# Juvenile Defender Newsletter

## Winter 2021

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## Groundbreaking Victory for Children Facing Out of State Institutionalization

DCF can no longer send children to out of state institutions against their will without presenting the court with expert testimony from a mental health professional that demonstrates why out of state institutionalization is necessary. The Vermont Supreme Court's decision in *In re S.R.* likely represents one of the most important children's rights cases in recent history. 2020 VT 287.

The case involved a sixteen-year-old boy who was sent to a locked out of state program. The juvenile, S.R., objected to the proposed placement and received a contested hearing pursuant to 33 V.S.A. § 5926. Under § 5926, the State must prove that: 1) no equivalent facilities exist in Vermont; 2) the out of state placement is in the child's best interests; and 3) the out of state placement will not cause undue hardship. The State did not offer any expert testimony or other evidence demonstrating the necessity of involuntary out of state institutionalization. Instead, it offered only the testimony of a "client placement specialist" employed by DCF.

The Court determined that when "the State seeks to place an adolescent out of state in a locked psychiatric residential treatment facility on a long-term basis, and the child objects to such a placement, the State must present expert evidence to support its request." *S.R.*, 2020 VT 287, ¶ 19. According to the Court, the testimony of DCF's client placement specialists is wholly insufficient, and the decision to place in an out of state residential program must be based on testimony from a "qualified mental health professional" sufficient to demonstrate the proposed level of care is necessary. *Id*. at ¶ 31.

Citing to *Parham v. J. R.*, 442 U.S. 584 (1979), the Court observed that children have a constitutionally protected liberty interest in avoiding involuntary medical treatment and overly restrictive placements. *Id*. at ¶ 24. Under *Parham*, these interests can only be protected when the placement is based on the professional medical judgment of a physician, as opposed to the wishes or opinions of the child's parents. The Court further declared that a child's interest in avoiding involuntary mental health treatment and overly restrictive placements increases as the child ages. *Id*. at ¶ 26. While

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the Court did not rest its holding on the Due Process Clause, it stated unequivocally that a "minor's substantial liberty interest, which calls for more robust protections as the minor approaches adulthood, necessarily informs the best interests analysis." *Id*. at ¶ 23.

This represents a significant shift from the usual deference courts afford DCF placement decisions, regardless of the restrictiveness of the facility. The Court found little difference between hospitals and residential programs in terms of the curtailment of liberty involved, observing that "the difference between a hospital and a psychiatric residential treatment facility from the perspective of an adolescent's interest in autonomy is only a matter of degree." ¶ 28.

In addition to the protections afforded by the Due Process Clause, state law also offers protection for people facing involuntary mental health treatment. Those protections are detailed in Title 18 of the Vermont Statutes. The Court observed that "nothing in Vermont's statutes relating to involuntary mental health treatment indicates that the statutes do not apply to minors." *Id*. at ¶ 27. The lower courts have repeatedly rejected the argument that Title 18 applies to children in DCF custody, but the Court's decision in signals that this may have been misguided.

Under the statutes governing involuntary mental health treatment, the State has the burden of proof, by clear and convincing evidence, that: 1) the person is a danger to self or others because of a mental disease or defect (18 V.S.A. § 7101(17)); and the proposed treatment setting is the least restrictive environment. 18 V.S.A. § 7504 *et seq*.; 18 V.S.A. § 7611 *et seq* (these statutes build in several other important procedural protections as well). The reason the Court gave for not providing relief on Title 18 grounds was the fact that appellate counsel did not raise the issue until her reply brief. This indicates that the Court may be inclined to grant relief on these grounds in the future. Since the process outlined in Title 18 is superior to the process afforded through Title 33 (33 V.S.A. § 5906 – for delinquent children facing out of state institutionalization and 33 V.S.A. § 5926 – for neglected and unmanageable children), raising this issue may provide your client with additional process and a superior remedy.

Even though it did not rest its holding on either constitutional or Title 18 grounds, the Court did declare that it could not "ignore this constitutional and statutory backdrop, and the competing values it seeks to balance." *Id*. at ¶ 29. Thus, attorneys should raise both arguments in any contested hearing involving a restrictive out of state placement or involuntary mental health treatment.

The Court was also explicit in dismissing the Case Review Committee (CRC) as an appropriate substitute for expert medical review of the child's needs and the necessity of a particular level of care. DCF and the State frequently argue that the CRC is a decision-making body invested with both the authority and the expertise to decide what level of care is appropriate for children in DCF custody (i.e. unlocked residential, locked residential, or psychiatric hospital), as well as the authority to determine which out of state facility is the best match for the child's needs. Courts have rarely questioned these assertions even though the CRC has no statutory authority to make decisions about anything other than funding. *See* 33 V.S.A. § 4301 et seq.

The Court specifically noted that "there was no evidence that the [CRC] included psychologists or psychiatrists," who were qualified to "diagnose juvenile mental illness or propose a treatment plan." *Id*. at ¶ 33. The Court further faulted DCF for failing to obtain all of S.R.'s relevant medical records, observing that it was "not clear what information the Committee used to make its recommendation." *Id*. Finally, and perhaps most importantly, the Court determined that nothing in the record suggested that anyone from the CRC had met with S.R. personally.

Nodding to the concept of "procedural justice" for children facing an involuntary institutional placement, the Court wrote that expert testimony was "necessary to ensure that the child, particularly an adolescent such as S.R., believes that he or she is being listened to and that his or her opinion is respected and counts." *Id*. at ¶ 31.

The Court also dismissed the State's arguments that 33 V.S.A. § 5926 did not require any additional evidence to support S.R.'s out of state placement beyond what was presented to the Family Division. According to the Court: "We recognize that § 5926 does not expressly reference the mental health statutes or require any particular showing beyond 'best interest' when placing a child in a secure psychiatric facility in another state against the child's wishes. This is not entirely surprising, because the statute governs not just placements in locked psychiatric residential treatment facilities but all out-of-state juvenile placements. Such placements could include treatment, rehabilitative, or educational programs that do not involve the curtailment of liberty associated with involuntary mental health treatment. In those cases, psychiatric assessments or expert testimony may not necessarily be required for DCF to meet its burden of demonstrating that the out-of-state placement is in a child's best interest." *Id*. at ¶ 30.

Importantly, the Court dismissed the often-repeated idea that a child's negative or problematic behaviors in less-restrictive placements are, without more, sufficient to justify increasingly restrictive placements. According to the Court: "With respect to S.R.' s escalating behaviors, we do not question that the concerning behaviors may have warranted short-term steps to stabilize and further evaluate S.R. Some of these behaviors, if proven, might well be critical factors supporting an expert 's opinion that S.R. requires long-term inpatient psychiatric treatment. But in the absence of expert analysis, we cannot agree that the behaviors, by themselves, are sufficient to establish that *long term treatment* in a secure psychiatric facility is warranted." *Id*. at ¶ 34 (emphasis in original).

The decision is worth a close read for attorneys, Family Division judges, and guardians *ad litem* because it is a significant departure from the deference frequently afforded to DCF in making placement decisions, and has potentially far-reaching implications for all out of state institutional placements moving forward.

Attorneys representing children and parents in contested out of state placement hearings should consider the following practice pointers:

- Investigate the proposed out-of-state placement (feel free to contact the Office of the Juvenile Defender) in advance of advising your client to consent to out-of-state placement.
- Do not be afraid to contest out-of-state residential placements – these are winnable hearings.

- Obtain your own expert opinion for any client who opposes out-of-state placement.
- In any case where involuntary mental health treatment is contemplated, regardless of the restrictiveness of the program, argue that the State needs to prove that the child meets the standards for involuntary treatment or hospitalization outlined in Title 18. It is very important to preserve this argument for appellate review, and courts may be persuaded by the dicta in *S.R.*
- Argue that under *Parham v. J. R.*, 442 U.S. 584 (1979), children have a substantial liberty interest under the Due Process Clause in avoiding unnecessary confinement and treatment. Again, it is vital to preserve this argument for appellate review.
- Insist on live testimony and an opportunity to cross-examine DCF's expert witness – reports or medical records are not sufficient to meet the State's "clear and convincing" burden of proof.
- Challenge any attempt by the State to use its employees as "expert witnesses," and challenge any attempt to argue that the CRC's opinion is a substitute for the court's judgment.
- Insist that under *Parham*, the expert opinion must be independent from DCF and the facility that is to serve as the proposed placement for the child.
- Challenge any witness who works for the proposed treatment facility as biased or unable to properly evaluate the child due to lack of holistic information, lack of Vermont licensure (to diagnose in Vermont), and inability to meet the child in person.
- *Parham* requires that a "physician's independent examination and medical judgment" form the basis for involuntary hospitalization. Because *Parham* involved parents trying to involuntarily commit their child, argue that when DCF is in the role of parent, it cannot also play the role of "independent" medical expert. Also, because *Parham* specifically contemplates a medical evaluation by a physician, insist that DCF's expert be a psychiatrist.
- Argue that because Title 18 also requires evaluation by a psychiatrist, DCF's expert must be a psychiatrist.

## The Human Services Board, Collateral Estoppel, and Confidentiality of Juvenile Judicial Proceedings Records

Another important decision limits the Human Services Board's ability to access juvenile court records without a court order and clarifies when the doctrine of collateral estoppel prohibits a parent who has stipulated to the merits in a CHINS proceeding from challenging a related DCF substantiation. DCF commonly precludes parents who have stipulated to merits from using the administrative process to challenge substantiations when there is a merits stipulation or adjudication regarding the same allegation. The Court's decision on this issue is likely to substantially curtail DCF's ability to preclude parents from accessing administrative due process remedies in substantiation cases because of a merits stipulation or adjudication.

According to the Vermont Supreme Court, the Human Services Board needs a court order to review records of juvenile judicial proceedings. Likewise, a merits stipulation in a related CHINS case does not necessarily collaterally estop a petitioner from challenging his or her substantiation before the Human Services Board. In its December 2020 decision in *In re H.H.*, 2020 VT 107, the Court reversed a decision by the Human Services Board granting summary judgment to the State in an appeal from a substantiation for risk of harm.

The petitioner in this case was substantiated for placing her children at risk of sexual abuse. The alleged incidents occurred in a home where petitioner, her children, her boyfriend, the children's father, and several other children and adults were residing. DCF received a report of concern alleging that an adult in the home had inappropriately touched one of the petitioner's children. DCF filed a CHINS A and a CHINS B petition. The CHINS A petition was dismissed for lack of evidence, and the parents entered a stipulation to the CHINS B petition. The stipulation stated that the parents had unknowingly allowed the children to have contact with persons who had been substantiated for sexual abuse, had mental health or substance abuse issues, or who had criminal records. The stipulation also acknowledged occasional "insufficient supervision" by the parents, resulting in the children either being inappropriately touched or propositioned by other children in the home. The stipulation referenced a report by a witness indicating that "someone touched [one of the children] in a sexual manner."

The petitioner raised three claims of error on appeal: "(1) the Board erred in basing its summary-judgment decision on the CHINS adjudication because, pursuant to 33 V.S.A. § 5117(b)(1)(F), the documents concerning those proceedings could not be disclosed absent a family-court order; (2) her procedural due process rights were violated by the procedure followed before the hearing officer in obtaining additional information from DCF; and (3) even assuming that the facts supporting the CHINS adjudication were appropriately considered here, that information did not support the application of collateral estoppel." *Id*. at ¶ 14. The Court concluded "that the Board improperly considered confidential family-court documents absent the 'need-to-know' designation required under [33 V.S.A.] § 5117(b)(1)(F)," and reversed and remanded the case.

The Court determined that records of juvenile proceedings are confidential and that none of the statutory exceptions applied to the Human Services Board. This means that DCF must get a court order authorizing the disclosure of records from a CHINS proceeding to the Human Services Board.

Additionally, the Court determined that the CHINS adjudication did not collaterally estop H.H. from litigating the merits of her substantiation. According to the Court, "the key question" was whether "the actual factual or legal question presented in the first action is the same as the question presented in the second." *H.H.*, 2020 VT at ¶ 25 (internal quotations and citations omitted). The Court determined that an allegation of risk of sexual abuse and a CHINS B adjudication based on the petitioner's stipulation did not answer the same "factual or legal question." According to the Court, "[t]he question presented in the CHINS adjudication was whether, at the time the petition was filed, S.H. was 'without proper parental care or subsistence,

education, medical, or other care necessary for ... her well-being.' 33 V.S.A. § 5102(3)(B)." *Id*. The Court added that the statutory language defining when a child is without proper parental care "must be liberally construed to effectuate the law's purpose, which is to provide for the welfare of children." *Id*. at ¶ 26.

According to the Court, the substantiation proceeding posed a "far narrower" question, i.e., whether the report alleging sexual abuse was based on "accurate and reliable information which would lead a reasonable person to believe that petitioner placed six-year-old S.H. at risk of harm for sexual abuse by not protecting her from sexual assault by a male staying in her apartment?" *Id.* at ¶ 27. According to the Court, the answer to that question could not "be found in the court's findings in the CHINS-B adjudication, nor is it necessarily or essentially revealed by that adjudication itself." *Id*. The Court concluded that the stipulation did not prove that the parents had placed their children at risk of sexual abuse because the sexual abuse allegations were unproven, and there was no evidence that the parents were aware that people they were living with had been substantiated for sexually abusing children. *Id*. at ¶ 28.

Thus, the Court determined that the petitioner was not collaterally estopped from challenging the merits of her substantiation. Attorneys hoping to use this decision to assist their clients should keep the following in mind:

- DCF is currently lobbying the Legislature to create an exception allowing the Human Services Board to access DCF records without a court order. It is likely that the bill will pass.
- Clients should be encouraged to appeal administrative substantiation decisions, and attorneys should assist clients whenever possible. Remember that appeals must be filed within ten days of the substantiation decision.
- When a client has been substantiated or may be substantiated for conduct that is also at issue in a CHINS proceeding, it is imperative to craft any stipulation carefully. Avoid admitting to any conduct that could collaterally estop the client from appealing the substantiation. Attorneys should carefully review the definitions of child maltreatment contained in 33 V.S.A. § 4912 before allowing a client to stipulate to the merits.

## Using Minor Guardianships to Facilitate Kinship Placement in CHINS Proceedings

Two recent Vermont Supreme Court decisions clarify the relationship between CHINS proceedings and minor guardianships when the same child or children are the subject of a simultaneous CHINS proceeding in the Family Division and a minor guardianship proceeding in the Probate Division. *In re C.B.*, 2020 VT 80 (Vt. Sept. 25, 2020); *In re A.M.*, 2020 VT 95 (Vt. Oct. 16, 2020). This article summarizes those two decisions and provides strategies for attorneys seeking to use minor guardianship proceedings to facilitate kinship placements.

Minor guardianships can offer a vehicle for facilitating kinship placement and maintaining a client's parental rights, including the right to visitation, but the

Family Division has significant discretion to decide not to adjudicate the minor guardianship and focus on the CHINS petition instead. Unless a voluntary guardianship is adjudicated prior to the filing of a CHINS petition, parents may not be able to avoid the CHINS process.

While DCF is not permitted to facilitate minor guardianships in lieu of filing a CHINS petition, there is no prohibition on parents' attorneys seeking a minor guardianship as an alternative to a CHINS proceeding. *See* 14 V.S.A. § 2634. Federal law requires dependency courts to consider suitable relatives. DCF is required to notify any relatives within 30 days of a child's removal from the home. State law requires DCF to notify the court of the existence of potentially suitable relatives and conduct a suitability assessment on any relatives identified. 33 V.S.A. § 5307(e)(5)(A)-(B). The statute does not specify what efforts, if any, DCF needs to make to identify potentially suitable kinship placements. Instead, the statute merely requires DCF to notify the court and conduct suitability assessment on any potential kinship placement "known to the Department" "who may be appropriate, capable, willing, and available to assume temporary legal custody of the child." *Id*. a § 5307(e)(5)(A). Because it is unclear to what extent DCF must make active efforts to recruit potential kin, there is wide variation between DCF offices in the frequency with which potential kinship care providers are located and utilized. This is unfortunate because placing children with kin has been definitively proven to reduce the trauma associated with removal and increase the chances of a successful reunification.

In *In re C.B.*, 2020 VT 80 (Vt. Sept. 25, 2020), mother stipulated that her child was CHINS after she allowed the child to have contact with the father, who had been accused of perpetrating domestic violence against her. Mother was given a CCO, but the child came into custody when she again allowed contact with the father. Father's parentage was not established at the initial temporary care hearing, and he was added as a party four months after the case was filed. Father was not assigned counsel until five months after he was added as a party. Two months later, Father was incarcerated.

When the State moved to terminate parental rights, the paternal grandmother, who DCF had refused to place with, filed a guardianship petition in the probate court. By statute, the Family Division has the discretion to determine whether and when to address a minor guardianship petition relative to the CHINS petition. 14 V.S.A. § 2624(b)(2)(C) permits the Family Division to immediately transfer the minor guardianship proceeding back to the Probate Division for further proceedings after the CHINS proceeding is resolved or to consolidate the cases and assume jurisdiction to adjudicate the minor guardianship petition. 14 V.S.A. §§ 2621-2633. If the Family Division grants the minor guardianship, it must then transfer the case back to the probate division for monitoring. *Id*. § 2624(b)(2)(D). At that point, the CHINS petition would likely be deemed moot by the Family Division.

The Court ruled that the Family Division has authority to "prioritize the CHINS proceeding and subsequently transfer the minor guardianship proceeding back to the probate division pursuant to § 2624(b)(2)(C)(ii)—either before or after finally resolving the CHINS case." *C.B.*, 2020 VT at ¶ 22. In *C.B.*, the Family Division declined to take jurisdiction of the

guardianship, instead leaving it with the Probate Division to be adjudicated after the termination petition. On appeal, Father argued that it was error for the Family Division to refuse to act on the guardianship petition prior to the termination of Father's parental rights. The Court held that the Family division "has the discretion to determine whether and when to address the minor guardianship petition relative to the CHINS petition." *Id*.

The facts of *In re A.M.*, 2020 VT 95 differ from those in *C.B.* because the maternal aunt and uncle filed a guardianship petition before the termination of parental rights petition in that case, and the Family Division decided to assume jurisdiction over the guardianship petition. The proposed guardians were not given party status in the CHINS proceeding, but the court allowed them to attend certain hearings. After DCF filed the termination petition, the Family Division issued an entry order stating that it would first consider whether to terminate parental rights, and if rights were terminated, it would deem the guardianship petition moot because the parents' consent was no longer required. No one objected to the entry order. The Family Division terminated parental rights and did not adjudicate the guardianship petition.

The Court, relying on its holding in *C.B.*, found no abuse of discretion. Citing to 14 V.S.A. § 2625, the Court determined that the Family Division had authority to prioritize the termination of parental rights over adjudicating the guardianship petition, especially given the absence of an objection by either parent. The Court also determined that the parents lacked standing to raise claims on behalf of the maternal aunt and uncle.

Because the Family Division has such broad discretion to ignore a guardianship petition that is filed while a CHINS petition is pending, it is best to utilize a variety of approaches to ensure that children are placed with kin. Some strategies include:

- Asking your client to list potential kinship placement resources before the first temporary care hearing starts and asking the court to order DCF to conduct suitability assessments on every identified person. Remember that kinship providers can include relatives and "other persons known to the child," like family friends.
- If DCF refuses to place with an identified kinship provider, move to transfer custody to that person at temporary care or disposition.
- Identifying kin early in the process is essential because courts (and DCF) are less willing to move a child who has adjusted to a non-kinship foster home, especially if the child is young.
- If the proposed kinship provider is unwilling to assume custody or the court is unwilling to consider transferring custody to that person, use DCF's administrative grievance process to review the decision of an individual social worker or supervisor not to place the child in a prospective kinship foster home. The process for administrative complaints is detailed on DCF's website.
- Kinship providers who wish to become DCF foster parents (as opposed to assuming custody) should fill out an application for a foster care license as soon as possible.

Attorney Sarah Star, who litigated the appeals in *C.B.* and *A.M.*, offers the following practice pointers for attorneys considering using minor guardianships to facilitate placement with kin:

- A minor guardianship brought by family or friends of the child in the Probate Division can moot the need for CHINS or TPR proceedings (subject to the Family Division's broad authority to reject or ignore the guardianship petition).
- The process for adjudicating concurrent guardianship and CHINS cases is outlined in detail in 14 V.S.A. § 2624. Attorneys should review the statute carefully.
- If a minor guardianship is desired, then it is best for the proposed guardians to file as soon as possible. It is never "too late" to file until an adoption occurs, but the family will be disadvantaged because the court can refuse to adjudicate the guardianship, particularly if the child is in a pre-adoptive home and moving is not clearly in the child's best interests.
- If the minor guardianship is transferred to the Family Division under 14 V.S.A. § 2624, the attorneys for the parents should ask for a hearing on it as soon as possible. The parents should also ask the court to consider guardianship and permanent guardianship as dispositional alternatives at either initial disposition or at a modification/TPR hearing.
- DCF placement discretion does not apply to guardianships. The court can order a guardianship to family members that DCF is unwilling to license as foster parents, although the court will consider DCF's position and information.
- Only the Family Division can order a permanent guardianship, so you must seek permanent guardianship in the Family Division, even if a concurrent petition for a minor guardianship is pending in the Probate Division.
- Because permanent guardianship can only be ordered if a child has lived with the proposed guardian for six months, you may first need to ask for a regular guardianship or conditional custody order to the proposed guardian. This is another reason to address kinship placement and guardianship issues early in a case.
- At disposition or permanency, you can ask the court to reject a case plan that calls for TPR and request that the court adopt a goal of permanent guardianship instead. If the court reject's DCF's proposed goal, DCF would then have to compile a new case plan describing how to achieve the permanent guardianship.
- There is no statutory preference for adoption over guardianship or vice versa, and there is nothing in statute that prohibits the court from creating a permanent guardianship for a young child (the requirement that the child be at least twelve was removed by the Legislature). Attorneys should consider presenting evidence, including expert testimony, on why guardianship is a better option to keep families connected and to avoid multigenerational trauma. Additionally, there may be important cultural and religious factors that make guardianship with kin preferable to adoption by an unrelated foster parent.

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