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November 14, 2014

Committee on Child Protection and Legislative Reform
Senator Richard Sears
Senator Claire Ayer
Senator Margaret Flory
Senator Kevin Mullin
Senator Eldred French
Representative William Lippert
Representative Ann Pugh

RE: Changes to Juvenile Laws

Dear Members,

The system is under resourced. There are not enough social workers, not enough prosecutors and there is not enough court time to make it work safely for children. As it will not be properly resourced in this budget climate, increasing efficiency is our best hope of protecting children.

Problem: Temporary Care Hearings are taking hours. When the court issues an ECO (Emergency Custody Order) a TCH (Temporary Care Hearing) must take place within 72 hours. That requires that the court jam these hearings into days which are already scheduled. In Windsor County as of November 12 we filed 205 juvenile cases (up from 150 in all of last year). Most of the cases were initiated by ECO and therefore resulted in an emergency hearing.

Under the current statute the State must first prove that putting the children back with their parents would be a substantial danger. Then the State must prove that the non-custodial parent, grandparent's and every other relative proposed by the parents is not suitable. Rarely is all of the information possessed by one social worker. Social worker 1 signed the affidavit, but social worker 2 talked to mom's boyfriend who saw mom using heroin in front of the child, and social worker 3 did the previous investigations, wherein it was clear that the grandparents would not be a suitable placement. Reliable hearsay is admissible at these

hearings – but most judges interpret that as one layer of hearsay. So we can't present evidence that the boyfriend told social worker 2 something unless social worker 2 is there.

Immediate issues:

- The court needs to reschedule 2 hour's worth of a divorce case to hear the temporary care hearing.
- Three social workers who don't have enough time to do their work as it is are going to lose a whole afternoon in court. Our juvenile docket is so jammed that hearings regularly run 1 to 1 ½ hours late. A social worker with three cases on Monday probably loses that whole day. Then most of Wednesday and half a day Thursday due to the TCH. They don't have time to do social work.

Solution:

1. Add language to 5307(f) to say that at the temporary care hearing the social worker, who signed the affidavit or a supervisor with knowledge of the investigation, is competent to testify to the contents of the affidavit and surrounding circumstances. This would mean only one person from the department would need to testify at the temporary care hearing.
2. Make it clear that a temporary care hearing is a summary proceeding not a full evidentiary hearing. While the court has present authority to limit the hearing to the issues of removal, typically the State needs to prove most of the allegations in the petition to justify DCF custody. The parents then have the right to call their own witnesses to refute the allegations. I suggest that you consider adopting language from our weight of the evidence bail review statute/criminal 12(d) standard which allows for cross examination, but not the presentation of modifying evidence. My proposed rewrite would be:
    a. 5307(f) The State shall present evidence sufficient to convince the trier of fact that placement with someone other than DCF could present an articulable risk of danger to the child. A representative of the department may testify to the contents of the affidavit and information obtained by other social workers mentioned in the affidavit. Other hearsay, to the extent it is deemed relevant and reliable by the court, shall be admissible. The court shall limit testimony to that which relates to removal of the child and continued placement outside the home. Modifying evidence shall not be considered.
3. Instead of the lockstep findings in 5308(b) where DCF is the last priority; give the judge greater discretion, and ask that she be mindful that it would be better to place with a parent or grandparent when determining the child's best interest which would be the factor for placement. Changes to:
    a. 5308(a)(1) - A return of legal custody presents an articulable risk to the physical health, mental health, welfare, or safety of the child.
    b. 5308(a)(2) – the child or another child residing in the same household has been physically abused, sexually abused, <u>or neglected</u> by ....
    c. 5308(a)(3) – the child or another child residing in the same household is at substantial risk of physical abuse, sexual abuse, <u>or neglect</u> ....

Problem: Merits hearings are trials. When there is medical neglect it requires a slew of medical professionals to prove the case. I know some would like to have merits hearings using hearsay. From a due process point of view I think that if the State is taking someone's child, the parent ought to be able to cross examine the person giving the information. However, in cases of physical abuse and exposing the child to the sale of narcotics that is difficult for young children. (see ex. A) I believe that 804(a) strikes the balance.

Solution: Amend 804(a) to allow hearsay of the child to come in in any abuse or neglect case subject to the child being available for cross examination. This use of 804(a) should be limited to juvenile cases.

Problem: There is a huge problem in terms of information sharing by state agencies. For instance, DCF Economic Services may provide the bare minimum necessary under the mandated reporting law, but then they will not cooperate with DCF Child Protection or the State's Attorney in order to get the necessary evidence in front of the court to continue to protect the child. They will even move to quash a subpoena which means there is no opportunity to talk with the witnesses ahead of trial to find out what information they know. (see ex. B) The information I was seeking from the Economic Services social workers was mother's statement to them that she allowed her sex offender boyfriend to have contact with her daughters, who were roughly the same age as the victim, because she did not believe the charges. I believe the intent of 33 V.S.A. §111 was to prevent an Economic Services worker from speaking in public about a person being on welfare. It was not intended to prevent a juvenile court in a closed proceeding from hearing information related to the protection of children.

Solution: Amend 33 V.S.A. § 111 to say: nothing in this provision shall be construed to prevent an employee of the department from cooperating with child protection or the State's Attorney regarding a juvenile case.

Problem: What risk of harm constitutes may be in the eye of the beholder, make clear that the use of illegal opiates in the presence of the child or dealing the same constitutes a risk of harm. (again see exhibit A)

Problem: Mandatory reporters make a report but then believe privilege and HIPAA or FIRPA kick in. This makes it difficult to prepare a case; and can result in motions to quash subpoenas.

Solution: Expand the mandatory reporting obligation beyond the initial report to require ongoing cooperation with the investigation and court related proceedings. 33 V.S.A. §4913(a) – Except as provided in subsection (b) of this section, a person may not refuse to make a report required by this section on the grounds that the report would violate a privilege or disclose a confidential communication. <u>The reporter shall continue to cooperate with DCF regarding the substance of the report during investigation. In the event that a juvenile petition is filed, the reporter shall cooperate with the State's Attorney or Attorney General and may not refuse to testify based on the grounds that it would violate privilege or disclose confidential communication.</u>

Problem: We need a failure to protect statute. If you look at exhibit D, mother was well aware that her boyfriend beat the tar out of her son. She was aware of other inappropriate behavior. Her conduct violates no Vermont law. I am familiar with another case where either the mother or the father shook the daylights out of their son. He has severe cerebral palsy. He will never speak or walk. He will probably die before he reaches age 7. We had a suspicion as to which one did it. But we can't prove it. Under present law, absent some break, no one will be brought to justice for that little boy's anguish and ultimate death.

I am sympathetic to the plight of an abused woman. I would like to think that prosecutors would not charge an abused woman.

Solution: I believe something like the Ohio statute would be sufficient, and provides an affirmative defense for an abused spouse. Make clear that the affirmative defense must be proven by the defendant by a preponderance of the evidence. Otherwise our supreme court may require that we prove the absence of the defense beyond a reasonable doubt (i.e. self-defense).

Problem: Heroin and other substances are very common on this case load. Addicts regularly trade in clean urine, so a non-observed U.A. is virtually useless. And poorly observed U.A.'s are foiled by Wizenators. DCF does not have the ability to observe and test urine. Probation officers used to do courtesy tests for DCF. Corrections now refuses to provide that service to DCF.

Solution: I think some legislative pressure on Commissioner Pallito would be effective.

Problem: We have too many emergency temporary care hearings. Section 5305 allows a judge to do an emergency conditional custody order to one or both parents.

Solution: Add language to 5307 which says that when the court does an emergency CCO to a parent the court shall hold a hearing within one week. This gives the court a little more flexibility in scheduling, and it does not have the same urgency as a situation where a child is coming into state custody.

Problem: Taking children out of environments they know is bound to be traumatic for children. DCF will do safety planning and try to get parents to voluntarily agree to have children stay with relatives without court involvement. But this leaves parents in a position where they can just go get the child. (there is no legal force to a DCF safety plan.) If this is perceived to be dangerous DCF will want an ECO. This results in removing a child from a grandparent's where the child was safe, but for the parent's ability to legally retrieve the child.

Solution: Allow the State to request and a judge to grant an order placing the child in the custody of a relative subject to a CCO, on an emergency basis.

Problem: Parents will often show up at a TCH with several proposed relative placements. DCF is easily able to run those names through its own registry expeditiously. However, 5307 (e)(5)(B and C) are not working. It seems to take forever for DCF to secure a criminal background check for proposed placements.

Solution: I don't know what the solution is. Police are authorized to get NCIC background checks and do so in minutes. I am guessing that the problem is around resources at VCIC to expeditiously respond to DCF requests. I also note that where the check is not finger print supported, and is only based on the person's self-reported name and date of birth the system will miss something under the person's real name and date of birth. Again, legislative pressure to make sure VCIC responds in hours not weeks to DCF requests for record checks may solve the problem.

Problem: Conditional Custody Orders (CCO's) are used to keep a child with a parent or relative, and have judicially ordered conditions to keep the child safe. They are used as a substitute for DCF custody when an ECO is requested. They are issued at the time of the temporary care hearing. They are used as a disposition and permanency option. The face

of the form gives the admonishment "failure to comply with these conditions may result in the child's removal from the home and immediate placement in DCF custody." (see attached exhibit) However, the statute is silent on how that happens. Presently, if it is a mild breach there is just a reminder to the parents by the social worker; in the event of a regular breach or more serious breach, I notify the court. And if we think the children are in danger I ask for an ECO. There is nothing to guide the courts on what happens next. CCO's are defined in 5102(5). You could add a 5124 entitled:

Violations of Conditional Custody Orders: should the State file a notice supported by an affidavit by DCF or law enforcement alleging that a CCO has been violated, the court may grant an immediate ex parte order placing the child in DCF custody if the circumstances in the affidavit suggest danger to the child. Whether the court grants the request for custody or not it shall expeditiously schedule a preliminary hearing on the violation. If the State or a parent challenges the initial custody determination a summary hearing under 5307(f) shall be held. The court shall schedule a hearing on the merits of the violation where reliable hearsay shall be admissible.

I appreciate the time you are putting in to try to protect children.

Sincerely

Michael Kainen
State's Attorney