

Sanctions in Family Drug Treatment Courts

By Judge Leonard Edwards (Ret.)

INTRODUCTION

We all know that sanctions and rewards are essential parts of the success of Family Drug Treatment Courts (FDTC), but no one is clear about what these sanctions and rewards should be. Each local court has its own set of sanctions and rewards, many borrowed from criminal drug courts, some created by available resources within the community. Now the California Supreme Court has made the decision about sanctions more complex with its decision in *In re Nolan W.*¹ holding that imprisonment cannot be used as a sanction in the FDTC.

What are permissible sanctions in an FDTC? After *In re Nolan W.*, are fines or community service permissible? What about a reduction in visitation? What guidance has the California Supreme Court given trial courts in these areas? This article will try to bring some clarity to these questions and also offer a framework for trial courts to consider regarding the most effective use of sanctions in FDTCs. The article concludes that imprisonment is an unnecessary sanction in FDTCs, and that sanctions in these courts should be guided solely by treatment considerations.

BACKGROUND

FDTCs are collaborative courts,² and as such they combine judicial supervision of clients with rehabilitation services that are rigorously monitored and focused on recovery.

1 *In re Nolan W.*, (2009) 45 Cal.4th 1217, 203 P.3d. 454, 91 Cal.Rptr.3d 140.

2 Collaborative courts are also called problem-solving courts.

Judge Leonard Edwards is a retired Superior Court Judge from Santa Clara County, California. He serves as Judge-in-Residence for the California Administrative Office of the Courts. Correspondence: Leonard.Edwards@jud.ca.gov.

Author's Note: Many thanks to Sidney Holler for her help in the research for this article.

Collaborative courts are distinguished by a problem-solving focus, a team approach to decision making, integration of social and treatment services, judicial supervision and monitoring of the treatment process, community outreach, direct interaction between the client and the judge, accountability for adherence to the treatment plan, and a proactive role for the judge inside and outside the courtroom.³ FDTCs are a specialized type of collaborative court that operates within the child protection (juvenile dependency) court. They are not courts in the traditional sense because they do not adjudicate. Instead, they provide a setting for a collaborative effort by the

... court and all participants in the child protection court to come together in a non-adversarial setting to determine the individual treatment needs of substance-abusing parents whose children are under the jurisdiction of the dependency court.⁴

The first Family Drug Treatment Courts started in Okaloosa County, Florida, in June 1993. Other FDTCs started soon thereafter including Washoe County (Reno), Nevada, and Seminole County (Sanford), Florida.⁵ Judge Charles McGee from Washoe County, a pioneer in the creation of FDTCs, believed that the collaborative approach to substance abuse treatment might improve a parent's chances of rehabilitating.⁶ Other judges heard of this innovation and FDTCs were created in jurisdictions across the country. As of June 2009, more than 300 FDTCs were active or in the planning stages. That number continues to grow as judges recognize the value of these courts.⁷

FDTCs look similar to most criminal drug courts except that they operate in the context of child protection proceedings. In this respect they are quite different from criminal and juvenile drug courts. They are classified as civil as opposed to criminal proceedings. Child protection proceedings are not about the offending parent—the legal action is brought on behalf of the child. The purposes of child protection proceedings are to protect the child, to provide timely permanency for the child, and to ensure the child's well-being. The stakes are high—higher than any other court proceeding with the exception of the death penalty. A child may be removed from parental care and placed in foster care. If parents are unable to reunify with their child, they may permanently lose their parental rights, and the child may be adopted by another family.

3 For additional information on collaborative courts, see California Courts: Programs: Collaborative Justice at <http://www.courtinfo.ca.gov/programs/>.

4 L. Edwards & J. Ray, *Judicial Perspectives on Family Drug Treatment Courts*, 56 JUVENILE AND FAMILY COURT JOURNAL 1-27 (Summer 2005), at 1.

5 The dating of the early FDTCs comes from Caroline Cooper at the BJA Drug Court Clearinghouse, American University, Washington, DC.

6 C. McGee, *Another Permanency Perspective*, 48 JUVENILE AND FAMILY COURT JOURNAL, Winter 1997, at 65-67.

7 SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY, June 18, 2009, BJA Clearinghouse, Justice Programs Office, School of Public Affairs, American University.

IN RE NOLAN W.

Let's start with *In re Nolan W.* The case began in San Diego where the Substance Abuse Recovery Management System (SARMS) has been in place for over 10 years.⁸ Under the SARMS protocol, all substance-abusing parents whose children are before the juvenile dependency court must be assessed for substance abuse and are then placed into the SARMS program pursuant to Local Rule of Court 6.1.19. The parents sign an agreement concerning participation in the program including a description of the sanctions for failing to complete the treatment plan. A typical plan might include attending Alcoholics Anonymous meetings, substance abuse counseling, frequent court hearings with mandatory attendance, and compliance with the visitation schedule. The sanctions increase in severity with each violation of the treatment plan and can include termination from the drug court and the scheduling of a permanency planning hearing. Contempt of court proceedings and imprisonment are also possible sanctions. The San Diego court culture seems to view imprisonment as an important sanction. As the former Presiding Judge of the San Diego Juvenile Court wrote, "A parent must receive immediate consequences for a noncompliant event, and the court must be able to swiftly incarcerate recalcitrant parents."⁹

In *Nolan W.*, the mother entered SARMS, signed the participation agreement, but did not follow through with the treatment plan. She came before the judge who held her in contempt of court (60 counts including multiple incidents of not testing, not attending meetings, and missing visitation), sentenced her to 300 days in jail, and suspended the sentence on condition that she follow the plan. When the mother continued to miss testing, meetings, and visitation, the judge reinstated the 300-day sentence and issued a bench warrant for her arrest. The sentencing on the contempt convictions occurred after the mother's reunification services had been terminated and a permanency planning hearing had been set in the underlying child protection case. The mother appealed the jail commitment arguing that the sentence was excessive and that the court did not have statutory authority to sentence her to jail in a child protection proceeding.

The intermediate appellate court reversed the sentence as an abuse of judicial discretion, but did not address the second issue. The California Supreme Court went further and declared that contempt and sanctions such as imprisonment and fines were not available in the dependency court because the legislative scheme did not envision punishment as a proper sanction in legal proceedings that focus on a child's safety, permanency, and well-being. The Supreme Court wrote that the ultimate sanction in juvenile dependency cases is permanent loss of parental rights, thus imprisonment has no place in the scheme established by the legislature.

8 J. Milliken & G. Rippel, *Effective Management of Parental Substance Abuse in Dependency Cases*, JOURNAL OF THE CENTER FOR FAMILIES, CHILDREN & THE COURTS 95-107 (2004), at 99.

9 *Id.* at 102.

When the Legislature has established a specific penalty for a transgression, courts may not impose a contempt punishment that is inconsistent with the legislative scheme . . . the legislative scheme here contemplates that the ultimate penalty for a parent's failure to satisfy reunification plan requirements is the loss of parental rights.¹⁰

The Supreme Court stated that “[r]eunification services are voluntary and an unwilling parent may not be compelled to participate.”¹¹ The court added: “[t]he juvenile court intervenes to protect a child, not to punish a parent.”¹² The state had argued that “shock incarceration” or “therapeutic jail time” are useful strategies for courts to have at their disposal. The Supreme Court, however, found “no empirical support for the proposition that the threat of parental incarceration encourages higher reunification rates.”¹³

Nolan W. has led to an outcry. Some say that the California Supreme Court has diminished the impact of Family Drug Treatment Courts. Some judges say the loss of the imprisonment sanction will reduce the effectiveness of court intervention because “graduating clients . . . almost all say that the possibility of going to jail for noncompliance was a major motivator early on in the program.”¹⁴ One experienced judge commented that the Supreme Court has “thrown the baby out with the bath water.”

REWARDS AND SANCTIONS

There seems to be a consensus among drug court professionals that rewards and other positive incentives enhance the effectiveness of collaborative courts.¹⁵

Surprisingly, [says Judge Hicks] praise is usually the most powerful motivator, especially for addicts who have often experienced very little praise recently. Therefore, family drug court teams try to identify every opportunity to recognize and praise good behavior and to celebrate the achievements of parents.¹⁶

Whether sanctions produce positive change is more difficult to assess. Most criminal drug court experts contend that the threat of jail is critical to the success of these courts.¹⁷ One study, conducted in San Joaquin County, California, indicates clearly that jail as a sanction in criminal drug court is an effective deterrent to participants' inappropriate behaviors, and that using jail as a sanction resulted in lower recidivism in

10 45 Cal.4th at 1231.

11 *Id.* at 1224.

12 *Id.* at 1233.

13 *Id.* at 1236.

14 Judge John Parnam, quoted in *Use of Jail Sanctions in Family Drug Courts*, Frequently Asked Questions Series, BJA Drug Court Clearinghouse, American University (2005), at 3.

15 Judge William Meyer, *Developing and Delivering Incentives and Sanctions*, April 2007, <http://www.georgiacourts.org/courts/accountability/2008Conference.html>, click on Therapeutic Sanctions and Incentives Developing and Delivering Incentives and Sanctions.

16 Judge E. J. Hicks, *Family Drug Courts*, 78 THE OKLAHOMA BAR JOURNAL (Nov. 3, 2007), at 2819.

17 D. Marlowe, & K. Kirby, *Effective Use of Sanctions in Drug Courts: Lessons from Behavioral Research*, II NATIONAL DRUG COURT INSTITUTE REVIEW (1999).

clients who did not receive jail.¹⁸ But as the author of the San Joaquin study wrote, “[j]ail sanctions are unnecessary in FDTCs because they have a different ‘ultimate’ threat of taking kids away.”¹⁹ That same author conducted a focus group with parents at an FDTC in Oregon. The parents “were adamant that jail as a sanction discourages their progress, especially for those that never experienced time in jail before participation in the voluntary FDTC.”²⁰

In practice, many FDTCs do not use jail as a sanction. Surveys from the BJA Drug Court Clearinghouse show that about half of these courts do not use jail.²¹ As Judge Douglas Johnson of Omaha, Nebraska, states:

We are in our 5th year of serving infants, toddlers and their parents who suffer from mental health and substance abuse in our 0-3 Family Drug Treatment Court. Most of these parents had childhood experiences of foster care, domestic violence, sexual abuse, or being poorly parented. An appropriate trauma-informed response to these families does not include a jail sanction for a parent who has not followed a program requirement. Missteps are inevitable on the road to sobriety. Affirmation and supportive services motivate a parent to continue the journey to overcome depression, anxiety, substance abuse, domestic violence, and the myriad of other issues in order to properly care for his or her child. Jail is the currency of criminal court, not juvenile and family civil courts.²²

In fact, imprisonment is an inappropriate sanction in the FDTC context for many reasons.

First, it appears that because jail is an effective sanction in criminal court, many professionals assume that it will be just as effective in FDTC. Many of the earliest FDTCs simply looked to existing criminal drug courts as a model for their operations. Experience has shown, however, that the two courts are distinct and that successful practices in criminal court do not necessarily ensure success in FDTC.

Second, the most rigorous national study of FDTCs undertaken by NPC Research indicates that courts that use jail as a sanction do not necessarily have better results than courts that do not use jail.²³ The five-year study of four jurisdictions (Suffolk County, New York; San Diego County, California; Washoe County, Nevada; and Santa Clara County, California) found that the one county that did not use jail (Santa Clara) provided more treatment, faster reunification, less time in foster care, and higher rates of family reunification than the other three jurisdictions.

Third, many FDTCs prefer not to use jail because they believe it is an inappropriate sanction in child protection court. As Judge Johnson states above, the FDTC is a civil court—dependency court is noncriminal in nature. The purpose of the juvenile depen-

18 S. M. Carey, K. Pukstas, M. S. Waller, & M. W. Finigan, *Drug Courts and State Mandated Drug Treatment Programs: Outcomes, Costs and Consequences* (2008). Submitted to the U.S. Department of Justice, National Institute of Justice. (Copy available from author at carey@npcresearch.com).

19 E-mail from S. Burrus to the author, Nov. 11, 2009 (on file with the author).

20 *Id.*

21 SUMMARY OF DRUG COURT ACTIVITY BY STATE AND COUNTY, *op cit.* note 7.

22 E-mail from Judge Douglas Johnson, Sept. 18, 2009 (on file with the author).

23 S. Worcel, B. Green, C. Furrer, S. Burrus, & M. Finigan, *Family Drug Treatment Court Evaluation, Final Report*, (NPC Research, Portland, Ore.), 2007.

dency court is not to punish parents, but to protect children, find them permanent homes (preferably with their own families), and provide for their well-being. The Maine Family Drug Court responded to this issue by pointing out that it is an additional burden on the taxpayers to increase the jail population by placing drug court clients in jail.²⁴

Fourth, some FDTCs have concluded that jail is inappropriate because children will learn that their parents are going to jail. These courts believe that a jail sentence may result in a loss of respect and dignity for the parent in the eyes of the child, and have concluded that despite the well-meaning purpose behind some jail commitments, parents and family members perceive jail as punishment.

Fifth, having jail as a sanction means that some judges will sometimes abuse their discretion. These abuses may not occur often, and they may never occur in some FDTCs, but as in San Diego and the *Nolan* case, they will occur. The California Supreme Court noted that this is problematic “because there are no statutory principles to guide or constrain the court.”²⁵ Moreover, these abuses may not be addressed because no attorney may be available with enough time and energy to appeal the judge’s decision.

Sixth, significant due process issues arise when courts use jail as a sanction. Legally the judge cannot simply sentence an FDTC client to serve a jail sentence. There must be a hearing with notice, an opportunity to confront those who claim that there has been a violation of the treatment plan, an opportunity to present evidence, and then a decision by the court regarding the alleged violation. All of this brings the adversarial process into the treatment court, which runs contrary to the Key Components of collaborative courts.

Using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights.²⁶

Seventh, the imposition of a jail sentence is likely to disrupt the FDTC client’s life. If the child is living with the parent, the child may need at least a temporary placement. Parent-child visitation in jail will be difficult if not impossible. The client may lose his or her employment or be unable to participate in services. Imprisonment may “get the client’s attention,” but it may also reduce her chances to turn around the other aspects of her life. Furthermore, any interruptions in the client’s life will affect the statutory timelines within which parents must reunify with their children. The pressure on parents to reunify within one year is a significant motivator for parents. Many judges have found that jail is unnecessary and that stressing the shortness of time, the necessity of working hard on the case plan, and the consequences of losing permanent custody of one’s children are more than enough to motivate parents.

²⁴ E-mail from Judge John Beliveau to the author, Dec. 8, 2009 (on file with the author).

²⁵ *In re Nolan W.*, at 1224.

²⁶ DEFINING DRUG COURTS: THE KEY COMPONENTS, *Principle 2* (Office of Justice Programs, Drug Courts Program Office, NADCP, January 1997). <http://www.dwicourts.org/sites/default/files/nadcp/KeyComponents.pdf>.

A NEW FRAMEWORK FOR SANCTIONS IN FDTCs

All of these reasons lead to the conclusion that the FDTC should not use jail as a sanction because it is unnecessary. A much greater sanction is already in place—the permanent loss of one’s children. Instead, FDTCs should focus on treatment. The FDTC response to a parent’s failure to follow the treatment plan should be a treatment issue. The standard response to failure should be a re-evaluation of the treatment plan and a likely increase in some aspect of that plan such as more testing, moving from out-patient to in-patient living, staying away from certain locations or people, attending FDTC more frequently, participating in counseling, and similar strategies.²⁷ The California Supreme Court appears to have reached a similar conclusion:

{The juvenile court} may extend the scope of services and supervision to secure compliance. For example, it may increase the frequency of reporting or testing, or require additional counseling or therapy.²⁸

If sanctions are to be based on treatment, what about other frequently used sanctions? The California Supreme Court concluded that fines were an impermissible sanction. But what of community service, such as 100 hours of doing something to improve the community? Perhaps the answers will depend on the nature of the community service. Community service for a community-based substance abuse service provider or at an Alcoholics Anonymous meeting probably would be considered treatment oriented. Picking up trash on the highway would not meet that test and would be an improper sanction.

Visitation presents a different set of issues. Some courts use reductions in visitation as a sanction for failures to follow the FDTC treatment plan.²⁹ Reducing visitation for such failures is improper for several reasons. First, visitation is a critical part of the underlying and ongoing child protection case. All reunification plans contain a visitation plan and schedule. Logically visitation should be addressed exclusively in the context of these proceedings, not at a treatment court hearing. Just as termination of parental rights would not be decided in the FDTC, so should visitation not be litigated in the FDTC.

Second, reduced visitation should not be a sanction under any circumstances because it is not a treatment issue. Visitation is the child’s right to stay connected to the parent and the parent to the child. It should never be used as punishment. Reducing visitation can punish the child as well as the parent. If visitation is to be reduced, reduction must come in the context of the child protection proceedings with all parties

27 “. . . [T]he court should consult with the treatment professional prior to ordering more restrictive treatment, and treatment should not be ordered for punitive purposes.” SAMHSA, CENTER FOR SUBSTANCE ABUSE TREATMENT, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, SUBSTANCE ABUSE TREATMENT PLANNING GUIDE AND CHECKLIST FOR TREATMENT-BASED DRUG COURTS (1997), at 33.

28 *In re Nolan W.*, at 1239, n.9.

29 In addition to the San Diego FDTC discussed above, the Hawai’i First Judicial Circuit uses reductions in visitation as a sanction; see the *Family Drug Court Participant Handbook*, First Judicial Circuit, Honolulu, Hawai’i, at 18. http://hawaii.gov/dhs/protection/social_services/child_welfare/.

having a full opportunity to be heard, and the decision must be based upon legal principles such as whether the parent's conduct indicates that visitation would be harmful to child.

CONCLUSION

In a treatment court, treatment considerations should guide decisions concerning parental failure to follow service plans. Imprisonment and other sanctions that are not treatment oriented should not be imposed by the court in FDTC proceedings. Nor should reduced visitation be used as a sanction in FDTC. Parents already have a significant potential sanction—permanent loss of their children—and a limited time to demonstrate that they can parent safely. Punishments are neither necessary nor appropriate.

Instead, we have learned that support and incentives work best with parents, and that adequate treatment plans will be the most effective path for parental success.

Most juvenile and family drug court judges are coming to realize that their ultimate effectiveness, in the long term, will depend upon their achieving compliance with drug court requirements through *persuasion* rather than coercion.³⁰ [emphasis in the original]

FDTCs have proven their effectiveness. These courts provide individualized treatment for substance-abusing parents, and studies show remarkably positive results for families. We have learned that the criminal drug court model is useful, but should not be copied entirely in FDTCs. With loss of permanent custody as the ultimate sanction, imprisonment is not necessary and may, in fact, limit the success of these courts.

30 OFFICE OF JUSTICE PROGRAMS DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, JUVENILE AND FAMILY DRUG COURTS: AN OVERVIEW (1999), at 13.