

## Understanding and Utilizing the Reasonable Efforts Standard in Child Protection Matters<sup>1</sup>

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The term “reasonable efforts” is found throughout the Child Protection Section of Minnesota’s Juvenile Code.<sup>2</sup> This simple phrase may play a big role in achieving positive results for your child client. Understanding the reasonable efforts standard at each stage of a child protection case can be an important tool to use to successfully represent your client.

The court must find that the responsible social services agency (“the agency”) made reasonable efforts to achieve certain duties at various stages and hearings throughout the course of a child protection matter from the initial removal proceedings all the way through the finalization of an adoption.<sup>3</sup> If the agency is not meeting its burden, depending on the stage of the case, there may be severe consequences that can alter the outcome of the case.

This practice point will describe the different stages of the proceedings when reasonable efforts findings must be made by the court. Further, it will review what the court must consider in reviewing whether the agency has met its burden, offer some guidelines as to what constitutes reasonable efforts and examine the legal and financial consequences if the court does not find the agency has made reasonable efforts.

### *When is a Reasonable Efforts Finding Required?*

In all child protection proceedings, the agency has the burden of proving by clear and convincing evidence<sup>4</sup> that it performed the appropriate reasonable efforts for the specific stage of the proceeding.<sup>5</sup> Reasonable efforts must be demonstrated at four different times in child protection proceedings and also continually applies to certain obligations of the agency throughout the life of the case. These efforts include 1) reasonable efforts to prevent an out-of-home placement into foster care or to eliminate the need for removal from the home, 2) reasonable efforts to reunify the parent and child once removal has occurred, 3) reasonable efforts to finalize and support a permanency plan for the child, and 4) reasonable efforts to secure an adoptive home, or to finalize an adoption.<sup>6</sup> The agency must also continuously perform

<sup>1</sup> Special thanks to Linda S. Svitak from the law firm of Faegre and Benson for the original memorandum of law prepared for Children’s Law Center of Minnesota on the “reasonable efforts” standard.

<sup>2</sup> See MINN. STAT. § 260C (2013).

<sup>3</sup> In cases in which the foster child is an Indian child and the Indian Child Welfare Act and Minnesota Indian Family Preservation Act apply, the agency is required to provide the higher standard of “active efforts.” MINN. STAT. § 260.012(c) (2013). A practice guide for lawyers representing Indian children can be found at: <http://www.clcmn.org/wp-content/uploads/2013/10/The-Indian-Child-Welfare-Act-October-Practice-Point.pdf> (last visited January 17, 2014).

<sup>4</sup> MINN. STAT. § 260C.163, subdiv. 1(a); MINN. R. JUV. PROT 39.04 (2012).

<sup>5</sup> MINN. STAT. §§ 260.012(f) (2013); 260C.605, subdiv. 1.

<sup>6</sup> *Id.* § 260.012; MINN. STAT. §§ 260C.178, subdiv. 1(e); 260C.201, subdiv. 2(4); 260C.204(a)(3); 260C.605; 260C.607(1)(c).

reasonable efforts to place siblings together both in foster care, and in adoption,<sup>7</sup> and ensure services provided to families in the system are culturally appropriate.<sup>8</sup>

At every stage of the proceeding, “the child’s best interests, health, and safety must be of paramount concern.”<sup>9</sup> There are certain times when the agency is not required to meet its reasonable efforts burden to prevent removal or to reunify the parent and child.<sup>10</sup> It is the court and not the agency who decides when reasonable efforts are not necessary.<sup>11</sup>

**Practice Tip:** At each step of the proceeding, make sure the agency provides a specific list of its reasonable efforts. Just because the agency performed its reasonable efforts previously, does not mean it is still meeting its burden. Reasonable efforts is an ongoing burden that the agency must continually meet. An argument that the agency has not met its burden can be used if your client’s wishes are not being realized as a result of the agency failing to provide appropriate services or support.

### *To Prevent Placement*

At the initial removal hearing, the agency must show that prior to a child being removed from her home, the agency “made reasonable efforts to prevent the placement of the child in foster care by working with the family to develop and implement a safety plan,”<sup>12</sup> or that, “given the particular circumstances of the child and family at the time of the child’s removal, there are no services or efforts available which could allow the child to safely remain in the home.”<sup>13</sup> The court’s written order resulting from this hearing must briefly describe the agency’s preventative and reunification efforts, why further efforts would not have prevented the child’s removal, or that the agency was not required to perform reasonable efforts due to an exception under Minn. Stat. 260.012(a) (1-7) & (f) (4), or 260C.178, subd. 1 (g).<sup>14</sup>

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<sup>7</sup> *Id.* §§ 260.012(e)(4); 260C.212, subd. 2(d).

<sup>8</sup> *Id.* § 260.012(f).

<sup>9</sup> *Id.* § 260.012(a).

<sup>10</sup> *Id.* §§ 260.012(a)(1)-(7) & (f)(4); 260C.178, subd. 1(g)(1)-(7). There are seven listed exceptions within section 260C.178, subd. 1(g)(1)-(7), that if anyone of them are determined by the court, the agency is relieved of its reasonable efforts burden to reunify the child with her parent. These exceptions are:

- (1) the parent has subjected a child to egregious harm as defined in section 260C.007, subd. 14;
- (2) the parental rights of the parent to another child have been terminated involuntarily;
- (3) the child is an abandoned infant under section 260C.301, subd. 2(a)(2);
- (4) the parent’s custodial rights to another child have been involuntarily transferred to a relative under Minn. Stat. 2010, section 260C.201, subd. 11(e)(1) and section 260C.515, subd. 4; or a similar law of another jurisdiction;
- (5) the parent has committed sexual abuse as defined in section 626.556, subd. 2, against the child or another child of the parent;
- (6) the parent has committed an offense that requires registration as a predatory offender under section 243.166, subd. 1b(a) or (b); or
- (7) the provision of services or further services for the purpose of reunification is futile and therefore unreasonable under the circumstances.

MINN. STAT. § 260C.178, subd. 1(g)(1)-(7).

If reasonable efforts to prevent the placement or to reunify the child are found to be unnecessary, the agency still has the burden of performing reasonable efforts to find a permanent suitable placement for the child in a timely manner. MINN. STAT. § 260.012(j).

<sup>11</sup> *Id.* § 260.012(a); *In the Matter of the Welfare of the Children of T.R.*, 750 N.W. 2d 656, 666 (Minn. 2008) (Court specifically said that the agency was not allowed to stop or not provide services based on the agency’s determination that they would be futile).

<sup>12</sup> *Id.* § 260.012(d)(1).

<sup>13</sup> *Id.* § 260.012(d)(2).

<sup>14</sup> MINN. STAT. § 260C.201, subd. 2(a)(4)(i).

### *To Reunify the Parent and Child after Removal*

The agency bears the burden of showing at each review hearing that after a child is placed in foster care, it is making continual reasonable efforts to reunify the child with her parents.<sup>15</sup> This is the most common time that CLC attorneys would question the agency's reasonable efforts. Carefully consider the agency's efforts in a case when a client wants to reunify with her parents and the agency has not appropriately helped the family to facilitate reunification.

**Practice Tip:** Always remember the factors the court considers when determining whether the agency is meeting its reasonable efforts burden. Ensure that you are aware of the specific case plan that is implemented for your child's parent, and that the agency is providing the appropriate type and amount of services that specifically relate to the safety and protection of your client.

### *To Finalize a Permanent Plan*

The agency must also make reasonable efforts to finalize a permanent plan for a child when the child cannot return home.<sup>16</sup> Once a child is placed out of her home, the permanency clock begins to tick. The court must review the permanency progress of the child no later than six months after the child is placed out of her home.<sup>17</sup> At this progress hearing, the court will look at the parent's progress on the out-of-home case plan, the agency's reasonable efforts to reunify the parent and child, and the agency's reasonable efforts to finalize a permanent home in the case that the child cannot return to her parent's care.<sup>18</sup>

If at this six month marker the court does not feel the child can safely return home at this time, but the parent is making progress on the plan, the court may continue the matter up to an additional six months.<sup>19</sup> If the parent has not made progress on the plan, the court may have the agency proceed immediately to finding a permanent option for the child, including filling an appropriate permanency petition with the court.<sup>20</sup>

In order for the agency to meet its burden of reasonable efforts to finalize a permanent plan for the child, the agency must show due diligence to:

- (1) Reunify the child with the parent or guardian from whom the child was removed;
- (2) Assess a noncustodial parent's ability to provide day-to-day care for the child and, where appropriate, provide services necessary to enable the noncustodial parent to safely provide the care, as required by Section 260C.219;
- (3) Conduct a relative search to identify and provide notice to adult relatives as required under section 260C.221;
- (4) Place siblings removed from their home in the same home for foster care or adoption, or transfer permanent legal and physical custody to a relative. Visitation between siblings who are not in the same foster care, adoption, or custodial placement or facility shall be consistent with section 260C.212, subdivision 2; and
- (5) When the child cannot return from the parent or guardian from whom the child was removed, to plan for and finalize a safe and legally permanent alternative home for the child, and consider permanent alternative homes

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<sup>15</sup> MINN. STAT. §§ 260.012 (e), (f)(2); 260C.201, subdiv. 2(4).

<sup>16</sup> *Id.* §§ 260.012 (e)(5); MINN. STAT. § 260C.204(a)(3).

<sup>17</sup> MINN. STAT. § 260C.204(a).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at (c)(1)(ii).

<sup>20</sup> *Id.* at (c)(2)(i)-(iii). The permanency dispositions available to the agency and the court include termination of parental rights, guardianship to the commissioner of human services, permanent transfer of legal and physical custody of the child to a relative, permanent custody to the responsible social services agency, and temporary legal custody to the responsible social services agency. *Id.* § 260C.515.

for the child inside and outside of the state, preferably through adoption or transfer of permanent legal and physical custody of the child.

MINN. STAT. § 260.012(e)(1)-(5).

The court may find that the agency has met its burden when it shows it made reasonable efforts to identify a more legally permanent placement for the child than an order for foster care, and the agency has reasonably and appropriately engaged the child for independent living planning.<sup>21</sup>

**Practice Tip:** Be aware that reasonable efforts to find the child a permanent placement, including adoption, may be performed at the same time the agency is providing reasonable efforts to either prevent placement, or to reunify the child with their family.<sup>22</sup> The agency must disclose its choice to seek both reunification and concurrent placement with all parties and the court, as well as provide each with the plans to do so.<sup>23</sup>

### *To Finalize an Adoption*

Once the parental rights have been terminated, it is the agency's burden to perform reasonable efforts to finalize an adoption for the child.<sup>24</sup> The reasonable efforts required for finalizing an adoption include:

1. Using age appropriate strategies to engage a child in planning for the adoption.
2. Identifying appropriate prospective adoptive placements by updating the child's identified needs.<sup>25</sup>
3. Making an adoptive placement that fits the child's identified needs including ensuring relatives who have been in touch with the agency and who have indicated interest in adopting the child as well as relatives located in an updated<sup>26</sup> search are notified of the need for an adoptive home for the child, and relative searches are updated and ongoing.
4. Engage those identified in the relative search and the child's foster care placement as being an adoptive resource, and taking other measures when there is no identified possible adoptive parent.
5. Updating and completing the child's social and medical history.
6. Making and updating appropriate referrals as required by section 260.851 (the Interstate Compact on the Placement of Children).
7. Giving notice of responsibilities to prospective adoptive parents.
8. Offering an adoptive parent the ability to apply for adoption assistance.
9. Certifying and assessing adoptive assistance.
10. Placing the child with their siblings.
11. Working with the adoptive parents and the court to submit the adoption petition and finalize the adoption.<sup>27</sup>

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<sup>21</sup> MINN. STAT. § 260C.521, subdiv. 1 (d)(1)-(2).

<sup>22</sup> MINN. STAT. § 260.012(k).

<sup>23</sup> *Id.*

<sup>24</sup> MINN. STAT. § 260C.605.

<sup>25</sup> *Id.* § 260C.212, subdiv. 2. (defining placement needs of a child in care).

<sup>26</sup> An updated search is required whenever:

- (A) There is no identified prospective adoptive placement for the child notwithstanding a finding by the court that the agency made diligent efforts under section 260C.221, in a hearing required under section 260C.202;
- (B) The child is removed from the home of an adopting parent; or
- (C) The court determines a relative search by the agency is in the best interests of the child.

*Id.* § 260C.605, subdiv. 1 (d)(B)(ii)(A)-(C).

<sup>27</sup> *Id.* § 260C.605, subdiv. 1 (d)(1)-(10).

When there is no identified possible adoptive parent, the agency must register the child on the state adoption exchange, unless they can provide the court with an exception for doing so. The agency must also review families that the agency knows have approved adoption home studies, present the child to other adoption agencies for assistance seeking an adoptive home, use newspaper and other forms of media to find an adoptive home, use a private agency for intensive recruitment efforts, and make any other efforts or resources that could reasonably lead to an adoptive home for the child.<sup>28</sup>

**Practice Tips:**

- 1) Ensure notice that the child is in need of an adoptive home is sent to relatives who have shown an interest in adopting the child, and have kept the court or agency aware of their contact information, as well as new relatives or kin located in the updated search.<sup>29</sup>
- 2) Make sure to speak with your client about possible relatives or caring adults they know and would like to be considered as an adoptive placement, relay the names you receive from your clients to the agency in court on the record and ask the court for an updated kinship search if it has been a while since the last one has been performed.

The agency has the responsibility to seek an adoption placement for the child.<sup>30</sup> Neither the court, nor the adoptive child can relieve the agency of this burden.<sup>31</sup> Thus, it is critical to know your clients placement preference and, with your client's consent, ensure your client's preference is known to the court.

*To Place Siblings Together*

The agency must also make reasonable efforts to place children with their siblings.<sup>32</sup> This determination must be made for both placement in foster care, as well as with an adoptive home.<sup>33</sup>

The court should inquire what reasonable efforts the agency has made to place siblings in foster care together at each court proceeding.<sup>34</sup> If siblings are not placed together the agency must create a visitation plan for the siblings, unless it is against the children's safety or wellbeing.<sup>35</sup>

When a child is placed for adoption, the agency must document the reasonable efforts it has made to place siblings together, and specify reasons for why the children are separated.<sup>36</sup> The agency must continue to make reasonable efforts to place siblings together for adoption until the court relieves it of this duty.<sup>37</sup> The court will relieve the agency of its reasonable efforts burden only if further reasonable efforts to place the children together would be futile, or it is in the best interests of the children that for the purpose of adoption they are separated.<sup>38</sup>

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<sup>28</sup> *Id.* § subdiv. 1(d)(3)(iv)(A)-(F).

<sup>29</sup> *Id.* § subdiv. 1 (d)(3)(i)(A)&(B).

<sup>30</sup> *Id.* § 260C.605, subdiv. 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* §§ 260C.212, subdiv. 2(d); MINN. STAT. § 260.012(d)(4).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* § 260C.178, subdiv. 1(k).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* § 260C.605, subdiv. 1(d)(9).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

## ***Court Considerations***

Among other things, the court considers six specific factors when determining whether the agency has met its reasonable efforts burden.<sup>39</sup> These factors include: “1) whether the services provided were, relevant to the safety and protection of the child; 2) adequate to meet the needs of the child and family; 3) culturally appropriate; 4) available and accessible; 5) consistent and timely; and 6) realistic under the circumstances.”<sup>40</sup>

The court specifically looks to the case plan that the agency and parents have submitted to the court.<sup>41</sup> If the case plan is approved by the court, it is presumptively reasonable, thus when all of the actions of the agency taken together are consistent with the case plan, its actions are likely presumptively reasonable in the eyes of the court.<sup>42</sup>

Even with the above referenced presumption, the court shall analyze the quantity and quality of the services provided to the parent in accordance with the case plan in order to determine whether reasonable efforts are met.<sup>43</sup> If the quantity and quality of the services are lacking, the court can find that reasonable efforts were not made.

Finally, the court may consider the relevance of the parent’s problems in relation to the parent’s ability to parent his/her child when considering whether the agency made reasonable efforts.<sup>44</sup> The agency only needs to help a parent address issues that are “relevant to the safety and protection of the child.”<sup>45</sup> In *Children of T.A.A.*, the Court determined that the agency’s efforts were not unreasonable when it did not provide a mother with services to combat her drug addiction, because her drug use did not actively hinder her ability to parent her child.<sup>46</sup> Since the agency did provide other services directly relevant to the difficulties the parent had in parenting her child, the court found the agency’s actions were reasonable.<sup>47</sup>

## ***Effects When the Responsible Social Services Agency Does Not Performing its Reasonable Efforts Obligation***

### *Legal Effects*

The effects of whether the agency has performed its reasonable efforts burden varies by the stage of the proceedings. In the early stages, the court may allow for a child to continue to be placed out of the home, even if the court determines that the agency’s efforts for prevention or reunification were unreasonable, as long as it is determined that further reasonable efforts would not allow for the child to return home.<sup>48</sup>

Consequences in later stages of the proceedings can be much more severe if reasonable efforts are not made. If the court determines that the agency has not performed reasonable efforts for reunification prior to the termination of parental rights, then the termination of such rights can be reversed.<sup>49</sup>

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<sup>39</sup> MINN. STAT. § 260.012(h).

<sup>40</sup> *Id.*

<sup>41</sup> *In the Matter of the Welfare of the Children of S.E.P. and J.W.P.*, 744 N.W. 2d 381 (Minn. 2008).

<sup>42</sup> *Id.* at 388.

<sup>43</sup> *In the Matter of the Welfare of the Children of S.W.*, 727 N.W. 2d 144, 150 (Minn. 2007) (citing *Welfare of A.H.*, 402 N.W. 2d 598, 604 (Minn. Ct. App. 1987)).

<sup>44</sup> *In the Matter of the Welfare of the Children of T.A.A.*, 702 N.W. 2d 70, 710 (Minn. 2005).

<sup>45</sup> MINN. STAT. § 260.012(h)(1).

<sup>46</sup> *In the Matter of the Welfare of the Children of T.A.A.*, 702 N.W. 2d 703, 710 (Minn. 2005).

<sup>47</sup> *Id.* At 710-11.

<sup>48</sup> MINN. STAT. §§ 260C.178, subdiv. 1(e)(2); 260C.201, subdiv. 2(b).

<sup>49</sup> *In the Matter of the Welfare of the Children of T.R.*, 750 N.W. 2d 656,666 (Minn. 2008). *See also, In Re Welfare of Copus*, 356 N.W.2d 363, 367 (Minn. Ct. App. 1984).

### *Title IV-E requirements and Funding Effects*

A lack of reasonable efforts can also have an impact on the funding the agency receives from the federal government. In order to receive federal funding under the Social Security Act, Title IV-E, the court must make a finding of reasonable efforts.<sup>50</sup> Federal law requires an individualized determination of reasonable efforts for each child, based on her specific case.<sup>51</sup>

The determination that reasonable efforts were made to prevent the removal of the child must be made within 60 days following the removal of the child from the home.<sup>52</sup> If this determination is not made within this 60 day window, then the agency forgoes all possible federal aid reimbursement of care for the duration that the child is in foster care.<sup>53</sup>

Moreover, an annual determination of reasonable efforts is required to finalize a permanency plan after the initial determination of eligibility described above, and each year thereafter.<sup>54</sup> If the agency fails to meet its burden of reasonable efforts to finalize a permanency plan, this can render the child ineligible to get federal funding for the entire 12 month period and the agency may incur these costs. However, if the court fails to find that the agency met its burden of reasonable efforts to finalize a permanency plan during the 12 month period, the child may still be eligible for federal funding if the court determined the agency made reasonable efforts at some point within the 12 month period.<sup>55</sup>

**Practice Tip:** If you are asking the court to find the agency did not make reasonable efforts and the court rules in your favor, request that the court explicitly state in its written findings that the agency has not met its burden.<sup>56</sup> It is not enough just to infer that reasonable efforts were done based on a list of actions the county has taken.<sup>57</sup>

### ***Conclusion***

Challenging reasonable efforts is a powerful advocacy tool for attorneys to utilize in their child clients' cases when the agency is not fulfilling its obligations. The agency has an ongoing burden throughout your client's case to meet the different reasonable efforts requirements for each stage of the proceeding. If the agency is not meeting its burden, you as an advocate can positively change the outcome of your client's case.<sup>58</sup>

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<sup>50</sup> 42 U.S.C. 672 (a)(2)(ii) (2012). *See also*, U.S. Department of Health and Human Services, Administration for Children & Families, *Title IV-E Foster Care Eligibility Review Guide*, 34 (December 2012), [http://www.acf.hhs.gov/sites/default/files/cb/title\\_iv\\_e\\_review\\_guide.pdf](http://www.acf.hhs.gov/sites/default/files/cb/title_iv_e_review_guide.pdf) (last visited on January 29, 2014) [hereinafter *Title IV-E Foster Care Review Guide*].

<sup>51</sup> *Title IV-E Foster Care Eligibility Review Guide*, *supra*, note 50 at 31-32.

<sup>52</sup> *Id.* at 34.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 45 CFR § 1356.21(d), *See also*, *Title IV-E Foster Care Eligibility Review Guide*, *supra*, note 50 at 31-34.

<sup>57</sup> *Title IV-E Foster Care Eligibility Review Guide*, *supra*, note 50 at 34.

<sup>58</sup> Only a few appellate courts in Minnesota have found an agency's actions to be unreasonable. *See, e.g., In the Matter of the Welfare of the children of T.R.*, 750 N.W.2d 656, 666 (Minn. 2008) (Court reversed father's termination of parental rights partly because the agency did not make reasonable efforts for the father to succeed with his case plan).