Second Report of the Working Group to Recommend Improvements to CHINS Proceedings

November 1, 2016

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I. The Working Group

Act 60 of the 2015 Acts and Resolves establishes "a working group to recommend ways to improve the efficiency, timeliness, and process of Children in Need of Care or Supervision (CHINS) proceedings." Act 60 § 24(a). The working group consists of six members:

- Hon. Brian Grearson, Chief Superior Judge;
- Matthew Valerio, Defender General;
- William Sorrell, Attorney General, *Chair*;
- Ken Schatz, Commissioner for Children and Families;
- John Campbell, Executive Director of State's Attorneys and Sheriffs; and
- Susan Hong, Guardian ad Litem for Chittenden County Superior Court (appointed by Judge Grearson).

See Act 60 § 24(b). The working group is directed by Act 60 to "study and make recommendations concerning" the following ten topics:

(1) how to ensure that statutory time frames are met in 90 percent of proceedings;

(2) how to ensure that attorneys, judges, and guardians ad litem appear on time and are prepared;

(3) how to monitor and improve the performance and work quality of attorneys, judges, and guardians ad litem;

(4) how to ensure that there is a sufficient number of attorneys available to handle all CHINS cases, in all regions of the State, in a timely manner;

(5) the role of guardians ad litem, and how to ensure their information is presented to, and considered by, the court;

(6) how to expedite a new proceeding that concerns a family with repeated contacts with the child protection system;

(7) whether requiring a reunification hearing would improve child welfare outcomes;

(8) how and whether to provide financial assistance to individuals seeking to mediate a dispute over a postadoption contact agreement;

(9) how and whether to change the confidentiality requirements for juvenile judicial proceedings under 33 V.S.A. chapter 53; and

(10) any other issue the working group determines is relevant to improve the efficiency, timeliness, process, and results of CHINS proceedings.

Act 60 § 24(c).

Pursuant to Section 24(e) of Act 60, the working group submitted the first report on its findings and recommendations with respect to topics (1) through (5) on December 1, 2015, to the Joint Legislative Child Protection Oversight Committee, the House Committees on Human Services and on Judiciary, and the Senate Committees on Health and Welfare and on Judiciary. This second report addresses topics (6) through (10). The working group "shall cease to exist on November 2, 2016." Act 60 § 24(f).

In preparation for filing this second report, the working group held meetings on June 7, June 29, August 1, August 31, and October 12, 2016. The working group has been assisted by Shari Young, Manager of the Juvenile Court Improvement Program; Marshall Pahl, Supervising Juvenile Defender; Susanne Young, Deputy Attorney General; Benjamin Battles, Assistant Attorney General; Leslie Wisdom, General Counsel, Department for Children and Families; Kerry McDonald-Cady, Deputy State's Attorney for Windham County; and David Kennedy, Guardian ad Litem Program Manager. In addition, Assistant Attorney General Howard Stalnaker attended the working group's June 29, 2016 meeting. Pursuant to § 24(d) of Act 60, the Attorney General's Office provided administrative and legal assistance to the working group.

II. Introduction

In its first report, the working group recommended two statutory changes, both of which the General Assembly enacted. *See* 2016 Acts & Resolves No. 153 §§ 28 (amending 33 V.S.A. § 5315), 29 (adding 33 V.S.A. § 5315a). In this second report, rather than recommend specific statutory language, the working group wishes to highlight several aspects of the State's legal system for protecting children from abuse and neglect that remain under tremendous stress and which could be improved by additional resources and study.

Before moving to the working group's specific recommendations, it is important to note the gravity of the situation in Vermont's family courts. In a recent opinion jointly authored by all five justices, the Vermont Supreme Court discussed the

"systemic problems" that frequently lead to delays in CHINS cases. That discussion is worth quoting at length:

> [T]wo important goals—the efficient and timely resolution of cases and the provision of fair process—must be carefully balanced to ensure that the needs of both children and parents are met. The . . . necessary balance is not being achieved and several themes are evident.
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> First, the . . . priority given to [] initial and emergency filings [which are generally timely scheduled and adjudicated] is obviously necessary since the safety of children is implicated.
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> Second, delays occur[] due to the difficulty of finding time when all of the many parties and their lawyers [are] available. . . . Finding time when all of these people are available is exceedingly challenging especially because the lawyers assigned to represent parents and juveniles in these cases may at the same time be assigned to clients in several juvenile proceedings in different counties. . . .
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> Third, even if all of the attorneys and parties are available, courtroom and judge time are in high demand and may not be readily available. . . .
>
> Fourth, even if a time can be successfully found, the interplay with other cases on a heavy docket may cause delays once scheduled . . . .
>
> The juvenile docket in Franklin County, and many other counties too, is overwhelmed with abuse and neglect cases. Indeed, many charged with responsibility in the justice system have undertaken tremendous effort to address a caseload that involves the most tender, difficult and complex issues for which they deserve great credit. . . .
>
> To restore balance, we must be open to experimenting with new methods. . . . [C]ontinued efforts must be made to provide the required process in a timely manner for both children and parents.

In re A.S., 2016 VT 76, ¶¶ 10-17 (per curiam) (internal citations and quotations omitted).

The working group agrees with the Supreme Court's analysis of the situation. Pursuant to its statutory charge, and with the aim to better serve Vermont's children and families, the working group provides its recommendations below.

III. Recommendations

In order to identify ways to improve CHINS proceedings, the working group discussed how an abuse or neglect case typically progresses—from the initial filing

of a request for an emergency care order to final disposition. That discussion revealed that, in recent years, problems arose much more frequently in some stages of the proceedings than in others. This section discusses the various procedural stages in a typical case and, where appropriate, provides recommendations with respect to each stage.

A. Initial Proceedings

The initial proceedings in an abuse or neglect case happen quickly, often on an emergency basis. These proceedings are rightly prioritized. Jurisdictional issues occasionally arise, but these are not a significant source of delay. The working group does not recommend modifying the way initial proceedings are handled.

B. Temporary Care Hearings

Initial temporary care hearings typically are held within 72 hours of an emergency care order, as required by statute. *See* 33 V.S.A. § 5307. Although all parties "shall have the right to present evidence on their own behalf and examine witnesses" at a temporary care hearing, 33 V.S.A. § 5307(e)(6), initial hearings often do not involve live testimony. Instead, a court may order temporary custody based on an affidavit of probable cause. If the parties wish to litigate temporary care issues, as they increasingly do, scheduling constraints may require setting the matter for an additional hearing weeks or months in the future to allow the parties to present their evidence. This can be a significant source of delay. Parents have a great deal of incentive to litigate issues of custody, visitation, and treatment at the beginning of the case because how those issues are resolved often shapes the trajectory of the rest of the case.

The working group believes that increased efforts should be made to expeditiously resolve contested temporary care issues, particularly in cases involving addiction-related neglect. To that end, the working group makes three recommendations.

First, the working group recommends that protocols be developed to guide how parent-child visitation schedules are determined in cases where the child has been removed from the parents' custody because of addiction-related neglect. In cases involving physical or sexual abuse, the issues are relatively straightforward. By contrast, in cases involving addiction-related neglect, it can be very difficult to untangle parents' success or failure in maintaining sobriety from their capacity to safely parent their children. This issue is a frequent source of tension, and consequently, litigation and delay. Consistent visitation is crucial for maintaining the parent-child bond and working toward reunification. Yet at the same time, parental substance abuse can pose serious threats to a child's physical and emotional well-being. To balance these competing concerns, the working group recommends that a body—either an existing group or an ad-hoc group created solely

for this purpose—should be charged with the responsibility for developing parent-child visitation protocols in addiction-related neglect cases. This group should explore what approaches previously have been successful in Vermont, and examine best practices nationally.

Second, the working group also recommends increased funding to support parent-child visitation. The State currently lacks adequate resources to support visitation—such as family time coaches—in all cases in which it would be beneficial. Given the importance of consistent parent-child visitation for the child's development and the parents' ability to achieve reunification, it is crucial that the system have adequate resources to support such visitation where it is appropriate and in the child's best interests.

Third, the working group supports the judiciary's plan to use the newly-created "judicial master" position to assist with monitoring parents' progress following a temporary care or conditional custody order. Although many details about the position remain to be worked out, the idea is for the judicial master to act as "middle management" after a temporary care or conditional custody order and monitor parents' progress between merits and disposition. The judicial master will have authority to increase or decrease parent-child contact. An important aspect of the position would be to improve the relationship between families and the court, by allowing parents, who generally are going through a difficult time, to have a consistent and supportive relationship with an authority figure who wants them to succeed. The hope would be that this would limit the number of disputes that need to be litigated and increase parental accountability to, and engagement with, the court and DCF.

C. Pretrial Hearings

The working group does not believe that pretrial hearings are a significant cause of delay. These proceedings are essentially status conferences, and can be an opportunity for parents to stipulate to the merits of a CHINS petition. Ideally, stipulations would be finalized and submitted before a merits hearing is scheduled, but that does not always happen. Practice varies from county to county. Pretrial hearings may be an opportunity for the judge, or judicial master, to encourage stipulations, particularly given the new law expressly authorizing parties to enter into agreements admitting the conduct in a CHINS petition and defining a case plan. *See* 2016 Acts & Resolves No. 153 § 29, *codified at* 33 V.S.A. § 5315a.

D. Initial Case Plans

DCF generally prepares an initial case plan within 60 days of a child being taken into state custody, *see* 33 V.S.A. § 5314(a), although the timeliness as well as the content of the initial case plans varies significantly from county to county, depending on local practice, caseload issues, and other litigation delays. The

working group discussed the benefit of DCF preparing and sharing its initial case plan as early as possible. Additional resources have helped DCF improve the quality, uniformity, and timeliness of its case plans. It remains extremely difficult, however, for department personnel to keep up with current caseload levels. In addition, recent increases in conditional custody orders have led some judges to ask for case plans for children who are not in custody. This is a rapidly growing part of DCF's workload. The working group notes that some uncertainty exists concerning DCF's role with respect to families subject to conditional custody orders. If the court orders protective supervision when it issues a conditional custody order, DCF can recommend services and monitor the family. But when protective supervision is not ordered, it is unclear who—DCF, the custodian, or nobody—is responsible for informing the court about the status of a child subject to a conditional custody order. The working group believes that DCF's role in this situation should be clarified, either by legislation or by court order in individual cases.

The working group also discussed whether case plans (initial case plans and disposition plans) should include a section describing the family's history, which may include descriptions of substance abuse, history with DCF, and criminal offenses. This is another area where practice varies across the State. DCF believes that this history is relevant to parental fitness and should be included, but recognizes that this practice can create tension with parents. If the first thing a parent reads in a case plan is a detailed description of his or her past mistakes, the parent may be more likely to view DCF as an adversary. One option might be to put a summary of the case plan upfront, followed by a relevant but brief history section. The working group did not reach consensus on this issue, but believes it warrants further analysis and discussion among stakeholders.

E. Merits Hearing

Apart from the difficulty of scheduling court time when all parties are available, the working group does not believe that hearings on the merits of CHINS petitions themselves are a significant cause of delay.

F. Disposition Hearing

The working group discussed several aspects of disposition hearings that can lead to delay.

DCF is permitted by statute to seek termination of parental rights at initial disposition. *See* 33 V.S.A. § 5316(b)(1), 5317(d). In recent years, for a variety of reasons, including because many cases involve very young children and parents with histories of chronic substance abuse, DCF has chosen this option more frequently. The decision to terminate someone's parental rights is never taken lightly and is often vigorously contested. When that decision is made early in the case, parents may stop cooperating with DCF and the proceedings become more

adversarial. On the other hand, when it is clear from the outset that a case is headed to termination because of the circumstances that led the child to be removed from the home, there is little reason to delay seeking termination. In all cases, the working group discussed and acknowledged that judicial leadership in disposition hearings, as well as at all stages of the CHINS process, is key to moving these cases through the process to achieve permanency and good outcomes for children and families.

The timing of the disposition case plan can also affect the disposition hearing. Last session, the Legislature amended 33 V.S.A. § 5316 to require DCF to provide its disposition case plan 7 days in advance of the disposition hearing. Previously, DCF was required to provide the plan 28 days after a finding that a child is CHINS. On its face, this amendment does not appear to change anything because disposition hearings are supposed to be held 35 days after a CHINS finding. *See* 33 V.S.A. § 5317(a). But because disposition hearings are often delayed beyond the statutory timeline, case plans filed 28 days after the CHINS finding may become "stale" and irrelevant by the time of the hearing due to changes in the parties' circumstances. The recent amendment aims to address this situation. Concerns have been raised, however, that the new timeline may not allow parents and their attorneys sufficient time to review the disposition plan before the hearing. These concerns might be alleviated somewhat if DCF uniformly sent its case plans electronically to parents' attorneys as soon as they are prepared, as is currently DCF's practice in many districts. The members of the working group will continue to discuss this issue with each other and within their respective agencies to ensure consistency and foster productive communication among the parties.

G. Post-Disposition Review Hearing

The purpose of the post-disposition review hearing is to monitor progress under the disposition case plan and review parent-child contact. 33 V.S.A. § 5320. As with many other aspects of abuse and neglect proceedings, the way these hearings are conducted varies throughout the State. These hearings can be a very effective forum for the parties to engage cooperatively with each other and the court. Several members of the working group pointed to Judge Devine's practice in Chittenden County as a good example of this approach. The working group also discussed the possibility of a judicial master playing a positive role in these proceedings.

H. Permanency Hearing

Termination proceedings are extremely time-consuming and resource-intensive. In several areas of the State, most notably Franklin County, the high number of termination cases on the docket presents a serious challenge. The working group notes that other groups—including the Justice for Children Task Force—recently have discussed the possibility of creating some form of a "mobile unit" of attorneys and judges that could be deployed to different regions of the State to resolve

termination cases. One concern with this approach is how to ensure continuity of legal counsel for parents and children through the termination proceeding. Although this concern should be addressed if a "mobile unit" is created, the working group believes this idea holds promise and warrants further consideration.

I. Conditional Custody Orders

The working group discussed the increase in conditional custody orders, under which a parent or other family member retains custody of the child, subject to judicially imposed conditions. Although conditional custody orders can be a useful tool to allow parents to engage in services while keeping the family together, the working group had concern that families subject to these orders are not receiving the oversight and support that they need. As noted above, DCF's role with respect to children subject to conditional custody orders is unclear when the court does not expressly order protective supervision. The working group believes that DCF's role in this situation should be clarified, either by legislation or by court order in individual cases.

J. Post-Adoption Contact Agreements

Act 60 provides increased opportunity for post-adoption contact agreements. Act 60, §§ 10, 11. There have not yet been many cases involving these agreements.

While the opportunity for these contact agreements is fairly new, some issues have been identified that affect pre-adoptive parents that warrant further discussion and consideration. Pre-adoptive parents entering into post-adoption contact agreements do not have representation provided by the State and are the only unrepresented party in these contract negotiations. In addition, many times these agreements are negotiated at the termination of parental rights hearing, which places enormous pressure on pre-adoptive parents to enter into these contracts without having the time to seriously consider the sometimes long-term impact that doing so could have on their families. The working group believes further consideration should be given to whether (i) legal resources should be provided to pre-adoptive parents in negotiating post-adoption contact agreements, and (ii) a process should be created to allow pre-adoptive parents adequate time to consider the terms of such an agreement before signing it.

The working group has been informed that parties in a dispute over a post-adoption contact agreement will be able to access mediation services through the Superior Court Family Mediation Program. There are funds available to absorb those services, given current appropriations and the limited number of disputes that have so far arisen related to post-adoption contact agreements. Any requests will be handled on a pilot basis and the impact of those requests going forward will be analyzed by the program manager for the Superior Court Family Mediation

Program. The working group does not recommend that any additional mediation assistance be provided at this time.

K. Confidentiality of CHINS Proceedings

Currently, the general public is denied access to child protection proceedings, including the records thereof, with very limited exceptions—typically in cases resulting in the death of a child when the Attorney General or a State's Attorney consents to a release of records.

Under the federal Child Abuse Prevention and Treatment Act, states retain flexibility to allow public access to abuse and neglect proceedings, provided there are safeguards to "ensure the safety and well-being of the child, parents, and families." 42 U.S.C. s 1506a(b)(2). A minority of states, including New York, New Jersey, Colorado, Oregon, and Washington, presumptively open abuse and neglect proceedings to the general public. Illinois closes the proceedings to the general public but allows news media to attend. California hearings may be opened at the request of parties to a case.

The working group discussed and debated the possibility of allowing increased public access to child protection proceedings in Vermont. With the exception of the Attorney General, however, the members of the working group believe these proceedings should remain confidential. These members believe that public proceedings will add to the emotional distress and embarrassment of children and their families. This is especially true in the internet age where court records and news articles about a child protection case can be found with a simple Google search and remain accessible online for years. Increased publicity could also have a chilling effect on the reporters of abuse and those suspected of abuse or neglect who might be harassed or threatened outside the courtroom. Hearings may also prove longer and more costly if lengthy closure issues are added to the typical case or if parents are less willing in a public forum to admit abuse or neglect. In addition, recent legislation makes case records more readily available to a variety of non-parties who may have a legitimate need to access such information. *See* Act 60, § 5 (amending 33 V.S.A. § 4921).

The Attorney General shared the perspective that open proceedings would have benefits, including increased transparency, oversight, and accountability of the child protection system and of the participants in that system. Increased public access might facilitate greater understanding of how the system functions, of the important work being performed by the social workers, guardians ad litem, attorneys, and judges who handle child protection cases, as well as the grave problems that many Vermont families are facing. In addition, the Attorney General noted that many of the concerns voiced about allowing the public to attend child protection proceedings also apply to criminal proceedings, which are generally open to the public.

The working group also discussed whether opportunities exist, short of opening proceedings to the public, to increase transparency and facilitate greater public understanding of the current challenges in the child protection system. For example, DCF potentially could provide narratives—as opposed to just data—about how the opiate problem is affecting children and families in Vermont, so long as confidentiality of the parties is preserved. Similarly, although there are many public reports describing the child protection system in Vermont, these reports are often dry and technical. Presenting this information in a more readable format might garner increased attention from the press and the public. These and other possibilities for making the system more transparent should continue to be explored.

L. How to expedite a new proceeding that concerns a family with repeated contacts with the child protection system.

The working group does not believe that there is a pressing need to expedite proceedings when a family has repeated contacts with the child protection system. Current law provides flexibility for the court to consider past family history and to rely on relevant factual findings made in prior proceedings or at earlier stages of a case. *See, e.g.*, *In re D.S.*, 2016 VT 38, ¶ 15 (affirming termination decision where trial court "ruled that it would take notice of, and rely on, the prior factual findings concerning parents' history of neglect of [child's] siblings, substance abuse, and failure to engage in services prior to [child's] birth," but "did not preclude parents from introducing additional evidence relating to the issue of their ability to parent the child").

M. Whether requiring a reunification hearing would improve child welfare outcomes.

In light of the limited court time that is currently available, the working group does not believe that mandating additional hearings would improve the system. The working group notes that some courts use conditional custody orders as a transition to reunification, although this practice varies throughout the State. In addition, DCF has instituted a practice of requesting a reunification hearing as a matter of course when a child is returning to the care of a parent from whom he or she was removed due to abuse or neglect. *See* DCF Family Services Policy 98.[1]

IV. Conclusion

Vermont's system for protecting children from abuse and neglect remains under tremendous stress. All parts of the system would benefit from additional resources. In some areas, however, the need is particularly acute.

[1] Available at: http://dcf.vermont.gov/sites/dcf/files/FSD/Policies/98.pdf.

For example, the shortage of attorneys willing to represent parents and children in CHINS proceedings is a serious concern. Although there is no simple solution, the working group discussed the possibility of collaborating with Vermont Law School to create a juvenile law clinic, which might foster interest in the subject matter among VLS students, many of whom wish to remain in the State after graduation.

Likewise, the lack of resources for the guardian ad litem program makes it extremely difficult for guardians to perform their responsibilities, which are required by statute and performed on a volunteer basis. As the working group noted in its 2015 report, additional funding and personnel are needed to facilitate recruitment, training, and supervision so that guardians can fulfill their responsibilities, which are central to the CHINS process, and do so in compliance with Vermont law and national standards.

In addition, resources are badly needed to facilitate supervised visitation. This is an area where a limited allocation of resources could have a significant and positive effect on case outcomes.

Apart from the issue of resources, the lack of uniformity across the State in how CHINS cases are handled has been a recurrent theme in the working group's discussions. Going forward, the members of the working group and other stakeholders should continue to examine those counties where the judicial process is working well and understand why, and then attempt to spread those effective practices to counties where the system is struggling.

The working group agrees with the Supreme Court's sentiment, noted at the outset of this report, that "we must be open to experimenting with new methods" and "continued efforts must be made" to restore balance to the State's child protection system. *In re A.S.*, 2016 VT 76, ¶17. The working group hopes that this report will facilitate those efforts.

With the submission of this report, the working group has fulfilled its statutory charge. The members of the working group are grateful for the opportunity to have met over the past two years and discussed and debated these important issues.