Child Protection Committee

Reunification, custody, and the statutory standards applicable to CHINS proceedings

Summary: The issues of family reunification, and how to strike an appropriate balance between reunification, child safety, and the best interests of a child, have been repeatedly mentioned by witnesses. It is important to understand:

- Vermont statutory references to reunification.
- The federal requirement of "reasonable efforts" to reunify families.
- The federal requirement of "contrary to the welfare" or "best interests" of a child.
- The statutory standards applicable at the different stages of a CHINS proceeding and how those standards impact custody decisions.
- The "custody hierarchy."

I. Vermont statutory references to reunification

Current law: Although current Vermont law does not mandate reunification, some sections of Title 33 contain language that seems to promote reunification. For example, 33 V.S.A. § 5101(a)(3) states that the juvenile judicial proceedings chapters shall be construed in accordance with a number of purposes, including "[t]o preserve the family and to separate a child from his or her parents only when necessary to protect the child from serious harm or in the interests of public safety."

Other statutory provisions seem to encourage reunification. The language used in these sections is not consistent, which can result in confusion and ambiguity as to what standards DCF and other participants in the child protection system should apply. See, 33 V.S.A. § 4901(4) (DCF may work with federal agencies to protect and promote "the welfare of children, including the strengthening of their homes where possible or, where needed, providing adequate care away from their homes in child-care facilities"); 33 V.S.A. § 4903 (DCF may expend funds to protect the welfare of children including providing "aid and services to the extent necessary for the purpose of permitting children to remain in their own homes," and providing substitute parental care if an investigation has determined that is in best interests of child); 33 V.S.A. § 4911(the purpose of sub-chapter two include protecting "children whose health and welfare may be adversely affected through abuse or neglect," "strengthen[ing] the family and mak[ing] the home safe for children whenever possible by enhancing the parental capacity for good child care;" and providing a "a temporary or permanent nurturing and safe environment for children when necessary").

Practice: The Committee heard contradictory testimony concerning the extent to which DCF emphasizes reunification. For example, some witnesses testified that reunification was pursued even when harmful to, or not in the best interests of, a child. On the other hand, other witnesses testified that this was not accurate and the best interests of the child is paramount.

Issues and Committee options: If the Committee wishes to recommend that reunification be de-emphasized, it could suggest amending language such as found in 33 V.S.A. § 5101. Consistency and clarity in statutory language is important, and any references to the powers and duties of DCF should clearly state the same guidance.

II. Reasonable efforts to preserve and reunify families

Introduction: Witnesses have referred to the requirement that DCF pursue reasonable efforts to preserve families. Although there is such a federal requirement, it is more relevant to funding, and not as relevant to custody decisions.

Federal law and reasonable efforts: 42 USC § 671(a) provides that in order for a state to receive funding for foster care and adoption assistance, the state must provide that "reasonable efforts" will be made to preserve families prior to the placement of a child in foster care, to prevent the need for removing a child, and to return the child to his or her home. The law also states that in making reasonable efforts, the health and safety of the child is paramount. 42 USC § 671(a)(15)(A), (B). See, Adoption Assistance and Child Welfare Act of 1980, the Adoption and Safe Families Act of 1997 (ASFA).

However, reasonable efforts "shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that" the parent has committed, attempted to commit, or conspired to commit murder or voluntary manslaughter of another child; committed a felony assault that results in serious bodily injury to the child; or the parental rights of the parent to a sibling have been terminated involuntarily. 42 USC § 671(a)(15)(D).

Most important, reasonable efforts are not required if the parent has subjected the child to "aggravated circumstances." 42 USC § 671(a)(15)(D)(i). Aggravated circumstances are defined in state law and may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse. Therefore, the federal reasonable efforts requirement includes a carve-out that reasonable efforts are not required if the parent has subjected the child to aggravated circumstances as defined in state law.

Vermont law and reasonable efforts: 33 V.S.A. § 5102(25) defines "reasonable efforts" as "the exercise of due diligence by [DCF] to use appropriate and available services to prevent unnecessary removal of the child from the home or to finalize a permanency plan." The statute continues, "the court may find that no services were appropriate or reasonable considering the circumstances," and if the court finds that aggravated circumstances are present, it "may make, but shall not be required to make" written findings as to whether reasonable efforts were made to prevent removal of the child.

33 V.S.A. § 5102(25) proceeds to define "aggravated circumstances" in nearly identical terms to federal law. For example, aggravated circumstances exist if a court of competent jurisdiction has determined that the parent has subjected a child to abandonment, torture, chronic abuse, or sexual abuse, been convicted of murder or manslaughter of a child, or been convicted of a felony crime that results in serious bodily

injury to the child or another child of the parent. Therefore, Vermont has chosen to limit "aggravated circumstances" to the same factors listed in the federal law, and has not defined "aggravated circumstances" more broadly.

Other states have taken a different approach and greatly expanded the circumstances under which reasonable efforts are not required. For example, under Florida law, reasonable efforts are not required if the parent did not follow the case plan, has a history of alcohol or substance abuse, or a newborn child has a positive test for alcohol or a controlled substance. Under Utah law, reasonable efforts are not required if the parent's rights were terminated with regard to any other child, the child was removed from the home twice before, the parent suffers from mental illness to an extent that prevents him or her from caring for the child, or other circumstance preclude reunification efforts. Therefore, unlike Vermont, other states have expanded the aggravated circumstances carve-out.

In what context do reasonable efforts matter? In In re D.C., 2012 VT 108, 193 Vt. 101 (2012), the Vermont Supreme Court discussed the distinction between factors that should be considered in deciding custody or parental rights, and other findings that a court must make. The D.C. court noted that "reasonable-efforts determinations were incorporated into Vermont law to implement federal law … presumably to preserve federal funding" and that "reasonable efforts" is not one of the factors a court will consider in determining to terminate parental rights or not. 2012 VT 108, ¶ 32, 193 Vt. 101, 115.

Issues and Committee options: Although witnesses have referred to the requirement that reasonable efforts be made by DCF, in fact, the presence or absence of reasonable efforts is most relevant to obtaining federal funding. If the Committee wishes to address this issue, it could do what other states have done, and define "aggravating circumstances" more broadly, which would lessen the circumstances under which a court would need to make findings as to whether reasonable efforts were made or not.

III. Contrary to welfare / best interests of a child

To be eligible for federal funds under title VI-E of the Social Security Act, a court order that removes a child from his or her home, even temporarily, must contain a determination that "continuation of residence in the home would be contrary to the welfare, or that placement would be in the best interest, of the child." Therefore, even an initial ex parte custody order must contain a determination that it would be "contrary to the welfare" of the child to remain, or in the "best interests" of the child, to be removed. However, this exact wording need not be used.

IV. The standards applicable at the different stages of a CHINS proceeding and how those standards impact custody decisions

Under current Vermont law, there are different standards applied by a court depending upon the stage of the proceeding:

- Removal of a child: "child in danger."

- Emergency care order: "contrary to child's welfare" to remain in the home.
- Temporary care hearing: the court must return the child to the parent unless it is "contrary to the child's welfare" because there is a substantial danger or risk. The court determines custody according to a multi-step hierarchy.
- Merits hearing: child in need of care and supervision.
- Disposition hearing: "best interests" of the child.
- Permancy hearing: "best interests."

Removal: A child can be removed from his or her home by a law enforcement officer if the officer believes the child is in immediate danger and removal is necessary for the child's protection. 33 V.S.A. § 5301(2).

Emergency care order: After a child is removed, the State's Attorney will contact the court and request an emergency care order. 33 V.S.A. § 5302(c). If the court determines that the child's "continued residence in the home is contrary to the child's welfare," the court may issue an emergency order transferring temporary custody of the child to DCF pending a temporary care hearing. If, however, the court determines that the child can safely remain in the home, the court can order the child to be returned to the home "subject to such conditions and limitations necessary and sufficient to protect the child." 33 V.S.A. § 5305(c).

Temporary care hearing: Within 72 hours of the issuance of an emergency care order (transferring custody to DCF) or a conditional custody order (returning the child to the home subject to conditions), a temporary care hearing should be held. 33 V.S.A. § 5307(a). At the conclusion of that hearing, the court engages in a two-step process.

First, the court "shall order that legal custody be returned to the" custodial parent or guardian unless it finds by a preponderance of the evidence that "a return home would be contrary to the child's welfare" because:

- A return could result in "substantial danger to the physical health, mental health, welfare, or safety of the child."
- The child or another child residing in the same household has been physically or sexually abused, or is at "substantial risk of physical or sexual abuse" by a custodial parent, guardian, or custodian, or by a member of the child's household, or another person known to the custodial parent, guardian, or custodian.
- The custodial parent, guardian, or guardian has abandoned the child.
- The child, or another child in household, has been neglected and there is a substantial risk of harm. 33 V.S.A. § 5308(a).

Second, if the court has found that the child should not be returned to the parent or caregiver, it must determine who will have custody. In doing so, the court applies the "custody hierarchy" described in section V below.

Merits hearing: A merits hearing must be held within 60 days of the date of the temporary care order (if child removed from parent's custody). 33 V.S.A. § 5313(b). At the merits hearing, the State bears the burden of establishing that the child is in need of

care and supervision.[1] If the court finds that the State has not met its burden of establishing that the child is in need of care and supervision, the petition will be dismissed and any orders vacated. If the court finds that the allegations in the petition are established, it shall order DCF to prepare a disposition case plan within 28 days and set the matter for a disposition hearing. 33 V.S.A. § 5315.

Disposition hearing: The next step in the CHINS process is for DCF to file a disposition plan, and for the court to conduct a hearing concerning that plan. At the conclusion of the hearing, the court decides the legal custody of the child, including whether the child should be returned to the parent(s), parental rights should be terminated, custody transferred to DCF, or other options. The court's decision should be based on the "best interest of the child." 33 V.S.A. § 5318(a).

Permancy hearing: If the goal is reunification with a parent, a review hearing must be held within 60 days. 33 V.S.A. § 5320. An order transferring custody to DCF shall be subject to periodic review at a permancy hearing. 33 V.S.A. § 5321. At such a hearing the court shall consider "the best interests of the child" and weigh: 1) the interaction and interrelationship of the child with his or her parents, siblings, foster parents, and any other relevant person; 2) the child's adjustment to his or her home, school, and community; 3) "the likelihood that the parent will be able to resume or assume parental duties within a reasonable period of time;" and 4) whether the parent plays a constructive role in the child's welfare. 33 V.S.A. § 5114.

Standard used in divorce proceedings: In divorce proceedings a best interests of the child standard governs. 15 V.S.A. § 665 states that a court shall make an order concerning parental rights and responsibilities, "guided by the best interests of the child," and in doing so shall consider nine factors, including "the ability and disposition of each parent" to provide love and assure that the child's material and developmental needs are met, the child's adjustment, and the child's relationship with the parent or with "any other person who may significantly affect the child."

Issues and Committee Options: As discussed in detail above, the current statutory scheme creates a complex, multi-stage process with different standards. There may well be valid reasons for different standards at different stages. For example, it may be reasonable to have a lower standard at an emergency care hearing, at which less information may be available, than at a later hearing. In addition, as discussed above, the State standards are based on federal law. However, this Committee may want to consider whether the complexity of the current statutory scheme, and the different standards, are helpful or not.

- Does complexity help, or hinder, clarity and consistency in application by DCF and the courts?

[1] 33 V.S.A. § 5102 defines a child in need of care and supervision as a child that has been abandoned or abused by the parent or guardian, is "without proper parental care or subsistence, education, medical, or other care necessary for his or her well-being," is beyond the control of the parent, or is habitually truant.

- Does complexity help, or hinder, the ability of parents and other parties to understand and participate in the system?
- Does complexity lead to good decisions?
- What is the appropriate balance between reunification, child safety, and the best interests of a child?
- What standard best achieves that balance?

V. The "custody hierarchy"

Federal law, preference to relatives: Pursuant to 42 USC § 671(a)(19), a state will receive federal funding only if it considers "giving preference to an adult relative over a non-related caregiver when determining placement for a child, provided that the relative caregiver meets all relevant [s]tate child protection standards."

Vermont's custody hierarchy: As discussed above, at a temporary care hearing, the court engages in a two-step process. First, the court "shall order that legal custody be returned to the" custodial parent or guardian unless the court finds by a preponderance of the evidence that a return home would be "contrary to the child's welfare" because of various factors, including a danger of physical or sexual abuse. Therefore, in essence, 33 V.S.A. § 5308 creates a default of return to, or reunification with, the same parent(s) the child was removed from.

Second, if the child is not being returned to the custodial parent, the court must determine custody based on the following hierarchy:

- Custodial parent under a conditional custody order. Therefore, there is a second default of returning the child to the same parent(s) he or she was removed from pursuant to a conditional custody order.
- Noncustodial parent.
- A relative such as a grandparent, great-grandparent, aunt, great-aunt, uncle, great-uncle, stepparent, sibling, or step-sibling.
- A relative not listed above or a "person with a significant relationship with child."
- DCF.

DCF Policy and Practice: DCF policies follow the statutory hierarchy. For example, according to Policy 89, "[t]he priority for the Family Court, and for the division, is to safely return a child in DCF custody to his or her custodial parent at the temporary care hearing." Policy 89 p. 2. If that is not possible, DCF will assess suitability of other options. However, "[i]t is not necessary for [DCF] to assess every person who might potentially assume custody of the child…. If the non-custodial parent appears suitable, it is not necessary to proceed with assessment of relatives." Policy 89 p. 3. Although this approach complies with the statutory framework, it may mean that the court is not even aware of other options, or able to compare different options.

Issues and Committee options: Options the Committee could consider include:

- Making the hierarchy not as rigid so that the court receives information on, and can weigh, all custody options. This relates to another issue the Committee

expressed interest in, ensuring that courts receive all relevant information so that they can make better informed decisions.

- Amending the hierarchy. Other states look first to relatives or long-term friends of the child's family in placement decisions. For example, in MA, the Department shall consider, consistent with the best interest of the child, the following placement resources in the following order:
    - Kinship family (defined as persons related either by blood, marriage or adoption or an adult to whom the child and parent(s) ascribe the role of family based on cultural and affectional ties or individual family values)
    - Child specific family (defined as a non-kinship individual identified and licensed for a particular child, for example, a schoolteacher comes forward or a child recommends a friend's parent)
    - Family foster care where child was previously placed
    - Family foster care
    - Shelter/short term program or group home
    - Community residential care
- Ensuring that conditional custody orders are monitored and enforced. On September 2nd, a Judge testified that there is an "expectation" that DCF will monitor compliance, but whether DCF actually does so varies by district. This relates to the issues of substance abuse and how drug testing should be handled.
- Providing a "carve out" under certain circumstances. This was done in 2014 bill H.663 which retained § 5308 but added a new subsection (c) that stated "[i]n compelling circumstances and in the best interests of the child, the [c]ourt may suspend the custodial preference set forth in subsection (b) of this section." However, there are issues with this approach. For example, what constitutes compelling circumstances?