

Trial Skills in Child Protection Proceedings



Trial Skills in Child Protection Proceedings

Style is overrated.

**Information and impressions
are not.**

Trial Skills in Child Protection Proceedings

"In war the victorious strategist only seeks battle after the victory has been won, whereas he who is destined to defeat first fights and afterwards looks for victory."

Sun Tzu *The Art of War*

Trial Skills in Child Protection Proceedings

Trial skills are one or lost long before we enter the courtroom.

Trial Skills in Child Protection Proceedings

Have a plan!

Trial Skills in Child Protection Proceedings

And a Plan B

Trial Skills in Child Protection Proceedings



Trial Skills in Child Protection Proceedings

1. Asking questions
2. Evidence and Objections
3. Take the initiative on reasonable efforts

Asking Questions

How do you ask
questions in court?

Asking Questions

It depends entirely on
your purpose.

Asking Questions

Open-ended questions elicit narratives – tell stories

Open-ended questions highlight the person answering

Asking Questions

Open-ended questions:

Who?

When?

What?

Why?

Where?

How?

Asking Questions

Open-ended questions:

Please tell the court . . .

Asking Questions

*Please tell the Court
what happened when
Sheriff John Brown
approached you?*

Asking Questions

Close-ended questions
(leading questions) narrow
discussions

Close-ended questions
highlight the person
asking the question

Asking Questions

Close-ended questions
suggest the answer

Asking Questions

➤ *It was 5 pm, wasn't it?*

Yes

➤ *You shot the Sheriff? Yes*

➤ *But you didn't shoot the deputy? Yes*

Asking Questions

In all cases, keep questions simple.

No compound questions

Asking Questions

After you were confronted by Sheriff John Brown, you shot the Sheriff but you did not shoot the deputy?

Asking Questions

*Well, I wouldn't say
"confronted."*

Asking Questions

One fact per question!

Baby steps

Asking Questions

On direct examination
only non-leading
(open-ended)
questions are allowed.

Asking Questions

Leading questions don't work well anyway.

You love your child? Yes

You'd do anything for your child? Yes

Asking Questions

On cross-examination
leading questions are
allowed and encouraged

Remember one fact =
one question

Asking Questions

You had a gun?

The Sheriff was there?

Sheriff John Brown?

And a Deputy?

You shot the Sheriff?

But you did not shoot the Deputy?

Asking Questions

One fact per question!

Baby steps

Asking Questions

Trick questions are not
allowed

Asking Questions

When did you stop beating your child?

How long after you got high did you finally check your child's fever?

Asking Questions

Objections

Objections make the other side follow the rules.

Asking Questions

They are really important
because the other side tends
to not follow the rules

Asking Questions

Why?

Because we have this notion that “informal” means the rules don’t apply.

Asking Questions

Object or object not,
there is no try.



Asking Questions

Use it or lose it!



Evidence

WAIVER !!!

“Father waived his hearsay objection by not asserting it in timely fashion”

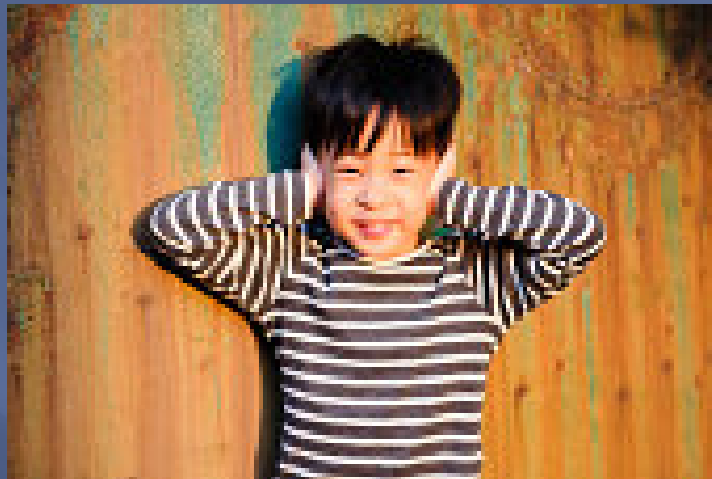
James W. v ADCS 2015 WL 773402

Asking Questions

You won't contract an STD by objecting.

Asking Questions

“Objection overruled” is not that painful to hear.



Evidence in Child Protection Proceedings

Topics

1. General things to think about
2. Foundation

Evidence in Child Protection Proceedings

3. Rule 45
 - a. Child's statements
 - b. Court reports
4. Party admissions

Asking Questions

1. Evidence is all about purpose.

Why is this being offered?

Evidence

2. Win evidence disputes at trial. You won't win on appeal.

Evidence

HARMLESS ERROR!!!

“Noncompliance with the rules . . . reviewed for harmless error when an objection has been raised.”

Monica C v. ADES, 211 Ariz 89 (2005)

Evidence

3. The victorious strategist thinks about admissibility in advance.

a)

Evidence

4. Every Judge has a unique way of doing and a unique way of thinking.

Evidence



Evidence

5. Everything is admissible unless someone objects!

Evidence

Foundation –

How do witnesses know what they know?

How do we know that this exhibit is what they say it is?

Evidence

How do they know
enough to offer that
opinion?

Evidence

GM says Dad uses
methamphetamines

Evidence

So, what's the foundation for GM statement?

Evidence

Did GM observe it?

Hear it from someone
else?

Did GM analyze behavior?

Evidence

What is the foundation
for an opinion?

Evidence

“This child is adoptable”

“This child needs
permanency”

“This parent will not be
able to parent in the near
future”

Evidence

Rules 701 and 702

Evidence

- The expert's opinion must be based on
- a. knowledge, skill, experience, training or education and,
 - b. sufficient data
 - c. having applied reliable principles and methods

Evidence

A foot doctor is not qualified to do brain surgery.



Evidence

And vice versa:



“Brain surgery? I have an app for that!”

Evidence

DCS workers are not experts in everything.

Evidence

“This child is adoptable”

“This child needs permanency”

“This parent will not be able to parent in the near future”

Evidence

Testimony of DCS worker:

Differentiate policy from fact or expert opinion.

Evidence

Testimony of DCS worker:

A failure to call in for or take a drug test is evidence of current use.

Evidence

Testimony of DCS worker:

DCS workers should have no more credibility than anyone else.

Evidence

Testimony of DCS worker:

Testimony of parent = bias

*Testimony of case manager =
bias, too*

Evidence

Rule 45 (B) and (E)

Evidence

(E) Kid's statements about abuse or neglect

Evidence

Statement of a child to OCWI:

I hate it when Daddy yells at Mommy.

I wish he (Daddy) would Go away.

I want to live with Mommy and Tommy.

Evidence

(B) Court Reports

Evidence

A report that covers the criteria in Rule 45 plus attachments and available witness

Evidence

“shall admit”

If properly disclosed

Evidence

Old report admissible in
a severance? Unclear

Evidence

Opposing party
statements

Rule 801 (d)(2)

Evidence

5. Statement of a Party

"Mom and I have used meth together."

"She neglects the kids when she is high."

Evidence

Statement of Dad:

A. Admissible against
Dad?

B. Admissible against
Mom?

Evidence

Psychological Evaluations

Evidence



Litigating Reasonable Efforts

Reasonable Efforts
to Reunify Families

Reasonable Efforts

Reasonable Efforts

1. A little history
2. How the money thing works [or doesn't]
3. Why and how to litigate?

Reasonable Efforts

In the 1950's when Elvis
was King and I was born

• • •



Reasonable Efforts

Minnesota –
introduced “reasonable
efforts”

Reasonable Efforts

The juvenile court may terminate all rights of parents . . . [where] reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination.

Reasonable Efforts

We can't take your kid forever if we don't try to help first.

Reasonable Efforts

By 1980, "reasonable efforts" gained traction. Congress passed the Adoption Assistance and Child Welfare Act.

Reasonable Efforts

(15) provides that, in each case, reasonable efforts will be made . . . (B) to make it possible for the child to return to his home.

Reasonable Efforts

But the pendulum swung almost immediately. . .



Reasonable Efforts

By the mid-1990's, there is serious push back.

Reasonable Efforts

Led by Washington Post
columnist Mary McGrory



Reasonable Efforts

and Wendy's Dave
Thomas



Reasonable Efforts

The law's folly -- requiring social workers to make "reasonable efforts" to send a child back to abusive parents

Reasonable Efforts

[as] if a wife-batterer were brought into court and the judge ordered the wife to return to him while he tried to straighten out.

Reasonable Efforts

. . . the tension in social workers who must work under warring mandates: investigating abusive parents while drawing up plans to reunite them with their endangered children.

Mary McGrory 5-12-96

Reasonable Efforts

The fear was all about
abuse – not neglect.

Reasonable Efforts

At the same time that Congress enacted the Omnibus Crime Control Act.

Reasonable Efforts

Senator (now Governor)
Mike Dewine of Ohio:

Reasonable Efforts

We send these children back to the custody of people who have already abused and tortured them. We send these children back to be abused, beaten, and, many times, killed.

Reasonable Efforts

Add to all of this the relatively new phenomenon of crack. . .

Crack is so addictive that mothers have sold their children so they can get more of it.

Reasonable Efforts

That led to the Adoptions
and Safe Families Act of
1997.

Reasonable Efforts

ASFA made a couple of major changes:

Reasonable Efforts

in making such reasonable efforts, the child's health and safety shall be the paramount concern;

Reasonable Efforts

Time limits for foster care

Reasonable Efforts

“kids languishing in foster care”

Reasonable Efforts

What happens if they don't make reasonable efforts?

They can't terminate parental rights and not much else.

Reasonable Efforts

Myth: DCS loses lots of money if the judge says they failed to make reasonable efforts.

Reasonable Efforts

Truth:

Any loss of funds is
miniscule.

127

Reasonable Efforts

Title IV-E (foster care reimbursement) is only available for eligible kids

Reasonable Efforts

What make a kid eligible?

Reasonable Efforts

1. Must be in licensed foster care

Reasonable Efforts

2. Family must have been AFDC eligible using 1997 standards

Reasonable Efforts

3. Judge must make a reasonable efforts at reunification finding within the previous 12 months.

Reasonable Efforts

What does that mean?

Reasonable Efforts

45 CFR 1356

Reasonable Efforts

(i) The title IV-E agency must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan . . . within twelve months of the date the child . . . entered foster care and at least once every twelve months thereafter

Reasonable Efforts

(ii) If a judicial determination regarding reasonable efforts . . . is not made . . . the child becomes ineligible under title IV-E at the end of the month in which the judicial determination was required to have been made, and remains ineligible until such a determination is made.

Reasonable Efforts

What does that all
mean?

Reasonable Efforts

1. The dreaded financial penalty does not apply to any kid in unlicensed relative care

Reasonable Efforts

2. Or any kid whose family was not AFDC eligible using 1996 standards

Reasonable Efforts

Roughly 45% of kids cannot lose federal reimbursement because they were never eligible in the first place.

Reasonable Efforts

4. In order to retain funding, DCS needs one reasonable efforts finding every 12 months

Reasonable Efforts

Let's say January 13,
the judge finds
reasonable efforts has
been made

Reasonable Efforts

July 1, the judge delays
a finding because some
mandate was delayed

Reasonable Efforts

Sept 1, the judge finds that the state has made minimal efforts

Reasonable Efforts

Dec 1, the judge finds that DCS has made efforts equal to those of the 2008 Detroit Lions

Reasonable Efforts



Reasonable Efforts

January 1, the judge finds that DCS has made efforts equal to those of the producers of Friday the 13th Part VIII

Reasonable Efforts

January 12, the judge
finds reasonable
efforts again . . .

Reasonable Efforts

No financial
consequences to DCS

Reasonable Efforts

How are reasonable efforts finances enforced?

By a random audit of 80 cases every 3 years

Reasonable Efforts

Between 1998 and today,
AZ has had five random
Federal audits

Reasonable Efforts

The random Federal audits for AZ have found one case in which 12 month reasonable efforts finding were not made

Reasonable Efforts

AZ has lost \$3827 in federal reimbursement for that one case. \$2484 for the child; \$1343 for administrative expenses

Reasonable Efforts

Out of about \$1 billion in Title IV-E foster kid reimbursements.

Reasonable Efforts

2015 – the same year that the Federal Children's Bureau found that AZ's reunification efforts were inadequate

Reasonable Efforts

2015 – the same year
that CPS was performing
so poorly that we
changed its name to DCS

Reasonable Efforts

2015 -- the same year that AZ ranked dead last of all states in the length of time it took to get services to kids in foster care

Reasonable Efforts

Tinsley v. Faust settlement.

<https://dcs.az.gov/news-reports/settlement>

Reasonable Efforts

What about reasonable efforts as a predicate to termination of parental rights?

Reasonable Efforts

Shawanee S. v. AZ DES

234 Ariz. 174, Div. 1, 2014

Reasonable Efforts

Because Mother failed to raise any objection in the juvenile court regarding the adequacy of services . . . we consider whether she waived that argument on appeal

Reasonable Efforts

ADES's obligation, however, does not free a parent from the need to raise a timely objection if the parent believes services are inadequate.

Reasonable Efforts

a parent who does not object in the juvenile court is precluded from challenging that finding on appeal.

Reasonable Efforts

It is a contributory
negligence standard

Reasonable Efforts

Even if DCS does nothing,
parents have to do DCS's
job.

Reasonable Efforts

What does that mean for
the lawyer?

Reasonable Efforts

What do we need to do?

Reasonable Efforts

DCS case plans tend to be one size fits all.



Reasonable Efforts

1. Don't agree to a case plan that does not address the individual needs of your client.

Reasonable Efforts

2. Ask clients, what they think they need?

2.a. Explore for trauma.

Reasonable Efforts

3. Pay close attention to psychological evaluations.

Reasonable Efforts

Did DCS offer the services that were actually recommended by a psych eval?

Reasonable Efforts

4. Make a stink about untimely services – on the record.

Reasonable Efforts

5. Periodically evaluate services as they happen.

Reasonable Efforts

Are there roadblocks that could be fixed?

If they aren't working, why not? Can it be fixed?

Reasonable Efforts

6. Attend CFT's
whenever possible

Reasonable Efforts

7. Have a plan B for your client.

Don't just object.

Propose.