

Juvenile Defender Newsletter

Summer 2021

Psychologists as Expert Witnesses: What Family Defenders Need to Know.....	1
Open Adoptions and Outcomes for Kids.....	3
The COVID-19 Pandemic, Reasonable Efforts, and TPR: What Family Defense Attorneys Need to Know.....	5

Psychologists as Expert Witnesses: What Family Defenders Need to Know

Attorneys representing children and parents often retain the services of psychologists to evaluate clients and provide the court with expert testimony. Psychologists can help the court better understand your client’s strengths, needs, and prognosis. Many attorneys have questions about the best use of psychologists as expert witnesses. Will a psychologist help this client’s case? Can hiring a psychologist hurt the client’s case? How do you know that you are choosing the right expert? What ethical obligations must a psychologist follow, and do these obligations conflict with your ethical obligations as an attorney? These are some of the questions this article will answer.

When should I consider hiring a psychologist in a juvenile case?

Attorneys representing parents in a CHINS proceeding may want to consider hiring a psychologist to conduct a family forensic evaluation to determine the level of current risk and prospective parenting ability of their clients. These types of evaluations can be useful at merits and in securing the return of custody to a client where the perpetrator is unknown. For example, when only one parent could have caused the injury, but the child remains in DCF custody due to uncertainty about which parent hurt the child, a family forensic assessment can give the court the confidence it needs to discharge custody of the child.

Psychological assessments of parents can also help the court understand and assess present and prospective parenting abilities to secure a discharge of custody, contest a disposition plan, or contest a TPR.

Psychologists can also diagnose psychiatric and developmental disabilities, thereby qualifying the parent for “reasonable accommodations” pursuant to the Americans with Disabilities Act. This in turn can assist the parent’s attorney in securing appropriate services and accommodations to facilitate reunification.

Attorneys representing children may consider retaining a psychologist to challenge a proposed restrictive or otherwise inappropriate placement or obtain necessary

This newsletter is made possible through the Vermont Court Improvement Program with federal funding from the U.S. Administration on Children and Families. This newsletter is intended to provide information and practice pointers for attorneys representing children, youth, and parents in juvenile court proceedings. Written and edited by Kerrie Johnson.

Kerrie is a juvenile defense attorney in Montpelier, Vermont. Please send questions and suggestions to kerrie.johnson@vermont.gov.

services for the client. Under a recent decision by the Vermont Supreme Court, expert testimony is needed to prove that a child needs involuntary treatment in a locked, out-of-state facility.¹ A psychologist may be able to render an opinion on whether your client can be served in the community or a less restrictive facility than DCF is proposing.

How do I know that I'm choosing the right psychologist?

Choosing the wrong psychologist wastes time and money, and it will not help your client. Soliciting recommendations from other attorneys is a good place to start. Once you have a few possibilities in mind, review their CVs carefully to determine whether the psychologist's education and experience matches your client's needs. You can also ask prospective experts to explain how they would conduct a hypothetical evaluation to get a sense of how they arrive at their conclusions. Ask questions up front to assess whether the psychologist has expertise and experience in conducting the type of evaluation you are seeking and whether retaining the psychologist is likely to improve the outcome for your client.

You should also look up your prospective expert on the Vermont Office of Professional Regulation's (OPR) website.² The website will tell you whether your expert is licensed to practice in Vermont, for how long he or she has been licensed, and whether there are any pending charges of unprofessional conduct (complaints are not public information unless they result in charges of professional misconduct). If you

find a disposed disciplinary action, you can read the disposition on the OPR website. If the case is still pending, you will need to make a public records request to get the information.

What ethical obligations do psychologists have, and do they conflict with my obligations to my client?

In addition to choosing the right psychologist, it is also helpful to know a bit about the ethical rules and standards of practice that apply to them. The ethical rules for psychologists can be found in the American Psychological Association's *Ethical Principles of Psychologists and Code of Conduct*.³ The ethics code is extensive and cannot be fully summarized within the scope of this article. However, there are several rules that govern the provision of assessments that attorneys should be aware of. Key ethical obligations for psychologists performing assessments include:

- Practicing within the scope of the psychologist's competence. For example, a school psychologist should not hold herself out as a forensic psychologist or conduct forensic evaluations unless she is receiving supervision from a forensic psychologist or has gained sufficient expertise and experience in forensic psychology to practice competently.
- A psychologist's findings, opinion, or testimony must be based on sufficient information and must be

¹ *In re S.R.*, 2021 VT 21, ¶ 29, 253 A.3d 907, 915.

² A link to the website can be found here: <https://sos.vermont.gov/opr/find-a-professional/>

³ <https://www.apa.org/ethics/code>

the product of reliable and properly applied evaluation methods.

- Psychologists must use tests and assessment instruments that are valid, reliable, and indicated for use on the person being tested or else, they must clearly state the limitations of the test results. For example, it would be inappropriate to use an instrument designed to measure an adult's risk to reoffend sexually on a juvenile without clearly indicating that the test has not been determined to be a valid and reliable measure of sexual recidivism in juveniles. Likewise, it would be inappropriate for a psychologist to rely on an outdated test result or a test that has been determined invalid.
- In general, a psychologist should not render an opinion about a person he or she has not personally examined. *See In re Hamel*, Board of Psychological Examiners, Docket No. 2012-637 (Oct. 10, 2014) (disciplining a psychologist for rendering an opinion on the fitness of a parent she had never met). For example, in a CHINS proceeding, it would be inappropriate for an expert to opine that a father was unfit after meeting only with the child.

It is also important to remember that when you retain an expert, any work product produced by that expert is privileged. It is up to your client to decide whether to release the results of an independent family forensic, psychological, or psychosexual evaluation. Do not allow other parties (or the court) to pressure you into releasing confidential information. Additionally, you are under no obligation to tell DCF or the State why you have retained an expert

unless and until you decide to use that expert's opinion in court. While most psychologists understand attorney-client privilege, attorneys have an ethical obligation to ensure that any experts they use maintain the client's confidentiality.

A final word of caution - psychologists *are* mandated reporters. They must report suspected child maltreatment, abuse or exploitation of vulnerable adults, and any credible threat to harm another person. They must also take protective action whenever someone makes a credible threat of self-harm. You should ensure that your client is aware of the psychologist's obligations in these areas in advance of any meeting.

In summary, psychologists can provide valuable information about your client to you and to the court. You should maintain control of the information obtained by your expert and decide whether to use it in court. It is important to look for a psychologist with the appropriate training and expertise and to ensure that the psychologist does not have any prior or pending charges of unprofessional conduct that could undermine credibility or hurt your client. It is also beneficial to familiarize yourself with the ethical rules governing the practice of psychology so that you can better evaluate the quality of your expert's work or effectively cross-examine an opposing party's expert.

Open Adoptions and Outcomes for Kids

Open adoptions are becoming increasingly common in the United States. The term "open adoption" means an adoption where the child maintains some level of contact with one or more members of his or her

birth family. Currently, more than half of all domestic adoptions (including private adoptions) are open. Despite the growing popularity of open adoptions, many professionals and adoptive parents remain concerned about whether such arrangements could place adopted children at risk.

Research suggests that on balance, open adoptions tend to benefit adopted children. For children who are adopted in the latency period of childhood (ages 6-11), ongoing birth family contact can reduce the feelings of grief, abandonment, and rejection typical of closed adoptions.⁴ In addition to mitigating feelings of rejection and abandonment, ongoing birth family contact helps children form a coherent identity and improves self-esteem.⁵

Guidance from the Children's Bureau, which is responsible for administering federal programs that support state child welfare services, strongly supports the proposition that the benefits of maintaining ongoing relationships between adopted children and their natural parents usually substantially outweigh the costs. According to the Children's Bureau, "Children and youth who are adopted need to maintain relationships with their birth families, previous caregivers, or other important

connections, and it is vital that their parents support them in doing so. Nurturing these relationships is in the best interests of the child, as ongoing contact with birth family members may minimize or resolve his or her feelings of grief and loss due to separation."⁶

Furthermore, post-adoption contact with birth parents has been shown to decrease the frequency of behavioral problems in adolescence, help adoptive parents develop a closer relationship with the adopted child, and help adoptive parents develop and maintain empathy for both the child and the birth parents.⁷ On the contrary, adolescents who are dissatisfied with the amount or quality of contact they have with their birth families tend to view their adoption more negatively.⁸ Additional benefits of ongoing relationships between adopted children and their birth parents include: preserving the child's connections to her cultural and ethnic heritage; maintaining access to important genetic and medical information; helping the adopted child make sense out of why she was removed from her parents; ensuring that the adopted child has a realistic view of her birth parents that neither idealizes nor denigrates; and increasing the number of supportive adults in the child's life.⁹

⁴ Ellen Singer, *Children and Adoption: The School Age Years (6-11)*, The Center for Adoption Support and Education, 1 (2016) available at <https://adoptionsupport.org/wp-content/uploads/2015/12/02-The-School-Age-Years.pdf>.

⁵ Debbie Riley and Ellen Singer, *Connections Matter: Relationships with Birth Families are Important for Foster, Adopted Children*, The Imprint: Youth and Family News, (August 2, 2019) <https://imprintnews.org/adoption/connections-matter-relationships-with-birth-families-are-important-for-foster-adopted-children/36174>.

⁶ The Children's Bureau, *Helping Children and Youth Maintain Relationships with Birth Families*, (Sept. 2019) available at https://www.childwelfare.gov/pubPDFs/bulletins_maintainrelationships.pdf.

⁷ *Id.* at 3.

⁸ *Id.*

⁹ Children's Bureau, *Helping Your Adopted Children Maintain Important Relationships with Family*, 2 (Sept. 2019) available at https://www.childwelfare.gov/pubPDFs/factsheets_families_maintainrelationships.pdf.

In practice, we often see adopted children seek out relationships with their birth parents on social media during their adolescence, often surreptitiously. After many years without contact, these children tend to have unrealistic expectations about their birth parents, and the secrecy surrounding the contact means that the adopted child does not receive any support in navigating their relationship with their birth parent. This dynamic can also cause problems in the adoptive family and even jeopardize placement stability.

Adoptees who do not maintain a relationship with their birth families are likely to experience a profound sense of loss. In the words of one commentator, “[i]t is likely that few legislators or jurists realize that psychological research indicates that the loss experienced by an adoptee ‘is more pervasive, less socially recognized, and more profound than that of death or divorce.’”¹⁰ Sadly, it is rare for therapists and other professionals working with an adopted child to recognize, let alone address, the profundity of that loss.

The impact of the permanent loss of custody of a child on the birth parent is also profound. A Canadian study demonstrated that mothers whose children are removed by child protective services had significantly higher rates of suicide following removal.¹¹

¹⁰ Shirley Darby Howell, *Adoption: When Psychology and Law Collide*, 28 *Hamline L. Rev.* 29, 43 (2005) quoting Kathleen Caswell, *Opening the Door to the Past: Recognizing the Privacy Rights of Adult Adoptees and Birthparents in California’s Sealed Adoption Records While Facilitating the Quest for Personal Origin and Belonging*, 32 *Golden Gate Univ. L. Rev.* 271, 310 (2002).

¹¹ Elizabeth Wall-Wieler, et al, *Suicide Attempts and Completions among Mothers Whose Children Were*

On the other hand, parents who have ongoing contact with their children following termination of parental rights cope better with their feelings of loss, sadness, and grief.¹² The suicide of a birth parent following TPR is absolutely devastating to the child or children left behind and dramatically complicates the grief experienced by the surviving children.

Given the benefits of open adoption, what can be done to manage the risks? Strategies include engaging the assistance of a professional to help establish or mediate the relationship between the adoptive family and the birth parents, prioritizing the child’s voice in contact, and limiting contact to monitored virtual, telephonic, or written contact if the contact threatens the safety or emotional wellbeing of the child. The Children’s Bureau provides an excellent list of resources for adoptive families and professionals looking for guidance on how to facilitate successful open adoptions. The resource list is available at:

<https://www.childwelfare.gov/topics/adoptive/n/adoptive/before-adoption/openness/>.

The COVID-19 Pandemic, Reasonable Efforts, and TPR: What Family Defense Attorneys Need to Know

Taken into Care by Child Protection Services: A Cohort Study Using Linkable Administrative Data, 63(3) *Canadian J Psychiatry*, 170-177 (Mar. 2018).

¹² Children’s Bureau, *Helping Your Adopted Children Maintain Important Relationships with Family*, 3 (Sept. 2019) available at https://www.childwelfare.gov/pubPDFs/factsheets_families_maintainrelationships.pdf.

As court operations enter a “new normal,” termination of parental rights proceedings have resumed around Vermont.

Undoubtedly, the COVID-19 pandemic has profoundly affected service provision to children and parents in CHINS cases. In many instances, inability to access services has made it harder for families to reunify. For example, repeated or prolonged suspension of in-person contact has resulted in disrupted parent-child relationships and a lack of progression to unsupervised or overnight visits. Similarly, the pandemic limited access to vital services necessary to many reunification plans, including mental health counseling, substance abuse treatment, parent education, home visiting services, transportation, medical care, and support groups. Anyone who has tried to find a therapist during this pandemic knows how increased demand has made timely access to care a challenge. Since most parents are expected to have increasing levels of contact with their children in addition to participating in a variety of services, it is not difficult to see how the pandemic could delay reunification.

As courts conduct increasing numbers of TPR hearings, judges, attorneys, and DCF workers will need to grapple with whether, and to what extent, timeframes for reunification should be extended to account for the effects of the pandemic. These decisions will have profound consequences for children and their parents. As attorneys representing children and parents, we are already well aware of the tension that exists between the family members’ constitutional right to remain intact whenever that can be accomplished safely and the child’s statutory right to timely permanency. The pandemic only increases the tension

between these sometimes-competing ideals. However, existing case law, guidance from the Children’s Bureau, and emerging research on the efficacy of remote parent-child contact all suggest that reunification timeframes need to be extended to account for the pandemic.

Vermont case law likely prohibits courts from terminating parental rights when delays in reunification are attributable to the pandemic as opposed to the negligence or inaction of the parent. Once a disposition plan calling for reunification has been approved, the court cannot terminate parental rights unless DCF proves that the parent’s progress has “stagnated,” and that termination is in the child’s best interests. Stagnation cannot be found when it occurs because of factors outside the parent’s control. *In re S.R.*, 157 Vt. 417, 421–22, 599 A.2d 364, 367 (1991); *In re D.M.*, 162 Vt. 33, 38, 641 A.2d 774, 777 (1994). Undoubtedly, the pandemic, with its myriad effects on visits and access to services, is a circumstance beyond any parent’s control.

Attorneys should take every opportunity to make the court aware of the pandemic’s negative impact on our clients. The fact that the pandemic shuttered DCF offices, foreclosed access to service providers, and cut off in-person parent child contact for many families is absolutely relevant to the question of whether a parent’s lack of progress is due to factors within his or her control. The inability of DCF to offer the same level of services during the pandemic also implicates the agency’s duty to make reasonable efforts toward reunification whenever that is the disposition goal.

Recognizing these as potential issues, the Children’s Bureau issued a letter to judicial and child welfare leadership explaining that inability to access treatment or services due to pandemic-related provider unavailability “should not be interpreted as a lack of parental compliance,” “might indicate an agency’s failure to make reasonable efforts to reunify,” and “may constitute a compelling reason not to file a petition to terminate parental rights under §475(5)(E) of the [Social Security] Act” regardless of ASFA timeframes.¹³ This makes sense - the pandemic was a historic event that upended many aspects of life as we know it. Rigid adherence to ASFA timeframes, without considering the individual circumstances of each case is likely to result in unnecessary TPRs.

At least equally as problematic as the limited access to treatment and services is the lack of access to in-person parent-child contact and Family Time Coaching. Virtual visits have well-documented drawbacks. Certain activities cannot be performed in a virtual visit, physical contact cannot occur, and parents lose out on opportunities to practice important skills in a real-world setting.¹⁴ Exclusive reliance on virtual parent-child contact “can limit the birth parent’s ability to develop and strengthen attunement to his or her child’s needs and provide for the child’s care, as well as

interfere with the parent-child attachment bond.”¹⁵ Virtual visits also “make it more difficult for social workers to gauge the parent’s progress in achieving reunification goals.”¹⁶ While remote contact is better than no contact, the success of remote visits with young children or those with disabilities depends on the availability of a skilled facilitator.¹⁷ Reliance on virtual visits also raises “questions about reunification timeframes and if they are achievable when only remote visits are offered.”¹⁸ It seems obvious that virtual visits would not facilitate reunification as effectively or as quickly as in-person contact, and when the child is an infant, remote contact likely fails to facilitate reunification entirely. With the pandemic far from over, families may continue to face periodic involuntary cessations of in-person contact, especially as school resumes.

What can attorneys do to protect their clients’ rights and prevent unnecessary TPRs? Whether you are representing a child or a parent, the following strategies can help ensure that your clients receive a fair chance at reunification:

1. Litigate visitation issues early and often. While it may be tempting to agree to visitation that occurs “at the discretion of DCF” or “by agreement of the parties,” such an agreement

¹³ U.S. Dep’t of Human Svs., Admin. for Children and Families, 3, (Mar. 27, 2020) https://www.acf.hhs.gov/sites/default/files/documents/cb/covid_19_childlegalandjudicial.pdf.

¹⁴ Jacqueline Singer and David Brodzinsky, *Virtual parent-child visitation in support of family reunification in the time of COVID-19*, 2(3) *Developmental Child Welfare* 153, 162 (2020).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ American Bar Association and National Council of Juvenile and Family Court Judges, *Supporting Remote Family Time During the Pandemic and Beyond: The Judge’s Role*, 3 (April 2021) available at https://www.americanbar.org/content/dam/aba/administrative/child_law/remote-family-time.pdf.

¹⁸ *Id.*

affords your client little protection should DCF or its contractors decide that in-person contact is no longer “safe.” Remember that DCF uses a standardized tool to guide reunification decisions and that tool assigns significant weight to the frequency and quality of parent-child contact, including whether parents are having unsupervised and overnight contact with their children. Therefore, it is essential to advocate for your client to have unsupervised, face-to-face contact.

2. Raise reasonable efforts. Even though the Vermont Supreme Court has held that parental rights can be terminated regardless of whether DCF made reasonable efforts, it is still useful to raise the issue when warranted. DCF must make reasonable efforts to prevent removal, and when the disposition goal is reunification - to return the child to the parents. Attorneys should consider raising reasonable efforts at temporary care and at permanency to ensure that the court is aware of any issues affecting service provision or access. For example, once a child is in custody, DCF’s failure to support parent child contact clearly implicates its obligation to make reasonable efforts. Therefore, if DCF refuses to offer a client Family Time Coaching while also asserting parenting deficits, that is a reasonable efforts issue.
3. Preserve the issues for appellate review. At TPR, make sure that you introduce evidence about the impact of the pandemic on case planning and service provision. Has the

pandemic resulted in staffing issues that have limited the availability of Family Time Coaching? Was your client placed on a lengthy waiting list for an individual therapist or substance abuse counselor due to above-average demand? Did the DCF worker conduct a single home visit with your client within the past year? Has the DCF worker ever visited the child in the current foster home? Was the child less engaged during virtual visits than during in-person visits? Did technological problems make virtual visits difficult or inconsistent? Were in-person visits missed because of COVID? Did the child’s placement disrupt because of issues related to the pandemic? Did the foster parents resist in-person visits with the parent due to concerns about COVID? These types of questions demonstrate to the court the impact of the pandemic on reunification efforts and ensure that the issue is preserved for appellate review.

PRIOR EDITIONS OF THE JUVENILE DEFENDER NEWSLETTER CAN BE FOUND AT:

[HTTP://DEFGEN.VERMONT.GOV/CONTENT/JUVENILE-DEFENDER-NEWSLETTERS](http://defgen.vermont.gov/content/juvenile-defender-newsletters)

