VERMONT JUVENILE LAW AND PRACTICE MANUAL

JUNE 2010

(Amended January 2013)

The Office of the Defender General

This manual was written and produced by Jennifer Wagner, Pam Marsh, Susan Buckholz, Trish Halloran, Bob Sheil, the Office of the Juvenile Defender, and the Office of the Appellate Defender. Technical assistance and funding were provided by the Vermont Court Improvement Program, with a grant from the U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. Thanks to all who contributed to this manual.

JUVENILE PRACTICE MANUAL 2010
TABLE OF CONTENTS

I. INTRODUCTION

Those involved in the child welfare system should have an understanding of the following issues regarding the law, also known as core competencies:

* A basic outline of the state statutory structure of the child welfare system
* A basic outline of federal law and regulation that impacts the child welfare system
* A basic outline of policies and laws the Department for Children and Families operates under
* A basic outline of the regulations Service Providers operate under
* Knowledge of Administrative Directives affecting the child welfare system

A. Overview of Vermont Family Court System

In October, 1990, a system of family courts was instituted in Vermont. This was the result of an act passed by the Vermont Legislature in its 1990 session. All juvenile matters that were heard by the district court, sitting as a juvenile court, are now heard by the family court.

B. Overview of Relevant Statutes and Rules

1. *Juvenile Judicial Proceedings Statute and 33 V.S.A. Chapter 49*

Chapters 51, 52 and 53 of Title 33 of the Vermont Statutes Annotated took effect on January 1, 2009 and superceded Chapter 55 of Title 33, Vermont Statutes Annotated, which was a modified version of the Uniform Juvenile Court Act. All section references in this guide are to Title 33 unless otherwise noted. Chapter 55's predecessor was Chapter 12 of Title 33, and some older juvenile cases thus may refer to these predecessor statutes.

According to the Uniform Laws Annotated (West Publishing, 1999), the Act has been adopted only by Georgia, Pennsylvania, and North Dakota. Vermont is not listed as an adopting state, so the precision of the Uniform Laws Annotated must be questioned. Although details of the Act may vary from state to state, the practitioner may wish to consult the annotations contained in the Uniform Laws Annotated for persuasive authority where no Vermont Supreme Court opinion has determined an issue.

The new juvenile judicial proceedings statute, 33 V.S.A. §§5101-5322, is an omnibus statute that provides distinct procedures for cases involving children alleged to be in need of care or supervision (“CHINS”) and children before the Court on a delinquency petition. As a result of the special session of the legislature in July 1981, certain "violent" delinquents may be tried as adults. The statute encompasses a basic procedure to deal with both delinquent children and "children in need of care or supervision" (or CHINS).

CHINS include:

(a) children who have been abandoned or abused by their parents, 33 V.S.A.§5102(3)(A);

(b) children who are neglected, i.e. who are "without proper parental care or subsistence, education, medical or other care" necessary for well-being, 33 V.S.A. § 5102(3)(B);
(c) children who are "unmanageable," i.e. who are "without or beyond the control of parents," 33 V.S.A. § 5102(3)(C); and/or
(d) children who are habitually and without justification truant from compulsory school attendance, 33 V.S.A. 5102(3)(D).

In Vermont the juvenile court is a court of limited jurisdiction. Unless the statutory authority exists for a particular procedure, the juvenile court lacks the authority to employ it. See, In re K.H., 154 Vt. 540, 542 (1990); In re B.S., 166 Vt. 345, 353 (1997) (court held that the juvenile court cannot consider side issues that do not directly concern the status of the juvenile before the court).

Under the 2009 statutory scheme, the Court is specifically empowered to consider some issues that were previously excluded from its jurisdiction, such as:

- sibling visitation for children in DCF custody (33 V.S.A. § 5319)
- visitation with parents and extended family members for children in DCF custody (33 V.S.A. § 5319)
- placement of custody with kin or other people important to the child (33 V.S.A.§§ 5308; 5256; 5232;)
- enforcement of protective orders through criminal sanctions (33 V.S.A. § 5115)
- modification of a restitution award made by a restorative justice panel (33 V.S.A. § 5264)

2. *Uniform Child Custody Jurisdiction Act (UCCJA)*

The Uniform Child Custody Jurisdiction Act (UCCJA), 15 V.S.A. §1031 et seq., applies to juvenile cases. In re A.L.H., 160 Vt. 410, 413 (1993). This statute, among other things, attempts to ensure that the state that hears the case is the best forum to decide the interests of the child. The statute looks at the child's ties to the states involved, and where evidence concerning the case is located.

The emergency jurisdiction provisions of 15 V.S.A.§1032(a)(3)(B) permit the entry of temporary custody orders. A.L.H. 160 Vt. at 415. However, other criteria must be satisfied in order to enter permanent orders regarding a child. Id. at 413. See also, In re: D.T., 170 Vt. 148 (1999) (child and parent had significant connections to Vermont and there was substantial evidence regarding the child in Vermont); In re B.T.C., 149 Vt. 196, 198-99 (1988) (Vermont had jurisdiction under Juvenile Procedure Act and because home state declined jurisdiction); In re: B.C., 169 Vt. 1 (1999) (at time of TPR, Vermont was child's home state and thus Vermont had jurisdiction); Jackson v. Hendricks, 2005 VT 113 (family court has jurisdiction to terminate Connecticut guardianship); In re: N.H., 2005 VT 118, (Florida declined jurisdiction because Vermont was most appropriate forum to decide best interests of the child; Vermont always had subject matter jurisdiction, UCCJA is about territorial limits).

3. *Indian Child Welfare Act (ICWA)*

The Indian Child Welfare Act (ICWA), 25 U.S.C.A. § 1902, is jurisdictional. It is only triggered if the child is an "Indian Child," which means that the child's tribe or band must be recognized by the Bureau of Indian Affairs (the Federal Register puts out a list each year). Then that tribe or band must decide whether the child meets the criteria to be considered a member. ICWA requires, among other things, that if a child is of Native American ancestry of a federally recognized tribe or band, notice must be given to the parent or "Indian custodian" and the "Indian child's tribe" when foster care placement or termination of parental rights is sought. Id. at sec. 1912. The tribe must be given leave to intervene. In re J.T. and C.T., 166 Vt. 173, 181-184 (1997). Failure to give proper notice constitutes grounds for remand and possible reversal of the TPR order. Id. at 183-84 (Because identity of child's tribe was not clear, court was required to give notice to the Bureau of Indian Affairs). The ICWA applies only to Native American tribes that are recognized as eligible for services provided by the Bureau of Indian Affairs. Id; see 25 U.S.C.A. § 1903(8). The Abenakis of Vermont have not been so recognized. If you question a child's Native American ancestry, you can contact the Assistant Attorney General for the DCF office in your county for assistance with such legal aspects of the case. A determination of whether ICWA applies in a particular case should be made very early in the case and should be addressed pre-merits.

4. *Vermont Rules of Family Procedure*

Vermont Rule of Family Procedure 1 sets forth the procedures for juvenile delinquency proceedings. Generally, the Vermont Rules of Criminal Procedure govern delinquency proceedings except where such rules are irrelevant (e.g., rules on juries), or would conflict with a statutory provision. Some of the criminal rules are modified in delinquency proceedings to conform to the juvenile code. In juvenile proceedings, admissions and denials replace pleas of guilty and not guilty.

V.R.F.P. 2 sets forth the procedures in CHINS (Children in Need of Care or Supervision) proceedings. Generally, the Vermont Rules of Civil Procedure apply, with the following exceptions: 1) where the rules are irrelevant or would operate at cross-purposes with the juvenile laws; 2) Vermont Rule of Criminal Procedure 17 provides the procedure for the issuance of subpoenas; 3) Civil Rule 12(a) & (h) do not apply and thus the obligation to file answers and pretrial motions to preserve certain defenses does not exist in CHINS proceedings, in order to expedite proceedings; 4) Rule 2 sharply limits the availability of certain types of civil discovery, and instead imposes the same discovery obligations of the state in criminal cases upon all parties to insure rapid and consistently complete disclosure of information. (For further information refer to section on Discovery.)

V.R.F.P. 3 sets forth additional procedures in instances where a Petition to Terminate Parental Rights has been filed.

V.R.F.P. 5 sets forth the procedure for the court ordering a physical or mental evaluation of a party or of a person who is in the custody or legal control of a party. The rule also vests with the court the poser to order a home study. The court shall select the physician or other expert who will perform the evaluation or home study and shall consider the names of persons submitted by the parties and allocate costs of the evaluation or home study. No expert may be appointed who presently provides or formerly provided treatment to the person being evaluated without that person's consent.

V.R.F.P. Rule 6 sets forth the procedures and guidelines for representation of minors by attorneys and guardians ad litem. Unless counsel has already been retained, V.R.F.P. Rule 6(b) mandates that the court assign counsel to represent the minor in all juvenile proceedings under 33 V.S.A. Chapter 52 and 53. Under the rule, the court also must appoint a guardian ad litem to represent a minor in all proceedings under 33 V.S.A. Chapter 52 and 53. See also, Vermont Rules of Professional Conduct No. 1.14 (client under a disability).

The guardian ad litem "shall act as an independent parental advisor and advocate whose goal shall be to safeguard the ward's best interest and rights." Rule 6(e)(1). In short, the guardian ad litem advises the court as to what action would be in the best interest of the child. The rule also addresses the guardian ad litem's duties; the guardian at litem's role when a child is under the age of 13 or under a mental or emotional disability, and thus is presumably incapable of making certain decisions; and what to do if the attorney disagrees with a guardian ad litem's position on a matter. See the section on The Role of the Guardian Ad Litem and the Attorney below for more detailed information. In delinquency proceedings the guardian ad litem may be, and often is, one of the child's parents. In CHINS cases because there is an allegation of abuse, neglect, abandonment or unmanageability it would be a conflict to have a parent act as the child's guardian ad litem.

5. *Vermont Administrative Directive 26 – Family Court Case Disposition Guidelines for the Juvenile Docket*

Directive 26 contains guidelines for the flow of cases in the family court, and was revised after the new Juvenile Proceedings Act was adopted. The guidelines do not supplant the rules. This Directive can be found in the Appendix.

6. *ASFA – The Adoption and Safe Families Act*

The Adoption and Safe Families Act of 1997 ("ASFA"), P.L. 105-89, was enacted primarily to promote child safety and timely decision making regarding permanency for children, and to clarify what "reasonable efforts" states need to make to keep families together.

ASFA strives to prevent children from being in foster care for long periods of time, and from moving from foster home to foster home. Permanency is necessary for a child's healthy development. It has been determined that uncertainty and instability is detrimental to children. In most cases, foster care should be a temporary setting and not a permanent place for children. A safe and permanent home for children is the goal. In recognition of children's developmental needs and sense of time, the law shortened the timeframe for making permanency planning decisions, and established a timeframe for initiating termination of parental rights proceedings. Adoption is promoted for children who cannot safely return home.

7. *DCF Policies*

DCF actions are governed by a set of laws, regulations, and promulgated policies. It is important to become familiar with DCF's regulatory scheme in order to advocate for our clients. This can be achieved by pointing to places where DCF has not followed its own rules and policies, such as in visitation, transportation of youth, provision of services to parents, kinship placement, or safety planning with families and care providers. Familiarity with DCF policies also helps the lawyer to help the client obtain administrative reviews, or services past the age of eighteen. The policies can be found on DCF's website at: http://dcf.vermont.gov/fsd/policies.

8. *Interstate Compact on the Placement of Children*

The ICPC is a contract among member states and U.S. territories authorizing them to work together to ensure that children who are placed across state lines for foster care or adoption receive adequate protection and support services. The ICPC establishes procedures for the placement of children and fixes responsibility for agencies and individuals involved in placing children. To participate in the ICPC, a state must enact into law the provisions of the ICPC. Vermont enacted the Interstate Compact on the Placement of Children as state law in 1972. (33 V.S.A. §§5901-5927) Vermont's ICPC statute replicates the model interstate compact law enacted by all 50 states, the District of Columbia, and the Virgin Islands. See Section VIII of this manual

9. *Fostering Connections to Success and Increasing Adoptions Act of 2008*

Public Law 110-351 - This act is intended to help children and youth in foster care by promoting permanent families for them through relative guardianship and adoption and improving education and health care. Additionally, the bill extends federal support for youth to age 21 and increases their opportunities for success when they finally leave care. It also will offer many American Indian children important federal protections and support for the first time. DCF has adopted new policies in compliance with this Act, and the Act's emphasis on kinship placement is reflected in the 2008 Juvenile Proceedings Act. Unfortunately, the federal government has not funded many of Act's provisions.

10. ***Other***

The Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, 42 U.S.C. §§620
Americans with Disabilities Act (ADA) 42 U.S.C. § 12132.
Social Security Act § 471(a)(15), as amended, 42 U.S.C.A. § 671(a)(15); 45 C.F.R. § 1356.21.
State plan for foster care and adoption assistance (reasonable efforts requirement)

C. Overview of CHINS and Delinquency Cases

Under the 2008 Juvenile Judicial Proceedings Act, which took effect on January 1, 2009, the statutory provisions relating to delinquency cases (Chapter 52) and CHINS cases (Chapter 53) were divided into separate chapters. Statutory provisions which apply to both delinquency and CHINS are contained in a separate chapter (Chapter 51).

In revising the laws in 2008, the legislature sought to conform statutory provisions to reflect caselaw and practice. time.

D. Privacy Considerations

The Juvenile Judicial Proceedings Act contains numerous provisions designed to protect children and families from publicity (e.g., 33 V.S.A. §§ 5110, 5117, 5205), and to protect juveniles from the taint of criminality (e.g., 33 V.S.A. §§ 5101(a)(2), 5119, 5202, 5292, 5322). See also, In re J.S., 140 Vt. 458 (1981). Privacy provisions generally do not extend to children transferred to a criminal court. See generally, State v. Favreau, 173 Vt. 636 (2002) (juvenile court confidentiality not applicable in adult court when no juvenile proceedings exist). Also, a victim of a felonious delinquent act may learn the name of the youth adjudicated delinquent. 33 V.S.A. § 5117(a).

Juvenile records are available for sentencing in a criminal case, to officials at a penal institution and other penal facilities, or to a parole board that is considering parole or discharge, among others. 33 V.S.A. § 5117(b)(1)(C). Under the "Act Relating to Improving Vermont's Sexual Abuse Response System, S. 13, (2009) the DOC will now have access to juvenile records when preparing a pre-sentence report in connection with a sexual offense. 28 V.S.A. § 204. In addition, in 1997, a law was passed that requires the court to provide written notice to the superintendent of schools where the juvenile is enrolled within seven days of its finding that a juvenile has been adjudicated for certain listed offenses under 13 V.S.A. §§ 5301(7). 33 V.S.A. § 5118.

While juvenile records are not public and may be inspected only by certain people, the court is now required to take steps to seal a juvenile's records two years from the date of discharge. §5119. The court must seal any such records unless, upon the states attorney's motion after notice of intent to seal received by that office, the court finds that the juvenile has been convicted of a listed crime as defined in 13 V.S.A. §5301 or adjudicated delinquent of such an offence, or a proceeding is pending seeking such conviction or adjudication, and the court finds that the juvenile has not been rehabilitated. §5119(a).

Also, within 30 days of the two-year anniversary of a successful completion of juvenile diversion, the court shall order the sealing of all court files and records, law enforcement records other than entries in the juvenile court diversion project's centralized filing system, fingerprints, and photographs applicable to a juvenile court diversion proceeding unless upon motion the court finds that the participant has been convicted of a subsequent felony or misdemeanor during the two-year period, or proceedings are pending seeking such conviction, or rehabilitation of the participant has not been attained to the satisfaction of the court. 3 V.S.A. § 163 (e).

On application of a person who, while a child, was found to be in need or care or supervision or, on the court's own motion, after notice to all parties of record and hearing, the court may order the sealing of all files and records related to the proceeding if it finds that the person has reached the age or majority sealing the person's record is in the interest of justice. 33 V.S.A. § 5319(c).

After the records are sealed, the records may only be viewed if permitted by the court. 33 V.S.A. § 5538(d). If anyone inquires as to the existence of such records, the court, law enforcement officers, and departments must reply that no record exists. 33 V.S.A. § 5119(e)(1).

Section 5119 also permits sealing of records "...of a person who has pleaded guilty to or has been convicted of the commission of a crime committed under the laws of the state prior to attaining the age of majority..." 33 V.S.A. § 5119(g) [emphasis added]. If this situation presents itself you should argue the controlling date is the date of the offense and not the date the charges are filed.

Section 5110 governs the conduct of juvenile hearings. It directs that all hearings shall be confidential, the public shall be excluded, and no publicity shall be given to any proceedings.

E. Attorneys and "Social Work"

An attorney representing juveniles not only needs a legal background, but some guidance on child development, psychological conditions, and what types of out of home placements are appropriate for certain children. Throughout this summary, some of these topics are addressed, or articles are referenced and attached which address these topics. I.e., Noy Davis, Should Children's Lawyers "Do Social Work?" ABA Child Law Practice, Vol. 15 No. 8, pp. 124-25 (October 1996); Claire Sandt and Dr. Karen Saywitz, Conducting Developmentally-Appropriate Child Interviews, ABA Child Law Practice, Vol. 15 No. 6, pp. 81-82, pp. 88-89 (August 1996), which can be found on the Defender General website.

In addition, DCF offers an extensive training schedule for social workers on various topics that are useful for juvenile attorneys. For a copy of the training schedule, contact the UVM Child Welfare Training Partnership. Also useful are the DCF policies, found in the Family Services Division Policy Manual at http://dcf.vermont.gov/fsd/policies. The Juvenile Defender's Office also has a copy of all of the policies.

At times, an issue for juvenile attorneys is their role and from whom to take direction (the child or the guardian ad litem) when the child is young or incompetent, or when the attorney does not agree with the opinion of the GAL. This topic is addressed in the section on The Role of The Guardian Ad Litem and the Attorney. See also ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (Feb. 5, 1996), which can be found on the Defender General website.

II. CHILDREN IN NEED OF SUPERVISION (CHINS)

A. Introduction

1. *Definition*

Under 33 V.S.A. § 5102, a "child in need of care or supervision (CHINS") is defined as a child who either:

(A) has been abandoned or abused by a parent, guardian or custodian;
(B) is without proper parental care or subsistence, education, medical or other care necessary for his or her well-being;
(C) is without or beyond the control of his or her parent, guardian or custodian; or
(D) is habitually and without justification truant from compulsory school attendance.

33 V.S.A.§ 5102(3). If any of those definitions fit, the child is considered to require the assistance of the state in order to ensure his or her safety and well-being.

2. *Age Limit*

A "child", for purposes of the juvenile justice proceedings statute, is defined differently in terms of age limitations for different statutory purposes, as follows:

a. A person must be under the age of 18 in order to be eligible for protection under 33 V.S.A. § 5102(3)(A), (B), or (D) (i.e., abandoned, abused, without proper parental care, or truant).

b. A person must be under the age of 16 at the time that a petition alleging that s/he is beyond or without parental control is filed in order to be eligible for protection under 33 V.S.A. § 5102(3)(C); in such cases, jurisdiction can continue until that child is 18.

c. A child between the ages of 16 and 17.5 who is at high risk of serious harm to self or others due to problems such as substance abuse, prostitution or homelessness is also eligible for protection as a child in need of care and supervision under 33 V.S.A. § 5102(3)(C).

3. *Burden of Proof*

The burden of proof rests with the state to show that a child is in need of care and supervision.

The standard of proof at temporary care hearings, merits and disposition is the preponderance standard, but the court has the option to make findings at merits by clear and convincing evidence. 33 V.S.A. § 5315(a).

In termination proceedings, the state must prove their case by clear and convincing evidence.

4. ***V.R.F.P. 2, 3, 5 and 6***

V.R.F.P. 2 sets forth the procedures in CHINS (Children in Need of Care or Supervision) proceedings. Generally, the Vermont Rules of Civil Procedure apply, with the following exceptions: 1) where the rules are irrelevant or would operate at cross-purposes with the juvenile laws; 2) Vermont Rule of Criminal Procedure 17 provides the procedure for the issuance of subpoenas; 3) Civil Rule 12(a) & (h) do not apply and thus the obligation to file answers and pretrial motions to preserve certain defenses does not exist in CHINS proceedings, in order to expedite proceedings; 4) Rule 2 sharply limits the availability of certain types of civil discovery, and instead imposes the same discovery obligations of the state in criminal cases upon all parties to insure rapid and consistently complete disclosure of information. (Refer to section on Discovery.)

V.R.F.P. 3 sets forth additional procedures in instances where a Petition to Terminate Parental Rights has been filed.

V.R.F.P. 5 sets forth the procedure for the court ordering a physical or mental evaluation of a party or of a person who is in the custody or legal control of a party. The rule also vests with the court the power to order a home study. The court shall select the physician or other expert who will perform the evaluation or home study and shall consider the names of persons submitted by the parties and allocate costs of the evaluation or home study. No expert may be appointed who presently provides or formerly provided treatment to the person being evaluated without that person's consent.

V.R.F.P. Rule 6 sets forth the procedures and guidelines for representation of minors by attorneys and guardians ad litem. Unless counsel has already been retained, V.R.F.P. Rule 6(b) mandates that the court assign counsel to represent the minor in all juvenile proceedings under 33 V.S.A. Chapters 51, 52 and 53. Under the rule, the court also must appoint a guardian ad litem to represent a minor in all proceedings under 33 V.S.A. Chapters 51, 52 and 53. See also, Vermont Rules of Professional Conduct No. 1.14.

B. Parties Involved In CHINS Cases and Their Roles

ATTORNEYS

For Juvenile In proceedings under 33 V.S.A. Chapters 51, 52 and 53, the court shall assign counsel pursuant to Administrative Order No. 32 to represent the child unless counsel has been retained by that person. V.R.F.P 6(b) The court, due to the inherent nature of a CHINS proceeding, will not permit the parents to retain an attorney for the child.

The attorney representing the juvenile in a CHINS case advocates for the child's right to a safe, stable and permanent home that meets the child's basic physical and developmental needs, including the preservation of family when ever possible. The

juvenile's attorney defends the child's interest against any unwarranted intrusion into that child's life by the State.

In a CHINS case, the juvenile's attorney must first consult with the child in an age-appropriate manner to determine the child's wishes. Depending on the child's age and decision-making capacity, the attorney then advocates for either the child's wishes or the best interests of the child as determined in collaboration with the juvenile's guardian ad litem. V.R.F.P. 6(d)(4). The National Association of Counsel for Children has recommendations for the representation of children in abuse and neglect cases which can be found on their website at http://www.naccchildlaw.org. For further discussion, see Section VIII A, p. 120

For Parents

In all phases of CHINS matters, the parents of a juvenile who is the subject of a Juvenile Court petition are entitled to be represented by an attorney. If the parents are unable to afford private legal representation, they may apply to the Juvenile Court for appointment of a public defender at greatly reduced or no cost. See Administrative Order No. 32.

The attorney's role as the parents' representative is to safeguard the parents' right against any unwarranted intrusion into their family's life by the State, to guide them through the process of that state intrusion and to defend the parents' interests during the appropriate phase of each type of proceeding.

State's Attorney

The State's Attorney Office ("SAO") in each county is responsible for all criminal and juvenile prosecutions within its respective county. In the Juvenile Court context, the SAO decides which CHINS petitions to present to the Court. If the Court finds probable cause for a petition, then the State's Attorney is responsible for proving the petition.

Attorney General

Although the DCF worker involved in the case sits with the SAO representative during all court proceedings, and DCF and the SAO are usually in agreement as to the merits of the case and the direction in which it should go, the SAO does not actually represent DCF in the case. There are cases in which DCF retains separate counsel to protect its interests or the interest of the DCF worker directly involved in the case, such as when DCF and the SAO disagree on a case. When this happens, the Vermont Attorney General's Office represents DCF. It is the practice in most counties that an Assistant AG will represent DCF in all TPR proceedings. You should contact the Assistant AG for DCF for your county if you are presented with challenging legal issues such as Indian Child Welfare Act applicability or out-of-state placement issues. You may also wish to confer with the AAG if you are experiencing difficulties with a DCF caseworker and speaking with his or her supervisor does not resolve the problem.

For All Parties

All parties are entitled to present evidence, compel the attendance of witnesses on their behalf and to cross-examine all witnesses called against them.

Court Clerk — In most Family Courts, one member of the Court Clerk's staff will be responsible for scheduling and recording all proceedings on the juvenile docket and maintaining the Court's files on all juvenile matters.

Foster Parent — Foster parents are recruited, trained and paid by the State to provide homes for juveniles who have been removed from their homes in the course of a CHINS or delinquency matter. Foster placements vary greatly in length and some foster families specialize in either short-term or long-term placement. In either case, the understanding between the State and the foster parents is that the juvenile will be returned to his or her biological family if at all possible and at the earliest possible date.

Guardian Ad Litem — A guardian *ad litem* ("GAL") is an impartial person appointed to oversee and safeguard the best interests of the juvenile throughout the course of the court's proceedings. V.R.F.P 6(c) and (e) The GAL acts as an independent parental advisor and advocate for the juvenile, consulting with the juvenile and with the juvenile's attorney. V.R.F.P. 6(e)(2)

GALs are under the court's supervision and receive formal training in many aspects of juvenile court and the issues surrounding children at risk. Please note that the Family Court is empowered to appoint a GAL for any party deemed incompetent to understand the proceedings, including parents and other custodial parties.

In any case where the parents either are not impartial or have an interest at stake (in delinquency cases) or are directly involved (as in a CHINS petition), a neutral third party will be appointed by the Court to fulfill this role.

The GAL must be present at all court hearings and should be consulted by the parties and their legal representatives during those hearings as well as during negotiations regarding resolution of the issues in the case. The GAL does not provide an opinion to the Court regarding the merits of a petition but may provide an opinion in temporary care hearings and disposition hearings. V.R.F.P. 6(e)(3)

The GAL may or may not agree with the juvenile as to what constitutes the best course of action in a given situation.

In many cases, the GAL and the juvenile's attorney will agree on the course of action best suited to protecting the juvenile's interest. However, cases arise in which the GAL believes that the juvenile's best interests are not being effectively represented by the juvenile's attorney. In those cases, the GAL is directed to so advise the Court, either "in open court, orally or in writing." V.R.F.P. 6(e)(3)

Judge — In juvenile matters, the Family Court Judge presides over all aspects of CHINS proceedings. As there are no juries in juvenile matters, the Judge is the trier of

both fact and law, making all decisions as to the weight of the evidence presented and the appropriate law to be applied in each case before the Court.

In many cases in juvenile court, the Judge is presented with an agreement by the parties recommending a particular outcome for the case. In those instances, the Judge's role is to ensure that the juvenile's interests have been adequately addressed and protected, that the issues which caused the juvenile to appear before the court have been satisfactorily resolved and that all parties have been given a fair and adequate opportunity to participate in the formulation of, and come to agreement regarding, the final stipulated plan for the juvenile.

Police — Parallel to DCF functions in investigation area. Police officers will make referrals to DCF when neglect and/or abuse of children is suspected, report alleged juvenile crime to the SAO for prosecution, and take children into custody on an emergency basis when warranted by circumstances.

School Admin. — School administrators and teachers often spend as much or more time with a child than do parents, guardians or custodians. They can be an excellent source of support and insight into a child's situation.

The superintendent of the school district in which a truant child is enrolled is also able to make a direct referral to the state's attorney to request that a petition be filed to address the child's truancy. 33 V.S.A. § 5309(a).

DCF — The Vermont Department for Children and Families ("DCF") is charged with the protection of all children within the state. Protecting children necessarily includes protecting their right to live with their families whenever that living arrangement does not endanger the child's safety and well-being. Therefore, DCF's first and highest duty is to work with **families** of at risk children to determine if the child's right to remain with his or her family can be protected.

In the CHINS context, DCF becomes involves in the lives of children in two ways:

1. Issuance of a Conditional Care Order ("CCO")

   At various points during a CHINS case, the court can issue a conditional care order that returns the child to the custody of a custodial parent/guardian/custodian but only as long as certain stated conditions are met. DCF is charged with monitoring compliance with those conditions and ensuring that the child or children are protected.

2. Request for Transfer of Custody

When DCF determines that a child is not safe within the family's home and should be removed from that home, DCF requests that the State's Attorney file a CHINS petition and ask the Court to place the child in the custody of the Commissioner of DCF. If the request is granted by the Court, then DCF steps into the shoes of the parents and is legally responsible for all decisions about that child, including but not limited to placement, visitation with family members (including parents), medical evaluation and treatment, educational issues, etc. Even when custody is removed from the parents, DCF is still bound to work with the family of origin towards reunification of the family with the child in question, unless there are aggravated circumstances as defined in 33 V.S.A. § 5102(25) in which case DCF doesn't have to work with the family.

C. Custody and Care

1. *Taking Into Care, 33 V.S.A. § 5301*

Although juvenile proceedings are initiated by a "petition," in many cases, the child is brought before the court before the petition is filed. This occurs when the child is taken into care, but not immediately released to his/her parents, guardian, or custodian. 33 V.S.A. §5301 enumerates three circumstances under which a child may be taken into custody:

(1) pursuant to an order of the juvenile court;

(2) by a law enforcement officer when the officer has reasonable grounds to believe a child is in immediate danger from his surroundings, and removal is necessary for the child's protection;

(3) by a law enforcement officer when the officer has reasonable grounds to believe that the child has run away from a custodial parent, foster parent, guardian, custodian, non-custodial parent lawfully exercising parent child contact or care provider

33 V.S.A. § 5302 provides that a child taken into custody under 33 V.S.A § 5301(1) or (2) shall immediately and without first being taken elsewhere be released to the child's parents, guardian, or custodian, or delivered to a place designated by DCF. Written notice of custody and reasons therefore must simultaneously be filed with the court and, if the child is not returned to a parent or guardian, a request for an emergency care order ("ECO") must also be made at this time.

33 V.S.A. § 5302 also provides that a child taken into custody under 33 V.S.A. § 5301(3) shall immediately be returned to his or her custodial figure(s) from whom the child ran or to a shelter designated by DCF pursuant to §5304. The shelter program director is responsible for notification to the child's parent/guardian. The child may stay at the shelter for seven days without court notification; after seven days, either the child either must return to his or her parent/guardian or an officer must request an ECO from the court. Under a novel, and

unsuccessful theory, a parent sued DCF and a runaway shelter for negligence, lost love and affection, emotional distress, and medical and psychiatric expenses, when a runaway stayed at a shelter and was taken into mandatory custody pursuant to this statute. The court found, in part, that the Juvenile Proceedings Act did not create a civil cause of action. Dalmer v. State, 174 Vt. 157 (2002).

It should be noted that the federal "Fostering Connections to Success Act' of 2008 requires DCF to exercise due diligence to identify and notify all adult relatives of a child within 30 days of the child's removal for his or her home. This is intended to strengthen opportunities for kinship care.

a. Emergency Care Hearing

When a child is taken into custody under 33 V.S.A. § 5301, and not immediately released under 33 V.S.A.§ 5302 or 33 V.S.A. § 5303, the court must issue an order for care or shelter care if the child is to be further detained. See 33 V.S.A. §§ 5305. The hearing upon which the order is issued is referred to as the "emergency care hearing." It is usually held ex parte and sometimes it is conducted by the judge speaking to DCF over the telephone.

There are no explicit statutory standards to guide a judge in determining "emergency" care or shelter care beyond the requirement that the court determine that "the child's continued residence in the home is contrary to the child's welfare." 33 V.S.A. § 5305(a). This standard is sufficiently broad to permit the court to exercise its discretion as it sees fit. In practice, a child who does not have a safe and secure house will probably be held. However, the court can return the child to its parents at this stage, either without condition or under a conditional custody order, pending a temporary care haring, subject to such conditions and limitations "necessary and sufficient" to protect the child in the interim. 33 V.S.A. § 5305(c).

As a parent's attorney (or juvenile's attorney), this is a good time to negotiate with the State for the parents to engage in services in an effort to have the child remain in the home subject to a conditional care order. Where there is substance use alleged, negotiate an agreement to engage in a substance abuse assessment, and to have this assessment released to DCF, or submitted to the court, with an agreement that its contents will not become part of the evidence at merits.

The so-called "emergency care order" (ECO) must contain certain provisions enumerated in 33 V.S.A.§ 5303(b)). Parents must be notified immediately if possible. 33 V.S.A. § 5306. One example of an ECO is an order to obtain temporary custody of a newborn at a maternity ward which can issue as a "pick-up order."

2. *Temporary Care Hearing*

If a child is held in "temporary" care or shelter care, the court must hold another hearing, commonly referred to as the "temporary care hearing," within seventy-two (72) hours of its original order, excluding state holidays. 33 V.S.A. § 5307(a). If the parent/guardian is not notified and does not appear or waive appearance at this hearing, the court must hold a *de novo*

temporary care hearing within one business day of the filing of a request therefore by the parent/guardian. 33 V.S.A. § 5307(1).

Factors in determining whether a child should be present include the age of the child, the physical and emotional condition of the child, whether requiring the child to be present might traumatize the child. The child shall be present unless he or she is under 10 years of age and the child's presence is waived by the child's attorney and, except for good cause shown, a child, ten years or older is required to be present in court for the hearing. 33 V.S.A.§ 5307 (c)(1).If the child is not present, arrangements should be made to meet with the child and GAL at an off-site location.

Under the federal Social Security Act, Judges are to consult with children regarding their views on a proposed permanency plan. The Judicial "Consulting" requirement is to be done in an age appropriate manner, and, for young children may be satisfied by consulting with the child's GAL or attorney. The relevant provisions of this part or the Social Security Act § 475(5)(C)(ii) and 675 (5)(C)(iii) are summarized as follows: At the annual permanency hearing, the court is to "consult' with the child, in an age appropriate manner regarding his or her views on the proposed permanency plan.

For youth who have reached age 16: the court must consult with the youth at any hearing related to the youth's transition from foster care to independent living. If the child is an infant or very young: "consulting" with the child may be met by having the judge observing the child in court. States need to have procedural safeguards to ensure that the "consultation" occurs. The Children's Bureau has advised that states can meet the requirement of § 475(C)(ii) of the Social Security Act if the attorney or GAL actually conveys the child's views to the court during a permanency hearing. The legislative history indicates that this provision was added because "each child deserves the opportunity to participate and be consulted in any court proceeding affecting his or her future, in an age appropriate manner. The statute does not prescribe a particular manner in which the consultation with the child must be achieved, leaving states with some discretion in determining how to comply with the requirement. The ABA Center on Children and the Law recommends that judges have each child in court at least once a year.

3. *Considerations for Removal of Child from Family Home*

Removing a child from his/her home can cause significant trauma to the child. Thus, the court should consider whether:

- there are protective measures that can be put in place to allow the child to safely remain in the home pending further hearings or;
- the child could safely be placed with relatives or family friends with whom the child is familiar and feels comfortable, in the interim.

The court should also be sensitive to the means of removal. Dragging a child out of his/her home late at night may be far more frightening than leaving from school or home in the daytime. The court should consider the emotional impact if the child is removed from the home. In a CHINS case, in deciding whether to place a child with relatives, it may also consider the following questions: Will the relatives put pressure on the child to recant? Will the relatives offer the child adequate protection from his or her parents? Do the relatives believe the child who has made allegations of abuse? See also, Considering Children's Attachment in Placement Decisions- A Conversation with Dr. Jay Belsky, ABA Child Law Practice, Vol. 15 No. 2, pp. 22-25 (April 1996), which can be found on the Defender General website.

4. *Orders Issued Following Temporary Care Hearing*

At the temporary care hearing, the court must make at least one of a range of five findings enumerated in 33 V.S.A. §5308(a) or else custody must be returned to the child's legal parent/guardian/ custodian, as follows:

(1) return of custody "could" result in substantial danger to the physical health, mental health, welfare or safety of the child.

(2) any child in the same household has been physically or sexually abused by any member of the household or by anyone known to the parent/guardian/custodian.

(3) any child in the household is at substantial risk of physical or sexual abuse by any party delineated in no. 2, above (definition of prima facie evidence: parent/guardian/custodian receives actual notice of abuse and then knowingly or recklessly allows child to be in physical presence of alleged abuser).

(4) child has been abandoned by parent/guardian/custodian.

(5) any child in the household has been neglected and there is "substantial risk of harm" to the child who is the subject of the petition.

a. Options for Temporary Care Orders

Once the requisite findings are made, the court has several options under the 2008 revisions, which are presented ***by order of preference*** in 33 V.S.A. § 5308(b):

(1) conditional care order, returning custody to parents under "such conditions and limitations as the court may deem necessary and sufficient to protect the child." 33 V.S.A. § 5308(b)(1).

(2) transfer of temporary custody to a noncustodial parent, allowable if:

- parentage is not contested;
- noncustodial parent appears and requests temporary custody;
- presentation of a care plan by the noncustodial parent that documents:
  - history of contact with child
  - if none or if gaps, why contact did not occur
  - addresses the child's need for
    - a safe, secure and stable home;
    - proper and effective care and control; and
    - a continuing relationship with the custodial parent, if appropriate.

The court must also consider any court orders from other proceedings relating to the custody of the child and must enter the order unless five specified conditions are found to exist, by a preponderance of the evidence, that would place the child in harm's way. 33 V.S.A. § 5308(b)(2).

(3) transfer of temporary custody to any of a list of close family members of the child and, if investigation is required in order to determine the suitability of the placement, an order that DCF take custody pending its investigation of the proposed relative placement. 33 V.S.A. § 5308(b)(3). See discussion in Disposition: Custody Options regarding cons of kin placement.

(4) transfer of temporary custody to a more distant relative not covered in (3), above or a "person with a significant relationship with the child", with the same provisions for investigation and temporary custody with DCF in the interim. 33 V.S.A. § 5308(b)(4). See discussion in Disposition: Custody Options regarding cons of kin placement.

(5) transfer of temporary custody to the commissioner of DCF.

These new provisions represent a marked departure from the previous statutory scheme, but do reflect trends that have been developing within juvenile court and DCF for several years.

Practice Note: If it appears likely that a relative may adopt the child, or become the child's permanent guardian the child must be in DCF custody at the time the child in placed with the relative in order to be eligible for funding either through a subsidized permanent guardianship or an adoption. This is a requirement of the 2008 federal Fostering Connections to Success Act as it amends the eligibility requirements for title IV-E adoption assistance. This should be pointed out early in a case to relatives who may want to take legal custody of a child, as opposed to the child being in foster care and placed by DCF with the relative.

b. Requirement for Initial Case Plan

In any case in which a temporary care order transfers legal custody to the commissioner, DCF must file an initial case plan with the court within 60 days of the child's removal from his or her home. 33 V.S.A. § 5314. Under this provision, DCF must begin to immediately determine (and communicate) what services will be needed before reunification can be effected, the parties' postures relative to merits notwithstanding. The Juvenile Judicial Proceedings Act requires that parents shall participate in the case planning process and the DCF shall actively engage families in planning. 33 V.S.A. § 5121

In order to encourage all parties to fully participate in that planning process and to engage in any services suggested, the statute also provides that the initial case plan cannot be used as evidence in any hearing held prior to a determination that the child is in need of care and supervision. 33 V.S.A. § 5314(b).

c. Reasonable Efforts Requirement

The Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, 42 U.S.C. §§620, 670-676, was designed to prevent the long-term placement of children in foster care. (For a copy of the Act, see the section in this manual on AACWA). The act conditions state receipt of federal money for foster care and adoption assistance upon the state's creation of a foster care case plan and case review system. The act also requires that

> "...in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home...."

42 U.S.C. §671(a)(15). The act requires a judicial determination that these "reasonable efforts" have been and will be made in order for the states to receive federal reimbursement for foster care maintenance payments for the child. 42 U.S.C. §672(a)(1). The 2008 statutory revisions incorporated this requirement at many stages of CHINS proceedings, including at the point where a temporary care order issues. 33 V.S.A. § 5308(c)(1)(B)

The child's removal from the home may be necessary to ensure the child's safety and it may be in his or her best interests to be removed. Certainly, if protective measures and services can be put in place that would allow for the child to safely remain in the home, that would be in the best interests of the child, given the trauma to the child that usually occurs when a child is taken from his or her parents.

At any time after the child is in foster care, a parent of the child, or the child, can petition for modification of the disposition order and can argue that the child could safely return home if a particular service were provided by DCF. 33 V.S.A. § 5113. (See the section below on Modification of Orders, which explains that the moving party must show a substantial change in material circumstances and that the modification is in the child's best interests). The "reasonable efforts" provisions of the act provide support for the argument that DCF must provide in-home

services if such services can permit the family not to be separated or to be reunited. The court has the power to return the child to his or her parent, guardian, or custodian under a conditional care order that is designed to ensure the child's safety. 33 V.S.A. § 5318(a)(1). This section can be used to assert the "reasonable efforts" requirements either at initial disposition or in a petition to modify a disposition order.

However, the 1997 amendments to the Adoption and Safe Families Act ("ASFA"), P.L. 105-89, 42 U.S.C. § 671(a)(15)(D), enumerate certain circumstances under which the state does not have to make reasonable efforts to reunify a family. These circumstances include where a parent has:

(1) murdered or committed voluntary manslaughter of another child of the parent;
(2) aided or abetted, attempted, conspired, or solicited to commit such murder or manslaughter;
(3) committed a felony assault which has caused serious bodily injury to the child or another child of the parent;
(4) had their parental rights to a sibling terminated involuntarily; or
(5) subjected the child to aggravating circumstances, which may include abandonment, torture, chronic abuse or sexual abuse.

D. Commencement of Proceedings – The Petition

1. *Who Files*

Juvenile proceedings are formally commenced in CHINS cases by the filing of a petition in juvenile court. 33 V.S.A. § 5309. The state's attorney having jurisdiction is responsible for the preparation and filing of the petition. In CHINS cases, the state's attorney does so upon the request of the Commissioner of DCF or the superintendent of the school district where the child is enrolled. If the SAO fails to file the requested petition in a reasonable amount of time, the requesting party may request that the Attorney General file the petition. 33 V.S.A. § 5309(a).

In practice, most CHINS cases flow though DCF. Though there is still discussion from time to time about the relationship of the state's attorney to DCF, it is now generally accepted that the state's attorney is not the attorney for DCF, but retains the independent function of the office.

2. *Contents of Petition*

There are three statutory requirements for the contents of the petition:

1. the facts which support the conclusion that the child is CHINS and a statement that it is in the child's best interest that the proceedings be brought;
2. name, date of birth, telephone number and residence address, if known, of the child, the custodial and noncustodial parents, guardian or custodian of the child if other than a parent, and notice of the participation by either parent in the Safe At Home Program (15

V.S.A. § 1152); and
3. jurisdictional information pursuant to the Uniform Child Custody Jurisdiction Act (15 V.S.A. § 1032 et seq.)

The courts invariably make it a practice to determine that they have jurisdiction based upon the age and residence of the child. Venue may be the territorial unit where the child is domiciled or where the child is present (in CHINS proceedings). 33 V.S.A. § 5105(a)(1) and (2).

3. *Alleging Specific Acts*

The juvenile petition should allege a specific act or acts that bring the child within the jurisdiction of the court. In years past, it was a common practice for state's attorneys simply to repeat statutory language, e.g., "the child is without the control of his parents." However, due process requires that the parties have adequate notice of the facts on which the allegation of CHINS is based. The better practice is to provide more detail about the conduct that brings the child to the attention of court in the petition. However, even when the petition is vague, if the supporting affidavit plainly recites the substance of the allegations, the requirement of particularity is satisfied. In re M.B. & E.B., 158 Vt. 63, 67 (1992); In re R.M., 150 Vt. 59, 70 (1988). Many judges make it a practice to review the petition and affidavit ex parte in order to determine probable cause. In all cases, counsel should review the petition and affidavit to determine whether the pleadings give the client sufficient notice of the conduct alleged, and whether the allegations are stated with sufficient particularity to enable counsel to prepare for the merits hearing.

Pleadings that fail to set forth allegations with sufficient particularity should be challenged by means of a written motion to dismiss. In appropriate cases, the practitioner may want to consider challenging the statute itself as being overly broad and failing to give sufficient notice of proscribed conduct.

4. *Service of Petition Where TCO Not Requested*

In cases where no temporary custody was requested, the court will issue a judicial summons to appear at the preliminary hearing directed to the parent/guardian/custodian/care provider and serve that party with the summons and a copy of the petition. 33 V.S.A. § 5311(a). The court must also make “reasonably diligent efforts” to serve the non custodial parent/s with a copy of the petition and summons. Id. Service may be accomplished by certified mail or by sheriff, deputy or constable. 33 V.S.A. § 5311(c). All other parties must receive notice at least five days before the preliminary hearing. 33 V.S.A. § 5311(d).

E. **Preliminary Hearings**

1. *Timelines*

Vermont Rules of Family Procedure 2(c) state that, unless a party enters an admission, a denial for that party is to be entered at the temporary care hearing, or at the preliminary hearing

(in the absence of a temporary care hearing). Rule 2(d)(1) states that the court shall issue an order setting the matter for a pretrial hearing or for trial on the merits on a date certain at the preliminary hearing. The purpose of the pretrial hearing is to ascertain whether a merits hearing will be needed. These provisions were meant to discourage the practice of scheduling a merits hearing with inadequate time for an evidentiary hearing since no one would know for certain whether a hearing would be needed or the parties were willing to enter an admission until the day of the scheduled merits hearing. The intent when a child is in custody is to have the evidentiary merits hearing in fact commence and be completed within the statutory 60 days. 33 V.S.A. § 5313.

Under the previous statutory scheme, the Vermont Supreme Court determined that the statutory time periods are directory, not jurisdictional. In re C.I., 155 Vt. 52, 55 (1990), In re M.C.P., 153 Vt. 275, 294 (1989). The merits hearing was commenced within the 15 day time limit of 33 V.S.A. 5519(a) by the taking of an initial plea; the merits hearing itself need not occur during the 15 day time period. In re C.I., supra. Because it is almost always in the child's best interest to get these hearings completed as quickly as possible, the child's attorney can expedite matters by requesting the scheduling of a status conference when aware that there are preliminary matters that must be heard and dealt with prior to the commencement of a contested merits hearing. Such preliminary matters might be appointment of counsel for parents, notice to all parties, prehearing motions, and paternity issues.

At the status conference, an attorney can strongly suggest that the parties be required to inform the court of the witnesses they intend to call and the estimated time required for their testimony so that the court can assure that the hearing, once commenced, can be concluded without interruption. Unfortunately, this does not happen as a rule and hearings can be spread out over the course of many months, with one day or one half day of hearing at a time. These delays are harmful to the children. "Court delays caused by prolonged litigation can be especially stressful to abused and neglected children. The uncertainty of not knowing whether they will be removed from home, whether and when they will go home, when they might be moved to another foster home, or whether and when they may be placed in a new permanent home [is] frightening." Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, p. 14, National Council of Juvenile and Family Court Judges, Reno, Nevada, 1995. It may also be difficult for children to attend to the normal developmental tasks when they are worried about such matters. Counsel for children should try to move CHINS proceedings along as quickly as possible.

Delaying proceedings also can prevent reunification with the family and keep the case in an adversarial posture, thereby delaying and discouraging the parents from availing themselves of the services necessary to work on the problems which resulted in their loss of custody.

V.R.F.P. 2(a)(3) states that pretrial motions and discovery requests must be made at or before a status conference, or, if there is no status conference, then at or before the merits hearing or within 28 days of the preliminary hearing, whichever occurs first. Due to scheduling problems in many of the family courts, many motions are decided at the merits hearing or shortly before the date of the hearing.

2. *Failure to Appear at Preliminary Hearing*

If a parent/guardian custodian is served by certified mail and fails to appear at the preliminary hearing, the court may issue a judicial summons directing that party's appearance with the child at a specified date and time. 33 V.S.A. § 5312(a) Subsequent failure to appear, or failure to bring the child to court, gives the court grounds to issue a pick-up order or warrant, pursuant to the terms of 33 V.S.A.§§5108, 5312(b)

F. **Discovery**

1. ***V.R.F.P. 2(d)***

In CHINS cases, at the request of a party or on its own motion, the court shall issue a discovery order containing dates by which each party shall file and respond to interrogatories, complete depositions, inspect or photocopy records of DCF, and disclose potential witnesses and any statements by witnesses. V.R.F.P. 2(d)(2). Furthermore, the parties may be ordered to disclose expert witnesses, reports, test results, physical or mental examinations, etc. V.R.F.P. 2(d)(2)(C). Depositions may be taken before the discovery deadline, except that depositions of a minor may not be taken without a court order. V.R.F.P. 2(d)(5). Interrogatories generally may not be used in CHINS cases, unless discovery is not available in any other way. V.R.F.P. 2(d)(3).

2. ***DCF Records***

DCF records may be reviewed and photocopied as provided in V.R.F.P. 2(d)(6). DCF may request a protective order or object to disclosure of a specific record, stating the reasons therefore, "at the detention hearing or preliminary hearing." See In re F.E.F. 156 Vt. 503, 506-508 (1991). In practice, courts generally give liberal access to DCF records, but will permit DCF to request a protective order at any time during the pendency of the proceedings.

3. ***Mental Health Records***

Vermont has a statutory patient privilege and an evidentiary privilege. The patient's privilege statute, 16 V.S.A. §1612, protects from disclosure information acquired by physicians and other specified professionals in attending a patient in a professional capacity. V.R.E. 503 protects confidential communications made for the purpose of treatment or diagnosis. Both provide for waiver by the patient or certain exceptions authorized by law. One of the exceptions in V.R.E. 503 is if there is risk of harm to a child, and the underlying proceeding is a divorce or juvenile proceeding:

> In a proceeding under Family Court Rule 4 to determine parental rights or responsibilities or parent-child contact, and in any proceeding under Chapter 53 of Title 33, Vermont Statutes Annotated, there is no privilege under this rule if

> the court, after hearing, finds on the basis of evidence other than that sought to be obtained, that: (1) in any such case lack of disclosure of the communication would pose a risk of harm to the child as defined in 33 V.S.A. § 4912, or in a proceeding to terminate parental rights the communication would be relevant under 33 V.S.A. § 5114(a)(3); (2) the probative value of the communication outweighs the potential harm to the patient; and (3) the evidence sought is not reasonably available by any other means.

V.R.E. 503(d)(7). This provision was added to overrule the implied waiver analysis recognized by the Vermont Supreme Court in In re M.M., 153 Vt. 102, 105-06 (1989), cert. denied, 494 U.S. 1059, 110 S.Ct. 1532, 108 L.Ed.2d 771 (1990). In re: B.W., 162 Vt. 287, 290 (1994). See the section on Psychiatric and Psychological Reports below for more information.

4. ***Drug and Alcohol Records***

Practice tip: In many counties, the parties agree to full disclosure of drug and alcohol assessments and urine analysis, and the client signs limited releases as to their sessions with treatment providers to verify that the client is attending and participating, but not to release the substance of what is discussed in therapy.

Without a release, there are additional requirements that must be met in order to obtain records relating to drug and alcohol treatment. Pursuant to 42 U.S.C. §§ 290dd-2, records relating to drug or alcohol treatment funded in whole or in part through any federal program are confidential. Disclosure of such records without patient consent may only be made in extremely limited circumstances. 42 C.F.R. §§ 2.64. The Vermont Supreme Court has described these procedures in detail:

> The regulations describe the procedures and criteria that a court must employ before authorizing a disclosure of patient records. See 42 C.F.R. § 2.64 (1993). First, the party seeking the information must file an application for a production order with the court, using a fictitious name to identify the patient. See id. § 2.64(a). The court must provide adequate notice to the patient and the person possessing the records at issue, id. § 2.64(b)(1), and must give an opportunity for these persons to respond either in writing or at a hearing. Id. § 2.64(b)(2). Normally, this means the court must conduct a hearing on the application. All of these procedures must be conducted in a manner that protects the patient's privacy. Id. § 2.64(a), (c).
>
> A disclosure order may be entered only if the court determines that good cause exists. See 42 U.S.C. § 290dd-2(b)(2)(C); 42 C.F.R. § 2.64(d). This determination is to be made only upon a finding that alternative means of obtaining the information are not available, and that the interest in disclosure outweighs "the potential injury to the patient, the physician-patient relationship and the treatment services." 42 C.F.R. § 2.64(d)(2). Even if disclosure is authorized, the court must limit the order's scope of disclosure to minimize the impact on the patient's privacy. Id. § 2.64(e).

In re: B.S., 163 Vt. 445, 449 (1995). In In re: B.S., the Court found that the trial court erred

by allowing a mother's alcohol counselor to testify and by ordering her treatment records disclosed, in part because there was an alternative means of obtaining the information from the social worker. Id. at 450-51. However, the Court held that this failure to follow procedures was not grounds for reversal of the TPR order, because most of the evidence to which the alcohol counselor testified was already in the record from the testimony of the DCF worker. Id. at 454-55. In addition, those records, and the alcohol counselor, revealed "confidential communications." The trial court found that disclosure was authorized by the exception allowing disclosure if "necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect..." Id. at 453. On appeal, the Court found that exigent circumstances did not exist to justify disclosure, particularly because the child was in DCF custody. Id.

5. ***School Records***

School records are protected from disclosure by federal and state law. 20 U.S.C. § 1232g; 1 V.S.A. § 317(b)(11). To obtain school records of a minor child, a parent's consent is required. See also 15 V.S.A. § 670 (access to records may not be restricted solely because the parent has not been awarded parental rights and responsibilities). Courts may grant access to school records. Zeal v. State, 602 A.2d 1247, 1261 (Md. 1992).

6. ***Department of Corrections Records***

The files kept by the Department of Corrections relating to an inmate in the correctional system are considered confidential. 28 V.S.A. § 601(10). They may be obtained by court order, for good cause shown, or by request of the inmate's attorney specifying what parts of the record are needed.

7. ***Other Records***

Do not overlook other sources of information such as parent educator notes, visitation supervision notes and other providers' notes.

G. **Pretrial Practice and Motions**

A party seeking discovery in a CHINS case must file a motion for an order compelling discovery, and prejudice must be shown before sanctions such as witness preclusion may apply. In re R.M., 150 Vt. 59, 63 (1988). However, sanctions which may be appropriate for violations of a defendant's rights in a criminal trial have been held not to be appropriate in CHINS cases. In re M.B. & E.B., 158 Vt. 63, 67 (1992), (parents' right to speedy adjudication must be weighed against the best interest of the child); In re R.B., 152 Vt. 415, 423-24 (1989) (court refused to apply suppression remedy to a disposition proceeding where main goal was to protect the interests of the child and ruled that such a remedy would elevate parents' rights over those of child to a point where serious damage could be done to child).

Children may face the same deprivation of liberty for non-criminal conduct, e.g., running away from home, as they do for delinquency. Therefore, any arguments that can be marshalled in criminal cases--lack of notice, lack of particularity, double jeopardy, etc.--can and should be employed in unmanageable cases.

1. ***Motion to Modify Court Proceedings***

Because of the compelling need to protect the child in juvenile proceedings, courts have consistently ruled that parents' rights in such proceedings are not co-extensive with those of a criminal defendant. For example, parents do not have a right to face-to-face confrontation in CHINS proceedings. See, In re A.L., J.L., & J.L., 163 Vt. 635, 636 (1995) (mem.). Thus, counsel may file a motion to modify court procedures to accommodate child witness' testimony under V.R.E 807 or the general provisions in V.R.E 611(a). See, In re C.K., 164 Vt. 462, 466 (1995) (father excluded from courtroom during child's testimony and testimony read to father before cross-examination); In re H.A., 153 Vt. 504, 510 (1990) (the right to confront and cross-examine witnesses in juvenile cases is not absolute); In re C.M., 157 Vt. 100, 104 (1993) (no error to allow child to testify seated at counsel table between lawyer and social worker). But see State ex rel. Juv. Dept. v. Beasley, 840 P.2d 78 (Or. 1992) (in TPR case, court must balance parent's right to call and confront child witness against potential harm to child). See the sample Motion to Modify Court Procedures and to Appoint Developmental Interpreter in the Motions section of this manual. A child may also be allowed to testify via closed circuit TV under V.R.E. 807 in certain cases involving allegations that the child was a victim of sexual abuse.

Other possible motions in CHINS cases are:

2. ***Motion to allow testimony by telephone***

Under V.R.E 611(a) (court must "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence"). See also Matthews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18 (1976); In re Juvenile Appeal, 446 A.2d 808 (Conn. 1982); State v. Mott, 166 Vt. 188, 193 (1997). Cf. V.R.F.P. 4(g)(1)(C);

3. ***Parent's motion for grant of immunity before testifying,***
In re M.C.P., 153 Vt. 275, 298 (1989);

4. ***Motion for the admissibility of child victim's out-of-court statements*** Under V.R.E. 804a. See sample Proposed Findings of Fact and Conclusions of Law in Support of Admissibility of Out-of-Court Statements in the Motions section of this manual;

Memorandum in opposition to admission of child victim's out-of-court statements under V.R.E. 804a(a). See the sample Memorandum of Law in Opposition to Prosecution's Motion for Admission of Hearsay in the Motions section of this manual;

5. ***Memorandum in support of child witness' competency to testify U***nder V.R.E. 601(b). See sample Memorandum in Support of Motion to Re-Examine Child Witness re: Competency in the Motions section.

Motion to contest child victim's availability to testify on the basis of incompetence. See the sample Proposed Findings of Fact and Conclusions of Law Regarding Competency of Child Witness in the Motions section; and

6. ***Motion for reasonable accommodations under the ADA***. See sample Motion and Reunification Efforts and the ADA below.

H. The Merits Adjudication

1. *Failure of Custodial Parent to Appear at Merits Hearing*

It is not uncommon for a custodial parent to fail to appear for a merits hearing. The question then arises whether the court can proceed with the hearing, and whether the custodial parent's failure to appear justifies the imposition of a judgment against that parent, or a "judgment by default". With respect to a noncustodial parent, his or her conduct normally is not in issue at the merits hearing, but the parent may become involved at the dispositional stage if he or she is a placement option. The petition provides notice to the custodial parent. 33 V.S.A. § 5311. The noncustodial parent is entitled to notice of the disposition hearing. The procedural due process requirements of notice and hearing apply to termination procedures. Santosky v. Kramer, 455 US 745, 753 (1982); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972); In re B.L., 145 Vt. 586, 590 (1985); V.R.F.P. 3(a). The best practice, reflected in 33 V.S.A. §§5306(b) and 5311(a), is to notify the noncustodial parent of the CHINS proceeding as soon as possible.

With regard to the first question, a judge normally will inquire of the parent's attorney about whether the parent received notice of the hearing, and if the judge is satisfied that the parent received notice, the hearing will proceed. Some judges may even issue a judicial summons to the parent before proceeding. See 33 V.S.A. § 5108.

As to the second question, it is unlikely that a default judgment is authorized. V.F.R.P. 2 states that the civil default judgment rule (Rule 55) does not apply to CHINS proceedings. The practice has been to require the state to present its evidence; often the proof is less extensive than had the custodial parent been present.

2. ***Scheduling***

a. V.R.F.P. 2(d)(1)

V.R.F.P. 2(d)(1) provides that at the preliminary hearing in both CHINS and delinquency cases, the court shall schedule a status conference or a merits hearing. If the child is in custody or shelter care, the merits hearing should be held within 60 days of the filing of the petition. 33 V.S.A. § 5313(b). Under the previous statutory scheme, the Vermont Supreme Court has held that while juvenile proceedings are to be resolved as quickly as possible, the failure to hold hearings at the statutory times is not a violation of due process; nor does it result in the loss of jurisdiction over the matter:

> It is settled that juvenile proceedings should be resolved as quickly as is reasonably possible, In re M.C.P., 153 Vt. 275, 293 (1989) ... but the time limits established by the governing statutes--i.e., § 5515 (preliminary hearing within forty-eight hours after child taken into custody), Sec. 5519 (merits hearing within fifteen days), § 5526 (disposition hearing within thirty days of CHINS finding)--are "directory and not jurisdictional." M.C.P., 153 Vt. at 294. Underlying the statutory scheme is the goal of furthering the best interests of the children whose future is at stake. See id. (parents' right to speedy adjudication must be weighed against child's best interests).

In re: M.B.& E.B., 158 Vt. 63, 67 (1992). See also, In re: C.I., 155 Vt. 52, 55 (1990); In re: M.C.P., 153 Vt. 275, 291 (1989). Further, the court has held that the former statute 33 V.S.A.§ 5519(a) only required the commencement of the merits hearing within 15 days. In re: M.C.P., 153 Vt. t 294. In In re: J.E.G., 144 Vt. 309, 314 (1984), the court held that the hearing required by § 647(a) [now § 5519(a)] "occurs when all parties are present, jurisdiction is found, and an entry of a denial or an admission is made." See also, In re: R.S., 143 Vt. 565, 570-71 (1983). In present practice, this is generally accomplished at the preliminary hearing.

Juvenile cases have a statutory priority over all other matters, except older juvenile cases. 12 V.S.A. § 5611. In re D.P., 147 Vt. 26, 32-33 (1986). The Vermont Supreme Court has condemned the "indiscriminate use of continuances" in juvenile cases. In re: R.S., 143 Vt. at 570; see also, In re: R.B., 152 Vt. 415, 421-22 (1989). Family courts should try to move juvenile cases along in an expedited manner in response to recent initiatives to reduce the time between custody and permanency for children. See Adoption and Safe Families Act of 1997, P.L. 105-89 (reduces amount of time to develop a permanency plan for children, and requires state to move for termination of parental rights in certain cases, including those in which child

has spent a long time in foster care; see section on The Adoption and Safe Families Act for more information on this Act).

Preparing a case for a contested merits hearing often takes more than 15 days, particularly if depositions must be taken. As a practical matter, the court uses the pretrial hearing contemplated in V.R.F.P. 2 (e) to determine if discovery is needed, set a discovery schedule, set a time by which witness lists must be exchanged, and set dates for motions to be filed. As judges are trained in the new permanency planning initiative, practitioners should expect increasing pressure to prepare juvenile cases for trial more quickly. However, until and unless more judicial resources are made available to try these cases, there will still be problems in getting sufficient court time assigned to juvenile cases in a timely fashion.

Despite the mandated priority granted to juvenile proceedings in 12 V.S.A. § 5611, clerks may not give them the priority to which they are entitled. It is not unusual for a hearing to be assigned odd days over the course of several weeks or even months. Habeas corpus may be a remedy, provided that it can be shown to be in the best interest of the child. In re: A.S. & J.S., 152 Vt. 487, 492 (1989). Sending a complaint to the Administrative Judge for the Trial Courts is another possible remedy.

3. *Burden of Proof*

The burden of proof rests on the state. However, the standard of proof changes at different phases of the CHINS proceeding. The standard of proof at a merits hearing on a CHINS petition is preponderance of the evidence. In re: A.D. Jr. et al., 143 Vt. 432, 435 (1983); In re: R.B., 152 Vt. 415, 421 (1989). Although no specific mention has been made of the standard of proof in CHINS unmanageability proceedings, there seems to be no logical reason not to treat such cases the same as other CHINS proceedings, and require proof by a preponderance of the evidence. At the disposition phase of a juvenile proceeding, there must be "convincing proof" of parental unfitness before a child may be placed in the custody of the state. In re: A.D., supra, In re: Y.B., 143 Vt. 344, 348 (1983). While hearsay evidence may be considered at the disposition phase of a juvenile hearing, §5527(d), it may not be the sole basis for the finding of parental unfitness. In re: Y.B.,143 Vt., at 348.

4. *Abuse and Neglect*

a. Statutory Definitions

Chapter 49 of Title 33 defines an abused or neglected child as "a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare." 33 V.S.A.§ 4912(2). A sexually abused child is abused or neglected. Harm is defined in 33 V.S.A. § 4912(3) and it includes the failure to supply a child with adequate food, clothing, shelter or health care. Harm also includes the abandonment of the child. See 33 V.S.A. § 4912 for additional definitions.

Vermont's statutory definition of child neglect has withstood a claim that it is void for vagueness. In re Proceedings Concerning a Neglected Child, 130 Vt. 525, 530-32 (1972). And, in Rutherford v. Best, 139 Vt. 56, 60 (1980), the court ruled that vague legislative standards may be safe from due process challenges if the needed specificity has been supplied by the Supreme Court in its decisions interpreting the statutory term in question. See In re R.M., 150 Vt. 59, 69-71 (1988); In re A.O., 161 Vt. 302, 305-06 (1994); In re F.P., 164 Vt. 117, 123 (1995); In re J.R., 162 Vt. 219, 223-25 (1994).

A finding of CHINS can be made even if no direct physical harm has been inflicted upon the child, if the evidence shows that the parents do not have the ability to care for, supervise, or protect the child. The courts have found that neglect can be proven by conditions in the home substantially departing from the norm; a crowded and untidy home alone is not enough. In re M.B., 147 Vt. 41, 43 (1986). For example, in In re M.B., three children were dressed in rags, without proper footwear, and suffering from head lice. They were occasionally unsupervised, and living in a filthy home with a strong odor. Neither parent could control their behavior, and the father verbally abused them. The court found that they were CHINS. See also, In re M.B. and E.B., 158 Vt. 63, 66 (1992) (neglect found where child lived in unclean house occasionally without heat or hot water, and with splintered floors and broken windows); In re: J.F. 2006 VT 45 (bond between family led to clannishness in extreme with neglectful deficiencies health, education, and adaptation to society in general). But see, In re J.M., 131 Vt. 604, 608-09 (1973) (no neglect found where six month-old child lived in a crowded and untidy home, and mother slept late and occasionally used intoxicants to excess).

Failure to obtain the appropriate medical care for a child also can constitute neglect. In re K.M., 149 Vt. 109, 110-11 (1987) (mother's failure to seek medical attention for a child until hospitalization was necessary, bring the child to scheduled health exams, and immunize the child). For DCF' definition of neglect, see DCF Policy No. 56, Substantiating Child Abuse & Neglect, http://dcf.vermont.gov/fsd/policies.

Relinquishing a child to the care of a relative can be the basis of a CHINS determination even where there is no finding that the relatives were not providing proper parental care. In re S.A.M., 140 Vt. 194, 197-98 (1981). In In re S.A.M., the mother left Vermont with the child, and later returned the child to Vermont, but did not return home. Id. at 197-98. There were no 'parents' (meaning mother or father) to provide proper care for the child because the mother was not caring for or supervising her child, and the relatives did not have any legal rights to care for the child. Id. See also In re E.B., 158 Vt. 8, 11 (1992).

If a parent fails to protect a child from harm, the parent may be found to have neglected the child. In In re K.M., 149 Vt. 109, 111 (1987), a mother was found to have neglected her child when her boyfriend chained the child to a dog house without food and water for most of an afternoon, and put the child in a pig-pen with two pigs. See also, In re M.B. and E.B, 158 Vt. 63, 71 (1992) (child was sexually abused by a boarder and mother could or would not protect the child); In re C.M., 157 Vt. 100, 102-03 (1991) (mother neglected child by leaving abusive father and child alone together). In Re S.P.,173 VT 480 (2001)(child was without proper care and

supervision because the child's guardian, his maternal grandmother, failed to protect child from sexual abuse by his uncle, an untreated sex offender, whom she permitted to live in her home with them.) But see In re T.R., 169 Vt. 574 (1999) (evidence did not support CHINS finding where mother did not believe boyfriend injured the child on one occasion).

A CHINS finding does not require a completed harmful act, but can be based on a risk of harm to the child. CHINS proceedings are preventative as well as remedial in nature. See, i.e, In re: J.R., 162 Vt. 219, 222 (1994) (child taken into custody at birth because siblings suffered extensive physical and emotional abuse which had not been remedied). In Re: A.G., 2004 VT 125 (2004) (SRS filed a CHINS petition to protect child from the effects of mother's binge drinking, which sometimes left the child without proper supervision and from mother's poor choice of intimate male partners that were abusive.) See also, DCF Policy No. 56, supra.

A CHINS finding may be based on educational neglect and/or truancy. (Parents did not enroll children in public or private school nor did they provide adequate home schooling to the children. In Re: A.V., S.T., A.C., & E.V., 176 VT 568 (2003-201) 2003

b. Responsible Parties

If only one parent is abusive, and the allegations that the other parent has failed to protect the child are dismissed, the child still can be found to be CHINS. In re: F.P., 164 Vt. 117, 120 (1995). A child may be found CHINS without any inquiry into the culpability of the child's non-custodial parent. In re: B.L., et al., 145 Vt. 586, 592 (1984), but at disposition the court cannot transfer custody without convincing proof that the non-custodial parent is unfit. In re N.H., 135 Vt. 230, 237 (1977).

Sometimes it may not be possible to conclusively determine who has abused or neglected a child. However, this does not prevent a CHINS determination. In re N.R., No. 92-322, slip op. at 2 (Sept. 29, 1995) (3-judge E.O.). In In re N.R., the child suffered from "Shaken Baby" Syndrome. The mother, father, and maternal grandmother all had been alone with the child at one time. The Court found that the father had been the caregiver prior to the two hospital visits and thus held him responsible. In addition, the court found that the mother was aware of the abuse but remained silent. See also, In re N.A., No. 96-374, slip op. at 2 (April 17, 1997) (3-judge E.O.) (CHINS finding where the child's pediatrician witnessed three incidents of unexplained unusual bruising). But see In re: M.L. and Z.L., No. 2009-89 (January 29, 2010) where the Supreme Court found that the non-medical evidence in the case was entitled to at least as much weight as the medical evidence and that the State, as the moving party, failed to meet its burden of persuasion that the child had been abused.

c. Corporal Punishment

In Vermont, a parent may use reasonable corporal punishment to discipline a child. Cf., §3503 and 16 V.S.A. §1161(a) (school personnel and child care workers may use corporal punishment in limited circumstances). In State v. Martin, No. 99-016 (Feb. 22, 2000), the Vermont Supreme Court distinguished "lawful parental discipline from unlawful corporal

punishment." Unlawful corporal punishment is motivated by an intent to harm, not a motive to correct or instruct. A father who hit his child frequently, above and below the waist with his hand and his belt, and who kicked her with steel toed shoes to "teach her survival skills", was not using lawful corporal punishment, but was abusive. In re F.P., 164 Vt. 117,123 (1995).

A parent who uses unlawful corporal punishment may be convicted of a domestic assault as in Martin, supra, if the state can show he intended to harm or recklessly caused bodily injury. State v. Lembesis, No. 451-1-95 CnCr, slip op. at 2 (April 12, 1995) (Davenport, J). In State v. Lembesis, the father spanked his thirteen year-old daughter for stealing alcohol from his liquor cabinet which she intended to take to school to ignite. Id. at 3. The Court held that this action did not amount to causing reckless bodily injury. Id. Similarly, where a father slapped his children but no bodily injury was shown and there was no evidence of any marks left on the children, the court held that there was no evidence of infliction of or an attempt to inflict bodily injury. State v. Reed, No. 49-1-95 BnCr, slip op. at 6 (Aug. 1, 1995) (McCaffrey, J).

However, see also, State v. Baron, 176 Vt. 314 (2004) where the Supreme Court reversed a trial court's decision granting a defendant father's motion to dismiss charges that he violated the domestic assault statute by striking his son. In her concurring opinion, Justice Skoglund notes that while honoring the right of a parent to reasonable disciplinary decisions in Title 15, by passing 13 V.S.A. § 1042, a domestic assault statute, "inadvertently, perhaps, but legally and literally, by the plain language used, (the legislature) made spanking a crime."

d. Evidence of Abuse and/or Neglect of Siblings

Evidence of a long-standing history of abuse and neglect of siblings can be relevant to a CHINS determination. E.J.R. v. Young, 162 Vt. 219, 224 (1994); In re P.S., 163 Vt. 654, slip op. at 2 (April 14, 1995); In re: J.B., 173 Vt. 515 (2001)(in TPR, failure to parent previous child within a reasonable amount of time is evidence of ability as to subsequent child). Evidence of treatment of siblings may be indicative of a broad pattern of abuse and neglect generally pervasive in the household. V.R.E. 404(b), which generally prohibits evidence of other wrongs, does not apply to prevent such evidence because the purpose is to show the totality of the home environment. In re S.G., 153 Vt. 466, 471-74 (1990). Where there is a pattern of abuse and a general inability of a parent to protect the children, one child can testify as to the abuse of all of the children. In re L.A. III, J.A. and D.A., 154 Vt. 147, 154 (1990). Also, evidence that a parent physically abused a sibling can be admitted. In re S.G., 153 Vt. 466, 473-74 (1990). See also, In re R.M., 150 Vt. 59, 67-69 (1988); In re K.B., 154 Vt. 647, 648 (1990); In re D.P., 147 Vt. 26, 30-31 (1986); But see, In re J.M., 131 Vt. 604, 609-610 (1973) (findings of neglect in siblings cases did not mandate that newborn was CHINS; no evidence was offered to show that those findings would apply to the newborn).

e. Effects of Abuse and Neglect

The effects of child abuse and neglect are wide-ranging. Studies have shown that a child who is subjected to physical or emotional abuse has a greater chance of becoming a delinquent in the future, suffering from chronic health problems, and/or being a violent offender in society.

Current research in brain anatomy and physiology demonstrates physical changes and harm resulting from these traumas. The consequences of the abuse will vary with the developmental level of the child, the duration and intensity of abuse, and the quality of the subsequent home environment and community support. The following categories indicate the possible effects of child abuse and neglect more specifically.

Physical abuse can be seen from bruises, especially in uncommon sites – e.g., buttocks, back, abdomen, and thighs. Bruises can be caused from grabbing, squeezing, or using belts, switches, or cords. The most common cause of death in abused children is a head injury. Various actions can result in head injury, including a blow to the head by an object or a fist, throwing a child against a hard surface, or grasping the child and vigorously shaking the child, described as "shaken baby syndrome". John N. Briere, Child Abuse Trauma: Theory and Treatment of the Lasting Effects, p. 77 (Sage Publications, Newbury Pk., CA 1992); Cindy L. Miller-Perrin & Robin D. Perrin, Child Maltreatment, pp. 73-84 (Sage Publications, Thousand Oaks, CA 1999).

Behavioral and emotional problems are common effects of abuse and neglect. However, they are not diagnostic of abuse or neglect. Behavioral issues might include acting out, drug abuse, alcoholism, aggressive behavior, juvenile delinquency, and antisocial behavior. Child Maltreatment, at pp. 76-81. Emotional issues might include depression, suicidal thoughts, generalized anxiety, sleeping problems, hostility, and feelings of helplessness. Id. at 77-81. More specifically, children may exhibit bedwetting, tantrums, hyperactivity, bizarre behavior, hypervigilance to adult cues, compulsivity, pseudo-adult behavior, suicide and self-mutilation. Not surprisingly, children may suffer from mental illnesses and other disorders, such as Bi-polar Disorder, Post-Traumatic Stress Disorder, Oppositional-Defiant Disorder, and Major Depressive Disorder. National Clearinghouse on Child Abuse & Neglect Information, Washington D.C., http://www.calib.com/nccanch/pubs/ factsheets/whatis.htm.

Possible effects of sexual abuse could be anxiety, isolation and stigma, low self-esteem, distrust, re-victimization, substance abuse, sexual dysfunction and promiscuity. Timothy J. Iverson and Marilyn Segal, Child Abuse and Neglect, pp. 100-106 (Garland Publishing, Inc., New York, 1990).

Abused and neglected children may also suffer from intellectual and/or cognitive deficits. These may include low intellectual and cognitive functioning, and problems with memory, verbal language, problem solving and perceptual motor skills. Abused and neglected children receive more special education services than children who have not been abused or neglected. Id. at 79. Abused and neglected children may have a learning impairment or an emotional-behavioral disability that interferes with their learning.

Finally, it is important to know the different developmental stages of childhood, as one tool to assess the effect of any abuse or neglect on a child. See Developmental Stages of Children and Their Tasks at Each Stage in the Articles section of this manual. See also Claire Sandt, Children and Violence-a Conversation with Dr. James Garbarino, ABA Child Law Practice, Vol. 15 No. 1, pp. 12-15, March 1996, which can be found on the Defender General website.

5. ***Unmanageability***

The term “unmanageable” has historically and colloquially been used to describe a child in need of care or supervision who is “without or beyond the control of his or her parent, guardian, or custodian” Cf., In re Hook, 95 Vt. 497, 503-04 (1922) (unmanageable child must be presently "incapable of being corrected or reformed.") The fact that a child refuses to return home after staying with a relative for a short period of time, with parental permission, does not make the child unmanageable. In re B.B., 155 Vt. 365, 370 (1990). As a practical matter, proving an unmanageability case is not that difficult for the state, as long as a parent is willing to testify that he or she is unable to manage the child.

In 1996 the law defining an unmanageable child was amended to bar the filing of an unmanageability petition for children who are 16 and 17 years old. However, the 2008 statutory revisions include provisions that allow persons between the ages of 16 and 17.5 to be the subject of a CHINS (C) petition under certain more defined circumstances. 33 V.S.A. §5102(1)(B)(ii).

6. ***Abandonment***

In Vermont, abandonment is now statutorily defined as follows:

> A person is considered to have abandoned a child if the person is unwilling to have custody of the child; unable unwilling, or has failed to make appropriate arrangements for the child’s care; unable to have physical custody of the child and has not arranged or cannot arrange for the safe and appropriate care of the child; or has left the child with a care provider and the care provider is unwilling or unable to provide care or support for the child, the whereabouts of the person are unknown, and reasonable efforts to locate the person have been unsuccessful.

33 V.S.A. § 5102 (3)(A). In the context of that new definition, previous case law discussing abandonment in other contexts may still be informative. In In re Bingham, 149 Vt. 211, 212 (1988), the court held that the state must show "absolute, complete and intentional" abandonment by a father under the adoption statute (15 V.S.A. §435(1)) in order for the step-father to adopt the child. There, the court found that because the father saw the children when the children visited their grandparent's home, he was still keeping his contact with the children, and had not abandoned them. See also, In re James Greenough, 116 Vt. 277, 281 (1950) (criminal complaint of abandonment must allege that the abandonment was willful and that it was done in a manner to cause the child unnecessary suffering or to endanger its health); In re Jessica B, 429 A.2d 320, 323 (N.H. 1981) (parent who had made no attempt to communicate with child for over two years, even though she lived within 30 miles of child, had abandoned child; "a mere flicker of interest on the part of the parent" will not bar a finding of abandonment).

DCF defines abandonment as when:

> ...the parent or person responsible for the child's welfare has ceased to provide for the needs of the child and has not made arrangements for the child's care. Such a situation must exist beyond a reasonable time, based on the child's developmental level.

DCF Policy No. 56, Substantiating Child Abuse & Neglect, http://dcf.vermont.gov/fsd/policies.

7. ***Habitual Truancy***

The 2008 JJPA has added a new category of CHINS known as habitual truancy, when a child is habitually and without justification absent from compulsory school attendance. 33 V.S.A. §5102 (3)(D). Previously, truancy was addressed as a type of unmanageability under subsection (C) or as neglect. In determining what is 'compulsory,' you may refer to 16 V.S.A. § 1126 – the education statute on truancy. The Department of Education has developed guidelines that allow the supervisory unions to use different models to address truancy concerns as long as those models are within the guidelines. The Department for Children and Families participated in the development of these guidelines. The report, dated December 15, 2009, includes a truancy protocol and policies from several counties and can be accessed at: http://education.vermont.gov/new/pdfdoc/laws/legislative_reports/09/educ_act_44_sec_46_truancy.pdf

8. ***Evidentiary Considerations***

a. Hearsay

In the merits hearing, the rules of evidence are observed and hearsay is not admissible. In re: M.P., 133 Vt. 144, 146 (1975); In re: J.L.M., 139 Vt. 448, 450 (1981); In re: Y.B., 143 Vt. 344, 347 (1983). Objections not made, of course, are waived. When objections are made, the party offering the out-of-court statement must make an offer of proof that there is a hearsay exception that applies or that the statement is not being offered for its truth. V.R.E. 103(a)(2). In re: A.L., 163 Vt. 635, 638 (1995) (mem.).

One of the common hearsay exceptions in Family Court is V.R.E. 804a, which covers alleged victims of sexual abuse who are age 12 and younger, as well and mentally retarded or mentally ill adults. This rule provides that statements by children are not excluded by the hearsay rule if:

> 1) the statements are offered in a civil, criminal, or administrative proceeding in which the child is an alleged victim of sexual assault, aggravated sexual assault, lewd or lascivious conduct with a child, incest, abuse, neglect, exploitation, or wrongful sexual activity;
>
> 2) the statements were not taken in preparation for legal proceedings and, if a criminal or delinquency proceeding has been initiated, the statements were made prior to the defendant's initial appearance;

3) the child is available to testify in court or under V.R.E. 807 (which provides for testimony by closed-circuit television or by recorded testimony in certain circumstances); and

4) the time, content and circumstances of the statements provide substantial indicia of trustworthiness.

See the sample Proposed Findings of Fact and Conclusions of Law in Support of Admissibility of Out-of-Court Statements in the Motions section of this Manual.

In In re C.K., 164 Vt. 462, 467 (1995), the court admitted a child's statements to a pediatrician and a nurse that her father had sexually abused her. The court found that the child's statements were not made in preparation for legal proceedings, but were made for the purposes of medical treatment. Id. The Court also has held that statements made during an initial DCF investigative interview are not made in preparation for legal proceedings; rather, the interviews are performed for the protection of the child. State v. Duffy, 158 Vt. 170, 172-73 (1992).

Two other common hearsay exceptions are "present sense impression" and "excited utterance." V.R.E. 803(1) provides that a present sense impression, or "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," is not excluded by the hearsay rule, even though the declarant is available as a witness. V.R.E. 803(2) defines an excited utterance as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." See Bayne v. State, 632 A.2d 476, 489 (Md. Ct. Spec. App. 1993); State v. Solomon, 144 Vt. 269, 272 (1984).

Rule 801(d)(2), which states that an admission by a party-opponent is not hearsay, is frequently used in CHINS cases to get the parents' statements into evidence.

b. Use of Initial Case Plan

If a temporary care order is issued granting custody to the commissioner of DCF in either a CHINS case or a delinquency case, DCF shall prepare and file with the court an initial case plan for the child and the family within 60 days of the child's removal from the home. 33 V.S.A. § 5314 (a), 33 V.S.A. § 5257 (a). These initial case plans shall not be used or referred to as evidence prior to a finding on the merits that the child is either a child in need of care and supervision (33 V.S.A. § 5314 (b)) or a finding that the child has committed a delinquent act. (33 V.S.A. § 5257 (b)). If the court reads the case plan prior to adjudication, a motion for mistrial should be made.

c. Use of Disposition Case Plan

In delinquency cases DCF shall file a disposition case plan no later than 28 days from the date of the finding by the court that a child is delinquent and the disposition case plan shall not be used or referred to as evidence prior to a finding that a child is delinquent. 33. V.S.A. § 5230

(a). While most disposition case plans will be filed subsequent to a finding by the court that a child is delinquent, there may have been a stipulation worked out where an admission to a delinquent act is entered, the court finds delinquency and the court proceeds directly to disposition. In those cases DCF may have prepared and filed a disposition report along with a stipulation by the parties. In those cases the court may not use or refer to the disposition case plan as evidence prior to the finding of delinquency.

In a CHINS case DCF shall file a disposition case plan, that has been ordered by the court after a child has been found to be in need of care or supervision, no later than 28 days from that finding. 33 V.S.A. § 5316 (a). However, the court may, in its discretion and with the agreement of the parties, waive the preparation of a disposition case plan and proceed directly to disposition based on the initial case plan filed with the court pursuant to 33 V.S.A. §5314. Although the statute is silent with regard to the court using or referring to a disposition case plan prior to a finding by the court that the child is in need of care or supervision, counsel should argue that any such use or reference by the court is not appropriate. Because the only time that a court would immediately proceed to disposition in a CHINS case following a determination that a child is in need of care and supervision would be when a disposition case plan has been waived by agreement of the parties this should rarely, if ever, be a concern.

d. Child Testimony

For a detailed look at the issues involved in children's testimony, see J. Meyers, Child Witness Law and Practice, (1987 & Supp.); S. Ceci and M. Buck, Suggestibility of the Child Witness: A Historical Review and Synthesis, 1993 Psychological Bulletin, both available at the Defender General's Office.

On the Defender General's website, see the article on Preparing Child Witnesses- An interview with Dr. Karen Saywitz, ABA Child Law Practice, Vol. 16 No. 11, pp. 170-76 (January 1998).

9. ***Practical Considerations—When & Whether to Enter Admission***

When representing a child or parents in a CHINS proceeding, it may be appropriate and tactically advantageous to admit to some or all of the allegations in the petition.

You can enter into a written stipulation to this effect. In the written stipulation, the parent or child may identify the specific facts to which they are admitting. A form stipulation is available on the judiciary website at www.vermontjudicairy.org/eforms/Form%20108,pdf. The parent or child must admit to sufficient facts to support the finding of CHINS. Children are not expected to enter admissions to Abuse or Neglect petitions, but are expected to enter an admission or denial to unmanageability and habitual truancy petitions.

However, be aware that in foregoing a merits hearing, you may be giving up the most effective leverage you have over the disposition of the case. More importantly, the disposition, which lies within the discretion of the court, may be extremely difficult to overturn. One alternative is to enter an admission conditioned upon the court's acceptance of the parties' agreed-upon disposition.

In addition, you may be able to reach an agreement with DCF not to make certain placements, e.g. out-of-state institutions, without first seeking a judicial order. Also, you can attempt to have the parties agree there will be no change of placement without a prior court hearing.

These considerations are more likely to apply to the parents in the CHINS context. In re P.F., 133 Vt. 64, 66 (1974) (admission led directly to loss of residual parental rights, and the child was placed for adoption). But see In re Y.B., 143 Vt. 344, 347 (1983) (a stipulation that a child was in need of care or supervision, offered and accepted on the condition that it could not be used to justify a finding of fault on the mother's part, provided "no evidence" of the mother's unfitness). It should be noted that, the longer the case is in an adversarial position, assuming that there is some validity to the allegations in the CHINS petition, the positions of the parties may become more entrenched. Also, the passage of time may delay an admission by a parent and the parent's acceptance of services. In such circumstances, it may be more likely that the case will end up in TPR proceedings.

I. **Findings and Order**

Under the prior statutory scheme, after a contested merits hearing, the court was required to make an order containing its findings unless the parties waived formal findings of fact. See In re J. M., 131 Vt. 604, 608 (1973); In re R.B., 134 Vt. 368, 369-70 (1976). (See §5315). Failure to do so was reversible error. In In re K.B., 155 Vt. 514, 516 (1991), the court held that §5526 required the court to make specific findings; a conclusory statement that the child was delinquent was not sufficient. However, the court did not need to make findings on an element not disputed at trial. Although a finding of abuse or neglect at the merits hearing alone could not meet the higher burden of proof at disposition to place a child in DCF custody (convincing proof of parental unfitness), see, In re R.L., 148 Vt. 223, 227 (1987); In re L.S., 147 Vt. 36, 38 (1986), parties could seek merits findings by clear and convincing evidence to avoid relitigating certain issues. See In re C.K., 164 Vt. 462, 470-71 (1995).

Under the 2008 revisions, the court must only make its findings “on the record,” 33 V.S.A. § 5315(e)), leaving the choice of issuing written findings to the sitting judge in each case. The question as to whether to make findings by the higher clear and convincing standard is left to the court’s discretion. 33 V.S.A. § 5315(a).

For appeal, the findings of fact constitute a critical part of the record. It may be the case that the evidence simply does not support the court's findings. Similarly, the findings may not support the adjudication. Adopting a party's proposed findings verbatim is not an exercise of the court's discretion.

If the allegations have not been proven, the court must dismiss the petition and vacate any temporary orders made in connection with the proceeding. 33 V.S.A. § 5315(f). If the allegations are proven, an adjudication is made that the child is in need of care or supervision and the court either orders that a disposition case plan be prepared by DCF and submitted within 28 days of the merits hearing 33 V.S.A. § 5315(g)) or, upon agreement of the parties to waive the preparation of the disposition case plan, may proceed directly to disposition using the initial case plan filed pursuant to 33 V.S.A. § 5314 (5315(h)).

J. Disposition Hearings and Reports

Refer to the DCF website for its policies, as they are very useful for holding DCF accountable regarding services, visitation, protocols on kinship placement, and so forth. See http://dcf.vermont.gov/fsd/policies

1. *Psychiatric and Psychological Reports*

a. General Considerations

Family Court Rule 2(h), allows for the physical or mental examination of a child or a parent in a CHINS proceeding. The rule basically follows Vermont Rule of Civil Procedure 35 which authorizes the physical or mental examination of a party in a civil proceeding or a person in the custody or under the legal control of a party when his or her mental or physical condition is in controversy.

Family Court Rule 2(h), however, specifically departs from subdivision (b)(2) of Civil Rule 35, which provides that when anyone that has been the subject of an examination under the Rule requests and obtains a copy of the examining expert's report or takes the deposition of the examining expert, that person is deemed to have waived "the physician-patient privilege as to the condition in question in its entirety." This means that if a party submitted to an examination by an expert that was ordered by the Court and then obtained that expert's report or deposed that expert, the party may not, thereafter, claim the physician-patient privilege with regard to any other examination conducted by another expert.

Under V.R.F.P. 2(h) the party does not waive such privilege. The rationale behind this is that while the Court may benefit from mental and physical examinations of parties, those parties should not be penalized for obtaining this information by being forced to waive the physician-patient privilege they hold with regard to their own therapist or physician from whom they are seeking help. Parties should be encouraged to seek treatment for their mental and physical problems and not be penalized when ordered to submit to a court ordered evaluation.

Also, under V.R.F.P. 5, the Court may order a physical or mental evaluation of a party or of a person who is in the custody or legal control of a party or may order a home study. This Rule is broader than V.R.F.P. 2, which only allows for the examination of parties. Also it grants the Court greater supervision over the selection and payment of experts. It allows the Court to

"select the physician or other expert who will perform the evaluation or home study, and [the Court] shall consider the names of persons submitted by the parties." Furthermore, the Court "shall determine who pays the cost of such evaluation and may order a party, the parties, or the court or some combination thereof to pay."

There are certain instances in which counsel, sometimes in conjunction with DCF or other parties, may deem it appropriate to request that the court order a family forensic evaluation. This would usually involve psychological evaluations of the parents, observation of the parents with the child, and interviews of service providers and other relevant persons. If termination of parental rights is being considered, such an evaluation may be both relevant and extremely useful in supporting your client's position. On the other hand, such an evaluation may develop evidence that is detrimental to your client's position. As always it is important to try and ensure that the evaluation is performed by an experienced and competent evaluator. There is a sample Motion for Family Evaluation located in the Motions section of this Manual.

b. Discovery of Parents' Mental Health Records

In 1991, Vermont Rule of Evidence 503(d)(7) was adopted. This rule allows for the admission of patient records when, among other considerations, the failure to do so would pose a risk of harm to the child. This rule is most often used to obtain parents' mental health records.

Prior to the adoption of V.R.E. 503(d)(7), which allows a party to claim the patient's privilege in certain instances in juvenile proceedings, the Vermont Supreme Court in In re: M.M., 153 Vt. 102 (1989), held that a parent's mere objection to an involuntary termination of his or her parental rights, or a CHINS finding, was sufficient to automatically call into question the parent's mental health and would be deemed to be a waiver by the parent of his or her physician-patient privilege.

The addition of § (d)(7) in 1991 limits instances in which the privilege would be waived and tries to strike a balance between the competing public policy considerations of ensuring that the Family Court receives necessary information to aid in its decision-making and ensuring that waiver of an individual's right to the protections of the physician-patient privilege will only occur in limited situations.

Section (d)(7) states that there is "no privilege under this rule if the court, after hearing, finds on the basis of evidence other than that sought to be obtained, that: (1) in any such case lack of disclosure of the communication would pose a risk of harm to the child as defined in 33 V.S.A.§ 4912, or in a proceeding to terminate parental rights the communication would be relevant under 33 V.S.A. § 5114 (ability to resume parental responsibilities within a reasonable period of time); (2) the probative value of the communication outweighs the potential harm to the patient; and (3) the evidence sought is not reasonably available by any other means." See also, In re:S.J. et al., 163 Vt. 651 (1995) (information from parent educator regarding parenting skills is critically relevant to threshold issue of whether stagnation has occurred). In In re: B.W., 162 Vt. 287, 290-91 (1994), the Court explicitly recognized the Legislature's changes and overruled In re: M.M.

For more information on psychiatric and psychological reports, see How to Seek Accuracy in Mental Health Assessments, by Judith Larson, and The Role of the Psychologist in Forensic Evaluations, by C. David Missar, ABA Child Law Practice, Vol. 16 No. 9, pp. 130-143, which can be found on the Defender General website.

2. ***Options for Disposition***

a. General Considerations

The Supreme Court has decided that, although the judge may not affirmatively order DCF to make a specific placement, In re: B.L., 149 Vt. 375, 377 (1988), the court may reject a disposition plan and order the agency to present additional evidence or an alternative plan. In re G.F., 142 Vt. 273, 281 (1982). In doing so the court should exercise its discretion with caution. The judge should not substitute personal judgment for that of the agency; the grounds for rejecting the plan must not be unreasonable, arbitrary, or capricious. The rejection must be "in the best interests of the child." Id. at 281. But see J.D., 165 Vt. 440, 444 (1996) (no error for court to reject DCF disposition recommendation and formulate a plan of its own; in determining initial custody the court may reject the recommendation of DCF custody set forth in disposition report but may not direct placement once DCF is the legal custodian.)

The requirements in the report must be supported by adequate findings, e.g., the court cannot order a father to participate in sex offender treatment at disposition if the court did not find at merits that he had sexually abused a child. In re F.P., 164 Vt. 117, 125 (1995). The case plan also may not require a parent to admit to a crime, and the court can strike such provisions from the report, In re M.C.P., 153 Vt. 275, 298-99 (1989); In re J.A., 166 Vt. 625 (1997) (mem.), although refusal to admit may justify not returning the child to a parent's custody where the denial impedes progress in treatment.

b. Custody Options

Disposition options are set forth in 33 V.S.A. § 5318 for CHINS cases. Alternatives in CHINS cases include seven options under the 2008 statutory revision, as follows:

1. return or continue custody in parent/guardian/custodian, with or without a conditional custody order for a period not to exceed two years

2. where goal is reunification with custodial parent, temporary custody to noncustodial parent, or other relative, or a person with a significant relationship with the child, again with or without a conditional custody order for a period not to exceed to years

3. transfer custody to the noncustodial parent and close the juvenile proceeding

4. transfer custody to DCF commissioner

5. terminate parental rights and transfer custody to DCF commissioner without limitation as to adoption

6. issue an order of permanent guardianship pursuant to 14 V.S.A. §2664

7. transfer legal custody to a relative or another person with a significant relationship with the child

33 V.S.A. § 5318(a). Note that, unlike the preference stated in 33 V.S.A. § 5308(b), these options are to be employed "as the court determines are in the best interest of the child." 33 V.S.A. § 5318(a) If custody is granted to the DCF commissioner, then DCF makes the decision as to where and with whom the child shall live. Historically, TPR, has been rarely sought at the initial disposition hearing (although numbers have been increasing). TPRs are usually sought under the provision allowing for modification of disposition orders. See section on Modification of Orders, below. At disposition, the court may not reserve its decision on termination and hold the record open to see "how things are going." In re B.B., 159 Vt. 584, 587 (1993).

The 2008 revisions specifically address the need for findings under options 2 or 3, above, at §5318(e), in that transfer under those provisions requires findings by the court "regarding the suitability of that person to assume legal custody of the child and the safety and appropriateness of the placement." (See In re C.A., J.A. & A.M., 160 Vt. 503, 509 (1993), and In re J.D., 165 Vt. 440, 442 (1996), decided under the prior statutory scheme, which required a finding that the individual to whom custody was to be granted was qualified to receive and care for the child, even if that individual was the noncustodial parent or a grandparent.) Transferring custody of the child in CHINS case directly to a group or foster home or a private agency, as was allowed under former §5528(a)(3)(B) or (C), has been eliminated from the 2008 revised statute.

Kinship Care: When relatives take custody of a child who would otherwise go into foster care, there is no case plan, so the kin are on their own to find services, enroll the child in school if necessary, etc. Generally more financial support is available to a child in foster care, so kinship custody must be weighed very carefully with other factors such as school placement. Typically, the school district in which a student resides is responsible for his or her education. However, the Commissioners of the Department of Education (DOE) and the Department for Children and Families have entered into a Memorandum of Understanding (MOU) that has developed a procedure by which children in DCF custody may be able to maintain an appropriate educational placement despite a change in foster home placement. Consideration must also be given to the availability of other supports for parents, and reimbursement of certain other expenses, such as mileage to doctor, counseling, phone calls to siblings, respite services and trainings available for foster parents, that may only be accessed if the child is in foster care.

Kin can be appointed as education surrogates when they are the foster parent for a child in custody. If adoption is a possibility, it is important to consider that only a child who is in DCF custody when the adoption proceedings are begun qualifies for the governmental adoption subsidy benefits. Many children who come through the court system have special needs and their caregivers would benefit from the subsidies and special services available though this program.

These kin are not typically represented by an attorney. The Public Defender statute appears to allow the court to appoint counsel for kin in Family Court proceedings only if the kin has already been appointed the child's legal guardian. 13 V.S.A. § 5232.

Lynn Granger (802-338-4725) at Vermont Kin as Caregivers is a great resource. VT Kin as Caregivers created a booklet, available on line, called a Resource Guide for Kinship Care Providers. http://dcf.vermont.gov/sites/dcf/files/pdf/ResourceGuideforKinshipCareProviders.pdf

See in table of articles, or at Juvenile Defender's Office, "Kinship Care: The Ramifications of a Relative Taking Custody of the Child vs. Becoming a Foster Parent for the Child."

c. Out-of-Home Placement Options

(1) *Legal Guidelines*

Note that 42 U.S.C. §5633(a)(12)(A) prohibits secure confinement of non-delinquent minors. This federal statute has been implemented by means of a consent order issued by the Washington Superior Court. P.D. v. Burchard, Docket No. S6-83WnM (1983). In practice, this means that unmanageable children cannot be confined at the Woodside Detention Unit. See also 33 V.S.A. § 5801(a). See the section below on Woodside.

No abused or neglected child in DCF custody may be placed in an institution used primarily for the treatment of delinquent children. 33 V.S.A. § 5322. With some exceptions, no "unmanageable" CHINS may be placed in a facility used for the treatment of delinquent children unless there is the opportunity for a prior Human Services Board hearing. 33 V.S.A. § 5322. Note, however, that in In re B.L., 149 Vt. 375 (1988), the Vermont Supreme Court held that Camp E-Wen-Akee was not a program primarily for the treatment of delinquent children. It also held that DCF has authority to place a child in its custody in any placement not prohibited by statute, without judicial approval.

Finally, for some guidance on considering children's attachment in making long-term placement decisions, see Considering Children's Attachment in Placement Decisions—a Conversation with Dr. Jay Belksy, ABA Child Law Practice, Vol. 15 No. 2, pp. 22-25 (April 1996) which can be found on the Defender General website. For information on specific potential placements, such as residential homes, see the section in this manual on Placements in the delinquency section. Also see the Defender General website in the Juvenile section.

(2) *Review of Vermont Options*

Following is a brief description of the most common out-of-home placements for children. If a child needs to be placed out of home, the least restrictive placement possible to keep the child and others safe should be pursued first. Foster care is the most common out-of-home placement for children. It can be short-term or long-term depending upon the child's needs. The goal often is that the child will return home within a certain amount of time. However, if the youth cannot return home, then long-term foster care, kinship care, or adoption may be pursued.

Foster families may need a variety of supports to care for youth so that the youth and the foster family can be successful.

Therapeutic foster care involves foster parents who are specially trained to care for children with serious emotional disturbances, and these types of homes offer greater supervision. Therapeutic foster homes are more scarce than "regular" foster homes. These foster parents are expected to:

1) teach more socially adaptive behavior within a family milieu;
2) creatively involve the youngster in recreational and community activities;
3) provide home/school coordination;
4) facilitate natural family visitation; and
5) implement the individualized treatment plan.

Therapeutic foster homes may be affiliated with certain organizations who work with families, such as Casey Family Services, Laraway or the Northeastern Family Institute. On occasion, when a child has unique needs, DCF may specifically recruit individuals to serve as foster parents for that specific child; do not hesitate to push for this type of action if DCF has been unable to locate a therapeutic foster home after a diligent search.

Residential treatment programs provide a structured living environment for youth with moderate to severe emotional problems. These programs usually provide 24 hour staff supervision, night awake security, on-site crisis management capability, clinical staff, and psychiatric consultation. The focus should be on placing children within their home region to enhance family involvement. Intensive residential programs will offer a school onsite. Other services provided are case management, family therapy and outreach, and services to reintegrate the child back into the community.

There are a number of types of residential programs. Some are large facilities with a variety of services and units including hospital units, group-care facilities, and special education schools. The Brattleboro Retreat is a fairly large facility. Others are organized into several small units or group-care programs on one large campus. Bennington School roughly fits this category. Still others are small programs serving perhaps only ten youth with both residential treatment and educational programs.

"Group homes" are more structured than therapeutic foster homes, yet less structured than traditional residential care. They provide a residential environment, but usually in single homes located within a community, serving about 6 youth. Generally, emphasis is on change and growth through supportive relationships, daily interactions, and problem solving. A group home either will have one or two adults who live in the home with the youth, or a rotating staff. The youth often will receive other services, such as counseling, in the community.

(The above information is from The Vermont System of Care Plan for Children and Adolescents Who Are Severely Emotionally Disturbed and Their Families, Vermont Agency of Human Services and Vermont Department of Education, January 1989 and current undated

version; both are available at our office and include descriptions of other services available to youth).

(3) *Out-of-State Placement Options*

Occasionally, the state may decide to transfer a child to an out-of-state placement. In re J.S., 139 Vt. 6, 12-13 (1980), dealt with the power of the state to effect a transfer without a judicial hearing, but the opinion left the waters murky.

The Court noted that the provisions of the Interstate Compact on the Placement of Children (33 V.S.A. § 5906 and 33 V.S.A. § 5925, formerly 33 V.S.A. § 3156 and 33 V.S.A. § 3205), authorizing out-of-state placement after a judicial hearing, superseded the general authority under the disposition statute (33 V.S.A. § 5529, formerly 33 V.S.A. § 657), to make placements without a judicial hearing. In re: J.S., 139 Vt. at 12. The Court found that certain transfers did not fall within the ambit of the Interstate Compact, e.g., transfer to "any institution primarily educational in character," and therefore the state retained general authority to make a transfer of this kind without a judicial hearing. Id. However, the Court ruled that the trial court failed to make findings of fact to determine whether the transfer would fall under the Interstate Compact or the statute governing dispositions, and reversed and remanded the case. Id. at 13.

The Vermont Supreme Court has held that the Interstate Compact provisions granting hearings before juveniles are placed out of state only grant a juvenile who has been adjudicated neglected or unmanageable, and not his/her parents, the right to request and be given a judicial hearing regarding a proposed out-of-state placement. In re A.K., 153 Vt. 462, 464-65 (1990). See also 33 V.S.A. § 5906.

See Section VIII G below for further discussion of the Interstate Compact on the Placement of Children.

Do not take comfort in the belief that the state will request judicial blessing before transferring your client out of state. Quite to the contrary, if there is any hint that an out-of-state transfer is contemplated, counsel should move for an immediate protective order under §5115 or a temporary restraining order under V.R.C.P. 65. Of course, there are times when children would like to be placed out of state. Be sure to inquire as to your client's wishes, assuming your client has decision-making capacity, prior to making a decision about strategy.

3. ***Content and Format of Disposition Case Plan***

DCF must submit a disposition case plan to the court no later than 28 days from the merits finding. 33 V.S.A. § 5316(a). V.R.F.P. 2(g) states that the disposition case plan and any report of expert witnesses must be filed with the court and arrangements made for the receipt of the reports by the GAL and attorneys of record 7 days prior to the disposition hearing.

Arrangements for the receipt of disposition case plans by the GAL and the attorneys of record may vary from county to county.

33 V.S.A. § 5316 outlines the required content of the disposition case plan, as follows:

1) a permanency goal, which must be either

    a. reunification with the custodial parent, guardian or custodian;
    b. adoption;
    c. permanent guardianship; or
    d. other permanent placement

2) an assessment of the child's medical, psychological, social, educational, and vocational needs;

3) a description of the child's home, school, community and current living situation;

4) an assessment of the family's strengths and risk factors, specifically including consideration of the needs of children and parents with disabilities (child's needs to be given primary consideration);

5) a statement of family changes needed to correct the problems necessitating state intervention, with timetables for accomplishing the changes.

6) Recommendation with respect to legal custody for the child and a recommendation for parent-child and sibling contact, if appropriate;

7) Plan of services outlining each party's responsibilities, including a description of services required to achieve the permanency goal;

8) A request for child support;

9) Notice to the parents that failure to accomplish substantially the objectives stated in the plan within the time frames established may result in termination of parental rights.

Where the report is deficient in any of these aspects, and the disposition is not favorable, a request should be made to the court for a report in compliance with the statute.

Efforts should be made to discuss disposition with the caseworker while the report is still in the drafting stage. The most useful information that can be shared with the disposition case plan writer will fall into two broad categories: factual data from your client's perspective and suggestions as to disposition plans.

The disposition case plan serves the purpose of creating a plan to achieve a goal determined by DCF. Later, at subsequent reviews, (see section below on Administrative Reviews and Permanency Hearings), this document is referred to as a caseplan. DCF must first consider whether reunification is a viable option before turning to alternative goals. Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, 42 U.S.C. § 671(a)(15). However, if reunification is not a viable option, DCF may seek termination of parental rights at initial disposition if that is in the best interests of the child as determined by the criteria in 33 V.S.A. §5114. See §5318. In re G.S., 153 Vt. 651, 652 (1990)(mem.)

4. ***Objections***

It is important to note on the record any disputes that your client might have with the facts set forth in the disposition case plan even if you are agreeing with the recommendations in the disposition case plan. Otherwise, these facts can be relied upon later in case plan reviews, modification proceedings, or a termination of parental rights hearing.

a. Inclusion of Hearsay

At a contested disposition hearing, all parties may present evidence and examine witnesses. If reports are admitted, the parties must have the opportunity to examine those making the reports, except sources of confidential information do not need to be disclosed. 33 V.S.A. § 5317(b). The court may admit hearsay, and rely upon it to the extent of its probative value. 33 V.S.A. § 5317(b). The disposition hearing is fraught with the danger that unreliable hearsay will be admitted and relied upon. In the event that disputed hearsay is presented to the court, counsel should ask for the opportunity--including a continuance if need be--to challenge or contradict the proffered material. 33 V.S.A. § 5317(b). On the other hand, the disposition hearing provides counsel with the occasion to present favorable information and an alternative disposition plan to the court. This possibility should not be overlooked.

Hearsay is admissible at a disposition hearing but there must be sufficient non-hearsay evidence of parental unfitness to remove a child from the home. In re S.G., 153 Vt. 466, 474 (1990). "([W]e have never held that findings at disposition can't be based, at least in part, on hearsay. Hearsay is admissible to show parental unfitness provided there is additional credible non-hearsay evidence as well"). Also, a determination of parental unfitness may be based solely on hearsay if there are no objections to the hearsay, although the court criticizes too much reliance on hearsay. Id. The question then arises as to how much hearsay is too much. In re R.B., 152 Vt. 415, 424 (1989) (court rejects argument that reliance on hearsay can never meet burden of proof of convincing evidence of parental unfitness; such an argument confuses the issue of admissibility with the overall weight of the evidence; if court finds hearsay has sufficient probative value in combination with other evidence to meet the state's burden of proof, it may use it to support its conclusions). See also In re A.F., B.F. & C.F., 160 Vt. 175, 181 (1993) (hearsay admissible in TPR as long as it is not sole basis for TPR); In re E.B. & M.B., 162 Vt. 229, 233 (1994) (same).

b. Noting Objections on the Record

If you are not in agreement with the disposition case plan or other reports, the general rule is to object to them as hearsay. If you do not object to hearsay, you waive it. One option is to file a motion in limine ahead of time to object to the hearsay or ask the judge for a continuing objection at the hearing. You can point out to the court that you have no choice and that also, by objecting, you are giving the other side the opportunity to make an offer of proof that the evidence is not hearsay or comes within one of the exceptions to the hearsay rule. It also is important to note on the record specific objections to hearsay contained within the disposition case plan.

5. ***Disposition Hearing***

If the court makes a finding that the child is in need of care or supervision, a date must be fixed for the disposition hearing. In CHINS proceedings, disposition may be made immediately if all parties agree, based upon the initial case plan required by 33 V.S.A. §5314 (5325(h)), but must be held within thirty-five days of the finding by the court that the child is in need of care and supervision. 33 V.S.A. § 5317(a). Under the prior statutory scheme, it was uncommon to have a CHINS disposition hearing held immediately upon a merits finding. It remains to be seen to what extent the requirement for an initial case plan under the 2008 revisions will change that practice.

A disposition hearing addresses the placement of the child and the underlying causes and conditions leading to the allegations of the petition. The court must accept or reject a case plan of services intended to remedy these deficiencies and set forth findings of fact to justify its decision thereon. In re G.F., 142 Vt. 273, 281 (1982). The court can only accept or reject the case plan; it cannot direct placement of the child by DCF.

The statute does not set forth any time limitation within which the court must issue its findings, but the Supreme Court has stated that the interval may not be unreasonable. In re B.M.L., 137 Vt. 396, 399 (1979), overruled in part by A.S. and J.S., 152 Vt. 487, 492 (1989). Failure to make findings within a reasonable period of time or failure to set the disposition hearing within the prescribed period constitutes the basis for release from detention, if such habeas corpus relief is in the best interests of the child. In re A.S., 152 Vt. at 490; In re M.C.P., 153 Vt. 275, 293-94 (1989). Some judges have dismissed proceedings where the disposition hearing was not timely set.

a. Findings of Parental Unfitness

At disposition, the court must go beyond the merits findings to determine parental unfitness before the court can remove the child from the custody of his parents. In re C.A., J.A. & A.M., 160 Vt. 503, 506-07 (1993) (findings as to when failure to protect becomes unfitness are vital). However, such a determination necessarily incorporates merits findings that may bear directly on the issue of parental fitness. In re T.D., 149 Vt. 42, 45 (1987).

Findings of fact are required in disposition orders. In re M.C., L.B. & G.B., 147 Vt. 41, 44-45 (1986); In re J.R., 147 Vt. 34, 36 (1986); In re L.S., 147 Vt. 36, 38 (1986); In re R.M., 150 Vt. 59, 71 (1986); In re L.H., 165 Vt. 591, 592 (1996) (mem.) (reversal for want of written findings at disposition despite court's adoption of disposition report and plan). Parents' refusal to stipulate to DCF custody at disposition requires the court to make findings of fact in support of its determination of parental unfitness. In re S.G., 153 Vt. 466, 475 (1990). However, there is no need for findings at disposition where the parties have stipulated to DCF custody. In re A.O., 161 Vt. 302, 304 (1994); In re C.D., supra. ; In re: B.H., 174 Vt. 213 (2002).

At the disposition phase of a juvenile proceeding, there must be "convincing proof" of parental unfitness before a child may be placed in the custody of the state. In re: A.D., 143 Vt. 432, 435 (1983). The Vermont Supreme Court in In re T.M., Docket No. 91-546 (Dec. 22, 1992) (3 Judge E.O.), expressed the importance of making explicit findings of parental unfitness. There, the Court remanded a case for specific findings of unfitness by the trial court where the trial court found that the child was subjected to physical abuse and that his mother failed to protect him. The Supreme Court stated that the trial court's findings could lead to either of two constructions: that the child was simply a CHINS, or that he was a CHINS and his mother was unfit. It held: "Where the trial court does not make an explicit finding of unfitness, and the record does not remove all doubt that the court's findings effectively amount to a determination of unfitness, the order cannot stand...." The Court explained the rationale behind its ruling as follows:

> It is especially vital for a court whose order will drastically affect family rights and responsibilities to speak clearly, to explain its reasoning, and, more fundamentally, to justify its decision. Without clear findings, this Court is left to speculation as to the trial court's rationale, and speculation is especially inappropriate in matters of such gravity.

Slip op. at 3. See also, In re C.D., Docket No. 93-309 at 3 (1994). But see, In re H.A., 148 Vt. 106, 109 (1987) (a general finding at disposition that the mother lacked "sufficient parenting skills," etc., was sufficient); In re C.W., No. 92-274, slip op. at 2 (1993) (failure to use word "unfit" doesn't necessarily negate finding of unfitness where balance of court's decision leaves absolutely no room for doubt). Finally, disposition findings must be based on the current circumstances of the family, not the circumstances at the time the petition was filed. In re C.B., 162 Vt. 614, 614 (1994).

In several cases, the Court has upheld the juvenile court's finding that there was convincing evidence of parental unfitness based upon proof of continued residence with the perpetrator of the abuse and/or failure on the part of a parent to acknowledge the abuse and to take steps to protect the child from further abuse. In re B.S., No. 90-557, slip op. at 2 (1993); In re K.M., 149 Vt. 109, 112 (1987).

However, it is not enough to allege that the abusive parent may be a danger to the child. Specifics as to how much the children are at risk, and whether there are any alternatives to transferring custody from the parents, also must be explored. In re C.A., J.A. and A.M., 160 Vt. 503, 505-07 (1993). Compare In re F.P., et al., 164 Vt. 117, 118 (1995).

In addition, absent any proof that a non-custodial parent is unfit, custody can be given to a non-custodial parent at disposition, if the parent is qualified to receive and care for the child. §5318(a)(2) and (3); See In re N.H., 135 Vt. 230, 237 (1977); In re B.L., J.L. and C.N., 145 Vt. 586, 592 (1984). The noncustodial parent must be given notice and an opportunity to be heard at disposition. In re: B.L., 145 Vt. at 592.

If a parent's attorney does not contest unfitness at the initial disposition and then appeals a subsequent adverse TPR order, the issue of parental unfitness is waived. In re C.H. & M.H., No. 99-352 (Jan. 14, 2000) (court terminated father's parental rights without finding at disposition or termination that he was an unfit parent; court avoided the issue by deciding that the father failed to "preserve his unfitness claim"); In re A.M., No. 99-365 (Nov. 24, 1999) (3-Judge E.O.) (failure to contest unfitness at the initial disposition and to appeal an adverse ruling waives the issue on appeal); In re K.K., No. 99-262 (Oct. 28, 1999) (3-Judge E.O.) (same).

Those parents who may wish to stipulate to the disposition order for whatever reason could try to stipulate with the added language that the stipulation cannot be the basis for a finding of parental unfitness at any time and that the parent contests unfitness. The attorneys who are advocating for DCF custody could oppose such a limitation on a stipulation. Unfitness is a prospective conclusion, although past failings may warrant a prediction of future unfitness. However, it is possible that the Court may not accept such a stipulation under In re: S.G., 153 Vt. 466, 475 (1990), which rejected a mother's request for a "no-fault" custody order in which the mother did not contest the disposition order, but did not want findings on parental unfitness.

6. *The Reasonable Efforts Requirement*

The Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, 42 U.S.C. §§620, 670-676, was designed to prevent the long-term placement of children in foster care. (For a copy of the Act, see the section in this manual on AACWA). The act conditions state receipt of federal money for foster care and adoption assistance upon the state's creation of a foster care case plan and case review system. The act also requires that "...in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home...." 42 U.S.C. §671(a)(15). The act requires a judicial determination that these "reasonable efforts" have been and will be made in order for the states to receive

federal reimbursement for foster care maintenance payments for the child. 42 U.S.C. §672(a)(1). In addition, the child's case plan must explain "how the agency plans to carry out the judicial determination made with respect to the child in accordance with [42 U.S.C. §672(a)(1)]...." 42 U.S.C. §675(a). Because federal reimbursements for foster care payments made by DCF are tied to this judicial determination it is incumbent upon DCF to prove to the court that this requirement has been met. If DCF cannot demonstrate to the Court that this requirement has been met the Court shall not find that DCF has made reasonable efforts.

In 1991 the Vermont Supreme Court held that the juvenile court is a court of limited jurisdiction and is without jurisdiction in a termination of parental rights hearing to consider DCF' compliance with the "reasonable efforts" requirement of 42 U.S.C. §671(a)(15). In re K.H., 154 Vt. 540, 542-43 (1990), cert. denied, 498 U.S. 1070 (1991). Subsequent to that case being decided there was a statutory change in 2005 when the legislature mandated that, at the conclusion of the detention hearing, the court shall make written findings on whether “reasonable efforts” were made to prevent unnecessary removal of the child from the home and defined “reasonable efforts” as the exercise of due diligence by the department for children and families to use appropriate and available services to prevent unnecessary removal of the child from the home. Prior 33 V.S.A. § 5515 (f). The “reasonable efforts” requirements were retained in the Juvenile Judicial Proceedings Act and may be found at 33 V.S.A. § 5256 (c) (2) and 33 V.S.A. § 5308(c)(1)(B).

In addition, the court found that the parent in In re K.H. had not shown that she had standing under the law to bring a private action. Id. at 542, n.2. Nevertheless, if DCF intervenes in a family and seeks a disposition that would require removal of a child from the home, the advocate can request that the court make findings about what, if any, efforts DCF has made to prevent removal and what DCF plans to do to reunite the family. In In re J.B., 173 Vt. 515 (2001), the Vermont Supreme Court requested the Advisory Committee on The Rules for Family Proceedings to consider whether and what due process requirements are mandated by the federal statute and whether the current practice for judicial determination conforms with due process, as well as whether judges have authority to make the reasonable efforts determination.

The child's removal from the home may be necessary to ensure the child's safety and it may be in his or her best interests to be removed. Certainly, if protective measures and services can be put in place that would allow for the child to safely remain in the home, that would be in the best interests of the child, given the trauma to the child that usually occurs when a child is taken from his or her parents.

At any time after the child is in foster care, a parent of the child, or the child, can petition for modification of the disposition order and can argue that the child could safely return home if a particular service were provided by DCF. 33 V.S.A § 5113. (See the section below on Modification of Orders, which explains that the moving party must show a substantial change in material circumstances and that the modification is in the child's best interests). The "reasonable efforts" provisions of the act provide support for the argument that DCF must provide in-home services if such services can permit the family not to be separated or to be reunited. The court has the power to return legal custody to the custodial parent, guardian, or custodian, subject to a

conditional custody order for a fixed period of time. 33 V.S.A. § 5318(a)(1) This section can be used to assert the "reasonable efforts" requirements either at initial disposition or in a petition to modify a disposition order.

However, the Adoption and Safe Families Act ("ASFA") of 1997, P.L. 105-89, 42 U.S.C. § 671(a)(15)(D), (see also 33 V.S.A. § 5102(25)) enumerates certain circumstances under which the state does not have to make reasonable efforts to reunify a family. These circumstances include where a parent has:

(1) murdered or committed voluntary manslaughter of another child of the parent;
(2) aided or abetted, attempted, conspired, or solicited to commit such murder or manslaughter;
(3) committed a felony assault which has caused serious bodily injury to the child or another child of the parent;
(4) had their parental rights to a sibling terminated involuntarily; or
(5) subjected the child to aggravating circumstances, which may include abandonment, torture, chronic abuse or sexual abuse.

a. Reunification efforts and the ADA

The Americans with Disabilities Act (ADA) prohibits state entities from excluding persons because of their disabilities from services, programs or activities of the public entity. 42 U.S.C. § 12132. Under the ADA, disability is defined as a "physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(2); 28 C.F.R. § 35.104. See also 9 V.S.A. §§ 4501(7), 4502(c)(1).

ADA issues must be raised as soon as possible in order to request and receive any reasonable accommodations. If a disabled parent is unable to access the programs DCF requires, you must seek accommodations that will enable the parent to participate. Although DCF's violation of the ADA is not a defense to a TPR, In re B.S., 166 Vt. 345, 351 (1997), the Vermont Supreme Court expressed its "hope that the effect of this decision is to encourage parents and other recipients of DCF services to raise complaints about services vigorously and in a timely fashion." Id. at 354-55. See sample Motion for Evaluation and Accommodations, the Memorandum from the Family Court Law Clerk, and the 1998 Training Handout on TPRs and the ADA.

7. ***Duration of Orders***

Disposition orders are indeterminate in duration unless otherwise specified. All disposition orders expire when the child attains majority (age eighteen). (See the section below on Privacy regarding a delinquent's rights to have his or her records sealed.) DCF Casework Manual policy No. 127 provides that financial support can be provided for certain juveniles in DCF custody who turn 18 and are continuing in school. See http://dcf.vermont.gov/fsd/policies.

K. Administrative Reviews and Permanency Hearings

1. *Permanence*

Children of all ages need and deserve permanence in their lives --a stable and lifelong commitment between children and their caretakers. Disposition case plans are designed to explain what services will be put in place to address the underlying causes of the abuse or neglect. For example, case plans should address parental substance abuse or mental illness, the parent's lack of understanding of child's needs and capabilities, housing and financial difficulties, and/or domestic violence. Hopefully, the parents (and/or child) will engage in services and benefit from them so that they can reunify with their child. However, a parent may be unable to resume parental responsibilities within a reasonable period of time, and in such cases termination of parental rights and adoption may be the best option for obtaining permanence for children. See In re A.S. & J.S., 152 Vt. 487, 493 (1989) (citing Adoption of Alexander S., 750 P.2d 778 (1988)) (need for finality is unusually strong in child custody cases due to need for "secure, stable, long-term, continuous relationships with parents or foster parents.") A child's attorney should be aware of what services are available, when they are available, and the feasibility of the case plan.

In relation to the above, there are several widely accepted principles on child development that should be kept in mind:

- stable and continuous caregivers for children are essential to normal emotional growth; children need secure and uninterrupted emotional relationships with adults who are responsible for their care;

- children need the security of having parents committed to their care; the lack of parents who provide unconditional love and care can profoundly affect a child's self-image;

- having a permanent family adds predictability to a child's life; foster care, with its inherent instability and impermanence, can impose great stress on a child; and

- child-rearing competence of autonomous (safe) families is always superior to that of the state.

Decision-making concerning a child in state-supervised foster care can often be fragmented and inconsistent. Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, National Council of Juvenile and Family Court Judges, Reno, Nevada, 1995, p. 13. These resource guidelines can be downloaded at http://www.ncjfcj.org/content/blogcategory/369/438/

The Resource Guidelines also state:

Children have a very different sense of time [than] adults.... Three years is not a terribly long period of time for an adult. For a six-year-old, it is half a lifetime, for a three-year-old, it is the formative stage for trust and security, and for a nine-year-old, it can mean the difference

between finding an adoptive family and failing to gain permanence because of age. If too much time is spent in foster care during these formative years, life-time problems can be created. Id. at 14.

Long-term foster care should not be considered unless other options, such as adoption or reunification or permanent guardianship, are ruled out. The longer a child is in foster care, the more likely that that child will experience multiple placements. Also, a foster family relationship technically ends when the child turns 18. Thus, a foster family may not be available to support a youth after that time. Many youth do need financial and emotional support after they turn 18. However, there may be individual situations where long-term foster care is the most realistic and beneficial choice for the child. Such situations may exist where foster parents are willing to commit to providing permanency for a child but for some reason are unable to adopt or become the child's permanent guardians. Another example may be where the child is older, has a bond with his or her biological parents, is content to remain at his or her foster home and does not want to be adopted.

2. ***Postdisposition Review Hearing***

Under the 2008 statutory revision, the court must hold a postdisposition review hearing within 60 days of the date of the disposition order in any case where the permanency goal of the disposition case plan is reunification. 33 V.S.A. § 5320. The stated purpose of the hearing is to

- monitor progress under the disposition case plan and
- review parent-child contact.

Notice must be given to all parties. Foster parents, preadoptive parents and relative caregivers must also be provided notice and afforded an opportunity to be heard. However, that notice and opportunity to be heard does not afford party status to any of the caregivers noted above. Id.

3. ***Administrative Reviews***

When custody or guardianship of a child is transferred to the commissioner of DCF by an order of the juvenile court, an administrative review is held by DCF at its offices every six months from the date that a child is placed in DCF custody. In certain cases, DCF may determine that additional 3 month reviews are appropriate based on the case plan. The inquiry at this review focuses on the goals in the case plan, whether the parties have achieved those goals, and the long-term plan for placement of the child. A party may appeal the following issues through an administrative process:

1) the long-term goal for the child,
2) the child's placement, and
3) visitation.

There is now one level of appeal replacing the three levels that were previously provided. See Casework Policy No. ***123*** for more information. This policy can be found online at http://dcf.vermont.gov/fsd/policies, or contact the Juvenile Defender's Office for a copy.

If satisfaction is not achieved through DCF's internal appeals process, an aggrieved party also may be entitled to a hearing before the Human Services Board on certain matters. Indeed, the statute authorizing hearings in front of the board is quite broad:

> An opportunity for a fair hearing will be granted to any individual requesting a hearing because his or her claim for assistance, benefits or services is denied, or is not acted upon with reasonable promptness; or because the individual is aggrieved by any other agency action affecting his or her receipt of assistance, benefits or services, or license or license application; or because the individual is aggrieved by agency policy as it affects his or her situation.3 V.S.A. §3091(a).

The Vermont Supreme Court has held that the Human Services Board does have subject matter jurisdiction to determine whether DCF should pay for counseling for a parent whose child was in DCF custody pursuant to a CHINS proceeding. In re Kirkpatrick, 147 Vt. 637, 638 (1987). It is unclear exactly what constitutes "affecting his or her receipt of assistance, benefits or services," but the Vermont Supreme Court has held that the "Legislature intended the Board to hear any case in which an individual is aggrieved by DSW action or policy that affects that individual." Stevens v. Dept. of Social Welfare, 159 Vt. 408, 417 (1992). It is conceivable that other grievances, such as grievances with visitation, the long-term goal, ADA issues, or the child's placement, could be brought before the Human Services Board, as opposed to going through the DCF administrative process. However, for some of these issues, such as visitation, a motion with the court would be more expedient. You probably would have to exhaust your administrative remedies by following the internal DCF appeal process before appealing to the Human Services Board.

4. ***Permanency Planning Reviews and Permanency Hearings***

a. The Adoption and Safe Families Act

The Adoption and Safe Families Act of 1997 ("ASFA"), P.L. 105-89, was enacted primarily to promote child safety and timely decision making regarding permanency for children, and to clarify what "reasonable efforts" states need to make to keep families together.

ASFA strives to prevent children from being in foster care for long periods of time, and from moving from foster home to foster home. As explained above, permanency is necessary for a child's healthy development. It has been determined that such uncertainty and instability is detrimental to children. In most cases, foster care should be a temporary setting and not a permanent placement for children. A safe and permanent home for children is the goal. In recognition of children's developmental needs and sense of time, the law shortened the timeframe for making permanency planning decisions, and established a timeframe for initiating termination of parental rights proceedings. ASFA promotes adoption for children who cannot safely return home.

i. Guidelines for Filing Termination of Parental Rights Cases

ASFA--Guidelines on Filing Termination of Parental Rights Cases

One of the most significant changes under ASFA is a more aggressive approach to pursuing termination of parental rights and seeking adoptions for children. Under ASFA, the state must file a termination of parental rights petition if:

1) a child has been in foster care for 15 of the last 22 months;

2) a parent has committed murder or voluntary manslaughter of a sibling of the child, or has aided, abetted, attempted, conspired, or solicited to commit such murder or voluntary manslaughter; or

3) a parent has committed a felony assault that has resulted in serious bodily injury to the child or a sibling. 42 U.S.C. §675(5)(E).

The state is not required to file a petition if:

1) the child is cared for by a relative;

2) there is a compelling reason for determining that filing such a petition would not be in the best interests of the child; or

3) the state has not provided services consistent with the case plan that the state deems necessary for the safe return of the child to the home. Id.

ASFA allows each state to define "compelling reason." The following are examples of "compelling reasons" that may be acceptable under ASFA:

.

(1) Services identified in the case plan have not been provided within the times specified in the case plan and such services are available and may make it possible for the child to safely return home by (a date certain).

(2) A person (e.g., foster parent, relative, friend) will provide the best available care for the child. The person prefers that parental rights not be terminated or is not willing to adopt, but is committed to providing a permanent home for the child. The person is fully capable of caring for and keeping the child safe and it is in the child's best interest to remain with this person.

(3) The parent has made substantial progress in eliminating the problems causing the child's continued placement in foster care; it is likely that the child will be able to safely return home within three months; no prior extension has been granted; and return home is in the child's best interest.

(4) A child (over 12) has a close and positive relationship with the parent and a permanent plan not including termination of parental rights will provide the most secure and appropriate placement for the child.

(5) A child (over 12) is firmly opposed to a termination of parental rights and is likely to disrupt any adoptive placement.

(6) A child is not presently capable of functioning in a family setting. This exception expires every 90 days unless there is a further court determination that the child cannot be placed with a family.

(7) The child has complex and expensive medical or other special needs and the state adoption subsidy and other benefits are insufficient to reliably cover the costs of the child's present or anticipated care and treatment.

2. ***Reviews and Hearings – Time Frames***

When a child has been in DCF custody for approximately eleven months, a permanency review is held at DCF. The focus is similar to the six-month administrative review, however, as explained below, the emphasis is on permanency.

Shortly after the permanency review at DCF, a Permanency Hearing is held in court. If these reviews and hearings are not held on time, DCF loses federal funding for children's placements. Under the 2008 statutory revisions, the permanency hearing must be held at least every 12 months, and the first must be held within twelve months of the date that custody is transferred to DCF. 33 V.S.A. § 5321(c). The court has the option to order more frequent permanency hearings, according to the age of the child, as follows:

- if the child was aged 3 years or under at the time of custody transfer, the court may review permanency as frequently as every three months;
- if the child was aged 3 to 6 years at the time of custody transfer, the court may review the permanency as frequently a every six months. Id.

Attorneys for young children should be aware of these options.

Please note that any shortened review interval approved for one child in a family shall apply to all siblings of that child who are also in DCF custody. 33 V.S.A. § 5321(d).

ASFA emphasizes the need for permanency for children in state custody, and the identification of a permanency plan for children within at least one year after the earlier of the following dates:

1) the date of the order finding a child delinquent or CHINS; or

2) 60 days after the date that the custody of the child was initially transferred.
The purpose of the permanency hearing is to review the disposition order. The court is to determine the permanency goal for the child and the estimated time for achieving that goal, and shall specify when:

(1) the child or custody thereof shall be returned to the parent, guardian or custodian;

(2) the child will be released for adoption;

(3) a permanent guardianship will be established;

(4) a legal guardianship will be established; under chapter 111 of Title 14; or

(5) the child will remain in the same living arrangement or be placed in another planned permanent living arrangement because it has been demonstrated by DCF that it is not in the child's best interests to:

a. return home;
b. have residual parental rights terminated; or
c. be placed with a fit and willing relative or legal guardian.

V.S.A. § 5321(a).

There has been some debate as to whether other issues may be raised at a permanency hearing. DCF has taken the position that only those issues specifically enumerated in the statute may be raised. However, in a 1999 trial court opinion, the court allowed a juvenile to litigate the issue of his placement at the Woodside Residential Unit; the court found that it should examine the juvenile's placement to determine if it was the most appropriate way of preparing him for independent living. In re C.B., No. F170-12-91 Rdjv, slip op. at 7 (Jan. 28, 1999) (Zimmerman, J.).

When a Permanency Hearing is due DCF must file a "notice of review" with the court, along with a report and recommendation; a hearing must then be held within thirty days. 33 V.S.A. § 5321(e).

ASFA also provides that foster parents, pre-adoptive parents, or relatives caring for a child have a right to notice and an opportunity to be heard in any review or hearing concerning a child. However, this provision does not afford party status to such individuals. 33 V.S.A. § 5321(e)(2).

The permanency hearing "shall be held in all respects as a hearing on a petition" (except that hearsay is admissible to the extent of its probative value). In practice, the court is likely to continue state custody unless another party proposes a viable alternative.

The permanency hearing may held before an administrative body which may consist of one but not more than three persons rather than a judge. This alternative form of hearing takes place in an informal meeting place in the courthouse. As of 2010 the only county where permanency hearings are not held before a judge is Chittenden County. If any party requests to go before a judge, however, a court date will be provided. 33 V.S.A. § 5321(g). If DCF or a party seeks modification of a permanency plan in court, the moving party bears the burden of proof to show a change of circumstances. In re: L.S., 172 Vt. 549 (2001).

III. DELINQUENCY CASES

A. Introduction

1. *Statutory Definitions*

In delinquency proceedings, what was before July 1981 a simple matter, is now quite complex. The main effects of amendments to the Juvenile Code that were enacted in 1981 were to: 1) lower the age of delinquency; and 2) provide for the prosecution of children as adults for certain crimes of violence. (These crimes are listed in 33 V.S.A. § 5204(a), and will be referred to here as "violent crimes".) Specifically, the breakdown is as follows:

(1) Children between ten and sixteen who are accused of non-violent crimes can only be prosecuted in juvenile court. 33 V.S.A. § 5203; 33 V.S.A. § 5102 (2)(C).

(2) Proceedings against children between ten and fourteen accused of violent crimes originate in juvenile court, but may be transferred to a criminal court upon motion of the state's attorney. 33 V.S.A. § 5102(2)(C)(i). Note special transfer rules contained in 33 V.S.A. § 5204(b)-(i).

(3) Proceedings against children between fourteen and sixteen accused of violent crimes originate in criminal court, but may be transferred to juvenile court. 33 V.S.A.§ 5102(2)(C)(ii).

(4) If a child between sixteen and eighteen is accused of a non-violent offense, the state's attorney may originate proceedings in either juvenile court or criminal court. 33 V.S.A. § 5203(c) and (d).

(5) Children under the age of ten accused of murder can be subjected to delinquency proceedings in juvenile court. 33 V.S.A. § 5102(2)(C)(iii).

2. *Rules Governing Delinquency Cases*

Vermont Rule of Family Procedure 1 sets forth the procedures for juvenile delinquency proceedings. Generally, the Vermont Rules of Criminal Procedure govern delinquency proceedings except where such rules are irrelevant (e.g., rules on juries), or would conflict with a statutory provision. Some of the criminal rules are modified in delinquency proceedings to conform to the juvenile code. In juvenile proceedings, admissions and denials replace pleas of guilty and not guilty.

V.R.F.P. Rule 6 sets forth the procedures and guidelines for representation of minors by attorneys and guardians ad litem. Unless counsel has already been retained, V.R.F.P. Rule 6(b) mandates that the court assign counsel to represent the minor in all juvenile proceedings under Chapters 51, 52 and 53. Under the rule, the court also must appoint a guardian ad litem to

represent a minor in all proceedings under Chapters 51, 52 and 53. See also, Vermont Rules of Professional Conduct No. 1.14. Often in delinquency cases a parent is appointed as the GAL.

The guardian ad litem "shall act as an independent parental advisor and advocate whose goal shall be to safeguard the ward's best interest and rights." Rule 6(e)(1). In short, the guardian advises the court as to what action would be in the best interest of the child. The rule also addresses the guardian's duties; the guardian's role when a child is under the age of 13 or under a mental or emotional disability, and thus is presumably incapable of making certain decisions; and what to do if the attorney disagrees with a guardian's position on a matter. See the section on The Role of the Guardian Ad Litem and the Attorney for more detailed information.

B. Parties Involved in Delinquency Cases

ATTORNEYS

For Juvenile	In all matters before the Juvenile Court, a juvenile must be represented by counsel. If counsel has not been retained privately by the juvenile's family, then the Court must appoint an attorney to represent him or her. V.R.F.P. 6(b) In the context of a delinquency petition, the juvenile's attorney performs the role of criminal defense counsel, protecting the juvenile's constitutional rights (most notably under Amendments IV, V, VI and VIII), ensuring that the State proves its case against the juvenile as would be required in Criminal Court. If the charge is proven or if the juvenile stipulates to the charge, the juvenile's attorney also represents the juvenile in the disposition phase of the matter.
For Parents	During the disposition phase of delinquency matters, the parents of a juvenile who is the subject of a juvenile court petition are entitled to be represented by an attorney if the State is seeking a transfer of custody of the child in the disposition case plan. A transfer of custody is a diminution of parental rights and triggers assignment of counsel for parents. If the parents are unable to afford private legal representation, they may apply to the Juvenile Court for appointment of a public defender at no or greatly reduced cost. See Administrative Order No. 32 The attorney's role as the parents' representative is to safeguard the parents' right against any unwarranted intrusion into their family's life by the State, to guide them through the process of that state intrusion and to defend the parents' interests during the appropriate phase of each type of proceeding. During disposition and review

proceedings, parents are entitled to present evidence, compel the attendance of witnesses in their behalf, and to cross-examine all witnesses called against them.

State's Attorney — The State's Attorney Office ("SAO") in each county is responsible for all criminal and juvenile prosecutions within its respective county. In the Juvenile Court context, the SAO decides which juvenile delinquency petitions to prosecute. If the Court finds probable cause for a petition, then the SAO is responsible for proving the petition.

Attorney General — Although the DCF worker involved in the case sits with the SAO representative during all court proceedings and DCF and the SAO are usually in agreement as to the merits of the case and the direction in which it should go, the SAO does not actually represent DCF in the case. There are cases in which DCF retains separate counsel to protect its interests or the interest of the DCF worker directly involved in the case, such as when DCF and the SAO disagree on a case. When this happens, the Vermont Attorney General's Office represents DCF. It is the practice in all Vermont counties that an Assistant AG represent DCF at all TPRs. When you are having difficulties with a DCF worker on the case (and speaking to his or supervisor has not resolved the problem), or if you encounter challenging legal issues, such as ICWA or out of state placements, contact the AAG for your county for assistance.

Court Clerk Staff — In most Family Courts, one member of the Court Clerk's staff will be responsible for scheduling and recording all proceedings on the juvenile docket and maintaining the Court's files on all juvenile matters.

Foster Parents — Foster parents are recruited, trained and paid by the State to house juveniles who have been removed from their homes in the course of a CHINS or delinquency matter. Foster placements vary greatly in length and some foster families specialize in either short-term or long-term placement. In either case, the understanding between the State and the foster parents is that the juvenile will be returned to his or her biological family if at all possible and at the earliest possible date.

Guardian Ad Litem — A guardian *ad litem* ("GAL") is an impartial person appointed to oversee and safeguard the best interests of the juvenile throughout the court proceedings. V.R.F.P.6(c) and (e) The GAL acts as an independent parental advisor and advocate for the juvenile, consulting with the juvenile and with the juvenile's attorney at all points in the proceedings. V.R.F.P. 6 (e)(2)

GAL's are under the supervision of the Vermont GAL program administered through the Office of the Court Administrator and receive formal training in many aspects of Juvenile Court and the issues surrounding children at risk. Note that the Juvenile Court is empowered to appoint a GAL for any party deemed incompetent to understand the proceedings, including parents and other custodial parties. There is no formal training for parents of children who are appointed to be their child's GAL in a delinquency case.

In some delinquency cases where the parents' interests are not at stake, a parent may act as the juvenile's GAL. In any case where the parents either are not impartial or have an interest at stake, a neutral third party will be appointed by the Court to fulfill this role.

The GAL must be present at all court hearings and should be consulted by the parties and their legal representatives during those hearings as well as during negotiations regarding resolution of the issues in the case. The GAL does not provide an opinion to the Court regarding the merits of a petition but may provide an opinion in detention and disposition hearings. V.R.F.P.6(c)(3)

The GAL may or may not agree with the juvenile as to what constitutes the best course of action in a given situation.

In most cases, the GAL and the juvenile's attorney will agree on the course of action best suited to protecting the juvenile's interest. However, cases arise in which the GAL believes that the juvenile's rights and interests are not being effectively represented by the juvenile's attorney. In those cases, the GAL is directed to so advise the Court, either "in open court, orally or in writing." V.R.F.P 6(c)(3)

Judge

In juvenile matters, the Family Court Judge presides over all aspects of delinquency and CHINS proceedings. As there are no juries in juvenile matters, the Judge is the trier of both fact and law, making all decisions as to the weight of the evidence presented and the appropriate law to be applied in each case before the Court.

In many cases in juvenile court, the Judge is presented with an agreement by the parties recommending a particular outcome for the case at hand. In those instances, the Judge's role is to ensure that the juvenile's interests have been adequately addressed and protected, that the issues which caused the juvenile to appear before the Court have been satisfactorily resolved and that all parties have been given a fair and adequate opportunity to participate in the formulation of, and come to agreement regarding, the final stipulated plan for the juvenile.

Police Officers

Parallel to DCF functions in investigation area. Police officers will report alleged juvenile crime to the SAO for prosecution. Under 33 V.S.A. § 5221 of the Juvenile Judicial Proceedings Act in most delinquency cases the police will now issue a citation to the child and issue or cause to be issued a notice to the child's custodial parent, guardian, or custodian indicating the date, time and place of the preliminary hearing and shall direct the responsible adult to appear at the hearing with the child. The police may take children into custody on an emergency basis when warranted by circumstances.

School Admin.

Unless the alleged delinquent act occurred at school or during a school sponsored activity, most school administrators and teachers do not have a direct role to play in a juvenile delinquency proceedings. However, the relationships between your client and school staff can prove useful to you as you prepare your case for hearing.

In some instances, school administrators/teachers can play a supportive role for a child who is before the court on a delinquency petition. In others, they may be fed up with a child's disruptive or non-engaging behavior at school and want no part of a proceeding. Inquiries in that direction can provide useful information to the child's attorney, one way or the other.

DCF Personnel

The Family Services Division of the Department for Children and Families ("DCF") is charged with the protection of all children within the state. Protecting children necessarily includes protecting their right to live with their families whenever that living arrangement does not endanger the child's safety and well-being. Therefore, DCF's first and highest duty is to work with **families** of endangered children to determine if the child's right to remain with his or her family can be protected.

In the delinquency context, DCF most often becomes involves in the lives of children in two ways:

1. Transfer of Custody

When the Court orders a juvenile taken into custody in connection with a delinquency petition (both pre- and post-adjudication), DCF assumes that custody, stepping into the shoes of the parents and becomes legally responsible for all decisions about that child, including but not limited to placement, visitation with family members (including parents), medical evaluation and treatment, educational issues, etc. Please note that placement options can and sometimes do include placement of the child with his/her family of origin although custody remains with the Commissioner. While the child is in DCF custody, DCF is required to work with the family of

origin towards reunification of the family with the child unless the parents' rights are terminated or there are aggravating circumstances as defined in 33 V.S.A. § 5102(25).

2. Probation Services in Delinquency Matters.

When a juvenile is adjudicated as a delinquent by the Juvenile Court, the Judge has the option to appoint a juvenile probation officer ("JPO") to oversee the disposition of the delinquency case. While a JPO is not appointed in every delinquency matter, any case in which treatment issues are ongoing and/or in which restitution must be made over the course of time will usually warrant such an appointment. In those cases, DCF supplies the JPO.

C. Custody and Care

1. *Considerations for Taking Juveniles into Custody*

Although juvenile proceedings are initiated by a "petition," in many cases, the child is brought before the court before the petition is filed petition is filed. This occurs when the child is taken into custody, but not immediately released to his/her parents, guardian, or custodian. 33 V.S.A.§ 5251 enumerates three circumstances under which a child may be taken into custody in the context of delinquency:

(1) pursuant to the laws of arrest;
(2) pursuant to an order of the juvenile court;
(3) by a law enforcement officer when he has reasonable grounds to believe a child has committed a delinquent act; and that the child's immediate welfare or the protection of the community, or both, require the child's removal from the child's current home.

Section 5252 provides that a child taken into custody under 33 V.S.A. § 5251 shall immediately and without first being taken elsewhere be released to the child's parents, guardian, or custodian, or be "taken into custody pending either issuance of an [ECO] or direction from the state's attorney to release the child."

Juveniles who are arrested and detained are often taken to police stations for interrogation, where they may be subjected to the same pressures to confess as are adults. One should consider whether detention in violation of 33 V.S.A. § 5251 may constitute an independent basis for suppressing a confession. One juvenile court judge suppressed a statement because the juvenile was not taken immediately to court. In re P.L., No. 141-4-87CnJ, slip op. at 7 (May 11, 1987) (J. Mahady).

Officers appear to use the same standards in determining when to take juveniles into custody in delinquency cases as those applied when arresting adults. Juveniles living at home

and who are not violent are rarely taken into custody, or, if they are, are soon released to their parents.

The V.R.F.P. Rule 1(a)(3) states that the Vermont Rules of Criminal Procedure Rule 3 (arrest without warrant) shall not apply in juvenile cases except that, in those situations in which Rule 3 authorizes a law enforcement officer to arrest an adult without an arrest warrant, a law officer may, without an arrest warrant, detention order, or other order of the juvenile court, take a child into custody for the purposes of initiating the statutory procedures set forth in 33 V.S.A. §§ 5251, 5252, and 5253. An arrest which does not comply with Rule 3 may therefore be invalid and subject to motion to suppress any evidence taken in violation of the Rule.

Removing a child from his/her home can cause significant trauma to the child. Thus, the court should consider whether:

1) there are protective measures that can be put in place to allow the child to safely remain in the home pending further hearings or;
2) the child could safely be placed with a noncustodial parent, in the interim.

33 V.S.A.§ 5256(b). The court should also be sensitive to the means of removal. Dragging a child out of his/her home late at night may be far more frightening than leaving from school or home in the daytime. The court should consider the emotional impact if the child is removed from the home.

2. ***Emergency Care Hearing***

When a child is taken into custody under 33 V.S.A § 5251, and not immediately released under 33 V.S.A. § 5252, the court must issue an order for care or shelter care if the child is to be further detained. See 33 V.S.A. § 5253. The hearing upon which the order is issued is referred to as the "emergency care hearing." It is usually held ex parte and sometimes it is conducted by the judge speaking to the police officer or State's Attorney on the telephone. 33 V.S.A. § 5252 (b)(2). It must be based upon the affidavit of the officer and/or DCF. Id.

In order to issue an ECO, the court must determine that:

1. There is probable cause that the child has committed a delinquent act; and
2. continued residence in the home is contrary to the child's welfare because:
   (i) the child cannot be controlled at home and is at risk of harm to self or others; or
   (ii) continued residence in the home will not safeguard the well-being of the child and the safety of the community because of the serious and dangerous nature of the act the juvenile is alleged to have committed. 33 V.S.A. § 5253 (a)

The standard outlined in 33 V.S.A. § 5253 is sufficiently broad to permit the court to exercise its discretion as it sees fit. In practice, a child who does not have a safe and secure house will probably be held. ("Secure" is a term that has a simultaneous double meaning. "Secure" can mean secure from the child's viewpoint, i.e. that the child will be protected. It can

also mean secure from the state's or court's viewpoint, i.e. can the child be held so that he/she will not escape, commit further crimes, etc. Juvenile authorities often employ the word to express both connotations at the same time.) The court can return the child to its parents at this stage, either without conditions or under a conditional custody order ("CCO") that includes "conditions and limitations necessary to protect the child, the community or both." 33 V.S.A. § 5253(c). Otherwise, an ECO must be issued that contains the following:

(1) A written finding that the child's continued residence in the home is contrary to the child's welfare and the factual allegations that support that finding;

(2) Date, hour and place of the temporary care hearing to be held pursuant to 33 V.S.A. § 5225; and

(3) Notice of a parent's right to counsel at the temporary care hearing.

33 V.S.A. § 5253(b).

Both the ECO and the CCO must contain certain provisions enumerated in the statute. Parents must be notified immediately if possible. 33 V.S.A. § 5254(a). Under the previous statutory scheme, the parents were also entitled to notice of the place of detention but that requirement has not survived into the Juvenile Judicial Proceedings Act.

3. ***Temporary Care Hearing***

If a child is held under an ECO the court must hold a temporary care hearing within seventy-two (72) of its original order. 33 V.S.A. § 5255. Again, the standard to determine continued detention is the best interests, safety and welfare of the child or public safety and protection. 33 V.S.A. § 5256(a). Hearsay is allowed and proof is by a preponderance of the evidence. 33 V.S.A. § 5255 (f).

Written or verbal notice of this detention hearing must be given to the custodial parent, guardian, or other custodian. 33 V.S.A.§ 5254. If such parent/guardian/custodian is not notified and does not appear or waive appearance at this hearing, the court must hold a *de novo* temporary care hearing within one business day of the filing of a request therefore by the parent/guardian. 33 V.S.A. § 5255(a). DCF must make reasonable efforts to locate and notify the noncustodial parent, and give a summary of their efforts. 33 V.S.A. § 5255 (d). Lack of notice to the noncustodial parent will not delay the hearing. Id.

The child who is held pursuant to the delinquency charge must be present at the temporary care hearing. 33 V.S.A. § 5255(c). At that hearing, DCF must give a report to the Court detailing the specific steps taken and services provided to the child and family in an effort to maintain the child in the home, any reasons for the child's removal not in the statute, any need for continuing DCF custody, ICWA information, and the suitability of a noncustodial parent or other relative taking temporary custody pending resolution of the case. 33 V.S.A. § 5255(e). DCF must

conduct an assessment and full record check of anyone seeking custody. 33 V.S.A. § 5255(e)(5)(B).

When relatives take custody of a child who would otherwise go into foster care, there is no case plan, so the kin is on their own to find services, enroll the child in school if necessary, etc. These kin are not typically represented by an attorney. VT Kin as Parents created a booklet, available on line, called a Resource Guide for Kinship Care Providers. http://dcf.vermont.gov/sites/dcf/files/pdf/ResourceGuideforKinshipCareProviders.pdf

The State must file a petition at the time of the TCH, 33 V.S.A. § 5255 (b), and the TCH shall also be the preliminary hearing. 33 V.S.A. § 5255 (g).

4. ***Contents of Order***

a. Findings

A Temporary Care Order removing a child from the custody and care of his or her parents must be based upon at least one of the following findings made at the TCH by a preponderance of the evidence:

(1) The child cannot be controlled at home and is at risk of harm to self or others;

(2) Continued residence in the home will not protect the community because of the serious and dangerous nature of the act the child is alleged to have committed.

(3) The child's welfare is otherwise endangered. §5256 (a).

b. Possible Orders

Once at least one of those findings is established, the court has essentially three choices. It may issue a:

- CONDITIONAL CUSTODY ORDER returning the child to the parent or custodian's care, with terms and conditions to protect the child and community;

- TEMPORARY CARE ORDER transferring temporary custody to a noncustodial parent or a relative, subject to some or no specific conditions (see Appendix for info on Kin Placement) ; or

- order giving DCF temporary custody.

§5256(b).

c. Additional Findings for DCF Custody

When temporary custody is given to DCF, the court **must** issue a written TCO that includes the following:

(A) a finding that remaining in the home is contrary to the child's welfare and *the facts upon which the finding is based;* and

(B) a finding as to whether reasonable efforts were made to prevent the unnecessary removal of the child from the home. 33 V.S.A.§ 5256(c). DCF can have up to 60 days more before that determination must be made by court, if the court determines that there is insufficient evidence at the end of the TCH to make that finding. 33 V.S.A. § 5256(c)(2)

d. Other Conditions

As deemed appropriate by the court, a TCO may also include

- conditions of release,
- an order for parent-child contact with terms and conditions needed to protect the child,
- an order that DCF provide services if legal custody is transferred to DCF (but note 33 V.S.A. § 5256(c)(4) which appears to give DCF an out if it is determined by the commissioner that funds do not permit compliance)
- an order that DCF refer a parent for services;
- genetic testing if parentage is at issue;
- an order that DCF make "diligent" efforts to locate NCPs;
- an order that the CP provide DCF with the names of all potential NCPs and relatives of the child;
- a Protective Supervision Order that requires DCF to "make appropriate service referrals for the child and family" if custody goes to someone other than DCF.

§5256(c)(3).

5. Initial Case Plan

If a TCO is issued giving DCF custody, DCF must file an initial case plan of services for the child and family within 60 days of the child's removal from the home. This case plan must be shared with the attorneys, the parties, the GAL and the court. It may not be considered evidence prior to the finding of a delinquency. § 5257.

6. Woodside – Limitation on Short-Term Program Orders

If the court determines that no other suitable placement is available and the child presents a risk of injury to him or herself, to others, or to property, the court may order the child detained at Woodside until DCF can find a suitable placement.

Alternatively, the court may order a child meeting the above conditions to be held for up to seven business days at Woodside.

Any inflexible order placing a child at Woodside expires at the end of seven business days, unless renewed by court order for another period not exceeding seven business days. 33 V.S.A. § 5291.

D. Commencement of Proceedings

1. Citation and Notice to Appear

A citation may be issued to a child to appear before a judicial officer if an officer has probable cause to believe the child has committed or is committing a delinquent act but the circumstances to not warrant removal of the child from his or her home. 33 V.S.A. § 5221(a). The child must appear as directed unless the court notifies him or her that such appearance is not necessary. 33 V.S.A. § 5221(b).

Parents are entitled to notice of the date, time and place of the preliminary hearing, which must be given or cause to be given by the officer issuing the citation. 33 V.S.A.§ 5221(c). Specific requirements for the contents of the citation are included in 33 V.S.A. § 5221(d). If a parent fails to appear after due notice, he or she may be subject to the provisions of 33 V.S.A. § 5108, up to and including a finding of criminal contempt.

The issuing officer must file the citation with supporting affidavit with the state's attorney's office, although no time frame is provided in the statute. 33 V.S.A. § 5221(e).

2. *By Transfer*

Juvenile proceedings are formally commenced either by transfer to a juvenile court from another court (33 V.S.A. § 5203) or by the filing of a petition in juvenile court (33 V.S.A. § 5223).

When a motion is filed in a criminal case to transfer the proceeding to juvenile court under 33 V.S.A. § 5203, the motion cannot be denied in a summary manner. A full hearing and adequate findings of fact are required. State v. Powers, 136 Vt. 167, 169 (1978); Kent v. United States, 383 U.S. 541, 554 (1966). Transfer/non-transfer criteria are not mandated, but Kent, and In re Gault, 387 U.S. 1 (1967), are cited with approval in Powers, supra., and Kent contains a broad-based test. In State v. Willis, 145 Vt. 459, 465-66 (1985), the court held that the use of the Kent criteria is not mandatory (State v. Jacobs, 144 Vt. 70, 72 (1984), but it is permissible to use these criteria in determining whether a case should be transferred. See also, State v. Buelow, 155 Vt. 537, 540 (1990). In practice, since the court has not limited its consideration to the Kent

factors, the attorney may ask the court to consider other factors such as those enumerated in § 5204 (d) and State v. Dixon, see below. Once a case has been transferred from district court to juvenile court, the court must follow statutory rules governing re-transfer to district court. In re: W.M., 2006 VT 129.

The Vermont Supreme Court has held that Vermont statutes provide for the confidentiality of juvenile proceedings only after a decision to transfer to juvenile court has been made and not before. In re K.F., 151 Vt. 211, 213 (1989). Compare to procedure for transfer from district court as a youthful offender where the hearing on the motion is heard in family court. 33 V.S.A. 5281(b). Also note that an order denying or granting a transfer to juvenile court is a collateral order which may be appealed as a discretionary interlocutory appeal under V.R.A.P. 5.1. In re J.G., 160 Vt. 250, 251-252 (1993) (overruling State v. Lafayette, 148 Vt. 288 (1987) to the extent that Lafayette held that such orders are appealable of right.) As a practical matter, it is difficult to obtain transfer for a client who has had significant prior experience in either juvenile or district court, or is close to reaching his/her eighteenth birthday. Compare to youthful offender status where the court may retain jurisdiction until age 22. 33 V.S.A. § 5286(d)

In State v. Dixon, (2007-457), 2008 VT 112 (2008), Justice Reiber, writing for an unanimous Court, reversed and remanded on interlocutory appeal the district court's order denying Jonas Dixon's transfer request to juvenile court in a case involving second degree murder. This is the first case where the Supreme Court has found the trial court to have abused its discretion in refusing to transfer a criminal case to juvenile court. The Court found error in the lower court's failure to give any weight to the "factual backdrop to defendant's actions," which included his inability to control any of the escalating events at home or the fact that there was a DCF "system breakdown" against the defendant. The Court held that failure to consider these factors goes against the special status accorded juvenile cases by the Legislature under 33 V.S.A. § 5101.

The Court also rejected concerns that transfer would hamper the ability of the public to follow the case through the judicial system. "This was not a proper consideration and was not entitled to independent weight as a matter of law. The Legislature has determined that a primary purpose of the juvenile court system is to project juveniles from the 'taint of criminality' that inevitably results from the publicity and permanence of convictions in the district court." The Court, rejecting the district court's consideration of all non-Kent factors, also rejected the court's analysis of some of the Kent factors, including whether there was prospective merit to the complaint. Dismissing this factor has not having much, if any, dispositive weight, the Court found this issue to have already been decided by the district court's finding of probable cause for the charge. Additionally, "requiring an evaluation of defenses at such an early stage of prosecution, seems to us rather unwieldy; it would seem to require a mini-trial at a stage of the proceedings when the defense might be well-served not to reveal its hand."

Depending upon your client's age, the alleged offense committed, and other factors relating to the case, the case may be transferred from criminal court to family court under a law enacted in 1997 governing the disposition of "youthful offenders", and included in the 2008 statutory revisions. 33 V.S.A. §§ 5203(e); 5281-5288. Although sentence is imposed, it is suspended and

replaced with a juvenile disposition. 33 V.S.A. § 5281-5284. If the juvenile violates the disposition order, the judge may modify the order or impose a criminal sentence. 33 V.S.A. § 5285. The court also may decide to continue jurisdiction up to age 22. 33 V.S.A. § 5286. If the juvenile fulfills the obligations in the disposition order, the juvenile may request that the court dismiss the criminal case. §5287. Transfers after merits are banned by double jeopardy, Breed v. Jones, 421 U.S. 519, 541 (1975) and by Vermont law, State v. Charboneau, 154 Vt. 373, 376 (1990). For a more detailed discussion of youthful offender status, see section M., below.

3. ***By Petition***

The state's attorney having jurisdiction is responsible for the preparation and filing of the petition. In delinquency cases, the state's attorney's role is very much the same as it is in adult criminal proceedings. The petition is usually filed upon request of the law enforcement officer involved.

There are two statutory requirements for the contents of all petitions:

1. statement of the facts which support the conclusion that the child has committed a delinquent act, together with a statement that it is in the best interests of the child that the proceedings be brought; and
2. the name, date of birth, telephone number, and residence address, if known, of the child and the custodial and noncustodial parents or the guardian or custodian of the child, if other than a parent (participation by a parent in the Safe at Home Program (15 V.S.A. §1152 must be noted). 33 V.S.A. § 5222.

If the child is in temporary care, the petition must also include a statement of the jurisdictional information as required by 15 V.S.A. §1032 et seq., 33 V.S.A. § 5222(b).

a. Jurisdiction

The courts invariably make it a practice to determine that they have jurisdiction based upon the age and residence of the child. Venue may be the territorial unit where the child is domiciled, where the delinquent act occurs (in delinquency proceedings), or where the child is present (in CHINS proceedings). 33 V.S.A. § 5105.

In order to modify a delinquency to a CHINS, the State must dismiss the delinquency and file a new CHINS petition. 33 V.S.A. § 5222(c).

Vermont is unique in that its State’s Attorneys have almost absolute discretion to file charges against 16 and 17 year-old youth, including the most minor misdemeanor chargers, in either juvenile (Family Division) or adult (Criminal Division) court. Prosecutors historically have filed the vast majority of these cases (70% for 17year-olds and over 50% for 16 year-olds) in Criminal Division. For several years advocates, with little results, have sought to have these cases filed in juvenile court to provide for confidentiality of these proceedings as well as to prevent youth from being burdened with adult criminal records.

In the past, legislation proposing to have these cases initiate in juvenile court has met strong opposition from state's attorneys and law enforcement. In an effort to encourage state's attorneys to initiate these cases in Family Division all state's attorneys were surveyed in 2011 to determine what were the greatest systemic barriers to their filing these cases in Family Division. Their overwhelming response was that Family Division jurisdiction over delinquents ended at age 18.

Legislation was introduced in 2012 which would have extended the jurisdiction of Family Division up to age 20 for delinquency cases involving 16 and 17 year-olds. Unfortunately, while it passed the Vermont House with broad-based support from the Defender General, the State's Attorneys, DCF and Diversion, it met resistance in the Senate and a much weaker bill emerged as the result of an effort to secure passage. The end result was **Act No. 159, (H. 751) Human services; crimes and criminal procedures; juveniles** which went into effect on July 1, 2012.

This act allows for Family Court jurisdiction over a child to be extended up to age 18 years 6 months if the offense for which the child has been adjudicated delinquent is a nonviolent misdemeanor and the child was 17 years when he or she committed the offense. DCF **custody** of the child as a delinquent cannot be continued past age 18 and there shall be no extended jurisdiction in CHINS cases.

Prior to a preliminary hearing in the delinquency case the child shall be afforded an opportunity to undergo a risk and needs screening, which shall be conducted by DCF or a community provider that has contracted with DCF to provide such screenings.
At disposition the court may refer the child directly to a youth-appropriate community-based provider that has been approved by DCF which may include a community justice center or a balanced and restorative justice program. Such a referral shall NOT require the court to place the child on juvenile probation.

The act also allows for the transfer from Family Division to Criminal Division of a delinquency proceeding if the child was 16 or 17 at the time of the alleged act and the act was not one of the big twelve listed in 33 V.S.A. § 5204(a). Such transfer may only be made after specific findings are made by the court after hearing on such a motion of the state's attorney and any transfer can only occur prior to an adjudication on the merits in the Family Division case. The court shall not be required to make findings if the parties stipulate to a transfer.

This section was added to encourage State's Attorneys to initially file these cases in Family Division while addressing their concern that if more information came to light prior to a merits adjudication indicating that the case really was more appropriate for Criminal Division or Youthful Offender status there would be a mechanism to move for transfer to Criminal Division. In cases where an accused is cited into Family Division and could face potentially serious adult sanctions counsel may wish to consider an early admission to the delinquency to avoid possible transfer to Criminal Division.

a. Alleging Specific Acts

The juvenile petition should allege a specific act or acts that bring the child within the jurisdiction of the court. In years past, it was a common practice for state's attorneys simply to repeat statutory language, e.g., "the child is without the control of his parents." However, due process requires that the parties have adequate notice of the facts on which the allegation of delinquency is based. The better practice is to provide more detail about the conduct that brings the child to the attention of court in the petition. Note that, even when the petition is vague, if the supporting affidavit plainly recites the substance of the allegations, the requirement of particularity is satisfied. In re M.B. & E.B., 158 Vt. 63, 67 (1992); In re R.M., 150 Vt. 59, 70 (1988). Many judges make it a practice to review the petition and affidavit ex parte in order to determine probable cause. In all cases, counsel should review the petition and affidavit to determine whether the pleadings give the client sufficient notice of the conduct alleged, and whether the allegations are stated with sufficient particularity to enable counsel to prepare for the merits hearing.

Pleadings that fail to set forth allegations with sufficient particularity should be challenged by means of a written motion to dismiss. In appropriate cases, the practitioner may want to consider challenging the statute itself as being overly broad and failing to give sufficient notice of proscribed conduct.

b. UCCJA

Petitions should also comply with the Uniform Child Custody Jurisdiction Act. 15 V.S.A. § 1031 et seq.

E. Alternatives to Adjudication

1. *Court Diversion*

Criteria

Court Diversion is a voluntary alternative to the formal court process for certain juveniles charged with delinquent or criminal acts.

Procedure

The State's Attorney refers cases on an individual basis. Once referred the child meets with a Review Board, created from community volunteers, that reviews each case and then decides whether to accept the case into the Program. In order to be considered for Court Diversion the child must acknowledge that he has committed the delinquent act. This admission is inadmissible if he or she is not accepted by the Diversion program and his or her case is returned to court for prosecution. If a juvenile is accepted, the Review Board designs a contract setting out specific

mandates the juvenile must meet. If the Review Board rejects the case, it is returned to the State's Attorney or the Court for court action.

As was noted in the Section on Privacy Considerations, in Section I, 10 G, within 30 days of the two-year anniversary of a successful completion of juvenile diversion, the court shall order the sealing of all court files and records, law enforcement records other than entries in the juvenile court diversion project's centralized filing system, fingerprints, and photographs applicable to a juvenile court diversion proceeding unless upon motion the court finds that the participant has been convicted of a subsequent felony or misdemeanor during the two-year period, or proceedings are pending seeking such conviction, or rehabilitation of the participant has not been attained to the satisfaction of the court. 3 V.S.A. § 163 (e).

Accountability

Usually, diversion will require a juvenile to write an apology letter to the victim, provide restitution for property loss or damage, and do community service. It may also require that the juvenile obtain substance abuse counseling or another type of counseling, perform a job search, tour a correctional facility, or attend a specific program. If the juvenile successfully completes diversion, the case is dismissed. Failure to complete diversion results in resumed court action.

2. YASI Screening

In some counties, the local prosecutor will agree to send a youth to DCF for a YASI screening. If the screen results in a prediction that the youth is a low risk to reoffend, that prosecutor may be willing to refer the case to diversion. See DCF policy no. 179 at http://dcf.vermont.gov/fsd/policies.

F. **Preliminary Hearings**

The preliminary hearing is held at the date and time specified in the citation or as otherwise ordered by the Court, unless the child is taken into custody in which case the preliminary hearing is held in conjunction with the temporary care hearing. 33 V.S.A. § 5225(g).

An attorney is appointed for the child prior to the preliminary hearing. A GAL is appointed at the hearing. The GAL may be the child's parent if the parent's interests do not conflict with the child's. 33 V.S.A. § 5225.

The court may set conditions of release at the preliminary hearing. 33 V.S.A. § 5225(e).

VRFP 1(c) states that a denial is to be entered at the [temporary care] hearing, or at the preliminary hearing (in the absence of a [preliminary care] hearing), unless an admission is offered after the juvenile has had adequate consultation with counsel and his/her GAL. Rule 1(d)(1) states that the court shall issue an order setting the matter for a pretrial hearing or for trial on the merits on a date certain at the preliminary hearing. The purpose of the pre-trial hearing is

to ascertain whether a merits hearing will be needed. These provisions were meant to discourage the practice of scheduling a merits hearing with inadequate time for an evidentiary hearing since no one would know for certain whether a hearing would be needed or the parties were willing to enter an admission until the day of the scheduled merits hearing.

Under prior statutory schemes, the Vermont Supreme Court determined that the statutory time periods are directory, not jurisdictional. In re C.I., 155 Vt. 52, 55 (1990), In re M.C.P., 153 Vt. 275, 294 (1989). The merits hearing was deemed commenced within the 15 day time limit by the taking of an initial plea; the merits hearing itself need not occur during the 15 day time period. In re C.I., supra. Under the 2008 revisions, the court must schedule a pretrial hearing within 15 days of the preliminary hearing (33 V.S.A. § 5227(a) **and** merits must be adjudicated within 60 days of the preliminary hearing absent good cause shown (33 V.S.A. § 5227(b)).

At the pretrial hearing, an attorney can strongly suggest that the parties be required to inform the court of the witnesses they intend to call and the estimated time required for their testimony so that the court can assure that the hearing, once commenced, can be concluded without interruption. Unfortunately, this does not happen as a rule and hearings can be spread out over the course of many months, with one day or one half day of hearing at a time. These delays are harmful to children. "Court delays caused by prolonged litigation can be especially stressful to abused and neglected children. The uncertainty of not knowing whether they will be removed from home, whether and when they will go home, when they might be moved to another foster home, or whether and when they may be placed in a new permanent home [is] frightening." Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, p. 14, National Council of Juvenile and Family Court Judges, Reno, Nevada, 1995. It may also be difficult for children to attend to normal developmental tasks when they are worried about such matters. The new language in 33 V.S.A. § 5227 is an attempt to address these concerns and, hopefully, good cause for delay will only be found when delay is unavoidable.

V.R.F.P. 1(d)(3) states that pretrial motions and discovery requests must be made at or before a pretrial hearing, or, if there is no pretrial hearing, then at or before the merits hearing or within 28 days of the preliminary hearing, whichever occurs first. Due to scheduling problems in many of the family courts, many motions are decided at the merits hearing or shortly before the date of the hearing.

G. **Discovery**

1. ***Introduction***

In delinquency cases, at the request of a party or on its own motion, the court shall issue a discovery order containing dates by which

1.) the state's attorney shall provide to the child's attorney all of the discovery required by V.R.Cr.P. 16.

2.) the child's attorney shall provide to the state's attorney all of the information required by V.R.Cr.P. 12.1 and 16.1.

3.) depositions shall be completed

4.) records of DCF shall be inspected or copied and

5.) all discovery shall be completed. V.R.F.P. 1(d)(2).

Depositions may be taken in cases where the juvenile is charged with an offense that would be a felony if the charge was brought in adult court. V.R.F.P. 1(d)(4). There is no provision for interrogatories in delinquency cases. See the Sample Request for Discovery in the Motions section of this manual.

2. ***DCF Records***

DCF records may be reviewed and photocopied as provided in V.R.F.P. 1(d)(5). DCF may request a protective order or object to disclosure of a specific record, stating the reasons therefor, "at the [temporary care] hearing or preliminary hearing." See In re F.E.F. 156 Vt. 503, 506-508 (1991). In practice, courts generally give liberal access to DCF records, but will permit DCF to request a protective order at any time during the pendency of the proceedings.

3. ***Other Records***

See Chapter in CHINS on Discovery, Section F.

4. Physical and Mental Examination

a. Purpose

The purpose of V.R.F.P. 1 (h) is to encourage the use of expert testimony to assist the juvenile court in decision making without discouraging litigants from seeking treatment. It does not render a person's entire health history an open book, as it would under V.R.C.P. 35(b)(2), because that provision is excluded from this rule.

b. General Considerations

The court may order a physical or mental examination of a child, but may not use the examination to incriminate the child. Rule 1 (h)(1). After a finding of delinquency, the court's power expands to order the physical or mental examination of any party or of a person in the custody of any party. Rule 1 (h)(2). The court may not use the anything said in the course of the examination to incriminate the person being examined. Id. Subsection (h)(2) is broader to provide for adequate information at disposition.

5. Depositions

Depositions may only be taken in cases that would be felonies in district court, or by permission of the court in misdemeanor cases. V.R.F.P. 1(a)(3), (d)(4); V.R.Cr.P. 15.

Effective July 1, 2009, the depositions of minor victims in sexual assault cases may no longer be taken except by agreement of the parties or permission of the court pursuant to criteria set forth in the rule. V.R.Cr.P. 15 (e)(5). If such deposition is taken, the minor victim shall now be appointed their own attorney for the deposition. Id.

Children under the age of 16, or 16 and over and the victim of a sex crime, are considered sensitive witnesses, and the procedures set out in V.R.Cr.P. 15(f) must be followed. This includes notifying the prosecution if you plan to inquire about sensitive topic and reach agreement about the scope of such inquiry. Id.

H. **Pretrial Practice and Motions**

1. *General*

Pretrial practice in delinquency cases is similar to pretrial practice in adult criminal cases. Motions to dismiss can be filed pursuant to V.R.Cr.P. 12(d), and motions to suppress are appropriate.

2. *Determination of Competency of Juvenile, V.R.F.P. 1(i)*

Competency may be raised in delinquency cases at any time and some juveniles may require special services to meet the competency standard. In re J.M., 172 VT 61 (Feb. 9, 2000). Rule 1(i) is the functional equivalent of the procedure for competence to stand trial in adult criminal proceedings, with some special consideration given to adolescent development.

When competency is raised by motion of any party, the court is required to order a mental examination by a psychologist or psychiatrist selected by the court. Rule 1(i)(2). The court contracts with one or two practitioners to perform these evaluations. None of them, at the time of this writing, are experts trained in child psychology. As a result, it is more likely that adult competency standards will be applied to children, leading to an inaccurate determination. If possible, seek funds for a private evaluation by a child psychologist or psychiatrist prior to submitting a motion to the court and offer the private evaluation. If a private evaluation is not possible, provide materials on child competency to the evaluator, such as Thomas Grisso's "Evaluating Juvenile's Adjudicative Competence." This manual, and separate guide for legal counsel Grisso's "Clinical Evaluations for Juveniles' Competence to Stand Trial: A Guide for Legal Professionals," are useful to the attorney as a basis for cross-examination of the evaluator. Both are available on Amazon.com.

In In re: J.M., 172 Vt. 61 (2001), the court adopted the standard for adult competence in Dusky v. Ohio, 362 U.S. 402 (1960), that a defendant have "sufficient and present ability to consult with his lawyer with a reasonable degree of rational understanding" and a "rational, as

well as factual, understanding of the proceedings against him." The J.M. court stated that competency should be based on juvenile norms.

While Rule 1 (h) does not define a standard for determining competence, it does set forth four factors for the court to consider:

1) the age and developmental maturity of the child;

2) any mental illness or developmental disorder, including mental retardation;

3) any other disability that may affect competence;

4) any other factor that may affect competence.

In evaluating competence, find an expert who specializes in child psychology or psychiatry, and who has experience in evaluating juvenile competence. See also Clinical Evaluations of Juveniles' Competence to Stand Trial: A Guide for Legal Professionals, Thomas Grisso, Professional Resource Press, 2005; Evaluating Juveniles' Adjudicative Competence: A Guide for Clinical Practice; Thomas Grisso, Professional Resource Press, 2005.

3. ***Motion to Allow Testimony by Telephone***

Motion to allow testimony by telephone under V.R.E 611(a) (court must "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence"). See also Matthews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18 (1976); In re Juvenile Appeal, 446 A.2d 808 (Conn. 1982); State v. Mott, 166 Vt. 188, 193 (1997). Cf. V.R.F.P. 4(g)(1)(C);

4. ***Admissibility of Out Of Court Statements of Juvenile***

a. Statements to Police

The Vermont Supreme Court has held that Chapter 1, Article 10 of the Vermont Constitution requires that a juvenile has the right to the advice and presence of a disinterested adult prior to any questioning by the police:

> Therefore, the following criteria must be met for a juvenile to voluntarily and intelligently waive his right against self-incrimination and right to counsel under chapter I, article 10 of the Vermont Constitution: (1) he must be given the opportunity to consult with an adult; (2) that adult must be one who is not only generally interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution, e.g., a parent, legal guardian, or attorney representing the juvenile; and (3) the independent interested adult must be informed and be aware of the rights guaranteed to the juvenile. In re: E.T.C., 141 Vt. 375, 379 (1982). See also 15 V.S.A. § 5228 (applying constitutional protections to children in delinquency cases).

See sample Memorandum of Law in Support of Motion to Suppress in Motions section of this manual. Thus, consideration should be given to the issue of suppression of any statements made by the juvenile while in police custody. An attorney's failure to advise the parents and juvenile regarding the exercise of their constitutional rights may constitute ineffective assistance of counsel. In re: J.B., 159 Vt. 321, 324 (1992). The protections of In re E.T.C. apply to all minors, even when charged as adults. State v. Piper, 143 Vt. 468 (1983). Whether a parent can waive the E.T.C. protections for a child is still an open question. State v. Mears, 170 Vt. 336 (2000). In addition, many of the motions in CHINS cases, noted above, will also be appropriate in delinquency cases.

b. Confession**:** An out-of-court confession of a juvenile defendant is insufficient to support an adjudication of delinquency unless it is corroborated in whole or in part by other substantial evidence. 33 V.S.A. § 5228.

c. 804a**:** V.R.E. 804a governs the admissibility of the hearsay statements of children under twelve years of age in court who are victims of a sexual assault or sexual abuse. The age was increased from 10 to 12 in Act no. 1, an Act Relating to Improving Vermont's Sexual Abuse Response System (S.13), effective July 1, 2009.

5. ***Child Witness's Competence to Testify***

V.R.E. 601(b)

See ***Memorandum in support of child witness' competency to testify*** under V.R.E. 601(b). See sample Memorandum in Support of Motion to Re-Examine Child Witness re: Competency in the Motions section.

See also ***Motion to contest child victim's availability to testify on the basis of incompetence***. See the sample Proposed Findings of Fact and Conclusions of Law Regarding Competency of Child Witness in the Motions section.

6. ***Reasonable Accommodations under ADA***

See sample Motion and Reunification Efforts and the ADA below.

I. The Merits Hearing

The child who is the subject of the hearing must be present in court. 33 V.S.A. § 5229(a).

1. ***Scheduling***

Family Rule 1(d)(1) provides that at the preliminary hearing in delinquency cases, the court shall schedule a pretrial hearing or a merits hearing. If the child is in custody or shelter care, the

merits hearing should be held within 15 days of the filing of the petition. 33 V.S.A. § 5227(a). The Vermont Supreme Court has held that while juvenile proceedings are to be resolved as quickly as possible, the failure to hold hearings at the statutory times is not a violation of due process; nor does it result in the loss of jurisdiction over the matter. In re: M.B., 158 Vt. 63, 67 (1992). See also, In re: C.I., 155 Vt. 52, 55 (1990); In re: M.C.P., 153 Vt. 275, 291 (1989).

Further, the court has held that 33 V.S.A. § 5519(a) [old law] only requires the commencement of the merits hearing within 15 days. In re: M.C.P., 153 Vt. t 294. In In re: J.E.G., 144 Vt. 309, 314 (1984), the court held that the hearing required by 33 V.S.A. § 647(a) [now § 5221; 5225] "occurs when all parties are present, jurisdiction is found, and an entry of a denial or an admission is made." See also, In re: R.S., 143 Vt. 565, 570-71 (1983). In present practice, this is generally accomplished at the preliminary hearing.

Nevertheless, juvenile cases have a statutory priority over all other matters, except older juvenile cases. 12 V.S.A. § 5611. In re D.P., 147 Vt. 26, 32-33 (1986). The Vermont Supreme Court has condemned the "indiscriminate use of continuances" in juvenile cases. In re: R.S., 143 Vt. at 570; see also, In re: R.B., 152 Vt. 415, 421-22 (1989). Family courts should try to move juvenile cases along in an expedited manner in response to recent initiatives to reduce the time between custody and permanency for children. A long gap between charge and adjudication works contrary to a child's interest, in that the most meaningful consequences for a child's actions are administered as close in time to the action as possible. Whether the child committed the alleged delinquent act or not, resolution is in the child's best interest so that stress and uncertainty are minimized.

Preparing a case for a contested merits hearing often takes more than 15 days, particularly if depositions must be taken. As a practical matter, the court uses the pretrial hearing contemplated in Family Rule 1 to determine if discovery is needed, set a discovery schedule, set a time by which witness lists must be exchanged, and set dates for motions to be filed. Expect increasing pressure to prepare juvenile cases for trial more quickly. However, until and unless more judicial resources are made available to try these cases, there will still be problems in getting sufficient court time assigned to juvenile cases in a timely fashion.

Despite the mandated priority granted to juvenile proceedings in 12 V.S.A. § 5611, clerks may not give them the priority to which they are entitled. It is not unusual for a hearing to be assigned odd days over the course of several weeks or even months. Habeas corpus may be a remedy, provided that it can be shown to be in the best interest of the child. In re: A.S. & J.S., 152 Vt. 487, 492 (1989). Sending a complaint to the Administrative Judge for the Trial Courts is another possible remedy. A Motion to Dismiss in the Interests of Justice pursuant to V.R.F.P. 1 and V.R. Cr.P. 48(b)(2) may result in the dismissal of a delinquency petition particularly for a minor charge, where hearing on the merits is delayed. A similar motion can be made if there is unreasonable delay in filing a petition after the occurrence of the alleged delinquent act.

2. ***Pleas/Withdrawal of Pleas***

The court must address the child in court to determine if 1) the plea is voluntary, 2) the child understands the nature of the delinquent act, the right to contest it, and those rights will be waived by admission, and 3) there is a factual basis for the delinquent act charged. 33 V.S.A. § 5229(c). The Rule 11 colloquy applies to juvenile proceedings. In re: J.M., 172 Vt. 61 (2001); In re: E.F., 177 Vt. 534 (2004).

Withdrawal of Plea. Rule 1(j) was added in 2009 to provide a procedure governing withdrawal of an admission of delinquency comparable to the provisions of V.R.Cr.P. 32(d) for plea withdrawal in a criminal case. In a parallel to the criminal rule, the motion must be made before or within 30 days after the entry of an adjudication of delinquency. As in the criminal rule, the 30 days is intended to allow withdrawal during the appeal period.

Under V.R.F.P. 1(j), the remedy after the 30-day period has passed would be a petition under 33 V.S.A. § 5113 (Modification or Vacation of Orders).

If the motion is made before a disposition order is made, the court may permit withdrawal of the admission if the child shows any fair and just reason, and that reason substantially outweighs any prejudice that would result to the state from the withdrawal. If the motion is made after disposition, the court may set aside the adjudication and permit withdrawal of the admission only to correct manifest injustice. V.R.F.P. 1(j).

The differing tests for allowing the motion use the disposition order as a determining point comparable to the imposition of sentence under V.R.Cr. P. 32(d). The tests for allowance of withdrawal before and after disposition are identical to those provided in the criminal rule for allowance of withdrawal before and after sentencing. See Reporter's Notes to V.R.Cr.P. 32(d). There are times when attorneys waive the disposition case plan and agree to impose disposition at the time of the plea. As a practice point, the attorney should delay disposition if the attorney is aware that the client might withdraw the plea.

Note that if withdrawal of the admission occurs after the court has given notice to a school superintendent or headmaster of the entry of a delinquency adjudication pursuant to 33 V.S.A. § 5118 ask the court to promptly inform the superintendent or headmaster of the withdrawal and ask that the notice be removed from the school's file.

3. ***Burden of Proof***

As in adult criminal prosecutions, the state has the burden of proof in a delinquency case. In proving the case, the state must prove the charge beyond a reasonable doubt. In re: Winship, 397 U.S. 358, 360 (1970); In re: Delinquency Proceedings, 129 Vt. 185, 188 (1970); §5526 (f).

4. ***Evidentiary Considerations***

a. Hearsay

In the merits hearing, the rules of evidence are observed and hearsay is not admissible. In re: M.P., 133 Vt. 144, 146 (1975); In re: J.L.M., 139 Vt. 448, 450 (1981); In re: Y.B., 143 Vt. 344, 347 (1983); 33 V.S.A.§ 5226 (e). Objections not made, of course, are waived. When objections are made, the party offering the out-of-court statement must make an offer of proof that there is a hearsay exception that applies or that the statement is not being offered for its truth. V.R.E. 103(a)(2). In re: A.L., 163 Vt. 635, 638 (1995) (mem.).

One of the common hearsay exceptions in Family Court is Rule 804a, which covers alleged victims of sexual abuse who are age 12 and younger, as well and mentally retarded or mentally ill adults. This rule provides that statements by children concerning wrongful sexual activity are not excluded by the hearsay rule if: 1) the statements are offered in a civil, criminal, or administrative proceeding in which the child is an alleged victim of sexual assault, aggravated sexual assault of a child, lewd or lascivious conduct with a child, incest, abuse, neglect, exploitation, or wrongful sexual activity; 2) the statements were not taken in preparation for legal proceedings and, if a criminal or delinquency proceeding has been initiated, the statements were made prior to the defendant's initial appearance; 3) the child is available to testify in court or under Rule 807 (which provides for testimony by closed-circuit television or by recorded testimony in certain circumstances); and 4) the time, content and circumstances of the statements provide substantial indicia of trustworthiness. The rule also provides that upon motion of either party in a criminal or delinquency proceeding, the court shall require the child to testify for the state.

In In re C.K., 164 Vt. 462, 467 (1995), the court admitted a child's statements to a pediatrician and a nurse that her father had sexually abused her. The court found that the child's statements were not made in preparation for legal proceedings, but were made for the purposes of medical treatment. Id. The Court also has held that statements made during an initial DCF investigative interview are not made in preparation for legal proceedings; rather, the interviews are performed for the protection of the child. State v. Duffy, 158 Vt. 170, 172-73 (1992).

Two other common hearsay exceptions are "present sense impression" and "excited utterance." Rule 803(1) provides that a present sense impression, or "a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," is not excluded by the hearsay rule, even though the declarant is available as a witness. Rule 803(2) defines an excited utterance as "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." See Bayne v. State, 632 A.2d 476, 489 (Md. Ct. Spec. App. 1993); State v. Solomon, 144 Vt. 269, 272 (1984).

b. Right Against Self-Incrimination

There are explicit Fourth and Fifth Amendment privileges incorporated into the juvenile procedure statute: the right against self-incrimination; the right to have constitutionally inadmissible extra-judicial statements excluded; and the right to have unlawfully-seized evidence excluded. 33 V.S.A. § 5228.

In In re E.T.C., 141 Vt. 375, 378-79 (1983), the Vermont Supreme Court recognized the right of a juvenile, pursuant to Chapter 1, Article 10 of the Vermont Constitution, to have the assistance and advice of a disinterested adult whenever a juvenile is questioned by police in a custodial setting. E.T.C. establishes a 3-part test to determine the admissibility of a confession made by a juvenile:

> [T]he following criteria must be met for a juvenile to voluntarily and intelligently waive his right against self-incrimination and right to counsel under chapter I, article 10 of the Vermont Constitution: (1) he must be given the opportunity to consult with an adult; (2) that adult must be one who is not only generally interested in the welfare of the juvenile but completely independent from and disassociated with the prosecution, e.g., a parent, legal guardian, or attorney representing the juvenile; and (3) the independent interested adult must be informed and be aware of the rights guaranteed to the juvenile. Id. at 379.

The adult with whom the juvenile consults must inform the juvenile of the meaning and importance of the decision whether to waive the juvenile's constitutional rights and answer questions by the police. In re: J.B., 159 Vt. 321, 325-27 (1992) (attorney consulted by the parents of a juvenile failed to inform the juvenile and his parents of the meaning and significance of a waiver of the juvenile's Fifth Amendment rights and confession was suppressed).

The rule of E.T.C. applies to the custodial interrogation of all persons under the age of eighteen, whether questioned on juvenile or adult charges. Further, the trial court must make sufficient findings to support a conclusion that there is not a custodial interrogation. In re: S.T., 161 Vt. 639, 639-40 (1994) (mem.). Where, however, a juvenile initiated a conversation and volunteered information to a deputy sheriff during a transport to a juvenile facility, even outside the presence of a independent interested adult, the Vermont Supreme Court has held that the juvenile was not subjected to a custodial interrogation. In re: J.E.G., 144 Vt. 309, 312-13 (1984). 33 V.S.A.§ 228 further protects juveniles by requiring that a confession made out of court is not sufficient to support an adjudication of delinquency unless it is corroborated by other "substantial" evidence.

In State v. Mears, 170 Vt. 336 (Jan. 28, 2000), the Court held that In re E.T.C. merely requires an opportunity for an interested adult to meet with the juvenile, not that a meaningful consultation occur. The Court found the father's improper waiver of the juvenile's rights was not raised below and was not plain error, and that the trial court's failure to conduct a "probing

inquiry" into his waiver of rights was not plain error. But the Court did not address who, if anyone, can waive the juvenile's rights under In re E.T.C.

Transfer of guardianship and custody to DCF and detention in Woodside or other such facility does not constitute an actual restraint triggering speedy trial rights. State v. Beer, 177 Vt. 245 (2004). It has not been decided, but the Beer rational may also extend to *Miranda* rights.

c. Possible Parent-Child Privilege

In the matter of In re: Inquest Proceedings, 165 Vt. 549, 550-52 (1996) (mem.), the Vermont Supreme Court explicitly rejected the parent-child privilege for parents and their adult children. However, the Court left the door open to the future recognition of such a privilege for minor children:

> Our laws recognize the special circumstances arising when minors or incompetent adults are involved in delinquency or criminal proceedings. See, e.g., 33 V.S.A . § 5228 (in delinquency proceeding, out-of-court confession of juvenile is insufficient to support adjudication of delinquency unless corroborated in whole or in part by other substantial evidence); 13 V.S.A. § 4816(c) (no statement made in course of court-ordered competency examination shall be admitted as evidence in any criminal proceeding).Id. at 551.
>
> The Court applied the four-part Wigmore test for recognition of testimonial privilege:
>
> "(1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation."
>
> Id. at 40, 597 A.2d at 777-78 (quoting 8 Wigmore on Evidence § 2285, at 527 (McNaughton ed. 1961)). In re: Inquest Proceedings, 165 Vt. at 551.

While the Court agreed that the parents had met the first and third criteria, the Court found that the second criterion was not met, writing: "The relationship between an adult child [emphasis added] and a parent is not one requiring confidentiality for its full and satisfactory maintenance." Id. In addition, the Court determined that the fourth criterion was also not met, holding that any harm to the relationship between an adult child and his

parents is outweighed by the public interest in seeking the truth in the context of a criminal investigation. Id.

The door remains open to the possibility that a parent-child privilege may be recognized with respect to a minor child. New York has recognized such privilege. See A&M, 403 N.Y.S.2d 375, 378-80 (1978). Certainly, if a parent serves in the role of an advisor to a child under E.T.C., a strong argument should be made that the child's confidences shared with the parent in the context of determining whether to waive her constitutional rights and answer police questions ought to be protected. The Rules of Evidence have been revised to prohibit the admission of statements made to a guardian ad litem against the ward. V.R.E. 412. In delinquency cases, when there is no conflict between the interests of the juvenile and the parent, the parent may serve as the guardian ad litem. V.R.F.P. 6. This may also bolster an argument for recognition of a parent-child testimonial privilege for minor children involved in delinquency or adult criminal proceedings.

d. Use of Disposition Case Plan

The disposition case plan (discussed below) cannot be used as evidence at the merits hearing stage in either CHINS or delinquency cases. 33 V.S.A. § 5230(a). If the court reads the disposition report prior to adjudication, a motion for mistrial should be made.

5. ***Practical Considerations***

a. Whether and When to Enter Admission

When representing a child in a delinquency proceeding, it may be appropriate and tactically advantageous to admit to some or all of the allegations in the petition. For example, you may bargain for juvenile probation in exchange for an admission. However, be aware that in foregoing a merits hearing, you may be giving up the most effective leverage you have over the disposition of the case. More importantly, the disposition, which lies within the discretion of the court, may be extremely difficult to overturn. One alternative is to enter an admission conditioned upon the court's acceptance of the parties' agreed-upon disposition. You can enter into a written stipulation to this effect.

There are also other types of plea bargaining. Aside from the enumerated violent crimes, any adjudication of delinquency can bring about the same disposition. You can make your client's "record" look better, by persuading the state to reduce the charge from a felony to a misdemeanor. This could be particularly important if your client is ever sentenced as an adult. See 33 V.S.A. § 5202(b). The state's attorney needs to amend the allegation in the petition to reflect the reduction in the charge. Also, if your client has more than one delinquency charge pending, you should attempt to negotiate having one or all of the additional delinquencies dismissed or the petitions withdrawn in exchange for your client entering an admission to one delinquent act.

In addition, you may be able to reach an agreement with DCF not to make certain placements, e.g. out-of-state institutions, without first seeking a judicial order. Also, you can

attempt to have the parties agree there will be no change of placement without a prior court hearing.

b. Negotiating Evidentiary Basis for Admission

A child may not agree to admit to all of the facts in the affidavit supporting the petition. While many facts are not legally relevant to the adjudication, sometimes it may be necessary to negotiate which facts the child will admit. The facts admitted should be sufficient to support the conduct charged.

Sometimes it may be necessary to demand that the State submit a revised affidavit in support of the agreed upon plea; other times it may be sufficient to strike the disagreeable facts from the affidavit or just clearly state the basis for the admission on the record.

It would help the client to have a revised affidavit, when the police/social worker affidavit will be later relied upon in therapeutic treatment (e.g. sex offender treatment). If the basis for the admission is clearly stated on the record, it is important to pass the basis on to the probation officer who is preparing the disposition report, since the facts will become part of the disposition report and the YASI screening questioning.

J. **Findings and Order**

After hearing all of the evidence, the court is required to make an order containing its findings. If the allegations have not been proven, the court must dismiss the petition. If the allegations are proven, an adjudication is made that the child is delinquent. 33 V.S.A. § 5229(g).

Unless the parties waive formal findings of fact, the juvenile court is required to make them. 33 V.S.A. § 5229; In re J. M., 131 Vt. 604, 608 (1973); In re R.B., 134 Vt. 368, 369-70 (1976). Failure to do so is reversible error. In In re K.B., 155 Vt. 514, 516 (1991), the court held that §5229 requires the court to make specific findings; a conclusory statement that the child is delinquent is not sufficient. However, the court need not make findings on an element not disputed at trial.

For appeal, the findings of fact constitute a critical part of the record. It may be the case that the evidence simply does not support the court's findings. Similarly, the findings may not support the adjudication. Adopting a party's proposed findings verbatim is not an exercise of the court's discretion.

K. **Disposition**

1. *Psychiatric and Psychological Reports*

a. *General Considerations*

Often DCF will request or require that a child be evaluated by a psychiatrist or psychologist to assist the social worker in preparing a disposition case plan, determining placement options or developing a treatment plan. This is especially true when the juvenile has been adjudicated on a delinquency charge relating to inappropriate sexual behavior.

Family Court Rule 1(h)(2) allows the court to order a physical or mental examination of a juvenile in a delinquency proceeding after a finding of delinquency. Evaluators are mandated reporters under 33 V.S.A. § 4913(a) and are required by law to report any instance of child abuse, even though, pursuant to Family Court Rule 1(h)(2), no communications made in the course of the examination can be used to incriminate the juvenile.

Once a child is placed in the department's custody, DCF generally assumes it can require psychological, psychosexual and/or psychiatric evaluations at any time pursuant to the authority given to the department by virtue of being the child's "legal custodian." Under 33 V.S.A. § 5102(16)(A)(ii), a person or entity that has legal custody of the person of the minor has the "authority to consent to major medical, psychiatric and surgical treatment for a child."

If the child or the guardian ad litem, if the child is not competent, opposes the evaluation, the attorney may wish to file a motion for a protective order under 33 V.S.A. § 5115. To prevail on any such motion you must convince the judge that DCF's subjecting the child to the evaluation "is or may be harmful to the child and will tend to defeat the execution of the order of disposition made or to be made." This is usually an uphill battle.

In making a decision as to whether to oppose or agree to an order or request to have a minor client evaluated, counsel must consider that resistance may irritate the court and DCF and, thus, adversely affect your client. On the other hand, DCF may propose restrictive and intrusive treatment for a minor based on mental health assessments, even if the prior adjudication is for a trivial offense. Often, counsel for a minor in custody will find out about an evaluation only after it has been done. Best practice would dictate that you advise your client and his or her DCF worker that you are to be informed anytime the department is contemplating setting up an evaluation of your client.

b. *Needs Assessment v. Risk Assessment*

Often for disposition purposes DCF or the Court will arrange for evaluations or assessments that focus primarily on the "future risk" presented by the juvenile. Such evaluations or assessments may result in your client being placed in a residential program or even more secure placement such as the residential program (R-wing) at Woodside. You should try and clarify

that such an evaluation or assessment should actually focus on who your client is and what his or her treatment needs are and not on "future risk."

The instruments that evaluators employ should be ones that are designed to identify treatment needs and not concentrate on risk of future dangerousness. Experts uniformly agree that "risk assessments" can never predict future behavior and should not be used to replace a "needs assessment." Another danger in an assessment that concentrates on "future risk" is that the judge may be unwilling to consider your recommendation that your client would benefit from a less restrictive placement if an evaluation emphasizes that such a placement might be "iffy" in terms of limiting "future risk."

Some "risk assessments" were originally developed to separate youth into different areas in detention units and have nationally evolved into being used as predictors of future violence and labeling youth as sociopaths. It is inappropriate to use them in developing well-reasoned treatment plans. For more information on the concerns about "risk assessments," see the Memorandum on Risk Assessments from S.K. Harper of the Miami Public Defender's Office to Patricia Purtiz of the ABA dated October 5, 1999, which can be found on the Defender General website.

c. ***Selection of Clinician/Factors Affecting Evaluation***

Many clinicians, even clinical psychologists who perform these types of assessments, do not have training in adolescent development and end up using inappropriate assessment tools. Also, they may overlook the importance of trauma in the child's past and, without relevant training, may reach conclusions that are damaging to your client (e.g., if a child, because of anxiety, is full of bravado during an interview with the evaluator, the evaluator may conclude that the child "shows no remorse.")

For more information on how a developmental perspective is important when evaluating a juvenile who commits an offense, see Recognizing the Child in the Delinquent, by Marty Beyer, Ph.D., Kentucky Children's Rights Journal, Vol. VII, No. 1, Spring 1999 which can be found on the Defender General website.

Other environmental factors come into play in connection with how and where the evaluation is performed and how those factors affect the conclusions the evaluator may draw. Virtually all of the tests that have been developed for and are ordinarily used by evaluators were developed for use with youth that are in school and often our juvenile clients may not be in a normal school setting. Tests results may also vary greatly depending upon where the tests are administered.

A young person who is brought to an evaluator's comfortable private office by a parent and knows that he or she is being taken out for a "treat" once the evaluation is concluded usually has a certain comfort level and will respond to questions much differently than a young person who is being tested in a detention facility where he or she has been placed for the first time and may be full of anxiety about what the future holds. The latter youth is much more likely to test poorly

on such standardized tests as the Minnesota Multiple Personality Inventory (MMPI) which measures such traits as anger. The result is the assessment may give a skewed and incomplete picture of the child, focusing on negatives and not strengths.

d. ***Psychosexual Evaluations***

It is extremely important to have qualified and well-trained evaluators perform psychosexual evaluations. These evaluations have a profound effect not only on the course of treatment for your client but on whether or not they will be placed in restrictive residential treatment programs, including out-of-state programs. Once again the instruments and other assessment tools that are employed by the evaluator must be age appropriate and the evaluator should have a strong background in adolescent development. There is an undeniable correlation between the validity and value of these evaluations and the expertise of the evaluator.

If your client is pre-adolescent or an adolescent and an evaluator were to employ tools that were developed for use with adult sex offenders, the recommendations of the evaluator might be useless in developing an appropriate plan of treatment for your client. You may contact the Juvenile Defender's Office for a list of evaluators that perform psychosexual evaluations.

e. ***Discovery of Juvenile's Mental Health Records***

Vermont has a statutory patient privilege and an evidentiary privilege. The patient's privilege statute, 16 V.S.A. §1612, protects from disclosure information acquired by physicians and other specified professionals in attending a patient in a professional capacity. V.R.E. 503 protects confidential communications made for the purpose of treatment or diagnosis. Both provide for waiver by the patient or certain exceptions authorized by law. One of the exceptions in V.R.E. 503 is if there is risk of harm to a child, and the underlying proceeding is a divorce or juvenile proceeding:

> In a proceeding under Family Court Rule 4 to determine parental rights or responsibilities or parent-child contact, and in any proceeding under Chapter 55 (now Chapters 51- 53) of Title 33, Vermont Statutes Annotated, there is no privilege under this rule if the court, after hearing, finds on the basis of evidence other than that sought to be obtained, that: (1) in any such case lack of disclosure of the communication would pose a risk of harm to the child as defined in 33 V.S.A. § 4912, or in a proceeding to terminate parental rights the communication would be relevant under 33 V.SA. § 5540(3) [now 33 V.S.A. § 5114(a)]; (2) the probative value of the communication outweighs the potential harm to the patient; and (3) the evidence sought is not reasonably available by any other means.V.R.E. 503(d)(7).

This provision was added to overrule the implied waiver analysis recognized by the Vermont Supreme Court in In re M.M., 153 Vt. 102, 105-06 (1989), cert. denied, 494 U.S. 1059, 110 S.Ct. 1532, 108 L.Ed.2d 771 (1990). In re: B.W., 162 Vt. 287, 290 (1994). See the section on Psychiatric and Psychological Reports above for more information.

f. ***Drug and Alcohol Records***

Practice tip: In many counties, the parties agree to full disclosure of drug and alcohol assessments and urine analysis, and the client sign limited releases as to their sessions with treatment providers to verify that the client is attending and participating, but not to release the substance of what is discussed in therapy.

Without a release, there are additional requirements that must be met in order to obtain records relating to drug and alcohol treatment. Pursuant to 42 U.S.C. §§ 290dd-2, records relating to drug or alcohol treatment funded in whole or in part through any federal program are confidential. Disclosure of such records without patient consent may only be made in extremely limited circumstances. 42 C.F.R. § 2.64. The Vermont Supreme Court has described these procedures in detail:

> The regulations describe the procedures and criteria that a court must employ before authorizing a disclosure of patient records. See 42 C.F.R. § 2.64 (1993). First, the party seeking the information must file an application for a production order with the court, using a fictitious name to identify the patient. See id. § 2.64(a). The court must provide adequate notice to the patient and the person possessing the records at issue, id. § 2.64(b)(1), and must give an opportunity for these persons to respond either in writing or at a hearing. Id. § 2.64(b)(2). Normally, this means the court must conduct a hearing on the application. All of these procedures must be conducted in a manner that protects the patient's privacy. Id. § 2.64(a), (c).
>
> A disclosure order may be entered only if the court determines that good cause exists. See 42 U.S.C. § 290dd-2(b)(2)(C); 42 C.F.R. § 2.64(d). This determination is to be made only upon a finding that alternative means of obtaining the information are not available, and that the interest in disclosure outweighs "the potential injury to the patient, the physician-patient relationship and the treatment services." 42 C.F.R. § 2.64(d)(2). Even if disclosure is authorized, the court must limit the order's scope of disclosure to minimize the impact on the patient's privacy. Id. § 2.64(e).

In In re: B.S., 163 Vt. 445, 449 (1995) the Court found that the trial court erred by allowing a mother's alcohol counselor to testify and by ordering her treatment records disclosed, in part because there was an alternative means of obtaining the information: from the social worker. Id. at 450-51. However, the Court held that this failure to follow procedures was not grounds for reversal of the TPR order, because most of the evidence to which the alcohol counselor testified was already in the record from the testimony of the DCF worker. Id. at 454-55. In addition, those records, and the alcohol counselor, revealed "confidential communications." The trial court found that disclosure was authorized by the exception allowing disclosure if "necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect..." Id. at 453. On appeal, the Court found that exigent circumstances did not exist to justify disclosure, particularly because the child was in DCF custody. Id. at 453.

2. ***Options for Disposition***

Disposition options are set forth in 33 V.S.A. § 5232 for delinquents. When found to be delinquent, a child may be placed on probation and may be either:

- placed at home, with or without conditions and with or without the protective supervision of DCF (any conditions or PSO require periodic review by the court);
- placed in the custody of a NCP or other relative or person "with significant connection to the child" (see detailed discussion of kinship care in II.J.2.b);
- placed in the custody of DCF;
- placed in the custody of DCF after a termination of parental rights; or
- placed under an order of permanent guardianship pursuant to 14 V.S.A §2664,

33 V.S.A. § 5232(b).

At Disposition, the criteria for removal of the child from the home necessary for a TCO have not been incorporated into the disposition statute. 33 V.S.A. § 5232.

a. Probation

If a juvenile is placed on probation, he or she is subject to supervision by DCF. 33 V.S.A. § 5232(b)(1). The caseworker is the juvenile's probation officer. Probation conditions may include restitution or community service requirements, attendance at a particular school program, work, or mental health counseling. 33 V.S.A §§ 5232(b)(1), 5235, 5262. If a juvenile fails to comply with a condition of probation, is again adjudicated delinquent, or is convicted of a crime, the juvenile may be found to have violated the conditions of probation. 33 V.S.A. § 5265. A juvenile probationer who is detained on the grounds that he or she has violated a condition of probation, is entitled to a detention hearing. 33 V.S.A. § 5267 Under 33 V.S.A. § 5269, if a violation of conditions of probation is established, the court may modify the conditions of probation or order any of the disposition alternatives provided for in 33 V.S.A § 5232.

As part of probation, courts may now order restitution. Restitution may now be enforced through a civil judgment after the youth turns 18. See section on Restitution below. Attorneys should diligently advocate ensuring that the restitution fixed is only for uninsured costs, and does not "exceed an amount the juvenile can or will be able to pay." 33 V.S.A. § 5235(e). See section on restitution below.

b. Out-of-Home Placement Options

The Supreme Court has decided that, although the judge may not affirmatively order DCF to make a specific placement, In re: B.L., 149 Vt. 375, 377 (1988), the court may reject a disposition plan and order the agency to present additional evidence or an alternative plan. 33 V.S.A. §§ 5232(c), 5258 (permanency); In re G.F., 142 Vt. 273, 281 (1982). In doing, so the court should exercise its discretion with caution. The judge should not substitute personal judgment for that of the agency; the grounds for rejecting the plan must not be unreasonable,

arbitrary, or capricious. The rejection must be "in the best interests of the child." Id. at 281. But see J.D., 165 Vt. 440, 444 (1996) (no error for court to reject DCF disposition recommendation and formulate a plan of its own; in determining initial custody the court may reject the recommendation of DCF custody set forth in disposition report but may not direct placement once DCF is the legal custodian.)

(1) Legal Guidelines

Under 33 V.S.A. § 5293, a child under sixteen who has been convicted as an adult may not be placed in an adult institution. At age sixteen, if convicted of a felony, the youth may be transferred to an adult institution. Id. at §5293(d). Youth under 18 who have been arrested for a felony charge may be housed with adult offenders. Id. at §5293(a)(1). Children between 10 and 14 charged with certain violent felonies may have their cases transferred to adult court, and may be housed with adult offenders. §§ 5293; 5204. However, minors under 16 years old convicted to a term of imprisonment shall not be placed with adult offenders. 33 V.S.A. § 5293(c). Note that 42 U.S.C. §5633(a)(12)(A) prohibits secure confinement of non-delinquent minors. In practice, this means that unmanageable children cannot be confined at the Woodside Detention Unit. 33 V.S.A. § 5322. See the section below on Woodside.

Other cases have challenged a child's placement through the Human Services Board. Indeed, the statute governing what claims the Board can hear is quite broad. 3 V.S.A. § 3091. However, DCF and the Human Services Board have taken the position that delinquents cannot use the fair hearing procedure to challenge their placements. This question has not been finally resolved by the Vermont Supreme Court. See In re S.H., 141 Vt. 278 (1982). For more information on appeals to the Human Services Board, see the section below on Administrative Reviews.

Finally, for some guidance on considering children's attachment in making long-term placement decisions, see Considering Children's Attachment in Placement Decisions—a Conversation with Dr. Jay Belksy, ABA Child Law Practice, Vol. 15 No. 2, pp. 22-25 (April 1996) which can be found on the Defender General website.

(2) Out-of-State Placement Options

Occasionally, the state may decide to transfer a child to an out-of-state placement. In re J.S., 139 Vt. 6, 12-13 (1980), dealt with the power of the state to effect a transfer without a judicial hearing, but the opinion left the waters murky.

The Court noted that the provisions of the Interstate Compact on the Placement of Children (33 V.S.A. §§5906 and 5925, formerly §§3156 and 3205), authorizing out-of-state placement after a judicial hearing, superseded the general authority under the disposition statute, originally 33 V.S.A. § 657, and now 33 V.S.A. §5529, to make placements without a judicial hearing. In re: J.S., 139 Vt. at 12. The Court found that certain transfers did not fall within the ambit of the Interstate Compact, e.g., transfer to "any institution primarily educational in character," and therefore the state retained general authority to make a transfer of this kind without a judicial

hearing. Id. However, the Court ruled that the trial court failed to make findings of fact to determine whether the transfer would fall under the Interstate Compact or the statute governing dispositions, and reversed and remanded the case. Id. at 13.

The Vermont Supreme Court has held that the Interstate Compact provisions granting hearings before juveniles are placed out of state only grant a juvenile who has been adjudicated neglected or unmanageable, and not his/her parents, the right to request and be given a judicial hearing regarding a proposed out-of-state placement. In re A.K., 153 Vt. 462, 464-65 (1990). See also 33 V.S.A. § 5906.

Do not take comfort in the belief that the state will request judicial blessing before transferring your client out of state. Quite the contrary. If there is any hint that an out-of-state transfer is contemplated, counsel should move for an immediate protective order under 33 V.S.A. § 5115 or a temporary restraining order under V.R.C.P. 65. Of course, there are times when children would like to be placed out of state. Be sure to inquire as to your client's wishes, assuming your client has decision-making capacity, prior to making a decision about strategy. The Defender General Website has a list of programs under the Juvenile section.

(3) In-State Placement Options

Following is a brief description of the most common out-of-home placements for children. If a child needs to be placed out of home, the least restrictive placement possible to keep the child and others safe should be pursued first. Foster care is the most common out-of-home placement for children. It can be short-term or long-term depending upon the child's needs. The goal often is that the child will return home within a certain amount of time. However, if the youth cannot return home, then long-term foster care, kinship care, or adoption may be pursued. Foster families may need a variety of supports to care for youth so that the youth and the foster family can be successful.

Therapeutic foster care involves foster parents who are specially trained to care for children with serious emotional disturbances, and these types of homes offer greater supervision. Therapeutic foster homes are more scarce than "regular" foster homes. These foster parents are expected to: 1) teach more socially adaptive behavior within a family milieu; 2) creatively involve the youngster in recreational and community activities; 3) provide home/school coordination; 4) facilitate natural family visitation; and 5) implement the individualized treatment plan. Therapeutic foster homes may be affiliated with certain organizations who work with families, such as Casey Family Services or the Northeastern Family Institute. On occasion, when a child has unique needs, DCF may specifically recruit individuals to serve as foster parents for that specific child; do not hesitate to push for this type of action if DCF has been unable to locate a therapeutic foster home after a diligent search.

Residential treatment programs provide a structured living environment for youth with moderate to severe emotional problems. These programs usually provide 24 hour staff supervision, night awake security, on-site crisis management capability, clinical staff, and psychiatric consultation. The focus should be on placing children within their home region to

enhance family involvement. Intensive residential programs will offer a school onsite. Other services provided are case management, family therapy and outreach, and services to reintegrate the child into the community.

There are a number of types of residential programs. Some are large facilities with a variety of services and units including hospital units, group-care facilities, and special education schools. The Brattleboro Retreat is a fairly large facility. Others are organized into several small units or group-care programs on one large campus. Bennington School roughly fits this category. Still others are small programs serving perhaps only ten youth with both residential treatment and educational programs. Brookhaven, in Chelsea, Vermont, is a smaller residential program for younger kids.

"Group homes" are more structured than therapeutic foster homes, yet less structured than traditional residential care. They provide a residential environment, but usually in single homes located within a community, serving about 6 youth. Generally, emphasis is on change and growth through supportive relationships, daily interactions, and problem solving. A group home either will have one or two adults who live in the home with the youth, or a rotating staff. The youth often will receive other services, such as counseling, in the community. Allenbrook, in Burlington, is an example of a group home.

(Descriptions of these and other programs are available on the Defender General website in the Juvenile section.)

(4) Woodside

At or after the TCH, the court may order placement of an alleged delinquent in Woodside for up to 7 business days, or until DCF finds a lesser restrictive alternative. 33 V.S.A. § 5291. The court may renew its order after 7 business days, but the new order may not exceed 7 additional business days. Id. Otherwise, only DCF may place youth at Woodside administratively.

Woodside has two sections, the Short-Term Detention Wing (D-Wing) and the Intensive Treatment Program, Residential Wing (R-Wing). The short-term detention program is locked and serves delinquent youth and youth alleged to have committed a delinquent act whose risk to commit illegal acts cannot be controlled in a less secure setting. The Intensive Treatment Program is the only locked residential treatment program for delinquent males in the state. The program has an educational, vocational and rehabilitative component. Normally, juveniles with multiple and/or serious delinquencies are placed here.

A complete description of both programs can be found in the Woodside Juvenile Rehabilitation, The Juvenile Defender's Office also has a compilation of descriptions of residential programs, including the short and long-term programs at Woodside, that Dotty Donovan put together in 2009. Please contact the Juvenile Defender's Office for a copy. Descriptions and procedures for both programs can be found in DCF policies nos. 171-174, 177. These policies can be found at http://dcf.vermont.gov/fsd/policies, or contact our office for a copy.

Following is a description of the procedures in the Short-Term (D-Wing) Program:

Youth are placed in the Short-Term Program because of their alleged behavior. A worker may feel that the youth is not safe in the community and that the community must be protected, and/or there is a risk that the youth will re-offend or run.

Youth admitted to Short-Term Program must be between the ages of ten and seventeen, inclusive. They must be adjudicated as delinquent, that is they must be:

A.

1. in custody as a delinquent under the terms of a disposition court order; or
2. detained on a charge for a delinquent act by order of the Court; or
3. in custody as CHINS, with a merits hearing finding of delinquency with a pending disposition; or
4. in custody as a CHINS, and a current delinquent on juvenile probation; or
5. on juvenile probation detention status as described in DCF Policy #162;
6. on juvenile probation or in the custody of another state as a delinquent, but being supervised in Vermont pursuant to the Interstate Compact on Juveniles or Interstate Compact on the Placement of Children.

NOTE: Although youth may be adjudicated delinquent in Vermont for Possession of Malt Beverage or other alcohol related offenses which would not be an offense if committed by an adult, under federal definitions these are considered status offenses and not delinquencies. If there is no other delinquency, these charges/adjudications cannot form the basis for an admission to Woodside.

AND

B. Youth must meet one of the following sets of criteria:

1. There is evidence that the youth poses a significant risk to the community; AND the youth demonstrates behavior that cannot be controlled in an available setting less secure than Woodside OR
2. The youth is subject to probation detention as described in Policy #162.

Minors adjudicated as CHINS may not be confined in secure facilities such as Woodside because of the provisions of 42 U.S.C. §5633(a)(12)(A) and the State of Vermont's agreement in its juvenile justice plan not to hold status offenders in secure confinement, as well as 33 V.S.A.§ 5322.

If youth are administratively admitted to the Short-Term Program at Woodside or placed there by a flexible court order of the juvenile court there needs to be a hearing at Woodside if they are to remain there for more than eight (8) days. This hearing is a formal review designed to protect the due process rights of the youth, and the hearing officer is someone from DCF. Youth must meet three criteria to stay at Woodside beyond 8 days:

1.The youth is:

- in custody as a delinquent under the terms of a disposition court order; or

- detained on a charge for a delinquent act by a flexible court; or
- in custody as CHINS, with a merits hearing finding of delinquency pending disposition; or
- in custody as a CHINS, and a current delinquent on juvenile probation; or
- on juvenile probation detention status as described in Policy #162; or
- on juvenile probation or in the custody of another state as a delinquent, but being supervised in Vermont pursuant to the Interstate Compact on Juveniles or Interstate Compact on the Placement of Children.

2. The youth is determined eligible for continued detention as determined by score on the Woodside Screening Instrument (FS-678) AND

3. The continued risk cannot be managed in an available less secure setting.

A legal representative from the Juvenile Defender's office represents youth at Woodside on Tuesdays and Fridays. The legal representative also represents youth at 8-day hearings.

Youth can appeal a ruling that they must stay in D-Wing beyond 8 days to a hearing officer who is not an employee of DCF. The hearing must be held within 10 days. At the hearing, the burden is on DCF to prove that there is substantial evidence that the youth continues to meet criteria for continued placement outlined above. See DCF Policy 172. http://dcf.vermont.gov/fsd/policies.

No youth can remain in the Short-Term Program for more than 60 days from the date of admission, without the approval of the commissioner of DCF. Woodside must forward an authorization form to the DCF operations manager for review and appropriate routing. If the commissioner does not sign the authorization form prior to the 60th day, the youth will be discharged.

There are times when youth sit on the Short-Term Program Wing for unnecessarily long periods of time. Lengthy detention of minors may violate the policies of least restrictive and most family-like placement embodied in 33 V.S.A. § 5101 and 42 U.S.C. §675(1) and (5). DCF Policies regarding Woodside (#166 and 171-178 may be found at the following website: http://dcf.vermont.gov/fsd/policies#Juvenile

3. ***Content and Format of Disposition Case Plan***

DCF must submit a disposition case plan to the court. 33 V.S.A. § 5230(b). In the past, the Department of Corrections was required to submit the disposition report in a delinquency case, but the 2008 revisions to the statute reflect the requirement that DCF submit the report. 33 V.S.A. § 5230(a).

V.R.F.P. 1(g) states that for delinquency proceedings, the disposition case plan and any report of expert witnesses must be filed with the court and arrangements made for the receipt of the reports by the GAL and attorneys of record 7 days prior to the disposition hearing. In some counties, attorneys must go to the court to pick up their copy of the disposition reports. In other

counties, the reports are mailed to the attorneys. Section 5230 requires DCF to file the case plan 28 days from the day delinquency was found, and the disposition hearing must be held within 35 days. 33 V.S.A. § 5231(a).

33 V.S.A. §5230 includes guidelines for the content of the disposition case report, including:

1) an assessment of the child's medical, psychological, social educational, and vocational needs;

2) an assessment of the impact of the delinquent act on the victim and the community, including, whenever possible, a statement from the victim;

3) a description of the child's home, school, and community, and current living situation;

4) an assessment of the child's and the family's strengths and weaknesses;

5) proposed conditions of probation which address the identified risks and provide for, to the extent possible, repair of the harm to victims and the community;

6) The plan of services shall describe the responsibilities of the child, the parent, guardian or custodian, the department, other family members, and treatment providers, including a description of the services required to achieve successful completion of the goals of probation and, if the child has been placed in custody of the department, the permanency goal.

If the child is in custody of DCF or the case plan calls for custody, the report should also include:

1) – 6) above

7) A permanency goal for a safe and permanent home, an estimated date for achievement, and with whom permanency will be achieved. The report may have a concurrent plan;

8) A recommendation for custody and parent-child contact;

10) A request for child support.

Where the report is deficient in any of these aspects, and the disposition is not favorable, a request should be made to the court for a report in compliance with the statute.

Efforts should be made to discuss disposition with the caseworker while the disposition case plan is still in the drafting stage. The most useful information that can be shared with the disposition case plan writer will fall into two broad categories: factual data from your client's perspective and suggestions as to disposition plans.

4. ***Case Plan***

The disposition case plan serves the purpose of creating a plan to achieve a goal determined by DCF and must be approved by the court. There is a requirement under 33 V.S.A. § 5121 that DCF actively engage families and solicit and integrate into the case plan the input of the child, the child's family, relatives, and other persons with a significant relationship to the child. Whenever possible, parents, guardians, and custodians shall participate in the development of the case plan. Later, at subsequent reviews, (see section below on Administrative Reviews and Permanency Hearings), this document is referred to as a case plan.

5. ***Objections***

It is important to note on the record any disputes that your client might have with the facts set forth in the disposition case plan even if you are agreeing with the recommendations in the report. Otherwise, these facts can be relied upon later in case plan reviews, modification proceedings, or a termination of parental rights hearing.

a. ***Inclusion of Hearsay***

In considering disposition the court may consider all information helpful in determining the questions presented, including oral and written reports and including the disposition case plan. 33 V.S.A. § 5231. These may be admitted and may be relied on to the extent of their probative value. 33 V.S.A. § 5231 (b). The disposition hearing is fraught with the danger that unreliable hearsay will be admitted and relied upon. In the event that disputed hearsay is presented to the court, counsel should ask for the opportunity--including a continuance if need be--to challenge or contradict the proffered material. 33 V.S.A. § 5231 (e). On the other hand, the disposition hearing provides counsel with the occasion to present favorable information and an alternative disposition case plan to the court. This possibility should not be overlooked.

Hearsay is admissible at a disposition hearing but there must be sufficient non-hearsay evidence of parental unfitness to remove a child from the home. In re S.G., 153 Vt. 466, 474 (1990). "([W]e have never held that findings at disposition can't be based, at least in part, on hearsay. Hearsay is admissible to show parental unfitness provided there is additional credible non-hearsay evidence as well"). Also, a determination of parental unfitness may be based solely on hearsay if there are no objections to the hearsay, although the court criticizes too much reliance on hearsay. Id. The question then arises as to how much hearsay is too much. In re R.B., 152 Vt. 415, 424 (1989) (court rejects argument that reliance on hearsay can never meet burden of proof of convincing evidence of parental unfitness; such an argument confuses the issue of admissibility with the overall weight of the evidence; if court finds hearsay has sufficient probative value in combination with other evidence to meet the state's burden of proof, it may use it to support its conclusions). See also In re A.F., B.F. & C.F., 160 Vt. 175, 181 (1993) (hearsay admissible in TPR as long as it is not sole basis for TPR); In re E.B. & M.B., 162 Vt. 229, 233 (1994) (same).

If you are not in agreement with the disposition case plan or other reports, the general rule is to object to them as hearsay. If you do not object to hearsay, you waive it. One option is to file a motion in limine ahead of time to object to the hearsay or ask the judge for a continuing objection at the hearing. You can point out to the court that you have no choice and that also, by objecting, you are giving the other side the opportunity to make an offer of proof that the evidence is not hearsay or comes within one of the exceptions to the hearsay rule. It also is important to note on the record specific objections to hearsay contained within the disposition case plan.

b. ***Inclusion of Prior Bad Acts***

In delinquency cases, often disposition reports will refer to other delinquent acts that your client is alleged to have committed. Such information, if not charged or proven, should not be permitted to remain as part of the disposition report. Unproven hearsay allegations should not become part of the permanent record in the juvenile's case by being included in the disposition case plan.

Counsel should argue that such matters should be removed from all reports submitted to the court and should not be considered in any way by the court in making a disposition order. In State v. Ramsay, 146 Vt. 70, 81 (1985), the Court held that:

> ...[S]entencing must be based on reliable information...(and)...(e)vidence of other criminal acts by the defendant and any other information is admissible if it satisfies the standards of V.R.Cr.P. 32(c)(2)--that is, if it is factual and helpful, or otherwise permitted (see, e.g. 13 V.S.A. §7006 (victim's right to testify at sentencing proceedings)) and is not excluded by constitutional limitations.

V.R.Cr.P. 32(c)(4) was amended to respond to the Ramsay decision. It prevents a court from considering challenged information unless the court specifically finds that the objected to fact is reliable. Although V.R.Cr.P. 32(c)(4) does not expressly apply in delinquency proceedings, counsel may argue that its reliability concerns should, by analogy, govern delinquency dispositions. Most judges correctly will not consider unproven allegations or substantiations as evidence, especially if they are made aware of the fact that the standard of proof necessary for DCF to substantiate is considerably lower than that required at any stage of a delinquency or CHINS proceeding. See the Section in the Manual on Substantiation of Juvenile Clients for Abuse.

6. ***Disposition Hearing***

If the court makes a finding that the child is delinquent, a date must be fixed for the disposition hearing. In delinquency proceedings the hearing must be within 35 days from the date of the finding of delinquency. 33 V.S.A. § 5231(a). Remember, however, that these time lines are only directory. See section above on Merits Hearing, Scheduling. It is not uncommon

to have a disposition hearing immediately upon a merits finding in a delinquency, unless it is a serious case.

A disposition hearing addresses: the placement of the child; the child's care, rehabilitation and supervision; protection of the community; accountability to victims and community; developing competencies to help the child become responsible and productive; and restitution. 33 V.S.A. § 5232. The court must accept or reject a case plan of services intended to remedy these deficiencies and set forth findings of fact to justify its decision thereon. In re G.F., 142 Vt. 273, 281 (1982). See also 33 V.S.A. § 5258 (court may accept or reject a plan, but may not designate a particular placement for a child in DCF custody).

The statute does not set forth any time limitation within which the court must issue its findings, but the Supreme Court has stated that the interval may not be unreasonable. In re B.M.L., 137 Vt. 396, 399 (1979), overruled in part by A.S. and J.S., 152 Vt. 487, 492 (1989). Failure to make findings within a reasonable period of time or failure to set the disposition hearing within the prescribed period constitutes the basis for release from detention, if such habeas corpus relief is in the best interests of the child. In re A.S., 152 Vt. at 490; In re M.C.P., 153 Vt. 275, 293-94 (1989). Some judges have dismissed proceedings where the disposition hearing was not timely set.

Hearsay is allowed. 33 V.S.A. § 5231(b). The State has the burden to prove its case by a preponderance of the evidence, unless the recommended disposition is TPR, in which case the burden of proof is by clear and convincing evidence. 33 V.S.A. § 5231(c). If TPR is recommended, the court is to consider the best interests of the child. 33 V.S.A. § 5231(d).

7. ***Duration of Orders***

Disposition orders are indeterminate in duration unless otherwise specified. All disposition orders expire when the child attains majority (age eighteen). (See the section below on privacy regarding a delinquent's rights to have his or her records sealed.) 33 V.S.A. § 5103 permits the juvenile court to retain jurisdiction up to age 18 for children who have committed a delinquent act. DCF Casework Manual policy No. 127 provides that financial support can be provided for certain juveniles in DCF custody who turn 18 and are continuing in school. See http://dcf.vermont.gov/fsd/policies, specifically Policy # 127. If a child is adjudicated as a youthful offender (see section below on Youthful Offenders), the juvenile court may retain jurisdiction over that child until he or she reaches the age of 22. 33 V.S.A. § 5104.

Orders placing a juvenile on probation may be for a specified term. Juvenile probation certificates must be furnished to and signed by the juvenile and a custodial parent, guardian or custodian of the child, if other than a parent. The signature of a custodial parent, guardian, or custodian on a probation certificate shall constitute verification that the parent, guardian, or custodian understands the terms of juvenile probation and agrees to facilitate and support the child's compliance with such terms and to attend treatment programs with the child as recommended by the treatment provider. 33 V.S.A. §5263 (b) (c).

8. *Restitution*

In 2008, the Juvenile Procedure Act added new provisions about juvenile restitution. 33 V.S.A. § 5235. This section may be applied retroactively to orders issued after July 1, 2004.

Victims may now obtain restitution through payments from the crime victim's restitution fund in the same manner as victims in adult cases do. 33 V.S.A. § 5235 (j).

The Restitution Unit may then bring a civil action to enforce restitution orders after the child turns 18. 33 V.S.A. § 5235 (k). Civil actions for enforcement are not confidential. 33 V.S.A. § 5235 (k)(3).

The court must still fix restitution based on the juvenile's ability to pay. 33 V.S.A. § 5235(e). The Judge shall set the manner of performance or refer it to the restorative justice program for determination of how the loss will be addressed. 33 V.S.A. § 5235(e) Restitution can be modified. 33 V.S.A. §§ 5235(e), 5264. The statute makes it clear that the court may modify restitution set by a restorative justice panel. 33 V.S.A. § 5264(a). In determining the amount, if the juvenile cannot pay at disposition, the court's amount may not exceed an amount the juvenile can or will be able to pay. In practice, the attorney should argue that the time limit set for probation, including when jurisdiction ends, should be relevant to determining the amount a juvenile will be able to pay. The danger of a civil judgment is that the court could rationalize that it is acceptable to set high amounts that a person would not be able to pay off until they are 30 years old. This scenario would set a child up to essentially fail juvenile probation, and have juvenile confidentiality broken by the ensuing civil suit.

If restitution is not ordered, the court must state the reasons, 33 V.S.A. § 5235 (h), and must make findings when awarding restitution. 33 V.S.A. § 5235(c). Restitution may be awarded for uninsured property, uninsured out of pocket monetary loss, uninsured lost wages, and uninsured medical expenses. 33 V.S.A. § 5235(a). The court may order: the return of property; cash, credit or installment payments to the restitution unit; or payment in kind, if the victim accepts. 33 V.S.A. § 5235(b).

9. Victims Rights

a. Victim of Listed Crime

i. Notification of Condition of Release

If a condition of release relates to the victim or the victim's family or current household, the SA's office will promptly notify the victim of the identity of the child when the condition is initially ordered or modified. If the conditions do not relate to the victim or the victim's family, the victim shall only be notified that conditions were initially set or modified. 33 V.S.A. § 5226. Victims are only entitled to information about conditions that relate to themselves or members of their families and immediate households. Id.

ii. Victim's Statement at Disposition

The victim has the right to file with the court a written or recorded statement about the impact of the act and the need for restitution. 33 V.S.A. § 5233. The victim also has the right to be present at the restitution hearing only to present the same; the victim then must leave the courtroom. 33 V.S.A. § 5233. The court shall take the victim's views into consideration. Id.

iii. Notification of Disposition

The victim shall be notified by the SA's office of whether the child was placed on probation and of any conditions relevant to the victim, after an adjudication of delinquency. 33 V.S.A. § 5233 (d), (e). Upon request, the SA office shall release the child's identity to the victim. 33 V.S.A. § 5233 (d).

iv. Other rights

In addition to the right enumerated above, victims of listed crimes also have the right to:

a. Be notified by the SA of when predispositional and dispositional court hearings will take place or have been cancelled or continued; 33 V.S.A § 5234 (1).

b. Be notified by the SA whether delinquency is found and disposition has occurred; 33 V.S.A. § 5234(2).

c. Be notified, upon request, by DCF, if DCF has custody, of the discharge of the child from a secure or staff-secured residential facility. 33 V.S.A. § 5234(4). The victim may not know the name of the residence. Id.

b. Victim of Non-listed Crime

i. Notification of Condition of Release

If a condition of release relates to the victim or the victim's family or current household, the court will promptly notify the victim of the identity of the child when the condition is initially ordered or modified. If the conditions do not relate to the victim or the victim's family, the victim shall only be notified that conditions were initially set or modified. 33 V.S.A. § 5226. Victims are only entitled to information about conditions that relate to themselves or members of their families and immediate households. Id.

ii. The Victim's Statement at Disposition

The victim has the right to file with the court a written or recorded statement about the impact of the act and the need for restitution. 33 V.S.A. § 5233. If the court finds that the presence of the victim in the courtroom is in the best interests of the child and the victim, the victim may be present at the restitution hearing only to present the impact and need for restitution. The victim must then leave the courtroom. 33 V.S.A. § 5233. The court shall take the victim's views into consideration. Id.

iii. Notification of Disposition

The victim shall be notified by the SA's office of whether the child was placed on probation and of any conditions relevant to the victim, after an adjudication of delinquency. 33 V.S.A. § 5233(c), (e). Upon request of the victim, and if the court finds that it is in the best interest of both the child and the victim, the SA office shall release the child's identity to the victim. 33 V.S.A. § 5233 (c).

c. Restitution

When ordered, a victim may agree to payments in kind. 33 V.S.A. § 5235 (b)(3). Otherwise the victim is entitled to payment from the crime victim's restitution fund, pursuant to 13 V.S.A. § 5363. 33 V.S.A. § 5235 (d).

d. Youthful Offender Proceedings

Victims of youths who are being considered for YO status, or have been granted YO status, have the following rights, pursuant to 33 V.S.A. § 5288:

1. Be notified by the SA of all court hearings and all cancellations or continuances;

2. Be present at all court proceedings pursuant to VRE 615 and reasonably express their views concerning the offense and the youth;

3. Request notification by DCF or DOC before the youth is released from a residential facility;

4. Be notified by the SA of the final disposition of the case and be notified of their rights.

At a hearing on YO status, the court shall ask if the victim is present and would like to be heard. In disposition, the court shall consider the victim's views, even if those views were presented in writing or orally through the SA. 33 V.S.A. § 5288. No hearing shall be delayed for failure to provide notice to the victim. Id.

Information regarding DCF policy regarding Youthful Offender status may be found at http://dcf.vermont.gov/fsd/policies#Juvenile , specifically Policy # 164.

L. The Reasonable Efforts Requirement

The Adoption Assistance and Child Welfare Act of 1980, Public Law 96-272, 42 U.S.C. §§620, 670-676, was designed to prevent the long-term placement of children in foster care. The act conditions state receipt of federal money for foster care and adoption assistance upon the state's creation of a foster care case plan and case review system. The act also requires that "...in each case, reasonable efforts will be made to preserve and reunify families (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from

his home, and (ii) to make it possible for a child to return safely to the child's home...." 42 U.S.C. §671(a)(15). The act requires a judicial determination that these "reasonable efforts" have been and will be made in order for the states to receive federal reimbursement for foster care maintenance payments for the child. 42 U.S.C. §672(a)(2)(A)(ii). In addition, the child's case plan must explain "how the agency plans to carry out the judicial determination made with respect to the child in accordance with [42 U.S.C. §672(a)(1)]...." 42 U.S.C. §675(1)(a).

The 2008 Juvenile Judicial Procedings Act has codified "reasonable efforts." DCF is required to show reasonable efforts at the TCH, and the court must find reasonable efforts have been made when issuing a TCO. 33 V.S.A. §§ 5255(e)(2), 5256(c)(1)(B), 5256 (c)(2) (additional 60 days permitted to determine if reasonable efforts were made, if necessary).

In the past, the Vermont Supreme Court has held that the juvenile court is a court of limited jurisdiction and is without jurisdiction in a termination of parental rights hearing to consider DCF's compliance with the "reasonable efforts" requirement of 42 U.S.C. §671(a)(15). In re K.H., 154 Vt. 540, 542-43 (1990), cert. denied, 498 U.S. 1070 (1991). In addition, the court found that the parent in that case had not shown that she had standing under the law to bring a private action. Id. at 542, n.2. However, given the codification of "reasonable efforts" into the 2008 Juvenile Judicial Proceedings Act, this may be a viable challenge to a case plan at disposition or permanency hearings.

The child's removal from the home may be necessary to ensure the child's safety and it may be in his or her best interests to be removed. Certainly, if protective measures and services can be put in place that would allow for the child to safely remain in the home, that would be in the best interests of the child, given the trauma to the child that usually occurs when a child is taken from his or her parents.

At any time after the child is in foster care, a parent of the child, or the child, can petition for modification of the disposition order and can argue that the child could safely return home if a particular service were provided by DCF. 33 V.S.A. § 5113. (See the section below on Modification of Orders, which explains that the moving party must show a substantial change in material circumstances and that the modification is in the child's best interests). The "reasonable efforts" provisions of the act provide support for the argument that DCF must provide in-home services if such services can permit the family not to be separated or to be reunited. The court has the power to "[p]ermit the child to remain with his parents, guardian, or custodian, subject to such conditions and limitations as the court may deem necessary,..." 33 V.S.A. § 5256 (emphasis supplied.) This section can be used to assert the "reasonable efforts" requirements either at initial disposition or in a petition to modify a disposition order.

However, the Adoption and Safe Families Act ("ASFA") of 1997, P.L. 105-89, 42 U.S.C. § 671(a)(15)(D), enumerates certain circumstances under which the state does not have to make reasonable efforts to reunify a family. These circumstances include where a parent has:

(1) murdered or committed voluntary manslaughter of another child of the parent;

(2) aided or abetted, attempted, conspired, or solicited to commit such murder or manslaughter;

(3) committed a felony assault which has caused serious bodily injury to the child or another child of the parent;

(4) had their parental rights to a sibling terminated involuntarily; or

(5) subjected the child to aggravating circumstances, which may include abandonment, torture, chronic abuse or sexual abuse.

1. Reunification efforts and the ADA

The Americans with Disabilities Act (ADA) prohibits state entities from excluding persons because of their disabilities from services, programs or activities of the public entity. 42 U.S.C. § 12132. Under the ADA, disability is defined as a "physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(2); 28 C.F.R. § 35.104. See also 9 V.S.A. §§ 4501(2), 4502(c)(1).

ADA issues must be raised as soon as possible in order to request and receive any reasonable accommodations. If a disabled parent is unable to access the programs DCF requires, you must seek accommodations that will enable the parent to participate. Although a violation of the ADA by DCF is not a defense to a TPR, In re B.S., 166 Vt. 345, 351 (1997), the Vermont Supreme Court expressed its "hope that the effect of this decision is to encourage parents and other recipients of DCF services to raise complaints about services vigorously and in a timely fashion." Id. at 354-55.

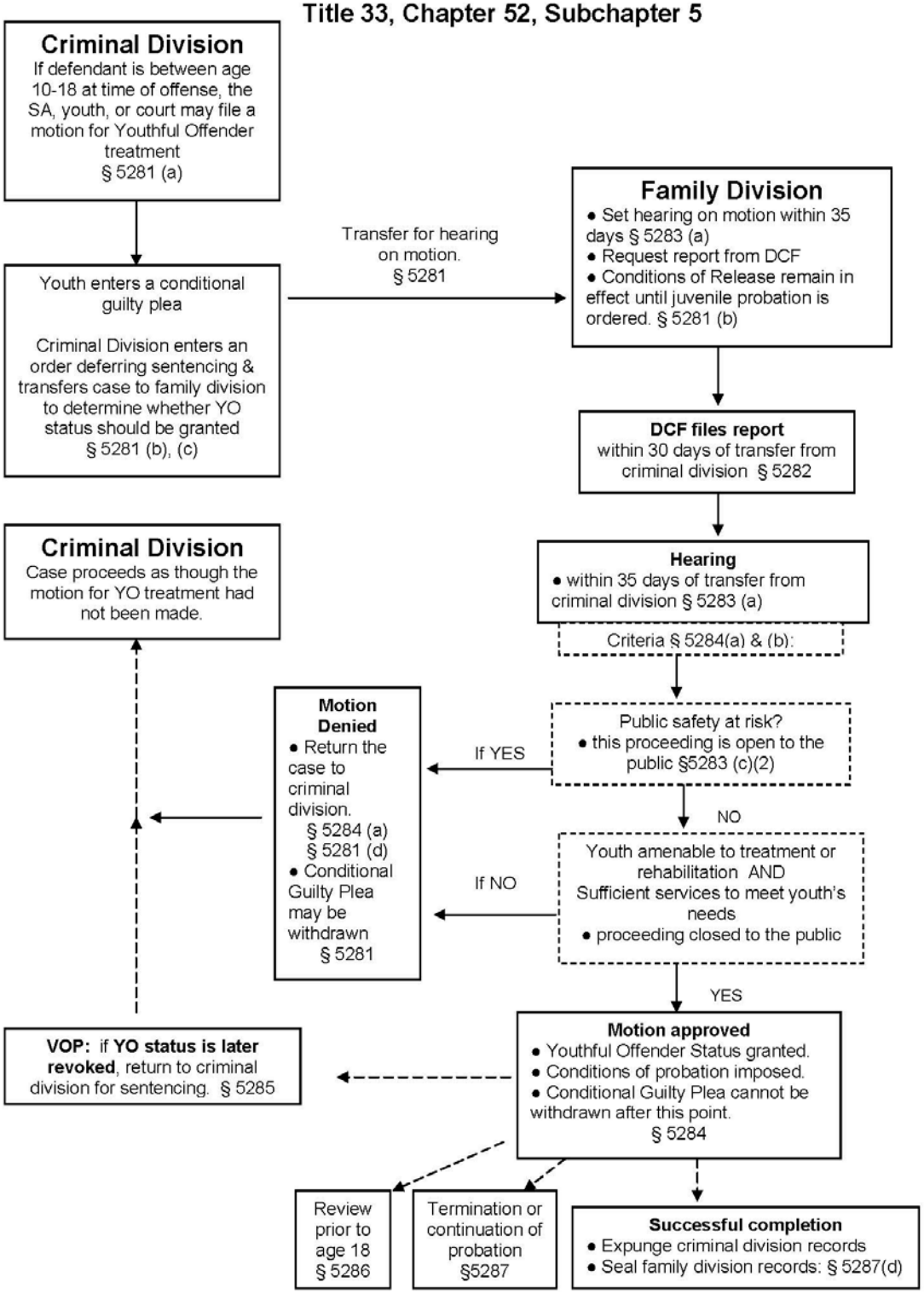
M. Youthful Offenders

The 2008 Juvenile Judicial Proceedings Act completely revises the procedure for youthful offenders (YO). A Youthful Offender is a juvenile between the ages of 10 and 18 who has been charged in criminal court, but whose case was transferred to family court for disposition and supervision. In family court, the court may extend its jurisdiction to age 22, and may return the youth to district court to impose sentence if juvenile probation is violated. YO is a viable option when a youth is about to age out of family court, but could still benefit from the family court's services, and when the crime is serious and the prosecutor wants the threat of an adult penalty motivating the youth to succeed on juvenile probation. An attractive element of YO status for the youth is that successful completion results in the dismissal of the family and district court cases. 33 V.S.A. § 5287(c). All district court records are then expunged and the family court records are sealed. 33 V.S.A. § 5287(d).

On the following page is a flowchart explaining the procedure involving determination of youthful offender status.

Youthful Offender Flowchart

Title 33, Chapter 52, Subchapter 5



1. ***Procedure***

    1. Motion to be treated as a YO may be filed by the defendant, state's attorney or court in district court. 33 V.S.A. § 5281.

    2. Youth enters a conditional guilty plea (conditioned upon granting of YO status). Id.

    3. Court enters order deferring sentence, and transferring case to family court for hearing on the motion. All records are transferred to family court, but District Court Conditions of Release continue. Id.

    4. Within 30 days DCF files a report recommending whether YO status is appropriate, files a disposition case plan with conditions and services, and a description of services available for the youth when they reach 18. The report is confidential and is distributed in similar manner to juvenile cases. 33 V.S.A. § 5282.

    5. Within 35 days of transfer, the Family Court holds a hearing. 33 V.S.A. § 5283.

    6. If YO status is granted after hearing on the motion, conditions of release are replaced by juvenile probation conditions. 33 V.S.A.§ 5281.

    7. If YO status not granted, the case is returned to adult court and the youth may withdraw the plea. 33 V.S.A. § 5281.

2. ***Hearings***

    a. <u>YO status</u>

Hearings are bifurcated into two parts. The first part of the hearing focuses on public safety. This portion of the hearing is open to the public. If the court finds that public safety will not be protected by YO treatment, the motion is denied and the case is transferred back to adult court where the youth may withdraw the guilty plea. 33 V.S.A. § 5284.

If the court finds that public safety <u>will be</u> protected, the court then considers whether the youth is amenable to treatment or rehabilitation as a YO, and that DCF and the juvenile court have sufficient services to meet the youth's needs. This part of the hearing is confidential, and closed to the public. 33 V.S.A. § 5284.

All parties have the right to present evidence and examine witnesses. 33 V.S.A. § 5283. Hearsay may be admitted. Id.

If the court grants YO status, it shall approve a disposition case plan and impose juvenile probation conditions, and may transfer custody of the youth.

b. 18 Year Old Review

Custody terminates on the youth's 18th birthday. Probation is reviewed before the youth's 18th birthday to determine whether to continue the court's jurisdiction up to the age of 22 or discharge the youth. 33 V.S.A. §§5284, 5286.

At the review prior to turning 18, anyone may file a motion to terminate YO status and discharge the youth; the state may file to modify or revoke YO status. 33 V.S.A. § 5286. At hearing, DCF must file a report with its recommendations regarding continued jurisdiction and suggesting whether DCF or DOC should supervise continuing probation. 33 V.S.A. § 5286(c)(1). If DOC supervision is recommended, DOC shall file a report outlining the services it could offer the youth. 33 V.S.A. §5286(c)(2). Regardless of who supervises, both departments must develop a joint plan. 33 V.S.A. § 5286 (d).

3. ***Consequence of Violating Probation***

The State must file a motion to modify or revoke YO status in family court to change the status; it is insufficient to alter YO status through filing only a violation of probation. 33 V.S.A. § 5285. If the youth is over 18, they may be detained in an adult facility for violating probation. 33 V.S.A. § 5285.

The family court must hold a hearing to determine if probation was violated. If it was the court may:

1. Maintain YO status, and modify probation conditions, if appropriate;
2. Revoke YO status and return the case to district court for sentencing; or
3. Transfer supervision of the youth to the DOC.

If YO status is revoked, the district court holds a sentencing hearing at which it may take into consideration, among other factors, the youth's progress toward rehabilitation while on YO status. 33 V.S.A. § 5285 (d). The district court has access to all family court records of that particular proceeding. 33 V.S.A. § 5285 (d). The attorney could use this provision to limit the district court's access to the juvenile's entire family court record where the youth's involvement in family court was extensive.

4. ***Termination of Probation***

A motion may be filed at any time to terminate the youth's status as a youthful offender and terminate him or her from probation. 33 V.S.A § 5287. In determining if a youth has been successful, the court determines the degree to which the youth fulfilled the case plan and probation order, the youth's performance during treatment, reports of treatment personnel, and any other relevant facts to the youth's behavior. 33 V.S.A. § 5287.

N. Sealing of Records

Recent changes in the law have made sealing of juvenile records automatic in most circumstances as long as two years have elapsed since the final discharge of the person. 33 V.S.A. § 5119 (a)(1).

Sixty days prior to sealing of a delinquency, the SA is notified. If the SA objects, a hearing may be held. At the hearing, a person who has been convicted of a listed crime or adjudicated delinquent of a listed crime after an initial delinquent adjudication (or a proceeding is pending seeking such conviction or adjudication) may not have their records sealed by the court. 33 V.S.A. § 5119(a)(1)(A). The court may also refuse to seal the record of a youth who has not been rehabilitated to the satisfaction of the court. 33 V.S.A. § 5119(a)(1)(B). Notice of intent to seal and objections are sent directly to the youth at their last known address, so their attorney may or may not receive notice. The Defender General has stated that if the State's Attorney objects to the sealing of the record and a hearing is held on the issue the person who is the subject of the sealing order is entitled to public defender representation if he or she would qualify at that time under the public defender act.

Records must be sealed by the prosecution, court, DCF and law enforcement agencies. Defense attorneys are not included. 33 V.S.A. § 5119(d). Under limited circumstances, specific people are authorized to access the index of sealed files. 33 V.S.A. § 5119(e). Review of files may occur only upon the granting of a confidential motion. 33 V.S.A. § 5119 (f).

Effective July 1, 2009, Act No. 1, an Act Relating to Improving Vermont's Sexual Abuse Response System (S.13) permits a sentencing court access to its sealed juvenile records of a person convicted of a registrable sexual offense, and to release records to the commissioner of DOC to be used for a PSI, determining placement, or developing a treatment plan. 28 V.S.A. § 204. The commissioner shall consider only information relating to adjudications that may be considered precursor offenses to the sex offense conviction. The new law also permits the commissioner of DOC to inspect confidential juvenile court records that are not sealed if it would be helpful in preparing a presentence investigation (PSI), determining placement, or developing a treatment plan for a person convicted of a registrable sex offense. 33 V.S.A. § 5119(f).

Adult criminal records may be sealed upon the application of a person who has been convicted of a crime prior to attaining the age of 18. The law is unsettled as to whether the conviction must be made prior to attaining majority, or if the act which constitutes the crime must be committed prior to attaining majority. It is safer to assume the former, and counsel clients of the opportunity to seal if they are convicted prior to their 18th birthday. 33 V.S.A. § 5119(g). The requirements for sealing are similar to the sealing of a juvenile record. Id.

O. Administrative Reviews and Permanency Hearings

Whenever custody is transferred to DCF, the custody order of the court shall be subject to the same 60 day post disposition review and permanency reviews as in CHINS cases. 33 V.S.A. §5258. See Section K in the Chapter on CHINS for details.

If DCF or a party seeks modification of a permanency plan in court, the moving party bears the burden of proof to show a change of circumstances. In re: L.S., 172 Vt. 549 (2001).

IV. MODIFICATION OF ORDERS

A. General

33 V.S.A. § 5113 provides that an order of the juvenile court may be set aside if it was obtained by fraud or mistake, if the court lacked jurisdiction over a necessary party or the subject matter, or if newly-discovered evidence so requires. That section also provides that an order may be amended, modified, set aside, or terminated at any time on the ground that "changed circumstances so require in the best interest of the child." In addition, 33 V.S.A. 5113 permits relief from orders terminating parental rights, at least on grounds of fraud.

The modification provision of the statute also may be used by parents to regain custody of their child. However, a change in a child's placement is not sufficient change in circumstances, standing alone, to warrant modification. In re R.F., 135 Vt. 275, 277 (1977); In re B.L., 149 Vt. 375, 377 (1988). In re: J.M., 2005 Vt. 62 (where DCF moves for modification prior to change in placement for child in custody, DCF must prove change in circumstances, even though as legal guardian, DCF has authority to place child).

Hearsay is permitted. 33 V.S.A. § 5113(c). The party seeking modification of an order, including at a permanency review, has the burden of proof to show a change of circumstances. In re: L.S., 172 Vt. 549 (2001).

B. Termination of Parental Rights

The modification provision of the statute is often used by DCF to petition the court to terminate residual parental rights, i.e free the child for adoption. It is the practice around Vermont for the Assistant Attorney General to file the petition and represent DCF at the TPR.

1. *Burden of Proof*

Where the state seeks to permanently terminate parental rights, the State has the burden of proving by clear and convincing evidence that the parents will not be able to resume their parental responsibilities within a reasonable period of time (according to the child's needs). Santosky v. Kramer, 455 U.S. 745, 748 (1982). The Vermont Supreme Court explained the

reasons behind the changing standard of proof from merits to termination in In re: R.B., 152 Vt. 415, 421 (1989):

> Because "the freedom of children and parents to relate to one another in the context of the family, free of governmental interference" is a fundamental liberty, In re N.H., 135 Vt. 230, 236 (1977), the courts are constrained to achieve the statute's stated purpose "whenever possible, in a family environment, separating the child from his parents only when necessary for his welfare. Former 33 V.S.A. § 631(a)(3), now 33 VS.A. § 5101 (a)(3); see also In re H.A., 148 Vt. 106, 108 (1987).
>
> Thus, at a merits hearing, the burden is upon the State to show, by a preponderance of the evidence, that a child is in need of care or supervision by establishing that the child has either been abandoned or abused, or is without proper parental care or subsistence necessary for his well-being. 33 V.S.A. § 5502 (a)(12); In re A.D., 143 Vt. 432, 435-37 (1983). In proceedings to terminate parental rights, the State has a greater burden of showing, by clear and convincing evidence, that there is no reasonable possibility that the "causes and conditions which led to the filing of the petition can be remedied and the family restored within a reasonable time." In re D.R., 136 Vt. 478, 481 (1978).

The changing standard of proof from preponderance of the evidence at merits to clear and convincing evidence upon termination of parental rights continues to be recognized today. 33 V.S.A. § 5231(c); In re: J.T. & C.T., 166 Vt. 173, 179 (1997).

To avoid relitigation of important findings in a termination proceeding, parties may seek favorable merits findings by clear and convincing evidence. See In re C.K., 164 Vt. 462, 470-71 (1995) (Where sexual abuse findings at the merits stage were based on the preponderance of the evidence standard a father was permitted to relitigate the issue of sexual abuse at the termination of parental rights hearing). See also, In re A.W. 164 Vt. 412, 416 (1995); In re J.R., 164 Vt. 267, 271 (1995).

2. *Standard*

For several years, the Supreme Court held that the failure to change over a period of time constitutes a sufficient change of circumstances to warrant modification. The Court held that if the evidence demonstrated "deterioration or that there exists stagnation coupled with a prospective inability for improvement" there was an adequate basis for termination. In re J. & J.W., 134 Vt. 480, 484 (1974); In re G.V. & R.P., 136 Vt. 499, 502 (1978); In re: S.W., 176 VT. 517 (mere fact that parent has some shown some progress does not preclude TPR).

Subsequently, the Supreme Court held that the issue of changed circumstances focuses directly on whether parental improvement, if any, substantially conformed with the expectations at the time of the CHINS adjudication and with the DCF case plan. In re D.B., 161 Vt. 217, 220 (1993); In re: A.G., 2004 VT 125. Attorneys representing parents should impress upon their clients the serious repercussions that may result if they fail to demonstrate progress toward the goals that are contained in the case plan adopted by the court.

When the termination of parental rights is sought, the trial court must conduct a two-step analysis: the court must first find that there has been a substantial change in material circumstances, and, then, the court must find that termination of parental rights is in the child's best interests. 33 V.S.A § 5113; In re: S.W., 176 Vt. 517 (2003); In re: J.F., 2006 VT 45; In re: J.L., 2007 Vt. 32.

The juvenile court should consider the best interests of the child in accordance with the following in conformance with 33 V.S.A. § 5114:

> (1) The interaction and interrelationship of the child with his or her natural parents, foster parents if any, siblings, and any other person who may significantly affect the child's best interests;
>
> (2) The child's adjustment to his or her home, school, and community;
>
> (3) The likelihood that the natural parent will be able to resume parental duties within a reasonable period of time; and
>
> (4) Whether the parent has played and continues to play a constructive role, including personal contact and demonstrated emotional support and affection, in the child's welfare.

33 V.S.A. § 5114. See In re D.R., 136 Vt. 478, 480-81 (1987). An older child's opposition to the termination is an important factor too, but does not outweigh other factors. In re: S.B., 174 Vt. 427 (2002). While parental improvement is a factor for the court to consider, "the real test is whether there is a reasonable possibility of reuniting parent and child within a reasonable period of time." In re J.J., 143 Vt. 1, 6 (1983); In re R.B., 152 Vt. 415, 421 (1989).

Furthermore, a "reasonable period of time" must be viewed from the perspective of the needs of the child. In re: C.L., 178 Vt. 558 (2005) (weighing unaware unwed biological father's right to establish relationship against child's need for permanence). According to In re B.S., 166 Vt. 345 (1997), the legislation does not call for an open-ended inquiry into how parents might respond to alternative DCF services and why those services haven't been provided. Such an inquiry ignores the needs of the child and diverts the attention of the court to disputes between DCF and the parents. Id. at 9-10. The In re B.S. court encouraged parents to raise complaints about services in a timely fashion without holding the interests of the child hostage to disputes between the parents and DCF. See also, In re B.M., 165 Vt. 331, 336-37 (1996); In re: D.A., 172 Vt.571 (2001) (DCF not show by clear and convincing evidence that parents could not resume in reasonable amount of time without harm to child. "Vermont law is not intended to place troubled or needy children in the best possible homes, but rather must be construed to preserve the family unit if it can be done within a reasonable period of time without physically or emotionally harming the child."); In re: K.F. 2004 VT 40. See also sections on Disposition, Reasonable Efforts, and Administrative Reviews and Permanency Hearings (discussion of Human Services Board hearings).

A juvenile court may not terminate an absent parent's rights without notice to the parent of the TPR hearing and an opportunity for the parent to present his or her case in court. In re C.W., 148 Vt. 282, 288 (1987). The state must use "reasonable diligence" to locate a parent. However, almost all juvenile courts have allowed the termination of the parental rights of an absent father of a child born out of wedlock who has completely failed to grasp the opportunity to participate in the rearing of his child or to accept some measure of responsibility for the child's future. See In re S.B.L., 150 Vt. 294, 302-303 (1988). The C.W. court also held that a court may not rely on earlier court denials of visitation requests to support a termination order, but any such reliance in this case was harmless. Id. at 287.

It is also permissible to terminate parental rights in the context of a permanency hearing held pursuant to 33 V.S.A §§ 5258, 5321. In re J.R., 153 Vt. 85, 92-93 (1989). Under the amended Family Rule 3(a), a petition or motion signed by an attorney must accompany the report or permanency review.

Once the family court determines that the child's best interests warrant giving the State custody of the child without limitation as to adoption, the court need not revisit the permanency hearing options contained in 33 V.S.A. § 5321 and explain why it is choosing termination of parental rights over other options enumerated therein. In re: T.T., 2005 VT 30.

3. *Rules and Procedure*

V.R.F.P. Rule 3 addresses TPR proceedings and requires that the notice of the petition or request for TPR be given to the court and directly to the parents in writing and that a pretrial hearing be held within 15 days after the filing thereof. It is insufficient to serve the parent's attorneys. See also In re: M.T., 2006 VT 114; In re: D.M., 2009 WL 173507 (January 14, 2009). Cf. In re: J.L. 2007 VT 32 (sufficient notice where court mailed to last known address, attorney notified parent, and parent participated); In re: S.W., 2008 VT 38 (TPR not overturned despite lack of notice because mother participated). However, because a TPR proceeding is a continuation of the CHINS proceeding, original process demanding the parents be present is not necessary. Id.

Hearsay may be admitted at a hearing under 33 V.S.A. § 5113(c).

Child support ends upon the termination of parental rights.33 V.S.A. § 5116.

In In re J.B., 173 Vt. 515 (2001), the Vermont Supreme Court invited the legislature to make rules clarifying whether reasonable efforts by DCF are a condition precedent to termination of parental rights.

For a discussion on appeals of TPR, see section on Appeals.

For a discussion of the effect of TPR on visitation with parents and siblings, see the section on Visitation under Miscellaneous Practice Considerations.

In 2001 the Chittenden Family Court developed a birthparent counseling project in partnership with Vermont Children's Aid Society (VCAS). The project resulted in more favorable outcomes for families concerning Termination of Parental Rights and birthparent counseling. The project helped birthparents deal with the emotional issues surrounding TPR proceedings and addressed the future of the birthparent if a reunification is not going to happen. It believed that the use of this type of counseling reduced the need for contested TPR hearings in some cases. Court Improvement funds supported the project in its infancy, but the project was not financially sustainable and has ended. It should be noted, however, that if this type of counseling is or becomes available that it should be considered.

C. Permanent Guardianship

Another option for juveniles is placement with a permanent guardian. The legislature passed legislation in May of 2000. (S.291, 14 V.S.A. § 2661). This guardianship would be different from long-term foster care in that the child would not be in DCF custody, and thus risk being moved from foster home to foster home.

The permanent guardianship would be a long-term commitment from a family until the juvenile reaches age 18. Initially, a permanent guardianship could only be ordered if there was clear and convincing evidence that "neither returning the child to the parents nor adoption of the child is reasonably likely during the remainder of the child's minority." 14 V.S.A. § 2664(a)(2). The requirement that adoption or the child during the remainder of his or her minority was reasonably unlikely was a barrier to this option being pursued very often. One court ruled that permanent guardianship could only be granted when adoption was not available. In re A.S., 171 Vt. 369 (Oct. 20, 2000). see also In re: M.W., 182 Vt. 580 (a person indicating "willingness to adopt" satisfies requirement that adoption is "reasonably likely.")

However, a bill was introduced in the legislature in 2010, H. 507, and as of May 8, 2010 has been passed by both the House and Senate and is awaiting the Governor's signature. The bill would amend the statute to only require that "neither returning the child to the parents nor adoption of the child is likely within a reasonable period of time."

In addition to the above, the court must find by clear and convincing evidence that: 1) Neither parent is capable or willing to provide adequate care to the child; 2) the child is at least 12 years old, unless the proposed permanent guardian is a relative or the permanent guardian of one of the child's siblings; 3) the child has resided with the permanent guardian for at least a year, unless the guardian is a relative with whom the child has a relationship; 4) a permanent guardianship is in the best interests of the child; and 5) the guardian meets certain requirements. 14 V.S.A. § 2664.

Only the guardian, the child (if 14 or older), or DCF may request a modification or termination of the guardianship. § 2666. In contrast to adoption, a juvenile's parents would be entitled to visitation. 14 V.S.A. § 2663. The visitation order can be enforced, modified, or terminated through the family court. 14 V.S.A.§ 2667. The parent continues to be financially responsible for the child unless DCF agrees to take on that responsibility. 14 V.S.A. § 2663(b). Under the present statute once an individual becomes a permanent guardian he or she is no longer eligible for foster care payments.

Based on anecdotal evidence, this latter provision has been a barrier to the more frequent use of permanent guardianship. Often, a parent may not be able to meet the child's financial needs, as many children in DCF custody are in need of services, some of which may not be covered by Medicaid or similar programs. The permanent guardian may be in the same situation. In contrast to permanent guardians, adoptive parents have available to them a subsidy based on federal funds to provide for a child's long-term needs, such a counseling, behavioral services, respite, etc. However, the original permanent guardianship statute did not provide similar funding. Thus, many adults considering permanent guardianship were concerned that they may not be able to provide for a child's extensive needs, and thus opt for adoption rather than permanent guardianship.

The bill (H.570) that in all likelihood will become law in May, 2010 would allow permanent guardians who were former foster parents of a child to continue to receive foster care payments as a subsidy for becoming permanent guardians. This is possible because the Foster Connections to Success legislation now allows Title IV-E funds to be used in this manner.

See in table of articles, or at Juvenile Defender's Office, "Kinship Care: The Ramifications of a Relative Taking Custody of the Child vs. Becoming a Foster Parent for the Child."

See also the link for a 20 page booklet created by Vermont Kin as Parents called a "Resource Guide for Kinship Care Providers" at
http://dcf.vermont.gov/sites/dcf/files/pdf/ResourceGuideforKinshipCareProviders.pdf

D. APPLA

"Another Planned Permanent Living Arrangement" (APPLA) is a case plan designation for children in out-of-home care for whom there is no goal of placement with a legal, permanent family. APPLA is an acceptable designation only if there is sufficient reason to exclude all possible legal, permanent family goals. However, APPLA designations must include plans for permanent placements of children and youth that meet their developmental, educational, and other needs.

APPLA differs from long-term foster care in that an APPLA is a permanent arrangement that is the goal for the child. The preferred permanency plans involve a specific adult or couple who will be in charge of the young person, exercise certain powers and responsibilities, and likely live with the young person. Further, the caregiver's familial relationships with the child will continue beyond the life of the dependency case. Unlike Permanent Guardianship, the child

remains in DCF custody until adulthood. APPLA replaced "long-term foster care" as a case plan designation with the passage of the federal Adoption and Safe Families Act of 1997.

APPLA may be appropriate where reunification may not be possible, and the child has a strong bond with the biological parent that would not be in the child's best interest to sever, yet the child needs a stable living situation. See In re: A.G., 2004 VT 125.

The court may only order an APPLA when it finds there is a compelling reason that it is not in the child's best interest to return home, be freed for adoption, or be placed with a fit and willing relative or legal guardian. 33 V.S.A. §§ 5321(5), 5258. APPLA is considered the least desirable alternative for children in state's custody. In re: A.S., 171 Vt. 369 (2000).

V. APPEALS

While an appeal of a juvenile court order is pending, a discretionary stay may be issued pursuant to V.R.A.P. 8(a) and (c). This appellate rule suggests that the automatic stay provisions of V.R.C.P. 62 do not apply to juvenile cases, and that is the practice. See In re: D.P., 147 Vt. 26, 32-33 (1986); but see J.T. & C.T., Docket No. F82-9-93 and F83-9-93Cajv (March 15, 1996) (Fisher, J.) (court left question as to whether stays are automatic or discretionary for another court). Moreover, V.R.A.P. 8(c)(2) makes clear that even while an appeal is pending, the juvenile court retains jurisdiction to modify, vacate, or enforce a juvenile court order.

When faced with the issue of how to get certain favorable evidence before the appellate court that was not available at the time of the merits hearing, consider filing a relevant motion with the trial court so as to build a record on appeal. See the Motion to Dismiss in the Interests of Justice in the Motions Section of this manual. See the section on Visitation, Termination of Parental Rights below regarding the fact that visitation pending appeal of a TPR order is within the discretion of the trial court.

With rare exceptions, the Vermont Supreme Court will not question a trial judge's finding that TPR is supported by substantial evidence. The Court rarely overturns a TPR order on any ground. There is a less than 1% reversal rate.

In a TPR, a parent whose rights have been terminated need not wait until the other parent's rights have been terminated to appeal. In fact, the first parent should not wait, because the statutory time frame for appeal begins to run. In re: A.D.T., 174 Vt. 369 (2002). In practice, if a parent wants to voluntarily relinquish his or her rights before the second parent's rights have been terminated, the attorney should ensure that it is a "conditional relinquishment" to avoid starting the clock running on an appeal. When a parent voluntarily relinquishes his or her parental rights in a family court TPR proceeding, the 20 day rescission period in the Vermont Adoption Act does not apply. In re: E.A., 183 Vt. 527 (2007). However, counsel may be able to argue that the consent was involuntary in an appropriate motion. Id., dissent.

VI. DCF FINANCIAL ASSISTANCE BEYOND AGE 18 – Transitional Services

A. Scope of Available Aid - DCF Policy Manual No. 127, and DCF Bulletin 08-1

DCF may provide financial and transitional services to youth after the age of 18 if they meet certain criteria. The criteria and the services available for each set of criteria met are set forth in DCF Bulletin 08-1 (http://dcf.vermont.gov/fsd/rules). Services include foster or housing payments for youth completing secondary or post-secondary educations or employment goals. This can also include incidental living expense grants. If youth is in a residential program when the youth turns 18, this policy provides for continued funding for such program.

Under 33 V.S.A. §4904:

(a) For purposes of this section, "youth" means a person between 18 and 22 years of age who either:

(1) attained his or her 18th birthday while in the custody of the commissioner for children and families; or

(2) while he or she was between 10 and 18 years of age, spent at least five of those years in the custody of the commissioner for children and families.

(b)(1) The department shall provide foster care services as described in subsection (c) of this section to:

(A) any youth who elects to continue receiving such services after attaining the age of 18.

(B) any individual under the age of 22 who leaves state custody after the age of 16 and at or before the age of 18 or any youth provided he or she voluntarily requests additional support services.

(2) The department shall require a youth receiving services under this section to be employed or to attend an educational or vocational program, and, if the youth is working, require that he or she contribute to the cost of services based on a sliding scale, unless the youth meets the criteria for an exception to the employment and educational or vocational program requirements of this section based on a disability or other good cause. The department shall establish rules for the requirements and exceptions under this subdivision.

(c) The commissioner shall establish by rule a program to provide a range of age-appropriate services for youth to ensue a successful transition to adulthood, including foster care and other services provided under this chapter to children as appropriate

housing assistance, transportation, case management services, assistance with obtaining and retaining health insurance or employment, and other services.

H.507 which was introduced in the legislature in 2010 and is mostly focused on permanent guardianships (see above) also would amend section (c) to add the following language: "At least twelve months prior to a child attaining his or her 18th birthday, the department shall assist the child in developing a transition plan. When developing the transition plan, the child shall be informed about the range of age-appropriate services and assistance available in applying for or obtaining these services."

The Fostering Connections to Success and Increasing Adoptions Act also requires that DCF provide services to youth prior to their 18th birthday which allow them to develop independent living skills and knowledge about health care and other subjects.

Attorneys representing youth transitioning to adulthood should make every effort to ensure that the transition plan set up for each client is the most appropriate plan and one that will best ensure a successful transition to adulthood for their client. They should also inform their clients about how to have their juvenile and district court records, if any exist, sealed if sealing is not automatic under the statute.

Title 33 VSA § 4903 (5) gives DCF the authority, ***within the amount available for the purpose***, for providing financial aid to persons who were committed to the department at the time they attained the age of majority and who are completing an educational, vocational, or technical training program designed to equip them for gainful employment.

B. Limitations on Available Aid

DCF is limited, first and foremost, by the amount of funds it has set aside for this purpose. There is no clear "right" to this financial assistance.

It is not necessary to hold formal case plan reviews, nor to hold permanency hearings in court once the young adult is 18. However, the action plan should be updated every six months.

See Bulletin for additional limitations.

VII. EMANICIPATION OF MINOR

Every teenager probably wonders at some point in their adolescence, how they can be in control of their own lives and get away from their parents' rules. Teens who are involved in the juvenile justice system actually have a lawyer to ask.

A. Legal Definitions/Standard – 12 V.S.A. §7151 et seq.

Section 7151 states:

(b) In order to become an emancipated minor by court order under this chapter, a minor at the time of the order must be a person who:

(1) is 16 years of age or older but under the age of majority;

(2) has lived separate and apart from his or her parents, custodian, or legal guardian for three months or longer;

(3) is managing his or her own financial affairs;

(4) has demonstrated the ability to be self-sufficient in his or her financial and personal affairs, including proof of employment or his or her other means of support. "Other means of support" does not include general assistance or Aid to Needy Families with Children, or relying on the financial resources of another person who is receiving such assistance or aid;

(5) holds a high school diploma or its equivalent or is earning passing grades in an educational program approved by the court and directed towards the earning of a high school diploma or its equivalent;

(6) is not under a legal guardianship or in the custody or guardianship of the commissioner of social and rehabilitation services;

(7) is not under the supervision or in the custody of the commissioner of corrections.

If the youth meets the above criteria, the court must consider the best interests of the child in accordance with the following:

(1) emancipation will not create a risk of harm to the minor;

(2) the likelihood the minor will be able to assume adult responsibilities;

(3) the minor's adjustment to living separate and apart from his or her parents, guardian, or custodian;

(4) the opinion and recommendations of the minor's parents, guardian or custodian.

12 V.S.A. § 7155(b)

VIII. MISCELLANEOUS PRACTICE CONSIDERATIONS

A. The Role of the Guardian Ad Litem and the Attorney

Section 5112(a) of Title 33 directs the juvenile court to appoint a guardian ad litem for a child who is a party to the proceeding in every case. In delinquency, the parent, guardian or custodian may be the GAL, if her or his interests do not conflict with the child's.

Rule 6 of the Vermont Rules for Family Proceedings (Family Rule 6) governs the appointment of guardians ad litem in Family Court proceedings and section (c)(1) directs that "[i]n all proceedings under Chapters 51, 52, and 53 of Title 33 appointment of a guardian ad litem for the child shall be governed by Family Court Rules 1, 2 and 3." Family Rule 1(c) directs that a guardian ad litem shall be appointed at the preliminary hearing in a delinquency proceeding. Family Rule 2(c) likewise states that, if not assigned prior to the preliminary hearing, a guardian ad litem shall be appointed at that hearing. Family Rule 3, which addresses termination or parental rights proceedings, adopts by reference all of Family Court Rule 2.

The role of the guardian ad litem in juvenile proceedings is set forth in Family Rule 6(e). This rule discusses the duties generally of the guardian ad litem to meet with the ward, the ward's attorney and others who may be necessary for an understanding of the issues in the proceeding. He or she shall also discuss with the ward and the ward's attorney all options which may be presented to the court, and shall assist the attorney in advising the ward regarding those options.

Family Rule 6(e)(3) prohibits the guardian ad litem from providing or being asked for an opinion on the merits at any contested merits hearing. The rule allows the guardian ad litem at a disposition or temporary care hearing to state his or her opinion and the reasons therefore. The rule also allows the guardian ad litem, in any other proceeding governed by Rule 6, to state his or her position or opinion and the reasons therefore, at any phase of the proceeding, but only if his or her reason for the opinion is based upon the evidence which is in the record. The rule also allows the court, at any hearing, to inquire, subject to the provisions of the rule, whether the guardian ad litem is satisfied with the representation of the ward by the attorney, including but not limited to the presentation of evidence by the ward's attorney, and states that if the guardian ad litem at any time is not satisfied that the ward's rights and interests are being effectively represented, he or she shall so advise the court in open court, orally or in writing.

Family Rule 6(e)(4) allows for the guardian ad litem to be called as a witness only when that person's testimony would be directly probative of the child's best interest, and no other persons could be employed or subpoenaed to testify on the same subject matter. If the guardian ad litem is to be called as a witness, however, a new guardian ad litem needs to be appointed. Section (e)(5) of Rule 6 prohibits the submission of any written report the guardian ad litem has prepared unless its submission is agreed to by the parties or pursuant to the Vermont Rules of Evidence and subject to paragraph (4) of the subdivision.

Section (d) of Rule 6 addresses settlements, compromises and waivers in juvenile proceedings and the role of the juvenile's attorney and the guardian ad litem with regard to them. Rule 6(d)(2) requires that the juvenile's attorney promptly and fully inform the court of the position of the guardian ad litem when the juvenile and the guardian ad litem disagree as to any settlement, compromise, waiver of evidentiary, statutory, constitutional or common-law privileges, stipulations, or other decisions affecting the substantial rights or interests of the juvenile. The guardian ad litem shall also be afforded the right to be heard, but shall not disclose either privileged information or information that has not been admitted into evidence. This section also gives the court the discretion to appoint separate counsel for the guardian ad litem. Section (d)(3) sets forth the four separate criteria that need to be satisfied prior to the court accepting any settlement or waiver.

Section (d)(4) identifies those circumstances which would allow the court to approve the waiver or admission without the consent of the juvenile. In those instances where, because of mental or emotional disability, the juvenile is unable to understand the nature and consequences of the waiver or admission, his or her consent is not required to enter the waiver or admission. The rule goes on to state that a juvenile who has not attained the age of thirteen shall be rebuttably presumed to be incapable of understanding the nature and consequences of the waiver or admission and of communicating with respect to the waiver or admission and a juvenile thirteen years or older shall be rebuttably presumed to be capable. There is a caveat attached, however, which states that in all cases in which it is alleged that a person had committed a crime or delinquent act, that person's knowing and voluntary consent shall be required with respect to the waiver or admission. Therefore, there can be no waiver or admission in any delinquency case without the consent of the juvenile no matter what his age. The effect of the rebuttable presumption is that a juvenile under the age of thirteen has the burden of proving capacity to understand the nature and consequences and to communicate with respect to the decision, but once he or she produces any admissible evidence in support of capacity, the presumption "bursts" and the question is strictly one of meeting a burden of persuasion.

There are times when a juvenile, under the age of thirteen, wishes his or her attorney to advocate for an outcome in a juvenile proceeding that is different from the outcome that the guardian ad litem believes is appropriate. There are differing schools of thought as to whose direction the attorney for the juvenile should follow. This question turns on whether the juvenile or the guardian ad litem is determined to be the client. In making this determination the attorney representing the juvenile needs to keep in mind issues regarding child development and capacity to reason.

If the attorney believes that the juvenile does understand the nature of the proceedings, the issues involved, the possible outcomes of the case, and their attendant repercussions, the attorney may think it appropriate to take direction from the juvenile. In such a case, it is incumbent on the attorney to inform the Court that the juvenile and the guardian ad litem have differing opinions and state those opinions to the Court. In rare instances, if the court believes it is necessary for the guardian ad litem to have separate counsel, the court may choose to appoint separate counsel for the guardian ad litem.

The Advisory Committee on Family Rules struggled for over two years to agree upon a rule whereby the attorney for the juvenile would be given direction as to when the juvenile was her or his client and when the guardian ad litem was the client. The present rule was a compromise that was reached after lengthy discussion. Attorneys representing juveniles continue to wrestle with the issue. There is ongoing discussion as to whether the rule needs to be revisited. For more guidance on this issue, see Ethical Issues in the Legal Representation of Children: Client Autonomy or Child Protection?, The Vermont Bar Journal and Digest, Vol. 24 No. 4, pp. 25-28 (1998) and ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases (Feb. 5, 1996), attached in the section on Articles.

The experience and expertise of guardians ad litem varies greatly as do their caseloads and degree of involvement with juvenile clients. Some attend out of court meetings such as caseplan reviews and IEP meetings, frequently communicate with their wards, and can be valuable allies for juvenile clients. Others may have little, if any, contact with their wards and only show up at court proceedings. Judges also hold widely differing views on both the role and the input of guardians ad litem. Some judges look to guardians ad litem as investigators and fact gatherers and always take their opinions into consideration. Other judges may rarely address the guardians ad litem in court and seem to not give their opinions much weight.

The Guardian ad Litem program in Vermont now employs training materials developed by the national Court Appointed Special Advocates (CASA) program and the training is much more comprehensive than it was years ago. It includes expectations for guardians ad litem such as monthly contact with each of their wards and other guidelines on how to effectively carry out their duties.

It is to your juvenile client's benefit to develop a good working relationship with the guardians ad litem that she or he works with on a regular basis in Family Court.

B. Visitation (Parent-Child Contact)

1. *Importance of Visitation*

Janet Chiancone has written an informative article on the importance of visitation entitled, "Visitation: What Lawyers Should Know" ABA Child Law Practice, vol. 16, no. 6, (August 1997) p. 85. In brief, she makes the following observations. The article is included in the Articles section of this manual.

Parental visitation serves a number of beneficial purposes for the child, the parent, and the legal system. First, it allows the child and parent to maintain an important bond. Second, it can be utilized to foster reunification. Third, it can allow professionals - DCF caseworkers, attorneys etc., - to observe the child and parent together. Caseworkers can evaluate the family interaction, observe parenting skills, and track any progress made in the relationship and parenting skills after intervention and provision of services. Frequent quality family contact is associated with

increasing the likelihood of family reunification and lessening the length of time children stay in foster care.

DCF policy recommends that family visits begin within three working days of a child's removal from his or her home. Family Services Policy Manual, Policy #124

Where reunification is the goal, visitation provides hope and reassurance for parents and children while maintaining the family relationship. Visits also enable parents to: 1) reinforce their commitment to be a parent; and, 2) demonstrate the skills they have learned through counseling and other services.

If reunification is not possible, visitation may also help the parent and child accept the reality of the situation and prepare for separation.

Some DCF offices are implementing a program called "Family Time Coaching." In this new model, DCF contracts with coaches who meet with parents prior to their visits to discuss their goals for the visit. The coaches sometimes supervise the visits, and then meet with the parent after the visit to evaluate how it went and offer suggestions. This program is in the process of being implemented on a statewide basis.

In some cases, parent-child visitation may not be beneficial and may in fact be detrimental to a child's well-being (especially where physical or sexual abuse has occurred at the hands of the parent). Under these circumstances, it may be appropriate for visitation to be restricted (supervised, short duration) or denied altogether. Where there are allegations of abuse, and a child is expected to testify in court, professionals recommend that no contact between a child victim and the alleged abuser occur until after the child testifies. Janet Chiacone's article advises, if possible, where supervised visitation is recommended or granted, the use of an independent, trained individual or organization (rather than a relative, friend of the family, or even caseworker) and a neutral atmosphere in order to avoid conflicts of interest and ensure protection of the child's well-being.

A court cannot deny visitation solely on findings made by only a preponderance of the evidence that the father has sexually abused the child. See, Mullin v. Phelps, 162 Vt. 250, 265-66 (1994). Nor can a court condition parent/child contact on a parent's acknowledgement of abuse, as this would be a violation of the privilege against self-incrimination. Id.

The Vermont Supreme Court has denied visitation to an incarcerated parent. See, In re J.B.& E.B. , Docket No. 95-036, slip op. at 1 (Aug. 31, 1995). The Court held that such denial is not a de facto termination of parental rights and therefore does not require clear and convincing evidence. Id. The Court stated that: 1) prison visits are not in the child's best interests; and, 2) the incarcerated parent is responsible for any resultant distance or degradation in the parent-child relationship from lack of parent-child contact. See also, In re H.B. III & J.B., No. 93-360, slip op. at 3 (Nov. 1, 1994), amended on December 1, 1994.

2. ***Pre-Termination Parental Visitation***

The 2008 Juvenile Judicial Proceedings Act added new laws giving the court increased authority over visitation. Attorneys may now file motions under V.S.A. 33 § 5319 to obtain and enforce visitation. Prior to enactment, DCF only had the authority to set visitation, and parents could file motions to modify the disposition order or move for supervised or unsupervised visitation.

a. *Establishment*

Under 33 V.S.A. § 5319, the court can determine reasonable frequency and duration of contact, but not the actual schedule. The court may also set conditions such as supervised or unsupervised. 33 V.S.A. § 5319 (b).

Section 5319 creates a presumption that if a child is placed out of the home, the court shall order contact except when the child's physical safety or emotional well-being would be at risk, or when contact is already prohibited by a court order. Parent-child contact orders should be consistent with existing parent-child contact orders in divorce or parentage proceedings, and the court may allocate the costs of supervised visits. 33 V.S.A. § 5319 (a).

b. *Modification*

Visitation may be modified by stipulation or by motion under 33 V.S.A. §§ 5113, 5319(c).

c. *Termination*

The court may terminate parent-child contact only upon finding that without good cause the parent failed to maintain a regular schedule, and that failure has a detrimental impact on the child, or if continued contact will have a detrimental impact on the child's physical or emotional well-being. 33 V.S.A. § 5319 (d).

d. *Enforcement*

Contempt or enforcement cannot be filed if parent-child contact does not happen due to the child's illness or other good cause. 33 V.S.A. § 5319(f).

e. *Visitation Generally*

If a child is taken into DCF custody, DCF will establish a visitation schedule with the parents. These visits can occur at the child's home or in another setting, such as a foster home or DCF office. Depending upon the child's needs and the parents' behavior, the visits will either be unsupervised or supervised. If visits are supervised, the DCF worker or another appropriate individual, such as a family time coach, will supervise the visit. The frequency of visits can range anywhere from daily (especially for very young children) to every other week, or less.

The parties usually attempt to work out any disagreements regarding visits informally, or through the DCF administrative process following an administrative review. See section on Administrative Reviews and Permanency Hearings. If the parties cannot work out an agreement, the parent's attorney or the child's attorney may file a motion with the court at any time. 33 V.S.A. §§ 5113, 5319.

Title 33 V.S.A. § 5102(a)(16)(B) grants parents divested of legal custody "the right to reasonable visitation" with the child. Visitation is recognized as a residual parental right. See, In re J.R., 147 Vt. 7, 9 (1986); In re T.S.,et al., 153 Vt. 533, 538 (1989); In re L.A., III, et al., 154 Vt. 147, 159-69 (1990). When the parents retain residual rights, the court must consider whether to allow visitation in light of the best interests of the child. See, In re L.A.III, supra. However, the right to visitation is not absolute and may be denied for good cause. In re T.S., 153 Vt. at 538.

A problem may arise when trying to establish the reasonableness of the court's decision regarding visitation. Interpreting this statutory provision in In re J.R., the court held that, while V.R.C.P. 52(a) does not require the court to make specific findings of fact regarding visitation, such findings are "desirable because they are helpful for appellate review." See, In re J.R., 147 Vt 7, 10-11 (1986). Furthermore, when a court does make findings, it must "provide an adequate basis for its decision," and a court should "explore or establish reasonable conditions under which visitation might take place, consistent with the best interests of the child." Id.

In the context of transferring custody of a child to another person, such as a relative, the Court in In re T.S., 153 Vt. at 538, held that the family court should have made an order addressing visitation, even though the parent did not move for a visitation order, and the family court had found that a reasonable visitation schedule had been established. The Court explained that such an order was important to avoid confusion and misunderstanding in the future. Id.

A court's suggestion, or approval of DCF's recommendation, that no visitation between a child and his or her parent occur pending conclusion of CHINS hearings, is not a prohibition of visitation. Only a court order precluding visitation is considered a prohibition which can be challenged for error. See, In re B.L., J.L., & C.N., 145 Vt. 586, 591-92 (1985). The court also has held that failure of the state to initiate periodic review of a disposition order denying visitation is not violative of the parent's due process rights. See, In re K.J., 155 Vt. 657 (1991).

3. *Post-Termination Parental Visitation*

Residual parental rights, including visitation, can be terminated at a hearing under 33 V.S.A.§ 5113, Modification or Vacation of Orders or at the initial disposition hearing. (see section on Modification of Orders/Termination of Parental Rights above).

Once a TPR is granted, visitation is terminated along with all other residual parental rights. See, In re L.A.III, 154 Vt. 147, 159-60 (1990); In re M.B. & E.B., 162 Vt. 229, 239 (1994); In re Cr.M., C.M., & M.M., Jr., 163 Vt. 542, 548 (1995); In re M.B. & E.B., 162 Vt. 229, 239 (1994); In re: A.D.T., 174 Vt. 369. Hence, the court need not consider the issue of visitation apart from that of termination of parental rights. See, In re L.A., III and In re Cr.M., C.M., & M.M., 163 Vt. 542, 548 (1995). DCF does not need to include that parent in case planning, visitation, or make any efforts to reunify the parent and child. In re: A.D.T.

Vermont does not have an "open adoption" policy that provides for continuing birth parent visitation after adoption. The Court has held that it will not consider whether denial of post-adoption biological parent visitation violates any statutory or constitutional rights, when such visitation is not in the child's best interests. See, In re F.M. & M.M., Docket No. 93-209 (Jan. 13, 1994) (3-judge E.O.). By implication, perhaps if such visitation is determined to be in the child's best interests, the Court might consider the issue. Furthermore, where a father whose parental rights had been terminated appealed the denial of post-termination visitation, the court upheld the denial for procedural reasons -- the father had not raised the issue in family court. See, In re H.B., III & J.B., No. 93-360 (November 1, 1994), amended on December 1, 1994). Again, this holding suggests that the issue of post-termination or post-adoption biological parent visitation may be open. Furthermore, the Assistant Attorneys General assigned to DCF will typically oppose any type of parent-child contact after TPR has been granted.

Occasionally, parties will agree to enter into an informal, and legally unenforceable, agreement allowing the biological parents to maintain some limited contact with the child after TPR and subsequent adoption. Where a parent-child bond exists, post-TPR contact between the child and the biological parent can lessen a child's feelings of abandonment and prevent the child from idealizing the absent parent. This option, of course, should only be considered if it is in the child's best interests to have such contact. It may be necessary to have a mental health professional examine the child to determine if such contact is warranted.

Pending appeal of a TPR order, the decision whether to allow parental visitation is to be made on a case by case basis: "the decision should be made by the juvenile court in its discretion, in light of all of the evidence placed before it at both the merits and disposition hearings." In re D.P. & J.P., 147 Vt. 26, 33 (1986). If visitation is denied, any further familial dissolution that occurs from lack of contact cannot be used to the detriment of parents in later proceedings. See, In re D.P. & J.P., supra, and In re J.R., 153 Vt. 85, 101 (1989).

The denial of visitation does not amount to a de facto termination of parental rights. See, In re A.R., Docket No. 95-442, slip op. at 1 (June 28, 1996) (3-judge E.O.). In In re A.R., after receiving testimony about the detrimental effect even supervised visitation could have upon the child, the Court found that visitation would provide "no beneficial aspect for [the child] and would likely result in significant negative consequences." Id. at 2. Thus, the Court denied the father's petition. This denial does not amount to a de facto termination of parental rights because the father may petition for visitation again when he can establish that it would be in the best interests of the child.

4. ***Grandparent Visitation***

Upon motion by the child's attorney, the court may order contact between the child and an adult relative whom the child has a significant relationship. 33 V.S.A. § 5319(e). A grandparent does not have standing to make this motion, only the child, and it must be shown that a significant relationship exists, not merely that a person is a grandparent.

Title 15 V.S.A. § 1011(A) permits a "superior, juvenile, or probate court which has considered or is considering the custody or visitation of a minor child" to award visitation rights to a grandparent, upon written request of the grandparent. In other words, the Court can consider such visitation when there is a pending parentage, divorce, legal separation, juvenile, or probate court case. But see Troxel v. Granville, 530 U.S. 57 (2000) in which the Court invalidated a state statute allowing a court to order visitation to "any person" whenever that visitation is in the best interests of the child. One of the reasons for the Court's holding that this statute as applied was unconstitutional was that it failed to grant due weight to the custodial parent's rights to decision-making concerning his or her children.

The conflict between 33 V.S.A. § 5319 (e), which allows only a child to make the motion, and 15 V.S.A. § 1011, which permits the grandparent to make the motion, is unresolved.

If there is or was no pending case, a grandparent may not initiate a petition for visitation unless "a parent of the minor child is deceased, physically or mentally incapable of making a decision or has abandoned the child." 15 V.S.A. § 1012. In Rivers v. Gadwah, 165 Vt. 568 (1996) the Court vacated an order granting visitation to the grandmother of a minor for failure to establish jurisdiction. The trial court had issued the order in granting mutual relief-from-abuse orders against both the mother and grandmother.

A grandparent who seeks custody or visitation of a child in a CHINS case should assert party status and raise an appeal either interlocutorily, collaterally, or as a final judgment. See, In re J.C., et al., No. 94-461, slip op. at 2 (July 31, 1995). There, a grandmother waited until the TPR hearing to file her appeal of visitation and custody, and it was dismissed for being untimely filed. Id. The J.C. court did not address the fact that the Grandparent Visitation Statute states that no grandparent shall be afforded party status, whereas the statute governing CHINS cases allows the Court to add proper and necessary parties, and thus did not determine which statute would control. See V.R.F.P. 2 (f).

Grandparent visitation expires upon adoption. 15 V.S.A. § 1016, In re A.S. 171 Vt. 599 (2000).

5. ***Sibling Visitation***

Upon motion by the child's attorney, the court may order contact between the child and the child's siblings. 33 V.S.A. § 5319 (e).

The Court has declared that it will not issue an order for post-TPR sibling visitation because it would be improper to usurp the power of the legal guardian. See, In re D.M., No. 94-094, slip op. at 3 (Jan. 26, 1995). In the past the Supreme Court also has held that a judge may not order visitation between a child in DCF custody and her step-sibling who was not in DCF custody. See, In re A.D., No. 92-205, slip op. at 2 (March 10, 1993). This type of visitation order would now arguably be enforceable given the change in the statute brought about by the Juvenile Judicial Proceedings Act. 33 V.S.A. § 5319 (e). Arguments can be marshaled in favor of visitation with step-siblings. For example, 33 V.S.A. § 5319 makes no distinction between a sibling and a step-sibling.

It should also be noted that the Fostering Connections to Success and Increasing Adoptions Act , P.L. 110-351, requires DCF to place siblings in the same foster home or facilitate contacts, unless contrary to the child's safety or well-being.

C. Substantiation by DCF for Child Abuse

1. *Substantiation*

Subchapter 2 of Title 33 (§§4911-4920) requires reporting of alleged child abuse by certain individuals to the Department for Children and Families (DCF) and encourages reports by others by granting legal immunity for good faith reports (33 V.S.A. § 4913). Abuse is defined broadly, and includes physical, sexual, and emotional maltreatment and neglect (33 V.S.A. § 4912). See also, DCF Policy No. 56, Substantiating Child Abuse and Neglect, at http://dcf.vermont.gov/fsd/policies, dated July 1, 2009; and DCF Rule B09-04 – Response to Child Abuse and Neglect, at http://dcf.vermont.gov/fsd/rules , adopted May 26, 2009. Rule B09-04 addresses substantiating risk of harm, criteria for determining whether to conduct an investigation or an assessment, procedures for assessment and service delivery, and procedures for investigations.

In 2007 there was a statutory change in Title 33 Chapter 49 which now mandates that DCF make an initial decision regarding whether the Department will conduct an assessment or an investigation regarding a report of child abuse or neglect. This reflects DCF's decision to adopt a policy referred to as "Differential Response." See Family Services Division Policy Manual, Policy #s 51, 52 and 60.

Only adults who are responsible for a child's welfare can be substantiated for physical abuse, neglect, or maltreatment of children. (sec. 4912(5)). For example, a responsible adult would include parents, foster parents, or any other adult residing in the home who is responsible for the child's welfare. Id. Adults not falling under this category can be prosecuted. You may have a juvenile client who is under 18 and is a parent or is otherwise responsible for a child's welfare, and thus that juvenile could be substantiated for physical abuse, neglect or emotional maltreatment.

Any person may be substantiated for sexual abuse of a child. Because it is more common for juveniles to be substantiated for sexual abuse than other types of abuse, this section focuses

on sexual abuse. However, this section can be used as guidance when representing a juvenile or parent on claims of other types of abuse.

Substantiation means that DCF finds that a report of sexual abuse "is based upon accurate and reliable information that would lead a reasonable person to believe that child has been abused or neglected." 33 V.S.A. § 4912(10). This standard is similar to the "preponderance of the evidence" standard.

If an allegation has been substantiated, the alleged perpetrator will receive notice via a Substantiation Letter. Notice to juveniles is sent in care of the parents, or, if the child is in DCF custody, in care of the social worker. The letter may be vague enough to fail, in some instances, to impress upon the juvenile and his or her family the significance of substantiation. Because DCF does not send the attorney a copy of the substantiation letter, you may not learn of the substantiation without inquiring of DCF as to the juvenile's status. If the child is in custody, the child's attorney will receive the substantiation letter.

2. *Sexual Abuse*

DCF policy defines sexual abuse in accordance with 33 V.S.A. § 4912(8):

Sexual abuse consists of any act or acts by any person involving sexual molestation or exploitation of a child including but not limited to incest, prostitution, rape, sodomy, or any lewd and lascivious conduct involving a child...

The Department differentiates sexual abuse by adolescents and children from other types of sexual exploration according to the following criteria:

1. The victim is being exploited, or prostitution is involved;
2. force, coercion or threat is used to sexually victimize the child, or the victim did not have the ability or opportunity to consent; or,
3. a significant difference in age, size or developmental level is used to sexually victimize the child.

DCF Policy No. 56, Substantiating Child Abuse and Neglect, at
http://dcf.vermont.gov/fsd/policies

You might argue that a client's conduct consisted solely of sexual exploration and never rose to the level of abuse. If the client and the alleged victim are approximately the same age and/or size, or at the same developmental stage, even if not of similar chronological age, coercion may be difficult for the Department to prove.

3. *Child Protection Registry*

DCF maintains a registry containing the names and records of substantiated perpetrators and victims. 33 V.S.A. § 4916(a). The Commissioner of DCF may only disclose registry

records to certain individuals who, by statute, are entitled to have access to this information. 33 V.S.A.§ 4916(a). A substantiated juvenile might apply for work – when an adult or when still a minor – at a day care center, nursing home, certain hospitals, or other service provider used by DCF, only to be prohibited from working or volunteering by his or her name being placed on the Child Protection Registry. DCF would inform such facilities of the substantiation "for the purpose of informing the owner or operator that employment of a specific individual may result in loss of license or registration." Id. at 33 V.S.A.§ 4919(a). In the 2009-2010 Legislative Session, S.13 was passed allowing increased access to DCF's child protection registry. This law goes into effect December 31, 2010.

DCF Rule B09-01 (http://dcf.vermont.gov/fsd/rules) addresses the Child Protection Registry. The rule establishes 1) a tiered child protection registry, 2) registry levels, based on risk, and 3) documentation and expungement.

Problems also can arise, for example, where a child, who is not in custody, is substantiated at age 11 as a perpetrator of sexual abuse. At age 15, the same child is charged as a delinquent and the substantiation re-surfaces to haunt him or her in the form of harsher penalties, Woodside threats or admission, and presumed behavioral flaws.

This same child might return to court at age 15 with mention of sexually abusive behavior as part of his or her biography, but without mention of substantiation. The attorney ought to inquire of DCF whether the juvenile has indeed been substantiated, and if so, the attorney might then pursue an appeal of the substantiation, depending on when it occurred, or expungement.

4. *Investigation or Assessment Process*

DCF must initiate an investigation or assessment within 72 hours after receipt of a report of suspected abuse. 33 V.S.A. sec. 4915(b). The lawyer may be the last to know that his or her client is being investigated and may learn of the incident only after substantiation. Years ago there was an agreement between DCF and the Office of the Juvenile Defender that if a youth was in custody and represented by counsel, DCF would notify the attorney of record that a substantiation investigation had commenced prior to any attempt to interview the youth. This does not always happen. There are times when DCF and its Special Investigations Unit, which investigates allegations of sexual abuse, have interviewed our clients without first contacting their attorneys**.. It would be good practice, upon disposition, for the lawyer to advise the client to contact his or her attorney or the Juvenile Defender's Office if anyone ever wants to interview the client about anything.** This may be our only means of learning of DCF allegations against a client.

Need for clarification of DCF providing notice if child is alleged perpetrator and DCF plans to interview

DCF may elect to conduct either an assessment or an investigation. DCF can investigate any case, but must conduct an investigation (rather than an assessment) when the allegations indicate "substantial child endangerment" such as sexual abuse by an adult, abandonment, child

fatality, malicious punishment, or serious physical injury. 33 V.S.A. § 4915(d). The decision to conduct an assessment is based on the nature of the conduct and extent of the injury, the prior history of abuse or neglect by the person, and the person's willingness to take responsibility and cooperate in remediation. 33 V.S.A. § 4915(c).

a. *Investigation*

The parameters of DCF's investigation are mandated by 33 V.S.A. § 4915b:

(a) The investigation, to the extent that it is reasonable, shall include:

(1) A visit to the child's place of residence or place of custody and to the location of the alleged abuse or neglect;

(2) An interview with or observance of or the child reportedly having been abused or neglected. If the investigator elects to interview the child, that interview may take place without the approval of the child's parents, guardian, or custodian, provided that it takes place in the presence of a disinterested adult who may be, but shall not be limited to being, a teacher, a member of the clergy, a child care provider regulated by the Department, or a nurse;

(3) The nature, extent, and cause of the abuse or neglect;

(4) The identity of the person responsible for such abuse or neglect;

(5) The names and conditions of any other children living in the same home environment;

(6) A determination of the immediate and long-term risk to each child if that child remains in the existing home environment;

(7) The environment and the relationship of any children therein to the person responsible for the suspected abuse or neglect; and

(8) All other data deemed pertinent.

Check to make sure that the investigation was commenced in a timely manner and that the investigation included a visit to the location of the alleged abuse. You should also argue that the investigation should include interviews of individuals that may offer exculpatory information regarding your client.

b. *Assessment*

The parameters of DCF's assessment are mandated by 33 V.S.A. § 4915a.

(a) The assessment, to the extent that it is reasonable, shall include:

(1) An interview with the parent, custodian, guardian, or anyone serving in a parental role in the child's home, focusing on safety and mitigation of future risk;

(2) An evaluation of the safety of the child and any other children living in the same home. Interviews of children shall occur with permission of the parent, guardian or custodian;

(3) With the family, identify family strengths, resources and service needs, and develop a plan that reduces risk of harm and improves and restores family well-being.

If a family declines services after an assessment, the case shall be closed unless there is sufficient cause to begin an investigation or request the State's Attorney to file a petition.33 V.S.A. § 4915a (c). When a case is closed, there is no finding of abuse or neglect and no indication of the intervention shall be placed in the registry. 33 V.S.A. § 4915a(d).

5. ***Challenging a Substantiation of Abuse.***

a. *Introduction*

In 2007 and 2008, the area of child abuse investigation and substantiation was examined at length in the Legislature, and a procedure for challenging substantiation was established in 33 V.S.A. § 4916a.

Prior to the enactment, there was no process in place to appeal a determination of substantiation in a child abuse investigation **prior** to having one's name placed on the child abuse registry. One could only appeal to have one's name **removed** from the registry.

The registry was originally set up in 1982 and access to it was quite limited until 2003. Initially it was only used by SRS (now DCF) to check on the names of potential foster parents or persons being licensed to operate day care facilities. In 2003 the legislature, without taking any testimony, greatly expanded those who have access to the registry and in 2007 DCF processed approximately 25,000 requests for record checks from the registry.

The legislature finally determined that given this huge expansion of access to the registry that it was time to put due process protections in place **prior** to an individual's name being **placed on the registry.** Consequently the 2007 legislation set up a statutory procedure to challenging the placement of one's name on the registry prior to the name being placed on the registry. (See 33 V.S.A. § 4916a).

While it was advocated in the legislature to have these type of challenges be handled by a court, DCF prevailed and the legislature set up "an administrative case review unit within the department," 33 V.S.A. § 4916a(f), to handle these challenges. The one concession the legislature made was to require that DCF needed to contract for the services of administrative reviewers (they can not be department employees as used to be the case in similar appeals) and

the "administrative reviewer shall be a neutral and independent arbiter who has no prior involvement in the original investigation of the allegation."

The quality of the reviews and the competence of the reviewers varies widely around the state. Although there are several shortcomings in the appeal process, and there is a wide discrepancy on how the "independent reviewers" look at facts and arguments, it is worth appealing in most cases.

DCF had to develop policies to set up the guidelines for these reviews. To view the current policies you can go to the "Department for Children and Families Family Services Policy Manual." The policies dealing with these investigations, substantiations and challenges can be found in Policies numbers 50-58 and can be found at the Family Services website at: http://www.dcf.state.vt.us/fsd/policies. The DCF Rule for the Administrative Review Process is B09-02, and can be found at http://dcf.vermont.gov/fsd/rules.

Note: A family court considering custody (or a juvenile court) does not need to give deference to a determination by DCF that a claim of abuse was unsubstantiated: DCF and the family court may come to different conclusions whether the abuse has taken place even when the bodies of evidence are overlapping. Siegel v. Misch, 182 Vt. 623 (2007).

b. *Process*

A person seeking to challenge a substantiation must notify DCF within 14 days of the date DCF mailed notification. 33 V.S.A. § 4916a(c)(1). An extension may be granted for an additional 14 days. 33 V.S.A. §4916a (c)(1). A stay may be requested until a related criminal case is resolved (33 V.S.A. § 4916a(c)(2)), however, a person's name remains on the registry during the stay. Substantiations made between 1/1/1992 and 9/1/2007 may be challenged at any time. 33 V.S.A. § 4916a (j).

DCF must hold a review conference within 35 days of the request. 33 V.S.A. § 4916a(d). At the conference, the person requesting the review may be represented by counsel and may present documentary or other evidence, such as witnesses or the names of people the reviewer should contact who have relevant information. 33 V.S.A. § 4916a (e). The burden of proof is on DCF by a preponderance of the evidence. Id. A decision must be made within 7 days. 33 V.S.A.§ 4916a(f). The reviewer may uphold the substantiation, overturn the substantiation or decide that the substantiation be put on hold and direct DCF to further investigate. In practice, DCF rarely has anyone attend these reviews on its behalf. If you think that you will be able to question the investigator at the review meeting, in all likelihood you will not be able to because they rarely attend.

c. *Discovery and Evidence*

Discovery at the first level of challenge (i.e. before a reviewer from what is now called the "registry review unit") is pretty murky. Under 33 V.S.A.§ 4916a(d) the only statutory requirement is that DCF "provide to the person requesting the review a copy of the redacted file,

notice of time and place of the conference, and conference procedures, including information that may be submitted and mechanisms for providing testimony. The department shall also provide to the person those redacted investigation files that relate to prior investigations that the department has relied upon to make its substantiation determination in the case in which a review has been requested." DCF Bulletin 09-03 governs Maintenance and Access to DCF Investigation, Assessment and Administrative Review Records, and is available at http://dcf.vermont.gov/fsd/rules.

If there is a video or audiotape, you could argue that the tape is part of the "investigation file."

If DCF refuses to release documents for a review, the attorney might inform the District Director of the intent to take the case to the Human Services Board where the Fair Hearing Rules require the release of information. The pressure may persuade the Department to be more forthcoming.

Nor does law enforcement consider itself required to release information which is not in the hands of DCF, such as transcripts of interviews with alleged victims and witnesses. The remedy for refusal may be a Motion for a Protective Order.

d. *Appeal to Human Services Board*

If you do not succeed at the "administrative review conference" level you will have to request a Human Services Board Hearing under 33 V .S.A. §4916b. The statute that sets forth the procedure for that type of hearing is 3 V. S. A. § 3091. DCF has agreed that since that is a de novo hearing, discovery is much broader and the petitioner is entitled to an unredacted file and greater discovery. Act No. 1, an Act Relating to Improving Vermont's Sexual Abuse Response System (S.13), effective July 1, 2009, amends the evidentiary requirements to limit application of VRE 804a regarding hearsay of a victim of sexual abuse or assault. 33 V .S.A. §4916b(b)(3). See also In re C.M., 168 Vt. 389 (1998) (the evidentiary requirements of V.R.E. 804a, governing admissibility of child hearsay statements concerning sexual abuse, apply, rather than the more relaxed hearsay requirements of the board's Rule 12.)

If you are having a problem with requested discovery, it may be possible to go to Superior Court under either Rule 74 or 75.

The board reviews the evidence de novo. In re Bushey-Combs, 160 Vt. 326, 329 (1993); K.G. v. DCF, 171 Vt. 529 (2000). The hearing is actually held before a hearing officer, who makes a recommendation to the board. The board either accepts or rejects the hearing officer's recommendation. In In re C.M., 168 Vt. 389 (1998), the Court held that the board must (and, in that case, did not) have good cause to reject the findings of its hearing officer in an expungement proceeding. DCF has the burden of proof. K.G. v. DCF, supra.

Problems of issue preclusion will arise if a client has been found to have abused a child in a CHINS or delinquency proceeding. DCF counsel will argue that the CHINS or delinquency finding of abuse precludes challenge to the abuse substantiation in a human services board proceeding. See In re Appeal of Levi Hall, No. 96-470 (Vt. July 24, 1997)(3-judge decision); Fair Hearing No. 13,432. There are a number of exceptions to the doctrine of issue preclusion. For example, some CHINS or delinquency appeals may be dismissed as moot if the child reaches age 18 while the appeal is pending. In such cases, issue preclusion does not bar an expungement proceeding because "[t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action[.]" Restatement of the Law, Judgments 2d, §28(1) at 273 (1982).

Clients who have been substantiated because they were found delinquent for having sexual contact with a person under age 16 when they were also under age 16 can challenge the substantiation on the grounds that the Vermont Supreme Court has held that such contact between minors under age 16 is not delinquent behavior, and thus not sexual abuse. In Re: G.T., 170 Vt. 507 (2000); 13 V.S.A. § 3252.

You must remember that if your client enters any sort of plea to the same underlying facts in a delinquency or criminal case and your client does not prevail at the registry review level he or she may be foreclosed from appealing to the Human Services Board. In all appeals where there was any sort of admission entered in a delinquency proceeding based on the same incident the Assistant Attorneys General from DCF are routinely filing motions to dismiss based on collateral estoppel, and the Human Services Board hearing officer has been granting those motions.

The Human Services Board on several occasions has applied the test set forth in *Trepanier v. Getting Organized, Inc.* 155 Vt. 259 (1990), to determine if the doctrine of collateral estoppel should apply to a petitioner's appeal of a substantiation. Under *Trepanier, supra,* the doctrine of collateral estoppel will be applied if: (1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

Also, a 2009 amendment to 33 V.S. A. §4916b, narrowed even further who might appeal to the Human Services Board. It states that: "Convictions and adjudications which arose out of the same incident of abuse or neglect for which the person was substantiated, whether by verdict, by judgment, or by a plea of any type, including a plea resulting in a deferred sentence, shall be competent evidence in a hearing held under this subchapter."

Further, 33 V.S.A. § 5117 prohibits, with certain limited exceptions, inspection of court and law enforcement reports and files concerning a person subject to the jurisdiction of the juvenile court. No exception in this statute exists for use by the human services board in an expungement proceeding of findings made concerning a minor in a CHINS or delinquency case; one can therefore argue that 33 V.S.A. § 5117 precludes board reliance on these adjudications

e. *Expungement*

Expungement is automatic for a person was under 10 years of age when he or she reaches 18, provided that the person has had no additional substantiated registry entries. 33 V.S.A. § 4916d. If a child was over 10, but under 18, or has been in the registry for 3 years, the person may file a written request after 3 years demonstrating rehabilitation as set forth in DCF's policies. 33 V.S.A. § 4916c.

The person must show that he or she is no longer a risk to the well-being or safety of children. 33 V.S.A. § 4916c. Factors to be considered are:

(1) the nature of the substantiation that resulted in the person's name being placed on the registry;
(2) the number of substantiations, if more than one;
(3) the amount of time that has elapsed since the substantiation;
(4) the circumstances of the substantiation that would indicate whether a similar incident would be likely to occur;
(5) any activities that would reflect upon the person's changed behavior or circumstances, such as therapy, employment, or education;
(6) references that attest to the person's good moral character.

33 V.S.A. §4916c (b)

Expungement for a substantiation that was made before an individual turned 18 years old may be sought every 36 months. 33 V.S.A. § 4916c (d).

D. Protective Orders

Title 33 § 5115 provides the court with the authority to issue an order restraining or otherwise controlling conduct, if that conduct is detrimental or harmful to the child. A hearing must be held, but an order may issue ex parte, with a hearing scheduled within 10 days. 33 V.S.A. § 5115(b), (c). The court may review the order to determine if it is still necessary. The 2008 Juvenile Proceedings Act added "teeth" with a criminal consequence for violation under 13 V.S.A. § 1030. Juvenile Protective Orders are now included in a statewide database of protective orders. 15 V.S.A. § 1107 (a).

Prior to the enactment of the Juvenile Judicial Procedings Act, the statute limited protective orders by only authorizing them when the conduct would "tend to defeat a court's disposition order that had been or was about to be made." This was read by court's to allow protective

orders only after a merits finding in a case, and to limit only conduct that was related to the disposition order that had been or was about to be made.

The court can control any sort of harassment of a child. The order may also be used to control detrimental activity on the part of the state. See In re D.B., 139 Vt. 634, 637 (1981) (juvenile moved for a protective order preventing his transfer out of state under the Interstate Compact Act; the court held that Interstate compact did apply and juvenile could be transferred).

However, in a series of decisions, the Vermont Supreme Court has routinely upheld the denial of protective orders where a juvenile opposed a specific placement by DCF, such as Camp E-Wen-Akee in Benson or the Baird Children's Center in Burlington. The court held that the juvenile court has no jurisdiction to control the placement by DCF of a juvenile in its custody other than in the context of accepting or rejecting a placement recommendation in a disposition plan. In re B.L., 149 Vt. 375, 377 (1988) (a placement may be prohibited only if it is not allowed by statute); see also In re J.S., 153 Vt. 365, 371 (1989).

In contrast, In In re E.L., 171 Vt. 612, (Vt. 2000), the Court held that the trial court should have held an evidentiary hearing to determine whether the placement proposed by DCF of the child in a residential treatment facility after TPR directly contradicted the findings and conclusions in the TPR and whether the proposed placement was harmful to the child. Pending disposition, the court may also issue a protective order that specifies the child's placement and orders the Department of Social and Rehabilitation Services (now DCF) to provide certain services. See, In re T.M., No. 95-057, slip op. at 3 (Dec. 6, 1995).

E. Shackling

The Chittenden District Court, sitting as a juvenile court, in 1988 issued a protective order prohibiting DCF, its agents, and representatives from using "leg irons, shackles, or similar restraining devices when transporting" a particular juvenile to and from court, and while the juvenile was in the courthouse. In re B.F., Docket No. 197-7-88CnJ, 1988 (Costes, J.). This order was appealed by DCF, and the Vermont Supreme Court ruled that the juvenile court is a court of special and very limited statutory powers and conduct harmful to a child is not enough to warrant an order restraining DCF from shackling the child. According to the language of the protective order statute in effect at the time, DCF' actions did not amount to conduct that tended to defeat the execution of the disposition order. In re B.F., 157 Vt. 67, 71 (1991). The Court stated, however, that the court has the discretion to determine whether shackling is necessary in the courtroom. Id.

Under the new 33 V.S.A. § 5115, the statutory language is arguably broad enough to address this issue. Also, there are now limited statutory protections regarding the use of mechanical restraints for children in custody, primarily when they are being transported. 33 V.S.A.§ 5123. DCF has also adopted a policy on the transport of, and use of restraints on, juveniles in custody, which has made shackling less of an issue in recent years. See DCF Policy 150, http://dcf.vermont.gov/fsd/policies. The legislature added a statute, 33 V.S.A. § 5123, relating to the transport of children.

The Supreme Court has distinguished In re: B.L. and In re: B.F. from a case in which a protective order was sought before a disposition order had been entered. In In re T.M., No. 95-057 (Dec. 6, 1995), the court stated that in predisposition situations, the need to protect the authority of the legal custodian from interference by the juvenile court is not at issue. The court is often willing to impose any number of conditions as part of temporary detention or care orders - i.e., that: 1) the child be allowed to attend the same school; 2) the child be placed with a relative after multiple failed foster care placements; or 3) continued placement of the child at home be conditioned on the parents' compliance with a number of restrictions to insure the child's safety and well-being (including regular visits to the doctor, adequate supervision, safe housing etc.). Slip op. at 3-4.

F. Habeas Corpus

At times it may be appropriate to file a habeas corpus petition if your client is in custody and there is a question concerning the legality of his/her custody with DCF. In re B.M.L., 137 Vt. 396, 398 (1979), overruled in part by In re A.S. & J.S., 152 Vt. 487, 491 (1989); 12 V.S.A. § 3951 et. seq. In In re B.M.L., the mother of the juvenile alleged to be CHINS filed a petition for habeas corpus after ten weeks had passed since the merits hearing, and the court had not yet issued an order. The family court denied the petition on the grounds that it lacked jurisdiction and that the proper avenue for review of the custody order was by appeal to the Supreme Court. The Supreme Court reversed, and held that the family court did have jurisdiction because at the time that the habeas corpus petition was filed, and at the time of the hearing thereon, the juvenile was being restrained without any final adjudication of the juvenile petition. Id. at 398.

In a subsequent case, the Vermont Supreme Court affirmed the denial of a mother's petition for habeas corpus, in part because she failed to allege that a return of custody to her would be in the best interests of her children. In re A.S. and J.S., 152 Vt. 487 (1989). The Court went on to state that it overruled "that part of In re B.M.L., 137 Vt. 396, 398 (1979), that required the issuance of the writ solely on a finding of unreasonable delay in making merits findings without consideration of the best interest of the child." Therefore, if you do file a habeas, make sure that you allege that the granting of the writ would be in the child's best interest. In addition, the court in In re: A.S. & J.S. found that relief was not appropriate because the error complained of was not jurisdictional. Id. at 492.

If you do file a habeas petition, you may find yourself in a Catch 22 situation. Superior Court judges will often state that you are not in the proper forum and should be filing a motion for protective order in juvenile (family) court, which has exclusive jurisdiction over juvenile matters. If you go the protective order route in family court, that judge may tell you that you should be in superior court asking for a habeas.

G. Appeals of DCF Action

Some DCF decisions, such as those found in six month case plans, may be appealed within DCF to the District Director. See DCF Policy 123, http://dcf.vermont.gov/sites/dcf/files/pdf/fsd/policies/123__Rev_Case_Plan_Decisions_.pdf Examples of the types of decisions that are found in case plans and may be appealed are the long term goal of the case plan, the child's placement and visitation between the child and the child's family.

After administrative review by the Agency has been exhausted, 3 V.S.A. § 3091 (a), authorizes appeal to the Human Services Board. The procedure for hearings is set forth in § 3091.

H. Interstate Compact on the Placement of Children

The ICPC is a contract among member states and U.S. territories authorizing them to work together to ensure that children who are placed across state lines for foster care or adoption receive adequate protection and support services. The ICPC establishes procedures for the placement of children and fixes responsibility for agencies and individuals involved in placing children across state lines. To participate in the ICPC, a state must enact into law the provisions of the ICPC. Vermont enacted the Interstate Compact on the Placement of Children as state law in 1972. (33 V.S.A. §§5901-5927) Vermont's ICPC statute replicates the model interstate compact law enacted by all 50 states, the District of Columbia, and the Virgin Islands.

The purpose of the ICPC is to protect the child and the party states in the interstate placement of children so that:

- The child is placed in a suitable environment;
- The receiving state has the opportunity to assess that the proposed placement is not contrary to the interests of the child and that its applicable laws and policies have been followed before it approves the placement;
- The sending state obtains enough information to evaluate the proposed placement;
- The care of the child is promoted through appropriate jurisdictional arrangements; and
- The sending agency or individual guarantees the child legal and financial protection.

The ICPC applies to children in foster care. It does not apply to:

- Placement of children between parents & specified relatives
- Placement into a receiving state pursuant to other interstate compacts
- Placement of a child with a non-custodial parent after which the Vermont court would no longer retain jurisdiction over the case

The New Hampshire Supreme court has ruled that the ICPC was not intended to apply when a child is returned by the sending state to a natural parent residing in another state. See In re Alexis O. 157 N.H. 781, 959 A.2d 176 (2008).

For a step-by-step description of the ICPC process and flow chart, description of state laws and agency rules, and legal and practical barriers, see Appendix for "Vermont's Interstate Compact on the Placement of Children: An Assessment on the Court's Role In Expediting the Interstate Placement of Children. June 30, 2008." If you are dealing with a challenging issue regarding out of state placements, obtain assistance by contacting the Assistant Attorney General for DCF in your county. See also Family Services Division Policy Manual, Policy #s 180-181.

INDEX OF SAMPLE MOTIONS INCLUDED IN THIS MANUAL

PAGE

V.R.E. 804a MOTION

STATE OF VERMONT
ADDISON COUNTY, SS.

IN RE: JUVENILE ADDISON FAMILY COURT
Docket No. Anjv

MOTION IN LIMINE

NOW COMES the juvenile, by and through his attorney, Jennifer Wagner of Marsh & Wagner, P.C., and moves in limine to exclude any evidence of any out-of-court statements made by the six year-old alleged victim, under V.R.E. 804a unless and until the State can establish that "the time, content and circumstances of the statements provide substantial indicia of trustworthiness" under V.R.E. 804(a)(4).

As grounds therefor, petitioner states as follows:

1. The purpose of V.R.E. 804a arose from a desire to protect a child of tender years from the rigors of a courtroom proceeding while still protecting confrontation rights. The rule assumes the reliability of early communications of the child regarding the abuse and the availability of the child for cross-examination or by video tape under V.R.E. 807. See Reporter's Notes to Rule 804a, page 227-228, 2003 Pocket Part. However, where the reliability of the child's statements is in doubt, the statements should not be admitted under Rule 804a.

WHEREFORE petitioner moves for the exclusion of the out-of-court statements set forth in the juvenile's memorandum in opposition to the use of hearsay statements allegedly made by the six-year-old victim unless and until the statements are proven to be reliable.

Dated at Middlebury, Vermont, this ____ day of January, 2004.

Respectfully submitted,

_____
Jennifer Wagner, Esq.
Attorney for Juvenile

STATE OF VERMONT
ADDISON COUNTY, SS.

IN RE: JUVENILE ADDISON FAMILY COURT
Docket No. Anjv

MEMORANDUM IN OPPOSITION TO USE OF HEARSAY STATEMENTS

NOW COMES JUVENILE, by and through his attorney, Jennifer Wagner, Esq., and responds to the State's Notice of Hearsay Statements dated October 7, 2003, as follows.

The State gave notice pursuant to V.R.Cr.P. 26 of its intent to use hearsay statements of the putative victim pursuant to V.R.E. 804a. The State failed to identify or outline the substance of the statements that it seeks to introduce in this manner, and instead named the witnesses the State intends to call and stated that the evidence would be that outlined in Det. Sgt. Whitney's affidavit, and referred to the additional documents of a VSP narrative by Tpr. Capagrossi about interviews on May 27, 2003, and also an audio tape made on May 27, 2003. Vermont Rule of Evidence 804a provides, in relevant part, as follows: (**NOTE: Rule 804a was amended in 2009 and the following language was changed in order to reflect those amendments)**

(a) Statements by a person who is 12 years of age or under or who is a person with a mental illness as defined in 18 V. S.A. § 7104(14) or developmental disability as defined in 18 V. S.A. § 8722(2) at the time the statements were made are not excluded by the hearsay rule if the court specifically finds at the time they are offered that:

(1) the statements are offered in a civil, criminal, or administrative proceeding in which the child or person with a mental illness or developmental disability is a putative victim of sexual assault under 13 V.S.A. § 3252, aggravated sexual assault under 13 V.S.A. §3253, aggravated sexual assault of a child under 13 V.S.A. §3253a, lewd or lascivious conduct under 13 V. S.A. § 2601, lewd or lascivious conduct with a child under 13 V.S.A. § 2602, incest under 13 V.S.A. § 13 V.S.A. § 205, abuse, neglect or exploitation under 33 V.S.A. § 6913, sexual abuse of a vulnerable adult under 13 V.S.A. 1379, or wrongful sexual activity and the statements concern the alleged crime or the wrongful sexual activity; or the statements are offered in a juvenile

proceeding under chapter 52 of Title 33 involving a delinquent act alleged to have been committed against a child 13 years of age or under or a person with a mental illness or developmental disability if the delinquent act would be an offense listed herein if committed by an adult and the statements concern the alleged delinquent act; or the child is the subject of a petition alleging that the child is in need or care or supervision under chapter 53 of Title 33 and the statement relates to the sexual abuse of the child;

(2) the statements were not taken in preparation for a legal proceeding and, if f a criminal or delinquent prceeding has been initiated, the statements were made prior to the defendant's initial appearance before a judicial office under Rule 5 of the Vermont Rules of Criminal Procedure;

(3) the child or person with a mental illness or developmental disability is available to testify in court or under Rule 807; and

(4) the time, content, and circumstances of the statements provide substantial indicia of trustworthiness.

(b) Upon motion or either party in a criminal or delinquency proceeding, the court shall require the child or person with a mental illness or developmental disability to testify for the state.

Each statement that the State proposes to offer must be analyzed under these criteria.

The juvenile concedes that he is charged with an offense of sexual assault against a victim thirteen (13) years of age or under, which would be an offense listed in 804a (a)(1) were he an adult, and that the statements are to be offered in a juvenile delinquency proceeding against him. The State has named the putative victim as a witness, therefore it can be assumed that she is available to testify. The putative victim is now six years of age. Thus, the proposed use of hearsay statements by the State is analyzed under the criteria of 804a (a)(2) and (a)(4) only.

A. <u>Statements of (Social Worker) & (Detective)</u>

(social worker) and (Detective) conducted an interview with the child at the SRS offices on May 12, 2003. Her mother, who had previously heard the story of 's alleged victimization by the juvenile from her husband, her five year old son, and from A , was also present for the interview by Social Worker and Detective. The juvenile requests that the court hold a hearing to determine the trustworthiness of the hearsay statements under 804a (a)(4) given the errors in investigatory interviewing and the presence and influence of the mother. The interviewing errors include leading questions, demands for accusatory statements, the presence of the mother during the interview, the participation of the mother in the interview, coaching by the mother and the interviewers, demands and pleas of and to the child to repeat what she had previously told her mother, interviewers correcting the child's statements to the child and asking the child to repeat corrected testimony, interviewers narrating in place of the child, introducing scary and incriminating information to the child, use of anatomical pictures to cue the child about sexual content, use of anatomical pictures to require the child to make a statement of experience not yet offered in the child's own report, posing multiple choice questions to the child, continued prompting and coaxing of the child to make an accusation, and interviewer misinterpreting the child's statements, giving the child wrong report of what child has said, and then requiring the child to repeat inaccurate testimony.

B. Deposition Statements

A deposition with the child was conducted on September 9, 2003, by Attorney Jennifer Wagner, Deputy State's Attorney Terri Ames, and State victim advocate, Deborah James. All statements made in this interview should be excluded under V.R.E. 804a (a)(2) given that they were taken in preparation for a legal proceeding and were made after the juvenile's initial appearance before a judicial officer.

C. Mother

Mother was present during the interview with the child by Social Worker and Detective. The juvenile request a hearing to determine the trustworthiness of the hearsay statements of the child, given the interview technique errors and the presence and influence of the mother, as set forth in detail in section A above.

The juvenile does not object to the State's proposed use of statements by the child made on Sunday, May 11, 2003, to her mother.

D. FATHER

The juvenile does not object to the State's proposed use of statements by the child made on Sunday, May 11, 2003, to her father.

Dated at Middlebury, Vermont, this 24th day of January, 2004.

_____

Jennifer L. Wagner, Esq.
Marsh & Wagner, P.C.
62 Court Street
Middlebury, VT 05753

V.R.E. 804a (b) Motion

STATE OF VERMONT
ADDISON COUNTY, SS.

IN RE: Juvenile

ADDISON FAMILY COURT
Docket No. Anjv

MOTION TO REQUIRE CHILD VICTIM TO TESTIFY

NOW COMES the juvenile, by and through his attorney, Jennifer Wagner of Marsh & Wagner, P.C., and moves in limine to require the child victim, age eight (8), to testify for the State at the hearing on the merits scheduled for Wednesday, April 21, 2004, pursuant to V.R.E. 804a (b).

As grounds therefor, petitioner states as follows:

1. Rule of Evidence 804a (b) states that "(u)pon motion of either party in a . . . delinquency proceeding, the court shall require the child . . . to testify for the state."

2. During deposition of the child, the child made statements regarding abuse that were inconsistent with her prior statements. In order for the defense to explore the inconsistencies within the rules of evidence, the child must testify. Rule 804a assumes availability of the child for cross-examination. See Reporter's Notes to Rule 804a. The defendant's confrontation rights require that the child victim testify at the merits hearing.

WHEREFORE petitioner moves to require the child victim testify for the State at the merits hearing in this case.

Dated at Middlebury, Vermont, this ____ day of April, 2004.

Respectfully submitted,

_____
Jennifer Wagner, Esq.
Attorney for Juvenile

Transfer to Juvenile from Adult Court (Motion to Seal Motion)

STATE OF VERMONT

ADDISON COUNTY, ss.

STATE OF VERMONT	)	ADDISON DISTRICT COURT
	)	
v.	)	
	)	DOCKET NO. Ancr
Defendant Juvenile	)	DOCKET NO. Ancr

MOTION TO TRANSFER TO JUVENILE COURT
And REQUEST TO SEAL MOTION

NOW COMES Defendant, by and through his attorney, Jennifer Wagner, Esq. and moves to transfer the above matters to juvenile court pursuant to 33 V.S.A. § 5302(b). Further, the Defendant requests that the Court seal this motion in order to protect and preserve the confidentiality of juvenile court records, because this motion by necessity contains extensive discussion of the Defendant's juvenile court record. If the State agrees with the statements made in paragraphs 1 through 10 below, the Defendant agrees that this Motion can be decided on the written filings without hearing. In support of this matter, Defendant states as follows:

1. Defendant just turned 17 years old, having been born October 27, 1986.

2. Defendant has now been charged in criminal court with Possession of Marijuana and Unlawful Trespass.

3. Defendant was sixteen (16) years old at the time of the alleged crimes.

4. Defendant is a juvenile, and voluntarily entered the residential treatment program at after these charges were filed.

5. The Defendant will be participating in a drug and alcohol counseling program at , and is participating in other therapy, including therapy to give the Defendant the skills to make appropriate life choices.

6. The Defendant has previously been adjudicated a CHINS, attended and was very successful in that program. He first entered on May 16, 2002. At , the Defendant performed very well academically. His mother states that he was on the honor roll every semester. According to his clinician, , he completed assignments and usually

went beyond the minimal requirements. See Case Plan at page 5, filed December 26, 2002, in docket nos. Anjv and Anjv.

7. staff also reported that the Defendant was positive in the classroom, honest, a leader amongst his peers, and focused on his treatment and his program. His clinician further reports that the Defendant was a positive role model for other peers. See Case Plan at page 6, filed December 26, 2002, in docket nos. Anjv and Anjv.

8. Immediately prior to entering the first time, the Defendant was also adjudicated delinquent for charges of uttering a forged instrument and providing false information to a police office by misidentifying himself.

9. The Defendant returned home to his mother's house at the beginning of the summer of 2003. The current alleged charges both occurred in September of 2003.

10. At status conferences on October 9, 2003, and November 6, 2003, the Defendant's clinician at , stated that the Defendant has settled into the program, and that the school has designed a new program tailored for the Defendant to address the behavioral issues that the Defendant may have masked during his first stay at that prevented him from remaining successful in the community.

11. The Defendant has been charged in the criminal court for possessing a plastic baggie of marijuana. The Defendant, however, did not possess a plastic baggie of marijuana. The supporting affidavit states that the Defendant only possessed a pack of cigarettes and a lighter. The affidavit states that the Defendant's brother, who has the same initials as the Defendant, possessed the plastic baggy of marijuana.

12. The Defendant has also been charged with unlawful trespass on the property of after verbal notice by the owner that he was not welcome. The statute requires that the Defendant receive actual notice from the person in lawful possession. The campground is in the business of leasing and renting camping sites. The campground also has common facilities for the use of guests, such as a pool, recreation hall and beach. The Defendant spent the night at the campground upon the invitation of a person lawfully renting or leasing a campsite. The owner of the campground could not lawfully exclude the Defendant, because he was the invitee of a person lawfully in possession. Nor could the owner of the campground lawfully prevent the

Defendant from entering the renter's campsite by passing through the common area. See State v. Dixon, 169 Vt. 15, 18 (1999).

13. Defendant requests that this matter be transferred to juvenile court pursuant to 33 V.S.A. § 5203(b).

14. If the State disagrees with the statements made in paragraphs 1 through 10 above, the Defendant requests a hearing on this motion to transfer. *State v. Buelow*, 155 Vt. 537, 546, 587 A.2d 948, 953 (1990) (The court must hold a hearing on a motion to transfer.) The transfer decision lies within the sound discretion of the trial court." *Id*. There are no specific statutory standards for transferring a case filed in criminal court to juvenile court pursuant to 33 V.S.A. § 5505(b). The Vermont Supreme Court has expressed its reluctance to

> hamper the court's discretionary powers by foreclosing consideration of factors not specifically enumerated in *Kent* or elsewhere.

Id. 155 Vt. at 546, 587 A.2d at 954.

15. In determining whether to transfer a case to juvenile court, the court may apply the factors used by a juvenile court to determine whether a delinquency petition against a child age 10 to less than 14 alleging certain serious acts should be transferred to criminal court for prosecution. These factors are set forth in 33 V.S.A. § 5204(d) as follows:

(1) the maturity of the child as determined by consideration of his age; home; environment; emotional, psychological and physical maturity, and relationship with and adjustment to school and the community;

(2) the extent and nature of the child's prior record of delinquency;

(3) the nature of past treatment efforts and the nature of the child's response to them;

(4) whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner;

(5) the nature of any personal injuries resulting from or intended to be caused by the alleged act;

(6) the prospects for rehabilitation of the child by use of procedures, services and facilities available through juvenile proceedings;

(7) whether the protection of the community would be better served by transferring jurisdiction from the juvenile court to a court of criminal jurisdiction.

16. The court may also analyze the case in light of the criteria set forth in Kent v. United States, 383 U.S. 541, 566-67 (1966). State v. Willis, 145 Vt. 459, 468 (1985). These criteria are similar to those set forth in § 5506(d), except for the order in which they are presented.

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.[1]
>
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.[2]
>
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons, especially if personal injury resulted.[3]
>
> 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the [prosecuting] attorney).[4]
>
> 5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime . . . .[5]
>
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.[6]
>
> 7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.[7]

---

[1] This is essentially the same as § 5204(d)(7).
[2] This is essentially the same as § 5204(d)(4).
[3] This is essentially the same as § 5204(d)(5).
[4] This criterion does not have a counterpart in § 5204(d), although since prosecutions in adult and juvenile court nearly always begin in essentially the same manner, i.e., a charging document filed by the State's Attorney, rather than by obtaining an indictment from a grand jury, this criterion lends little insight to the Court in determining where this case should be tried.
[5] This criterion also does not have a counterpart in § 5204(d).
[6] This is essentially the same as § 5204(d)(1).
[7] This is essentially the same as § 5204(d)(2) and (3).

> 8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.[8]

In this case, transfer of the present charges to the juvenile court is appropriate. The Defendant has not had an extensive delinquency record in the juvenile court. His prior delinquencies of forging a name on a check and misidentifying himself to a police officer were crimes of immaturity and dishonesty, and not crimes against a person, nor were they crimes of aggression or violence. The current charges against the Defendant are misdemeanors, and are also not crimes against a person. The charge of possession of a baggie of marijuana is not supported by the affidavit, and in the second charge, the Defendant remained on the campground property at the invitation of renter of that property who was in lawful possession.

The juvenile court has the appropriate resources to provide for the rehabilitation and treatment of the Defendant, and the Defendant has demonstrated his willingness to take advantage of those resources. The Defendant has previously completed program and was very successful in this residential school setting. The Defendant has now returned to the , where the program has been redesigned to address issues that prevented the Defendant from maintaining his skills and good behaviors in the community. The Defendant entered the for the second time on or about October 1, 2003. The Defendant will be able to complete the program there before he turns eighteen on 2003, because the program is months. See Case Plan at page 5, filed December 26, 2002, in docket nos. Anjv and Anjv (Program is twelve months). The adult court system offers no similar treatment as is available at There is no reason to treat the Defendant as an adult instead of as a juvenile in the instant charges.

WHEREFORE, the Defendant requests that the Court grant his Motion to Transfer the above charges to the Juvenile Court. Further, the Defendant requests that the confidentiality of juvenile court records be maintained by sealing this Motion to Transfer as it contains extensive discussion of his juvenile record.

DATED at Middlebury, Vermont this ____ day of November, 2003.

---

[8] This is essentially the same as § 5204(d)(6).

Jennifer Wagner, Esq.
Marsh & Wagner, P.C.
62 Court Street
Middlebury, VT 05753

Juvenile VCR filed in Adult Court/ beginning of Motion to Dismiss

STATE OF VERMONT
ADDISON COUNTY, ss.

STATE OF VERMONT	**)**	**DISTRICT COURT OF VERMONT**
	)	**UNIT 2, ADDISON CIRCUIT**
v.	**)**	**DOCKET NO. Ancr**
	)	
Defendant Juvenile	**)**	

MOTION TO DISMISS/ MOTION TO TRANSFER TO JUVENILE COURT

NOW COMES, the defendant, by and through his attorney, Jennifer L.Wagner, Esq. and asks this court to dismiss, or in the alternative, transfer to juvenile court the above-entitled charge against him. The defendant is presently on release on conditions for a charge pending in the Addison County Juvenile Court. The State has brought a charge of Violation of Conditions of Release in the District Court for an alleged violation by defendant of his conditions imposed in the juvenile court. As grounds for his motion, the defendant asserts: 1) that violation of juvenile court conditions of release cannot be prosecuted in the district court under 13 V.S.A. § 7559 (e)(f); and 2) the district court lacks authority to punish by contempt for violation of another court's order.

Discharge on 18th Birthday

STATE OF VERMONT
ADDISON COUNTY, ss.

In re: JUVENILE) ADDISON FAMILY COURT
) DOCKET NO. Anjv

Motion to Dismiss VOP and Discharge Juvenile from Probation

NOW COMES, JUVENILE, by and through his attorney, Jennifer L. Wagner, Esq. of Marsh and Associates, P.C. and asks this court to dismiss the charge that he violated his probation in the above entitled case and discharge JUVENILE from his juvenile probation. In support, JUVENILE states as follows:

1. On , JUVENILE celebrated his 18th birthday.
2. The family court's jurisdiction over minors terminates on the day they attain majority, unless the juvenile is a youthful offender, in which case the court may retain jurisdiction until the youthful offender is 22 years old.
3. JUVENILE was not sentenced as a youthful offender – he was under the age of 16 when the delinquent act occurred, and his act was not one enumerated in 33 V.S.A. § 5204 (a).
4. Upon termination of the period of probation, the court must discharge the probationer. See 33 V.S.A. § 5271 (b).

WHEREAS, JUVENILE attained the age of majority on , the family court no longer has jurisdiction over him and must dismiss the pending VOP and discharge JUVENILE from probation.

Dated this 18th day of May, 2001, at Middlebury, Vermont.

_____

Jennifer L. Wagner, Esq.
Marsh & Associates, P.C.
62 Court Street
Middlebury, VT 05753

Vacate Custody

STATE Of VERMONT

ADDISON COUNTY, SS.

	)	ADDISON FAMILY COURT
IN RE. JUVENILE	)	Unit II, Addison Circuit
	)	DK. NO. AnJv

MOTION TO VACATE CUSTODY OR MODIFY PLACEMENT

NOW COMES JUVENILE, by and through counsel, and request that this Court release him from S.R.S. custody or, in the alternative, place him in his mother's home.

As grounds he states:

1. Juvenile has been living at the or at one of its foster homes for approximately one year and a half.

2. He has resided at the foster home of since , 1999.

3. Although Juvenile continues to have some behavior problems at school, there have been few problems at his new foster home.

4. Juvenile is considered a good worker at the horse farm he works at after school

5. Juvenile believes that he is ready to return home. He believes he can now control his behavior in the right setting, such as at his mother's.

WHEREFORE, JUVENILE respectfully requests this Honorable Court discharge him for S.R.S. custody or, in the alternative, allow him to be placed at home.

Dated this ___ day of October, 1999 in Middlebury, Vermont.

Respectfully submitted,

Waive Juvenile Appearance at Hearing

STATE OF VERMONT
ADDISON COUNTY, ss.

In re:	**)**	**ADDISON FAMILY COURT**
	)	**DOCKET NO. Anjv**

REQUEST TO WAIVE APPEARANCE OF JUVENILE

NOW COMES the juvenile, by and through his attorney, Jennifer Wagner, Esq. and requests permission to waive his appearance before the Addison County Juvenile Court for Disposition on Thursday, November 28, 2001. The juvenile submits with this motion his Waiver of Further Appearance.

A hearing was held on November 1, 2001, and the juvenile accepted responsibility was found delinquent. As grounds for his request to waive his appearance at Disposition, the juvenile states he has reviewed the Disposition Report with his attorney, resolved his only disagreement with the report with the Office Social and Rehabilitative Services and agrees with SRS's recommendations.

Further, the juvenile states that travel from , New Hampshire, to Middlebury, Vermont, is an extreme hardship on his family. The six hour round trip is very costly. The finances of the family are limited. lives with his mother who is employed part-time cutting hair. The family cannot afford to spend the night in a hotel in Middlebury, and the family car is not sufficiently reliable to make the long trip safely. Furthermore, travel would require driving over several mountain passes in the very early hours of the morning, on a night when freezing rain is predicted, making travel exponentially dangerous.

is doing well academically and socially, as reflected in the Disposition Report submitted to the court. He has accepted responsibility, and cooperated at all phases of both investigation and litigation. Supervision of his probation will be transferred to New Hampshire via Interstate Compact after the Disposition has been entered.

WHEREFORE, the juvenile requests that the Court grant his request, and waive his personal appearance at Disposition tomorrow. He will be represented by his attorney at the hearing.

Respectfully submitted, _____

INDEX OF OLDER MOTIONS THAT MAY NEED UPDATING

These motions are on file at the Office of the Juvenile Defender. If you would like a copy of a particular motion please contact the office of the Juvenile Defender.

TABLE OF CONTENTS
(Page numbers refer to location in packet of sample motions previously available)

LINKS

Vermont's Interstate Compact on the Placement of Children: An Assessment on the Court's Role In Expediting the Interstate Placement of Children. June 30, 2008
http://www.abanet.org/child/rclji/placement_assessments/VT_icpc_assessment.pdf

Resource Guide for Kinship Care Providers, published by VT Kin as Parents.
http://dcf.vermont.gov/sites/dcf/files/pdf/ResourceGuideforKinshipCareProviders.pdf

DCF Family Services Division Policies: http://dcf.vermont.gov/fsd/policies

DCF rules on Transition Age Youth: http://dgsearch.no-ip.biz/juvenile/Transition%20Age%20Youth.pdf

DCF/FSD Transformation Plan (transition age youth):
http://dcf.vermont.gov/sites/dcf/files/pdf/fsd/FSD_Transformation_Plan.pdf

Guide to New Juvenile Statute
Guide to New Juvenile Statute Conversion Chart
Guide to New Juvenile Statute Highlights
Guide to New Juvenile Statute Section by Section Analysis
Guide to New Juvenile Statute Text of the Act
http://www.vermontjudiciary.org/GTC/Family/Juvenile.aspx

Juvenile Court Forms: http://www.vermontjudiciary.org/GTC/Family/juvenile.aspx

Juvenile Justice and Delinquency Prevention Authorization Act summary from 2008 (never became law)
http://www.govtrack.us/congress/bill.xpd?bill=s110-3155&tab=summary

Fostering Connections to Success and Increasing Adoptions Act Summary
http://www.clasp.org/publications/fctsaiaact2008resources.htm

Youthful Offender Flowchart: http://defgen.vermont.gov/sites/defgen/files/YOF.pdf

Child-Case Listserv –Open to attorneys and judges only, to discuss issues that arise in litigating civil and criminal child abuse and neglect and related cases.
http://new.abanet.org/child/Pages/discussion.aspx

American Bar Association's Parent Representation website:
http://www.abanet.org/child/parentrepresentation/home.html

National Association of Counsel for Children: www.naccchildlaw.org

INDEX OF CHARTS, AND OTHER RESOURCES

Charts:

Other Resources:

Included on the next page of this list are older articles that were included in the original Vermont Juvenile Law and Practice Manual published in June, 2001. They may be referred to in the revised manual and are now included on the Defender General website as they may be of interest to practitioners but one should note that the information contained in some of them may be dated.

More recent articles covering a wide variety of topics regarding juvenile law may be found in the ABA Child Law Practice reporter. Here is a link to The ABA Child Law Practice reporter indices from 1999 through the present: http://www.abanet.org/child/clp/index.html.

These indices have subject, case law subject and state by state case law listed by year. The Office of the Juvenile Defender has hard copies of these articles and should be contacted if you are interested in a particular article.

Older articles and Resource Materials (on Defender General website):

ABA Standards for the Child's Attorney, ABA Child Law Practice, March 1996, Vol. 15 No. 1.....

Children and Violence—A Conversation with Dr. James Garbarino, ABA Child Law Practice, March 1996, Vol. 15 No. 1 .....

Conducting Developmentally Appropriate Child Interviews—A Conversation with Dr. Karen Saywitz, ABA Child Law Practice, August 1996, Vol. 15 No. 6.....

Considering Children's Attachment in Placement Decisions—A Conversation with Dr. Jay Belsky, Claire Sandt, ABA Child Law Practice, April 1996, Vol. 15 No. 2.....

Developmental Stages of Children and Their Tasks at Each Stage.....

Ethical Issues in the Legal Representation of Children: Client Autonomy or Child Protection? Kathryn A. Piper, Esq., The Vermont Bar Journal & Law Digest, December 1998.....

How to Seek Accuracy in Mental Health Assessments, Judith Larsen, ABA Child Law Practice, November 1997, Vol. 16 No. 9.....

Preparing Child Witnesses—An Interview with Dr. Karen Saywitz, ABA Child Law Practice, January 1998, Vol. 16 No. 11 .....

Recognizing the Child in the Delinquent, Kentucky Children's Rights Journal, Spring 1999, Vol. VII, No. 1 .....

Risk Assessments, Memorandum to Patricia Puritz, ABA, from S.K. Harper, October 5, 1999 Should Children's Lawyers "Do Social Work?", Noy Davis, ABA Child Law Practice, October 1996, Vol. 15 No. 8 .....

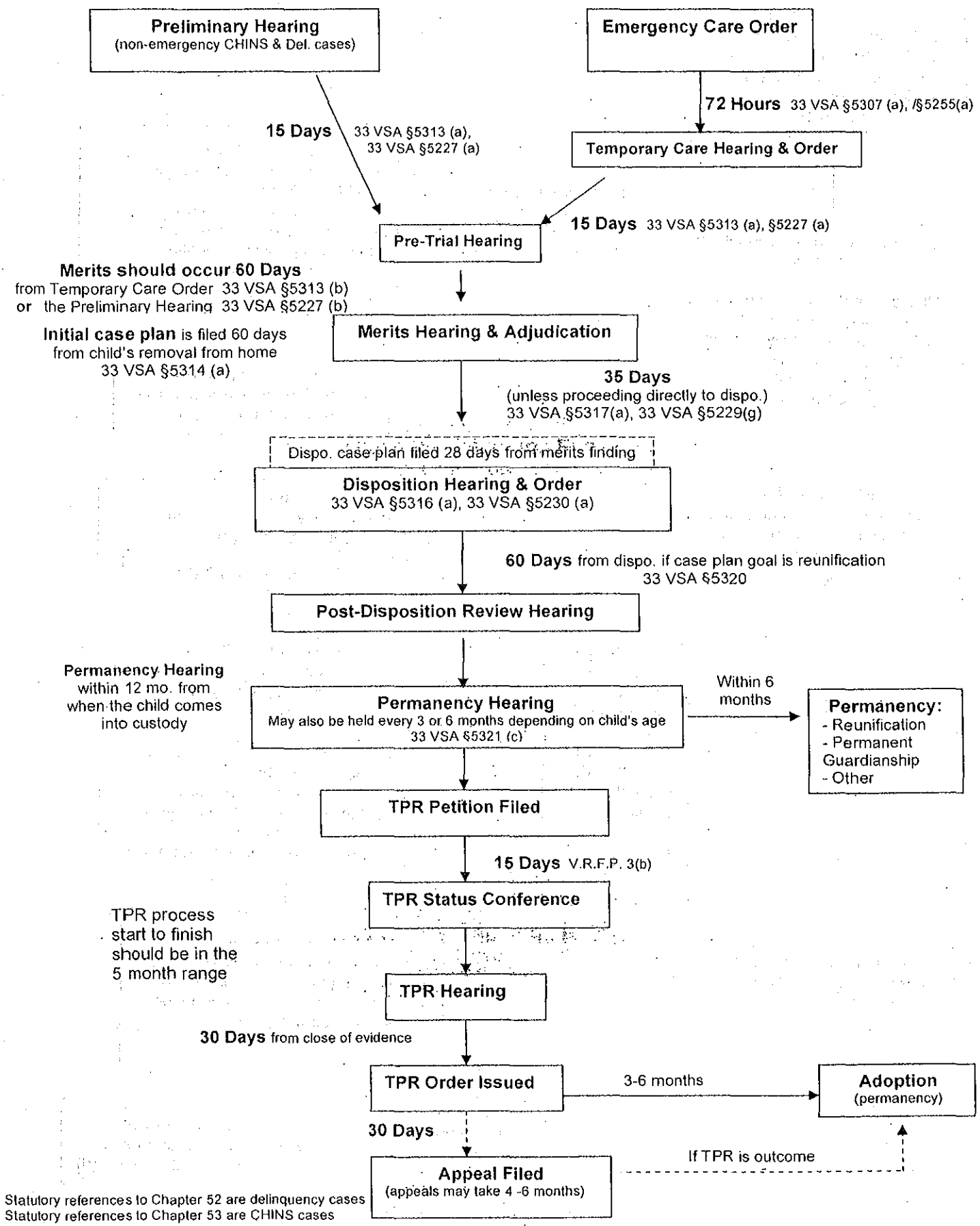
Better Lawyering: Should Children's Lawyers do Social Work? By Noy Davis, ABA Child Law Practice, Vol. 15, no. 8 …….

The Role of the Psychologist in Forensic Evaluations, by C. David Missar, ABA Child Law Practice, November 1997, Vol. 16, No. 9 .....

Visitation: What Lawyers Should Know, Janet Chiancone, ABA Child Law Practice, August 1997, Vol. 16 No. 6 .....

JUVENILE PROCEEDINGS FLOWCHART

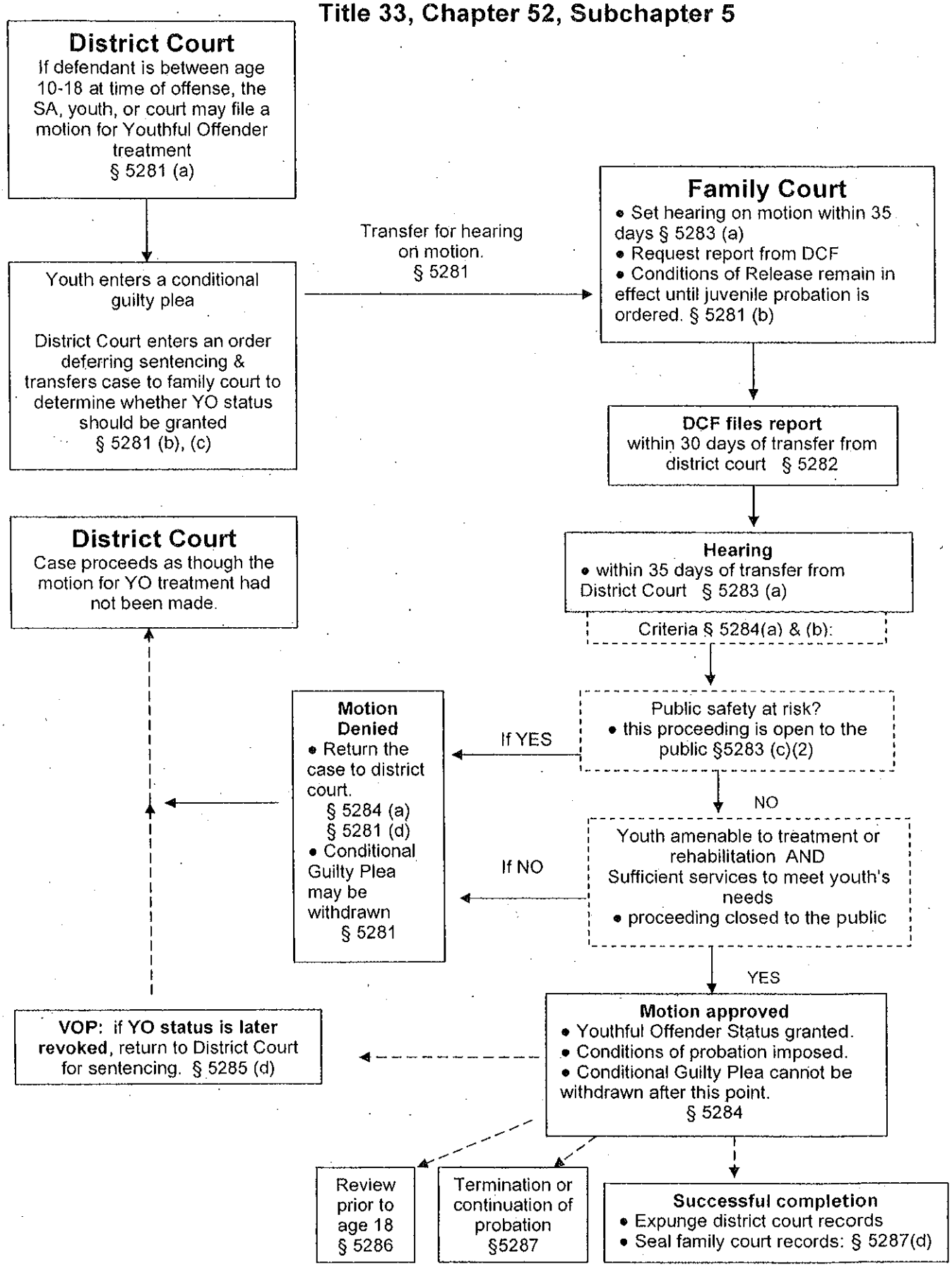
NOT ALL CASES FOLLOW THIS PROGRESSION

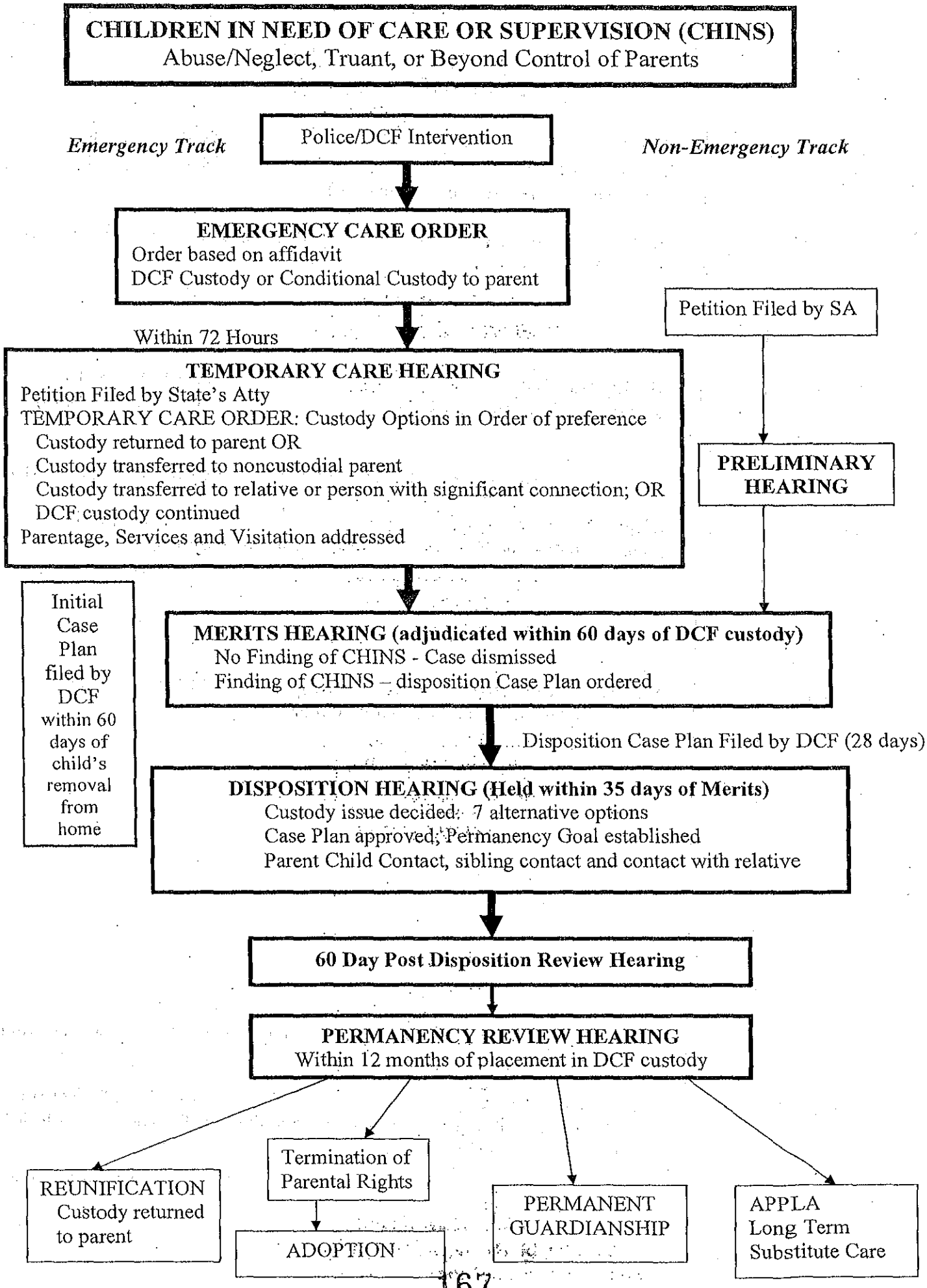


Statutory references to Chapter 52 are delinquency cases
Statutory references to Chapter 53 are CHINS cases

Youthful Offender Flowchart

Title 33, Chapter 52, Subchapter 5




CHILDREN IN NEED OF CARE OR SUPERVISION (CHINS)
Abuse/Neglect, Truant, or Beyond Control of Parents
Emergency Track
Police/DCF Intervention
Non-Emergency Track
EMERGENCY CARE ORDER
Order based on affidavit
DCF Custody or Conditional Custody to parent
Petition Filed by SA
Within 72 Hours
TEMPORARY CARE HEARING
Petition Filed by State's Atty
TEMPORARY CARE ORDER: Custody Options in Order of preference
Custody returned to parent OR
Custody transferred to noncustodial parent
Custody transferred to relative or person with significant connection; OR
DCF custody continued
Parentage, Services and Visitation addressed
PRELIMINARY HEARING
Initial Case Plan filed by DCF within 60 days of child's removal from home
MERITS HEARING (adjudicated within 60 days of DCF custody)
No Finding of CHINS - Case dismissed
Finding of CHINS – disposition Case Plan ordered
Disposition Case Plan Filed by DCF (28 days)
DISPOSITION HEARING (Held within 35 days of Merits)
Custody issue decided: 7 alternative options
Case Plan approved; Permanency Goal established
Parent Child Contact, sibling contact and contact with relative
60 Day Post Disposition Review Hearing
PERMANENCY REVIEW HEARING
Within 12 months of placement in DCF custody
REUNIFICATION
Custody returned to parent
Termination of Parental Rights
ADOPTION
PERMANENT GUARDIANSHIP
APPLA
Long Term Substitute Care

Timeline for CHINS Proceedings
Child in Custody of DCF

Day 1 — **Child Taken into Custody** 33 V.S.A. § 5301

Day 3 — **Temporary Care Hearing** 33 V.S.A. § 5307
(may also be the Preliminary Hearing)

Day 15 — **Pretrial hearing: Set for Contested Merits if not resolved by stipulation**
33 V.S.A. § 5313

Day 60 — **Merits Resolved** 33 V.S.A. § 5315
Initial Case Plan filed by DCF 33 V.S.A. § 5314 (a)

Disposition Case Plan filed by DCF 28 days after merits 33 V.S.A. § 5316

Day 95 — **Disposition** 33 V.S.A. § 5317
(hearing shall be no later than 35 days after merits findings)

Day 155 — **Post-Disposition Review to monitor progress** 33 V.S.A. § 5320
60 days from the Disposition Order

Permanency Case Plan filed by DCF 30 days before Permanency Hearing
33 V.S.A. § 5321 (e)

Day 365 — **Permanency Hearing** 33 V.S.A. § 5321 (c)
(at least 12 months from the date the child was removed from home; may be held sooner if child is under 6

F:\JJPA\Timeline_CHINS Proceedings.doc

DELINQUENCY PROCEEDINGS

Emergency

Non-Emergency

Police Involvement

EMERGENCY CARE ORDER
DCF Custody ordered based on affidavit

Within 72 Hours

TEMPORARY CARE HEARING
Petition Filed by State's Atty
TEMPORARY CARE ORDER
Custody is returned to Parent **or**
DCF Custody is continued

Citation Issued by Officer

Delinquency Petition filed by State's Atty

PRELIMINARY HEARING
Juvenile Admits or Denies
Conditions of Release ordered

Initial Case Plan is filed by DCF within 60 days of the child's removal from home

PRE-TRIAL HEARING (15 days from prelim. hrg)

MERITS HEARING
No Finding of Delinquency - Case Dismissed
Adjudication within 60 days from Prelim. Hrg, except for good cause shown
If finding of Delinquency - Disposition Case Plan is ordered

35 Days

Disposition Case Plan filed by DCF

DISPOSITION HEARING

Juvenile Probation PLUS DCF Custody

Juvenile Probation NO DCF Custody

PERMANENCY REVIEW HEARING
Within 12 months of placement in DCF custody

REUNIFICATION
Custody returned to parent

Termination of Parental Rights

ADOPTION

PERMANENT GUARDIANSHIP

APPLA
Long Term Substitute Care

Timeline for Delinquency Proceedings

Timeline for children *not* taken into custody:

Officer issues citation with a preliminary hearing date 33 V.S.A. § 5221

# days from Prelim. Hearing:			
	—	**State's Attorney files petition** 10 days prior to preliminary hearing date	33 V.S.A. § 5223 (a)
	—	**Preliminary Hearing**	33 V.S.A. § 5225
15	—	**Pretrial hearing** Within 15 days of preliminary hearing Set for Merits if not resolved by stipulation	33 V.S.A. § 5227
60	—	**Merits Resolved**	33 V.S.A. § 5229
	—	**Disposition Case Plan filed** 28 days after merits	33 V.S.A. § 5230
95	—	**Disposition Hearing** (no later than 35 days after merits findings)	33 V.S.A. § 5231

NOTE: if child is taken into custody, see title 33, Chapter 52, subchapter 3:

Temporary Care Hearing 33 V.S.A. § 5255
- Held within 72 hours of child's removal from home

Initial case plan filed 33 V.S.A. § 5257
- Within 60 days of child's removal from home

Post-Disposition Review to monitor progress 33 V.S.A. § 5258
- 60 days from the Disposition Order

Permanency Case Plan filed 33 V.S.A. § 5321 (e)
- 30 days before Permanency Hearing

Permanency Hearing 33 V.S.A. § 5321
- Held within 12 months from the date the child entered custody

MEMORANDUM OF UNDERSTANDING
BETWEEN

THE DEPARTMENT OF EDUCATION (DOE) AND THE DEPARTMENT FOR CHIDREN AND FAMILIES (DCF) REGARDING EDUCATIONAL PLACEMENT AND ALTERNATIVE EDUCATIONAL PLANS FOR CHILDREN IN DCF CUSTODY

This Memorandum of Understanding is entered into this 16th day of November, 2009 by and between the Vermont Department of Education and the Vermont Department for Children and Families.

Whereas, both DCF and DOE believe that educational placement for a foster child is an important tool in designing a plan that serves the best interests of a child;

Whereas, both DCF and DOE recognize that a child's best interest may be promoted by placement in a certain educational setting without regard to the child's actual residency or the residency of the biological parents;

Whereas, maintaining connections with teachers, peers and other community members and a foster child will, in some cases, promote the child's immediate and future welfare while the child resides out of the family home.

Now, therefore, the Parties, acting by and through the undersigned duly authorized agents, hereby agree as follows:

(1) The DCF Commissioner may request that the DOE Commissioner exercise his authority pursuant to 16 V.S.A. §1075 (b) and (c) to determine the legal residence of a DCF custodial state-placed foster child and to approve an alternative educational plan for the foster child;

(2) That these requests shall come directly from the DCF Commissioner to the DOE Commissioner;

(3) That these requests shall contain a specific and detailed recommendation as to why the proposed educational plan is in the child's best interests. DCF Commissioner shall provide any information that the DOE Commissioner considers necessary to assist him in his decision making.

(4) That the DCF Commissioner shall make any such request to the DOE Commissioner only after local educational authorities have had the opportunity to consider the same request made by DCF as set forth in the Appendix of this Agreement.

(5) That the DOE Commissioner shall make a final determination within 5 school days of receiving a request. The DOE Commissioner shall communicate a decision to the DCF Commissioner.

(6) That any decision by the DOE Commissioner concerning a request made by the DCF Commissioner pursuant to this Agreement shall be final.

(7) This Memorandum of Understanding inures to the benefit of and is binding on the Parties and is intended for the sole and exclusive benefit of the Parties. Nothing in this Memorandum of Understanding shall give rise to or be deemed to give rise to any third party beneficiary rights, and in particular, but without limitation, this Memorandum of Understanding does not give rise to any third party rights to any child in DCF custody.

Dated this 17th day of November 2009, at Waterbury, Vermont.

By: _____
Armando Vilaseca, Commissioner
Vermont Department of Education

By: _____
Stephen R. Dale, Commissioner
Vermont Department for Children and Families

Appendix

Procedure for
Educational Residency Determination for Children in DCF Custody

In exceptional cases, a DCF worker, in collaboration with a representative of a custodial foster child's coordinated services planning team, may determine that the child's educational needs can be best met by attendance at a public school located in a non-residential district which the child has previously attended, or may attend upon a return home, or at another public school if the previous options have been explored and determined inappropriate. This determination

shall be based on the child's history, present circumstances and permanency needs. The recommendation of the DCF worker and team representative shall include input relating to the child's educational best interests from school officials associated with the proposed placement school, and the current educational placement. In making this recommendation consideration should be given to how attending the proposed school would advance the goals of the child's case plan in ways that could not otherwise be met by pursuing an education in the district where the child is residing.

1. The DCF worker shall request participation of educational officials of the proposed school district in which enrollment is sought. The request developed by the team should explain the nature and reasons for the request, including an explanation of why the child's needs can be best met by attendance at the proposed school. The request shall also contain a plan for transportation of the child by DCF to an educational placement outside the child's district of residence. DCF will pay for the child's transportation beyond available and existing means of transportation.

2. The DCF worker shall provide any additional information required by local school authorities to assist them in their consideration of the request.

3. The DCF worker should request an expeditious decision from local school officials regarding the request.

4. If the local educational officials grant the request, the DCF worker should enroll the child in the proposed school as soon as practicable, and the receiving school will notify the department of education of the alternative plan for the education of the child and the date of enrollment, in order to finalize the process for the commissioner's approval of reimbursement to the selected and agreed upon school district.

5. If the local educational officials deny the request, the DCF worker shall ask the reasons for the denial and make a caseworker note of the same.

6. The DCF worker, in consultation with the DCF supervisor, may seek immediate further review of the request. This review shall be commenced by contacting the DCF Commissioner's office.

7. In requesting further review, the DCF worker shall send to the DCF Commissioner the same materials presented to local school authorities, the child's current case plan and the reason for the denial by the local school officials. The DCF worker shall provide any additional information required by the DCF Commissioner.

8. The DCF Commissioner shall inform the DCF worker and DCF supervisor of the outcome of the review.

Next in line behind the noncustodial parent in the order of custodial preference found in Section 5308 are certain relatives (grandparent, great grandparent, aunt, great aunt, uncle, great uncle, stepparent, sibling or step sibling) followed by custody to "another relative or person with a significant relationship with the child."

This provision is a marked departure from prior practice where custody was more likely to be transferred to DCF with DCF placing the child with relatives as licensed foster parents. DCF has long had a policy of preference for kinship placements for children in foster care. Unfortunately, as was true with absent fathers, appropriate kin were too often not being identified early enough in the court process. The current statute changes that by requiring DCF to come to the temporary care hearing with information about potential kinship placements and their suitability to care for the child.

However, the statute goes further by creating a preference for a transfer of custody to kin over a transfer of custody to DCF even in cases where it is DCF's intention to place the child with kin. The reason for this goes back to one of the main challenges presented to the revision committee which drafted the proposed legislation. One of the major controversial issues facing the committee was whether the courts should have the authority to dictate placement of a child in DCF custody. As Judge Davenport pointed out in her interview with Justice Skoglund, the committee chose to take this issue off the table in order to be able to achieve consensus on the draft proposal. Many on the committee did not want to leave the decision regarding kinship placement in DCF's sole discretion. Others believed that DCF as a child's custodian must have the discretion to place the child where the agency sees fit. It was the consensus of the committee that this proposal maintained the current balance of power between DCF and the courts over children in custody while at the same time ensuring that children removed from their parents would end up living in the homes of suitable kin whenever possible.

This legislative provision also has the incidental effect of substantial cost savings to the state. According to data gathered by Lynn Granger, Coordinator for Vermont Kin as Parents, it costs the state on average $23,000 per year to maintain a child in foster care. While it is true that a relative taking custody of a child may be eligible for a RUFA grant,[i] there is a considerable discrepancy between the amount of a RUFA grant and a foster care subsidy, with that difference increasing substantially with each additional child in care.[ii] Moreover, children in DCF custody have a right to services; children in the custody of relatives only have a right to a referral for services. When it comes to obtaining access to DCF contracted services, the provision of such services for children in kinship custody is made only at the Commissioner's discretion and dependent on available funding. Currently Family Time Coaching, DCF's new initiative to help parents reunify with their children, is available only for families whose children are in DCF custody.

The list of services and costs automatically covered for children in DCF custody and their families but not for those in kinship custody includes: DCF social worker or contracted assistance to kin in negotiating family issues and parent child contact, monitoring progress under the terms of the case plan (unless there is a protective supervision order), filing and prosecuting a TPR petition, arranging for and covering the costs of adoption, paternity testing, reimbursement for transportation to school and medical appointments for the child, full reimbursement for child care expenses, respite care, caregiver training, and post-adoption assistance.

The overall goal for this new legislation is to improve outcomes for abused and neglected children, including providing them with secure and stable homes. However, the stability of kinship placements is inextricably linked to the amount of support given to the kin as caregivers. Research on stability of kinship care suggests that rates of disruption are sensitive to both the level of financial support and the availability of post-discharge services to families. For example, in Texas, which does not have subsidized guardianship and where little in the way of post-discharge services are provided, a study found disruption levels as high as 50% for children discharged from foster care to the physical custody of kin.

In contrast, available data indicate that there are relatively few disruptions (2-3.5%) when kin are appointed as legal guardians and are provided with financial subsidies and post-permanency support services.[iii]

Children who have been abused and neglected have extraordinary needs and it often requires extraordinary skill and resources to care for them. These children need intensive services and a stable, secure environment in which to heal. Without that, these- our most vulnerable children- could grow up to become our state's greatest liability.[iv]

Judge Davenport is correct in saying that these are tough economic times. As she states: "The needs of children will be greater than ever and our resources to provide for those needs will be smaller than ever." How we choose to allocate those resources to address the needs of abused and neglected children should be a legislative decision. It is neither fair nor wise to allow for such a huge discrepancy in financial support and services to be based not on the needs of the individual child and family but rather on the serendipitous availability of kin willing to take custody of these children.

Practice Tips

Someone needs to explain to potential kinship caregivers the ramifications of taking custody of the child vs. becoming a foster parent for the child. If DCF is not able to tell kin whether they are licensable as foster parents at the time of the temporary care hearing, that hearing should be continued until such time as DCF knows whether they can license the relatives as foster parents and are willing to place the child with them.

The advantages of having custody of the child are obvious: 1) the relative with custody has the legal decision-making authority over the child subject only to possible protective supervision by DCF; and 2) the child cannot be removed from that relative's home without a modification of the court order. The disadvantages are not as immediately apparent. The relative needs to understand that, depending on the terms of any protective supervision order, DCF may not be available to act as a buffer between them and the parent when conflicts arise over parent/child contact and other issues. The relative also needs to understand the significant differences in financial support and services. It is only fair that these relatives be allowed to make informed decisions before they take on the awesome responsibility of caring for these often challenging and troubled children.

If custody is transferred directly to a relative, especially in cases where there is a goal of reunification, it is essential that the court also issue a protective supervision order that requires DCF to monitor compliance with the expectations of the case plan and that requires the relative custodian to sign releases allowing DCF and the child's attorney to have access to information about the child. (Requesting a protective supervision order and releases signed by the parent is also advisable in cases of conditional custody orders issued pursuant to §5308(b)(1) and §5318(a)(1).)

The court may order a transfer of custody to a relative at the temporary care hearing only if the court determines that the "relative is suitable to care for the child. In determining suitability, the court shall consider the relationship of the child and the relative and the relative's ability to:

(i) Provide a safe, secure, and stable environment.
(ii) Exercise proper and effective care and control of the child.
(iii) Protect the child from the custodial parent to the degree the court deems such protection necessary.
(iv) Support reunification efforts, if any, with the custodial parent.
(v) Consider providing legal permanence if reunification fails.

These considerations are designed to avoid some of the pitfalls that can occasionally occur with kinship placements:

*Kin may not perceive the negative impact of the home environment on the child's behaviors and join the parent in blaming the child.

* Kin may not believe the allegations of abuse/neglect and therefore may not see a need to protect the child from further abuse/neglect or pressure on the child to recant. In cases of sexual abuse especially, whether or not a caregiver believes the child and is able to support a child's therapeutic needs has a huge impact on that child's ability to heal.

*Kin may agree to take a child as the result of family pressure without a true commitment to caring for the child long-term.

*Kin may undermine reunification efforts if they have a hostile relationship with the parents.

*Relatives themselves may be abusive or neglectful toward the child because they come from the same troubled family background that led the parent to mistreat the child.[v]

Despite these possible drawbacks, there is little doubt that kinship placements can be highly beneficial to children. Kinship placements provide children with a familiar environment with people who frequently already love and feel a commitment to them, thereby minimizing the trauma of removal. There is less stigma attached to living with kin than with foster parents. We as practitioners need to do everything we can to ensure that these kinship placements can succeed including advocating for needed resources and services for the child and family.

*Excerpt from *The Practical Implications of the Newly Enacted Vermont Juvenile Judicial Proceedings Act,* by Pam Marsh and Kathryn Piper, VBA Journal, Spring 2009

---

[i] RUFA grant is a Child Only Reach Up grant obtainable through Economic Services. Child support and any income for the child such as Social Security offset the benefit. Caregiver income is not taken into consideration. However, a family that is eligible for food stamps, housing or fuel assistance may find those benefits reduced dollar for dollar because of a RUFA grant.

[ii] According to data compiled by the Vermont Kin as Caregivers, foster care reimbursement rates for one child range from $534.90 to $762.60 compared to a RUFA grant for one child of $434.00 to $458.00. For two children foster care reimbursement rates range from $1,069.80 to $1,525.20 and RUFA grants for two children ranger from $535.00 to $560.00. The amount of the discrepancy increases with each added child.

[iii] www.futureofchildren.org, Vol. 14, No. 1, p. 124

[iv] In a compelling book entitled Ghosts from the Nursery-Tracing the Roots of Violence, Authors Robin Karr-Morse and Meredith S. Wiley illustrate the heavy price society pays for child abuse and neglect: "Violent behavior often begins to take root during those [first] thirty three months as the result of chronic stress, such as domestic or child abuse, or through neglect." P. 15.They go on to state: "Abuse and neglect in the first years of life have a particularly pervasive impact. Prenatal development and the first two years are the time when the genetic, organic, and neurochemical foundations for impulse control are being created. It is also the time when the capacities for rational thinking and sensitivity to other people are being rooted- or not- in the child's personality." P. 45. Atlantic Monthly Press, NY, 1997.

[v] Fiermonte, Cecilia and Renne, Jennifer, "Reasonable Efforts to Finalize a Permanency Plan for Relative Placement" in Making it Permanent, ABA Center on Children and the Law, 2002; Hardin, Mark, "Legal Analysis-Placing Abused and Neglected Children with Kin:Deciding What to do", 13 ABA Juvenile and Child Welfare Law Reporter 6, August 1994 at 91.

Amendment to
Administrative Directive No. 26

Supreme Court
January Term, 2009

FAMILY COURT CASE DISPOSITION GUIDELINES FOR JUVENILE DOCKET

Administrative Directive No. 26 is amended to read as follows (new matter underlined, deleted matter overstruck):

The management of the flow of cases in the family courts is the responsibility of the judiciary. In carrying out that responsibility, the judiciary must balance the rights and interests of individual litigants, the limited resources of the judicial branch and other participants in the justice system, and the interests of the citizens of this state in having an effective, fair, and efficient system of justice.

A. The State Court Administrator and Administrative Judge for Trial Courts are directed, within available resources, to:

1. assist family courts in implementing caseflow management plans that incorporate case processing time guidelines established pursuant to this directive;
2. gather information from family courts on compliance with case disposition guidelines; and
3. assess the effectiveness of management plans in achieving the guidelines established by this directive.

B. Family courts are directed to:

1. Maintain current caseflow management plans consistent with case processing time guidelines established in this directive;
2. Collect and maintain accurate caseflow management data;
3. Cooperate with the Administrative Judge for Trial Courts and Court Administrator's Office in assessing caseflow management plans implemented pursuant to this directive.

The following amended time guidelines for juvenile docket case processing are provided as goals for the administration of court caseloads. These amended time guidelines for CHINS and Delinquency cases replace in their entirety the guidelines adopted by the Court on January 7, 2007. The amended guidelines were made to conform with changes made necessary by the enactment of Act No. 185 of 2007 (Adj. Session) which repealed 33 V.S.A. Chapter 55 covering juvenile proceedings and replaced it with 33 V.S.A. Chapters 51-53. These guidelines do not supersede procedural requirements in court rules or statutes for specific cases, or supersede reporting requirements in court rules or statutes.

Milestone Standards For CHINS Cases: Children in Custody of DCF or Non-Parent

Juvenile Events/Milestones		Standard	Complex[1]
Removal / Emergency Care Order (ECO) to Disposition		**90 days**	**5-2 months**
Removal to Temporary Care Hearing	33 V.S.A. §5307 (a)	3 days	3 days
Temporary Care Order to Merits Adjudication	33 V.S.A. §5313 (b)	60 days	90 days
Merits Adjudication to Disposition Order	33 V.S.A. §5317 (a)	35 days	65 days
Disposition Order to Post-disposition Review (if reunification is goal)	**33 V.S.A. §5320**	**60 days**	**60 days**
Removal / ECO to first Permanency Hearing	**(33 V.S.A. § 5321)**	**12 months**	**12 months**
Removal / **ECO** to first Permanency Hearing if child is under 6 and Permanency Hearing is expedited to 6 months		6 months	6 months
Removal / ECO to Return of Custody Order (plan is reunification)		**18 months**	**21 months**
Removal / ECO to Permanent Guardianship Order		**18 months**	**21 months**
Removal / ECO to Adoption (excluding appeal time)		**20 months**	**23 months**
Removal / ECO to TPR petition filing		12 months	12 months
TPR Petition Filing to First TPR Status	V.R.F.P. 3 (b)	15 days	15 days
Filing of TPR petition to TPR decision		5 months	8 months
TPR decision to Adoption (if no appeal)		3 months	3 months
Affirmed TPR decision to Adoption		2 months	2 months
Removal to Court-signed approval of plan for Another Planned Permanent Living Arrangement ("APPLA")[2]	**33 V.S.A. §5321a(5)**	**24 months**	**24 months**

1 **Complex Factors** – see next page for a list of factors that might make a case complex.

2 Another Planned Permanent Living Arrangement ("APPLA") is the least desirable of the permanence outcomes. 171 VT 369 (2000).

Milestone Standards For CHINS Cases: Children who remain in Custody of Parents

(excludes truancy cases)

Juvenile Events/Milestones	Standard	Complex
Removal[3] or Preliminary Hearing to Disposition	98 days	5.2 months
Removal to Temporary Care Hearing (at which custody is returned to parent)	72 hours (3 days)	3 days
Preliminary Hearing[4] to Merits Adjudication 33 V.S.A. §5313 (b)	60 days	90 days
Merits Adjudication to Disposition Order	35 days	65 days

Factors That Might Make a Case Complex:

- TPR filed to, or at, disposition (Applies to "Removal to Disposition" time only.)
- Forensic Evaluation (competency of parties or Family Evaluation)
- Additional parties and attorneys (multiple fathers or grandparents, extra parties or 6+ siblings)
- Interpreters (sign language and interpreters for uncommon / obscure languages)
- ICPC (Interstate Compact - out of state placement of child requiring home study in another state)
- Multiple expert witnesses

[3] "Removal" could be the date of the Emergency Care Order. This category includes children who may spend a very brief period (up to 3 days) in DCF custody and then are returned to the custody of a parent, as well as children who never come into DCF custody at all. If an Emergency Care Order issued, the case should be tracked from that date (date of removal). If no removal occurs, the case is tracked from the preliminary hearing date.

A pretrial hearing is 15 days after the Preliminary Hearing. 33 V.S.A. §5313 (a)

[4] A Temporary Care Hearing would serve as a Preliminary Hearing.

Milestone Standards for DELINQUENCY Cases: Children in Custody of DCF

(Track from date of removal from home; same as CHINS)

Juvenile Events/Milestones	Standard	Complex
Removal to Disposition	98 days	5.2 months
Removal to Temporary Care Hearing[5]	72 hours (3 days)	3 days
Temporary Care Order to Merits Adjudication	60 days	90 days
Merits Adjudication to Disposition Order	35 days	65 days
Disposition Order to Post-disposition Review (33 V.S.A. § 2538)	60 days	60 days
Removal to first Permanency Hearing (33 V.S.A. § 2538) (same as CHINS)	12 months	12 months
Removal to Return of Custody Order (plan is reunification) (same as CHINS)	18 months	21 months
Removal to Permanent Guardianship Order (same as CHINS)	18 months	21 months
Removal to Adoption (excluding appeal time) (same as CHINS)	20 months	23 months
Removal to TPR petition filing	12 months	12 months
TPR Petition Filing to First TPR Status V.R.F.P. 3 (b)	15 days	15 days
Filing of TPR petition to TPR decision	5 months	8 months
TPR decision to Adoption (if no appeal)	3 months	3 months
Affirmed TPR decision to Adoption	2 months	2 months
Removal to Court's signed approval of plan for Another Planned Permanent Living Arrangement (APPLA)[6] (same as CHINS)	24 months	24 months

[5] The Temporary Care Hearing is also the Preliminary Hearing, at which Probable Cause is determined.

[6] Another Planned Permanent Living Arrangement ("APPLA") is the least desirable of the permanence outcomes. 171 VT 369 (2000).

Milestone Standards for DELINQUENCY Cases: Children who remain in Custody of Parents

(Track from date of preliminary hearing)

Juvenile Events/Milestones	Standard	Complex
Preliminary Hearing to Disposition	90 days	5 months
Preliminary Hearing to Merits Adjudication[7] 33 V.S.A. §5227 (b)	60 days	90 days
Merits Adjudication to Disposition Order 33 V.S.A. §5231 (a)	35 days	65 days
Violation of Probation Filing to Disposition of VOP Complaint	45 days	60 days

Factors That Might Make a Case Complex:

- Sexual offenses
- TPR filed to, or at, disposition (applies to "Removal to Disposition" interval only.)
- Forensic or psychosexual evaluation
- Competency / mental health issues
- Serious physical injury to victim
- Significant restitution issues
- Multiple offenders
- Interpreters (sign language and interpreters for uncommon / obscure languages)
- Multiple expert witnesses
- Out of state residential placement or ICPC (Interstate Compact - out of state placement of child requiring home study in another state)

[7] Preliminary Hearing to pretrial hearing is 15 days; 33 V.S.A. §5227 (a).

This amended directive shall become effective immediately.

Done in Chambers at Montpelier, Vermont this 13th day of January 2009.

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice