

# Reasonable Efforts

Joshua B. Kay  
University of Michigan Law School  
Child Advocacy Law Clinic

## The Basics

- Reasonable efforts required:
  - To **prevent removal** of children from the home
  - To **reunify the family** if removal has occurred
  - To **find permanent homes** for children who cannot be returned to their families

## Statutory Basis

- Federal
  - Adoption Assistance & Child Welfare Act (1980)
  - Adoption & Safe Families Act (1997)
- Codified in state law, court rules
  - See PDF handout
- Also important to look at DHS policies

## Variations on a Theme

- Active efforts
  - Required under **Indian Child Welfare Act**
  - Recognized as **more intensive** than reasonable efforts
  - Case worker must thoroughly assist families in accessing and participating in necessary services that are **culturally appropriate, remedial, and rehabilitative** in nature.
- Reasonable accommodations
  - Under Americans with Disabilities Act
  - **Reasonably accommodate disability, or no RE**

## DHS Policies

- PSM 714-2: Reasonable efforts to prevent removal required unless child is at *imminent risk* of harm without removal
  - Policy includes extensive, non-exhaustive list of services and funding
- FOM 722-6: Case service plan must list services provided and offered
  - Policy includes extensive, non-exhaustive list

## More DHS Policies

- NAA 205: Agency must work with tribe; tribe defines what constitutes active efforts
  - Pro-active approach, active support of compliance
  - Document all services designed to prevent breakup of family, show that services have failed prior to filing petition for court involvement

## Think about *This* Family

- What will address the family's needs?
  - What kinds of services?
  - Concrete assistance?
  - What is the parenting time plan?
  - Maintain in the home with services?
  - Or, if placement is considered, why? Is the child truly at imminent risk of harm?
  - What placement would meet the family's needs?
  - Shed unnecessary services; focus on truly targeted services

## RE Case Law

- *In re Rood*, 483 Mich 73 (2009)
  - Reasonable efforts required by 712A.19a(2) unless there are aggravated circumstances
    - No exception for TPR at initial disposition
  - Failure to make reasonable efforts is a defense against TPR, because failure creates "hole in the evidence"
  - Cannot exclude parent from participation and then terminate rights based on non-participation
  - DHS must follow its own policies: due process

## More RE Case Law

- *In re Mason*, 486 Mich 142 (2010)
  - RE requirement extends to incarcerated parents
  - Agency cannot speculate about how long it will take for incarcerated parent to become fit after being released and then decide not to give services based on that speculation
  - As in *Rood*: can't exclude from participation and then terminate based on non-participation.
  - Adopts "hole in the evidence" concern from *Rood*

## Still More RE Case Law

- *In re JK*, 468 Mich 202 (2003)
  - Compliance with service plan is evidence of ability to provide proper care and custody
    - Need to benefit, too (*In re Gazella*, 264 Mich App 668 [2005])
  - Service plan presumed adequate to address identified problems.
- *In re Newman*, 189 Mich App 61 (1991)
  - No basis for TPR in a problem that respondent did not have a full and fair opportunity to rectify

## Active Efforts Case Law

- *In re JL*, 483 Mich 300 (2009)
  - Active efforts are affirmative, more proactive. More than “reasonable efforts”
  - Efforts need not be current or target child at issue in present proceeding if efforts made previously
    - But cannot be in distant past
    - Must be relevant to current circumstances
    - Must permit current assessment of parental fitness

## Reasonable Accommodations Case Law

- *In re Terry*, 240 Mich App 14 (2000)
  - ADA Title II, 42 USC § 12101 *et seq.*, applies to services provided by an agency
  - If services do not reasonably accommodate the disability, then RE cannot be found
  - Need for accommodation or claim of ADA violation must be raised in timely manner
- Disability = physical or mental impairment that substantially limits one or more major life activities; or a record of having such impairment; or being regarded as having such an impairment

## Bottom Line

- Reasonable efforts or active efforts are required to prevent removal, to reunify the family, and to finalize a permanency plan for a child
- If the ADA applies due to disability, then services must reasonably accommodate the disability in order for a finding of RE to be made
- It is critical that reasonable efforts truly target the identified problems and have a strong rationale.
  - Families and children depend on this.
  - Reasonable efforts are the key to successful and appropriate case outcomes that are least traumatizing to all involved.
- Ask for a finding of no RE when warranted

Questions?

## **Ensuring that Reasonable Efforts are Reasonable and Effortful**

Joshua B. Kay, J.D., Ph.D.  
University of Michigan Law School  
Child Advocacy Law Clinic

### **Statutes that address reasonable efforts, directly or indirectly, and associated court rules**

- 712A.13a(8)(a): Agency must prepare Initial Service Plan within 30 days of child's placement outside the home. Also 3.965(E).
- 712A.13a(9): Addresses criminal record check, central registry clearance, and home study for placement with relative.
- 712A.13a(10): Placement in most family-like setting available.
- 712A.13a(11): Frequent parenting time required. If parenting time may be harmful, court must order psychological evaluation or counseling or both.
- 712A.13a(12): Upon motion of any party, court must review placement orders and service plans and may modify these as needed in the child's best interests. Also 3.966(A)(1).
- 712A.18f(1): If recommending removal, agency must report on efforts made to prevent removal or efforts made to rectify conditions that caused the child's removal. Must indicate what services were provided.
- 712A.18f(3): Case service plan must provide for placement in most family-like setting available and in as close proximity to parents' home as is consistent with child's best interests and special needs. Agency must indicate why it chose the type of home or institution in which child is to be placed, efforts that parent must make to enable reunification, efforts that agency must make to return child to home, schedule of services to be provided, and schedule for regular and frequent parenting time (not less than once per week).
- 712A.18f(4): Court must consider case service plan prior to entering order of disposition. Order must state whether reasonable efforts have been made to prevent child's removal from home or to rectify the conditions causing removal. Court may order compliance with all or part of case service plan. Also 3.973(E), (F).
- 712A.18f(5): If child is in placement outside of home, case service plan must be updated every 90 days. Agency must consult with foster parents when updating service plan and must attach a statement summarizing the information received from the foster parent.
- 712A.18f(6): Under some circumstances, agency must review case with child's physician in order to ensure that case service plan addresses the child's medical needs.
- 712A.18f(7): If the agency had to review the case with the child's physician and the child is placed outside the home, the court must allow the physician to testify about the case service plan, and the court must notify the physician of the hearing's time and place.
- 712A.19(6): At a review hearing, court must review compliance with and benefit from case service plan, including services and parenting time. Court must review likely harm to child if separation continues and likely harm if child is returned. Also 3.975(F).
- 712A.19(7): After reviewing the case service plan, court must determine how much progress has been made toward rectifying conditions that caused child to be placed or to remain in foster care. Court may modify any part of service plan.

- 712A.19(12) & (13): Concurrent planning is allowed. Reasonable efforts apply to primary and alternate permanency plans
- 712A.19a(2): **Reasonable efforts must be made in all cases except where specified aggravated circumstances have been found.**
- 712A.19a(5): Court must return child to parent if it would not cause a substantial risk of harm to do so. Failure of parent to substantially comply with case service plan is evidence that return of child would cause substantial risk of harm. Also 3.976(E)(2).
- 712A.19a(6)(c): Agency's failure to provide family with services that the state considers necessary for child's safe return is exception to requirement that court order agency to initiate proceedings to terminate parental rights where child has been in foster care for 15 of the most recent 22 months. Also 3.976(E)(3)(c).
- 712A.19c(1)(c): At post-termination review, court must review reasonable efforts made by agency to place child for adoption or in another permanent placement. Also 3.978(C).

### Additional court rules

- 3.961(B)(6)(a): If petition requests removal of Indian child or if Indian child was taken into custody in an emergency, petition must describe **active efforts** that were made to provide services to prevent breakup of family.
- 3.963(B)(1): When court issues order to remove child, must determine that reasonable efforts to prevent removal were made or were not required.
- 3.965(D): In making reasonable efforts determination, child's health and safety are of paramount concern. If placed outside of home, court must determine whether reasonable efforts to prevent removal were made or were not required. Reasonable efforts to prevent removal are required unless aggravated circumstances are found.
- 3.967(D): For Indian child, removal can be ordered or maintained upon clear and convincing evidence, including testimony of at least one expert, that **active efforts** have been made to prevent breakup of Indian family, that these efforts were unsuccessful, and that continued custody by parent is likely to result in serious emotional or physical damage to child.
- 3.975(A): At dispositional review hearing, court reviews compliance with service plan.
- 3.976(A): At permanency planning hearing, court must determine whether agency made reasonable efforts to finalize the permanency plan.
- 3.976(E)(4)(a): At PPH, if court doesn't return child to parents, and if agency shows that TPR is not in best interest of child, court may continue placement in foster care for limited time while agency continues to make reasonable efforts to finalize court-approved permanency plan.
- 3.977(G)(1): Cannot TPR to Indian child unless court is satisfied that **active efforts** have been made to provide remedial services designed to prevent breakup of Indian family and these have proved unsuccessful.

### Some important cases on reasonable efforts

- *In re Rood*, 483 Mich 73 (2009): **Reasonable efforts required by 712A.19a(2) unless aggravated circumstances.** Failure to make reasonable efforts is a defense against TPR, because TPR may be premature due to the "hole in the evidence" that results. Cannot exclude the parent from participation and then terminate rights based on non-participation.

- *In re Mason*, 486 Mich 142 (2010): **Reasonable efforts requirement extends to incarcerated parents, who have a right to participate in a service plan.** Cannot exclude the parent from participation and then terminate rights based on non-participation. DHS cannot use an unsupported opinion that it will take a certain amount of time for the parent to become fit after release from incarceration; the opinion is too speculative. Adopts “hole in the evidence” concern raised in *Rood*: failure to make reasonable efforts amounts to a defense against TPR.
- *In re JK*, 468 Mich 202 (2003): Compliance with a case service plan (i.e., parent-agency agreement) is evidence of ability to provide proper care and custody. The service plan is presumed adequate to remedy the problems identified by the agency.
- *In re Gazella*, 264 Mich App 668 (2005): Compliance with – and benefit from – services is required.
- *In re Fried*, 266 Mich App 535 (2005): Case service plan reflects the reasonable efforts that must be made to rectify conditions that caused removal.
- *In re Newman*, 189 Mich App 61 (1991): Trial court cannot find basis for TPR in a problem that respondent did not have full and fair opportunity to rectify.

#### **Important case on reasonable accommodations for parent’s disability**

- *In re Terry*, 240 Mich App 14 (2000): Americans with Disabilities Act, Title II, 42 USC § 12101, applies to services provided to families by the agency. **If services do not reasonably accommodate the disability, then reasonable efforts cannot be found.** Parent must raise the need for accommodation or a claim of an ADA violation in a timely manner. Reasonable accommodations are not well-defined, but they stop short of providing full-time, live-in assistance.
  - Note: Disability under ADA is a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment.

#### **Important case on active efforts requirement under Indian Child Welfare Act (ICWA)**

- *In re JL*, 483 Mich 300 (2009): **Active efforts are affirmative, more proactive, and amount to more than “reasonable efforts.”** Efforts need not be current, but cannot be in distant past and must be relevant to current circumstances. Efforts need not target child at issue in present proceeding, but efforts must permit current assessment of fitness.