

EXECUTIVE DIRECTOR'S MESSAGE:



Helpful Technology to Help NACC Members

Good news from your association: we've finally entered the modern digital age with a revamped website, and we're actively engaging with new technologies to improve services and resources for members. Our website address stays the same – www.NACCchildlaw.org – but it's now much easier to find what you're looking for and do what you need to do. Please check it out, and then let us know what's helpful and what needs to be fixed. Also know that we're working on a number of ways to use technology to better support your work and your career, and we want to hear from you on what would actually do you some good.

I suspect that most of us view computer technology like a friend of mine views automotive technology: he just wants the damn car to get him from point A to point B, and doesn't care about any of the gears or valves that make that happen. So talk to us about what you wish we could do for you, and then we'll worry about how that can happen. Would it help to have an electronic, searchable Red Book at your fingertips? We now have webinar capability – how can we use that together? Would →

The NACC envisions a justice system that protects the rights of children by ensuring their voices are heard through the assistance of well-trained, well-resourced, independent lawyers.

Giving Children and Families What They Need Instead of "What We Got":

Using the Reasonable Efforts Tool to Improve Outcomes for Children and Families

by J. Robert Lowenbach, J. Robert Lowenbach Consulting



Judge Lowenbach served for 27 years as a District Court Judge in Colorado. He now serves as a Senior District Court Judge, a Child Trauma Fellow and a consultant dedicated to improving the child welfare agency and court system to better serve children and families.

In the more than five years since my retirement from the bench, I have learned a great deal that I wish I knew when I was a sitting judge in the Colorado courts. In that time I have served as a Child Trauma Fellow, as a Senior Judge, as the Court Improvement Program's Judge-in-Residence, and as a consultant dedicated to improving the lives of children and families in the child welfare system. I've gained a new perspective on how the system works or does not work when we intervene in child welfare cases.

In the medical field "iatrogenic" harm is described as an inadvertent harm that is caused by a medical intervention that is designed to help. Examples of such harms are infections from surgeries or hospitalizations, drug reactions and interactions, or medical error. Judge Michael Town of Hawaii coined the term "jurigenic harm" to represent the unintended harm that often comes from involvement with the court system.¹ I have come to believe that there are many *avoidable* "jurigenic" harms that come to pass in the child welfare agency and court system and that too often we are guilty of saving the body at the expense of the mind. →

1. See, <http://www.judgemiketown.com/therapeutic-justice/jurigenic-harm/>.

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Let's consider for a moment what happens to children when they enter the child welfare system. If a court case is filed, children have most often been removed from the care of their families. Children are placed with generally well-meaning strangers who know little about them, but who try their best to provide the care the children need. These foster parents' hands are tied by a system that does not allow them to act like a parent or the child to be a "normal" child in significant ways. For example, foster parents are generally not allowed to use their judgment to give foster children an over-the-counter medication for a headache, normal aches and pains, or fever unless the foster parents first consult a physician. Often the foster child cannot participate in otherwise normal family activities such as vacations, church, or learning to drive. As a result these children are often labeled as "foster children" by their peers and endure the stigma that accompanies that label.

Foster parents are further hindered because, other than knowing a bit about the immediate reasons for removal, they have little concept of the trauma these children may have suffered throughout their brief lives and thus are ill equipped to provide the trauma informed care that the child needs. As a result, children are often *mis*-placed and the cycle of movement within the system begins. One sequelae of this state of limbo is educational failure. A recent report from the Colorado Department of Education relates that foster children are much less likely to graduate from high school

than even homeless children.² It would not be surprising to find similarly dismal educational outcomes in most other states.

This lack of stability together with the child's historical trauma results in new behavioral issues that are often cast in terms of defiance, lack of motivation, enmity and danger. When foster children act out they are often disciplined or drugged. Although not a problem unique to Colorado, a recent series of articles in *The Denver Post* reported that psychotropic drugs were prescribed to foster children in Colorado at almost 5 times the rate for children who are not in foster care.³ The off-label uses of these drugs were often given at almost twice the recommended dosage for adults.

A traumatized child is most often a misunderstood child. These children are often described as "problem children" or diagnosed as having oppositional defiant disorder, for example. The discipline that is often administered to these traumatized children is isolation from their families and peers, either in their foster or group homes or in juvenile detention centers. But what they really need are *relationships* with caring adults who understand their trauma and use proven approaches to healing their wounds.⁴ →

2. Homeless children had an on time graduation rate of 50.4% while foster children had a rate of only 27.5%. See, http://www.denverpost.com/news/ci_26528734/colorado-foster-care-youth-less-likely-graduate-than.

3. See, http://www.denverpost.com/fostercare/ci_25555472/colorado-responds-slowly-psychotropic-drug-use-among-foster.

4. Clearly some children require out of home care and some are not suitable for kinship care; however, there is substantial evidence that children from families where there is professional debate about the need for out-of-home care do better when they are not removed than those who were removed under similar circumstances. (See, J. Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 2007, http://www.mit.edu/~jjdoyle/fostercare_aer.pdf.)

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an electronic "motion bank" specific to your jurisdiction be a helpful thing to access from your laptop or tablet, or even your smartphone? Could a membership "app" help get you the information you need on a case, and help you manage your workflow? Would you be interested in further training if it was available online to you as an NACC member?

The technologies to support all this have become much cheaper and easier to use, so there's every reason to dream big dreams. We're aware of several laudable efforts across the country to help the child welfare legal community take advantage of the digital realm, but we also believe we could do so much more if we put our minds to it. Let us know what you want, through whichever technology floats your boat: my phone is 303-864-5322, and my email address is Kendall.Marlowe@childrenscolorado.org. Your suggestions and demands will help all NACC members.

Kendall Marlowe
Executive Director

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Conversely, parents who enter the system are confused, often angry or remorseful, and always fearful of what is in store for them and their children. These parents often represent the previous generation of children who have not been provided the tools they need to succeed in parenting or in life. If we ignore the origins of their deficits we cannot hope to effectively remediate their parenting and provide their children with the stable and caring homes they require.

In an aphorism most often attributed to Albert Einstein, "insanity" is defined as doing the same thing over and over again and expecting different results. As legal professionals, we know that the system we administer or the children and parents we represent deserve more. Ethically we cannot be satisfied with the outcomes produced by our system. Yet too frequently we "go along to get along" and continue to apply the same remedies that have failed in the past.

The "Reasonable Efforts" Tool

The "reasonable efforts" requirements in federal and state law have been around since the enactment of the Adoption Assistance and Child Welfare Act of 1980. Simply stated, child protection agencies are required to make reasonable efforts to prevent out-of-home placement and also must make such efforts to eliminate the continued need for removal of children from their homes.⁵ Although there are limited exceptions to the requirement based on aggravating circumstances, generally the findings must be made throughout the life of the case. In 1997,

5. 42 U.S.C. §472(a)(2)(A)(ii); 42 U.S.C. §971(a)(15)(B)(ii).

with the enactment of the Adoption and Safe Families Act, agencies were also required to make reasonable efforts to finalize the permanency plans of children who were placed out of the home. The failure to make such efforts would result in a loss of federal dollars used to support the system.⁶

Although the courts did not ask for this responsibility, the legislation provided for judges to be the enforcer of the reasonable efforts requirements. In order to keep the flow of federal dollars intact courts were to make findings that the agency had fulfilled this responsibility. The problem, however, was that the legislation did not provide a definition of what constitutes "reasonable efforts." What was "reasonable" was to be decided on a case-by-case basis, taking into account the specific needs of the children and the family.⁷ The Child Welfare Information Gateway offers some guidance regarding what constitutes reasonable efforts. They are referred to as "accessible, available and culturally appropriate services that are designed to improve the capacity of families to provide safe and stable homes for their children..."⁸ In addition, some states have enacted definitions of their own.

I vividly remember a statewide training for Colorado judicial officers that was held early in 1981 when I was a wet-behind-the-ears newly appointed magistrate. We were informed at that time that we must make "reasonable efforts" findings in order to keep the much needed

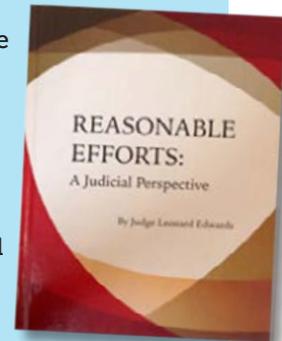
6. 45 CFR §1356.21(b)(1); 45 CFR 1356.21(b)(2)(ii).

7. Child Welfare Policy Manual, Section 8.3C4 Title IV-E.

8. Child Welfare Information Gateway, Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children: Summary of State Laws (2009), https://www.childwelfare.gov/systemwide/laws_policies/statutes/reunify.cfm.

Throughout his career, Judge Leonard Edwards has been a strong advocate for a court and child welfare system that supports families and children. He has authored numerous articles on judicial leadership, ethics, best court practices, family drug courts; fatherhood, family finding and reasonable efforts to name just a few. In each of these areas Judge Edwards has pushed the envelope in a way that has moved outcomes for children and families in a positive direction.

You can find *Reasonable Efforts: A Judicial Perspective*, other publications, and much more at Judge Edwards' webpage: www.judgeleonardedwards.com



money flowing. There may have been a discussion of a definition or of the need for evidence to support the finding, but I don't remember that part. The emphasis was clearly upon the need to keep the money flowing.

Over the years, because of the crush of overburdened dockets and the comfort found in repetition, judges such as myself have often recited the reasonable efforts mantra without giving sufficient thought to what it really means to make those efforts. Attorneys for the state have asked for the findings; too often guardians *ad litem* have agreed and, too frequently counsel for parents have acquiesced. In summary, the "reasonable efforts" tool has been under-utilized as a means of improving outcomes for

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individual families and to make system improvements that benefit all.

Judge Leonard Edwards makes this point emphatically in his new book *Reasonable Efforts: A Judicial Perspective*.⁹ Although the book is written from a judicial perspective, the book is an extremely valuable tool for legal practitioners. It provides a detailed history on why the federal legislation was necessary as well as a comprehensive review of how the states have responded in statute and caselaw. In addition, it outlines recurring factual situations that may give rise to reasonable efforts arguments.¹⁰ The book should be required reading for every legal professional involved in the child welfare system.

Using the Tool

As revealed in Judge Edwards' state-by-state review, the meaning of "reasonable efforts" is still developing. In order to find clarity, it is necessary that legal professionals appearing in any dependency court bring facts to the table and use their legal training to present those facts in a way that advances their client's position about whether or not reasonable efforts have been made. Our Rules of Professional Conduct require no less. The ABA's Model Rules of Professional Conduct require the lawyer act as advocate to zealously represent the client's interests and in all

9. Through the generosity of Casey Family Programs this book is available free of charge to child welfare professionals at the following website: <http://www.ncjfcj.org/resource-library/publications/reasonable-efforts-judicial-perspective>. There is a charge for shipping and handling.

10. The topics include: Housing, poverty; visitation; case planning and provision of appropriate services; substance abuse; domestic violence, mental health, culturally competent services; meaningful efforts – agency's good faith; strengthening the parent-child relationship; timeliness of services; incarcerated parents; access to services; and, parental behavior.

professional functions to be competent, prompt and diligent.¹¹ Using this standard, although the lawyer has a responsibility to the client to pick his/her battles in the best interests of the client, "going along to get along" often represents a breach of duty to the client.

So how can the legal professionals bend the curve so that the judicial officer is more likely to carefully consider whether the particular actions of the agency constitute "reasonable efforts?" First, advocates must raise the issue. As the Judge-in-Residence for Colorado's Court Improvement Program I visited every judicial district in the state and interviewed the various stakeholders. I always asked parent counsel whether they made reasonable efforts arguments. Many said that they had given up because they never succeeded. Judges were asked the question about whether lawyers ever raised the issue. Their reply was that they wished the issue would be raised more often.

This cycle of frustration can be broken by regularly raising the issue and demanding a fact-based response. For example, if a judicial officer recites the reasonable efforts mantra without making specific findings, it is appropriate and a sign of effective advocacy to ask the court for specific findings about how the agency has demonstrated reasonable efforts. Further, if the attorney believes the court's findings to be in error, it is incumbent upon the lawyer to promptly seek relief from a higher court.

11. ABA Model Rules of Professional Conduct, Scope and Preamble. http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope.html.

If lawyers appearing before a judicial officer always ask for specific findings, it is likely the judge will expect the request, will consider the reasonable efforts finding in a more painstaking manner, and will make specific findings without the prompt from counsel. In this way, each legal professional becomes an "agent of accountability" to assure that the law is followed and that their client achieves the best outcome the system can produce.

In my travels around Colorado, I have asked guardians *ad litem* about how often they raised a reasonable efforts argument. Many suggested that this was an argument that should primarily be made by parent's counsel. Given the discussion of unacceptable child and family outcomes set forth above, and the premise that children belong with families, it is clear that the reasonable efforts tool is one that can serve the children well if raised in a timely manner by guardians *ad litem*. Too often the issue is seriously considered for the first time at termination hearings. **This is too late.** This delay results in parents becoming disengaged and children becoming estranged from their parents, siblings, schools and communities. Children remain in limbo when litigation must begin anew if the motion is denied or if a termination order is overturned on appeal because of a lack of support for a reasonable efforts finding.

Being an agent of accountability not only means that a better record of reasonable efforts will be made but that agency practice will be improved when a "no reasonable efforts" finding is threatened. As Judge Edwards regularly points out, judicial officers must make "no reasonable efforts" findings when the record supports



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such a finding to ensure the agency is doing its job. However, there is an “art” to making those findings so that in most cases the agency has an opportunity to conform its services to what is reasonable and avoid the loss of funds that the community desperately needs.¹²

Collective Action

History has shown that the most effective dependency court systems are those that assemble and nourish a robust group of agency, community and legal stakeholders to collaboratively promote a mission to improve the child welfare and court system. Courts designated as Model Courts under the Child Victims of Crime Act are required to practice this approach. Over the years, the model has been proved to be effective in moving our notion of best practice forward.¹³ These collaboratives typically operate through consensus and are incubators of ideas to improve outcomes for children and families. Although typically assembled and led by a judicial officer, lawyers involved in the child welfare court system are essential members whose contributions are invaluable.

At trainings I conduct, I often ask participants to think back over the time that they have been involved in the child welfare system and consider the progress we have made in creating a more humane system for children and families. While the baby steps we have taken over the years may not look like much when we view

12. Edwards, L., *Reasonable Efforts: A Judicial Perspective*, (2014) at 83-85.

13. See, <http://www.ncjfcj.org/resource-library/publications/model-court-protocol-leadership-innovation-and-accountability>.

them in isolation, when viewed collectively the incremental changes made to the system take on larger dimensions.

If your system looks essentially the same when viewed over time or hasn't made the progress toward better results that you expect, it is stuck in a rut and needs to be jostled out of complacency through your advocacy. Whether we are judges or attorneys, we must recognize that it is our job to make people a little uncomfortable. Positive change happens in this manner. For legal professionals working within this system the reasonable efforts tool provides the best means to move the needle and to give children and families what they need instead of “what we got.” Children and families cannot wait. Nobel Prize winning poet Gabriella Mistral said it best when she wrote:

*We are guilty of many error and faults
but our worst crime is abandoning the children,
neglecting the fountain of life.
Many of the things we need can wait.
The child cannot.
Right now is the time bones are being formed,
blood is being made,
senses are being developed.
To the child we cannot answer “Tomorrow.”
The child's name is “Today.”*

Carpe diem! ■

Save the Date, and Join Us by the Bay!

38th National Child Welfare,
Juvenile & Family Law Conference

Hyatt Regency Monterey
Monterey, California

Pre-Con August 24
Three-Day Conference
August 25-27, 2015

Abstracts Open December 1, 2014



Join our LinkedIn Group
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conference location!