Juvenile Defender Newsletter

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Defending Parents in Termination of Parental Rights Cases

Defending parents in termination of parental rights cases can often feel hopeless. Indeed, in fiscal year 2018, 97% of TPR petitions that went to a contested hearing were granted. Even though it is difficult, adequate representation in TPR cases is essential. Not only is the right to parent one's children a fundamental liberty interest protected by the Fourteenth Amendment, one can argue that outside of extreme circumstances, children are generally better off with their natural parents. The goal of this article is to provide some tips on how to defend your client in a TPR and counter DCF's argument that children are better off when the court severs parental relationships permanently.

Let's begin with the proposition that children are better off when the court severs parental relationships permanently. The best-case scenario for a child whose parents' rights have been terminated is adoption, preferably by a family member or someone known to the child and the parents. In the absence of kinship adoption, the next-best scenario is adoption by one or two unrelated adults. Unfortunately, permanency through adoption is not always permanent and is rarely a panacea.

Somewhere between 9% and 15% of adoptions disrupt before legal finalization, and about 1% legally dissolve after finalization (i.e. the adoptive parents' rights are terminated).[1] It is unknown how many adopted children end up in out-of-home care after adoption finalization as these statistics are notoriously difficult to track, but a 1996 study found that 8% of adopted children were placed in out-of-home care within four years of adoption finalization.[2] Almost a quarter of kids adopted as teenagers end up in out-of-home care.[3] Vermont does not collect any data on the number of children who reenter DCF custody following an adoption, nor does it track the number of children who are placed in group homes or residential treatment programs without coming into DCF custody. However, according to data collected by the Office of

[1] https://www.childwelfare.gov/pubPDFs/s_disrup.pdf#page=5&view=Dissolutions

[2] *Id*.

[3] *Id*.

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the Juvenile Defender between August 2016 and August 2018, 24% of children admitted to Woodside were previously adopted children who reentered DCF custody after being charged with a delinquency. This figure suggests that many Vermont children experience the trauma of re-entering DCF custody after achieving "legal permanence" through adoption.

Does any of this matter to courts considering a termination of parental rights? Like so many things in the law, the answer is complicated. The absence of a permanent home for a child has not been held to be a barrier to TPR. *In re T.T.*, 2005 VT 30, ¶ 7, 178 Vt. 496, 872 A.2d 334. To this writer's knowledge, no Vermont court has explicitly considered whether an adoption was likely to last in its best-interests analysis at TPR. However, the focus of a termination of parental rights proceeding is on the best interests of the child, and the court may consider the absence of a permanent home as part of its best-interests analysis. *In re J.M.*, 2015 VT 94, ¶ 11, 199 Vt. 627, 632, 127 A.3d 921, 924 (affirming the trial court's denial of a petition to terminate parental rights where the child was living in a residential program and the father visited him regularly); 33 V.S.A. § 5114(a)(1) (stating that the child's relationship with the foster parents is one of the "best interest" factors the court is required to consider). Therefore, it is important to assess the child's prospects for permanency and bring any concerns to the court's attention as part of your client's defense.

As part of its analysis of the child's "best interests," the court must also consider the parent-child relationship. 33 V.S.A. § 5114. To be able to effectively argue this point at TPR, you must defend your client's right to parent-child contact throughout the life of the case and ensure that you client receives the support necessary to have positive and frequent visits with his or her child. Then, at the TPR, be sure to call witnesses who can highlight your client's relationship with his or her child.

Additionally, talk to the child's attorney to find out whether the children want to have an ongoing relationship and/or contact with your client. If the child wants to keep seeing his or her parent, then the child's attorney should not be supporting TPR.

In addition to arguing that TPR is not in the child's best interests, you should also argue against a finding of a "substantial change in material circumstances" (provided that DCF is not seeking TPR at initial disposition). Typically, DCF's evidence of a substantial change in material circumstances will amount to an argument that your client has "stagnated," or failed to make progress toward achieving case plan goals despite the passage of time. In order to combat claims of stagnation, you must highlight the progress your client has made. In order to do this, it is helpful to obtain your client's treatment records and all records pertaining to parent-child contact. Is your client in drug treatment? Did he complete a "Nurturing Fathers" group? Can she show that she's been substance-free for some period of time? Is he having unsupervised visits? This type of evidence weighs against a finding of "stagnation."

Primary Prevention in Child Welfare and the End of Unnecessary Family Separation

A renewed focus on prevention as a way to reduce the number of children in state custody might be the first sign that the

pendulum of child welfare policy is starting to shift. In November 2018, the Children's Bureau released an Informational Memorandum encouraging "all child welfare agencies and Children's Bureau (CB) grantees to work together with the courts and other appropriate public and private agencies and partners to plan, implement and maintain integrated primary prevention networks and approaches to strengthen families and prevent maltreatment and the unnecessary removal of children from their families."[4]

While acknowledging the continuing necessity of child protection work, the CB's memo states that "the system can and should be designed to protect children by keeping families safe, healthy, and together whenever possible before remedial efforts become necessary." Effective prevention services are run by non-profits not directly connected to child-welfare agencies, accessible to everyone, and non-stigmatizing. Effective programs work to normalize help-seeking and decrease social isolation by connecting families to providers and each other.

According to the Children's Bureau, in addition to "evidence-based clinical services" like home visiting, families also need access to material assistance such as help paying for housing, food, or utilities, and help accessing services like affordable child care or civil legal assistance. The CB encourages community leaders such as judges, attorneys, and court administrators to take an active role in advocating for prevention services for families.

Lastly, the CB's memo profiles several different prevention programs with demonstrated success in reducing involvement with the child-welfare system. Several of the programs resemble Vermont's network of parent-child centers (though Vermont's parent-child center programs have been chronically underfunded for many years). Other programs are more radical – one county contracted with a private entity to purchase an renovate a school for use as a "family residential treatment program" where children and parents could live together in their own apartments while receiving treatment in common areas within the facility.

The memo ends with a call to action to child welfare officials, judges, attorneys, court administrators and community partners to advocate for increased resources for prevention services

Preparing for Disposition in Delinquency Cases

Proper preparation for the disposition phase of a delinquency proceeding is essential to getting a good result for your client. For most clients, a "good result" will mean staying in the community (i.e. staying out of Woodside or other highly restrictive placements) or staying out of DCF custody entirely. As the numbers of young children in DCF custody increases, older children and delinquent teens become more difficult to place in foster care. Older children and teenagers are more likely to be pushed into residential treatment programs or Woodside, regardless of whether that level of care is necessary. Research on adolescent development and treatment approaches for delinquent children suggests that when evidence-based treatment is delivered in community-based placements like foster

[4] https://www.acf.hhs.gov/cb/resource/im1805

homes and small, trauma-informed group homes, youth achieve better outcomes at a lower cost. Preparing to contest a disposition plan that calls for a highly restrictive placement may be the only way your client gets the treatment he or she needs.

Before contesting disposition, it is helpful to familiarize yourself with the law governing disposition orders. In crafting a disposition order, the court must weigh four factors: (1) the child's supervision, care, and rehabilitation; (2) the protection of the community; (3) accountability to victims and the community for offenses committed; and (4) the development of competencies to enable the child to become a responsible and productive member of the community. 33 V.S.A. § 3232.
To accomplish the above aims, the court may place the child on probation, refer the child to community-based services like restorative justice programs, place the child in DCF custody, terminate parental rights, establish a permanent guardianship, or grant custody or conditional custody to a parent, relative, or other person. *Id*. If the child is placed in DCF custody, the court must adopt a permanency goal and approve or reject a case plan that supports that permanency goal. Thus, the court can reject a case plan on the grounds that an element of the plan, such as placement, does not support the permanency goal. *Id*.

Although the court cannot order incarceration after disposition, DCF policy states that if the court approves a disposition case plan calling for the "long-term program" at Woodside, then DCF will be able to incarcerate the child and he or she will have no further due process rights for twelve months. Many judges, attorneys, and clients are unaware of this policy or the effect of the court approving a disposition case plan calling for long-term incarceration/treatment at Woodside. Though the constitutionality of using an internal policy (as opposed to an administrative rule or statute) to outline the procedural due process protections for youth facing long-term incarceration at Woodside is questionable, it is imperative that courts understand that they can reject a plan for long-term Woodside (or any other highly restrictive placement).

Even without court approval, DCF can still administratively incarcerate children in its "short-term program" at Woodside. These children receive due process through a series of administrative hearings that occur in the weeks following administrative incarceration. Again, many children are unaware that if they are in DCF custody and are post-disposition on a delinquency, they can be incarcerated administratively without prior process. Counseling clients on this reality is an essential part of the attorney's role prior to merits and again before disposition. The only way to protect your client from incarceration or placement in a highly restrictive residential treatment environment is to keep your client out of DCF custody.

If your client is likely to remain in DCF custody regardless of your efforts and probation is unavoidable, focus on keeping probation terms short because youth cannot be administratively incarcerated once the probation term expires. Additionally, advocate for specific, manageable probation conditions that have a direct nexus to the offense for which the youth has been adjudicated. When advocating for juvenile probation conditions, borrow from the excellent Vermont case law concerning adult probation conditions and argue against conditions that are overbroad or assign an

impermissible level of discretion to the juvenile probation officer. Conditions like, "you must attend mental health treatment if your probation officer tells you to," or "you must comply with your disposition case plan" would not be permissible in the adult world.

Refresher: Tips for Keeping Your Client Out of Woodside Before Disposition

Keeping your client out of Woodside can be a confusing process. Recent changes to statute have added to the confusion. Here are some tips for protecting your juvenile clients:

1. Only courts can order Woodside placement prior to disposition, but they can only do so with a recommendation from DCF. As the child's attorney, focus on refuting DCF and the state's claims that your client poses a risk to self, others or property and cannot be managed in an available, less-secure environment. If it's your client's first offense, make sure the court knows that. If your client is accused of domestic assault on one of her parents, argue that she can live with a friend or family member instead.
2. Force the court to take evidence. The statute requires that the court make "findings" that the child poses a risk to self, others, or property and cannot be managed in a non-incarcerative setting. Hold the state to its burden. If we want courts to take the pre-disposition incarceration of children seriously, we need to lead by example.
3. If there isn't time to put on evidence at the temporary care hearing, ask the court to set an evidentiary hearing on the Woodside order.
4. Ask if your client knows people who might be willing to serve as placement providers and call those people as witnesses.
5. If you lose, appeal! Since the new law went into effect permitting kids to appeal a decision to incarcerate them to a single justice of the Vermont Supreme Court, the Court has not heard a single such appeal.

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