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Jeanne M. Kaiser

*Western New England University School of Law*, [jkaiser@law.wne.edu](mailto:jkaiser@law.wne.edu)

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## FINDING A REASONABLE WAY TO ENFORCE THE REASONABLE EFFORTS REQUIREMENT IN CHILD PROTECTION CASES

Jeanne M. Kaiser<sup>1</sup>

*Abstract: Under federal law, state child protection agencies are required to exert “reasonable efforts” to reunite abused and neglected children with their parents before seeking to terminate parental rights and free the children for adoption. The scope of this requirement is undefined in federal statutes and in the statutory law of many states. As a result, it has fallen to appellate courts to determine the degree of effort a state agency must exert before the relationship between a parent and a child is severed.*

*This has proven no easy task. By the time a parental termination case has reached an appellate court, the children may have been in the care and protection of the state for a lengthy time and may have developed a bond with foster parents who are hoping to adopt them. This leaves the appellate court with a difficult choice if it finds that the efforts of the state agency have been insufficient or poorly matched to the needs of the family in question.*

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<sup>1</sup> The author is a member of the appellate panel of the Children and Family Law program of the Massachusetts Committee for Public Counsel Services. She is also an Assistant Professor of Legal Research and Writing at Western New England College School of Law, where she teaches a class entitled Child, Family and State. The author thanks her colleagues Beth Cohen, Giovanna Shay and Taylor Flynn for their comments on this piece. The author owes a particular debt to the Legal Writing Institute’s 2009 scholarship workshop for all the help she received as a participant.

*Faced with these circumstances, many appellate courts have simply rubber-stamped the efforts of the state agency without much review, and in effect read the reasonable efforts requirement out of existence. Other appellate courts have done a more exacting examination of whether reasonable efforts were made. When these courts have found deficiencies, the almost inevitable effect has been to delay permanency for the children involved by requiring the agency to go back and make further attempts at reunification.*

*After reviewing appellate decisions of both types, this article concludes that neither approach is satisfactory. The article offers three ways to alleviate the thorny problems faced by appellate courts in these difficult cases. First, it contends that in the absence of a federal definition of reasonable efforts, states should develop more precise definitions of their own. Second, it argues that courts make better use of empirical research when evaluating whether a state agency has made reasonable efforts, so as to make a more accurate assessment of whether the state's efforts are satisfactory. Finally, it suggests that state courts discontinue the practice of considering reasonable efforts as a condition precedent to termination of parental rights.*

*The article acknowledges that these approaches singly or in combination will not completely resolve the issues raised by reasonable efforts cases, but asserts they will help ease the problems created by those difficult cases.*

As an attorney who serves as appellate counsel for individuals in Massachusetts whose parental rights have been terminated, I have been quite surprised by the near universal failure of the "reasonable efforts" defense to the termination of those rights. In Massachusetts, as in almost every other state in the union,<sup>2</sup> the state child protection agency is required to show that it used reasonable efforts, both to prevent the removal of

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<sup>2</sup> Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT'L L.J. 259, 293 & n.167 (2003).

children from their homes, and to reunite them with their families.<sup>3</sup>

The reasonable efforts requirement is consistent with the basic underpinnings of care and protection law. At the federal level, Congress requires states to use reasonable efforts to preserve families or forego federal funding for their child protection programs.<sup>4</sup> In my own state, preservation of the biological family is cited as a fundamental purpose in the first section of the governing statute,<sup>5</sup> and the state's departmental regulations require that it try to preserve the family unit in the course of carrying out its protective duties.<sup>6</sup> In addition, there has long been a common law requirement in Massachusetts that the Department of Children and Families (the Department) establish that it tried to correct the conditions that led to its involvement before seeking to terminate parental rights.<sup>7</sup> Massachusetts, like a number of other states, codified the reasonable efforts requirement in 1984, in response to the federal mandate.<sup>8</sup>

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<sup>3</sup> MASS. GEN. LAWS ch. 119, §§ 26(b), 29C (2008).

<sup>4</sup> See *infra* note 21, and accompanying text; 42 U.S.C. § 671(a)(15).

<sup>5</sup> MASS. GEN. LAWS ch. 119, § 1 (2009). The statute provides:

It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the care and protection of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure [sic] the rights of any child to sound health and normal physical, mental, spiritual and moral development.

*Id.*

<sup>6</sup> 110 MASS. CODE REGS. 1.01 (2009) (explaining that the philosophy of the Department is to exert reasonable effort to keep families intact).

<sup>7</sup> *In re* Dep't of Pub. Welfare to Dispense with Consent to Adoption, 381 N.E.2d 565, 571 (Mass. 1978).

<sup>8</sup> MASS. GEN. LAWS ch. 119, § 29C (2008) (effective July 12, 1984).

In view of this legal landscape, I expected that the Department's efforts to keep children in their homes would be scrutinized carefully by appellate courts reviewing judgments terminating parental rights and/or placing children in the care and protection of the Department. However, after repeatedly having little success with my own "reasonable efforts" arguments on behalf of parents, I decided to explore the issue in more depth. My exploration revealed a fundamental predicament for appellate courts reviewing reasonable efforts cases. It is extraordinarily difficult to simultaneously hold the state to its obligation to use reasonable efforts to keep a family together and preserve permanency and stability for children.

A review of appellate decisions on reasonable efforts revealed that cases are rarely overturned on the grounds that the state has not done enough to try to reunite parents with their children. The practical reasons for this outcome are abundantly clear. When the appellate court of any state reverses a decision of a trial court in a care and protection or adoption case it may also be reversing years of work to obtain permanency, safety, and emotional well-being for children who are parties to the case. This is a hard path for an appellate court to take even when faced with lackluster, or downright hostile, attitudes towards reunification by the state. In essence, courts are aware that a decision enforcing the state's obligation to comply with the law may also upset stability for a child who has been previously neglected or abused. In such circumstances, courts may find it easier to rule that reasonable efforts need only mean meager or pro-forma efforts.

Such a results-driven approach has its own substantial drawbacks. If an appellate court always finds that the efforts made by the state are good enough, what motivation is there for the state to comply with its obligations in this regard? Indeed, my observation is that many service plans developed for parents who have children in the Massachusetts child protection system have a decidedly perfunctory feel to them. They routinely contain a mix of parenting classes, anger management workshops, and individual therapy, which when looked at in the context of the needs of the parents involved, appear to have little

to no chance of providing any actual help.<sup>9</sup> Consistent judicial approval of these sorts of efforts certainly does little to encourage the state to exercise more creativity or vigor in carrying out its reunification efforts.

Moreover, there are unfortunate secondary effects to this approach. A judicial preference for preserving stability for children over enforcing the reasonable efforts requirement may benefit the children involved in a particular case, but be a detriment to children in state custody as a whole. The reasonable efforts requirement is born out of a policy decision at both the state and federal level that children do best when raised by their family of origin and that the family unit should be preserved.<sup>10</sup> Regular disregard of the reasonable efforts requirement, however well-intentioned or inadvertent, hardly furthers this goal.<sup>11</sup>

This article explores the question of whether the goals of enforcing the reasonable efforts requirement and preserving stability for children can be reconciled. Part I traces the origin of the reasonable efforts requirement in state and federal child protection law. Part II.A examines state law cases, of which Massachusetts is a typical example, that have elevated concerns about permanency for children over rigorous enforcement of the requirement. Part II.B examines decisions from other jurisdictions that have held the state to a higher standard, while at the same time creating an unacceptably high risk to the children involved. Finally, Part III investigates some approaches that might alleviate, although not completely

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<sup>9</sup> See Crossley, *supra* note 2, at 305 (criticizing the use of “boilerplate” service plans “unrelated to the conditions that gave rise to intervention”).

<sup>10</sup> This is not an unsubstantiated concern. There is significant evidence that separating children from their families, even when the families have significant defects, can be psychologically devastating to the children. Nell Clement, Note, *Do “Reasonable Efforts” Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L. J. 397, 418-19 & nn.135-42 (2008).

<sup>11</sup> Indeed, one author has concluded that the law governing reasonable efforts is a “hollow requirement” and a “dead letter.” Crossley, *supra* note 2, at 312.

resolve, the clash between enforcement of the reasonable efforts requirement and preserving stability and safety for children.

## I. ORIGIN OF THE REASONABLE EFFORTS REQUIREMENT

There has long been a tension between whether the natural family or substitute caretakers are the best way to care for abused and neglected children. At times, child protection experts have taken the position that children should be permanently severed from abusive and neglectful homes and placed with new families without much regard for the children's biological parents.<sup>12</sup> However, this approach is not only controversial on child development and child psychology grounds, it has constitutional problems. The routine or automatic removal of children from their families cannot meet constitutional standards set forth in a series of United States Supreme Court cases. These cases hold that parents have a constitutional right to raise their children as they see fit without interference from the state.<sup>13</sup> This right was specifically applied to the care and protection setting in 1982 when the Court decided *Santosky v. Kramer*.<sup>14</sup> There, the Court determined that the state could not terminate parental rights without a finding, by clear and convincing evidence, that the parent was unfit.<sup>15</sup>

Nonetheless, this right is tempered by the state's *parens patriae* interest in protecting the health and welfare of

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<sup>12</sup> Robert F. Kelly, *New Perspectives on Child Protection, Family Preservation and Reunification Programs in Child Protection Cases: Effectiveness, Best Practices, and Implications for Legal Representation, Judicial Practice, and Public Policy*, 34 FAM. L. Q. 359, 359 (2000).

<sup>13</sup> See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (stating that parents have constitutional liberty interest in choosing to enroll child in parochial school); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (identifying liberty interest in child-rearing choices).

<sup>14</sup> 455 U.S. 745 (1982).

<sup>15</sup> *Id.* at 769.

children.<sup>16</sup> At times, the prevailing view has been that it is best to freely exercise this power to separate children from allegedly unfit parents as quickly and cleanly as possible. At other times, the pendulum has swung in the opposite direction.<sup>17</sup> At these times, child protection experts have been more concerned about the problems inherent in separating children from not just the biological parents they love, but their communities, and perhaps their racial, ethnic or religious identities as well, and consequently fought to keep families together.<sup>18</sup> Unfortunately, these efforts sometimes resulted in children returning, time and again, to parents who were utterly incapable of caring for them safely.<sup>19</sup> At other times, it led to “foster care drift,” wherein the child would be placed with a series of foster families in lieu of a

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<sup>16</sup> *Id.* at 766-67.

<sup>17</sup> See Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8:1 THE FUTURE OF CHILDREN, 23 (1988), available at [http://www.princeton.edu/futureofchildren/publications/docs/08\\_01\\_FullJournal.pdf](http://www.princeton.edu/futureofchildren/publications/docs/08_01_FullJournal.pdf). Schene asserts that this battle has been going on for a long time. She writes:

The history of the nation’s response to child abuse and neglect has been marked by a tension between two missions: an emphasis on rescuing children from abusive or neglectful families on the one hand, and efforts to support and preserve their families on the other. The contemporary debate over the priority given to these competing goals, waged in the press and in scholarly journals, is actually more than 100 years old.

*Id.* at 24 (citation omitted).

<sup>18</sup> See Kelly, *supra* note 12, at 359; see also Clement, *supra* note 10, at 418 (focusing on the problems created by separating children from their backgrounds contending, “[r]emoval of children from their families and cultural community has potentially devastating effects on the identity and psychological health of the removed children.”).

<sup>19</sup> See Michele Ingrassia & John McCormick, *Why Leave Children with Bad Parents?*, NEWSWEEK, Apr. 25, 1994, at 52 (outlining a series of what the authors viewed as egregious errors by child welfare officials who left children with their families with disastrous consequences). See generally Elizabeth Bartholet, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999).



pre-adoptive family who would be willing to care for the child permanently.<sup>20</sup>

The competing fears about each end of the separation-reunification spectrum serve as background to the reasonable efforts requirement. First, the concern about separating children from their biological parents too precipitously led states to require reunification efforts in their common-law decisions and then eventually to codification in federal child welfare statutes. However, by limiting the state's responsibility to exerting only "reasonable" efforts, the government addressed concerns about foster care drift and lack of permanence for children that can result from parents being given multiple "second" chances.

While many states already had common-law or statutory requirements that child protective agencies attempt to keep families together, the reasonable efforts requirement was first included in federal law in 1980.<sup>21</sup> The Adoption Assistance and Child Welfare Act (AACWA) required states to exercise reasonable efforts at points in the child protection process. Specifically, the AACWA required that "in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home."<sup>22</sup> Thus, under the statute, reasonable efforts were required first to prevent a child's removal from the home and then to make it possible for him or her to return home.<sup>23</sup>

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<sup>20</sup> Bartholet, *supra* note 19, at 241.

<sup>21</sup> Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101(a)(1), 94 Stat. 500, 503 (1980). This provision of the reasonable efforts requirement was preserved when Congress enacted the Adoption and Safe Families Act in 1997. See 42 U.S.C. § 671(a)(15)(B) (2009).

<sup>22</sup> Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 671(a)(15).

<sup>23</sup> The reasonable efforts requirement, along with other provisions of the AACWA, was intended to eliminate the unintended consequence of promoting foster care placement that resulted from previous federal legislation. Under the previous legislation, states received federal reimbursement for foster care placements, but not federal financial aid for providing reunification or adoption services. The AACWA, thus transformed the federal role from a "relatively

One goal of the AACWA was to discourage states from looking at removal of children from their homes as both a first and last resort. The legislation instead sought to encourage states to provide families with the services they needed to remain intact and functional.<sup>24</sup> One likely motivation for this goal was the explosion in foster care placements, which rose from 8,000 to 100,000 during the ten-year period prior to enactment of the AACWA.<sup>25</sup>

However laudable this goal, following the enactment of the AACWA, the pendulum swung away from the goal of family reunification back to the goals of achieving permanency and avoiding foster care drift. At least one commentator posits that the primary reason for the swing was a series of high profile news reports of horrific child abuse that rightly or wrongly were blamed in part on the reasonable efforts requirement of the AACWA.<sup>26</sup> As a consequence, the reasonable efforts requirement was limited in the Adoption and Safe Families Act of 1997 (ASFA).<sup>27</sup> Perhaps the most fundamental change was

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simple bill payment for foster care into a system of requirements that encouraged states to focus on services aimed at preserving families and achieving permanency for children.” Crossley, *supra* note 2, at 270.

<sup>24</sup> See Adoption Assistance and Child Welfare Act of 1980 § 103, 94 Stat. at 519 (codified at 42 U.S. C. § 625(a)(1) (2006)) (enumerating “preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible” as one of the purposes of child welfare programs).

<sup>25</sup> See Shawn L. Raymond, *Where Are the Reasonable Efforts to Enforce the Reasonable Efforts Requirement?: Monitoring State Compliance Under the Adoption Assistance and Child Welfare Act of 1980*, 77 TEX. L. REV. 1235, 1235 (1999).

<sup>26</sup> Crossley, *supra* note 2, at 273-82. According to Crossley, the vagueness of the reasonable efforts requirement in the AACWA led child protection caseworkers to believe that their hands were tied when faced with parents who endangered their children. *Id.* at 273-78. See also Cristine H. Kim, Note, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 294-96 (placing the blame for a number of appalling child abuse and neglect cases on the AACWA; calling them “reunification murders”) (citations omitted).

<sup>27</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

that the legislation provided that the child's "health and safety" are the "paramount concern" for a judge determining whether reasonable efforts had been made.<sup>28</sup> Thus, for the first time, the question of whether the state had utilized reasonable efforts was explicitly linked to the child's safety. Given this new emphasis, states might well feel free to be less aggressive with the services they offer to families, knowing that the primary consideration for a judge will be not the strength of their efforts, but the health and safety of the child.<sup>29</sup>

In addition, under the ASFA, states did not have to exercise reasonable efforts to keep children in their homes when certain enumerated conditions were met.<sup>30</sup> The ASFA also enacted timetables governing how long a child could be in foster care before the state was required to file a petition for termination of parental rights.<sup>31</sup> In these ways, Congress tacitly limited the amount of time state child welfare agencies were required to dedicate to trying to preserve the family.<sup>32</sup>

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<sup>28</sup> 42 U.S.C. § 671(a)(15)(A) (2009).

<sup>29</sup> The evidence is that this indeed has been the case at least with regard to incorporating this standard into statutory law. According to one author, two-thirds of the states have incorporated into their child protection statutes the paramount nature of the health and safety of the child in the calculation of whether reasonable efforts have been made. See Crossley, *supra* note 2, at 294.

<sup>30</sup> 42 U.S.C. § 671(a)(15)(D). The ASFA excuses reasonable efforts when the parents' behavior has been particularly deplorable. These circumstances include when (1) the child has been abandoned; (2) the parental rights were involuntarily terminated (3) the parent has been convicted of murder or voluntary manslaughter of another of their children or aiding or abetting in that crime; (4) the parent has been convicted of assault or another crime that results in serious injury to the child or another of parent's children; (5) the parent has subjected the child to aggravating circumstances including the murder of another parent in front of the child, subjecting the child or other children in the home to sexual abuse or other conduct of a severe and repetitive nature that subjects the child to physical or emotional abuse. *Id.*

<sup>31</sup> 42 U.S.C. § 671 (5)(C).

<sup>32</sup> Although the ASFA significantly modified the reasonable efforts requirement, its effect on the states is uncertain. Crossley noted that many state statutes appear to be emphasizing child safety and permanency while deemphasizing reunification services in the wake of the ASFA. Crossley, *supra* note 2, at 294. Furthermore, another commentator views the ASFA as changing a presumption that reunification is in the best interests of the child to a

A number of factors have led to uneven treatment of the reasonable efforts requirement in the states. First, neither the AACWA nor the ASFA defined the reasonable efforts requirement. Second, under both statutes, the penalty to states for failure to comply with the requirement is to risk losing federal matching funds for their child protection programs.<sup>33</sup> This has proven to be an idle threat. Strict monitoring of compliance and denial of matching funds has rarely, if ever, occurred.<sup>34</sup> Finally, the United States Supreme Court has determined there is no private right of action to enforce the reasonable efforts requirement.<sup>35</sup> The combination of these factors means that states can essentially enforce the reasonable efforts requirement as rigorously or as loosely as they see fit.<sup>36</sup>

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presumption that termination of parental rights is in the best interests of the child if reunification cannot be accomplished within fifteen months. See Clement, *supra* note 10, at 397.

On the other hand, according to another commentator, most state courts did not vary their approach to the interpretation of the reasonable efforts requirement after the ASFA was passed. See Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 324 (2005). I have noted that neither the AACWA nor the ASFA is mentioned in Massachusetts cases with any frequency, nor is there any indication in its judicial decisions that the change in the federal law has effected a change in the view of what constitutes reasonable efforts under Massachusetts law.

<sup>33</sup> 42 U.S.C. § 671(a)(15).

<sup>34</sup> See generally Raymond, *supra* note 25. See also Crossley, *supra* note 2, at 286-87 (commenting that federal funding is rarely withheld, leaving states to enforce the reasonable efforts requirement in any way they choose).

<sup>35</sup> Suter v. Artist, 503 U.S. 347, 364 (1992).

<sup>36</sup> State practices, at least to some extent, encourage a loose approach. Many states have pre-printed forms where judges can simply check off a box to fulfill their obligations to certify that reasonable efforts were made to prevent removal. Crossley, *supra* note 2, at 285. As Crossley notes, “[c]hecking a box on a pre-printed form . . . does not foster a hearing conducive to the individualized determinations that [the statute] had contemplated.” *Id.*

## II. THE THORNY PROBLEM OF JUDICIAL REVIEW OF THE REASONABLE EFFORTS REQUIREMENT IN THE STATE COURTS

### A. LOOSE ENFORCEMENT OF THE REQUIREMENT

Massachusetts serves as one example of a state in which judicial enforcement of the reasonable efforts requirement has been forgiving of uninspired state efforts. At first glance, this is an unexpected result. Although neither the ACCWA nor the ASFA required states to incorporate the reasonable efforts requirement into their statutory law,<sup>37</sup> Massachusetts was one of the states that chose to integrate the language of the federal statute into its own child protection scheme.<sup>38</sup> By adopting the federal language as its own, the Massachusetts legislature apparently intended to impose an obligation that can be relied upon by parents and children aggrieved of the state's efforts in its child protection system. This was not really a substantial change in the law; common-law decisions in Massachusetts had consistently cited the need for the Department to work with parents towards reunification before termination of parental rights could take place.<sup>39</sup>

However, Massachusetts appellate courts have set the bar for complying with the reasonable efforts requirement quite low, rarely deciding that the state has not met its obligation.<sup>40</sup>

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<sup>37</sup> 42 U.S.C § 671(a).

<sup>38</sup> See MASS. GEN. LAWS ch. 119, §§ 24, 29C (2008). In addition to these explicit references to the reasonable efforts requirement, the Massachusetts statute governing termination of parental rights essentially incorporates the reasonable efforts requirement when setting forth the circumstances the court must consider when terminating parental rights. See MASS. GEN. LAWS ch. 210, § 3(c) (2008).

<sup>39</sup> See *In re Dep't of Pub. Welfare to Dispense with Consent to Adoption*, 381 N.E.2d 565 (Mass. 1978).

<sup>40</sup> Massachusetts appellate cases reversing judgments against parents on the basis of failure to exercise reasonable efforts are difficult to find. In one case, the Massachusetts Appeals Court reversed a judgment terminating a father's parental rights in part because the Department had done little to help the father find appropriate housing for him to care for the children. *In re Elaine*, 764 N.E.2d 917, 922 (Mass. App. Ct. 2002). The court found that the

Viewed from a results-oriented perspective, the advantages of this approach are clear. By the time a parent's rights are terminated, a child may have been in foster care or a pre-adoptive home for many months, if not years. The children may well have a stronger bond with the substitute caretaker by this point than they have with their biological parents. Moreover, it may appear to an appellate court that the biological parents in question are so impaired by drugs, disability, violent disposition or character flaws that no amount of effort by the state agency is likely to make a sizeable difference in their ability to care for their children.

Compounding the problem, an appellate court faced with a lackluster effort to preserve the family by the state agency has only unattractive options at its disposal. It could reverse the judgment of termination and remand to the trial court, essentially giving both the agency and the biological parents another opportunity to make the family work. However, taking this option could wreak disaster on the life of a young child. The child might be separated from foster parents with whom he or she has a warm attachment. Pre-adoptive families may decide they are not patient or flexible enough to put their plans on hold until the child's family falls apart again. Most worrying, the child may be subjected to additional abuse or neglect despite the best efforts of the state agency.

Given all of this, the lax enforcement of the reasonable efforts requirement by the Massachusetts courts is both practical and predictable. However, a review of Massachusetts appellate decisions related to the reasonable efforts requirement

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Department's efforts, which amounted to giving the father "a list of places to call," were insufficient, especially given that it did not contact him until several days before filing a petition to terminate his parental rights. *Id.* However, in this case, there was very little evidence of the father's unfitness to uphold the judgment of termination, no matter what the Department's efforts. In an unpublished decision, the Appeals Court considered reasonable efforts to be a factor when it reversed a judgment of termination. *In re Talbot*, No. 01-P-1831, 2002 WL 31455226, at \*2 (Mass App. Ct. Nov. 4, 2002). In that case, the court reversed because the trial judge relied on stale information and because the Department offered the mother a "paucity of services" in the face of her repeated requests for help from the Department. *Id.* at \*1. Beyond these two cases, there do not appear to be instances where a judgment of termination was overturned by an appellate court on the ground that the Department did not use reasonable efforts to reunify the family.

reveals an essential lack of connection between what the court says is the law and what the court is willing to enforce as the law. Massachusetts appellate decisions continually stress that heroic efforts to preserve the family are not required.<sup>41</sup> This raises no concern; state and federal statutes only require a reasonable effort. What does raise a concern is the amount of effort that the appellate courts are willing to view as reasonable. The appellate courts have often excused decidedly non-heroic efforts by the Department as good enough to meet its standards, especially when a failure to so find would undo the placement of the child.

For instance, in *Adoption of Gregory*,<sup>42</sup> one of the first post-AACWA cases to address the reasonable efforts requirement, the state, working through a private agency, could hardly have done less to reunify the family in question. It made no efforts whatsoever to reunite the children with their parents for the first twenty months after they were removed from their custody.<sup>43</sup> Thereafter, it informed the institution where the children had been placed that reunification with the parents was a possibility and that therefore the facility should try to work with them.<sup>44</sup> At that point, the institution set up meetings with the parents to discuss their parenting problems, encouraged them to participate in services in the community and set up a visitation schedule. The agency's own efforts were limited to drawing up a service plan for the parents that identified the tasks the parents needed to complete before reunification could occur.<sup>45</sup>

Despite these sparse efforts by the agency, the Massachusetts Appeals Court gave short shrift to the parents' argument that the Department failed to work to reunify them with the children. The court's direct discussion of reasonable efforts was relegated

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<sup>41</sup> See, e.g., *Adoption of Lenore*, 770 N.E.2d 498, 503 (Mass. App. Ct. 2002); *Adoption of Abigail*, 499 N.E.2d 1234, 1238 (Mass. App. Ct. 1986).

<sup>42</sup> See 501 N.E.2d 1179 (Mass. App. Ct. 1986).

<sup>43</sup> *Id.* at 1180-81.

<sup>44</sup> *Id.* at 1181.

<sup>45</sup> *Id.*



to a short paragraph at the end of the decision.<sup>46</sup> There, the court made clear its view that it was the parents' failings, and not the Department's, that made reunification impossible, noting that the parents did not consistently take advantage of those services that were offered.<sup>47</sup> More tellingly, the court focused on the children's fragile emotional state and their bond with pre-adoptive parents in deciding to uphold the decision to terminate parental rights.<sup>48</sup> The court determined that while the Department may have failed to follow its own regulations, "the breach was not such as to call for a present remedy,"<sup>49</sup> thus indicating that it was far more concerned with the practical result of a reversal of the termination decision on the children than whether the Department fulfilled its statutory obligation to use reasonable efforts to reunify.<sup>50</sup>

The Appeals Court has also consistently excused the Department from making any effort to preserve the family when a post-hoc examination of the case permits the conclusion that

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<sup>46</sup> *Id.* at 1186. The parents premised their claim on chapter 119, section 1 of the General Laws of Massachusetts which stresses the goal of "strengthening and encouragement of family life," as well as regulations that required the Department to develop service plans for the parents. *Id.*

<sup>47</sup> *Adoption of Gregory*, 501 N.E.2d at 1186.

<sup>48</sup> *Id.* at 1183.

<sup>49</sup> *Id.* at 1186.

<sup>50</sup> Other jurisdictions have taken a similar approach when faced with desultory efforts by their state child protection agency. For instance, the New Mexico Appeals Court expressed concern that despite all parties' agreement that a mother should obtain an evaluation that would permit her to receive a referral to parent-child therapy that was deemed necessary to reunification, she was unable to obtain the expert evaluation she needed to obtain a therapy referral. *State ex rel. Children, Youth & Families Dep't*, 47 P.3d 859 (N.M. Ct. App. 2002). In that case, the court commented that the state agency "simply let events take their course" until "time became an insurmountable obstacle" for the mother and termination of her parental rights was inevitable. *Id.* at 866. The court remarked that it was "troubled" by the state agency's actions and that it believed the state "agency [could not] be proud" of its actions, but found the reasonable efforts requirement was "barely satisfied" and upheld the judgment of termination. *Id.*



any efforts would have been futile.<sup>51</sup> In *Adoption of Nicole*, for instance, the court acknowledged that “it is fair comment that the [agency charged with working with the father] did not do much for the father, but it is equally fair comment that [the agency] had little with which to work.”<sup>52</sup> The court ruled that because the father was going to be incarcerated for a lengthy period of time, the Department did not have to “go through the motions” of providing reunification services when it had already settled on the plan of adoption.<sup>53</sup> The court also noted “parenthetically” that it was unwilling to penalize the child involved in the case because of mistakes made by the Department.<sup>54</sup> Thus, in this case, the Appeals Court signaled its view that if forced to choose between strict enforcement of the reasonable efforts requirement and preserving the placement of the child, it would choose the latter course.

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<sup>51</sup> Massachusetts courts are far from alone in deciding that the state does not have to make efforts to reunify if those efforts are likely to be futile. See *Bean*, *supra* note 32, at 337-43 (positing that the proliferation of cases finding that a state agency does not have to go through the motions of attempting to reunify if such efforts are likely to be fruitless is related to the more constricted view of reasonable efforts contained in the ASFA). However, at least in Massachusetts, the futility defense to a reasonable efforts challenge predates the AFSA. See *Adoption of Nicole*, 662 N.E.2d 1058, 1061 (Mass. App. Ct. 1996).

<sup>52</sup> 662 N.E.2d at 1061.

<sup>53</sup> *Id.* at 1062. See also *Adoption of Abigail*, 499 N.E.2d 1234, 1238 (Mass. App. Ct. 1986) (finding that “it would have required a high and unreasonable measure of optimism” for the Department to create a specific plan to reunite a daughter with her mentally retarded mother). The child in *Adoption of Abigail* was removed from her mother’s care sixteen days after her birth. The court found that the Department fulfilled its obligation to attempt to reunify the family by allowing the mother to visit the child after the removal. *Id.* The court further found that even though there were signs that the mother had made significant progress in defeating her personal problems in the time between her daughter’s birth and the trial, the mother would be unable to meet the special needs of her child and thus termination of her rights was appropriate. *Id.* at 1237. Of note in this case is that the child had been placed with a foster family as a newborn and remained with them for the three and one-half years that it took for the case to move through trial and appeal. *Id.* at 1235. Thus, the court was indirectly posed with the question of whether it should delay and possibly disrupt adoption of a child who had been with the prospective adoptive parents since she was a new-born.

<sup>54</sup> *Adoption of Nicole*, 662 N.E.2d at 1062.

The Appeals Court has also made it clear that the Department's efforts are limited to linking parents to existing services and that it is not required to fill the gaps in available services on its own.<sup>55</sup> In fact, the Department is not even required to look very hard for available services and instead can rely on an expert opinion asserting that there are no services that would fill a particular need of a parent.<sup>56</sup>

The Appeals Court has been similarly tolerant of reunification efforts by the Department that are so poorly matched to the parent in question as to raise a judicial eyebrow.<sup>57</sup> For instance, in *Adoption of Adam*, the court acknowledged that it was "unusual" for a Department case worker to serve as a "therapist" for a mother seeking reunification with her son.<sup>58</sup> The court nonetheless found that this service was reasonable because the case worker labored diligently to help the mother for three years and the mother found the contact to be beneficial.<sup>59</sup> The court did not comment

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<sup>55</sup> See *Adoption of Lenore*, 770 N.E.2d 498, 503 (Mass. App. Ct. 2002). In *Lenore*, the Department referred the parents to a number of services, but their applications to receive them were rejected. *Id.*

<sup>56</sup> *Id.* In *Lenore*, the Appeals Court chided the Department for relying on the expert's testimony that no services were available that would help the parents to raise their child, rather than investigating the availability of services itself. The court noted that the Department has the expertise to match parents and services and that it is obligated to use that expertise and urged that the trial court must remain "vigilant" in assuring that the Department fulfilled its obligations. *Id.* at 503 & n.3. Nonetheless, other than this mild rebuke in the footnote to a published decision, the Department suffered no consequence for its failure to use its expertise.

<sup>57</sup> A good example of this attitude by the Appeals Court is contained in the unpublished decision *Adoption of Madison*, No. 05-P-390, 2005 WL 2861460, at \*1 (Mass. App. Ct. Nov. 1, 2005). There, the court remarked in a footnote that "this was not the Department's finest hour." *Id.* at \*4 n.5. This was something of an understatement. Despite the fact that the Department had been involved with a very needy family for many years, it did not enter a single service plan that would have established its efforts to preserve the family into the record. *Id.* Although clearly disturbed by this apparent failure to fulfill its statutory obligation, the court found that the Department's efforts were reasonable because the parents had rejected some of the services offered. *Id.* at \*4.

<sup>58</sup> *Adoption of Adam*, 500 N.E.2d. 816, 819 (Mass. App. Ct. 1986).

<sup>59</sup> *Id.*

on the fact that the evidence strongly indicated that serious psychological problems were the source of the mother's difficulties in raising her son and that generally a Department case worker will not have the same qualifications or skills as a trained psychotherapist to deal effectively with these problems. It also failed to note the possibility that the Department's case worker may well have had an adverse interest to the mother, given that the Department favored adoption over reunification as a plan for the child. Indeed, it is hard to see how using such a poorly matched resource to provide the crucial reunification service in a particular case could possibly be viewed as a "reasonable" way to effect reunification.<sup>60</sup>

But perhaps the most potent means the Appeals Court has used to dispose of the reasonable efforts requirement is to routinely hold that the Department's obligation to offer services is contingent on the parents fulfilling their own obligations to work towards reunification.<sup>61</sup> In these cases, the court's discussion has focused on the unreasonableness of the parents' efforts as opposed to an evaluation of whether the Department has acted reasonably.<sup>62</sup> Whatever the initial appeal of this

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<sup>60</sup> For an example of similar acceptance of poorly matched services in another jurisdiction, see *In re Charles A.*, 738 A.2d 222 (Conn. App. Ct. 1999). In this case, the trial court had heavily criticized the state Department of Children and Families for failing to recognize that the mother was not abusing her children, but rather, like the children, was a victim of her husband's abuse. The trial court found that the department had violated its own regulations with regard to the mother's situation and even took some responsibility upon itself for failing to appoint separate counsel to represent the mother. *Id.* at 223. Nonetheless, the trial court found that the mother had refused some of services proffered by the department and that therefore reasonable efforts to reunify her with the children were made. *Id.* at 224. The Appeals Court upheld this determination. *Id.*

<sup>61</sup> See, e.g., *Adoption of Mario*, 686 N.E.2d 1061 (Mass. App. Ct. 1997); *Adoption of Serge*, 750 N.E.2d 498 (Mass. App. Ct. 2001); *Adoption of Eduardo*, 782 N.E.2d. 551 (Mass. App. Ct. 2003). Other states also judge the state's efforts in conjunction with the parents' efforts or lack thereof. See, e.g., *In re Guardianship of D.M.H.*, 736 A.2d 1261, 1274 (N.J. 1999); *In re Jason L.*, 810 A.2d 765, 767 (R.I. 2002); *In re M.B.*, 595 N.W.2d 815, 818 (Iowa Ct. App. 1999).

<sup>62</sup> See, e.g., *Adoption of Mario*, 686 N.E.2d. at 1066; *Adoption of Serge*, 750 N.E.2d. at 504.

approach, there are at least two problems with its application. First, nothing in the Massachusetts statutes governing reasonable efforts, or the federal law those statutes are modeled upon, suggests that the Department's obligation is excused if the parents do not show initiative themselves. Thus, the Appeals Court interpretation creates an exception to the reasonable efforts requirement that is absent from the plain language of the statute.

Perhaps more importantly, this approach ignores a fundamental aspect of care and protection cases in general and the reasonable efforts requirement in particular. The cases excusing the Department's responsibilities on the ground that the parents have not fulfilled their own obligations catalogue the failings of the parents in great detail. The average reader, upon reviewing this litany of parental failures, might well determine that the parents have forfeited all right to services offered by the Department because of their bad behavior. However, this ignores that the Department's very existence is premised on the assumption that it will deal with dysfunctional, disturbed and/or irresponsible parents. Thus, it seems only fair that the reasonable efforts requirement be tailored to meet the propensities of those parents, and not those of the average, responsible parent who might be expected to eagerly accept available services. In short, the clientele served by the Department would seem to need extra measures of outreach, patience and aggressiveness to successfully link to services. In view of this dynamic, excusing the Department from any obligation at all if the parents do not show initiative in engaging in services is both counter-intuitive and unfairly shifts the burden to the parents.<sup>63</sup>

This unfairness is particularly problematic when parents suffer from a disability such as mental illness or mental retardation. The decisions of the Massachusetts appellate courts

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<sup>63</sup> Some states have noted this problem in reviewing their own reasonable efforts cases. The Connecticut Appellate Court, for instance, quoted New York's highest court with approval, stating "the parent is by definition saddled with problems: economic, physical, sociological, psychiatric or any combination thereof. The agency, in contrast, is vested with expertise, experience, capital, manpower and prestige." *In re Eden F.*, 710 A.2d 771, 783 (Conn. App. Ct. 1998) (quoting *In re Sheila G.*, 462 N.E.2d 1139, 1145 (N.Y. 1984)).

send a contradictory message on what constitutes reasonable efforts in these cases. On the one hand, these decisions have stressed that the Department has an obligation to tailor services in order to accommodate the disabilities of parents.<sup>64</sup> On the other hand, no decision has ever found that the Department failed to fulfill this obligation, no matter what the nature or severity of the disability involved.<sup>65</sup>

This is perhaps most problematic when a parent suffers from a mental illness. Parents suffering from a serious mental illness such as schizophrenia or bi-polar disorder present a particular conundrum with regard to reunification services. One of the hallmarks of serious mental illness is denial that any problem exists. Oftentimes, people suffering from schizophrenia, for example, will be extremely paranoid and delusional while at the same time vociferously denying that there is anything wrong with them or that medication is required. Nevertheless, when a mentally ill parent refuses a Department recommended psychiatric evaluation or prescribed medication, on the ground that nothing is wrong with them, the Appeals Court has generally found that the Department has fulfilled its reasonable efforts obligation simply by making those services available.<sup>66</sup> Moreover, the Appeals Court has found that a parent who declined those services on the ground she did not need them has

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<sup>64</sup> See, e.g., *Adoption of Gregory*, 747 N.E.2d 120, 126 (Mass. 2001) (reiterating earlier decisions that the Department was required to accommodate a parent's disabilities in provision of services, but held that the American with Disabilities Act, as codified in 42 U.S.C. § 12131, cannot be used as a defense in termination of parental rights proceedings).

<sup>65</sup> In *Adoption of Gregory*, the Supreme Judicial Court found that the Department sufficiently accommodated a father with cognitive disabilities by revising its visitation schedule, continuing to use a social worker trained in cognitive deficits to work with the father beyond the investigation stage, and referring the parents to a parenting group designed to work with cognitively limited parents. *Id.*

<sup>66</sup> Not all states require that their child protection agencies exert reasonable efforts to reunite parents suffering from a mental illness with their children. Indeed, several states have statutes that explicitly exempt the state from this requirement upon a showing that the parent has a mental disability. See Dale Margolin, *No Chance to Prove Themselves: The Rights of Mentally Disabled Parents Under the Americans with Disabilities Act and State Law*, 15 VA. J. SOC. POL'Y & L. 112 (2007).

waived her claim that the Department failed to accommodate her disability by not raising the claim at the very time she refused the services.<sup>67</sup> In essence, such a holding places the responsibility for recognizing and accepting help for a mental illness on the parent at the very time the parent is clinically the least likely to do so. This practice hardly accommodates the disability. To the contrary, it treats the disability as if it did not exist and as if the mentally ill parent was equally capable of taking advantage of services as a parent not so impaired.

In short, at every juncture, the Massachusetts courts have taken an approach to the reasonable efforts requirement that minimizes the obligations of the Department and maximizes the need for difficult and impaired parents to take responsibility for resolving their own parenting problems before they can attain reunification with their children. Ultimately, the reason for this approach appears to be the principle first stated in *Adoption of Gregory*, that the failure to exert reasonable efforts is a breach for which there is no “present remedy”<sup>68</sup> and the “parenthetical” comment in *Adoption of Nicole*,<sup>69</sup> that the court would not allow the children involved to be penalized because of the deficiencies of the Department. In essence, by holding the Department to a minimal standard, the courts can preserve the placements of the children of parents who may have been poorly served. Nonetheless, while it is quite problematic for a state’s appellate courts to systematically minimize, or even ignore, the requirements of state statutory law, along with federal mandates, the potentially tragic consequences of a more rigorous approach to the reasonable efforts requirement approach are easy to see when reviewing decisions from other states.

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<sup>67</sup> See, e.g., *Adoption of Eduardo*, 782 N.E.2d 551, 555 (Mass. App. Ct. 2003).

<sup>68</sup> See *supra* notes 49-50 and accompanying text.

<sup>69</sup> See *supra* note 54.

## B. STRICT ENFORCEMENT OF THE REQUIREMENT

A number of states have applied more exacting standards in reasonable efforts cases at various points in the past. As a consequence, the outcomes in those decisions are sometimes starkly different from those in Massachusetts. For example, in California, the standard the state must satisfy is by design more stringent. The California parental rights termination statute requires the state to prove by clear and convincing evidence that it has used reasonable efforts to reunify the family before it will permit termination of parental rights.<sup>70</sup> One example of a reasonable efforts case from California suffices to illustrate how this more stringent standard can have radically different consequences in the life of a family.

In *In re Victoria M.*,<sup>71</sup> the California Court of Appeal reversed a judgment terminating the parental rights of a mother in the following circumstances. The mother had seven children, none of whom were in her care at the time of the hearing on this matter.<sup>72</sup> The case arose when the mother and three of her children, two girls and a boy, were about to be evicted from a motel. All of the children had head lice so severe that their heads needed to be shaved and the two girls had scabies. The boy had suffered an accidental burn that needed to be treated by a skin graft. The donor site for the skin graft had become so infected due to inadequate care that the skin grew over the bandage and his “trousers had to be peeled off” to treat the infection.<sup>73</sup>

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<sup>70</sup> CAL. WELF & INST. CODE § 361.5(b) (West 2008). Connecticut has a similar requirement of clear and convincing evidence. Crossley, *supra* note 2, at 301 nn.210-11. This is a requirement these states have imposed upon themselves. Proof by clear and convincing evidence of a parent’s unfitness is constitutionally required. *Santosky*, 455 U.S. at 769. However, most states have not required that same burden of proof with regard to the reasonable efforts requirement. The Massachusetts courts have not spoken to the burden of proof with regard to reasonable efforts.

<sup>71</sup> 255 Cal. Rptr. 498 (Cal. Ct. App. 1989).

<sup>72</sup> *Id.* at 500.

<sup>73</sup> *Id.*



The mother was mentally retarded and had a poor history with social service providers. In fact, one agency refused to work with her anymore because of her excessive use of services.<sup>74</sup> After the children were removed from her care, the mother was instructed to participate in numerous services and to meet certain goals such as obtaining appropriate housing and acting appropriately during visitation.<sup>75</sup> Although the mother actively participated in most of the services offered to her; because of her borderline IQ, she had difficulty benefitting from the services. The service providers uniformly proffered a poor prognosis for her ability to adequately parent the children.<sup>76</sup> She visited with the children regularly, although not as often as her service plan allowed. Furthermore, during the visits she had difficulty controlling all three children at the same time and the arrangements had to be revised so she could visit with the boy alone. At the time of the appellate decision, the girls, who had been in state custody for three years, were living with foster parents who were willing to adopt them. The prognosis for the boy was bleaker. Service providers predicted he would need institutional care because of his own disabilities.<sup>77</sup>

On appeal, the California court accepted the mother's argument that the state did not prove by clear and convincing evidence that it had made reasonable efforts to reunify her with her children. The court found that the services offered were not specifically tailored to address the mother's limited intellectual abilities.<sup>78</sup> The court also criticized the state for not being more proactive in its efforts to assist the mother in obtaining housing, and expecting instead that the mother find housing on her very limited income by herself.<sup>79</sup> The court reached this conclusion even though the mother's counselor in her parenting class

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 501.

<sup>77</sup> *In re Victoria M.*, 255 Cal. Rptr. 498, 501 (Cal. Ct. App. 1989).

<sup>78</sup> *Id.* at 504-05.

<sup>79</sup> *Id.* at 504.



recognized her limitations but found that she was unable, even after three attempts, to understand the material in the classes or integrate them into her parenting style. The court was also unimpressed that the mother eventually became a client at an agency that specialized in working with mentally retarded individuals because the state had referred her to the agency because of her son's needs and not her own.<sup>80</sup> In short, because the state had failed to tailor its efforts to the mother's mental disabilities, the judgment of termination was reversed, creating the possibility that the children would be returned to the mother's care and guaranteeing that a permanent solution to their care and custody would be delayed. Conversely, a Massachusetts court reviewing similar facts would likely find that further efforts would be futile; or that the mother had not sufficiently cooperated in services herself; or that no services capable of curing the mother's parental deficiencies were available.<sup>81</sup>

Although other states do not share California's requirement of clear and convincing evidence with regard to reasonable efforts, some states share the concern about closely matching services to the parental needs. For instance, in an Oregon case,

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<sup>80</sup> *Id.*

<sup>81</sup> See *supra* Part II.A. In contrast, California courts have continued to strictly enforce the reasonable efforts requirement in recent years. For instance, in one case it found that reasonable efforts had not been made when a series of logistical problems, most of which related to the maternal grandmother who was caring for the child, led to a delay in counseling services. *In re Alvin R.*, 134 Cal. Rptr. 2d 210, 216-18 (Cal. Ct. App. 2003). In another case, the appellate court delayed the permanent placement of a child who had been in state custody since he was four days old because the state agency could not show that it provided services to the child's mother, who suffered from a serious mental illness. *In re Daniel G.*, 31 Cal. Rptr. 2d 75, 78-80 (Cal. Ct. App. 1994). Nonetheless, California's approach to the reasonable efforts requirement is somewhat schizophrenic. While the cases discussed here demonstrate that California has sometimes imposed more stringent requirements on its child protection agency than other states have imposed on theirs, California has completely eliminated the requirement in other cases. By statute, California allows the state to bypass reunification efforts entirely when two experts testify that the parent has a mental disability that renders him or her incapable of benefiting from those efforts. See Nina Wasow, *Planned Failure: California's Denial of Reunification Services to Parents with Mental Disabilities*, 31 N.Y.U. REV. L. & SOC. CHANGE 183, 183-84 (2006).

the court reversed a judgment terminating a mentally ill mother's parental rights to her young child. The court found that the newborn had been "dumped in her mother's lap" without any immediate provision for the mother's considerable needs for mental health treatment. The court acknowledged that the child had formed a very real bond with foster parents during eighteen months of foster care and that it was troubling to break this bond to allow the mother another opportunity to raise her child. Nonetheless, the court decided to take this route.<sup>82</sup>

Similarly, a New York appellate court reversed a judgment of termination of the parental rights of a mother who had been found wandering with her infant children.<sup>83</sup> The court found the state failed to use reasonable efforts because it did nothing to monitor the mother's outpatient treatment or link her with services after her discharge from the hospital. The court made this decision even though there was significant evidence that the mother would not have complied with mental health services even if the state had done more.<sup>84</sup> The court found that it would be improper to speculate on whether the mother would have participated in services had they been offered and provided the mother with another chance to raise her children.<sup>85</sup> The most remarkable thing about this case is that the children had been in foster care for ten years at the time of the decision; the mother had visited with the children infrequently, and at least at some points her proposed plan for the children was that they stay in foster care until they were ready for college.<sup>86</sup> Thus, it seems

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<sup>82</sup> See *State ex rel. Juvenile Dep't of Multnomah County v. Habas*, 700 P.2d 225, 230-31 (Or. 1985) (noting that failure to use reasonable efforts was not the sole reason for reversal in this case, as the court was also concerned about the state's failure to satisfy statutory pleading requirements).

<sup>83</sup> *In re Star A.*, 435 N.E.2d 1080 (N.Y. 1982).

<sup>84</sup> The dissent asserted that the state would have needed to make "relentless" efforts to assure the mother remained linked with services. *Id.* at 1085 (Meyer, J., dissenting).

<sup>85</sup> *Id.* at 1083.

fair to say that in this case, the court elevated the need to enforce the reasonable efforts requirements over the needs of the children for permanency.

In short, it is painful to contemplate the consequences of judicial decisions such as these, which strictly enforce the reasonable efforts requirement. When appellate courts take this approach, permanent placement for the children is delayed while the state again attempts to match the parents with services that satisfactorily demonstrate reasonable efforts. Indeed, the courts' decisions in these cases might well result in children being subjected to another round of upheavals in their living situations, shuttling between natural parent and foster or pre-adoptive parent. This is a disheartening result. As the Iowa Supreme Court has repeatedly noted, "[t]he crucial days of childhood cannot be suspended."<sup>87</sup>

Nonetheless, the lax treatment of the reasonable efforts requirement described in Part B above is also seriously flawed. So what is an appellate judge faced with unimpressive efforts towards reunification to do? Is the judge truly provided only with the Hobson's choice of deciding between ratifying inadequate efforts by the state and delaying permanency and stability for abused and neglected children? The remainder of this article will focus on possible alternative approaches to this problem that would help avoid the quandary currently faced by appellate judges in these cases.

### III. POSSIBLE SOLUTIONS TO THE REASONABLE EFFORTS CONUNDRUM

#### A. MORE PRECISE DEFINITION OF THE REASONABLE EFFORTS REQUIREMENT

One possible solution to the quandary faced by courts reviewing whether reasonable efforts have been exercised is for

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<sup>86</sup> *Id.* at 1086 (Meyer, J., dissenting). It should be noted that given the new timeframes contained in ASFA it would be unlikely for a child protection case to drag on for such a long time without resolution at the present time. *See supra* notes 31-32 and accompanying text.

<sup>87</sup> *In re K.C.*, 660 N.W.2d 29, 35 (Iowa 2003) (quoting *In re A.C.*, 415 N.W.2d 609, 613 (Iowa 1987)).

states to fill the gap created by the failure of Congress to define reasonable efforts. States can accomplish this goal by providing a more precise definition themselves. A number of states have taken this approach and enacted statutes that provide more direction to their child protection agencies regarding reunification services.<sup>88</sup>

For instance, Minnesota has a detailed statute governing reasonable efforts. It defines reasonable efforts as “the exercise of due diligence by the responsible social service agency to use culturally appropriate and available services to meet the needs of the child and the child’s family.”<sup>89</sup> The statute further places the burden on the state to show that it has exercised reasonable efforts and requires the juvenile court to make findings of fact and conclusion of law on the question of reasonable efforts. Finally, the statute gives the juvenile court specific guidelines to consider when evaluating the state’s efforts. The court should consider whether the services were “(1) relevant to the safety and protection of the child; (2) adequate to meet the needs of the child and family; (3) culturally appropriate; (4) available and accessible; (5) consistent and timely; and (6) realistic under the circumstances.”<sup>90</sup>

The Minnesota statute also codifies the circumstances under which reasonable efforts are excused.<sup>91</sup> For the most part, this

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<sup>88</sup> The federal government has attempted to give the states some guidance in this area. The Federal Children’s Bureau, a division of the Department of Health and Human Services, has issued guidelines for states with regard to reasonable efforts. These guidelines suggest courts use a variety of factors in determining whether reasonable efforts have been made. These factors include the specific dangers to the children involved, whether services relate specifically to the family’s needs, whether the state agency was diligent in arranging services, and whether those services were appropriate and timely. Crossley, *supra* note 2, at 313.

<sup>89</sup> MINN. STAT. ANN. § 260.012(f) (West 2008). This definition applies equally to the efforts the state must exert to reunify families and the efforts the state must exert to provide the child with a permanent placement once it has determined that reunification with the family of origin is not feasible. *See* § 260.012(a), (e).

<sup>90</sup> MINN. STAT. ANN. § 260.012 (h).

<sup>91</sup> *Id.*

section of the statute mirrors the exceptions to the reasonable efforts requirement set out in the federal statute.<sup>92</sup> Additionally, the statute permits the court to determine that reasonable efforts are not necessary when they would be futile and therefore unreasonable under the circumstances.<sup>93</sup> Minnesota thereby accomplishes by statute the practice of excusing states from “going through the motions” that many state courts have achieved by their common-law interpretations of the reasonable efforts requirement.<sup>94</sup> While the merits of this approach are certainly debatable,<sup>95</sup> at least Minnesota has stated a legislative preference for this means of dealing with difficult odds in reunification cases.

Colorado, likewise, has developed a more comprehensive definition of reasonable efforts in its statutes. Colorado requires that each of its counties and cities provides services to families and children who are in out-of-home placements.<sup>96</sup> The statute further provides that certain services “shall” be available to families in its care and protection system.<sup>97</sup> The statute goes on to require certain additional services “based upon the state’s capacity to increase federal funding or any other moneys appropriated.”<sup>98</sup> The enumerated services include concrete assistance, such as child care, transportation, in-home homemaker services, and financial services likely to be helpful to overwhelmed and embattled parents.<sup>99</sup> In addition, the services include mental health, drug and alcohol treatment,

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<sup>92</sup> Compare *id.*, with 42 U.S.C. § 671(a)(15).

<sup>93</sup> MINN. STAT. ANN. § 260.012(a)(5).

<sup>94</sup> See *supra* note 53 and accompanying text.

<sup>95</sup> See Bean, *supra* note 32, at 337-43.

<sup>96</sup> COLO. REV. STAT. ANN. § 19-3-208(1) (West 2008).

<sup>97</sup> COLO. REV. STAT. ANN. § 19-3-208(2)(b) (West 2008). These services include basic services such as screening, assessments and individual case plans, home based crisis and family counseling, referrals to private and public resources, visitation and placement, including emergency shelter. *Id.*

<sup>98</sup> COLO. REV. STAT. ANN. § 19-3-208(2)(d) (West 2008).

<sup>99</sup> *Id.*

presumably to address the problems that are at the root of so many care and protection cases.<sup>100</sup>

The benefit of these statutes to an appellate court is clear. When a state more precisely defines reasonable efforts, the reviewing court can compare the efforts of the state actually made in a particular case against the efforts required by the statute to determine if the state has fulfilled its duty. By contrast, states that use the term reasonable efforts without further definition provide no guidance to the appellate court about how the reasonableness of the efforts is to be measured. Therefore, in states with a more precise definition of reasonable efforts, the danger that an appellate court will so significantly minimize the requirement as to adjudicate it out of existence is greatly reduced. Whatever one's position on the issue of whether services should be offered in the first place, it cannot be good practice for a state to establish a requirement in a statute and then systematically ignore that requirement in judicial decisions.

A more precise definition is also helpful in states that have been more demanding in their enforcement of the reasonable efforts requirement.<sup>101</sup> In those states, the reviewing courts may apply expectations to child protection agencies that are simply unrealistic given issues such as difficult-to-access services, high case loads, and uncooperative parents. When the state legislature has more specifically defined the reasonable efforts requirement, appellate courts have some guidance on how to evaluate the reasonableness of the efforts. Thus, the more precise definition of reasonable efforts can guard against unnecessarily prolonging a child's drift in the foster care system.

But the greatest value of such legislation is probably at the front-end of the system - in the child protection agency itself. More precise definitions of reasonable efforts can be enormously helpful to front-line workers in state care and protection services. The challenges faced by these workers cannot be overstated. Every day they are charged with making difficult, value-laden decisions about the families torn by tremendous social and psychological problems. The

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<sup>100</sup> *Id.*

<sup>101</sup> *See supra* Part II.B.

consequences of making an incorrect decision about a family can literally be fatal.<sup>102</sup> In addition, many of these front-line workers are undertrained and overworked. In view of these pressures, vagueness over how much effort they are required to exert to reunify families only serves to make an already difficult job nearly impossible. It seems only fair to give these workers, as well as the families and the courts, statutory guidance on what constitutes reasonable efforts.

The same considerations also apply to the upper levels of the child protection system. Burnout and rapid turnover consistently plague the highest administrative levels of child protection systems.<sup>103</sup> Often each change in administrators brings a drastic change in philosophy and clinical priorities for the department.<sup>104</sup> Thus, within a very short period of time, a state or local child protection system might be headed by different directors with entirely different views of the reasonable efforts requirement. This works a great burden on the front-line staff who must constantly adapt to changes in philosophy in their daily practice.<sup>105</sup>

One example suffices to illustrate the difficulties. Social work professionals can have a reasonable difference of opinion as to whether parents should be offered concrete services such as transportation, housekeeping, or financial assistance when working toward reunification. One valid professional viewpoint is that providing such services fosters dependence and actually

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<sup>102</sup> See Kim, *supra* note 26, at n.63 (stating that “[t]here are far too many deaths to document,” but providing details of the deaths of eight children who died at the hands of their parent/abusers after or during the intervention of a state child protection agency).

<sup>103</sup> Jim Moye & Roberta Rinker, *It’s A Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 383 (2002).

<sup>104</sup> *Id.* (referencing a twelve year study by the Urban Institute reporting that respondents to the study complained that their agencies continually fluctuated between a philosophy emphasizing family preservation and a philosophy emphasizing child safety).

<sup>105</sup> *Id.* (noting that such changes in leadership also have an impact on families in the system who may have come to expect multiple services under one administration only to have those services withdrawn in another).



discourages parents from taking the lead in attending to their parental responsibilities. Another equally valid professional viewpoint is that such concrete services are exactly what parents need to get their lives back on track and in fact are much more immediately helpful than any number of anger management or parenting skills classes.

When a state's statutes or regulations spell out at least generally what services should be included in the reasonable efforts package, there is no need to revisit this question each time there is a change at the upper levels of administration. Instead, front-line workers have a consistent understanding of what is and is not expected of them. Moreover, providing these front-line workers with more detail about how the state views the term "reasonable efforts," makes it easier for them to know what to do in the course of attempting to effect reunification. When this is the case, workers can exert their efforts to implement actual services as opposed to trying to discern what exactly they should be doing.

Another advantage of more detailed legislation is that there is some evidence that the mere act of providing a more precise definition in the statute leads to more aggressive delivery of reunification services by state agencies. Although it is difficult to tell whether this is a direct result of the more precise definition,<sup>106</sup> a review of both Minnesota and Colorado cases suggests a fairly rigorous approach to reunification efforts in those states. For instance, in *In re Welfare of Children of S.W.*,<sup>107</sup> the Minnesota Appeals Court found that the state had complied with the reasonable efforts requirement when the mother had received an impressive array of services, including intensive mental health treatment that involved almost daily contact with her mental health worker. The worker offered both concrete assistance in terms of arranging transportation and setting up appointments, and substantial emotional support. The mother also received parenting training, psychological

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<sup>106</sup> At least one commentator has concluded that states that have defined reasonable efforts have more successfully complied with the obligation to exercise those efforts. See Crossley, *supra* note 2, at 313.

<sup>107</sup> *In re Welfare of Children of S.W.*, 727 N.W.2d 144 (Minn. Ct. App. 2007).



evaluations, individual therapy and a substantial number of supervised and unsupervised visitation ultimately totaling three weekly two-hour visits.<sup>108</sup> The court found that this encompassed all of the services available in the area.<sup>109</sup> In addition, the agency had extended the deadline for changing the goal for the children from reunification to adoption in order to allow the mother time to deal with her serious mental health problems.<sup>110</sup> In short, the efforts of the state in this case seemed both exhaustive and specifically designed to assist this particular mother with her individual needs.

Moreover, the Minnesota cases reflect an effort by the state's Department to provide concrete services. For instance, in one case, the state provided a free bus pass and paid for babysitting services in order for a mother to attend visits with her children and school conferences on their behalf and for her to attend recommended drug treatment programs.<sup>111</sup> In another case, the state provided housekeepers, in-home skills counselor and in-home public health nurses, along with a broad array of outpatient services in an attempt to cure the parents' multifaceted problems dealing with four young children.<sup>112</sup> In each of these cases, the appellate court found reasonable efforts had been made and that termination of parental rights was appropriate; however, the broad range, number and aggressive nature of the services offered in these cases suggest that simply providing a more comprehensive definition of reasonable efforts

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<sup>108</sup> *Id.* at 150. By contrast, this author has observed that the Massachusetts practice is to provide one-hour of weekly visits for children who are in foster care when the stated goal remains reunification. This is changed to once monthly visits for the period of time between the change of goal to adoption and termination of parental rights by a trial court.

<sup>109</sup> *Id.* at 148.

<sup>110</sup> *Id.* at 150.

<sup>111</sup> *In re Welfare of D.T.J.*, 554 N.W.2d 104, 109 (Minn. Ct. App. 1996). There is some evidence that such concrete services are more effective in facilitating reunification than other, more insight-oriented services. *See infra* note 127.

<sup>112</sup> *In re Welfare of A.R.G.-B.*, 551 N.W.2d 256, 258-59 (Minn. Ct. App. 1996).

in the state statute serves to motivate the state to take the requirement more seriously.

This hypothesis is borne out by reviewing decisions in Colorado. As in Minnesota, the mere existence of detail in the statute seems to have an effect on the number, type and intensity of services offered to families. For instance, in one case, a developmentally disabled mother challenged the state's efforts because the state did not assure that she received services from a specific agency specializing in serving individuals with developmental disabilities.<sup>113</sup> The Colorado Court of Appeals found that the reasonable efforts requirement was nonetheless satisfied because for eleven months the mother received forty-four hours of weekly in-home family preservation services. These services included hands-on repetitive instruction about parenting skills, nutrition, budgeting, and basic life skills. The family preservation worker and the mother's case worker were aware of her developmental disabilities and adjusted their services to accommodate issues associated with her problems. Moreover, the mother ultimately received services from the agency specializing in developmental disabilities, including being placed with a host family. Thus, although the mother may have been disappointed with the outcome, the court's determination that the mother had received sufficient help from the state seems completely reasonable.<sup>114</sup>

A comparison of these Minnesota and Colorado decisions with the decisions examined in Part II of this article seems to demonstrate some clear advantages to developing a more precise statutory definition of reasonable efforts.<sup>115</sup> As an initial matter, it appears that when a state statute more specifically defines reasonable efforts, the state care and protection agency may do more to attempt reunification. This is advantageous for several reasons. First, the state's efforts may work as intended—i.e. they might preserve families where permanent removal of

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<sup>113</sup> *People ex rel. J.M.*, 74 P.3d 475 (Colo. App. 2003).

<sup>114</sup> *Id.* at 477.

<sup>115</sup> Appellate judges in states that have not enacted legislation defining reasonable efforts might instead be guided by the federal guidelines designed to assist states in refining the term. See Crossley, *supra* note 2, at 313.

the children ultimately proves unnecessary. This is a highly desirable result if one assumes, as federal and state legislation does, that the best outcome for children is to remain with their natural families in a safe and healthy environment. Additionally, reunification preserves the state's scarce resources; because of the high cost of long-term foster care, effective reunification services that result in children being returned to their home more quickly are likely much more cost effective.<sup>116</sup> Even if this was not true, no state has an inexhaustible number of potential adoptive families who are equipped to handle the substantial emotional challenges of caring for traumatized children who are not reunified with their parents.

In short, there seem to be multiple advantages and few disadvantages to further defining the reasonable efforts requirement at the state level. While there may be some concern that more precise definitions might lead to less flexibility for child protection agencies, the definitions themselves could be structured to allow for diversity in services. In fact, a definition that demanded that state child protection agencies use the best practices and research available at a given time might serve as an impetus to the further development of research in the reasonable efforts arena.

## B. USE OF SOCIAL SCIENCE RESEARCH

Although hundreds of reasonable efforts decisions have been made around the country, I have found none that address the question of which specific programs have actually proven useful in reuniting troubled families. Courts rely on logic and intuition with regard to what services might help families reunite rather than any empirical proof of efficacy. Thus, it appears that courts may be ignoring a significant tool that would assist them in judging whether a state agency has used reasonable efforts to reunite a family. Certainly, it seems that part of the analysis should be whether the state is delivering services that have a proven record of success in child protection cases.

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<sup>116</sup> See, e.g., Sally K. Christie, *Foster Care Reform in New York City: Justice for All*, 36 COLUM J.L. & SOC. PROBS. 1, 33 (2002).

Nonetheless, this is no easy task. There has been very little research conducted on the question of the effectiveness of reunification services. Indeed, the existing research is “especially thin, even by child welfare standards.”<sup>117</sup> Moreover, there are significant problems for judges in evaluating the quality of such research. Indeed judges attempting to evaluate research might feel that they are being pulled in opposite directions depending on what study they are reading.

This difficulty is well illustrated by reviewing research about a particular program in the related area of family preservation. The emphasis of a family preservation program differs from reunification programs because of the point of intervention. Family preservation programs are designed to intervene in a family’s life before the children are removed from the home; whereas family reunification programs are implemented after a child has been removed from the home.<sup>118</sup> There has been substantial research about the value of one particular family preservation program; however, the problem is that the research itself is very conflicting.

The program at issue is “Homebuilders,” an intensive intervention model developed in Washington State in the early 1970s.<sup>119</sup> Multiple studies of the use of this model have demonstrated that families who receive “intensive family preservation services” under this model fare better than families in a control group.<sup>120</sup> However, a federally funded study of five family preservation programs throughout the country debunked these findings and determined that families receiving intensive services were not able to avoid foster-care placement any better

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<sup>117</sup> Fred Wulczyn, *Family Reunification*, 14:1 THE FUTURE OF CHILDREN 95, 108 (2004), available at [http://www.princeton.edu/futureofchildren/publications/docs/14\\_01\\_FullJournal.pdf](http://www.princeton.edu/futureofchildren/publications/docs/14_01_FullJournal.pdf).

<sup>118</sup> Kelly, *supra* note 12, at 359.

<sup>119</sup> Richard Wexler, *Take the Child and Run: Tales From the Age of ASFA*, 36 NEW ENG. L. REV. 129, 136-37 (2001).

<sup>120</sup> *Id.* at 141.

than families in a control group.<sup>121</sup> This study, in turn, was heavily criticized by a professor at the University of North Carolina School of Social Work, who concluded that the study was defective on a number of grounds and therefore unreliable.<sup>122</sup> Given this morass of conflicting evidence, both trial and appellate court judges might well throw up their hands and determine that there is little help to be found in social science research.<sup>123</sup>

Despite this problem, it may be worthwhile for appellate court judges to review the evidence related to the reunification programs because there is some consistency with regard to the evidence. First, if nothing else, research has been able to identify characteristics of families most likely to benefit from reunification services. Specifically, reunification has been more successful with older children than younger children.<sup>124</sup> Moreover, families with multiple problems, or with children who have disabilities or serious emotional problems, are more difficult to reunify.<sup>125</sup> Different appellate judges may find this information enlightening for entirely different reasons. For

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<sup>121</sup> Westat et al., *Evaluation of Family Preservation and Reunification Programs: Final Report* (Dec. 2002), available at <http://aspe.hhs.gov/hsp/evalfampres94/Final/Vol1/index.htm>.

<sup>122</sup> Wexler, *supra* note 119, at 142-43.

<sup>123</sup> Robert Kelly, who has studied the efficacy of family reunification programs, has along with a co-author, attempted to provide some assistance in assessing the validity of social science research to judges. See Robert F. Kelly & Sarah H. Ramsey, *Assessing and Communicating Social Science Information in Family and Child Judicial Settings: Standards for Judges and Allied Professionals*, 45 FAM. CT. REV. 22 (2007); Robert F. Kelly & Sarah H. Ramsey, *Assessing Social Science Studies: Eleven Tips for Judges and Lawyers*, 40 FAM. L.Q. 367 (2006). Both of these articles illustrate that unless a judge is thoroughly educated in research methods and statistics, it is a daunting task to evaluate the complexities of social science research.

<sup>124</sup> See Kelly, *supra* note 12, at 384. Kelly's work attempted to provide "a systematic review and synthesis of findings of evaluations of [family reunification programs] with the goal of developing a social science knowledge base for child protection legal practitioners (judges, court professional staff, and attorneys representing parents, children, and human services agencies)." *Id.* at 360-61.

<sup>125</sup> See *id.* at 385; Wulczyn, *supra* note 117, at 99-100.

instance, in one state, appellate courts may determine that fewer efforts should be required when a state agency is attempting to reunify a very young disabled child with parents who have multiple problems because reunification is less likely to be successful in the end. Or, a state's appellate courts could take the contrary view that the state must be much more aggressive when faced with such families and not limit itself to the steps taken when attempting to reunify an older, non-disabled child with parents who have fewer problems. Nonetheless, a court charged with evaluating reasonable efforts could certainly benefit from having this information about the relative difficulty of reuniting certain types of families in order to make an informed evaluation of whether the state has done enough.

In addition, while the empirical evidence about reunification programs may be thin, there is some evidence about which approaches are most effective. Robert Kelly, in his review of research studies evaluating family reunification programs, found that several approaches were apt to be more successful than others. First, he found that a "managed care" approach that focused on intensive in-home services was most likely to be successful.<sup>126</sup> Second, he found that concrete services, such as "emergency cash, housing, medical care, food, transportation, assistance with gaining employment, and/or assistance with securing public assistance" were associated with success, especially with very low-income families.<sup>127</sup> He also found that more lengthy treatment programs with well-trained and experienced staff tended to be successful.<sup>128</sup>

Fred Wulczyn, in his article about reunification services stressed that because studies of reunification services are limited, professionals in this area must rely more on observation about what works than empirical evidence.<sup>129</sup> However, he noted that such observation demonstrates that there are several "promising practices" in reunification services.<sup>130</sup> These include

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<sup>126</sup> Kelly, *supra* note 12, at 378-79.

<sup>127</sup> *Id.* at 380.

<sup>128</sup> *Id.* at 382-84.

<sup>129</sup> See Wulczyn, *supra* note 117, at 108.

<sup>130</sup> *Id.* at 108.

“strengths-based family services,” intensive family visitation, developmental awareness, ongoing aftercare and cultural sensitivity.<sup>131</sup> He also noted that research establishes that comprehensive and theory based interventions that involve “thoughtful implementation of comprehensive and holistic approaches to addressing the needs of family and children in foster care can have positive effects.”<sup>132</sup> Certainly appellate judges charged with having to assess the reasonableness of a state agency’s efforts could benefit from at least possessing knowledge of these observations.

The potential importance of such social science research is apparent when reviewing one easily isolated reunification service—visitation. The importance of visitation between natural parents and children placed in foster care has repeatedly been noted as crucial to reunification.<sup>133</sup> In addition, the quality of visitation is related to success. Child welfare agencies often limit visitation to one-hour or ninety minutes in a cramped room at a social services agency. During these visits, the parent might have to tend to the needs of multiple children of different ages under the eye of a social worker who is recording his or her observations. Research shows, however, that reunification is far more likely when visitation occurs at the foster home where the parent can engage in normal activities such as putting them to bed or feeding them a meal.<sup>134</sup> Given this evidence, an appellate judge should question whether the child protection agency that offers only visits in an office setting is truly exercising reasonable efforts.

In addition, it is crucially important for appellate judges to be aware of the research involving the importance of providing

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<sup>131</sup> *Id.* at 108-09.

<sup>132</sup> *Id.* at 109.

<sup>133</sup> *See, e.g.*, U.S. DEP’T. OF HEALTH AND HUMAN SERVICES, CHILDREN’S BUREAU: CHILD WELFARE INFORMATION GATEWAY, FAMILY REUNIFICATION: WHAT THE EVIDENCE SHOWS (2006), available at [http://www.childwelfare.gov/pubs/issue\\_briefs/family\\_reunification/index.cfm](http://www.childwelfare.gov/pubs/issue_briefs/family_reunification/index.cfm); Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE 311, 336-37 (1996).

<sup>134</sup> Beyer, *supra* note 133, at 338.



“culturally competent” reunification services.<sup>135</sup> Culturally competent services are those that “have the capacity to . . . respond to the unique needs of populations whose cultures are different than that which might be called dominant or mainstream American.”<sup>136</sup> Culturally sensitive reunification services are vital given the over-representation of certain cultural groups in the nation’s child protection system.<sup>137</sup> Appellate judges must be sensitive to the need to tailor services to parents who may be outside the mainstream culture and face difficulties related to language barriers and cultural expectations.<sup>138</sup>

In short, in view of even this limited research, judges should be reviewing child welfare agencies’ efforts with a view to whether they are providing concrete and comprehensive services rather than the scattershot menu of services so often seen in service plans. Indeed, without such review, the tendency of agencies can be to develop service plans only loosely connected with the needs of a family.<sup>139</sup>

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<sup>135</sup> It is beyond the purview of this article to extensively examine the need for culturally competent services, but it is imperative for any professional involved in the child protection system to be aware of this concern. At least one state, Minnesota, requires that services be delivered in a culturally competent way. *See supra* notes 89-90 and accompanying text.

<sup>136</sup> Terry Cross, *Developing a Knowledge Base to Support Cultural Competence*, 14 FAM. RESOURCE COALITION REP. 2, 3-4 (1995-96).

<sup>137</sup> According to one 2008 article, African-American children comprise less than one-half of the nation’s children, but more than one-fifth of the foster care population. *See Clement supra* note 10, at 413 (noting that African-American children in the child welfare system are more likely to be removed from their homes than white children). In addition, Latino and Native Americans make up a disproportionate number of children in the foster care system. *See also* Naomi R. Cahn, *Children’s Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1198-99 (1999).

<sup>138</sup> Cahn, *supra* note 137, at 1212.

<sup>139</sup> I have often been dismayed by the cookie cutter approach to reunification efforts contained in some of the service plans for my appellate clients. For instance, at times parents who have never shown signs of a drug problem must engage in random drug screens or parents must attend anger management groups that have not been evaluated for their effectiveness. Beyer has also criticized this approach at length, illustrating that it can do more harm than good. She provides an example of a highly typical component of a service



Judges may well be reluctant to question the clinical decisions of a child welfare agency, which after all, presumably will have some expertise on the issues before it. However, it seems entirely reasonable that judges should be provided with research about the most successful means of reunification when they are charged with assessing whether a child welfare agency has fulfilled its legal obligations in this regard. It would not seem a difficult matter to use some of the money set aside for states to effect reunification efforts to keep judges educated and updated on available information. If this were to happen, judges faced with seemingly perfunctory or mechanical service plans might be more apt to challenge child welfare agencies to do better by declining to rule that the reasonable efforts requirement has been satisfied.

### C. DECOUPLING THE REASONABLE EFFORTS REQUIREMENT FROM THE TERMINATION OF PARENTAL RIGHTS DETERMINATION

Another, perhaps more radical approach to dealing with the reasonable efforts problem, is to rethink the rationale for making reasonable efforts a precondition for the termination of parental rights (“TPR”) and freeing children for adoption. Nothing in the ASFA requires states to make reasonable efforts a condition precedent to terminating parental rights.<sup>140</sup> Moreover, the constitutional standards governing TPR require only that a court find by clear and convincing evidence that a

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plan: “Ms. Lawrence must attend parenting skills class.” Beyer, *supra* note 133, at 314-15. As Beyer notes, this component of the service plan does not examine the needs of the hypothetical Ms. Lawrence. If it did, it might note that while Ms. Lawrence loves her children, she often has difficulty coping with their needs for long periods of time and loses control of herself. This diagnosis indicates that Ms. Lawrence does not necessarily need parenting classes to help cope with her anger. She may instead need the services of a babysitter to give her an occasional break. The author also notes a further problem with this service plan; it is not logically connected to her needs. The consequences of this can be disastrous, because as Beyer notes, if Ms. Lawrence becomes defensive and does not attend parenting classes she may be accused of not caring for her children. *Id.* at 315. In such an instance, the service plan might actually act to impede, not encourage reunification. Certainly, such plans do not constitute a “reasonable effort” to reunify.

<sup>140</sup> See *supra* notes 27-30 and accompanying text.

parent is unfit and that termination is in the child's best interests.<sup>141</sup> Nonetheless, approximately one half of the states have statutes requiring the state to show reasonable efforts before a parent's rights can be terminated and the child freed for adoption.<sup>142</sup> Moreover, even in states where reasonable efforts are not explicitly a precondition to termination, statutes can implicitly create such a requirement.<sup>143</sup> In short, although neither Congress nor the constitution requires it, most states have assumed that child welfare agencies must make reasonable efforts before a parent's rights can be terminated.

The drawbacks of this approach are apparent from the cases outlined in Part II above in which children were deprived of permanency because of the state's failure to offer sufficient services to the parents during their time in foster care. Indeed, to many reasonable people the prospect of a vulnerable child being left to drift in foster care because of the combined failings of a child welfare bureaucracy and abusive or neglectful parents is simply intolerable. Given this, one must wonder why states have preconditioned permanency for their abused and neglected children on reasonable efforts.

Perhaps the most logical explanation is that there is an assumption that if reasonable efforts are not a precondition to termination, there would be no way to enforce the requirement at all. In essence, making termination dependent on reasonable efforts can be likened to the exclusionary rule in criminal law. The exclusionary rule has long been assumed to act as a deterrent; that is, police officers, faced with the opportunity to cut legal corners presumably do not because they know the

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<sup>141</sup> See *Santosky v. Kramer*, 455 U.S. 745, 769 (1982).

<sup>142</sup> Kim, *supra* note 26, at 304.

<sup>143</sup> See David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 178 (1992). Massachusetts is one such state. Its termination statute contains fourteen non-exclusive factors for the court to consider when deciding to terminate parental rights. MASS. GEN. LAWS ch. 210, § 3(c)(i)-(xiv) (2008). Four of these factors require the court to consider whether the parents were offered or received services to correct the problem but refused or were unable to productively utilize the services on a consistent basis. *Id.* § 3(c)(ii)-(vi).

evidence they will obtain under those circumstances cannot be used to convict a criminal. Similarly, child welfare workers who are tempted to cut corners in providing services to parents will likely be deterred if they know that the children they are working with cannot be freed for adoption until they fulfill their obligation.

Whatever the merits of this logic, it seems both a draconian and ineffective approach to dealing with the problem. If the reasonable efforts requirement is strictly enforced, it places the biggest burden of failure, not on the shoulders of negligent parents and lethargic or overwhelmed caseworkers, but on victimized children, effectively victimizing the children again. When judges strive to avoid this result, the requirement can be so watered down as to lose meaning.<sup>144</sup> Thus, the irony is that making TPR dependent on satisfying the reasonable efforts requirement imposes no deterrent effect on lax caseworkers and agencies whatsoever. When these parties can reliably predict that the reasonable efforts requirement will receive lenient treatment, families that might be reunited if reasonable efforts were employed do not receive the services they need. Given this perverse result, it would behoove states to consider decoupling the reasonable efforts determination from the decision about termination of parental rights. However, at the same time, states should add provisions to their laws that would encourage the delivery of services to needy families as intended by the federal legislation in the first place.

One possible approach is to remove reasonable efforts as a condition precedent to termination while at the same time requiring more judicial scrutiny of reasonable efforts at earlier stages of a child welfare case. As one author notes, there are usually multiple hearings in a child welfare case prior to a hearing on termination of parental rights. More vigorous monitoring of what services are being offered; whether those services are targeted at the problems the family is experiencing and whether they are likely to be effective could be done at these hearings.<sup>145</sup>

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<sup>144</sup> See *supra* Part II.A.

<sup>145</sup> See Herring, *supra* note 141, at 203-04.

Such an approach is essentially consistent with the ASFA which requires a judicial assessment of reasonable efforts at the point a child is removed from the home and then to establish that the state has made efforts to allow the child to return home.<sup>146</sup> While the ASFA does not require assessments at each stage of child protection legislation, its requirements provide a floor, not a ceiling. States are free to require reasonable efforts at as many junctures of a child welfare case as they choose.<sup>147</sup> This approach may indeed be more effective in enforcing the reasonable efforts requirement than to pair it with the decision on TPR. Certainly, stricter monitoring of whether a family is receiving effective services at an early stage of a child welfare case can be far more helpful in either salvaging the family or moving forward to permanency than a post-hoc determination of reasonable efforts at the termination stage.<sup>148</sup>

In addition, states, by statute or common-law, could require more exacting scrutiny of reasonable efforts from judges. Currently, often the only documentation a judge makes with regard to reasonable efforts is to check off a box on a pre-printed form.<sup>149</sup> Check-off formats such as this not only permit casual assessments of reasonable efforts, they may in fact encourage them. To combat this, states could impose a requirement that judges make detailed, written findings with regard to reasonable

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<sup>146</sup> See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).

<sup>147</sup> At least two states, California and Ohio, require by statute that the court make a reasonable efforts assessment at each stage of the court process. Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 226-27 (1990).

<sup>148</sup> One commentator notes that in his experience practicing in the child welfare area in Pennsylvania, few judges assess reasonable efforts before the termination stage. See Herring, *supra* note 141, at 194 n.161. Herring notes that "Only when TPR procedures roll around do the courts take the reasonable efforts requirement seriously. . . . At this point, rehabilitation is usually hopeless and requiring the agency to make reasonable efforts at this late date merely punishes the child for the agency's failure." *Id.*

<sup>149</sup> See Crossley, *supra* note 2, at 285; Herring *supra* note 143, at 153-54.

efforts at each stage of the litigation.<sup>150</sup> Judges are surely familiar with mandate; because of the high evidentiary burden in TPR cases they are required to make detailed findings of facts and conclusions of law to support their decisions.<sup>151</sup>

Requiring judges to make detailed findings at early stages in the litigation has clear advantages. The child protection agency would have an early and clear message about whether the court believes it is fulfilling its legal obligations and if not, what more needs to be done. This information would be delivered in time for the agency to implement the judge's findings before deciding that efforts are hopeless and a TPR petition is necessary. Moreover, the approach has benefits even if not employed in stages of a case before the TPR hearing, and even when the state statute does not require reasonable efforts as a condition precedent to TPR. The judge could still make detailed findings of fact that would outline specifically why the reasonable efforts requirement was not satisfied. Although a negative finding would not derail the petition, the child protection agency would at least have guidance on whether it met its obligations and could adjust its methods accordingly in future cases.

Moreover, judges could use additional weapons if faced with repeated failures to exercise reasonable efforts. For instance, they could hold an agency in contempt or impose a fine.<sup>152</sup> While judges may be reluctant to impose sanctions on an overburdened, underfunded agency assigned to protect vulnerable children, most would find it more palatable than denying a child a permanent home because the reasonable efforts requirement has not been satisfied.

In short, states are not required to link the reasonable efforts requirement to TPR. Instead they seem to be driven to do so by an intuitive sense that the only way to enforce the requirement

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<sup>150</sup> Minnesota's reasonable efforts statute requires that judges make findings of fact and conclusions of law on the issue of reasonable efforts. See *supra* note 89 and accompanying text.

<sup>151</sup> See, e.g., *Custody of a Minor*, 389 N.E.2d 68, 70 (Mass. 1976) (holding that given the constitutional concerns implicated when terminating parental rights, judges must make "specific and detailed findings demonstrating that close attention has been given to the evidence").

<sup>152</sup> See Herring, *supra* note 141, at 204.

is to do so. Given that alternatives not only seem to be available, but might actually be more effective in delivering reasonable efforts, states should explore changing their statutes to separate the reasonable efforts requirement from TPR determinations. The ironic and welcome consequence of such action might well be overall better enforcement of the reasonable efforts requirement.

#### IV. CONCLUSION

There are no perfect solutions to the dilemma posed by the reasonable efforts requirement. It is almost certainly a good thing to require agencies that remove children from their families to make realistic attempts to return them at the earliest possible date. Nonetheless, failures will inevitably occur and courts will repeatedly be faced with instances where the state has not met its legal obligation in this regard.

Courts have sometimes addressed this failure by requiring a “do-over” and requiring states to reinitiate its attempts to reunite children with their families. The drawbacks of this approach are so clear, and so potentially damaging to children, that courts have on many occasions instead glossed over the legal requirement of reasonable efforts.

The child protection system, faced with this problem must pursue at least the best inadequate solution that it can. The approaches outlined in this article—giving social services clear guidelines on what is expected of them; constantly monitoring social services research to determine what is most likely to help troubled families; providing judicial scrutiny of whether agencies are meeting their obligations at early rather than late stages; and imposing sanctions least likely to affect already victimized children—hold promise in making incremental change.