TESTIMONY TO HOUSE HUMAN SERVICES COMMITTEE RE S.9 3/24/15
Presented by Pamela A. Marsh, Esq., Marsh & Wagner, P.C., Certified Child Welfare Law Specialist

Background

I have practiced in the area of juvenile law since 1985, first as a conflict counsel contractor, and since 1992, as a primary juvenile defense contractor. In 2012, I was certified by the National Association of Counsel for Children as a Child Welfare Law Specialist. I currently represent primarily children in CHINS cases, but I also represent some parents – former clients whose children have come into custody, and in counties outside of Addison, parents where the court has run out of conflict counsel.

I have been active in the Permanency Planning Committee, the Justice for Children Task Force, and I am the Chair of the Vermont Bar Association Juvenile Law Committee. However, in these remarks I am speaking only for myself, not as a representative of any organization.

Section 8– Post Adoption Agreements

I believe the creation of enforceable post-adoption agreements is beneficial to the children involved in a termination of parental rights [TPR] proceeding. In my experience, children (even those adopted at a young age) are very curious about their biological parents. As they grow older, they may tend to idealize these parents and to believe that they may take better care of them then their adoptive parents. This phenomenon happens in divorces, where a child idealizes an absent parent. Having safe, defined post-adoption contact can help a child grow and thrive in her adoptive family, while knowing that her biological parent or parents still care for her.

Often adopted children seek out their birthparents in their teens, and once they are of legal age, they may desire to move in with these parents. Having ongoing contact may mitigate the need to find the birthparents, and the desire to live with them.

Section 8 sets forth the protocol for the establishment of post-adoption contact agreements under the control of the juvenile court. Currently, parents and adoptive parents enter into unenforceable contact agreements – "good faith" agreements for

post-adoption contact. There is really no way to track whether the agreements are adhered to. The lack of enforceability discourages parents who might otherwise voluntarily relinquish their parental rights from doing so. Having enforceable post-adoption agreements will likely encourage more voluntary terminations.[1] Involuntary termination cases often take days of judicial and attorney time. Parents who would voluntarily terminate but for the fact that post-adoption contact agreements are currently unenforceable would likely agree to a voluntary termination with an enforceable agreement.[2]

I think it is important for the child's attorney and guardian ad litem [GAL] to be involved at least in approval of such agreements, as provided in proposed § 5124(c)(4). Presently, the unenforceable agreements are not approved by the court and the GAL and attorney for the child are not consulted with respect to the agreements. I support the adoption of Section 8 without changes.

Section 9 – Modification and Enforcement of Post Adoption Agreements

While I understand why modification and enforcement of post-adoption agreements is assigned to the Probate Courts (similar to modification and enforcement of permanent guardianship agreements pursuant to 14 V.S.A. Chapter 111), I would prefer to see them enforced in the juvenile court where the agreements were made and approved. I understand that there is a bill pending which would reduce the number of Probate Judges. Assigning enforcement, modification and termination of post-adoption agreements to the Probate Courts at a time when reducing the number of probate judges is being considered seems foolish. Most probate judges are part-time, and have to hold outside employment to make a living. Overburdening the Probate Courts may serve to reduce the stress on the appointed Superior Court judges, but will not necessarily result in the best interests of children and families in the system. Superior

[1] I do not mean to imply that TPR is the desired outcome in most cases. However, TPR is often necessary to achieve permanency especially for a young child whose parents are caught in the cycle of addiction. A voluntary termination has the advantage for a parent in that the Department is not required to make "reasonable efforts" to prevent removal of a child where there has been an involuntary termination of parental rights. Adoption & Safe Families Act, 42 U.S.C. § 671(15)(D)(iii).

[2] There will still be involuntary termination cases, especially those in which the evidence is close and the parent has made some progress, but allegedly not enough to support reunification within a reasonable period of time.

Court judges are all trained in the complex issues of developmental trauma, best interests of the child, permanency, etc. It is far from clear what training Probate judges receive in these areas.

Further, there is no right to counsel in Probate Court proceedings. I understand that enforcement in juvenile court may be more expensive than in probate court if the biological parents and adoptive parents are entitled to assignment of counsel, but I think that have counsel would ensure that the important information relevant to modification and/or enforcement is presented to the court. I do not think that DCF would have to be a party, but it should be noticed and allowed to intervene if it wishes.

If enforcement remains in Probate Court as written, a GAL should be appointed for the child. If available, it should be the GAL from the juvenile proceeding. I am concerned regarding § 9-101(a), which seems to presume that if the parties agree to modified contact, the court will approve the agreement without hearing. I am concerned with the idea of rubber stamping such agreements without consideration of the best interests of the child. I disagree with proposed § 9-101(f), which prohibits the court from ordering further investigation or evaluation from the Department. That should be eliminated, as it would prevent the court from receiving potentially beneficial information with respect to the best interests of the child.

I also disagree with § 9-101(i) as written, which allows the court to rule on a petition without an evidentiary hearing. Such a provision does not allow due process to the parties, and especially to the biological parents. The court should only be able to rule on a petition without a hearing if the pleadings do not set forth the basic requirements for modification or enforcement as required by the statute. Otherwise, a hearing should be held. Affidavits, if deemed reliable by the court, along with evidentiary testimony, including reliable hearsay, may serve as the basis for the Court's decision regarding enforcement or modification of an agreement.

<u>Reinstatement of Parental Rights</u>

I understand that an amendment has been or will be introduced to add reinstatement of parental rights to S.9. I was part of the group that drafted an

amendment for proposal to the House. I understand that the amendment has not yet been introduced.

I support the concept of reinstatement of parental rights in limited circumstances. The focus must always be on the best interests of the child. Unfortunately, the reality is that some adoptions disrupt, primarily during the teenage years. Also, the reality is that there are some children whose parental rights have been terminated, but who have not been adopted within a reasonable period of time (3 years). For example, many grandparents take on the responsibility for raising very young children. If they should die while caring for the child, the child likely has retained a relationship with the biological parent. In the meantime, the situation of the parents may have dramatically improved, especially if it was a termination of a very young child due to ongoing addiction issues that have resolved in the interim period. For these limited situations (dissolved adoptions, and failure to find a permanent family after 3 years), consideration of reinstatement of parental rights is appropriate.

Only DCF or the child, if over 14, should be able to petition for reinstatement of parental rights. I would expect that before doing so, the child would likely have been placed with the parent, in DCF custody, for at least six months, in order to assess the quality of the parent-child relationship, safety in the home, and the parent's ability to provide for care, protection, education and healthy mental, physical and social development of the child. [I note that the draft bill would hold a hearing on these issues first, then place the child with the parent for up to six months, with the petition for reinstatement of parental rights still pending. I think it might be better for DCF to use its inherent power to place a child who is in DCF custody (which happens when an adoption dissolves and is true when TPR has occurred and the adoption hasn't been finalized) with the parent first, then, after six months, file the petition for reinstatement of parental rights.]

In any event, the focus should be on once again achieving permanency for the child in a safe, supportive environment.

Improving child protection responses:

1. Early intervention:

Prevention and early intervention is, in my opinion, the best way to improve child protection. Putting more resources into supporting young parents through such programs as Parent-Child Center outreach workers, visiting nurses, quality childcare and Head Start can often assist before things get to the point that the Department needs to intervene. Early neglect has long lasting and even permanent effects on children. Developmental trauma results in children that appear to be on the autism spectrum, have PTSD or ADHD, conduct disorders. The cost of undoing the harm already done to such children in terms of DCF intervention, special education, and eventually adult incarceration, is astounding. Putting resources in at the front end is better than being reactive. Nothing in S.9 addresses prevention.

2. Essential Sections:

A. Section 12 – Mandated Reporter

I agree that sharing information with mandated reporters who have an ongoing working relationship with a child would be beneficial. I have had many mandated reporters, especially teachers and doctors, express frustration to me when their reports are not accepted and they feel they have to report again and again to get intervention necessary for the safety of a child.

B. Section 13 - Sharing of Information with other courts and providers working with families

I like the wording proposed by Cindy Walcott on behalf of the Department in her testimony dated March 20, 2015. In addition to providing information to all parties in juvenile proceedings, enabling DCF to share information with probate and family courts dealing with families that DCF is involved in may assist the court in making decisions that can assure protection of the child, while keeping the child with family and outside of the child protection system.

Especially since most family and probate cases have no attorneys involved, it would be particularly relevant to the judges involved to know whether DCF has been involved in the family and the nature of the involvement.[3] Even though it causes more work for the courts, providing for an *in camera* review of the records before disclosure to parties in family and probate division cases provides a layer of protection to families where the information may consist of unsubstantiated reports by persons with an axe to grind against one party.

There seems to be some evidence that better information sharing among agencies, attorneys and the court might have avoided at least one of the tragic deaths in 2014. Thus, I support sharing records and information as provided (change Cindy's proposal to and information from or information).

C. Section 14 – Conduct of Hearings

I concur that juvenile proceedings should remain confidential, but that the doors should be open to more family and supports for parents. During evidentiary hearings, anyone other than a party who may be a witness shall be excluded until s/he testifies.

D. Section 15 – Request for Emergency Care Order

It is, in reality, the practice that the social worker prepares the affidavit in support of an emergency care order most of the time. Officers generally only do it if criminal charges are being pressed against the parent or the child. This is a sensible amendment.

E. Section 16 – Temporary Care Order

[3] Usually the situation comes up when DCF has an open family case involving one of the parents, or DCF advises a parent to seek a modification of parental rights and responsibilities or parent-child contact in order to avoid juvenile court intervention. Giving such advice, without making their records available and their workers available to testify, makes it extremely difficult for a parent seeking modification to meet the legal standards of a substantial and unanticipated change of circumstances necessitating a change in parental rights and responsibilities under 15 V.S.A. § 668.

This is very controversial because it does away with the statutory preferences for custody set forth in the current statute. However, this section goes a long way towards improving child protection. In practical terms, I believe judges will continue to issue conditional custody orders, look at non-custodial parents, kin and fictive kin as potential placements. DCF will also consider such persons as potential placements if a child is placed into custody. Existing DCF policies require this. See DCF Policy 91. However, this revision will give judges more flexibility in making temporary placements, allowing them to focus on the best interests of the child. The best interests of the child will often result in conditional custody orders to parents or kin, and will not automatically result in more children being placed into state custody.[4]

It is essential that the Department do its due diligence in investigating the suitability of a person seeking custody of a child (whether through a conditional custody order or through DCF custody) to ensure that the temporary care placement will provide safety for the child. Often that cannot be done in the 72 hours between the issuance of an emergency care order and the temporary care hearing (33 V.S.A. § 5307), especially if the 72 hours encompasses a weekend. I would suggest amending § 5307 to exclude weekends from the 72-hour period. (State holidays are currently excluded, but not weekends.)

[4] I understand that my esteemed colleague, Marshall Pahl, has recommended that temporary care orders be considered collateral final orders appealable under V.R.A.P. 5.1. I disagree with this recommendation, as I think it would lead to even more drawn out proceedings, with parents focusing on the appeal, rather on getting on with a determination of the merits, and if found, to disposition. If merits are not found, the temporary care order immediately is released. In most cases, if reunification is to occur, the parent's early cooperation with DCF's plan of services is essential. If parents remain focused on appeals of temporary care orders, they are likely to continue in an adversarial relationship with DCF, rather than working on the issues that brought the child into custody. If parents feel that the petition has no merit, the parents should seek to get to the merits hearing as soon as possible, so that if they are correct, reunification will happen very quickly.

3. Helpful but not Essential:

    A. Enforceable Post adoption contact agreements:

        Enforceable post adoption contracts would help streamline the overcrowded court system, as well as inure to the long-term welfare of the child and the biological parents. However, they are not essential for the protection of children. This is, however, a subject that has been long considered by the Justice for Children's Task Force.

    B. Reinstatement of parental rights

        A formal reinstatement of parental rights amendment has not yet, as I understand it, been introduced. This is something that has occurred occasionally, on an anecdotal basis, even without formal legislation. However, the knowledge that parental rights might be restored in the event the adoption dissolves or a child is not adopted, may help streamline the court system by encouraging voluntary TPR agreements.

    C. Sections 11, 17, 18, 20.

4. Missing to move the State toward its goal

    A. Adequate funding for the Judiciary (Not necessarily in S.9, but must be included in the budget bill)

        Without funding the judiciary to a level that allows it to fill all current judicial vacancies, the timeliness of juvenile proceedings will continue to be adversely impacted. Merits hearings should be held within 60 days of the issuance of a temporary care order. § 5313.[5] However, that rarely occurs. There is often a combination of too much litigation over temporary care orders and lack of judicial time that result in contested merits hearings being scheduled 6 or more months after a child has been removed from the home. Federal regulations require timely hearings; this Bill wants to create a study

[5] The Vermont Supreme Court has held that the timeframes are not mandatory, because dismissal of a case because the timeframe hasn't been met is not in the best interests of the child.

committee to determine why hearings aren't timely (Section 20 (c)(1)). Having judges available to do this work is essential.

B. Adequate funding for representation of children and parents(Not necessarily in S.9, but must be included in the budget bill)

Children and parents are represented in part by full-time public defenders. However, in every case, there is need for conflict counsel to represent the parties that are not represented by public defense staff.[6] In nearly all cases, that means that separate attorneys are required for each parent. Then come the families with one mother, and multiple fathers, which make things even more complicated.

The Office of the Defender General [ODG] currently has a system of contracts with conflict counsel (and in my case for primary representation of children.) In addition, it hires ad hoc attorneys at $50/hour when it runs out of contractors. Contracts are paid at such a low level that contractors have either to maintain a private practice to make up for the low pay, or take contracts in multiple counties. Contractors are not paid mileage; they have to maintain their own malpractice insurance and a required level of insurance on their automobiles; they are not paid for many routine out of pocket expenses. As a result, contractors frequently leave, and new attorneys have to be recruited. Furthermore, the practice of having multiple contracts across county lines results in significant scheduling delays. In Addison County, we have one contractor with contracts in Addison and Rutland County, and another contractor with contracts in Addison and Franklin County. We have standby

[6] In Addison County, the Office of the Defender General contracts with Marsh & Wagner, P.C. to provide the primary juvenile representation, and the public defender office handles only adults.

contractors from Burlington and Rutland. Finding time other than on our regular juvenile day (Tuesday mornings two to three days a month and all day Tuesdays twice a month) is extremely difficult. When I last spoke with Teri Corsones regarding how many full juvenile hearing days are needed to catch up with the backlog, not including new cases, it was 15. We have only one judge for all dockets.

C. Increasing the number and competency of guardians ad litem

With the ever increasing caseload, we are running out of guardians ad litem. Guardians feel pressured to take more cases than they feel they can competently handle. Guardians with the skill to become educational surrogates are increasingly rare. Guardians aren't paid, and their training and mileage has been cut. Their function is essential, in that they are the only people, aside from the DCF workers, that can talk to all parties in a CHINS proceeding.[7]

D. DCF Access to DAIL's Adult Protection Registry

As suggested by Cindy Walcott in her 3/20/15 testimony, allowing DCF to access the DAIL registry when investigating the suitability of persons applying for the care of a child as a conditional custodian or as a foster parent.

5. Sections not necessary to improving Vermont's child protection responses

A. Section 3 - New Crime of Failure to Protect.

I agree with Cindy Walcott's testimony on March 20 with respect to this section. It is not necessary to create new crimes to deal with child protection. Creating this new crime would likely be counterproductive. Making it a 20 year felony is even more unlikely to gain cooperation from caregivers. Encouraging reporting in a positive manner is much more likely to be beneficial.

[7] The Rules of Professional Conduct prohibit attorneys from contacting parties represented by attorneys, unless the attorney consents. Usually limited consent is given for the purpose of setting up visits with children living with parents under a Conditional Custody Order, but not otherwise.

B. Section 4 - Special Crime of Methamphetamine Production in the Presence of a Child

Manufacturing methamphetamine is already a 20 year felony with a $1 million fine. Do you really think that making it a 30 year felony with a $1.5 million fine if it is done in the presence of a child will deter anyone? People who make meth are not deterred by criminal penalties. They are addicts who are rarely successfully treated. They should be detained for the safety of the public, but the existing up to 20 years is more than enough. And fines of $1 million or more – when is the last time someone who makes meth in Vermont had that kind of money?

C. Section 10 – Redefining Chapter 49 Definitions

I agree with Cindy Walcott that it is not necessary to broaden the definitions of abuse in Chapter 49. The definitions of abuse did not cause the two child deaths. Broadening the definitions may have the effect of every child with a bruise having to be assessed by DCF – something which would be wholly unnecessary.

Notes on related bills

H. 399 – I generally support this bill. However, I would suggest that 33 V.S.A. § 4916c(a)(3) be changed to read that, "The Commissioner may deny a petition for expungement based solely on subdivision (2)(A), provided the person was at least 18 years old when placed on the registry, and on (2)(B).

The basis for this recommendation is that a lot of juveniles get placed on the registry for sexual acts when they are in their early teens. There is very little recidivism with juvenile sexual behavior, but the current climate regarding sex cases seems to assume that once a sex offender, always a sex offender. Persons who have their names placed on the registry as juveniles should always have the opportunity to have their registry records expunged.

H. 400 – Related to the Modification or Termination of Permanent Guardianships

I support this bill. I suspect the modification and termination of permanent guardianships is fairly rare, but I have a case right now where I am preparing to file for one. I have been in touch with the Probate Court, Family Court, DCF (up to and including Cindy Walcott) regarding the issue of continuing the subsidy agreement, and no one is quite sure how best to proceed. This would clarify the practice and be helpful.