VERMONT ATTORNEY GENERAL'S REMARKS
TO THE LEGISLATIVE COMMITTEE ON CHILD PROTECTION
JULY 29, 2014

Good morning. Thank you for the opportunity to appear before you to discuss truly important issues relating to protecting at risk children in Vermont. Although I am happy to try to answer questions you may have about issues raised in your prior hearings, in the interests of time, I will begin with some recommendations I have for you to consider.

SUMMARY RECOMMENDATIONS

1. There should be a re-examination of not only the confidentiality that hinders good communications at the investigation and case work stages, but also the confidentiality currently afforded CHINS and TPR cases in family court;

2. We should take a hard look at the problem of opiate addiction as it relates to child welfare and consider joining the vast majority of states that express strongly in statute the risks to child welfare posed by an opiate-addicted caregiver;

3. There should be communications with the Judiciary and consideration given to the Judiciary assuming responsibility for training and minimum acceptable performance standards for those attorneys assigned to represent children in CHINS and TPR proceedings. Similarly, there should be consideration of the Judiciary assuming responsibility for making the assignments of publically funded lawyers representing children in such proceedings;

4. We should consider whether Vermont law should be amended to hold a parent or caregiver responsible for permitting a child to be physically or sexually abused, although he or she may not be the actual perpetrator of the abuse;

5. There should be consideration of whether Vermont law should expressly address the threats to child welfare of residing in a home where investigation has established the possession and/or production of child pornography.

INTRODUCTION

In preparation for this hearing, I have met with my Assistant Attorneys General (AAGs) who do much of the legal work for the Vermont Department of Children & Families (DCF), particularly on TPR (termination of parental rights) cases. AAGs who handle TPRs become involved in cases when DCF has reached the conclusion that reunification is not a possibility. Hence, these lawyers have a unique perspective from viewing the entirety of DCF's interactions with a family leading to the decision to terminate parental rights. I have also met at length with my leadership team and conversed with others in the community with knowledge of family court proceedings, and privately, with promises of confidentiality, with DCF line personnel.

I would like to make some things abundantly clear. First and foremost, I do not pretend to have all of the answers to the vexing problems of child abuse and neglect in our state. There is no silver bullet cure. Ours is a system of people making subjective decisions relating to child welfare. None of us is perfect. We will continue to make mistakes, but that should not hinder efforts towards improvement. I mentioned mistakes, both past and to be anticipated. But we need be mindful that there are many, many competent, dedicated individuals within DCF, in the Judiciary, as well lawyers who practice in family court, guardians ad litem, teachers, medical professionals and others who successfully protect at risk children, despite the daunting challenges presented by unduly high case loads and made all the worse in recent years by the skyrocketing problems associated with increasing rates of addiction to heroin and other opiates.

Our existing laws are clear in that the controlling determinant is to be "the best interests of the child." When in doubt, it is the child's welfare that is to be pre-eminent. Despite this statutory obligation, on many occasions it appears that parental and/or other familial rights trump those of the child or children – and sometimes with horrifying results. We have experienced tragic child deaths and way too many other cases, not prominently in the public eye, of children who have been physically and/or emotionally scarred for life. Being mindful of privacy rights and protections, I will describe throughout my testimony some current or recent cases arguably illustrating the need for systemic changes.

PLACING A CHILD'S SAFETY FIRST

Case I

The facts are abundantly clear in the recently-released report of the investigation into the handling of the D.S. case conducted by the Vermont State Police. DCF, law enforcement and the legal system failed her. Among other issues, there was inadequate investigation of the risks to D.S. presented by her mother's boyfriend turned husband. Critical information within DCF was not shared between DCF personnel. Nor was this information provided to the Deputy State's Attorney (DSA) or the attorney who represented D.S. Neither the DSA nor the appointed attorney requested the DCF records. The judge making the ultimate decision to return D.S. to her mother was not the same judge who had prior knowledge of the case and who had earlier expressed concern about the effect of the mother's criminal conviction on the reunification plan.

The D.S. case underscores the importance of placing a child's safety and welfare and parental accountability paramount to application of any "family engagement" and "strengths-based" policy. Much of what I heard by way of concerns and recommendations for change were directed towards DCF's practices and policy relating to when to seek court involvement in an open family case, when to reunify "at risk" children with their families, and "kinship placements." Many expressed concern the practical application of DCF policies calling for a "family first/strengths-based" approach to social work, at times seems to have resulted in decisions that do not properly take into account risks to the child. While I fully support the law that directs that children should be with their families of origin when it can be done without risk to a child, a re-examination of how that policy is implemented should be a key part of DCF's review.

DCF must also ensure that the reasons that brought a family to the attention of the department do not become secondary considerations in making decisions that impact the safety of a child. While building on a family's strengths is an important part of successful casework, the family first approach, as currently implemented, has served in some cases to underplay the problems in a family that are barriers to successful and safe reunification of a child. Moreover, in some situations where DCF has an "open" family case, children remain in a problematic home for months while courses of ultimately unsuccessful services are offered before a decision is made to bring the case to the court's attention.

Case II

A great-grandfather, well into his eighties, was considered to be a suitable placement for young great-grandchildren, despite his age and physical limitations that impeded his ability to adequately supervise the children.

Often when a child is unable to remain safely with a parent, DCF and the Courts look to other family members to provide for the child in a "kinship" placement. DCF's policy on kinship placements should be strengthened by requiring family members to be assessed in the same manner as non-kinship placements with respect to overall suitability to meet the child's needs, especially for very young children. Although the obvious goal, to keep the child with familiar and caring family members is laudable, some of these placements are not given a sufficient level of scrutiny to ensure that those family members are able to meet the child's many needs on both short-term and long-term bases. In some situations, family members have their own personal problems, or are unable to effectively supervise and care for a child, no matter how well-intentioned. Consideration should be especially given to the multi-generational dynamics in a family and their impact on a child's short-term and long-term care and stability within the family unit.

OPIATE ADDICTION AND CHILD PROTECTION

Case III

A mother, an opiate addict with a two year old child, was required by DCF to participate in substance abuse treatment and to obtain adequate housing. The mother did neither and the natural father obtained full rights and responsibilities for the child. While still addicted, mother became pregnant with a second child. At the time of her birth, the mother was homeless. DCF sought custody of the second child through a CHINS petition within three days of the birth. The judge denied DCF's request for custody, instead issuing a Conditional Care Order (CCO) leaving the child with her mother, but requiring the mother to move to a family services agency.

Despite the order, the mother remained homeless. Twice more, DCF unsuccessfully sought custody of the child with the judge again ordering the mother to apply for housing at the family services agency. The mother was accepted for the agency's housing but declined to take up residence. At a subsequent court hearing, the mother admitted, due to her drug addiction and homeless state, that her child was a Child in Need. However, the court

issued another CCO requiring her to attend outpatient substance abuse treatment, participate in anger management counseling, complete a psychiatric evaluation and work with DCF to be drug screened.

Three months later, the mother having been convicted of criminal offenses in the interim, the court issued a fourth CCO, again leaving the child with the mother. Two months later at another hearing and despite the mother having recently moved several times to different motel rooms and having tested positive twice for amphetamines, custody remained with the mother.

In the months that followed, in the words of the court, "Mother continued to struggle." She lost her shelter housing, resumed using drugs, entered and was promptly discharged from two residential drug abuse programs for rules violations. Another CCO was issued, temporarily transferring custody to the maternal great-grandmother.

Ultimately, when the child was eighteen months old, custody was transferred to DCF. The mother adhered to her case plan for a period of time but relapsed, resuming drug usage, again experienced unstable housing and was incarcerated for probation violations. DCF petitioned to terminate the parental rights of the mother.

The petition was granted when the child was three years old.

The State's approach to child protection needs to be adapted to the realities of substance abuse, treatment and recovery. As Vermont grapples with skyrocketing rates of substance abuse, particularly involving opiate addiction and recurring relapses, DCF is experiencing higher and higher numbers of abuse, neglect and TPR cases in which substance abuse is placing children at risk. Factors applied to decisions that a child can be safely reunited with a parent or if court intervention is necessary are not in sync with the realities of treatment and recovery from addiction. The number of CHINS and TPR proceedings have increased statewide and many, if not most, current TPR cases involve substance abuse and/or mental health issues. Parental opiate use presents a serious threat to child welfare. Also, once treated and sober, maintaining one's sobriety is extremely difficult. Relapses are an unfortunate reality of recovery and recovery cannot be expected to occur within the timeframes of DCF's current practices. Moreover, treatment of a parent's drug addiction should take into consideration the developmental timeframes and needs of children. This would result in more informed decisions about what is in the best interests of the child when a parent is gripped by opiate addiction.

Case IV

A family court judge denied a petition to terminate the parental rights of the parents of a 17 month old child, despite the fact that both parents were drug addicts, had long histories of addiction, relapse and drug-related criminal activity, and allowed another adult residing in the household to manufacture methamphetamine. The mother and father would take turns taking the child outside on the steps while the meth was being "cooked." The court described this as a "troubling incident", but ultimately found it was in the child's best interest to afford the father a meaningful opportunity to be able to resume parenting the child. The mother voluntarily relinquished her rights.

Case V

The parents of two children under the age of four had all the ingredients, equipment and chemicals to make methamphetamine, but had not started to "cook" any when the DEA raided their household. A Vermont State Trooper described the house as a bomb waiting to go off and, due to the danger, did not enter the household when the DEA conducted its raid. The Human Services Board initially determined that the children's exposure to the home-based meth lab did not constitute abuse or neglect because the parents hadn't begun to manufacture the meth. The case was appealed to the Vermont Supreme Court. It was remanded to the HSB and the facts were substantiated as posing a risk of harm to the children. In Re M.G. and K.G., 2010 VT 101.

As noted earlier, decisions must be made "in the best interests of the child". Despite the legal mandate, it seems all too often that DCF, the courts and the Human Services Board view parental rights, not a child's safety, as paramount. This view can be particularly prevalent in cases involving parental substance abuse. An addicted parent or parents, struggling to avoid criminal conduct, to maintain employment and safe, stable housing and to adequately attend to nutritional and hygienic needs, can present a grave risk to a child – and the younger, more dependent the child, the more grave the risk. Vermont's statutes should make this reality abundantly clear.

Vermont's child protection laws need to be strengthened to include the dangerous consequences of exposure to parental drug activity and opiate addiction. Exposure to illegal drug activity should be included in the statutory definition of "harm." Amendment of the statute in this regard will

provide needed clarification to all facets of the child protection system, from caseworkers and law enforcement to the courts, that this exposure is a factor of significance in any determination of whether a child is a child in need of care and supervision. According to a 2012 comprehensive comparative review of state statutes addressing parental substance abuse and its impact on child abuse, only Vermont, Connecticut and New Jersey lacked such legislation. See: Child Welfare Information Gateway, U.S. Department of Health and Human Services, "Parental Drug Use as Child Abuse", available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/drugexposed.pdf

The recent tragedy in Winooski illustrates the need for DCF to consider a change in practice with respect to drug testing and home visits. Once a child is reunited with his or her family, DCF should always require that addicted parents be routinely and randomly screened over a prolonged period of time, and ensure the results of those tests are promptly known and made a part of the DCF case file and plan. In some districts, DCF relies upon community agencies, as well as the Department of Corrections, Division of Probation and Parole, to do this work sometimes resulting in delays in the receipt of test results by DCF. Random visits to homes are not routine and most visits by social workers are announced. A more comprehensive picture of the home environment where a child is placed and the functioning of his or her caretakers would be gained if DCF considered more frequent use of random drug screens and home visits in at risk households.

There is also a current and compelling need to identify professionals with expertise regarding illegal drug use, specifically methamphetamines and opiates, and its impact on children. The State needs to develop experts that can advise DCF and attorneys involved in all facets of legal proceedings that are qualified to testify and assist the courts in understanding the risks that living with addicted parents present to the children. These experts can advise caseworkers about how a parent's opiate use impacts their ability to appropriately parent and how likely it is they will reach and maintain sobriety. A standardized, statewide training curriculum should be designed for professionals to meet this need.

CONFIDENTIALITY

The committee heard agreement last week from DCF, law enforcement and others who testified that confidentiality statutes applicable to DCF investigations and records have actually compromised child protection

efforts by inhibiting open communications between DCF, law enforcement and community members at the investigation and casework level. These confidentiality provisions must, at a minimum, be amended to allow for the exchange of information freely between DCF, law enforcement, mandated reporters and witnesses to ensure a comprehensive review of a child's situation can be achieved so fully informed decisions can be insured.

I would like to address the confidentiality of court proceedings that result from these investigations and the fact that, currently, the general public is denied access to Family Court CHINS and TPR proceedings. In only very limited situations – typically in cases resulting in the death of a child when the Attorney General or a State's Attorney consents—are records publicly released. The secrecy of the proceedings and related records does not allow the public to readily appreciate the nature and extent of child abuse and neglect in Vermont, nor to critique the decisions and job performance of DCF personnel, Family Court judges, court-appointed lawyers representing at risk children and State's Attorney and Attorney General personnel. Further, other than those involved in these court proceedings, very few people are aware of very real risks to the health and safety of specific Vermont children.

Under the federal Child Abuse Prevention and Treatment Act (CAPTA), 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. § 1506a(b)(2). At least nineteen states, including New York, New Jersey, Colorado, Oregon and Washington, presumptively open abuse and neglect proceedings to the general public. Among remaining states, 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.

Among the arguments asserted in defense of confidentiality are that public proceedings could add to the emotional distress and embarrassment of children and their families, could have a chilling effect on the reporters of abuse, and could result in harassment or threats to those suspected of abuse or neglect. Some argue that hearings will 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.

On the other hand, our adult criminal courts and other family court divorce and child custody proceedings very frequently involve public airing of domestic violence, murder, sexual assault, child abuse, embezzlement and many other forms of anti-social behavior. Victims and witnesses report

criminal activity and participate in court proceedings, perpetrators nearly always admit their crimes without resort to trials and the criminal justice system continues to process particularly serious cases. Opening CHINS and TPR proceedings will bring more accountability to all involved in the family court system, including attorneys, judges, social workers, guardians and parents. Through open proceedings, more information about how the child protection system operates should bring more credibility to a system that suffers as a result of its secrecy.

Amendment of our confidentiality laws should not be done without careful analysis and review of how open proceedings have fared in other jurisdictions. If proceedings are opened, legislation could be crafted that allows a court to close all or part of a proceeding for compelling reasons and to address other safety and privacy concerns, through means such a redaction of court records before public release. Any dramatic change to our confidentiality laws relating to abuse, neglect and TPR proceedings might well contain a sunset provision to allow, after a reasonable period of time, for an assessment of the benefits of the change versus harm caused. The Legislature should act with calm deliberation, but be mindful of whether, had we had more past transparency, outcomes in the case examples I have provided might have been different.

IMPROVING THE LEGAL RESPONSE

There are extremely competent and dedicated attorneys who practice in Family Court CHINS and TPR cases. Some are employees of my Office, State's Attorney's Offices and the Defender General (DG). Additionally, the DG has retained private attorneys to provide representation as "conflict counsel", i.e. lawyers who are assigned to provide representation at public expense for indigent litigants when the DG or a private practitioner may not ethically represent more than one party in a proceeding.

As has been noted, there were lapses in the lawyering in the D.S. case and it is difficult to know, especially with the closed nature of CHINS and TPR cases, whether these were one-time failures or indicative of a broader issue with training, professionalism and overall job performance. I am aware of efforts by the Judiciary and some in the legal community to address lawyer training and professionalism in family court and applaud these efforts. However, I believe that we now have another opportunity to examine the level of competency and performance of those representing children, parents, DCF and the State in CHINS and TPR proceedings and to assess what additional training may be required or whether court procedures or other aspects need to be improved. Further, efforts should be made to

increase the pool of private attorneys willing to step in and provide legal services in these difficult cases.

Judges have numerous opportunities to observe high quality, mediocre and substandard legal work. In the federal system, the judiciary handles the assignment of publicly funded defense attorneys when the federal public defender has a conflict. In Vermont state courts, the judiciary has oversight over the Guardian Ad Litem (GAL) program. Perhaps it is time to consider whether the Judiciary should be assigning publicly funded attorneys to represent children in CHINS and TPR proceedings.

VERMONT'S CHILD CRUELTY LAW

Cases VI & VII

A 14 day old child suffered multiple broken ribs. Neither parent could explain the injuries that experts concluded were a result of grabbing or shaking.

A baby suffered traumatic brain injury from a blunt trauma injury to the head. He recently died from those injuries at the age of two. Again, experts concluded the child's injuries were a result of child abuse. Neither parent could explain how the injuries occurred. Yet, to date, no one has been charged with this child's tragic death.

Another sad reality of child abuse is that sometimes a child is seriously injured or killed at the hands of an adult and it is difficult to determine and prove which of multiple caregivers caused the injury or death. In the case of D.S., law enforcement never determined who was responsible for her broken legs. Her mother pled eventually to a misdemeanor child cruelty charge based on her failure to get D.S. medical care. No one has been held criminally accountable for the actual physical abuse she suffered at the hands of one of two adults. This is not uncommon. The Legislature should consider enacting laws that would hold multiple caregivers responsible in circumstances where serious injury or death occurs as a result of child abuse and a parent or other person responsible for that child's welfare permitted the child abuse to occur or could reasonably have prevented it from occurring.

The New York State legislature recently considered (but ultimately did not pass) a bill creating offenses for "aggravated abuse of a child" and "aggravated manslaughter of a child". These would have created liability and enhanced penalties for caretakers who, through reckless conduct, create

"a grave risk of serious injury or death" of a child, and serious injury or death results. Such a provision potentially could be used to prosecute a caretaker who did not intervene or seek help when another caretaker was harming a child or a caretaker who failed to prevent a child's injury or death because the caretaker was voluntarily incapacitated through drug or alcohol use. Ohio has enacted a "Permitting Child Abuse" law (Ohio Revised Code Section 2903.15) that provides an affirmative defense for those parents or caregivers who do not have a readily available means to prevent the harm to the child or took timely and reasonable steps to summon aid.

In 2012, my Office supported a proposed amendment to Vermont's child cruelty law, 13 V.S.A. § 1304, which would have made cruelty to a child a strict liability offense and would have more specifically defined the acts that constitute that crime. That proposed legislation, H. 645, http://www.leg.state.vt.us/docs/2012/bills/Intro/H-645.pdf was introduced in the 2011-2012 session. It is my hope that the Legislature will take a serious look at this proposed amendment that would broaden the scope of Vermont's child cruelty law and strengthen the penalties warranted by its violation.

CHILD PORNOGRAPHY AS POSING A RISK OF HARM

Case VIII

A criminal investigation determined that a resident of an apartment possessed child pornography on a computer. No children resided there. Law enforcement reported the person to DCF for possessing child pornography. Within six weeks, DCF substantiated the person for child abuse based solely on the possession of child pornography.

Case IX

A criminal investigation resulted in the execution of a search warrant at an apartment for child pornography. It was determined that a resident possessed child pornography and had access to children residing in the apartment and elsewhere. DCF conducted interviews and declined to substantiate for child abuse. Subsequently it was determined that the individual had video-recorded himself molesting a child. A second report was made to DCF based on the new information. More than six months later DCF substantiated based on the second report.

Since 2012 my office has prioritized the investigation and prosecution of persons possessing and sharing child pornography. The child

pornography seized in these cases frequently involves video of the sexual abuse of very young children. Interviews of the targets generally contain admissions to the possession of the child pornography and admissions to the sexual purposes for which it was possessed. It is my position that persons who have a sexual interest in children necessarily pose a risk of harm to children whether or not they have previously committed a hands-on offense.

Additionally, in a significant number of the cases investigated by my office, the target of the investigation has resided in a home with children or had access to children. In each case, the investigators have made a report to DCF under Vermont's mandatory reporting statutes. DCF offices, however, have not been consistent in the response to such reports – some substantiate while others appear less willing to do so. In order to ensure that persons who possess child pornography and have access to children are properly identified as posing a risk of harm to children, I am proposing amendments to Vermont's mandatory reporting statutes to clarify this exact point.

CONCLUSION

I again want to thank this Committee for the important work it is doing this summer. I and my office stand ready to work with you, Secretary Racine and Commissioner Yacavone to improve the State's response to children at risk.

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