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A Call to Clarify Child Protection Law (Part 2 of 2)

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On a practical level, local trends may make more of a difference in the day to day practice of a child protection attorney than national trends. Nevertheless, trends in other states and across the country, to the extent that they exist, can be useful to bolster arguments for change in local courts or state legislation. Part 1 of this article addressed the background of the reasonable efforts requirement of the Adoption and Safe Families Act (ASFA) and the responsibilities of child protection attorneys to help ensure that these reasonable efforts are effective in serving the needs of abused and neglected children. We turn now to the courts' interpretations of the reasonable efforts mandate and the search for trends in services offered to children and parents in need.

By far the most prevalent national trend in any area is, in fact, an absence of trend in terms of core services viewed as necessary in every child protection situation. A growing number of state courts are affirming that each case is unique and there is no prophylactic response for each family. The Supreme Court of South Dakota has found that "[e]ach case will turn on its own peculiar facts, and compelling circumstances may require different courses of conduct"2 and that "[w]hat is reasonable is defined by the individual circumstances of each case."3 Many other states have also determined that a case-by-case approach is most appropriate.4 Although court decisions are making distinct findings as to what are deemed to be reasonable efforts in each case, there are trends and notable cases in several areas that seem to affect a large number of families. This article features a discussion of three areas common to many child protection cases: chemical dependency, domestic violence, and mental illness.

Chemical Dependency is a predominant issue in child protection cases. Nationwide it appears that parents struggling with issues of chemical dependency are having their rights terminated after being offered and failing or refusing dependency treatment programs. Courts are typically requiring at least some treatment options in order to meet the reasonable efforts standard. In Division of Family Services v. N.X.,5 the Delaware Family Court held that the state did not meet its burden of demonstrating, by clear and convincing evidence, that reasonable efforts had been extended. The Court noted that DFS had only provided a chemically dependent mother with referrals for out-patient treatment programs even after the department's drug treatment professionals had recommended in-patient programming to address the mother's addiction. Beyond chemical dependency treatment, in other cases the services provided range from a bare minimum of counseling and transportation assistance, to a comprehensive package of services including counseling, housing assistance, parenting aides, and homemaker services.

The complex nature of addiction as a disease requiring efforts over an extended period of time is often at odds with the ASFA-mandated timelines. Nevertheless, in the interest of family preservation, many courts have offered services to parents for long periods of time exceeding any recognized timeline.6 Other courts interpret statutes uniformly and seem not to allow variances for chemical dependency. For example, Arizona and Wisconsin courts have tried to maintain a twelve-month deadline for parents to achieve sobriety.7 Avoiding any problem of interpretation, the Ohio legislature enacted a statute that permits termination without reasonable efforts where a parent has placed the child at "substantial risk of harm two or more times due to alcohol or drug abuse" and has rejected or refused to participate in court ordered drug treatment two or more times.8

Domestic Violence is all too often a frightening reality of children involved in child protection cases. Across the country, children living in homes in which domestic violence is a potential threat to their safety can expect to be under the jurisdiction of the court for long periods of time before their well-being in the home is assured or parental rights are terminated.9 Unique challenges arise in cases where one parent is not a perpetrator of child abuse but either lacks the ability to safeguard the child or continues to place priority on his/her relationship with the abuser over that with the child. After offering services to an abused parent without success, several states will terminate parental rights based on a failure to protect the child from the violence of an abuser.10 Where courts have found that reasonable efforts have been made, generally, some level of service programming directed toward the non-abusive parent has been offered. There is a notable lack of cases where a non-abusive parent in a violent situation has successfully challenged the reasonableness of efforts.

Services offered to perpetrators of domestic violence range from non-existent (due to either the severity of the abuse where the perpetrator is a parent, or to the fact that the abuser has no legal relationship with the child) to counseling or anger-management programs related to the abuse. In cases where the abuser has no legal relationship to the child, the jurisdiction of the court can only reach the battered parent if the abuser voluntarily participates in programming designed to remedy the unsafe environment. In all situations involving domestic violence, the players involved in the child protection case should not ignore the detrimental effects suffered by children who witness such violence.11

Mental Illness plagues many families and can be the circumstance which spurs the involvement of the child protection system. Where a parent suffers from a mental illness, the consequences of which adversely affect the lives of the children, most states will subject that parent to the jurisdiction of child protection courts and services in order to ensure the well-being of the children. Notably, in 2003, the Oklahoma Court of Appeals reversed a termination where the condition that precipitated court involvement was mental illness and the state had moved for a termination of parental rights based upon a failure to remedy the condition which led to involvement.12 The Court of Appeals held that substantive due process of law prevents the state from terminating parental rights for "failure to correct a mental condition when such failure is part of the mental condition itself."13 As this case points out, it is important for both the state and the child protection attorney to pay attention to documenting the reasons for intervention and the corresponding grounds for termination in order to preserve the due process rights of both the children and the parents involved. As stated by the Missouri Court of Appeals, "the mental illness of a parent is not per se harmful to a child."14 Thus, the decision to terminate parental rights should be based upon an inability to provide a safe and healthy environment for the child rather than the illness of the parent.

In most cases resulting in a termination of parental rights, reasonable efforts have been extended and the termination turns on some failure of the parent to respond to the reasonable efforts or to remedy conditions. However, Connecticut and Wisconsin have seen cases where reasonable efforts are offered but termination is held to be the appropriate remedy based upon the best interests of the child.15 Several states have gone so far as to enact statutory provisions eliminating the requirement of reasonable efforts where a parent or guardian is the sole caregiver and mental illness renders him or her incapable of caring for the children and/or benefiting from rehabilitation or reunification services.16

Conclusion

Indisputably, we live in a world where there are no guarantees that an alcoholic will never have another drink, that a victim of domestic violence will never again become trapped in an abusive relationship, or that a parent suffering from a treatable mental illness will not abandon treatment and become harmful to his or her own child. Nevertheless, the children living in unsafe or unhealthy environments caused by these conditions deserve our utmost attention and, certainly, our most reasonable efforts.

1 Staff Attorney, National Child Protection Training Center. The author thanks Andrea Domeyer, Tiffany Evansen, Lyndsay Haller, and Emily Stenhoff for their invaluable research assistance and dedication to children.
2 In the Interest of T.H. and J.H., 396 N.W.2d 145, 151 (S.D. 1986).
3 In re W.G, 597 N.W.2d 430, 433 (S.D. 1999).
4 See e.g. In the Interest of C.B. and G.L., 611 N.W.2d 489 (Iowa 2000); Montgomery County Dept. of Social Services v. Sanders, 381 A.2d 1154 (Md. 1978); Adoption of Lenore, 770 N.E.2d 498 (Mass. App. Ct. 2002); In re Welfare of H.M.P.W., R.F.W., and K.W., 281 N.W.2d 188 (Minn. 1979); New Jersey Div. of Youth and Family Services v. A.G., 782 A.2d 458 (N.J. Super. Ct. App. 2001); In the Matter of Sara R., 945 P.2d 76 (N.M. 1997); Matter of Charlene TT., 634 N.Y.S.2d 807 (N.Y. 1995); In re Ryan S., 728 A.2d 454 (R.I. 1999).
5 802 A.2d 325 (Del. Fam. Ct. 2002).
6 See e.g. Williams v. Dept. of Health & Rehabilitative Servs., 648 So.2d 841 (Fla. Ct. App. 1995) (nearly four years of services); In the Interest of J.P.V., 582 S.E.2d 170 (Ga. Ct. App. 2003) (approximately three years of services); In the Matter of Annette F. et al, 911 P.2d 235 (N.M. Ct. App. 1996) (over two years of services); and In the Matter of Z.Z., 494 N.W.2d 608 (S.D. 1992) (three years of services in South Dakota for a total of ten years of services from Minnesota, North Dakota, Colorado and South Dakota).
7 See e.g. Matter of Appeal in Maricopa County Juvenile Action No. JS-501568, 869 P.2d 1224, 1232-3 (Ariz. Ct. App.1994) (The court, relying on Arizona Revised Statutes §8-862 (A)(2), noted that "[i]ndividuals who are unwilling or unable, due to drug addiction, to accept their parental responsibilities and who thereby lose custody of their children to the State, need to be aware that they run the risk of having their parental rights

permanently terminated if they substantially neglect to remedy their addiction in the year following the removal of their children."); In re Termination of Parental Rights of Timothy G., 2003 WL 22946492 (Wis. Ct. App.) (UNPUBLISHED) and In the Interest of Joseph C.B., 2000 Wis. App. 214 (UNPUBLISHED) (Wisconsin Court of Appeals applies the general 12-month standard of Wisconsin Statute 48.415(2)(a)(3) to chemically dependent parents).

8 Ohio Rev. Code Ann. §2151.419 (A)(2)(c) (2004).

9 See e.g. In the Interest of M.S.H., 656 P.2d 1294 (Colo. 1983) (attempts to rehabilitate over two years before termination); In the Interest of J.P. and T.P., 770 N.E.2d 1160 (Ill. Ct. App. 2002) (ten years of services before termination); In the Interest of J.D.D., K.W.J., and K.J.J., 908 P.2d 633 (Kan. Ct. App. 1995) (children were removed three times prior to termination as repeated attempts to remedy the abusive environment failed); In re Angel N., 679 A.2d 1136 (N.H. 1996) (child was removed four times within her first three years; termination did not occur until the child was five years old).

10 See e.g. In the Interest of Doe, 2004 Haw. App. LEXIS 19 (UNPUBLISHED) (mother's rights terminated for failure to provide a safe family home); In re Doe, 2002 Haw. App. LEXIS 151 (UNPUBLISHED) (mother's rights terminated for failure to provide a safe family home); In the Matter of the Welfare of P.R.L., 622 N.W.2d 538 (Minn. 2001) (mother's continued contact with abuser led to termination); In re Interest of Samuel W. and Sophia W., 1999 WL 170021 (Neb. Ct. App.) (UNPUBLISHED) (mother terminated for substantial and continuous neglect and refusal of parental care and protection); In the Interest of J.F., W.F., and M.P.S., 2002 WL 507174 (Utah Ct. App.) (UNPUBLISHED) (mother terminated for failure to protect children from abusive step-father).

11 For a discussion of the effects of domestic violence on children and the need for collaboration among child protection professionals see UPDATE, Volume 16, Nos. 1-2 (2003), Domestic Violence Basics for Child Abuse Professionals and Strategies for Handling Cases where Children Witness Domestic Violence, by Allison Turkel and Christina Shaw. These Update articles are available online at www.ndaa-apri.org.

12 In the Matter of C.R.T., 66 P.3d 1004 (Okla. Ct. App. 2003).

13 Id. at 1010.

14 In the Interest of N.B., 64 S.W.3d 907, 915 (Mo. App. 2002).

15 See e.g. In re the Termination of Parental Rights to Shannon G., 644 N.W.2d 295 (Wis. Ct. App. 2002); In the Interest of Rayshawn P., 2000 Conn. Super. LEXIS 3346 (UNPUBLISHED).

16 See e.g. Alaska Stat. §47.10.086(c)(5)(2002); Ariz. Stat. Ann. §8-846(1)(b); Ky. Rev. Stat. §610.127(6); N.H. Rev. Stat. Ann. §170-C:5(IV); Utah Code Ann. §78-3a-311(b)(ii)(2003).