MARCH 24, 2015

MEMO RE: S.9

TO: HOUSE COMMITTEE ON HUMAN SERVICES
FROM: BRIAN J. GREARSON, CHIEF SUPERIOR JUDGE

THIS MEMO IS INTENDED TO ADDRESS THE COMMITTEE'S CONSIDERATION OF THE GOAL OF S.9 AND TO WHAT EXTENT THE CURRENT BILL MEETS THAT GOAL.

The goal of the bill S.9 is to improve Vermont's child protection responses.

- **What sections do you think are essential in meeting this goal?**
  Section 16 – the Temporary Care Hearing (hereinafter TCH) as it appears in the current bill is an improvement from the bill as introduced as well as an improvement to the existing statutory framework. The current amendment allows the court to exercise its discretion consistent with the factors in the existing TCH framework, which is familiar to judges, as well as State's Attorneys, defense counsel, and DCF workers. At the same time it eliminates the necessity of exploring a hierarchy of possible placements as recommended by the Vermont Citizens Advisory Board report. It does, however, continue to include all of the possible placements that were available under the former hierarchical procedure.
  The words "protect the welfare and safety of the child" were removed from the existing statute (b) in two places. T.33 sec. 5101 sets forth the purposes of juvenile judicial proceedings and similar language is found in that section. Therefore reinserting that language would seem consistent with the purposes of the statutory framework and not have a detrimental effect on the balance of the amendments to the statute contemplated by S.9.

- **What pieces are helpful but not essential?**
  Section 7-9, the post adoption contact provisions. The expectation is that this section will be applicable to the relatively few cases where the pre-adoptive parents and the parents already have an ongoing relationship where some level of contact probably exists. Nevertheless, even if it only comes into play in a few cases, it will serve to lessen the impact of the difficult and traumatic nature of TPR's on the parents and allow for an easier transition for the child. While some witnesses advocated for the right of the legal parents to petition the court for increased contact, such a provision would defeat the purpose of the post-adoption contact and lead to endless litigation. The contact that is contemplated is not the visitation normally found in divorce orders, but rather limited forms of contact. For example, the adoptive parent sending report cards and or photos to the parents, or the parents having the right to send birthday or holiday cards to adoptive parents for the child.

- **What is missing to move the state towards reaching its goals?**
  The Casey Foundation Report included a recommendation of consideration of a Family Treatment Court. These courts are designed to address the issue of substance abuse as it impacts on the ability of parent to safely care for a child. If the goal of S.9 is to improve the child protection response, at some point the issue of what brings these families to court – substance abuse, specifically, opiate addiction, - must be addressed. Neither S.9 as introduced or as

passed by the Senate references a change in the procedures for addressing this issue. Casey Family Services in their December 2014 report recommended the following as one response to the burgeoning opiate addiction problem:

> A number of Family Drug Treatment Court programs—a specific type of drug treatment court aimed at improving both substance abuse treatment and child welfare outcomes—have shown promise in other states in increasing parents' completion of substance abuse treatment and in decreasing children's time in out-of-home care, increasing family reunifications, and offering potential to reduce overall costs to taxpayers.[28] Vermont has piloted drug court programs in Chittenden and Rutland Counties with mixed results. Given the ongoing impact of families with parental substance abuse problems on the state's child welfare system, a broader Family Drug Treatment Court initiative merits consideration.

The Judiciary recognizes that budgetary limitations preclude any realistic consideration of a Family Treatment Court at this time. The Judiciary is requesting that it should be a topic of discussion by the Working Group.

Reunification: S.9 does not address the concept of a reunification hearing to oversee the transition from DCF custody to the legal parents. At the present time there is no statutory framework for such hearings but in practice, some judges issue Conditional Custody Orders to ease the transition from DCF custody to legal custody to the parents. DCF is implementing a new policy of seeking Conditional Custody Orders from the court as part of the process of returning a child home. The Judiciary supports this policy and does not see the need for statutory changes at this time and would suggest that reunification hearings could be more fully explored by the Working Group.

- **From your perspective, what sections should be amended in order to move us towards this goal?**
  Sec. 1 - Legislative Findings, (b)(1) should include a reference to the role of GAL's in this process: (1) the dedicated frontline professionals, including volunteer guardians ad litem, who struggle . . . ,

  Sec. 3-the Judiciary is concerned that the creation of a new offense, the failure to protect a child, will not serve to improve child protection responses. To the contrary, whatever behavior a new crime captures that is not available under existing law has to be weighed against the detrimental effect on the inevitable CHINS proceedings that will flow from the arrest. Any parent charged under this new crime they will not be able to work with DCF because any communication will potentially expose them to further prosecution. Prosecution of the parents will contribute to further delay in proceedings that are already consistently over goal. One can anticipate that a parent charged with this offense will also be subject to a condition of release that prohibits contact with the child and thereby removing any reasonable prospect of reunification.

  Sec. 5 - requires some revision due to the limitations on the Judiciary's existing data collection and reporting system. The necessary changes are as follows:

  Sec. 5. JUDICIAL BRANCH REPORT ON PROSECUTIONS, CONVICTIONS, AND SENTENCINGS PURSUANT TO 13 V.S.A. 1304a;

(1) the number of ~~arrests~~, ~~prosecutions,~~ filings and convictions pursuant to 13 V.S.A. 1304a;
(the Judiciary does not record arrests and therefore that requirement should be struck in its entirety; in lieu of "prosecutions" our legacy system would record "filings");

(2) the disposition of all cases prosecuted pursuant to 13 V.S.A. 1304a; (the Judiciary can provide this information);

(3) the sentence imposed for all convictions pursuant to 13V.S.A. 1304a; (the Judiciary can provide this information) and;
(4) ~~any other data or information that the Judicial Branch deems relevant.~~ (This would no longer seem necessary in light of the foregoing list and should be struck.)

Sec. 8 POST ADOPTION CONTACT AGREEMENTS

1. Section 8 (c)(3) calls for agreement of the child if 14 years or older; and 9(c)(4) calls for agreement of the Department, the GAL, and the attorney for the child. These sections require some clarification - if any one of those parties does not agree to the contact, does that mean the court cannot order the contact or is the lack of agreement only a factor for the court to consider in ordering contact.

Sec. 9 ENFORCEMENT, MODIFICATION, AND TERMINATION OF POST ADOPTION CONTACT AGREEMENTS

2. As presently structured both the parent and the adoptive parent may seek enforcement of a contact agreement. While the adoptive parent can seek a decrease in contact or termination, the parent, absent agreement of the adoptive parent to increase contact, is limited to enforcement. The current bill allows the parties to submit agreements to increase contact to the court for approval (presumably for future enforcement). However, the ability to file modification agreements would only serve to increase costs to the parties as well as increase the burden on the court. Unlike a parent child contact schedule in a divorce order, parties to a post adoption contract do not have equal bargaining power. The practical effect of this section simply means that as long as the parties have a workable relationship, the adoptive parent can allow whatever contact they deem appropriate but if the relationship deteriorates to the point the prompts the parent to seek enforcement, it is highly likely the adoptive parent will be seeking termination of any contact. If one of the primary purposes of the bill is to decrease the litigation inherent to TPR's, any gain will be lost to post-adoption litigation involving modification agreements. The Judiciary would urge the committee to remove the provision that allows for modification agreements.

3. Mediation costs:
This provision prompted a significant amount of testimony before the Senate as to who should bear the costs of mediation. This is an expense that should be borne by the parties initially. If the matter is not resolved through mediation, the court could, during the course of the hearing on the dispute, re-allocate that cost if it believes one party's position is unreasonable. The Judiciary does not bear the cost of mediation ordered in post-divorce proceedings nor should it bear that cost in these proceedings.

Sec. 10 REDEFINING CHAPTER 49 DEFINITIIONS

The Judiciary agrees with DCF and the Defender General that no amendments are necessary to the existing statutory definitions and for the reasons set forth by the Defender General - "there is a substantial body of decisions by the Vermont Supreme Court and the Human Services Board that interpret the existing statutes. **Changes to the definitions will render existing precedent irrelevant and the new definitions will be subject to extensive litigation.*" (Emphasis added by writer)

Sec. 13 DEPARTMENT'S RECORDS OF ABUSE AND NEGLECT

Amendments to T.33 V.S.A. sec. 4921 call for the production of relevant Department records to the Family Division of the Superior Court pursuant to Sec. (e)(1)(G) if the Court is involved in custody proceedings for a child who is the subject of a CHINS proceeding. The proposed legislation then calls for the court to provide a copy of the record to the parties to the custody proceeding. This latter requirement seems superfluous in that the same parties would be parties to the CHINS proceeding and thereby already have access to those records.

Sec. 14 CONDUCT OF HEARINGS

The Judiciary agrees that the proceedings should be open to those individuals upon approval by the court. However, in the event the court denies access, that order should be final and not subject to appeal.

Sec. 23 WORKING GROUP

The deadline of November 2015 is not realistic in light of the scope of the work to be undertaken by the Work Group and I would recommend a deadline of November 2016.

The Judiciary believes the choice of a GAL as a member of the Working Group should properly be made by the Chief Justice and/or the Court Administrator.

ADDITIONAL COMMENTS

The Judiciary feels compelled to respond to two proposals set forth by the Defender General, the first, a proposal to change the definition of a Child in Need of Care and Supervision, and second, a proposal to grant the right of appeal from a Temporary Care Order.

1. Change in Definition of Child in Need of Care and Supervision

The Judiciary would refer the committee to the Defender General's justification for not amending the existing Chapter 49 Definitions - *"*Changes to the definitions will render existing precedent irrelevant and the new definitions will be subject to extensive litigation."* The rationale expressed by the Defender General is even more pertinent to the definition of CHINS.

The current CHINS standard, which refers to abuse of a child without specifically defining the term "abuse", has been employed since at least 1974 (See, former § 5502(a)(12) as amended, Act No. 246 1973 Adj.Sess.). The standard reflects a realistic assessment of the need for reasonable flexibility in the determination of abuse, without being either over or under inclusive. Judicial construction has served to provide guidance over time as to standards for determination of abuse, such as in marking the bounds between parental discipline including corporal punishment, and child abuse. See, e.g. *State v. Martin, i170 Vt. 614 (2000)* (addressing the standard in context of a criminal jury instruction); also, *In re: F.P.,* 164 Vt. 117 (1995). The decisions also recognize that abuse may be found in instances where the evidence establishes serious *risk* of harm to a child, that it's not necessary to wait until a child is actually abused if there is proof of such substantial and imminent risk. See, *E.J.R. v. Young,* 162 Vt. 219(1994). Most recently, in *In re: M.K.,* 2015 VT 8, the Court cited favorably the decision in *People v. D.A.K.,* 596 P.2d 747, 751 (Colo. 1979) to the effect that "The protection of an abused or mistreated child is an area of legitimate legislative concern that does not lend itself to a more precise definition".

2. Appeals from Temporary Care Orders as Collateral Final Orders

TEMPORARY CARE ORDERS ARE NOT, AND SHOULD NOT, BE CONSIDERED EITHER FINAL ORDERS, OR COLLATERAL FINAL ORDERS FOR PURPOSES OF APPEAL.

- Temporary care orders are essentially, and by reasonable statutory definition, not final, but temporary or provisional, and subject to revision by the trial court pending merits and disposition proceedings upon full development of evidence and argument as to a child's best interests. Juvenile court judges can, and often do, modify temporary care orders from the time of Emergency Care Orders to temporary care hearing, and from temporary care hearing to merits and disposition. Circumstances as to a parent's ability to safely care for the child not reasonably known, or existing, at time of the temporary care hearing may later be brought to light, warranting modification of the TCO to either a Conditional Custody Order (CCO), or a return of custody altogether. Kinship care provided by a family member, not first available at time of the Temporary Care Hearing, may later become a reasonable option to further facilitate reunification of child and parent, and continued exclusive jurisdiction and authority to modify TCOs at the trial court level facilitates these modifications. Apart from being provisional in nature, the Temporary Care Order has not been considered to have such finality to serve as a final judgment subject to appeal, in contrast to the CHINS merits decision (see, *In re: C.P.,* 193 Vt. 29, 2012) or the final disposition decision in the case.

- Appellate review of TCOs would likely be subject to delay that is not in the best interests of either children or parents, as preparation of a transcript of the original temporary care hearing would be required, and a hearing scheduled and completed before the Supreme Court. Time is of the essence with respect to determining all children's best interests, and engaging in reunification efforts, but especially so with very young children. Delay actually enhances the prospect of "piecemeal" review and determination of a CHINS case, not in the interests of any party, by multiple judges who have less familiarity with the family's strengths and challenges, and the prior proceedings.

- In contrast, a Motion to Modify a Temporary Care Order perceived to be given imprudently, without basis, or reasonably subject to change, can be promptly heard by the juvenile court judge who issued the order, with the benefit of having heard the prior testimony/evidence, and the expertise and ability to address any warranted modifications in the presence of all parties initially convened in the case. In contrast, decisions of the Supreme Court are typically given in writing, following hearing, and there are no personal interactions with the parties, which is especially critical to assuring understanding and prompt implementation of any TCO provisions of impact to children and families.

- Appeal of temporary care orders may serve to inhibit reasonable engagement in good faith and realistic case planning and plan implementation calling for reunification of children with parents, at a time when efforts toward reunification are most called for.

In conclusion, the juvenile justice system is confronted with a two prong dilemma. First, the flood of cases coming into the courts, overwhelmingly due to opiate addiction, is a circumstance over which we have no control. However, once in the system, the Judiciary, indeed all parties to the process, have an obligation to achieve permanency for the child, whether that results in a return home or to another permanent placement. The proposals made by the Defender General, rather than improving the process of resolution, will only exacerbate already significant delays to a compromised system.