Juvenile Defender Newsletter

Spring 2021

Best Practices: Children in Court

Opinions on whether and to what extent children should participate in CHINS proceedings are varied. Under Vermont law, children are parties to CHINS proceedings. 33 V.S.A. § 5102(22). Additionally, state law requires that children be present in court at the temporary care hearing unless their attorney waives the requirement. 33 V.S.A. § 5307. But, what about after temporary care? Is court a healthy environment for children? Should children have the option to attend all court proceedings? When is a child "old enough" to decide whether she wants to be in court?

A recent article in the ABA's Child Law Practice Today[1] entitled *Implementing a Child-in-Court Protocol in Berrien County, Michigan* sets out to address some of these questions.

According to Berrien County Judge Brian Berger, "Pretty much all the science supports kids, from a young age to teenagers, wanting to have their voice heard in court. We're making decisions that directly impact their lives. Even though every child in Berrien County is appointed a GAL, sometimes that's not enough." To ensure that children's voices are heard, Judge Berger is collaborating with the National Council of Juvenile and Family Court Judges (NCJFCJ), to develop a protocol for including children in court proceedings.

The protocol "applies to children of all ages and emphasizes safeguarding children from trauma."[2] It provides optional accommodations for children who might be traumatized without them, including bifurcated hearings, remote participation, and allowing the child's legal representative to read a written statement from the child.

[1] Claire Chiamulera, *Implementing a Child-in-Court Protocol in Berrien County, Michigan*, Child Law Practice Today, March 02, 2021, https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2021/implementing-a-child-in-court-protocol/

[2] *Id*.

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The goals of the protocol include: "(1) making the court process more engaging and collaborative with the objectives of familiarizing the child and judge with one another and making the court process more transparent and understandable to children; (2) giving children a voice in the process; and (3) ensuring the court hearing focuses on the child."[3]

Key elements of the protocol are:

"*Including children in court:* General guidelines cover common reasons children should come to court. Examples include: upon a therapist's recommendation, at 6-month review hearings, at hearings to return a child home, at case closure hearings, when the youth is age 14 or over and wants to be present, at juvenile guardianship hearings, when the judge wants to see or has questions for the child.

Excusing children from court: Guidance for excusing children from court centers on protecting the child from serious trauma as determined by a judge, therapist, or the case circumstances. School conflicts and the child's wishes regarding court attendance are also relevant factors.

Implementation procedures: Practical aspects of implementing the policy are outlined, including training staff on the protocol; preparing children for court; transporting children to court; providing courtroom accommodations and alternatives to in-court participation; child-sensitive scheduling of hearings; sending child-friendly invitations to come to court; and protocols for engaging children at hearings.

Recommended changes: The protocol recommends changes and procedures needed to accommodate bringing children to court. These include physical and logistical changes, such as establishing a child-friendly waiting area with supervision; training foster parents on the protocol; developing a template for a child to provide a written statement in lieu of coming to court; developing surveys to measure performance and impact of the protocol; and finetuning the protocol based on surveys and feedback."[4]

Although Vermont has yet to develop a similar protocol, children's attorneys can take proactive steps to increase client participation in court. Since it appears that remote court hearings are likely to stay, children have more options for participation than ever. Attorneys representing children can:

- Provide child clients with notice of upcoming court hearings and ask them if they want to participate.
- Meet with or call child clients before major hearings to ascertain their expressed preferences or legal interests and to prepare them for the hearing.
- Encourage remote participation in a safe environment for children with a history of trauma.
- Offer to assist the child in preparing a written statement if the child does not wish to attend the court hearing.
- Ask for a recess if your client becomes upset or if events in the courtroom appear likely to cause your client distress.

[3] *Id*.

[4] *Id*.

Vermont Legislature Amends Confidentiality Statute, Abrogating *In re H.H.*

In December 2020, the Vermont Supreme Court ruled that the statute protecting the confidentiality of juvenile court records prohibited DCF's Registry Review Unit and the Human Services Board from accessing juvenile court records without a court order. *In re H.H.*, 2020 VT 107.

In response, the Legislature passed S. 97 (An act relating to miscellaneous judiciary procedures) this session. S. 97 amends 33 V.S.A. § 5117 to permit DCF and the Human Services Board to inspect and disseminate juvenile court records. The same bill also clarified that the parties to the case, including the parents and the child(ren) may also inspect and possess juvenile court records for proceedings they are party to. This means that attorneys can give clients copies of their own files, including any juvenile records contained therein, without seeking permission from the court. However, clients should still be advised that it is unlawful for them to disseminate the records to anyone else without a court order. The bill is set to take effect on July 1, 2021.

Mandated Reporting Statutes: What the Data Shows

Every state in the country mandates that certain professionals report child abuse.[5] States enacted these laws ostensibly to keep children safe, but do they work? New research suggests that the answer is "not nearly as well as we had hoped."

States began enacting mandated reporting laws in the 1960s after a pediatrician published a study on "battered child syndrome." Initially, only physicians were mandated reporters, but states have gradually expanded the definition of who qualifies as a "mandated reporter" to include a variety of professionals. Federal law requires all states to have mandated reporting laws. Some states have gone further than federal law requires, divorcing the concept of mandated reporting from particular professions and declaring that every single resident is a mandated reporter.

A recent study compared states with these "universal mandated reporting" laws to states where mandated reporting is required only in certain professions.[6] That study found that universal mandated reporting dramatically increases the proportion of false reporting, diverting resources that would otherwise be used to respond to legitimate reports of abuse and neglect. Another study found that mandated reporting laws led to more children being removed from women who were themselves victims of domestic violence.[7] Another study of economically disadvantaged mothers found that many refused to disclose

[5] Every state and the District of Columbia requires that medical personnel, school staff, and social workers report child abuse. Forty-nine and the District of Columbia require law enforcement officers to report, and forty-one states make members of the clergy mandated reporters. Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 Ohio N.U. L. Rev. 819, 851 (2010).

[6] Grace W.K. Ho, *Universal Mandatory Reporting Policies and the Odds of Identifying Child Physical Abuse*, 107(5) Am J Public Health, 709–716 (2017).

[7] Carrie Lippy *et al.*, *The Impact of Mandatory Reporting Laws on Survivors of Intimate Partner Violence: Intersectionality, Help-Seeking and the Need for Change*, 35 J. Fam. Violence, 255–267 (2020).

the extent to which they were struggling to mandated reporters who might have been able to offer them help.[8] The same study found that low income mothers were also more likely to refuse voluntary services proven to improve the wellbeing of their children, like visiting nurse services, because the nurses were mandated reporters. An older study found that most mental health professionals surveyed believed that having to report their clients as perpetrators of abuse or neglect increased the risk to their children because it either caused clients to drop out of treatment or withhold critical information from the therapist, thereby preventing the therapist from addressing the root causes of the alleged maltreatment.[9] The results of these studies raise a question about whether mandated reporting statutes are actually preventing child maltreatment or simply making harder for struggling parents to seek help.

Vermont law requires mandated reporters to contact DCF within 24 hours anytime they "reasonably suspect abuse or neglect of a child." 33 V.S.A. § 4913. Mandated reporters in Vermont include medical professionals, dentists, pharmacists, mental health professionals, school staff (excluding custodial and food services staff), social workers, probation officers, probation officers, camp counselors, clergy, childcare workers, and employees, contractors, or grantees of the Agency of Human Services. Failure to report suspected abuse or neglect is a misdemeanor, but there is no penalty for filing an intentionally false report.

In Vermont, mandated reporting accounted for at least 78% of the more than 20,000 reports made to the DCF's child protection hotline in 2019.[10] Almost a third of those reports came from teachers and other school personnel. Just under 23% of all reports made in 2019 were accepted for an investigation or assessment. 31% (822) of the 2,640 total investigations were substantiated, and nearly 23% (1,047) of 4,606 accepted reports resulted in the family having an open case with DCF after closure of the investigation or assessment. Almost half of substantiations were for "risk of harm." Interventions by DCF resulted in 857 separate CHINS proceedings in FY 2020.

Reports to DCF's child protection hotline have increased sharply since 2012. In 2013, two school officials were charged criminally for failing to report child abuse to DCF. Although the charges did not result in convictions, there was a dramatic surge in reports to DCF beginning that year. In 2015, the Legislature amended the mandated reporting statute to clarify that each mandated reporter who has knowledge of an act of abuse must make a report. The statutory language was also amended to change the threshold for mandated reporting from "reasonable cause to believe" maltreatment occurred to "reasonably suspects" maltreatment. These changes correspond to further increases in the volume of reports to DCF.

All mandated reporters in Vermont must take a 2 ½ hour online course outlining the obligations of mandated reporters. The training covers the definitions of child

[8] Kelley Fong, *Concealment and Constraint: Child Protective Services Fears and Poor Mothers' Institutional Engagement*, 97(4) Social Forces, Volume 97, 1785–1810 (2019).
[9] Hafemeister, *supra*.

[10] Vermont Dep't for Children and Families, Child Protection in Vermont: Report for 2019, (2020) https://dcf.vermont.gov/sites/dcf/files/Protection/docs/2019-CP-Report.pdf.

maltreatment and encourages mandated reporters to err on the side of reporting in cases of uncertainty. In the video, Dr. Lewis First, a child abuse pediatrician, states, "It is not your job to determine whether maltreatment happened or will happen. It is your job to help DCF Family Services do its job." He adds that "DCF will know what to do next." The training also emphasizes the criminal penalties for failure to make a report. In the presentation, mandated reporters are encouraged to make reports based on signs and symptoms of child maltreatment, including the behavior of parents. The training lists parental substance abuse, domestic violence, and parents who are controlling or easily frustrated as risk factors for child maltreatment. Changes in a child's behavior, including anxiety, aggression, withdrawal, or excessive friendliness with strangers are listed as signs of physical abuse that may necessitate a report. Signs indicating emotional abuse can include eating disorders, pulling out hair, self-harming behaviors, or emotional changes like excessive crying. Signs of sexual abuse can include promiscuity, advanced sexual knowledge, being excessively physically affectionate, depression, and running away.

While the training does clarify that behavioral indicators do not necessarily mean that child maltreatment is happening, it encourages mandated reporters to contact DCF whenever they are uncertain about whether the behavioral signs they observe could indicate abuse or neglect. This encouragement creates thorny ethical and legal questions for mandated reporters, especially substance abuse and mental health treatment professionals. For example, while patient confidentiality laws exempt mandated reporting, should a substance abuse treatment provider report a patient who has children merely because he or she had a positive urine drug screen? Should a buprenorphine prescriber report a patient because a pill count came up short? Should a psychiatrist report a mother who is experiencing a major depressive episode that makes it difficult for her to get out of bed? There are no easy answers to these questions.

Another difficult issue is domestic violence. Mandated reporters are encouraged to report "risk of harm" in any case where a child is present during domestic violence. DCF policy, however, states that reports alleging domestic violence between parents should only be accepted when domestic violence places the child at risk of physical harm. If victims of domestic violence know they will be reported to DCF, they may be less likely to reach out for help from service providers who could otherwise serve as valuable resources. Perhaps for this reason, the Vermont Network Against Domestic and Sexual Violence trains its advocates to report only when there is evidence that a child was present and was at risk because of the violence.[11] Likewise, the absence of a penalty for false reporting has the potential to allow a person who engages in domestic violence to use DCF as a tool for further harassment and abuse.

Since attorneys are not mandated reporters, we may be the first people our clients tell about problems they are having in their families. It is our responsibility to support

[11] http://promising.futureswithoutviolence.org/files/2012/08/Final-Advocates-Guide-to-Mandated-Reporting-8-27-15-1.pdf

and guide these clients to available assistance and counsel them about what they can expect when interacting with different types of mandated reporters.

Ineffective Assistance of Counsel in CHINS Cases: Recent Vermont Supreme Court Decision Avoids Affirming that Parents Deserve Effective Representation

In a recent decision, the Vermont Supreme Court sidestepped the issue of whether parents in CHINS cases have the right to effective assistance of counsel. The case, *In re C.L.S.*, involved a father whose infant son was removed at birth because of concerns about the mother's use of non-prescribed medications during pregnancy. 2021 VT 25. Father's attorney failed to tell the court that Father was a custodial parent and was therefore entitled to custody of his son because the allegations contained in the petition concerned the mother. Father's attorney also arrived late to a critical hearing and failed to request a contested merits hearing, despite the absence of allegations against his client. Father's subsequent attorneys likewise failed to mount a defense at disposition and TPR. Father then appealed the termination of parental rights, but the Court affirmed based on his attorneys' failure to preserve the defects at temporary care, merits, and disposition for appellate review. Father did not argue ineffective assistance in the direct appeal.

Father then filed a motion for relief from the judgment terminating his parental rights in the Family Division, pursuant to V.R.P.C. 60(b). The motion alleged ineffective assistance of counsel and was supported by an affidavit from an expert in juvenile law. Father's expert opined that father was deprived of due process due to ineffective assistance of counsel.

Unbeknownst to Father, his son was adopted prior to the filing of motion for relief from judgment. The Family Division held that it lacked jurisdiction to rule on Father's motion and dismissed it. Father appealed again, and the Court affirmed the dismissal of Father's motion.

The Court reasoned that the statute defining the jurisdiction of the Family Division, 33 V.S.A. § 5103, did not give the court authority to exercise jurisdiction once a child had been adopted. The Court dismissed Father's arguments that such an interpretation would deprive him of due process and equal protection, and it held that neither the statute governing modification of Family Division orders, 33 V.S.A. § 5113, nor V.R.C.P. 60 conferred jurisdiction independently.

The Court did clarify that DCF cannot terminate the jurisdiction of the Family Division by placing the child for adoption while a direct appeal or Rule 60(b) motion is pending. Because the case was decided on jurisdictional grounds, the Court declined to reach Father's arguments regarding ineffective assistance of counsel.

At least 26 states and the District of Columbia have explicitly recognized that parents have the right to effective assistance of counsel in dependency proceedings. Father argued that Vermont should follow suit, and that Vermont should adopt a more flexible standard for reviewing ineffective assistance claims than the standard that applies in criminal proceedings.

In declining to address these arguments again, the Court left open the question of whether parents have a right to effective

assistance of counsel in CHINS proceedings. Should such a right exist, it is still unclear what the applicable standard of review would be, and it is unclear whether parents must raise claims of ineffective assistance on direct appeal or in a Rule 60(b) motion in the Family Division.

The decision in *C.L.S.* does suggest practice pointers for attorneys seeking to provide effective representation to clients. It also provides some guidance for attorneys who are in a position to address ineffective assistance in the Family Division or on direct appeal.

Practice Pointers

- Remember that Vermont law significantly disadvantages non-custodial parents. Non-custodial parents must prove their fitness to the court, whereas custodial parents are presumed fit in the absence of contrary evidence.
- Learn to recognize a "custodial parent." Both parents are custodial if they live together, regardless of their marital status.
- Tell the court that your client is a custodial parent in any case where the primary allegations concern the other parent. File a motion to preserve the issue for appellate review, and appeal the disposition order.
- Remember that all parties to the case are entitled to contest the merits, and all parties, including non-custodial parents, must sign a merits stipulation.
- Defects at the temporary care and merits stages of a case are deemed waived unless the attorney timely appeals the disposition order.
- Issues not raised in a timely manner before the Family Division, no matter how meritorious, will likely be deemed waived on appeal.
- Appellate attorneys (and any attorney taking over a case still in the Family Division) should talk to the client and evaluate the record for evidence of ineffective assistance.
- Claims of ineffective assistance should be raised as early as possible.
- Unless the Family Rules change or case law clarifies the issue, it is proper to raise an ineffective assistance claim either on direct appeal or in a Rule 60 motion.
- It is likely preferable to raise an IAC claim in a Rule 60 to permit expansion of the record and the admission of expert testimony to prove deficient representation and prejudice.

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