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# Reasonable Efforts Checklist for Dependency Cases Involving Domestic Violence

National Council of Juvenile and Family Court Judges
Family Violence Department

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# About the Author

Leigh Goodmark is an Associate Professor at the University of Baltimore School of Law. Professor Goodmark teaches Family Law and supervises students in the Family Law Clinic, where her students represent clients in family law matters ranging from domestic violence protective orders to divorces to international parental kidnapping.

Professor Goodmark's recent publications include *When is a Battered Woman Not a Battered Woman? When She Fights Back*, in the Yale Journal of Law and Feminism; *Going Underground: The Ethics of Advising a Battered Woman Fleeing an Abusive Relationship*, in the University of Missouri-Kansas City Law Review; *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, in the Kansas Law Review; *Telling Stories, Saving Lives: The Battered Mothers' Testimony Project, Women's Narratives, and Court Reform*, in the Arizona State University Law Journal; *Achieving Batterer Accountability in the Child Protection System,* in the Kentucky Law Journal; and *Law Is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, in the St. Louis University Public Law Review.

Prior to joining the faculty at the University of Baltimore, Professor Goodmark was the Director of the Children and Domestic Violence project at the ABA Center on Children and the Law and the family law staff attorney at Bread for the City, a holistic neighborhood service center in Washington, D.C. Professor Goodmark was a member of the *Greenbook* Policy Advisory Committee from 2000-2003 and has served as faculty at various *Greenbook* Initiative conferences and training events. With Ann Rosewater, Professor Goodmark co-wrote *Steps Toward Safety: Improving Systemic and Community Responses for Families Experiencing Domestic Violence* and *Bringing the Greenbook to Life: A Resource Guide for Communities.*

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# Purpose

The purpose of this checklist is to assist dependency court judges in identifying factors that should be considered when making reasonable efforts determinations in cases involving domestic violence. The checklist is divided into five sections. Section One discusses why judges need to understand domestic violence when handling dependency cases. Section Two examines the family context of these cases. This section includes information on how domestic violence affects parenting, and the interrelationships between domestic violence and mental health and substance abuse. Section Three lays out the legal framework for making reasonable efforts findings. Section Four describes the types of reasonable efforts that should be made in dependency cases involving domestic violence. And Section Five provides suggestions to help judges improve the availability and quality of services for families experiencing domestic violence in their communities. Finally, the publication includes easy reference bench cards for judges to consult when hearing dependency cases involving domestic violence.

# The Rationale

Judges hearing dependency cases see families confronting a range of difficult issues—abuse and neglect of children, substance abuse, mental health, poverty, lack of housing. What these judges may not be made aware of, however, is the domestic violence lurking beneath the surface of these cases. Domestic violence affects a large percentage of the families in the dependency system; but even now, after years of attention focused on domestic violence, and the development of training for judges, caseworkers and other professionals,[1] and specialized services for these families, domestic violence in dependency cases often goes unrecognized and unaddressed.

## Why should dependency court judges be concerned about ensuring that domestic violence is identified and confronted?

### *Because judges see families every day who are experiencing domestic violence—whether reported to the judge or not.*

Child welfare agencies attempting to determine the scope of this problem have discovered domestic violence in one-third to one-half of their cases.[2] While some of these families are certainly known to the dependency courts,[3] this estimate is probably low. Many women[4] experiencing domestic violence never disclose the battering to their closest friends and family, let alone to their attorneys or a government agency empowered to remove their children. And although professional organizations such as the National Association of Public Child Welfare Administrators have stressed the importance of screening and assessing families for domestic violence,[5] some caseworkers may not make such inquiries. Moreover, the complex dynamics of child welfare cases may prevent even caseworkers who follow these recommended procedures from receiving complete information about family violence from victims in crisis, their children, or their abusers. As a result, dependency cases may reach the court without any-

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1. A tremendous amount of energy and effort has gone into initiatives to improve practice in dependency cases involving domestic violence. Most notably, in 1999 the National Council of Juvenile and Family Court Judges [hereafter NCJFCJ] released *Effective Intervention in Cases Involving Domestic Violence and Child Maltreatment:Guidelines for Policy and Practice,* authored by Susan Schechter & Jeffrey L. Edleson. Also known as the "Greenbook," the publication inspired communities throughout the country to develop collaborative efforts among courts, domestic violence advocates and child welfare agencies to better serve children exposed to domestic violence and their battered parents. A federal Greenbook demonstration project funded six communities' efforts to implement the Greenbook's guidelines; other communities have marshaled resources to do the work without external support. Copies of the Greenbook are available online at http:// the greenbook.info through NCJFC's Family Violence Department at (800) 527-3223.
2. Melanie Shepard & Michael Raschick, *How Child Welfare Workers Assess and Intervene Around Issues of Domestic Violence,* 4 CHILD MALTREATMENT 148, 149 (1999).
3. The Dade County Dependency Court Intervention Project found that a "significant percentage" of the cases appearing in dependency court involved domestic violence. Christine A. O'Riley & Judge Cindy S. Lederman, *Co-Occurring Child Maltreatment and Domestic Violence: The Judicial Imperative to Ensure Reasonable Efforts*, FLA. B.J. (The Fla. Bar) November 2001, at 43.
4. While there are male victims of domestic violence, the Department of Justice estimates that 85 percent of the victims of domestic violence are women. CALLIE MARIE RENNISON, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE, *1993-2001* 1 (2003). For the purposes of tthis publication, victims of domestic violence will be referred to as female, perpetrators as male.
5. NAT'L ASSOC. PUB. CHILD WELFARE ADMINISTRATORS, GUIDELINES FOR PUBLIC CHILD WELFARE AGENCIES SERVING CHILDREN AND FAMILIES EXPERIENCING DOMESTIC VIOLENCE (2001), *at* http://www.aphsa.org/Publications/Doc/dvguidelines.pdf.

one having ever inquired about the presence of domestic violence in the home, and even if those inquiries have been made, without the family trusting attorneys or case-workers enough to disclose the violence.

### *Because children may be profoundly affected by domestic violence.*

Although the experience of domestic violence is different for every child, a number of problems are common to children from violent homes. Children may be the victims of physical abuse at the hands of the alleged abuser of domestic violence or the battered parent. Child abuse and domestic violence frequently co-occur; studies estimate that in 30 to 60 percent of families experiencing one form of family violence, the other is present as well.[6] Incest and child sexual abuse are also common in families experiencing domestic violence.[7] Children may be inadvertently injured during violent episodes or forced to watch or take part in the abuse.[8] Some children actively intervene to stop a parent's abuse.[9] In the aftermath of the violence, children may experience emotional, behavioral, and cognitive difficulties, including:

- Post-traumatic stress disorder (symptoms include agitation, irritability, withdrawal, problems in social functioning, "re-experiencing" the traumatic event, sleep disturbances, emotional distress, regression in toilet training and language)[10]
- Aggression[11]
- Depression[12]
- Suicidal behaviors[13]
- Anxiety[14]
- Insomnia[15]
- Impaired ability to concentrate[16]
- Decreased verbal, motor and cognitive skills[17]

Judges who understand how domestic violence affects children can better exercise their oversight to ensure that professionals working with the family provide appropriate services.

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6. Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering, 5* VIOLENCE AGAINST WOMEN 134-54 (1999).
7. LUNDY BANCROFT & JAY G. SILVERMAN, THE BATTERER AS PARENT 84-97 (Sage Publications) (2002).
8. Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L.J. 1, 82 (2001).
9. *Id.* at 83.
10. *Id.* at 87
11. Jeffrey L. Edleson, *Should Childhood Exposure to Domestic Violence Be Defined as Child Maltreatment Under the Law,* in PROTECTING CHILDREN FROM DOMESTIC VIOLENCE: STRATEGIES FOR COMMUNITY INTERVENTION 8 (Peter G. Jaffe, et al., eds., Gilford Press (2004).
12. Edleson, *id.* at 3.
13. Weithorn, *supra* note 8, at 86.
14. Edleson, *supra* note 11, at 3.
15. Weithorn, *supra* note 8, at 86.
16. *Id.*
17. *Id.*

### *Because involvement in the dependency system can trigger greater violence.*

Perpetrators frequently threaten their victims that greater harm will come to them and their children if their abuse is reported to authorities. As a result, when the dependency system intervenes in a family, a real risk exists that the perpetrator will increase his violence. If the dependency system fails to address the domestic violence specifically and appropriately, the safety of adult victims and their children can be compromised. Similarly, the safety risk for adult victims and their children often increases when the woman initiates separation from her abuser.[18] Interventions that merely require the mother to choose between separating from her abusive partner or losing her children ignore the complex dynamics of family violence. Separation does not necessarily equate to safety for children.

Removal poses additional risks for children from violent homes. In *Nicholson v. Williams*, a federal lawsuit challenging the child welfare agency's policy of pursuing dependency cases against battered mothers who "engaged in" domestic violence (by being abused), experts testified about the primacy of the parent/child bond and how separation can provoke fear and anxiety in children, diminishing a child's sense of stability and self.[19] Disruption of the parent/child bond can be even more damaging for children from violent homes. Removal heightens the child's tendency towards self-blame; the child may see the removal as a "traumatic act of punishment."[20] Children exposed to domestic violence are often anxious about their battered parent's well-being, afraid to leave the parent for even short periods of time lest something happen to that parent. Removal from the parent greatly increases that separation anxiety.[21] As Dr. David Pelcovitz stated, "Taking a child whose greatest fear is separation from his or her mother and in the name of 'protecting' that child [by] forcing on them, what is in effect, their worst nightmare ... is tantamount to pouring salt on an open wound."[22] Removal may also mean entering a foster care system where very few foster parents are screened for domestic violence—exposing the child to further trauma without the protection of the parent/child bond.[23]

### *Because judges must assess whether child welfare agencies have made "reasonable efforts" for families experiencing violence.*

This publication is designed to aid judges in making the reasonable efforts findings required by federal law in dependency cases involving domestic violence. It will first lay out the family context in which judges make their decisions, with a focus on the impact of domestic violence on the parenting skills of both the abused and the abusive

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18. Jeffrey L. Edleson et al., Jud. Council of Cal., Parenting in the Context of Domestic Violence 9 (2003) (summarizing studies on post-separation violence).
19. *Nicholson v. Williams*, 203 F. Supp 2d 153, 199 (E.D.N.Y. 2002).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

partner. Special attention will be paid to the intersection of domestic violence and other problems, such as substance abuse and mental health issues, confronted by these families.

The publication will then review the legal framework within which judges work—the reasonable efforts requirements of the Adoption Assistance and Child Welfare Act of 1980 and the Adoption and Safe Families Act of 1997, state statutes incorporating (and in some cases, exceeding) the federal law, and case law interpretations of these requirements. It will examine the implications of these three sources of law for the reasonable efforts decisions that judges make on a daily basis.

The bulk of this piece will be devoted to helping judges think about reasonable efforts at every stage of a dependency proceeding involving domestic violence, from the initial removal hearing to termination of parental rights. At each stage, specific guidance will be offered on what reasonable efforts might include. Finally, the publication will look at ways that judges can work to ensure that agencies can comply with reasonable efforts requirements and create better outcomes for children and families experiencing domestic violence.

# The Family Context

To determine whether an agency's efforts to prevent removal or reunify children and parents have been reasonable, judges must first understand the problems that the agency should be trying to address. This section examines parenting by batterers and the adult victims. Because these families often have more than one issue that requires the agency's attention, this section also looks at how domestic violence intersects with two of the most frequent reasons for dependency system interventions: substance abuse and mental health. Note: statistically speaking, 85 to 95 percent of batterers are male. This checklist will use the terms "adult victims" and "abused parent" interchangeably. Likewise it will use the terms "batterer," "perpetrator," and "abusing parent" interchangeably.

## *How Domestic Violence Affects Parenting*

### The Abusing Parent

Abusing parents typically exhibit a number of characteristics. They "tend to be rigid, authoritarian parents," expecting to be obeyed without question, with a limited tolerance for criticism.[24] They are often under-involved with their children, lacking basic knowledge about their children's daily lives and developmental abilities.[25] Abusing parents may undermine the abused parents' authority both overtly and through their behavior towards their partners, which indicates to the children that the abused parent need not be treated with respect and that using physical violence against the abused parent is acceptable.[26] Abusing parents tend to be self-centered and manipulative, focused on their own needs rather than their children's.[27] Abusing parents may seek to consolidate their power by creating division within the family and by scapegoating—and encouraging others to target—one child.[28] Paradoxically, however, abusing parents tend to perform well when being observed—for example, in a supervised visitation setting.[29] However, most abusing parents lack an understanding of where to begin the process of rebuilding their relationships with their children.[30]

### The Abused Parent

Abusing parents can destroy children's bonds with the abused parent in a number of ways. They model "negative and disrespectful" attitudes towards mothers through their physical and verbal assaults.[31] They directly interfere with the abused parents' parenting (i.e., by preventing the abused parent from providing emotional or physical

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24. Bancroft & Silverman, *supra* note 7, at 30.
25. *Id*. at 32-33.
26. *Id*. at 33-34.
27. *Id*. at 35-36.
28. *Id*. at 77-78.
29. *Id*. at 36-37.
30. David Mathews, The Family Violence Prevention Fund, *Restorative Parenting: A Strategy for Working with Men Who Batter and Are Fathers*, http://endabuse.org (type "Restorative Parenting" in the search bar; then follow "Toolkit for Working with Men and Boys—Restorative Parenting: A ..." hyperlink) (last visited September 8, 2006).
31. *Id*. at 57.

care for a child in need).[32] Battering can deprive the abused parents of the physical and emotional energy needed to parent.[33] Children who are afraid to lash out at the abusing parent may turn their anger against the abused parent, further damaging their relationship.[34]

Abused parents tend to experience greater levels of stress than other parents, but that stress does not always affect their parenting.[35] Nonetheless, there is some data suggesting that abused parents may be more likely to physically abuse their children.[36] The likelihood decreases, however, when they are safe from violence.[37] In sum, the research on adult victims' parenting ability indicates "most tend to parent adequately and sometimes even compensate for the abusing parents' behaviors."[38]

### Implications for Judges

Judges should be aware of how the abused parent and the perpetrator will present to social workers, court staff, and to judges themselves. On first glance, the perpetrator may appear to be the better parent—charming, cooperative, and in control of the children. The abused parent, on the other hand, may seem stressed, depleted, and an inadequate parent. Judges should understand, and help others in the dependency system to understand, the techniques used by the perpetrator to undermine the adult victim's parenting. Judges should ask about the parenting skills of each parent and ensure that if parenting classes are part of the parent's service plan, those classes address the issues faced by the adult victim and the abusing parent. Judges should examine the abused parent's parenting skills not only at the initial hearing, when her safety may still be compromised, but also when she has had time to establish a safer, more stable environment for herself and her children. Judges should not ignore physical abuse perpetrated by either parent, but should be cognizant of the research suggesting that physical abuse by the abused parent decreases markedly when safety is established.[39]

## *Substance Abuse & Mental Health*

### Substance Abuse

Substance abuse is a serious problem in families experiencing domestic violence. Studies estimate that one-quarter to one-half of perpetrators are substance abusers.[40]

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32. *Id*. at 64-66.
33. *Id*. at 67.
34. *Id*.
35. Bancroft & Silverman, *supra* note 7, at 13.
36. *Id*. at 14.
37. *Id*.
38. *Id*. at 15.
39. *See, e.g.*, Naomi Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand. L. Rev. 1041, 1057 (1991); Daniel G. Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations* (Oct. 1998), http://www.vawnet.org/Domestic Violence Research/VAWnetDocs/AR_custody.pdf (last visited Sept. 8, 2006).
40. Patricia A. Fazzone, et al, U.S. Dep't Health & Human Serv., Substance Abuse Treatment and Domestic Violence: Treatment Improvement Protocol (TIP) Series 25 (1997).

Alcohol is often a factor in abusive incidents; Department of Justice studies estimate that more than half of the defendants accused of murdering their spouses (and almost half of their victims) were drinking at the time of the murder.[41] Another study found that 22 percent of abusive men and 10 percent of their female victims were using alcohol during abusive incidents.[42] While substance abuse does not cause battering, it can increase the risk that the perpetrator will misinterpret his partner's behavior, leading to abusive incidents; cloud his ability to consider the repercussions of his actions; reduce his ability to see that the adult victim is injured; and reduce his ability to benefit from punishment, education or treatment.[43] Curtailing substance abuse may not end the violence. In fact, physical violence may increase after the batterer begins treatment; and, even if the physical abuse ends, other forms of abusive and controlling behavior may replace it.[44]

One study conducted in Illinois in 1994 determined that there was a strong relationship between victims of domestic violence and high rates of substance and alcohol abuse. In this study, staff from domestic violence shelters were asked to estimate the number of women in their programs who were substance abusers. The results of the study suggested that as many as 42 percent of the women were abusing substances.[45] Women who abuse substances are more likely to become victims of violence; victims of violence are more likely to receive prescriptions for and become dependent on controlled substances.[46] Adult victims may use substances to self-medicate—to avoid "facing daily bouts of physical, emotional and sexual abuse" and the evidence of the impact of the violence on their children, their other relationships, and their lives.[47] Some women begin abusing substances at the behest of their perpetrators, who find them easier to control when drugged and who regulate access to alcohol and drugs in order to exercise further control.[48] Relapse is common among all recovering substance abusers, but in the case of a adult victim, may indicate that abstinence is unsafe, that the perpetrator is insisting that she continue to use with him.[49] Substance abuse can create special problems for an adult victim, rendering her unable to shield her children from her abuser's violence.

## Mental Health Issues

Domestic violence and mental health intersect in two ways for adult victims of violence. First, women with mental health issues, particularly those with serious mental

41. *Id.*
42. Larry W. Bennett, *Substance Abuse and Woman Abuse by Male Partners*, (Sept. 1997, rev. 1998), *at* www.vawnet.org/DomesticViolence/Research/VAWnetDocs/AR_substance.pdf.
43. Domestic Violence/Substance Abuse Interdisc. Task Force of the Ill. Dep't of Human Serv. [hereinafter Interdisc. Task Force] Safety and Sobriety: Best Practices in Domestic Violence and Substance Abuse (2000).
44. Leigh Goodmark, *Substance Abuse and Domestic Violence in the Child Welfare Context: Where Do You Start?*, 21 Child L. Prac. 101, 102 (2002).
45. Larry Bennett & Marie Lawson, *Barriers to Cooperation between Domestic-Violence and Substance-Abuse Programs*, 75(5) Families in Soc'y: J. Contemp. Hum. Serv. 277, 280, 285 (1994).
46. Fazzone Et Al., *supra* note 40.
47. Patricia J. Bland, *Strategies for Improving Women's Safety and Sobriety,* The Source, Winter 1997, at 3.
48. Goodmark, *supra* note 44, at 103.
49. *Id.*

illness, are victimized by partners at very high rates. Secondly, adult victims of domestic violence can suffer from a range of mental health issues.[50] Depression and post-traumatic stress disorder (PTSD) are most prevalent; one meta-analysis of the studies on rates of depression and PTSD among battered women found that 48 percent suffered from depression and 64 percent experienced PTSD.[51] Somatoform disorders, eating disorders, and psychotic episodes have also been linked to family violence.[52] Domestic violence is a risk factor for suicide as well.[53] Battered women recognize these problems; one study of battered women found that 48 percent had wanted help with mental health issues in the past year.[54] Note, however, that many battered women never develop mental health conditions, and that those who suffer from mental illnesses, particularly depression, often find that their symptoms resolve when their safety and social supports increase.[55]

While battering cannot be justified as the product of mental illness, significant numbers of perpetrators also report experiencing mental health problems. In a long-term, multi-site study of men in batterer intervention programs, researchers found that one-fourth to one-third of the men reported "serious emotional states," prior to entering the program, including angry outbursts (35 percent), serious anxiety (27 percent), mood swings (24 percent), and serious depression (18 percent).[56] While 41percent of the men reported no mental health problems, almost one-third reported two or more problems.[57] Twelve percent of the men reported threatening or attempting suicide, and 22 percent were receiving some form of mental health treatment prior to entering their programs.[58] Evaluating the results of a personality test, researchers estimated that as many as 20 percent of the men may have had major mental disorders, including major depression and anxiety disorders.[59]

## Implications for Judges

Families coming before the dependency court are likely to present with a number of problems, and domestic violence co-occurs with substance abuse and mental health with some frequency. Judges should understand how domestic violence interacts with substance abuse and mental illness and consider the connection between safety and the ability to engage in treatment. Judges should work with social service administrators to ensure that best practices on screening and treating families with multiple issues are being implemented. Untreated substance abuse and mental health issues

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50. Domestic Violence and Mental Health Policy Initiative, *Domestic Violence, Mental Health & Trauma: Research Highlights*, *at* http://www.dvmhpi.org/Research%20Highlights.pdf.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. Edward W. Gondolf, *Characteristics of Batterers in a Multi-Site Evaluation of Batterer Intervention Systems* (1996), *at* http://www.mincava.umn.edu/documents/gondolf/batchar.html.
57. *Id.*
58. *Id.*
59. *Id.*

may make it impossible for parents to comply with a treatment plan focused on the violence, particularly if the perpetrator has blocked the adult victim from seeking assistance with these issues in the past. Judges should attempt to ensure that domestic violence complaints from adult victims with diagnosed substance abuse or mental illness are taken seriously; reports of violence from women with these histories are sometimes dismissed as delusional.[60] Making reasonable efforts requires addressing all of the problems that compromise the child's safety, and addressing those problems in a way that keeps adult victims of violence safe while they work on their other issues. Safety is the key to sobriety as well as to addressing the adult victim's mental health issues. For perpetrators, substance abuse and mental health issues should not be seen or used as excuses for violence, but must be addressed concurrently. Judges should not permit agencies to use mental health or substance abuse issues as excuses for failing to recognize and treat domestic violence.



60. Domestic Violence and Mental Health Policy Initiative, *supra* note 50.

# The Legal Framework

Understanding what reasonable efforts entails also requires looking at three sources of law—federal statutes, state statutes, and cases interpreting those statutes. This section will examine each in turn and discuss the implication of those sources of law for the daily decisions of dependency court judges.

## *Federal Statutes*

### Adoption Assistance and Child Welfare Act of 1980

The creation of the Adoption Assistance and Child Welfare Act of 1980 (AACWA) was a reaction to the alarming increase in the number of children in foster care and the concern that children were being removed unnecessarily from their families. Congress attempted to address this problem through the creation of the reasonable efforts requirement. AACWA conditions federal funding of state child welfare efforts on a number of mandates, including the requirement that child welfare agencies make reasonable efforts to prevent removal of children from their homes and to reunify children with their parents if children must be removed.[61] The statute does not, however, define reasonable efforts.[62] While the statute itself does not specify at what point the court is required to make such findings, later regulations clarify that the court must make a finding that reasonable efforts were made to prevent removal no later than 60 days from the date that the child was removed from the home.[63] A court finding that an agency has failed to make reasonable efforts to prevent removal or to reunify can result in the agency losing federal matching funds under Title IV-E for the child's foster care placement during the time that the court found reasonable efforts were not made.[64]

### Adoption and Safe Families Act of 1997

After some initial successes in decreasing the foster care population, by the early 1990s the number of children in foster care had again increased dramatically. Moreover, concerns emerged that AACWA's reasonable efforts requirements allowed child welfare agencies and courts to focus on preserving families at the expense of child safety.[65] The Adoption and Safe Families Act of 1997 (ASFA) was the response. ASFA clearly and repeatedly states that the health and safety of children are primary in all child welfare decisions, particularly in "determining reasonable efforts to be made…and in mak-

61. 42 U.S.C. § 671.
62. Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 Cal. W. L. Rev. 223, 225-27 (1989-90). A recent Children's Bureau publication suggests that the federal government felt that it was more appropriate for states to develop their own criteria and suggests questions that the states should ask in developing these criteria. Admin. for Child. and Fam., *Reasonable Efforts to Preserve Families and Achieve Permanency for Children*, *at* http://www.acf.hhs.gov/programs/cb/publications/adopt02/02adpt3.htm.
63. 45 C.F.R. § 1356.21 (b)(1)(i). The regulations do not speak to when reasonable efforts findings on reunification must be made.
64. Shotton, *supra* note 62, at 226.
65. Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. Tol. L. Rev. 321, 326 (2005).

ing such reasonable efforts."[66] ASFA clarified the reasonable efforts requirement by specifying that in certain cases involving "aggravated circumstances," reasonable efforts to reunify need not be made.[67] Aggravated circumstances can include abandonment, torture, chronic abuse, sexual abuse, or the termination of parent's rights to another child involuntarily, although ASFA leaves the states to define aggravated circumstances as they see fit.[68] ASFA also requires agencies to stop making reasonable efforts to reunify children with parents when doing so would be inconsistent with the child's permanency plan; at that point, the agency must make reasonable efforts to ensure that the child achieves permanency.[69] Findings that the agency has made reasonable efforts to finalize the permanency placement must be made at or before permanency hearings.[70]

### The Indian Child Welfare Act

Unlike AACWA and ASFA, the Indian Child Welfare Act (ICWA) requires state agencies to make "active efforts…to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family" and to show that "these efforts have proved unsuccessful."[71] The active efforts requirement is more stringent than AACWA and ASFA's reasonable efforts standards. State courts have found that the active efforts requirement places an affirmative duty on state agencies to act. The agency must provide services, rather than simply make referrals or require that the parent complete a case plan without further assistance.[72] Understanding what is minimally required under active efforts can provide a sense of what the reasonable efforts ceiling might look like.

## *State Laws*

The lack of guidance in both AACWA and ASFA as to what constitutes reasonable efforts allowed states to develop their own interpretations of the requirement, but few states have taken the opportunity. Those that define reasonable efforts typically charge agencies with using "reasonable" or "due" diligence in making efforts.[73] Others tell agencies to use this diligence or care to employ available or appropriate services to meet the needs of children and families in the system.[74] Only a few states have offered courts a detailed description of what to look for when making reasonable efforts determinations.

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66. 42 U.S.C. § 671(a)(15)(A).
67. 42 U.S.C. § 671(a)(15)(D)(i). For a discussion of how states have defined aggravated circumstances, see New Jersey Division of Youth and Family Services v. A.R.G., 824 A.2d 213 (NJ 2003).
68. 42 U.S.C. § 671(a)(15)(D)(iii).
69. 42 U.S.C. § 671(a)(15)(C).
70. 45 C.F.R. § 1356.21(b)(2)(i).
71. 25 U.S.C. § 1912(d).
72. Mark Andrews, *"Active" Versus "Reasonable" Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes*, 19 Alaska L. Rev. 85, 92-93 (2002).
73. Shotton, *supra* note 62, at 225.
74. *Id.*

In New Jersey, for example, reasonable efforts are defined as "attempts by an agency…to assist the parents in remedying the circumstances and conditions that led to the placement of the child and in reinforcing the family structure."[75] The child welfare agency must consult and cooperate with the parent to develop a service plan; provide services either directly or through referrals to community services providers; inform the parent of the child's progress, development and health; and facilitate appropriate visitation.[76] The agency must also assess agency efforts through consultation with the family and service providers or direct observation of services and identify barriers to services and ways to overcome those barriers.[77] In Alaska, the agency's responsibility for making reasonable efforts includes a duty to identify and actively offer or refer the parent to family support services and to refer the parent to community based services where such services are available and requested by the parent.[78] Courts making reasonable efforts findings in Minnesota must determine whether services were relevant to the child's safety and protection, adequate to meet the child and family's needs, culturally appropriate, available and accessible, consistent and timely, and realistic under the circumstances.[79] New York's statute defines diligent efforts as "reasonable attempts by an authorized agency to assist, develop, and encourage a meaningful relationship between the parent and child, including but not limited to: (1) consultation and cooperation with the parents in developing a plan for appropriate services…making suitable arrangements for the parents to visit the child…provision of services and other assistance to the parents so that problems preventing discharge of the child from care may be resolved or ameliorated; and…informing the parents…of the child's progress, development, and health."[80]

Some states have mandated that courts make reasonable efforts findings at specific points in a case. A number of states require agencies to show that reasonable efforts have been made before removal of a child is permitted.[81] Some states require that reasonable efforts findings be made at one or more hearings over the life of a case.[82] In Ohio, reasonable efforts determinations must be made whenever the court removes a child from the home or leaves the child in foster care.[83] California law requires that a reasonable efforts determination be made at every hearing, from the initial removal through termination of parental rights.[84]

Consistent with ASFA, state laws that discuss reasonable efforts are clear that safety and permanency trump all other concerns. New Jersey's statute sets forth the agency's

75. N.J. Stat. Ann § 9:6-8.84.
76. N.J. Stat. Ann. § 30:4C-15.1c.
77. N.J. Admin. Code tit. 10, 133I-4.2.
78. Ak. Stat. Ann. § 47.10.086.
79. Minn. Stat. Ann. §260.012(c).
80. NY Soc. Serv. § 384-b.7.(f).
81. Shotton, *supra* note 62, at 227.
82. *Id.* at 226.
83. Ohio Rev. Code Ann. § 2151.419(A).
84. Cal. Welf & Inst. Code §§ 306, 319, 361. 366.21(e), (f), 366.22(a); Cal. Civ. Code § 232(a)(7).

priorities: "When determining whether reasonable efforts are required to reunify the child with the parent, the health and safety of the child and the child's need for permanency shall be of paramount concern to the court. This section shall not be construed to prohibit the division from providing reasonable efforts to reunify the family, if the division determines that family reunification is in the child's best interests."[85]

## *Case Law*

Because Congress and state legislatures have largely declined to articulate anything more than a minimal definition of reasonable efforts, courts have been left to determine whether agency efforts meet the reasonableness standard.

### Reasonable efforts, generally

Since the passage of ASFA, state courts have revised their understanding of what constitutes reasonable efforts. As required by ASFA, the safety and health of children takes priority over the rights or needs of parents in recent state court determinations on reasonable efforts.[86] Moreover, courts are more willing to find that reasonable efforts are unnecessary in cases where those efforts would be "futile."[87] Professor Kathleen Bean suggests that courts look to a number of factors when making reasonable efforts determinations: the adequacy of the case plan and services provided; the timeliness of service provision; access to visitation; whether efforts were made in good faith; the parent's response to the efforts; and resource limitations.[88] Courts will not require agencies to make every possible effort and may excuse agency mistakes if the child's health and safety are not compromised. While the court may have reservations about the efforts undertaken by the agency, courts have by and large been reluctant to find that the agency has failed to make reasonable efforts.[89]

Courts are willing to make a finding of no reasonable efforts in certain situations, however. In *Division of Family Service v. N.X. and G.X.*, for example, the agency failed to address appropriately the serious substance abuse problems of the parents, despite ample evidence that the parents' drug problems drove the other issues facing the family, including the abuse and neglect of the child.[90] The court found that the department's failure to develop a meaningful case plan responsive to the severity of the parents' addiction deprived the parents of the opportunity to be reunited with their child.[91] The court concluded, therefore, that the department had not made reasonable efforts to prevent placement or reunify the family.[92]

85. N.J. Stat. Ann. § 30:4C-11.3.
86. *See*, e.g., Bean, *supra* note 65, at 334-35 (discussing cases from New Jersey, Pennsylvania, Delaware, and New Mexico).
87. *Id.* at 337-38.
88. *Id.* at 345-66.
89. *Id.* at 358-60; *see also Tina S. v. Alaska*, 2003 WL 22351630 (Alaska 2003) (holding that Alaska's statue requires "reasonableness, not perfection....[E]ven accepting Tina's premise that the division's efforts fell short of the mark or could have been better in certain respects, we think that the record convincingly demonstrates that the division's overall efforts were reasonable by any practical measure.")
90. 802 A.2d 325, 336-37 (Del. 2002).
91. *Id.* at 337.
92. *Id.*

## Reasonable efforts in domestic violence cases

Courts have similarly been reluctant to find that reasonable efforts have not been made in cases involving domestic violence. *In re Charles A.* is illustrative.[93] In that case, the trial court noted that the agency had failed at every turn to identify and treat the mother as a victim of domestic violence. The agency treated the mother as a perpetrator and failed to communicate and work with her separately from her husband, whom the court called "an abusive, violent, controlling and manipulative man."[94] The trial court also found that a social worker with familiarity with domestic violence and with the agency's policy on handling such cases should have identified the mother as a victim of violence and that the agency should have communicated to the mother its belief that her continued relationship with her husband "placed her children in jeopardy and her reunification with her children in jeopardy."[95] The court found that the agency had violated its policy for handling cases involving domestic violence and "failed on at least three occasions to pick up clear signals that she was abused and a victim in need of protection."[96] Moreover, the court accepted some responsibility for the mother's plight, in that the court failed to provide the mother with separate counsel.[97] Nonetheless, the court found that because the agency had provided some services to the family, and because the parents "actively sought to deceive the service providers by failing to disclose the dysfunction, abuse, and violence within the household," the agency had satisfied the reasonable efforts requirement.[98]

Courts have relieved agencies of their duties to make reasonable efforts when parents fail to comply with their treatment plans. In *Elvira A. v. Superior Court of San Diego County*, the court found that the mother had periodically complied with treatment plan requirements to participate in domestic violence counseling, but that issues remained nonetheless.[99] After participating in services for more than 19 months in a previous case, the mother reunited with the father; and although she expressed a willingness to separate from him to regain custody of her child, she stated that she preferred to work things out with her husband.[100] The social worker believed that the mother would permit the father contact with the children, despite her promises to protect them, and concluded that the mother could not protect the children.[101] The court found that the mother's continued inability to protect the children, notwithstanding her completion of services, warranted the lower court's decision to allow the agency to terminate its efforts to reunify.[102]

93. 738 A.2d 222, 224 (1999).
94. *Id.* at 223.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 224.
99. 2003 WL 22245040 (Cal. 2003).
100. *Id.* at 2.
101. *Id.*
102. *Id.* at 3.

In other situations, however, courts have been willing to find that agencies have not made reasonable efforts with battered mothers. *In the Interest of Rayonna M.* is one example.[103] In that case, the child welfare agency failed to provide the mother, a victim of domestic violence, with any services prior to filing to terminate her parental rights; it made service referrals only after the petition to terminate was filed.[104] The court found unpersuasive the argument that the mother was unable or unwilling to benefit from efforts to reunify the mother and child, as the agency contended, since the agency had made no such efforts prior to filing. The court noted that the mother in this case had far fewer obstacles to overcome than parents in many child welfare cases and stated, "If this mother is deemed 'unable or unwilling to benefit from reunification efforts,' then the parental rights of other young mothers who get into their first abusive relationship are unfairly in jeopardy.[105] Most of these mothers should receive a fair chance to rehabilitate before the state seeks the ultimate remedy of termination."[106]

## *Implications for Judges*

Under federal law, judges must make three reasonable efforts determinations at some point during a case: to prevent removal, to reunify, and to achieve permanency.[107] If those determinations are not made, or if the court finds that the agency has not made such efforts, the agency is denied federal foster care reimbursement for the time during which the judge determines no reasonable efforts were made. For state child welfare agencies, then, the reasonable efforts finding is a particularly important one.

This should not mean, however, that judges simply rubber stamp agency efforts. "The reasonable efforts finding is as important an element of the case as a finding on abuse or neglect."[108] Judges can help to ensure that agencies prevent unnecessary removals and facilitate reunification by requiring agencies to prove that they have made reasonable efforts and being willing to make a no reasonable efforts finding when such findings are warranted.[109] Researchers have found that caseworkers often resist changing their initial assumptions about families; when presented with new information contradicting their original assessments, caseworkers simply incorporate that information in ways that allow them to maintain their existing beliefs about the family.[110] This tendency may lead workers to suggest that making reasonable efforts is futile, that the parents are unable or unwilling to benefit from services. Judges can provide fresh perspectives on a family's potential and challenge agency assumptions about whether rea-

103. 2000 WL 195087 (Conn. 2000).
104. *Id.* at 4.
105. *Id.* at 5.
106. *Id*. at 6.
107. 45 C.F.R. § 1356.21(b).
108. Youth L. Ctr., Making Reasonable Efforts: A Permanent Home for Every Child 40 (2000).
109. *Id.* at 36. Judge Leonard Edwards has not only made such determinations, but explained that he was doing so because of the lack of services available to meet the needs of the families he saw. *See* NCJFCJ, Resource Guidelines: Improving Court Practice in Child Abuse & Neglect Cases 167-68 (1995).
110. Eileen Munro, *Common Errors of Reasoning in Child Protection Work*, 23 Child Abuse & Neglect 745 (1999).

sonable efforts are warranted, rather than allowing agencies to rely on their first impressions of the family. Judges should remind agencies of the financial consequences of failing to make reasonable efforts to ensure that agencies meet their federal obligations.[111] Judges are charged with ensuring not only that the child welfare agency has made some affirmative effort to prevent removal or reunify the family, but that those efforts are tied to the problems that initially brought the family to the attention of the child welfare system. Those services should be appropriate and timely; as one judge noted, "Reasonable efforts require immediate provision of domestic violence services to families in dependency court."[112] Exactly what those services might look like will be discussed in the following section.

111. Youth L. Ctr., *supra* note 108, at 37.
112. O'Reily & Lederman, *supra* note 3, at 43.

# Making Reasonable Efforts in Cases Involving Domestic Violence

## *Removal Hearings*

The court's first opportunity to make a reasonable efforts determination is at an initial removal hearing (called a shelter or detention hearing in some states), often held between 24 and 72 hours after the child is removed. As a preliminary matter, the court should determine whether the parties are entitled to counsel and appoint separate counsel for the adult victim and the perpetrator, given the conflicts of interest that are likely to occur should the parties share counsel. The court should then be focused on two questions: 1) Why was the child removed? 2) Did the agency make reasonable efforts to prevent the need for removal?

### Why was the child removed?

For the court to determine whether the agency's efforts to prevent removal were reasonable, it must first understand the agency's rationale for removing or seeking removal of the child. While this sounds fairly simple, in a domestic violence case there are three potential scenarios that could result in the agency seeking removal; and each would require markedly different efforts to prevent the need for removal. The agency might seek removal because the child was being physically or emotionally abused by the same perpetrator who was battering the child's mother (or because the mother failed to prevent the child from being abused). The agency might seek removal because the child was being physically or emotionally abused or neglected by the adult victim. Or the agency might seek removal because the child was exposed to domestic violence in the home.[113] The court's questions about the kinds of efforts provided in each of those scenarios would be different, given the identity of the primary perpetrator (and the presence or absence of a secondary perpetrator) and the nature of the harm to the child.

### Did the agency make reasonable efforts to prevent removal?

For a judge to ascertain whether the agency's efforts to prevent removal were reasonable, a number of inquiries are necessary.

***First, the judge should ask about the agency's investigation of the case.***

- How did the family come to the agency's attention? *(hotline report, police referral, other court referral)?*
- How did the caseworker determine that domestic violence was an issue for the family?

113. A number of states define exposure to domestic violence as *per se* neglect, including California and New York, but *Nicholson v. Williams* suggests that such findings against a battered mother are unconstitutional (at least in New York), when the mother has done nothing more than be assaulted in the presence of her child. *See Nicholson*, 203 F.Supp.2d 153, 250, 251 (E.D.N.Y. 2002).

*Is there a past history of domestic violence? Who is the perpetrator of that violence?*
- What injury to the child (physical, emotional, undetermined) is the agency alleging?

***Second, the judge should inquire into how the agency sought to address the domestic violence in the family prior to seeking removal, or, in the alternative, why immediate removal was warranted.***

- Did the adult victim have strategies to keep the child safe? *Why were those strategies not effective?*
- Did the caseworker consult with a domestic violence expert or advocate?
- Did the caseworker consult with any probation or parole officers or treatment providers involved with the perpetrator?
- Did the caseworker assess the case to determine the likelihood of future violence?[114]

***Next, the court should ask whether the adult victim was offered assistance to keep herself and her children safe and together. This question goes to the heart of the reasonable efforts inquiry—what services and supports could have prevented the need for placement of the child? Such services might include:***

- Developing a meaningful safety plan;
- Helping the adult victim find a family member or friend to stay with temporarily;
- Giving the adult victim income to enable her to live independently;
- Increasing police presence around the home;
- Enlisting the support of community entities such as churches, schools, and other neighborhood organizations;
- Providing the adult victim with legal assistance;
- Helping the adult victim obtain a protective order, if the adult victim is willing to pursue such an order;
- Helping the adult victim enter shelter, if she deems it necessary;
- Connecting the adult victim with in-patient services that allow the adult victim and child to remain together (particularly in cases involving serious substance abuse or mental illness);
- Securing counseling for the child that specifically addresses the domestic violence;
- Accessing a crisis nursery or other day care services;
- Providing transportation services; and
- Providing interpreters.

***The court should also ask how the agency dealt with the batterer. The court should pay particular attention to the language of the petition—does it hold the batterer accountable for his violence? The court should determine whether the agency sought to remove the batterer from the home—either through voluntary agreement or using***

114. For example, the boyfriend of Shawrline Nicholson (the named plaintiff in *Nicholson v. Williams*) had never been violent with her prior to that incident, did not live with her or have a key to her apartment, fled the scene immediately, and was not heard from again. Coupled with Ms. Nicholson's willingness to assist the police with the investigation of the beating, an assessment could have revealed how unlikely it was that the children would be exposed to repeated violence.

*the power of the courts.*

***Finally, if the child has already been removed, the court should ask what actions would be needed to allow the child to return home immediately and safely and what services would be needed to support the child's return.***

This list of questions and services is not exhaustive. In every case, the services that the adult victim will need to keep herself and her child safe will be different. Too often, particularly in families facing multiple problems, families are offered "inept" services—services that, although available, fail to address the family's actual problems.[115] The key is for caseworkers to make individualized assessments of each family and to provide services that are tailored to the needs of that family, and for judges to ensure that agencies are performing this function when families reach the dependency court.

Judges should also ensure that services are culturally competent, linguistically appropriate, and sensitive to the particular concerns of immigrant communities. Families of color are overrepresented in the child welfare system.[116] Those families do not always respond to services developed for a white client base; research is emerging that shows how better to reach African-American men who batter, for example.[117] Agencies should find and partner with organizations developing services specifically for people of color. The agency's failure to access such services when those services are available (or to develop expertise when they are not) should prompt judges to question whether the agency's efforts are reasonable. Similarly, offering services in a language that neither the adult victim nor perpetrator speaks is unreasonable. Expecting an undocumented immigrant victim to call the police or use the courts, knowing that she or her partner could be deported, is unreasonable. Asking a woman to enter a shelter where she cannot communicate with the staff, participate in counseling, or even cook familiar foods for her children is unreasonable. Courts should hold agencies accountable for providing

## *Adjudication*

***At adjudication, the court will determine whether the allegations raised in the petition and the evidence offered to support those allegations rises to the level of child abuse or neglect, as defined by state law.***

Here again, understanding exactly why the case has been petitioned is crucial. Alleging physical abuse of a child is very different from alleging a vague "harm" as a result of exposure to domestic violence.[118] Judges should understand that social science research indicates that some, but not all, children exposed to domestic violence exhibit the kinds

115. Cigal Knei-Paz & David S. Ribner, *A Narrative Perspective on "Doing" for Multiproblem Families*, 81 Fam. in Soc'y 475 (2000).
116. Dorothy Roberts, Shattered Bonds: The Color of Child Welfare 8-10 (Basic Civitas Books)(2002) (summarizing the research on the overrepresentation of children of color in the child welfare system).
117. Edward W. Gondolf & Oliver J. Williams, *Culturally Focused Batterer Counseling for African American Men*, 2 Trauma, Violence and Abuse 283 (2001).
118. Some states define exposure to domestic violence as neglect either statutorily or in case law. Weithorn, *supra* note 8, at 93-98. In those states, judges would have little discretion to analyze whether the child has been abused or neglected.

of harms discussed previously. A number of different factors may explain this variation in response: the level of violence in the home, the amount of exposure to the violence, other stressors in the child's life, the degree to which the child is involved in the violence (directly or indirectly), the child's unique coping skills, and protective and risk factors in the child's life.[119]

At the very least, then, by the time of the adjudication hearing, the agency should have assessed the child to determine what harm the child has suffered or is likely to suffer as a result of the violence in the home. The court should inquire into both the methodology and the results of that assessment before determining that a child has been abused or neglected as a result of domestic violence.

## *Disposition*

***The disposition hearing (which, in many states, takes place at the same time as the adjudication hearing) gives the court the opportunity to review the case plans for the family.***

The review of the case plan dovetails with the court's obligation to ensure that reasonable efforts to reunify the family are being made; the case plan is the vehicle through which the court can assess the agency's efforts.

"In order for the plan to be reasonable, it must have been created to fix the problems that required state involvement."[120] Again, the services offered must directly address the issues that brought the family to the agency's attention, whether domestic violence is the only issue or there are other concerns, such as poor housing/living conditions, substance abuse, or mental illness. In addition to the services mentioned in the Removal Hearings section, case plans for victims of domestic violence might include:

- Individual/group counseling for the adult victim and the child;
- Housing, welfare, employment, and economic advocacy services;
- Transitional living services;
- Visitation center services;
- Parent group support; and
- Legal assistance with longer-term matters, such as immigration.

If the adult victim has chosen to end the relationship, services should address the long-term barriers to leaving that have stood in her way. If she opts to remain with the perpetrator, services should be focused on creating a safe environment within the home for her and her child. In assessing the reasonableness of the efforts, courts should ask whether the services mandated in the case plan are:

119. Edleson, *supra* note 11.
120. Bean, *supra* note 65, at 345.

- Available;
- Accessible;
- Provided by those with knowledge in the field;
- Tied to an identified need;
- Safe;
- Useful to the family; and
- Culturally and linguistically appropriate.

In many child welfare cases, perpetrators are invisible—never interviewed, engaged, made parties to the case, or provided with services. Adult victims and perpetrators should have separate case plans and separate counsel, even if they plan to continue their relationship, and the perpetrator's case plan should focus on the safety risk he poses to the child. Services for the perpetrator could include:

- Batterer intervention programs;
- Visitation center services;
- Substance abuse/mental health services;
- Parenting classes incorporating information on the impact of the perpetrator's actions on his children;
- Probation/parole contacts;
- Translator/interpreter services;
- Housing services; and
- Employment services.

The long-term needs of children exposed to domestic violence are sometimes forgotten once their immediate safety needs have been addressed. The child, too, should have a separate case plan, which should include a safety plan and counseling targeted to any harm suffered as a result of the violence in the home.

If the case plan involves treatment for substance abuse or mental health problems, the judge should ask how this treatment will affect the potential for violence in the family. The judge should elicit information on the perpetrator's response to the adult victim's attempts to address her problems. Is he hampering her efforts? Is he providing her with drugs or threatening her if she stops using? Is he more violent or more lethal as a result of his own treatment? Is probation or parole monitoring his treatment? The judge should ensure that the agency understands the interrelationship between domestic violence and these other issues and has crafted service plans accordingly.

The judge must decide where the child will reside until the next review hearing is held. If the child has been removed, the judge should ask whether the child must continue to be out of the adult victim's care to remain safe. If the child has been placed in out-of-home care, the judge should remind the parties, attorneys and agency that ASFA

requires that the agency seek termination of the parent's rights once the child has been in out-of-home care for 15 of 22 months. The judge should ask whether the family's service plans can be completed in that timeframe, bearing in mind the many barriers facing victims of domestic violence attempting to achieve safety and stability for themselves and their children. Judges should also ensure that the child welfare agency has assessed the homes of relatives or foster caregivers for the presence of domestic violence. Such assessments are not routine; while agencies inquire into the criminal histories of the residents in the caregiver's home, they do not always screen for domestic violence or check civil protective order registries. Removing children from their parents to avoid exposure to domestic violence just to place them in homes where such violence occurs is more than ironic—it can hamper the child's ability to heal from harm already suffered. Such screening is helpful later in the case as well, when determinations are made about where the child will live permanently.

## *Review Hearings*

ASFA requires that the court hold review hearings every six months from the date that the child enters foster care.[121] At each review hearing for as long as the permanency plan calls for reunification, the judge should examine the agency's efforts to reunify the family and make a reasonable efforts determination. The judge should re-examine the adequacy of the case plan in light of any changes in family structure, completion of services, and newly discovered needs of the family. The judge should ensure that the services ordered continue to be the services needed by the family.

As long as the court has jurisdiction over the perpetrator, the judge should not allow the agency to discontinue its work with him, even if the perpetrator has left the family or the mother has decided to end her involvement with him. Remember that the child's safety was compromised by the perpetrator's violence; and the perpetrator should be held accountable for that violence, whether he remains part of the family structure or not. Moreover, many abusive men are recidivists;[122] unless his behavior is dealt with appropriately, the real possibility exists that other families will be destroyed by his violence. Even if there is no plan to reunify the child with the perpetrator, addressing his violence and involving him in services should remain a focus of the agency's efforts.

The judge should determine when the agency discovered the domestic violence in the home. If domestic violence was not the reason that the case originally came to the attention of the child protection agency, the court should ask whether the agency timely provided services to address the domestic violence when it learned that the problem

121. 42 U.S.C. § 675(5)(B).
122. Edward W. Gondolf, *Multi-Site Evaluation of Batterer Intervention Systems: A 30-Month Follow-Up of Court-Mandated Batterers in Four Cities*, at http://www.iup.edu/maati/publications/30MonthFollowup.shtm (finding that 25 percent of men assaulted new partners within 30 months of batterer intervention program intake).

existed. Moreover, the court should inquire as to whether the agency is using its concerns about domestic violence as a pretext for keeping a child in care who could safely be returned home.

## *Permanency Hearings*

Federal law requires that a hearing to determine the child's permanency plan be held no later than 12 months after the child enters foster care, and every 12 months thereafter should the child remain in foster care.[123] At that hearing, the judge must determine whether the agency has made reasonable efforts to finalize the permanency plan. At these permanency hearings, judges should ask many of the same questions posed in the previous section.

Even if the permanency plan does not call for reunification and the agency is no longer providing services to the parents, the court should ensure that the child continues to receive services that target any problems the child confronts as a result of exposure to domestic violence. The court should ask whether the child's caregivers are committed to the child's continued participation in such services. Moreover, the court should ensure that any prospective adoptive parent or guardian is screened for domestic violence to safeguard the child from further exposure to violence in his/her new environment.

## *Termination of Parental Rights*

If a child remains in foster care for 15 months in a 22 month period, federal law generally requires that the agency petition the court to terminate the parents' parental rights.[124] The termination of parental rights hearing gives judges their last opportunity to determine whether the agency has made reasonable efforts to reunify parents and children. Given the gravity of the consequences—for both parents and children—of termination of parental rights, it is crucial that judges conduct a comprehensive inquiry into the nature of the efforts made by the agency, the appropriateness of the efforts to the problems presented by the parents and child, and the parties' responses to those efforts.

The inquiry should include many of the same questions posed in the other sections of this publication. Judges should feel satisfied at the end of the inquiry that the agency understood the nature of the relationship between the parents and between the parents and the children; that the agency provided the adult victim, perpetrator, and child with services tailored to meeting their specific needs; that the services provided were appropriate, available, accessible, and culturally and linguistically appropriate; and

123. 42 U.S.C. § 675(5)(C).
124. Some states have shorter timelines. *See, e.g.,* Ohio Rev. Code Ann. § 2151.414 (B)(1)(d) (requiring the agency to file for termination of parental rights when the child has been in out of home care for 12 of the last 22 months).

that, for whatever reason, the parents were either unable or unwilling to avail themselves of those services in a way that would allow the child to reunify safely with the parents. Unless the judge is confident that the agency has made such efforts, the judge should not terminate the parents' parental rights.

If parental rights are severed, and the permanency plan is guardianship or adoption, the court should ensure that the agency has found a safe placement for the child. A criminal records check is not sufficient to determine whether domestic violence has occurred in the family of the guardian or the adoptive family. Agencies should search protective order registries and local court records to determine whether anyone in the guardian's or adoptive family has been a party to a protective order and should screen for the presence of domestic violence in the home. All of this should be done before the child is initially placed with the family; but if the agency has not inquired prior to the termination of parental rights hearing, the judge should mandate that it do so before any permanent order regarding the child is entered.

## *Judges and Communities*

No one system or organization can meet the multi-faceted needs of perpetrators of domestic violence, adult victims, and their children. The agency's ability to make reasonable efforts in cases involving domestic violence is directly linked to the resources available for families experiencing domestic violence, both within the agency and in the community. Judges may find themselves frustrated by agency efforts in cases involving domestic violence, only to hear that the resources the judge believes the family needs simply do not exist. Judges have the ability to increase these resources in a number of ways.

Judges can participate in community needs assessments to determine whether adequate services exist to serve families experiencing domestic violence and to identify services that are lacking.[125] Judges have a unique perspective on these issues by virtue of their responsibility for making reasonable efforts determinations. Judges should familiarize themselves with the resources available in the community to perpetrators, adult victims, and their children. The judge should then approach the needs assessment with this question: "What services does this community need to ensure that I will be able to make positive reasonable efforts findings in cases involving domestic violence?" Judges can use their leadership position within the community to engage community members, such as business leaders and government officials, who might not respond to requests from the agency or domestic violence advocates, in these efforts.

Judges can participate in collaborative efforts to increase resources for families experiencing violence. Many judges, for example, sit on local domestic violence coordinating councils. These councils are often made up of representatives from the court; other government agencies; non-governmental programs serving adult victims of violence; perpetrators, and their children; and interested community residents. Coordinating councils engage in a variety of activities, ranging from organizing domestic violence awareness activities to helping determine how to allocate funding for family violence resources in the community. Some judges have expressed concerns that they are ethically constrained from participating in such efforts. These councils, however, are not designed to discuss individual cases or to ask judges to make advisory rulings. Rather, the councils address the systemic issues around serving families experiencing domestic violence.[126] Because they oversee services for families in crisis every day, judges can identify gaps in the service provision system and help the community think of ways to fill these gaps. Judges can also help the community better understand the court system and the legal and systemic issues facing families involved in the dependency system.

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125. Judge Richard Fitzgerald *et. al., Using Reasonable Efforts Determinations to Improve Systems and Case Practice in Cases Involving Family Violence and Child Maltreatment*, 54 Juv. & Fam. Ct. J. 104 (2003).
126. The Family Violence Department of the NCJFCJ has compiled a packet of information that addresses these concerns. *See* Family Violence Department, *Judicial Ethics: Considerations for Judicial Involvement in Community Response Efforts to End Domestic Violence.*

Demystifying the courts can help build community faith in the integrity of the dependency system and overcome community mistrust of the courts working with families experiencing domestic violence.

Judges have been active participants in projects seeking to improve the dependency system's handling of cases involving domestic violence. These projects, often known as "*Greenbook*" efforts,[127] engage courts, agencies, domestic violence service providers, and others in thinking about how systems change can lead to better outcomes for families experiencing domestic violence. Judges have been leaders in these projects.

Judges can also bring pressure to bear by the rulings they make on reasonable efforts. When agencies fail to provide appropriate services, judges should not hesitate to inform them that their efforts are lacking. Judges can send this message by making no reasonable efforts findings or by giving agencies notice of judges' intentions to make such findings if agencies are unable to locate and provide such services within a specified period of time.[128] Judges with knowledge of their communities can then encourage agencies to partner with others in the community who can provide the resources that the agency cannot—resources such as batterer intervention programs, supervised visitation programs, domestic violence legal advocacy, or community-based programs for children exposed to domestic violence.

Judges and courts do not exist in a vacuum, and the community context is particularly important in cases involving family violence. Judges must be engaged with their communities to ensure that they are aware of available services and to increase the pool of services for the families coming into their courts. Judges should open their courts to communities to help them understand how the courts operate, including the constraints on the courts. Judges can use the reasonable efforts determination as a starting point for these endeavors.

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127. In 1999, the National Council of Juvenile and Family Court Judges (NCJFCJ) published *Effective Interventions in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice*. This publication, commonly referred to as the "*Greenbook*" due to its green cover, provides guidance for child welfare, domestic violence service providers, and family courts to work together more effectively to serve families experiencing violence. From 2000-2007, the United States Departments of Health and Human Services and Justice, funded six demonstration sites across the country. The demonstration sites joined battered women's organizations, child protection agencies, the courts, and other partners in implementing the *Greenbook's* recommendations. NCJFCJ, Family Violence Prevention Fund, and the American Public Humane Association provided technical assistance to the sites. Every local site was evaluated individually, and a comprehensive national evaluation was conducted at the completion of the initiative. To learn more about the *Greenbook* Initiative, please visit http://thegreenbook.ncjfcj.org.
128. Judge Leonard Edwards used this strategy in a letter to the Department of Family and Children's Services in Santa Clara County, California. Judge Edwards informed the Department of the reasons for several judicial officers' no reasonable efforts findings, advised the Department of the ramifications of such findings, and offered to help the Department in its advocacy with the local Board of Supervisors for funds to make needed services available. NCJFCJ *supra* note 109, at 167-68.

## *Conclusion*

Dependency court judges face a tremendous responsibility in cases involving domestic violence. They must be concerned with keeping children safe, first and foremost, but also with establishing safety for the adult victim and the child, with holding the perpetrator accountable for his actions in a way that promotes child safety, and with monitoring the agency's efforts to prevent removal of children, to reunify children and families, and to promote children's permanency. Judges can use these reasonable efforts findings as vehicles for reinforcing agency best practices in dependency cases involving domestic violence and improving service provisions to children, the adult victims, and perpetrators. Ensuring that reasonable efforts have been made in domestic violence cases will mean better agency practice as well as better outcomes for families experiencing domestic violence—in the hopes that those families will be able to live violence-free lives once their interaction with the court has ended.

Please refer to the checklists located in the back-cover pocket of this document for a quick reference of the document and further guidance on making reasonable efforts determinations in domestic violence cases.

# Notes

# Notes

I

# Removal Hearing

## Preliminary matters

### ❑ Are the parties entitled to separate counsel?

If there are allegations of domestic violence, there may be a conflict of interest between the parents and they should be assigned separate counsel.

### ❑ How did the family come to the agency's attention?

- Did the report come in via a family member or neighbor, hotline report, police referral, court referral, other?
- What information did the source of the referral contain about whether domestic violence is an issue for this family?

### ❑ Did the agency screen and assess the family for the presence of domestic violence ?

- Using what screening approaches and assessment tools?
- Were family members interviewed separately?

### ❑ Was the child's removal related to domestic violence?

- What was the nature of the exposure? (i.e., was the child directly harmed, within sight or sound? How frequent or recent is the exposure?)
- Was there physical or emotional abuse by the alleged abusive parent?
- Was there physical or emotional abuse by the adult victim of domestic violence?

## Reasonable efforts determination

### ❑ Has the agency been involved with this family in the past?

- What services were provided? What was the outcome or result of the services? Why?

### ❑ Did the agency seek to address domestic violence prior to removal?

- What attempts were made to enhance child safety to prevent removal?
- Did the agency help the adult victim with strategies to keep themselves and the child safe? If so, why were those strategies not effective to prevent removal?
- Did the agency consider the risks to the child of removal, such as separation anxiety, sibling loss, or school change? In what ways did the risk of harm outweigh the trauma of removal?
- What other strategies did the agency employ? Why were they unsuccessful? Other strategies may include linking the victim parent with a local domestic violence agency, assisting in the creation of a safety plan for the victim parent, offering and securing temporary shelter, using supervised visitation for the perpetrator, or seeking a juvenile court restraining order to remove the perpetrator from the home.

### ❑ Is the alleged perpetrator of domestic violence also the alleged primary perpetrator of abuse or neglect?

- If the victim parent is not the primary perpetrator of abuse or neglect, can it be made safe for the child to return home with the victim parent?



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## Reasonable efforts determination (continued)

- ❑ **Did the agency consult with the local domestic violence agency about providing advocacy or domestic violence services and link the victim parent to these services?**
  - Did services include helping the victim parent create a safety plan or secure emergency shelter or other domestic violence support services?
  - Did the consultation include helping the caseworker to recognize possible barriers to compliance with a service plan and ways a perpetrator may undermine these efforts; brainstorm safe and creative alternatives to removal; and identify and contextualize a victim's protective strategies and behaviors within the context of the violence?
- ❑ **Did the agency assess the case and create a plan to keep the victim parent and child safe in the future?**
  - Does the plan recognize that the victim parent can not control the abuser's behavior?
  - How were the selected services specifically relevant to the family's problems and needs?
- ❑ **What other issues are confronting this family? Have services been offered to address these issues?**

  For example, the victim parent may be weighing competing interests such as the impact of the violence against the risk of homelessness; safety versus the threat of retribution for the request of support or income maintenance; child care and transportation expenses against employment opportunities.

## Working with the victim parent

- ❑ **Did the agency offer and diligently arrange services for the victim parent to allow the child to remain safely in the home?**
  - Did the services include access to cash payment or noncash services to meet basic needs, housing, transportation, child care, counseling, referrals to legal assistance on relevant custody matters, etc.?
  - Were all services accessible to the adult victim? Were programs and services offered in the victim parent's primary language and culturally appropriate?
  - Did programs and services offered meet any special needs or accommodations?
- ❑ **Did the victim parent avail themselves of the services offered? If not, why not?**
  - Did the agency identify and address possible dangers to the child and family that could be caused from potential services?
  - Were the barriers to obtaining services addressed? What strategies were taken to overcome them?
- ❑ **What services or actions would be necessary to return the child to the home immediately and safely?**



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IA

# Removal Hearing (continued)

**Working with the perpetrator**

## ❑ Was a separate service plan created for the alleged batterer?

- Is mandatory attendance of a batterer's intervention program part of the service plan?
- What services were offered to increase the alleged batterer's awareness of the impact of domestic violence on his children?

## ❑ Did the agency hold the batterer accountable for the abuse?

- Did the agency request a juvenile court restraining order to remove the batterer from the home?
- If appropriate, were financial orders imposed against the batterer to support the child and family?
- How was the batterer's family and community engaged to support his or her use of non-violence?
- What approaches were employed to demonstrate that the batterer is responsible for their actions and the victim parent is not responsible for the abuse?

## ❑ Did the agency consult with any probation or parole officers or treatment providers involved with the batterer ?

- Has the batterer followed the conditions of court orders and probation?
- Have home visits or monitoring been coordinated in collaboration with probation or parole?
- What information or recommendations were made by other treatment providers?

## ❑ What resources and strategies did the agency use to restrain the batterer from perpetrating any form of abuse toward a child or partner?

## ❑ What services or actions would be necessary to return the child to the home immediately and safely?

**Substance abuse or mental health concerns**

## ❑ Are there any substance abuse or mental health concerns?

- How do substance use or mental health concerns intersect for the victim parent? Is the victim parent using substances as a coping strategy or to self-medicate? Is the victim parent exhibiting signs of depression as a result of the violence?
- How are substance use or mental health concerns connected to the batterer's use of violence? Is substance abuse used as a justification for the abuse by the batterer?
- Is safety impeded due to substance use or mental health concerns?
- Is the victim parent or batterer in treatment for substance abuse? Does the batterer's treatment for substance abuse take into account his or her use of violence?



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II

Making the finding and reasonable efforts

# Adjudication Hearing

## ❑ Does exposure to domestic violence form the sole basis for seeking jurisdiction?

Juvenile court jurisdiction should only be extended in a case involving a child's exposure to or witnessing of domestic violence if the victim parent is unable to protect the child even with the assistance of the agency or other social services and there is reasonable cause to believe that the exposure is causing substantial harm to the child.

## ❑ Was the family offered services to prevent filing of the petition? What were they?

- How did the victim parent demonstrate that she or he is unable to protect the child even with the assistance of the agency?
- Are unsuccessful attempts directly related to the victim parent's inability to protect the child or do they involve the actions of another party?

## ❑ Did the agency assess the impact of the domestic violence on the child? Using what assessment tool? What was the result?

- What did the assessment reveal about how the child is substantially harmed?
- Did the assessment include identification of problems associated with witnessing domestic violence including behavioral and emotional functioning (i.e., aggressive and anti-social or fearful and inhibited behavior, anxiety, depression, or temperament problems); cognitive functioning and attitudes (i.e., low verbal and quantitative skills, attitudes justifying the use of violence); and physical functioning (i.e., psychosomatic complaints, low school attendance, high hospital admissions)?
- Did the assessment include identification of the existing and potential skills, attitudes, and other resources that can be applied toward solutions?

## ❑ Did the agency identify protective factors in the child's life?

- Who does the child have in his or her life to help bolter resiliency? How were these bonds and connections fostered?
- How did the child's age, culture, spirituality, adaptability to change, cognitive and emotional development, self esteem, social orientation, achievement motivation, and social comprehension factor into the intervention?
- What are the child's unique coping skills? What is the child's capacity to keep him or herself safe?
- Is there a safe relative placement for the child?

## ❑ Did the agency identify risk factors in the child's life?

- What was the level of violence in the home? To what degree was the child exposed to the violence? Was the child involved in the violence, directly or indirectly? How so?
- Is the child at risk from coercive control, manipulation, or undermining of victim parent authority by the abusive parent?



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III

# Disposition Hearing

**Reasonable efforts in case planning**

- ❑ **Do the child, the perpetrator, and the victim parent have their own case plan?**
- ❑ **Is the child being offered services directly related to the reasons the child was brought within the jurisdiction of the court?**
- ❑ **Is the victim parent offered services that directly address the issues that brought the family to the agency's attention?**
- ❑ **Does the perpetrator's case plan address how the violence affects the child's safety?**
- ❑ **Has the agency evaluated how domestic violence affects the victim parent's ability to access, utilize, or benefit from services?**
- ❑ **Can each case plan be accomplished realistically within the applied time frames?**
- ❑ **Does each case plan provide for services that are:**
  - available?
  - accessible, based on the specific needs and circumstances of the party?
  - provided by those with knowledge in the field?
  - tied to an identified need?
  - safe?
  - culturally and linguistically appropriate?

**Child's continued out-of-home placement**

- ❑ **Must the child remain in out-of-home care in order to be safe?**
- ❑ **Has the agency screened for domestic violence in the child's out-of-home placement?**



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## Substance abuse or mental health problems

- ❑ **Are there any substance abuse or mental health issues that need to be addressed?**
- ❑ **Has the agency recognized and responded to the domestic violence despite these issues?**
  **If concerns exist for adult victims:**
  - Have symptoms or dependence been resolved or minimized as a result of increased safety or social support? If not, has the adult victim engaged in treatment?
  - How has the perpetrator responded to the victim parent's attempts to secure treatment? Have there been attempts to undermine the victim parent's treatment?
  - Has treatment created greater safety risks for the child or the victim parent?
  - Has the agency responded to any interference by the perpetrator into the adult victim's efforts? How?

**Card 3 Side 2**

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IV

Reasonable efforts in the family's case plan

# Review Hearing

- ❑ Does the case plan continue to accurately reflect the needs of the family?
- ❑ Is the agency continuing to make services available to each family member who needs them?
- ❑ Has the perpetrator been involved in services addressing the abuse, whether he or she is still involved with the family?
- ❑ Are family members availing themselves of services?
- ❑ Has the agency seen any changes in the child's conditions and circumstances as a result of these services?
- ❑ Are the perpetrator's actions and behaviors in any way coloring the agency's assessment of the victim parent's ability to care for the child?
- ❑ Are the child's caregivers ensuring that the child receives appropriate services, including those services which would help the child cope with exposure to domestic violence?
- ❑ What ongoing safety issues require the child to remain a ward of the state or under the jurisdiction of the court?



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V

Reasonable efforts in the family's case plan

# Permanency Hearing

- ❑ What is the child's primary permanency plan? What is the alternate plan?
- ❑ Have there been any changes in the plan? What are they, and why?
- ❑ What is the current status of the questions posed in the REVIEW HEARING benchcard?
- ❑ Is the child continuing to receive needed services?
- ❑ Is the agency continuing to provide services to the parents?
- ❑ If there is an alternate plan of permanent guardianship or adoption (or another planned permanent living arrangement), is the primary reason related to domestic violence?
- ❑ Has the agency made reasonable efforts to provide services to the victim parent which might make is safe for the child to return home?
- ❑ Have the prospective guardians or adoptive parents been screened for domestic violence?

  This may include a search of protection order registries, court records, and criminal records.
- ❑ Are the prospective guardians or adoptive parents committed to securing or continuing services for the child?

Card 5 Side 1

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VI

# Termination of Parental Rights Hearing

**Reasonable efforts in the family's case plan**

- ❑ **Was each family member provided services tailored to meet their specific needs?**
- ❑ **Were all services accessible to the person receiving them; actually available; culturally and linguistically appropriate; and meeting any special needs?**
  - Were the services needed actually available?
  - Were the services culturally relevant and linguistically appropriate? How so?
  - Did the services meet any special needs? In what ways?
- ❑ **Has the agency clearly articulated why efforts to reunify the child with the parent(s) were unsuccessful and what those efforts were?**
- ❑ **Has the agency clearly articulated the likelihood that the causes and conditions that led to the abuse or neglect will not change?**

**The guardian or adoptive family**

- ❑ **Has the child's current or future placement been screened for domestic violence?**

  This may include a search of protection order registries, court records, and criminal records.
- ❑ **Will the child continue to receive any needed services in the permanent placement? If not, why not?**
- ❑ **What is the plan for continuing services?**



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