Best Interests, Reasonable Efforts and Case Outcomes

OHIO CASA CONFERENCE

2023

DAVID HEJMANOWSKI, JUDGE

DELAWARE COUNTY PROBATE/JUVENILE COURT

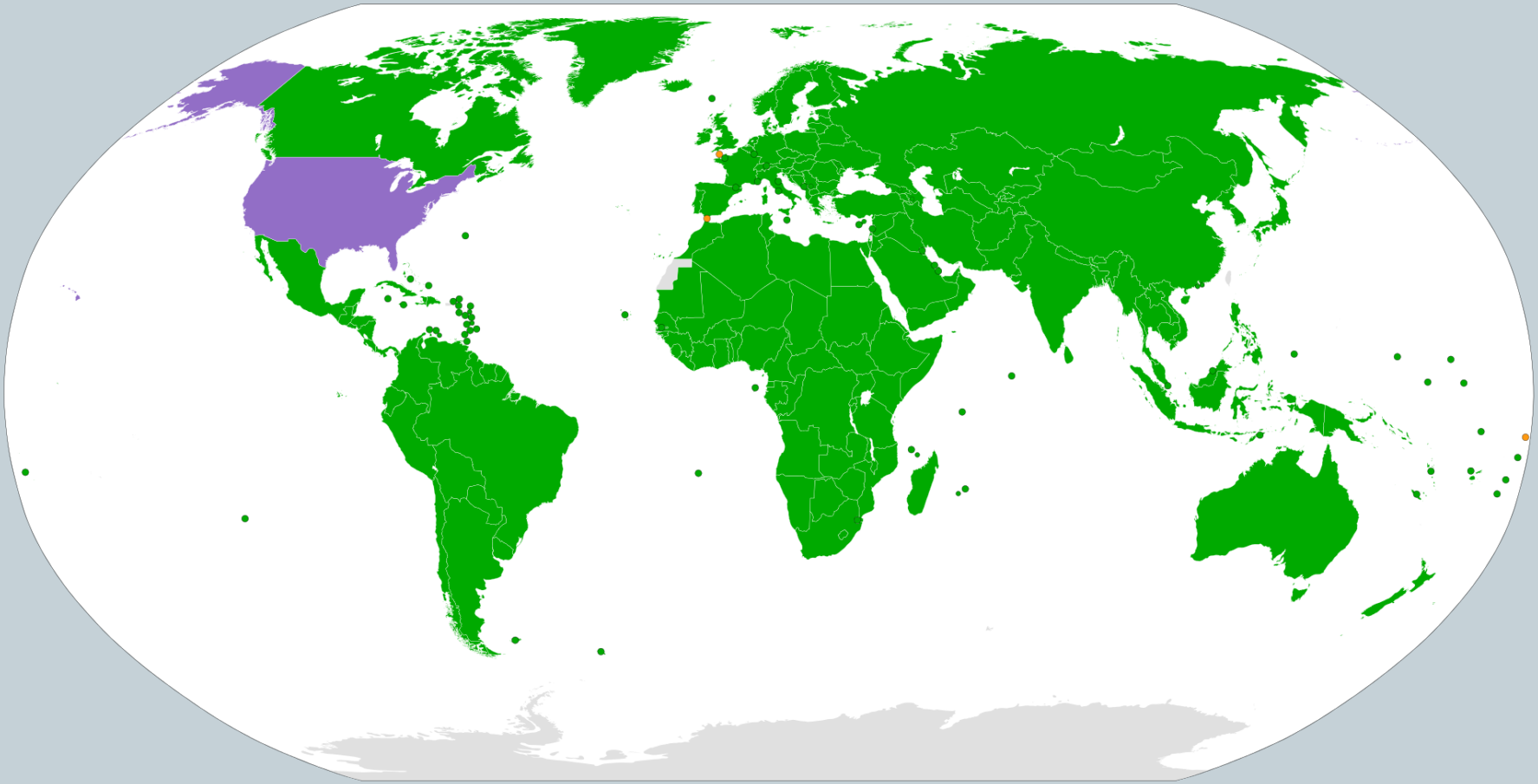
Best Interests Basics

- We use the term ‘Best Interests’ all the time, but where does the term come from?
- The concept of ‘best interests’ appears in international, federal and state law
- The concept is not specifically defined, because to do so would remove the case-specific findings that are necessary
- The concept is often confused or merged with the requirement to use ‘reasonable efforts’

Best Interests Basics

- International Law:
  - United Nations Convention on the Rights of the Child:
    - Article 3 – 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'
    - The Convention provides that determining best interests can be achieved by considering, 'all the elements necessary to make a decision in a specific situation for a specific individual child or group of children.'

Best Interests Basics



Best Interests Basics

- The concept is not unique to child welfare cases, but applies in juvenile delinquency matters as well.
- It arises from early 20th C. reform in juvenile matters to focus on a 'parens patriae' model.
- In 1909 Judge Julian Mack of Cook County, Illinois defined the purpose of a juvenile court as follows;
  - The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.

Best Interests Basics

- The U.S. Department of Health and Human Services defines ‘best interests’ this way:
  - Although there is no standard definition of "best interests of the child," the term generally refers to the deliberation that courts undertake when deciding what type of services, actions, and orders will best serve a child as well as who is best suited to take care of a child. "Best interests" determinations are generally made by considering a number of factors related to the child's circumstances and the parent or caregiver's circumstances and capacity to parent, with the child's ultimate safety and well-being the paramount concern.

Best Interests Basics

- The phrase appears ten times in R.C. 2151.353, the section providing for disposition, extension, and termination orders in abuse, neglect and dependency cases.
- It appears five times in R.C. 2151.414, the section dealing with motions for permanent custody.
- And R.C. 2151.42 is titled ‘best interest’ and deals with modification of legal custody orders.

Best Interest Factors

- There is no definitive list of factors that a court should consider in making a best interests determination.
- Among them are:

  - The wishes of the child (if old enough to capably express a reasonable preference);
  - The mental and physical health of the parents;
  - Any special needs a child may have and how each parent takes care of those needs;
  - Religious and/or cultural considerations;
  - The need for continuation of stable home environment;
  - Other children whose custody is relevant to this child's custody arrangement;
  - Support and opportunity for interaction with members of the extended family of either parent (such as grandparents);
  - Interactions and interrelationships with other members of household;
  - Adjustments to school and community;
  - The age and sex of the child;
  - Whether there is a pattern of domestic violence in the home;
  - Parental use of excessive discipline or emotional abuse; and
  - Evidence of parental drug, alcohol or child/sex abuse.

Best Interests Interpretation

- As a result, courts have immense leeway
- The concept of best interests must also be played out in case law
- Appellate courts are very unlikely to disturb a finding by a trial court that something is in the best interests of a minor
- The trial court has the ability to see all factors, whereas the appeals court sees only the transcript of hearings and the written orders

Best Interests Interpretation

- *In re A.P.*, 2012-Ohio-3873 (9th Dist.)- A juvenile court violates the rights of a custodial grandparent where it terminates placement with that grandparent in an A/N/D case without determining that there has been a change in circumstances and that termination of the placement would be in the best interests of the child.

Best Interests Interpretation

- *In re J.K.*, 2013-Ohio-4938 (1st Dist.)- A juvenile court may not dismiss a case under Rule 29(F)(2)(d) (in the best interests of the juvenile) as a result of discovery violations by the state. Juvenile Rule 29(F)(2)(d) permits dismissal on that grounds only after the allegations have been admitted or proven.

Best Interests Interpretation

- *In re W.A.J.*, 2014-Ohio-604 (8th Dist.)- Successful completion of a case plan is not dispositive on the issue of reunification and the court must act in the best interests of the child.
- *In re A.C.*, 2015-Ohio-153 (1st Dist.)- Where a child has been adjudicated abused, dependent or neglected it is not necessary for the court to find that a parent is unsuitable before placing legal custody with a non-relative but rather only that the placement is in the child's best interests.

Best Interests Interpretation

- *N.S. v. C.E.*, 2017-Ohio-8613 (6th Dist.)- A juvenile court abuses its discretion where it makes a change in custody without finding that a change in circumstances exists, even if the court makes a finding that the custodial modification is in the best interests of the minor.

Best Interests Interpretation

- *In re B.A.*, 2016-Ohio-7786 (8th Dist.)- The Americans With Disabilities Act is not a defense to an allegation of dependency, and the disability of a parent may serve as the basis for a finding of dependency if the best interests of the child dictate it.

Best Interests Interpretation

- *In re J.W.*, 2018-Ohio-2475 (11th Dist.)- A juvenile court does not lose jurisdiction simply because a 'sunset provision' passes in an abuse, neglect, or dependency matter without a motion be filed. Instead, the juvenile court retains authority to enter dispositional orders that are in the best interests of the minor, including proceeding on a motion for permanent custody.

Best Interests Interpretation

- *In re J.F.*, 2020-Ohio-3085 (3rd Dist.)- Failure of the trial court to either specifically address all of the R.C. 2151.41(D)(1) best interest factors, or to state that it has done so, renders the appellate court unable to fully review the permanency decision, thereby necessitating remand back to the trial court.
- *In re A.M.*, 2019-Ohio-5221 (9th Dist.)- Blood relation is not dispositive in a best interests placement analysis in a children's services action, and it is not per se error for the court to award custody to a non-relative following such an analysis.

Best Interests Interpretation

- *In re S.C.*, 2019-Ohio-3664 (8th Dist.)- Even where the agency incorrectly calculates the 12 out of 22 period and the child has not been in care for 12 months, a permanent custody finding may be upheld on the grounds that the child cannot be returned home within a reasonable period of time and the PC is in the best interest of the child.

Best Interests Interpretation

- *In re E.B.*, 2019-Ohio-3943 (1st Dist.)- A Guardian ad Litem has standing to appeal a juvenile court's order granting custody to a cousin, because the GAL has a 'substantial right' to ensure that the best interests of the child are met, and the custody order terminates the role of the GAL.

Reasonable Efforts

- Title IV-E requires that state and local child welfare agencies make 'reasonable efforts' to reunify children who are in foster care, or to prevent removal of children who are in the home but receiving services.
- Federal funding is tied to these reasonable efforts findings.
- Thus, all 50 states and the District of Columbia have laws defining reasonable efforts.

Reasonable Efforts

- The judge must make:
  - A finding that the social worker provided reasonable efforts (services/interventions) to prevent removal of the child from parental care;
  - Findings that during the reunification period, the social worker provided reasonable efforts (meaningful services) to promote reunification between the parents and their child; and
  - Reasonable efforts findings that the social worker has taken steps to make and finalize alternate permanency plans for each foster child in a timely fashion. The permanent plan could be with parents, a legal guardian, a relative, or an adoptive home.

Reasonable Efforts

- Sen. Cranston:
  - These sections are aimed at making it clear that States must make reasonable efforts to prevent removal of children from their homes. In the past, foster care has often been the first option selected when a family is in trouble; the new provisions will require States to examine alternatives and provide, wherever feasible, home-based services that will help keep families together or help reunite families.

Reasonable Efforts

- If the court concludes the state has offered appropriate services, the court makes a “reasonable efforts” finding.
- If, however, the court determines the state did not offer adequate services, the court makes a “no reasonable efforts” finding. Such a finding would mean the state will not receive federal funding for that child.
- A third finding authorized by federal law is that no reasonable efforts were offered because of an emergency. But even with this finding, the court can determine when the emergency is over and when an alternative plan must be implemented.

Reasonable Efforts – Ohio Law

- Section 2151.419 | Court's determination as to whether agency made **reasonable efforts** to prevent removal or to return child safely home:
  - (A)(1) Except as provided in division (A)(2) of this section, at any hearing held pursuant to section 2151.28, division (E) of section 2151.31, or section 2151.314, 2151.33, or 2151.353 of the Revised Code at which the court removes a child from the child's home or continues the removal of a child from the child's home, the court shall determine whether the public children services agency or private child placing agency that filed the complaint in the case, removed the child from home, has custody of the child, or will be given custody of the child has made **reasonable efforts** to prevent the removal of the child from the child's home, to eliminate the continued removal of the child from the child's home, or to make it possible for the child to return safely home. The agency shall have the burden of proving that it has made those **reasonable efforts**. If the agency removed the child from home during an emergency in which the child could not safely remain at home and the agency did not have prior contact with the child, the court is not prohibited, solely because the agency did not make reasonable efforts during the emergency to prevent the removal of the child, from determining that the agency made those **reasonable efforts**. In determining whether reasonable efforts were made, the child's health and safety shall be paramount.

Reasonable Efforts – Ohio Law

- 2151.419 (cont.):
  - 2) If any of the following apply, the court shall make a determination that the agency is not required to make reasonable efforts to prevent the removal of the child from the child's home, eliminate the continued removal of the child from the child's home, and return the child to the child's home:
  - (a) The parent from whom the child was removed has been convicted of or pleaded guilty to one of the following:
  - (i) An offense under section 2903.01, 2903.02, or 2903.03 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense was a sibling of the child or the victim was another child who lived in the parent's household at the time of the offense;
  - (ii) An offense under section 2903.11, 2903.12, or 2903.13 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;
  - (iii) An offense under division (B)(2) of section 2919.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in that section and the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense is the victim of the offense;
  - (iv) An offense under section 2907.02, 2907.03, 2907.04, 2907.05, or 2907.06 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to an offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;
  - (v) An offense under section 2905.32, 2907.21, or 2907.22 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to the offense described in those sections and the victim of the offense is the child, a sibling of the child, or another child who lived in the parent's household at the time of the offense;
  - (vi) A conspiracy or attempt to commit, or complicity in committing, an offense described in division (A)(2)(a)(i), (iv), or (v) of this section.

Reasonable Efforts – Ohio Law

- R.C. 2151.419 (cont.):
  - (b) The parent from whom the child was removed has repeatedly withheld medical treatment or food from the child when the parent has the means to provide the treatment or food. If the parent has withheld medical treatment in order to treat the physical or mental illness or defect of the child by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body, the court or agency shall comply with the requirements of division (A)(1) of this section.
  - (c) The parent from whom the child was removed has placed the child at substantial risk of harm two or more times due to alcohol or drug abuse and has rejected treatment two or more times or refused to participate in further treatment two or more times after a case plan issued pursuant to section 2151.412 of the Revised Code requiring treatment of the parent was journalized as part of a dispositional order issued with respect to the child or an order was issued by any other court requiring such treatment of the parent.
  - (d) The parent from whom the child was removed has abandoned the child.
  - (e) The parent from whom the child was removed has had parental rights involuntarily terminated with respect to a sibling of the child pursuant to section 2151.353, 2151.414, or 2151.415 of the Revised Code or under an existing or former law of this state, any other state, or the United States that is substantially equivalent to those sections.

Reasonable Efforts – Ohio Law

- Not only must the court find reasonable efforts, it must make the finding in writing, and it must outline the reasons it makes the finding:
  - 2151.419(B)(1) A court that is required to make a determination as described in division (A)(1) or (2) of this section shall issue written findings of fact setting forth the reasons supporting its determination. If the court makes a written determination under division (A)(1) of this section, it shall briefly describe in the findings of fact the relevant services provided by the agency to the family of the child and why those services did not prevent the removal of the child from the child's home or enable the child to return safely home.
  - (2) If a court issues an order that returns the child to the child's home in situations in which division (A)(2)(a), (b), (c), (d), or (e) of this section applies, the court shall issue written findings of fact setting forth the reasons supporting its determination.

Reasonable Efforts – Ohio Law

- In re K.R. 2021-Ohio-3544 (5th Dist.):
  - In In re Kyle, 5th Dist. Tuscarawas No.2008 AP 01 0002, 2008–Ohio–5892, and In re B.G., P.G., and K.G., 5th Dist. Muskingum No. CT2013–0033, this Court reviewed similar cases and, in both cases, reversed the trial courts' decisions, finding each trial court failed to address in writing the reasonable efforts of the agency as required by R.C. 2151.419. We find the same in the case sub judice. The trial court found KCDJFS made reasonable efforts by creating a case plan and utilizing kinship and foster placement for some of the Children. The trial court did not recite the "relevant services" provided, nor state "why those services did not prevent the removal of the child from the child's home or enable the child to return safely home." R.C. 2151.419(B)(1).
  - In its Reply Brief, KCDJFS argues the record is replete with testimony regarding the efforts it made towards reunification and the reasons why those efforts were unsuccessful. KCDJFS suggests the trial court's failure to make the requisite findings and state its rationale is merely a "clerical error." Appellee's Brief at 16. We do not.

Reasonable Efforts – Ohio Law

- R.C. 2151.417 – Review of Placements:
  - (E) If a court determines pursuant to section 2151.419 of the Revised Code that a public children services agency or private child placing agency is **not required** to make **reasonable efforts** to prevent the removal of a child from the child's home, eliminate the continued removal of a child from the child's home, and return the child to the child's home, and the court does not return the child to the child's home pursuant to division (A)(3) of section 2151.419 of the Revised Code, the court shall hold a review hearing to approve the permanency plan for the child and, if appropriate, to make changes to the child's case plan and the child's placement or custody arrangement consistent with the permanency plan. The court may hold the hearing immediately following the determination under section 2151.419 of the Revised Code and shall hold it no later than thirty days after making that determination.

Reasonable Efforts – Ohio Law

- R.C. 2151.412(J) – Permanency Plan
  - (2) On and after January 1, 2023, a case plan for a child in temporary custody shall include a permanency plan for the child unless it is documented that such a plan would not be in the best interest of the child. The permanency plan shall describe the services the agency shall provide to achieve permanency for the child if **reasonable efforts** to return the child to the child's home, or eliminate the continued removal from that home, are unsuccessful. Those services shall be provided concurrently with **reasonable efforts** to return the child home or eliminate the child's continued removal from home.

Reasonable Efforts – Federal Law

- Federal law has long required State agencies to demonstrate they made reasonable efforts to provide assistance and services to prevent the removal of a child from his or her home and to make it possible for a child who has been placed in out-of-home care to be reunited with his or her family.
- "Reasonable efforts" are services and supports that are provided by the child welfare agency to assist a family in addressing the problems that place a child at risk of harm with the goal of preventing the need for substitute care or reducing the time the child must stay in an out-of-home placement.

Reasonable Efforts – Federal Law

- The Department of Health and Human Services states that 'reasonable efforts' can include:
  - Child care ☐
  - Homemaker services ☐
  - Individual, group, and family counseling
  - Health-care services ☐
  - Behavioral health evaluation and treatment ☐
  - Vocational counseling

Reasonable Efforts – Not Required

- Reasonable Efforts are *not* required when:
  - The parent subjected the child to aggravated circumstances as defined by State law. The definition of aggravated circumstances may include, but is not limited to, abandonment, torture, chronic abuse, and sexual abuse.
  - The parent committed murder of another child of the parent. ☐
  - The parent committed voluntary manslaughter of another child of the parent. ☐
  - The parent aided or abetted, attempted, conspired, or solicited to commit such a murder or voluntary manslaughter. ☐
  - The parent committed a felony assault that resulted in serious bodily injury to the child or another child of the parent. ☐
  - The parental rights of the parent to a sibling of the child were terminated involuntarily.

Reasonable Efforts – Not Required

- Reasonable effort are *not* required under Ohio-specific implementation of federal law when:
  - The parent abandoned the child
  - The parent was convicted of trafficking the child
  - The parent suffers from a mental illness of such duration or severity that there is little likelihood that the parent will be able to resume care for the child within a reasonable time
  - The parent has repeatedly withheld medical treatment or food from the child
  - The parent has placed the child at substantial risk of harm two or more times from substance abuse or has refused treatment three or more times

Reasonable Efforts – Not Required

- *In re J.O.*, 2018-Ohio-943 (6th Dist.)- Pursuant to R.C. 2151.419(A)(2)(e), a juvenile court is required to find that a children's services agency need not make reasonable efforts to reunify a child with a parent whose parental rights had been involuntarily terminated with regard to a sibling. The fact that the agency had first encouraged the parent to work a case plan toward reunification does not affect the mandatory nature of that statute.

Reasonable Efforts – Limits

- *In re R.M.*, 2021-Ohio-324 (2nd Dist.)- An agency may move for permanent custody based on a child being in care for 12 out of 22 months, even when a court has not made a finding that the department has made reasonable efforts toward reunification as the two are distinct and separate bases for filing.
- *In re D.T.*, 2020-Ohio-2968 (6th Dist.)- Ohio law requires that a CPS agency make reasonable efforts toward reunification, but it does not impose any minimum, or arbitrary mandatory period during which services must be provided.

Ensuring Reasonable Efforts

- Judge Len Edwards (Ret.), California:
  - Attorneys should be appointed simultaneously with the filing of the petition. That means the state must send a copy of the petition and supportive documents to the attorney simultaneously with filing of the petition.
  - The attorneys must have the ability to ask for a short continuance if there are delays so that there can be sufficient time to prepare for the hearing.
  - Attorneys must be prepared to ask the social worker detailed questions about the services she provided to prevent removal of the child from parental custody. This questioning creates a record that an appellate court can review.

Ensuring Reasonable Efforts

- Attorneys must be prepared to seek appellate review in appropriate cases where the social worker failed to take steps to support the family without removing the child. Appellate review must be accessed by using an extraordinary writ, since time is of the essence.
- The appellate courts must be ready to respond quickly to these extraordinary writs.
- Court decisions reflect that the children's attorneys and GALs rarely, if ever, raise the reasonable efforts issue. It is likely that appointed attorneys/GALs do not believe that their role encompasses the adequacy and timeliness of services to parents.

Reasonable Efforts - Barriers

- **Many judges are not in a position to make an intelligent finding about available services in the community**. After all, social workers are the experts in their knowledge of services, while judges are trained in the law and do not study service availability in their community. Judges realize that to make a "no reasonable efforts" finding, the judge would be second guessing an expert and denying funding to the local agency.

Reasonable Efforts - Barriers

- **State plans are not easily available to the public and are not broken down into a single document** so judges and attorneys can know what services the state has promised the federal government they will provide families. To make intelligent reasonable efforts findings, the judge needs to know what services are available in the local community and whether they are effective or not. Judges are usually not experts in community services. In courts where judges rotate from one assignment to another, the judge will not have a basis of knowledge to make such a finding.

Reasonable Efforts - Barriers

- **Other than a report from the social worker, judges get little information in court.**
- **Attorneys rarely make reasonable efforts arguments in court**, and almost never at the initial hearing partly because attorneys may not be appointed early enough to prepare for that hearing.
- **Federal law does not define reasonable efforts**. This may be because services in one community would differ from services in other communities. Several states have legislated definitions of reasonable efforts, but they are very general. The lack of a definition has also made it difficult for a judge to decide if the agency provided reasonable efforts in individual cases.

Reasonable Efforts – ABA Recommendations

- Frontline social workers should accurately assess family needs and report those needs to the court. Those needs should form the foundation of the case plan.
- Judges should discuss the availability and effectiveness of services provided by service providers contracted by the agency.
- Judges should review service effectiveness early in the case rather than waiting until the termination of parental rights hearing. Using interim reviews is an effective way to accomplish this goal.

Reasonable Efforts – ABA Recommendations

- Attorneys should actively participate in the reasonable efforts determinations at every stage of the case, particularly the initial hearing.
- The judge, attorneys, and the social worker should urge clients to participate in services. Many parents do not follow through, enroll in services, and complete the program. The number of clients who complete services can be increased if there is an active family drug treatment court (FDTC). Because the client sees the judge regularly in a FDTC, follow-through is much more likely.

Reasonable Efforts – ABA Recommendations

- The judge must take the reasonable efforts determination seriously. Reasonable efforts is not litigated in many state courts. Several states have few or no appellate law decisions discussing the reasonable efforts issue. Of the thousands of cases that go through the nation's juvenile courts, less than 1% address whether reasonable efforts were provided to prevent removal of the child. There are good reasons for this failure to address the "prevent removal" issue, most of them having to do with late appointment of attorneys.