Vermont Juvenile Defender Newsletter

Summer/Fall 2011

In this issue:

****At the VBA Annual Meeting September 23 (and at the Education Conference) **Colin Seaman** was presented an award from the Justice for Children Task Force for exemplary efforts to improve outcomes for children and families through effective representation and advocacy

Notes from the Second National Parents' Attorneys Conference

By Kerry Spradlin

For those of us who primarily represent parents in child welfare cases, the odds seem stacked against us. The attorney usually meets his client for the first time at the courthouse, shortly before the temporary care hearing, where, having just read a petition filed that day alleging his client has caused or is likely to cause harm to a child, he attempts to create a plausible argument why the child should remain at home.

The likelihood of preventing the child's removal from the home is low, as is the likelihood of prevailing at a merits hearing, if contested. If there is a finding that a child is in need of care or supervision, particularly a young child, the parent faces the daunting prospect of a shortened timeline for strict compliance with recommended treatment services or the filing of a petition to terminate parental rights.

Throughout the court process, the parent's attorney tries to guide his client through the court maze using legal acumen, but more often relying on social work skills to attempt reunification of the family. All of this occurs in an atmosphere of skepticism and sometimes outright hostility by the other parties toward one's client, who is often perceived as an obstacle rather than a solution to the child's future welfare.

To attend the ABA 's Second National Parents' Attorneys Conference in Washington D.C. was therefore not only enlightening but therapeutic. The two days (July13-14) were filled with compelling addresses by authorities in the child welfare system combined with valuable workshops on topics ranging from the impact of the Adoption and Safe Families Act (ASFA) to child safety guidelines for judges, with extensive materials made available in a flash drive format.

The opening address, entitled "Still Searching for America's Heart: Why We Haven't Done Better for Poor Families and Children", was presented by Professor Peter Edelman of Georgetown University Law Center and Professor Martin Guggenheim of the New York University School of Law. This set the theme for the next two days

This newsletter is made possible through the Vermont Court Improvement Program with federal funding from the U.S. Administration on Children and Families

with statistics showing how the war on poverty, not yet lost, but certainly not won, is the real battleground for keeping families together.

Just as important for this writer was the unique opportunity to be with over three hundred lawyers and advocates from across the country sharing ideas, information and a commitment to our work in the child welfare system. Fifteen discussion groups met each afternoon to explore a variety of topics such as representing clients in rural areas, working with vulnerable populations and changing the way child welfare systems view our clients. My group focused on the use of social service agency tools and practices to benefit our clients. The exchanges were lively and by the second day we felt we were not only up for the challenges ahead but could actually prevail for our clients.

The diversity within our country's juvenile court system, both in its challenges and resources is astonishing. In Virginia, for example, an attorney only receives a flat fee of $120 per juvenile case while guardians ad litem are paid $50 per hour. Some jurisdictions do not see the appearance of an attorney until a termination of parental rights petition is filed. Other jurisdictions provide attorneys with private social workers from the onset of the case. Vermont has fared better than many states with respect to continued funding and in assuring attorney representation for parties.

A central theme of the conference was the need to change the way child welfare workers and the courts perceive our clients. Two workshops which I found particularly useful dealt with myths associated with mothers who use drugs during pregnancy and myths associated with the non-offending parent in sexual abuse cases. Robert G. Newman, M.D. conducted a thought-provoking workshop on the myths and realities of pregnancy and drug use and Professor Rebecca Bolen did a similarly lucid examination of the myths associated with the non-offending parent in sexual abuse cases. I would suggest that in any case where these issues arise, the attorney line up a good expert witness from the start to debunk these myths and educate our courts and child welfare workers about recent studies.

At the final meeting the participants engaged in a town hall type forum where the question of "where do we go from here?" was discussed. Without exception the feeling was the conference was a great success and that, if possible, this should be an annual event. We had come from all over the country not only to learn, but to make a change in a system we often feel is too quick to make inappropriate judgments and too slow to respond in ways that actually support families. To the extent we left with renewed hope and our convictions intact, it was an unqualified success.

Back to School: Children, Courts, and Education Success

This conference on September 16, 2011 sponsored by the Justice for Children Task Force with funding from the Vermont Court Improvement Program was well attended. Of the more than 200 people registered from a wide range of organizations and agencies including DCF, the Vermont Judiciary, numerous school districts and service providers, only 15 parents' or juvenile attorneys were in attendance.

Despite significant gains made to improve educational continuity, more needs to be done to improve the low expectations of children in foster care concerning their

future. This conference brought together those people concerned about providing the tools and practical ideas for additional action to improve the educational success of children in foster care. In Vermont as of January 1, 2011 there were 451 family cases open, with 985 children in care through the first quarter of 2011.

The keynote speaker, Annie Blackledge, from Washington state, illustrated the disparity when foster youth success is compared with the national average. Fifty per cent of foster youth drop out of high school compared to the national average of a 30% drop out rate. Of college attendees who got their GED's, 70% drop out of college so she emphasized the need for helping foster youth get job preparedness and college readiness skills. Of the 50% of foster youth who graduate from high school only 20% go on to college. Less than 9% of those who were in foster care graduate from college. (Fifty per cent of the men in prison are high school dropouts.) She emphasized that kids will become what we expect them to become so we need higher expectations.

The involvement of one positive significant adult in a young person's life is the greatest predictor that a child will become a successful adult. Building resiliency in foster youth requires school stability, trusting relationships with adults, having higher expectations for the youth, and educational advocacy. It also requires patience and the use of strength-based approaches, and guaranteeing supportive transitions to and opportunities for preparing the youth for independence.

Ms. Blackledge suggested that to develop this resiliency will take system's change that addresses data and information-sharing and the implementation of policies, practices and procedures that ensure school stability and appropriate transition planning. It also requires that there be system-wide collaboration, cross-training of providers and shared planning to empower foster youth, their families and their communities.

Professor Joseph Tulman, who also spoke at the Defender General training in June, presented along with Ann Culkin from the Parent Representation Project and Carol Gilbert, a GAL. Their workshop was on School Discipline, Truancy and Disability: A Puzzle Worth Solving for At-Risk Youth. Prof. Tulman explained the intricacies of implementing an IEP, pointing out the exceptions built into the law regarding expulsions for safety problems involving either incidents resulting in serious bodily injury or the use of weapons or drugs.

There was some disagreement with Prof. Tulman's assertion that Functional Behavior Assessments or Behavior Intervention Plans are never formulated correctly. This discussion resulted in workshop participants then focusing on the importance of IEP's and addressing truancy concerns at an early age.

Ann Culkin offered her experiences working with families and the importance of looking beyond behavior and making sure the proper testing is done. Even when ACT 264 services are in place, they only work if the families are willing to accept services, and half of them are not.

Carol Gilbert, a former educator emphasized that after third grade schools stop teaching reading. Many kids never get that basic skill, especially if they stop going to school or have no contact with a reading specialist. Her wish was that the court system and public defenders were trained and more supports created to understand what's going on with kids.

As truancy cases are handled differently in each district, there seems to be a problem where they are given less attention. Another workshop looked at non-adversarial resolution of truancy cases through collaboration between parents, schools and courts.

Justice Reiber spoke about Truancy Courts and Judge Crucitti's approach where the youth, the parent and the principal have to show up for weekly meetings. Accountability is a major factor. They may be trying out these truancy courts in the future in Rutland. The big push is to start early, after five or ten days of truancy, to get the family involved, and to get to the root of the problem early on before the youth ends up missing half a year of school.

Other workshops addressed: Education Stability; Trauma, Substance Abuse, Mental Health Disorders and their Impact; Unconscious Bias; Response System to Sexual Abuse; Cybertraps with Fred Lane; Which Court is the Right Court? ; A Practitioner's Guide to Working with Fathers; and Successful Transitions to Adulthood.

Two workshops dealt with Permanency Planning. One discussed a new initiative by DCF focusing on permanency for 96 children and young adults through targeted training and permanency roundtable discussions. The purpose of these roundtables is to expedite legal permanency, stimulate thinking about pathways to permanency for these and other children, and to identify and address barriers to expedited permanency. The full Permanency Team includes Attorneys.

Margaret Burt from the ABA presented a workshop offering suggestions to improve the quality of permanency hearings with some ideas that other jurisdictions have tried. Some states have moved to having permanency hearings every six months ensuring that at least one is held within the one year time requirement. She stressed the importance for the child's attorney to see and talk to the child on a frequent basis. The child has a right to understand the process as well as a right to provide input for which the child should be prepared.

Attorney Burt addressed the ten time bombs that come up and the need to diffuse them before they blow up. Identification of and working with fathers is the number one legal time bomb in permanency planning according to Attorney Burt. All attorneys should ask who the father is, because Burt suggests, "You should know whatever dirt mom has on dad if he does show up. An attendee suggested that court records should be checked for previous parentage actions. Early on fathers need to know if a permanency plan is not going to work with the mother, so they have a chance. Even a father who cannot be a resource may have something to offer a child. According to Judge Davenport the longest cases in Vermont are those where the mother is TPR'd and then they can't find the dad.

The second time bomb is the identification of relatives as placement resources. Know who the relatives are; make a family tree. Use relatives to host visitation. Maternal grandparents are much more likely to keep siblings together. Burt suggests considering ICPC requests right away, even if you have no idea whether you'll use it. The ICPC is good for six months and it's much easier to extend it than start it later on and find out that some states won't do these, while others require them.

Other time bombs include: ICWA, which you should ask about; ICPC; Good quality initial placements; Hearing continuances; Front Loaded Services; Detailed, behavior oriented court orders; "Fear" of concurrent planning; and Effective meaningful permanency hearings.

The initial placement is important because the foster home should be committed to helping the child get home where the goal or concurrent goal is reunification. Suggestions regarding front loaded services included "immunity" regarding statements to service providers if there has been no adjudication, and judicial activism regarding services where the waiting list for programs are too long, thwarting reasonable efforts. Court orders should not constantly "Reset the bar" for parents, when in fact that parent may not be able to read the order. The plans should be phrased positively, i.e. not mother remains sober, but rather mother develops plan for child's safety if she relapses. This was a very dynamic presentation with a lot of suggestions from the presenter who seemed to have knowledge of the Vermont system, and the attendees who seemed to be searching for better ways to make the system work.

The day concluded with a panel of youth who explained their frustrations, what meant most to them, and added a plea to those who care about children and educational success to spend the time getting to know each child at risk in foster care, and not just label them, medicate them, and forget about them.

Education Matters

Professor Joseph Tulman spoke at the Juvenile Defender training session June 2, 2011, "Using Special Education Law to Help Families in Family Court Cases: What every Lawyer Should Know."

He emphasized the value of the IEP, and the situations that lead a juvenile to qualify an IEP. He suggested following the educational history of your juvenile clients to focus on the mitigating circumstances where an IEP was neither implemented nor followed.

The IEP Team meetings are extremely important and there has been some confusion as to who can attend these meetings. Under the Vermont Special Ed. Rule 2363.4, "At the discretion of the parent or LEA, other individuals who, in the opinion of the parents or [emphasis added] LEA, have knowledge or special expertise regarding the child, including related services personal, as appropriate" are included amongst those who must attend the IEP team meetings. Under 34 C.F.R.. §300.321(c) relating to the Determination of knowledge and special expertise, "The determination of the knowledge or special expertise of any individual described in paragraph (a)(6) of this section must be made by the party (parents or public agency) who invited the individual to be a member of the IEP team.

On September 16, Professor Tulman spoke in Fairlee about the "Supportive Discipline Initiative announced in July by the Secretary of Education and the U.S. Attorney General, a joint initiative to "ensure that our educational system is a doorway to opportunity and not a point of entry to our criminal justice system."

Professor Tulman is the director of the Took Crowell Institute for At-Risk Youth and also the director of the University of the District of Columbia's Law School and Special Education Clinic.

J.D.B. v. North Carolina

This case should be used to argue that children are in custody for Miranda purposes.

In the August 24, 2011 issue of the Criminal Law Reporter Marsha Levick of the Juvenile Law Center pointed out some of the ramifications of the US Supreme Court's J.D.B. v. North Carolina (564 U.S. ___(2011) decision dealing with the relevance of the child's age to the Miranda v. Arizona custody analysis. The fundamental differences between juvenile and adult minds was acknowledged by Justice Sotomayor in the slip opinion on page 9 in footnote 5 without citation to social science and cognitive science authorities citing Graham v. Florida,560 U.S. ___, ___ (2010).

As Marsha Levick points out,

> "In the juvenile justice system, courts should likewise not ignore relevant characteristics of youth in deciding such fundamental questions as the scope of a child's blameworthiness, the voluntariness of a child's confession, the reasonableness of the child's believe that he was threatened with or subject to force, or the reasonableness of his belief that he could not extricate himself from peers or circumstances resulting in otherwise criminal conduct…two significant characteristics make it more difficult for adolescents to resist such pressure: their limited decision making capacity and their susceptibility to outside influences."

Creating a Child-Friendly Court

There is a move nationally and in Vermont to create a child-friendly space in court by providing Family Division courts with crayons and activity sheets for children. If possible a children's room should be created at the court house.

One court in the nation had community groups provide snacks and food for the foster youth while they waited for their hearings, bringing them together to talk.

Legislative News

This past session the Vermont legislature passed S.58 which is an act relating to jurisdiction of a crime committed when the defendant was under the age of 16. It resulted from a case in Bennington where an allegation was made when the defendant was 19 that he had committed a sexual offense at an age where he could have only been the subject of a delinquency petition and not charged in criminal court.

The legislature, once made aware of this "loophole," passed a statute which allows for an individual who is at least 18 years old to be the subject of a juvenile delinquency petition in the Family Division when s/he is accused of committing a serious crime when s/he was under the age of 16, a juvenile petition was never filed based on the alleged conduct, and the statute of limitations has not tolled on the crime the defendant is alleged to have committed.

Under various conditions the Family Division may treat the defendant as a Youthful Offender. Otherwise, the Family Division shall transfer the petition to the Criminal Division if: 1) there is probable cause to believe that while the defendant was less than 18 years of age s/he committed such an act; 2) there was good cause for not filing a delinquency petition when the defendant was under the age of 18; 3) there has not been an unreasonable delay in not filing the petition; and 4) transfer would be in the interest of justice and public safety.