delivery system in one's community.

There will always be tension between what the agency believes is reasonable and affordable and what advocates for parents and children argue is necessary and therefore reasonable. You will find that each decision reflects that tension. Considering the risk that the state could lose federal funding, shall I hold the agency accountable and make a no reasonable efforts finding, or shall I just let it go since they are doing the best they can with limited resources? The best practice is to set fair (reasonable) standards and hold the agency to those standards. Let the agency know what

is appropriate and reasonable in each case. Once the standard is set, you should expect the agency to comply in subsequent cases, and your finding in one case will have an impact on the entire child protection system.

"Reasonable efforts" deserves careful judicial attention. Making reasonable efforts findings based on an examination of your community's capacity means that you are following the law and accomplishing what Congress and the state legislature intended us to do. Used properly you will be able to accomplish what the legislature envisioned: effective and fair oversight of the child protection system. You will also be able to improve outcomes for children and families appearing before the juvenile dependency court.

CATCHING OUR FLAG - A BOOK REVIEW *Judge Gregory C. O'Brien, Jr., Los Angeles Superior Court (Ret.)*

Love him or hate him, the impeachment of William Jefferson Clinton will be of interest to historians in 200 years. Nixon having resigned in the teeth of such a vote, it remains only the second impeachment in U.S. history. Rather than a scab to be picked, the episode remains a scar on the psyche of the body politic. Among the political class, there is an unspoken truce. "We won't talk about it anymore if you won't."

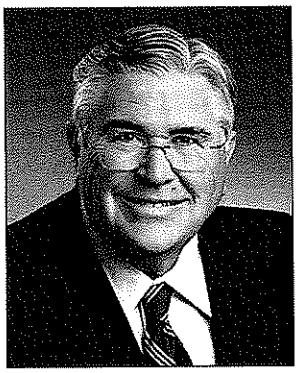
Yet there is someone who wants to talk about it, and indeed has. As a former member of the House Judiciary Committee and one of 13 House "managers" to prosecute the case in the Senate, Orange County Superior Court Judge James E. Rogan has sat down with his diary and produced a book that is startlingly complex, with heroes and villains on both sides of the aisle.

"I wrote it more for people who are yet to be born," Rogan told me of his most recent literary work, Catching Our Flag (WND Books, 2011). With a forward by Newt Gingrich, it is a serious book, not at all like the author's brash, rollicking, self-deprecating and sometimes hilarious autobiography *Rough Edges, My Unlikely Road from Welfare to Washington,* published in 2004 by the prestigious giant HarpeCollins. His new work, by contrast, found a home at a smaller publisher, a division of the conservative news site World Net Daily. This contrast of publishers may imply two things: first that Rogan is an excellent writer; second, that his new book is a polemic of limited partisan appeal. Of these, only the first is true.

Rogan might have avoided his destiny with history and be a member of Congress today had he remained on the politically "juicy" House Commerce Committee. With a district that represented much of motion picture industry, Commerce gave Rogan the opportunity to cast votes important to his entertainment constituents, meanwhile becoming friends with one of the most improbable of all House members, Sonny Bono. As a former prosecutor and municipal court judge, however, Rogan caught the eye of Henry Hyde, who persuaded the speaker to appoint the young freshman to the Judiciary Committee, of which he was chair.

When a bill of impeachment was assigned to the Judiciary Committee, no less an authority on politics than Gingrich himself warned Rogan of the danger of being involved with a subject that could cost him his reelection.

As readers of Rough Edges know, there is nothing conventional about the former bartender and one-time bouncer in a porno movie house who grew up in San Francisco's tough Mission District, later graduated from UCLA Law School as a member of the law review, and then went from being an associate at Lillick McHose & Charles to becoming a deputy district attorney. He does not shy away from a fight, political or any other kind.



At age 18, Rogan, a Democrat, had sought out a meeting with then-Judiciary Committee chairman Peter Rodino, who was fresh off the Nixon hearings. Rodino was busy, but offered a rain check. Years later and long since retired from office, Rodino must have been amazed that a freshman Republican congressman would seek him out for advice as to how an impeachment inquiry should proceed, particularly as the current committee chair was the redoubtable Henry Hyde of the young member's own party. Rodino relented for what was to be a brief courtesy, but when Rogan showed him the "rain check" from long ago, the aging former congressman sat back and for the next three hours shared his memories and advice. When the evening came to an end, Rodino and Rogan agreed to have dinner soon, but five days later the old congressman died.

As evidence in the case mounted, Rogan wanted to broaden the committee's inquiry to include the wide variety of allegations that had been investigated by Kenneth Starr, the former U.S. Solicitor General and federal circuit court judge appointed to be special prosecutor by Attorney General Janet Reno. Believing that hearings would be politically tighter and more efficient if confined to perjury and obstruction of justice related to the Paula Jones lawsuit, the Republican leadership agreed with the Democrats to wrap up the proceedings by December, 1998. In Rogan's view, this was a mistaken strategy.

Many Democrats, including Clinton, believed that Rogan might vote against articles of impeachment. He was certainly no prude, and at one time he had been a member of the Los Angeles County Democratic Central Committee. Rogan also credits Bill Clinton with encouraging him to go to law school. The two had met when Rogan was a delegate to the Democratic National Midterm Convention and Clinton was Attorney General of Arkansas.

Rogan escaped a narrow defeat by the voters of his district in the fall of 1998, but returned to Washington convinced that he was a