

Juvenile Defender Newsletter

Summer 2009

Juvenile Records No Longer Confidential

Adjudications will no longer be confidential records under the new law in certain circumstances.

The life-long consequences of delinquency adjudications make it imperative to litigate and challenge them from the very beginning of the process.

S.13 as enacted amends 33 V.S.A. § 5117(b)(1) to allow the commissioner of corrections access to juvenile delinquency records "if the information would be helpful in preparing a presentence report, in determining placement, or in developing a treatment plan for a person convicted of a "registrable sex offense. 33 V.S.A. § 5117(b)(1)(G)

Also effective July 1, 2009 there is an additional exception to inspection of juvenile records of anyone convicted of a registrable offense. The court in which the person was convicted: a. may inspect its own files and records for the purpose of imposing sentence upon or supervising the person for a registrable offense, and b. shall examine court indices developed under 33 V.S.A. § 5119(e)(2)(A) and if the offender appears on the indices, the court shall unseal any files and records may be unsealed and made available to the commissioner of DOC for the preparation of a PSI, determining placement, or developing a treatment plan. DOC can only use the information relating to adjudications relevant to a sex offense conviction.

Sex Offenses Committed by Juveniles

It is not necessary for all the components required for substantiation to be present in an intake for that intake to be accepted as a report for investigation.

DCF policies numbers 51 and 56 relating to sexual abuse between children articulated the standard which will be superseded by new policy.

According to DCF Rule 2010.05 – Substantiating Sexual Abuse, part of the Child Neglect and Abuse Rule adopted May 26, 2009:

"Sexual abuse by one child on another child is substantiated when:

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's Child Protection Registry

There are two registries. The Sexual Offender Registry should not be confused with the Child Protection Registry.

DCF Policies have been reformulated regarding the Child Protection Registry as mandated by the legislature. They were recently adopted on May 26, 2009.

Bob Sheil's presentation at last year's Juvenile Defense Training about "Fighting Substantiation of Juveniles as Sex Offenders", focused on the revisions to the Child Protection Registry enacted last year.

The "Child Protection Registry" is a "record of all investigations that have resulted in a substantiated report on or after January 1, 1992." 33 V.S.A. §4912(14)

If a child's name goes on the Child Protection Registry it can only go on as a result of a substantiation for sexual abuse, not physical or emotional abuse. "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. Sexual abuse also includes the aiding, abetting, counseling, hiring or procuring of a child to perform or participate in any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts sexual conduct, sexual excitement or sadomasochistic abuse involving a child." 33 V.S.A. § 4912(8)

This is different from the Sexual Offender Registry where, in addition to the sexual abuse and assault offenses, now a conviction for lewd and lascivious conduct, or a second or subsequent conviction for voyeurism, or attempt of any of these listed crimes mandates placement of one's name on the Sexual Offender Registry.

Placement of a child's name on the Child Protection Registry virtually eliminates future employment or volunteer opportunities in the field of education or nursing, either private or public, or where there is a possibility of child contact such as in day care centers, and summer camps.

If the child is under ten years of age, only his/her initials will be placed on the registry.

Disclosure of registry records is regulated by 33 V.S.A. § 4919 and among other people and state agents listed as those to whom the commissioner may disclose a registry record are listed employers "if such information is used to determine whether to hire or retain a specific individual providing care, custody, treatment, transportation, or supervision of children or vulnerable adults." Additionally, "Volunteers shall be considered employees for purposes of this section." 33 V.S.A. §4919 (c)

Effective July 1, 2009, Presentence Investigations (PSI) "shall include information regarding the offender's records maintained by the Department of Children and Families in the child protection registry pursuant to 33 V.S.A. § 4916 if the offender was previously substantiated for child abuse or neglect".

As of July 1, 2009 any person convicted of a sex offense that requires registration on the Sex Offender Registry pursuant to chapter 167, subchapter 3 of Title 13 will be ineligible to be a work study student in the schools, and ineligible for educator licensure or employment as a superintendent.

Challenging Placement on the Child Protection Registry

Under 33 V.S.A. 4916a(k) if no administrative review is requested the decision is final.

You have 14 days to make a written request for a first review by the registry review unit. The entire process for challenging placement on the registry after a substantiation is set forth in 33 V.S.A. § 4916a. An exception for good cause may be granted giving you an additional 14 days to challenge. They will only send you the redacted investigation file which means the intake report, the investigation activities summary, and case determination report that are amended in accordance with confidentiality requirements set forth in subsection 4913(d) of Title 33.

You should hear the results of the first review within 14 days but this doesn't always happen.

Within seven days of the conference the reviewer shall decide to (1) reject the department's substantiation determination; (2) accept the department's substantiation; or (3) place on hold pending further investigation. The administrative reviewer then has seven days to provide notice to the person of his or her decision. All notices must conform to 33 V.S.A. § 4916e in regards to whom they must be sent.

You have thirty days from the date the notice was mailed to appeal to the Human Services Board.

Human Services Board Hearings

On final appeal of a substantiation before the Human Services Board the department will argue collateral estoppel for prior decisions that meet the Trepani criteria. So if you have an adjudication, or an admission in court, in all likelihood you won't be successful with the appeal because of collateral estoppel, or issue preclusion.

Under 33 V.S.A. § 4916b(c) the "hearing may be stayed if there is a related criminal or family court case pending in court which arose out of the same incident of abuse or neglect for which the person was substantiated."

You do have subpoena power. Their policy is to provide you with an unredacted file. You can ask for case notes if it looks like everything's not there. But there is no subpoena authority under the APA to get police reports and the public records act doesn't help here.

As of July 1, 2009 the legislature has revised and clarified which sections of V.R.E. 804(a) shall apply to Human Services Board Hearings. Statements by a person who is a child under 12 [not 10] years of age at the

time the statements were made [not at the time of the hearing] are not excluded.

The requirement of V.R.E. 804(a)(3) that the child be available to testify shall apply, and will only not apply "if the hearing officer determines, based on a preponderance of the evidence, that requiring the child to testify will present substantial trauma to the child". The state has to provide reliable evidence, and there must be a preponderance of it.

Also as of July 1, 2009 under 33 § 4916b(4) "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 chapter."

Expungement

Expungement was unavailable until last year. There are now four different rules for those seeking expungement from the child protection registry.

The first rule applies to "A person whose name has been placed on the registry [after they were 18 years old] prior to July 1, 2009 and [whose name] has been listed on the registry for at least three years may file a written request with the commissioner, seeking a review for the purpose of expunging an individual registry record." 33 V.S.A. § 4916c(a)

The second rule under 33 V.S.A. § 4916c(a) applies to the group of persons who were 18 or older on or after July 1, 2009 when their name is placed on the registry. After seven years a person in this category may file a written request with the commissioner seeking review.

Third, under 33 V.S.A. § 4916d "A person substantiated for behavior occurring before the person reached 18 years of age and

whose name has been listed on the registry for at least three years may file a written request with the commissioner seeking a review for the purpose of expunging an individual registry record in accordance with 33 V.S.A. § 4916c [(b) – (f)]of this title.”

Finally, under 33 V.S.A. § 4916d expungement of the registry record is automatic for a juvenile when they reach age 18 if that juvenile was substantiated for behavior occurring before they reached ten years of age provided that juvenile has had no additional entries.

Mandated Reporters

As of July 1, 2009 this group includes any employee, contractor and grantee of the agency of human services who have contact with clients. 33 V.S.A. 4914(a) This will substantially increase the pool of mandated reporters.

Differential Response

Differential response is a significant change in Family Services practice which will impact both the families that DCF/FSD works with and other stakeholders in the child welfare system. This new approach allows for a choice of interventions – assessment or investigation—to accepted reports of child abuse and neglect. It recognizes the variation in the nature and severity of reports so that Family Services can tailor the response accordingly. All situations will not require substantiation (a formal determination of child risk or maltreatment). This will allow Family Services to offer services to some families without substantiating a report. Assessment entails “identification of the strengths and support needs of the child and the family, and any series they may require to improve or restore their well-being and to reduce the risk of future harm.” Investigation means “a response to a report of child abuse or neglect that begins with the systematic gathering of information to determine

whether the abuse or neglect has occurred and, if so, the appropriate response. An investigation shall result in a formal determination as to whether the reported abuse or neglect has occurred.” DCF/FSD begins implementing Differential Response on July 1, 2009.

Sexting

As of July 1, 2009, under 13 V.S.A. § 2802b, no minor may knowingly and voluntarily transmit and/or possess indecent visual depictions of himself or herself via computer or an electronic communication device. First offense shall be adjudicated delinquent in family court. Those previously adjudicated of such an offense may be adjudicated in family court or prosecuted in district court. Minors adjudicated delinquent shall have records expunged upon reaching 18 years of age.

New Juvenile Probation Certificate

There is a new Juvenile Probation Certificate form as of May 2009. To the extent that this new certificate may be helpful to your client you may want to consider making a motion to modify their old probation certificate to conform to the new one.

Improving Representation for Parents involved with DCF

The ABA has a National Project to Improve Representation for Parents Involved in the child Welfare System. Its website, <http://www.abanet.org/child/parentrepresentation/home.html>, has links to tools to other useful resources. The National Project to Improve Parent Representation has a listserv to provide attorneys who represent parents with a networking opportunity to improve practice. To join the Parents’ Attorneys

listserv, send a message to listserv@mail.abanet.org with "SUBscrib child-parentsattorneys YOUR NAME" in the body of the message.

Colin Seaman has organized some general practice information for representing parents in CHINS cases. They are listed immediately below :

Some general practice information for representing parents in CHINS cases:

We all know that being assigned to represent mom or dad (or both) in a CHINS case can require time, patience and a cool bedside manner. In the past ten years I have found a few general strategies that get me through the tough cases. We all know we should get to the preliminary hearing (which is now called the temporary care hearing), we should prepare a case sooner than five minutes before a hearing, and we should call our clients back. And reality is that we do all those things, but the following ideas may sometimes help:

1. Remember to tell your client that you will present the evidence and fight as necessary, it is their job to work with the social worker. I will often (much to the chagrin of DCF) sit down after a contentious hearing with my client and the social worker. I lay out the ground rules for front-loading services and remind everyone that some issues might be evidence and should be off limits (the abuse issues) and others are service recommendations and visit issues that should be discussed. The most important thing is that the client realizes that you are the person who will do their fighting and they can focus on utilizing DCF as a service provider.
2. Encourage your clients to keep a journal. This should include a record of phone calls they make and who calls them. Make sure your clients know to leave a message when they call with their current telephone numbers.
3. Get the kinship information early and contact these people. If they are for real, have them file a Care Plan with the court as quickly as possible.
4. Tell your clients when you give them your card that you will always call them back, but sometimes it might take twenty-four hours depending on your schedule.
5. Take the time in a contested matter to call a few witnesses as soon as possible. The mere fact that you are calling your client's witnesses may allay their fears that you are another "State" lawyer.
6. If this is a truly contested case, and there is a hearing, services are relevant to some judges. If your client is accessing services talk to the providers and see if they are doing well enough to be worth providing evidence.
7. At disposition remember that the disposition report once accepted is the record and may become evidence. If the client stipulates to DCF custody he or she should understand that means they agree to a finding they are not currently fit to have custody of the child. I never sugarcoat this so there will not be a misunderstanding later on.
8. At disposition make sure the goals are attainable. If there is a concern, see if anything is negotiable. If the number of items appears unseemly, mention this to the judge and leave open the possibility to review the issue at the post-disposition review. The post-disposition review is an opportunity to review services, goals and parent child contact.

9. Always request discovery in a contested case. Get witness lists, exhibits and if appropriate ask to do depositions. If you don't ask for discovery you will not get it before the hearing.

10. Stipulating by clear and convincing evidence sets up findings for the State in a contested disposition regarding custody. If there is a contested merits, the court does have the option of making findings by clear and convincing evidence, but what can possibly be gained by the stipulation at the higher level during merits?

11. Avoid getting into a battle with your client if he or she says you are not doing your job. Some clients will always tell the court for whatever reason that their lawyer is not doing a good job. Instead of responding to the client in court, work it out in the hallway and let the judge know you have worked it out and continue representing the client. If the client really hates you, at least you can tell the judge you tried to work it out, would like to still represent the client, but the client really wants a second opinion.

I hope these ideas are helpful. [Colin]

Helpful Links

Pam Marsh's blog so you can put in your experiences with the new juvenile law:

<http://vtjuvlaw.blogspot.com/2009/04/vt-juvenile-law-section.html>

Pam Marsh's and Kate Piper's article entitled "The Practical Implications of the Newly Enacted Vermont Juvenile Judicial Proceedings Act (JJPA)" from the Spring 2009 issue of the VBA quarterly:

<https://www.vtbar.org/Images/Journal/journalarticles/spring2009/JJPA.pdf>

New DCF rules on Child Abuse and Neglect adopted May 26, 2009:

[http://dcf.vermont.gov/sites/dcf/files/pdf/fsd/rules/Child Abuse and Neglect Adopted Rule 5 2 6 09.pdf](http://dcf.vermont.gov/sites/dcf/files/pdf/fsd/rules/Child%20Abuse%20and%20Neglect%20Adopted%20Rule%205%206%2009.pdf)

New DCF rules on the Child Protection Registry adopted May 26, 2009:

[http://dcf.vermont.gov/sites/dcf/files/pdf/fsd/rules/ild Protection Registry Adopted Rule 5 26 09.pdf](http://dcf.vermont.gov/sites/dcf/files/pdf/fsd/rules/ild%20Protection%20Registry%20Adopted%20Rule%205%2026%2009.pdf)