

# Juvenile Defender Newsletter

## Summer 2010

### Juvenile Manual The Role of the Juvenile's Attorney

The updated Vermont Juvenile Law and Practice Manual was distributed at our Juvenile Law training in June and is now available on the Defender General website. If you have a hard copy you should note that corrections have been made to pages 10 and 11 to better reflect the roles of parties involved in CHINS cases, particularly the role of attorneys for the juvenile.

The exact wording of V.R.F.P. 6(b) is now quoted pertaining to the mandatory assignment by the court of an attorney for the juvenile "unless counsel has been retained by that person", with the caveat added that in a CHINS proceeding the court will not permit the parents to retain an attorney for the child, due to the inherent nature of the CHINS proceeding. There may be an admittedly far-fetched situation where a 15-year-old who is the subject of an unmanageability petition, who for whatever reason has his or her own funds, (gifts from grandparents, holds a patent, etc.) and they may decide that he or she wants to hire their own attorney to fight the unmanageability allegation.

The second change in this section expands on the manner in which the juvenile's attorney consults with the juvenile emphasizing the consideration of age and decision-making capacity of the juvenile. These factors lead the attorney to advocate for either the child's wishes or the best interests of the child as determined in collaboration with the juvenile's guardian ad litem.

Under V.R.F.P.6(d)(4) "A person who has not attained the age of thirteen shall be rebuttably presumed to be incapable of understanding the nature and consequences of the waiver or admission [listed in subdivision (d)(3)

of this rule] and of communicating with respect to the waiver or admission; a person thirteen years old or older shall be rebuttably presumed to be capable."

It is important to determine whether the juvenile is under any emotional or mental disability prohibiting them from understanding the nature and consequences of the waiver of their constitutional and other important rights. The commentary to 3-3 of the ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases points out that disability is contextual, incremental and may be intermittent with kids.

The reporter's notes to V.R.F.P.6(d)(4) offer further explanation: "Subdivision (d)(4) dispenses with part of the fourth finding under (d)(3), the requirement of consent by the ward. Consent by the ward is not needed if that person "because of minority or mental or emotional disability," is "unable to understand the nature and consequences of the decision or is unable to communicate with respect to the decision." The rule sets forth several presumptions to determine a minor's ability to communicate with respect to the decision. Persons twelve years old or younger are rebuttably presumed to be incapable. Persons thirteen years old or older are rebuttably presumed to be capable. The presumptions have the effect set forth in Vermont Rule of Evidence 301 and they also have the effect of allocating burdens of proof (which is not true under V.R.E. 301). Thus, for example, a child of ten years has the burden of proving capacity to communicate with respect to the decision; once he or she produces any admissible evidence in support of capacity the presumption "bursts" and the question is strictly one of meeting a burden of persuasion."

Determining the role of the juvenile attorney presents tough ethical issues and is very

case specific. You must zealously represent your client's wishes, but this is sometimes tempered by whether you can "burst the bubble of the presumption". Working with the GAL can be essential.

Kate Piper has written an article addressing these ethical issues and the conundrum between client autonomy or child protection which can be found here:

[http://defgen.vermont.gov/sites/defgen/files/ethical\\_issues\\_rep\\_juv.pdf](http://defgen.vermont.gov/sites/defgen/files/ethical_issues_rep_juv.pdf)

Additionally she has suggested that attorneys and GALs use one of two sets of guidelines for relating to your juvenile client, depending on whether they are over or under the age of thirteen. These can be found on the Defender General website and can also be accessed here:

[http://defgen.vermont.gov/sites/defgen/files/Engaging\\_School\\_Age\\_Children.pdf](http://defgen.vermont.gov/sites/defgen/files/Engaging_School_Age_Children.pdf)

The last change to the manual clarifies that all parties, not just parents, are entitled to present evidence, compel the attendance of witnesses on their behalf and to cross-examine all witnesses called against them.

### Sibling Visitation

The Fostering Connections to Success and Increasing Adoptions Act, P.L. 110-351, requires under section 471(a)(31) that a title IV-E agency must make reasonable efforts to place siblings removed from their home in the same foster care, adoption or guardianship placement, or to facilitate frequent visitation or ongoing interactions (for example, letters, phone calls, text, email and other electronic communication) for those that cannot be placed together, unless it is contrary to the safety or well-being of any of the siblings to be placed together or to have frequent visitation.

Although the act does not define siblings or sibling groups, it does specify that frequent visitation means at least monthly. A title IV-E agency may establish its own standards for visitation and contact

between siblings consistent with the law. The agency can determine the most appropriate settings for visitations and protocols for supervision.

Under 33 V.S.A. § 5319(e) upon motion by the child's attorney, the court may order contact between the child and the child's siblings and/or an adult relative or friend with whom the child has a significant relationship.

Given the rural character of Vermont requesting "virtual visitation" via Skype where there is a great distance involved may be appropriate. This allows for real time communications between the parties.

### Education Matters

By Bob Sheil, Office of Juvenile Defense

A child's education plan should be a key component of any case plan written by the child's social worker. This is especially true for older youth aging out of the foster care system.

The Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351, requires that any case plan for children 16 years of age and older must include a "written description of the programs and services which will help such a child prepare for the transition from foster care to independent living." Often the best way to insure that these services are provided is in the context of the youth's education plan. This plan should detail the services that the child needs to prepare for successful adulthood and identify the individual or agency responsible for seeing that the child completes each component of the plan. Teachers and other school personnel are often in the best position to determine what services a child needs to develop into a successful and independent adult.

Department for Children and  
Family  
Family Service Division  
Guardianship Assistance Program  
Program Description and  
Instructions for Application

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Although the federal law only requires that the child welfare agency develop a transition plan within the 90 day period before the youth is discharged from care, recently passed Vermont legislation is stronger and requires the development of such a plan by DCF twelve months before a youth's discharge. 33 V.S.A. § 4904(c)

For youth in foster care who have been found eligible for special education services, other federal legislation, the Individuals with Disabilities in Education Act (IDEA), requires an additional transition plan. The first IEP that is in effect when a youth reaches his or her 16<sup>th</sup> birthday must include: 1) Measurable post-secondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and 2) transition services(including courses of study) to help the child reach those goals. It should also be remembered that these youth remain eligible for the services required by their IEP (Individual Education Plan) up to age 22 or their high school graduation, whichever occurs first.

Attorneys representing youth in DCF custody should always insist on accountability on the part of the education agency and advocate for DCF and the youth's educational provider to collaborate in creating an educational plan that is the most likely to provide their clients with those skills necessary for them to transition to a successful adulthood. See: Educational Transition Plans for Children in Foster Care by Kristin Kelly, ABA Child Law Practice, Vol. 28, No.8, page 121 (October, 2009).

### Shaken Baby Syndrome

The American Academy of Pediatrics (AAP) has urged usage of the more scientific comprehensive diagnosis "abusive head trauma" so you may hear this terminology.

### What is Guardianship?

Guardianship develops a legal relationship between the adult appointed as a guardian over another person who is unable to care for themselves because of their age or mental capacity. The guardian has authority over decision-making including education, travel, medical/dental and mental health decisions, housing, and finances.

In a guardianship, the family of origin continues to hold residual parental rights. Those rights included paying child support and visiting the child. Under guardianship, a child has no inheritance rights from the guardian unless specifically named in a will. In addition, in the event the guardian should die the child is not eligible for social security death benefits from the guardians work history.

Minor guardianships, formed in Family or Probate court without DCF custody or involvement, may be eligible for financial assistance and Medicaid through Economic Service's Reach-Up program. While the guardian's assets or income is not relevant for Reach-Up benefits, the child's assets are relevant and may lower or disqualify the child for Reach-Up. Children who have a deceased parent who paid into Social Security may be eligible for Medicaid and a financial benefit through Social Security.

### What is the Guardianship Assistance Program (GAP)?

GAP is a funding source to assist families where DCF has custody of their child to

prevent long term foster care by creating a permanency option with relatives. It is made available to the States through federal funds much the same way as Foster Care Maintenance, Adoption Assistance and Child Care Assistance. The assistance a child can receive under GAP may include Medicaid and a monthly stipend. Medicaid eligibility is determined by the State in which the relative guardian resides. Vermont residents acting as a guardian can access Medicaid for the child.

#### Who is Eligible?

1. A child is eligible for permanent guardianship, “kinship guardianship” under federal law if the State/Tribal agency determines that:

a. the child has been—

i. removed from his or her home pursuant to a voluntary placement agreement or as a result of a judicial determination to the effect that continuation in the home would be contrary to the welfare of the child; and

ii. eligible for foster care maintenance payments while residing for at least 6 consecutive months in the home of the prospective relative, recently defined as one with a biological or legal relationship or eligible for foster care maintenance payments while residing for at least a year with the proposed non-relative permanent guardian, fictive kin recently defined as a person with whom the child had a significant relationship before the child came to the attention of DCF.

b. being returned home or adopted are not appropriate permanency options for the child;

c. the child demonstrates a strong attachment to the prospective relative guardian and the relative guardian has a strong commitment to caring permanently for the child; and

d. with respect to a child who has attained 14 years of age, the child has been consulted regarding the kinship guardianship arrangement. A child or youth in DCF custody eligible for foster care maintenance payments living in the home of a licensed relative foster parent, (prospective guardian) for six consecutive months, is unable to return to the family of origin and for whom adoption is unattainable or inappropriate. A youth age 14 or older must sign in agreement of the guardianship.

2. Siblings.

a. There is a preference, unless it is contrary to the child’s best interest, that the child and any sibling of the eligible child may be placed in the same kinship guardianship arrangement, if the State/Tribal agency and the relative agree on the appropriateness of the arrangement for the siblings; and

b. Kinship guardianship assistance payments may be paid on behalf of each sibling so placed.

Vermont has chosen to allow non IV-E children in paid foster care with a relative to access state GAP assistance including Medicaid. For relative foster parents in other states Medicaid eligibility is determined by that State.

#### What is the Process?

##### During Family Court Hearings

During the Preliminary Hearing in non-emergency CHINS & Delinquency cases or at the Temporary Care Hearing when an Emergency Care order exists the Social Worker for DCF will advise families’ and potential relative caregivers of the various ways to become a child’s guardian. The DCF Worker is also responsible at those hearings for advising all parties to a case at the Preliminary Hearing in non-emergency CHINS & Delinquency cases or at the Temporary Care Hearing when an Emergency Care order exists of the pros and cons in forgoing DCF custody and asking the court to

award direct custody to a relative or close family friend.

Should Family Court award custody to the state, DCF may make a permanency recommendation to the court as early as the Disposition Hearing. Under the federal guideline of the Adoption and Safe Family Act (ASFA) DCF must make a recommendation by the twelfth month at the Permanency Hearing. If it is determined that a child in FSD custody cannot or should not return to the family of origin both DCF and Family Court must make a decision about who will raise the child and what degree of permanency is most appropriate. This is a very serious decision. For young children (under 12) the preferred practice is to recommend the adoption of the child by the caretaking relative or foster care family. Youth age 14 or older must consent to either an adoption or a guardianship. All parties must complete and sign GAP documents prior to the establishment of a permanent guardianship order. Unless funding through GAP is approved prior to the ordering of a permanent guardianship by the court, the child's eligibility for the funding ceases when DCF custody is discharged. A child's eligibility for GAP ceases once the child is no longer in DCF custody.

#### District Permanency Planning Meetings

Once it is established that a child will remain in DCF custody beyond 90 days DCF social workers must begin concurrent planning for the child's long term permanency goal of reunification, guardianship, adoption or another planned permanent living arrangement. Social workers discuss their cases during supervision and at district permanency meetings. The decision to establish a Permanent Guardianship may result from conversations at permanency meetings. During the meeting the Project Family worker will complete the referral form. Cases not discussed during the permanency meeting will require the DCF

worker or supervisor to complete a referral form. All referrals are sent directly to the Adoption Assistant for that district. The Adoption Assistant will send a Statement of Intent to the family and the Referral form to the Admin for Project Family.

Once a Project Family Permanency Placement Counselor is assigned, they will contact the family to complete the GAP packet.

Once all parties sign and send the forms to the DCF central Adoption Unit, the court is notified and it is up to the judge to grant the permanent guardianship. The court will mail a copy of the guardianship order to the adoption assistants. The adoption assistants will make copies of the order to the family, district and central office.

Questions you may contact: Diane Dexter, Adoption Chief, [diane.dexter@ahs.state.vt.us](mailto:diane.dexter@ahs.state.vt.us) or 802-241-2142.

### Health Reforms

Excerpted from May 2010 issue of ABA  
Child Law Practice

The Patient Protection and Affordable Care Act signed by President Obama on March 23, 2010 contains many reforms that apply to children and youth in foster care or those at risk of entering care. Some of these are immediately effective and others begin in 2014.

Information should be made available to youth aging out of foster care about health insurance and the importance of designating a health care power of attorney, or having an advance directive for when treatment decision must be made but the child cannot participate.

The Act fully funds the Children's Health Insurance Program (CHIP) through 2015, and continues the dental coverage as part of CHIP reauthorization.

The Adoption Tax Credit has been extended and increased by \$1000 to \$13,170. Eligible children are under age 18 or have physical or mental health needs that make it difficult for him to care for himself.

Insurance companies are now prohibited from denying coverage to children under age 19 with preexisting conditions or discriminating against them based on their health status. Pub. L. No. 111-148 § 1101 and § 1201. There is some conflicting interpretation by insurance companies as to when this coverage would start, now or 2014, which the administration is working on reconciling.

There are mandatory appropriations for home visitation programs to reduce infant and maternal mortality, decrease crime and juvenile delinquency, and improve prenatal, maternal, and newborn health, child health and development, parenting skills, school readiness and family economic self-sufficiency in an effort to prevent child injuries and maltreatment. Pub. L. No. 111-148 § 2951

Funds are also provided for pregnancy assistance, which Congress must appropriate to be implemented. Id. at §10212

Qualified health plans must now include access to mental health and substance abuse treatment services, including behavioral health treatment. Id. at § 1302, amending 42 U.S.C. § 18022 This provision may apply to children adopted from foster care who are now covered under their adoptive parents; private insurance plan.

Ensuring that clients obtain any newly available services and benefits, such as enrollment in Medicaid or CHIP, is essential to effective advocacy.

Be aware of the required court findings for a child to be eligible for federal foster care maintenance payments. It is important to create a clear record around

reasonable efforts – **unavailability of needed services should not be considered reasonable.**

## Useful Links and Important Dates

Hon. Katherine A. Hayes wrote a piece entitled “Vermont Guardians ad Litem in the 21<sup>st</sup> Century” for the Spring 2010 issue of the Vermont Bar Journal -

<http://www.vtbar.org/Images/Journal/journalarticles/spring2010/GALs.pdf>

The Sentencing Project now has a section devoted to juveniles, with news, publications and featured stories:

<http://sentencingproject.org/template/page.cfm?id=184>

Of particular interest recently was a paper on Youth Reentry in May 2010 found in the publications section:

[http://sentencingproject.org/doc/publications/publications/jj\\_jlwopfactsheetJuly2010.pdf](http://sentencingproject.org/doc/publications/publications/jj_jlwopfactsheetJuly2010.pdf)

- Sept 9                      Kinship Conference - Parenting Revisited: Learning from One Another, sponsored by Vermont Kin as Parents, Dr. Joseph Crumbley, presenter, at Hampton Inn, 42 Lower Mountain Rd, Colchester, 830 am to 345 pm, \$25, no charge for grandparents or kinship providers, CEUs, contact 802-338-4725 or go to [http://www.events.unh.edu/RegistrationForm.pm?event\\_id=7324](http://www.events.unh.edu/RegistrationForm.pm?event_id=7324)
- Sept 22                      2010 Vermont Summit on Sexual Violence, sponsored by OUR House of Central Vermont, Lake Morey Inn, go to <http://summit.ourhousevt.org>
- Oct 3– 6                      New England Council on Crime & Delinquency – 71<sup>st</sup> Annual Training Institute, Mt. Snow Resort Hotel & Conference Center, Mt. Snow, contact [alan.cormier@ahs.state.vt.us](mailto:alan.cormier@ahs.state.vt.us) or go to [www.neccd.org](http://www.neccd.org) for information
- October 13                      Juvenile Law Center’s 35th Anniversary Celebration  
<http://jlc.org/>  
Grand Ballroom at the Hyatt at The Bellevue, Philadelphia  
<http://jlc.org/events/>
- Oct 21-23                      Vermont Association for the Education of Young Children – 2010 Fall Conference, at the Dudley Davis Center at University of Vermont, go to <http://vaeyc.org/2010/04/2010-fall-conference-rfp/> for information or call 244-6282