Vermont Juvenile Defender Newsletter

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Vermont Supreme Court Cases

Two cases last year addressed the reasonable efforts requirement and had jurisdiction issues as well: In re C.P., 2012 VT 100 (December 7, 2012) and In re D.C., 2012 VT 108 (December 21, 2012).

Jurisdiction

The court in In re C.P. resolved the home-state jurisdiction question relying on In re B.C., 169 Vt. 1 at 7(1999), finding that "Because the court had subject matter jurisdiction "over the general type of controversy before it, "the resulting judgments were not void even if jurisdiction was erroneously exercised in the particular case."

Following the same reasoning, the Court rejected mother's suggestion in In re D.C. regarding a jurisdictional defect "precluding the parties from agreeing to waive the procedural posture adopted by the family court." At the initial stages of this case mother was not involved, and "she [later] made a tactical decision through counsel to proceed as if this were a TPR petition at initial disposition." In re D.C., 2012 VT 108, at ¶13.

Reasonable Efforts

Both of these cases emphasize that "whether DCF made reasonable efforts is a separate question from and not a prerequisite to, the issue of whether termination of parental rights is warranted under the statutory criteria contained in 33 V.S.A. § 5114(a)". Id at ¶33.

"The extent of DCF's efforts to achieve the permanency plan is not one of the best-interest factors to be considered at termination" In re C.P., 2012 VT 100 at ¶38 referring to In re J.T., 166 VT at 180 "(explaining that extent of efforts to assist parents is not a best-interests factor). See also In re J.M., 170 Vt. 587, 589 (2000) (mem.)

There was no plan of services, nor any reasonable efforts made to reunite mother and child in In re D.C., a finding which the Court made in the TPR decision. The Court's reasoning was that

> "She was content to play a minimal role in D.C.'s life while DCF, with mother's agreement, focused on establishing permanency for D.C. first with the father and then the father's mother. The record supports the family court's undisputed findings that during the lengthy period when mother played a limited role in D.C.'s life and agreed to other family members assuming custody of the child, she made no progress in reaching a point where she could care for the child. Mother cannot now challenge the TPR order through a belated claim that DCF failed to make reasonable efforts to prevent

D.C.'s removal from his home. In re D.C. , 2012 VT 108, at § 34.

Amelia S. Watson, JD has written an article available in the May 2013 sample issue of the ABA's Child Law Practice. "This article:

- discusses federal statutes and regulations that can be used to help frame a reasonable efforts definition;
- provides strategies for reasonable efforts enforcement; and
- highlights how parent's counsel can investigate and respond to lack of funding claims at the initial stages of a family's involvement with the child welfare system."

She emphasizes the importance of implementing the recommendations very early in the case. She points out that people working with parents, such as our Family Support Workers here in Vermont, can really be helpful, particularly in making "a record for the trial judge, and, if necessary, an appeal." One of the practice tips she suggests is to "ask the court to order a timeline for offering services." Take a look at this article "A New Focus on Reasonable Efforts to Reunify" at the following link:

http://www.americanbar.org/publications/child_law_practice/vol_32/sample_issue/a_new_focus_on_reasonableeffortstoreunify.html

Federal law requires that reasonable efforts to prevent the removal of a child from its home be made. Reasonable efforts towards reunification must also be made. These are incorporated into Vermont law, presumably to preserve federal funding, at 33 § V.S.A. 5102(25) (definition), 33 § 5308 §(c)(1)(B) (for the temporary care hearing) and 33 V.S.A. § 5321(h) (to finalize the permanency plan). There are some exceptions to requiring the court to determine that reasonable efforts were made toward reunification at initial and permanent removal hearings in the cases where there are aggravated circumstances found, such as abandonment, torture, chronic abuse, sexual abuse or returning to a dangerous home and more as described in 33 § V.S.A. 5102(25)(A-D).

Are reasonable efforts always being made given the economic crises, parents' transportation problems, and the questionable availability of services? Does DCF incorporate in its case plans expectations that are unreasonable? "In order for the plan to be reasonable it must have been created to fix the problems that required state involvement." Katherine S. Bean, *Reasonable Efforts: What State Courts Think,* 36 U. Tol. L. Rev. 321, 345 (2005)

However, "ASFA's [the Adoption and Safe Family Act] emphasis on the safety of the child and its limits on the duration of reunification efforts will likely favor a finding of reasonable efforts, even when an agency's efforts come up short, so long as those shortcomings are caused by an agency's lack of resources." Id. at 365.

Reasonable efforts are not defined in the Federal law. The Vermont statute defines it as "the exercise of due diligence by the department to use appropriate and available services to prevent unnecessary removal of the child from the home or to finalize a permanency plan." 33 V.S.A. 5102 (25)

Katherine Bean's article reviewing case law identifies these considerations by the Courts:

> "(1) [W]hether the case plan and services address the problems that caused the child to be removed from the home; (2) whether the

time period for the efforts was reasonable and the specific efforts during that period timely; and (3) whether there were arrangements for visitation. Four other common considerations are more intangible and, thus, are better labeled as precepts: (1) the agency need only to do that which is reasonable; (2) agency efforts must be meaningful and done in good faith; (3) the reasonableness of agency efforts cannot be assessed independently of the response of parents to the agency's efforts; and (4) resource limitations of the state are a legitimate consideration when assessing reasonableness." Id. at 344. (Footnote references omitted)

Case plans often now have concurrent plans of reunification and adoption. So what types of services might be helpful in working toward reunification?

> A broad array of services to improve parenting is offered in most states. Services might include drug treatment, housing assistance, homemaker ***346** services, counseling, transportation, parenting education, anger management classes, mental health care, child-development classes, home visits by nurses, day care, referrals to medical care, domestic violence counseling, financial management services, alcohol recovery support, stress management services, nutritional guidance, and arrangements for visitation. To ensure the case plan is more than a paper plan, the court must examine whether the agency has provided the services the plan requires. Limited resources can affect the availability of these services, however. Id. at 345-6 (Footnote references omitted)

The "Vermont Juvenile Law and Practice Manuel" discusses how the Court considered the requirement of the reasonable effort determination as follows:

> "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." See the "Vermont Juvenile Law and Practice Manuel" (2010) on line, p. 118 under "Reasonable Efforts" on the Defender General's website.

Role of the Attorney

According to the comment to ABA Model Rule 5 with regards to taking protective action, the attorney for the child may consult with family members, and consult with support groups, and other individuals or entities that have the ability to protect the client. This must be done while respecting

the confidentiality of the attorney/client relationship with respect to the juvenile. The attorney cannot disclose the private conversations which he/she had with the juvenile with anyone, not even that juvenile's parents. The lack of parent-child privilege may need to be explained to all parties to insure that the attorneys conversation with the juvenile remain confidential by excluding parents (and any other third parties) from this conversation.

Taking guidance from the National Juvenile Defender Center's (NJDC) Revised Standards of Practice for Juvenile Defense, Standard 2.5 suggests that developing a relationship with the parents may give the attorney a better understanding of the juvenile. But the attorney may not permit any third party (including the parent and GAL appointed for the juvenile) to interfere with their assessment of the case. Nor shall the attorney substitute a third party's wishes for those of the client. Standard 2.5 c states further that "When a third party, including a parent, is trying to direct the representation of the client, counsel should inform that person of counsel's legal obligation to represent only the expressed interests of the client. In the event of a disagreement, counsel is required to exclusively abide by the wishes of the client."

In Standard 6.3 of the NJDC Revised Standards, the development of disposition plan and preparing the client for the hearing is addressed. Sub category f suggests that "Counsel should confer, when appropriate, with the client's parents to explain the disposition process and inquire about the parents' willingness to support the client's proposed disposition. Counsel must ensure that parents understand their role in this process."

While advocating zealously for the juvenile's expressed interests the attorney must prevent the parent from controlling the disposition planning. If the parent cannot be convinced to be supportive of the juvenile's expressed wishes, the attorney "should attempt to limit the parent's negative effect …by limiting the parent's role in the proceeding as much as possible."

Role of the Guardian ad Litem (GAL)

Generally, The Guardian ad Litem acts to advocate for the child to make certain of continued prioritization of his or her best interests and rights throughout the child's involvement in the court process. This includes meeting with the child, and the child's parents, custodian, or legal guardian.

The GAL must maintain a confidential file containing notes and information gathered in the case. This information helps the GAL determine what will be in the child's best interest, and the GAL should report identified needs to the attorney. The GAL should contact the attorney for the child with any information indicating departure from court orders that could require early court review. Arguably this includes information regarding whether reasonable efforts are being made by DCF to pursue reunification and provide the services necessary.

Further information on the Role of the GAL and the Attorney may be found online (p. 134) in the Vermont Juvenile Law and Practice Manual under Miscellaneous Practice Considerations on The Defender General's website.

Youth Participation in Court Hearings

In the spring of 2013 a survey of transition age youth (age 15+) by the Vermont Court Improvement Program found that 71% of the 73 respondents (of whom 74% were in

DCF custody) often or usually attend court hearings, and that 18% of those respondents sometimes attend court hearings.

By statute V.S.A. 33 § 5307(c)(1) juveniles over the age of ten are required to attend the Temporary Care Hearing, unless, for good cause shown, the Court waives this requirement.

In the recent survey the top reasons for not attending Court hearings were not knowing about the hearings and/or not wanting to miss school or work (27%) followed by feeling that the hearings are unpleasant, and/or not wanting to miss sports or another after school activity, and/or feeling their input is not valued (23%).

In one county improving the quality of these hearings is being explored by possibly offering to schedule them to fit the juvenile's schedule, and sending the youth a friendly notice of the court hearing. Additionally they may increase the time spent for a permanency hearing from 15 minutes to 30 minutes.

As the juvenile's attorney, you are responsible for preparing the juvenile for the hearing and 75% of those youth most recently surveyed answered that it was their attorney who prepared them for the hearing. But others are also involved. The social worker prepared 55% of those youth respondents, parents accounted for 27%, and the GAL was noted by 43% of those youth respondents as being the person who prepared them for the hearing.

Of those 78% of respondents who had a permanency hearing, 81% attended their hearing. But only 69% of all the respondents felt that their input was valued by their attorney, with 13% answering no to this question and 19% answering that they didn't know. Fair enough, how could they know how much the attorney valued their input?